IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CIVIL APPEAL No. 06 of 2022

(Arising from the decision of Geita District Court in Matrimonial Appeal No. 15 of 2021 dated 24th of November, 2021 issued by Hon. K. A. SOSTHENES; RM)

ELIZABETH MARCO LEONARD..... APPELLANT

VERSUS

DOHOI SHIMIYU KULWA..... RESPONDENT

JUDGMENT

17th March & 1st April 2022

ITEMBA, J

This is a second appeal filed by Elizabeth Marco Leonard, herein the appellant. Initially, the appellant had petitioned for divorce and division of matrimonial properties before Katoro Primary Court. She requested an amount of Tshs. 42,000,000/= as her contribution to the shop jointly owned with the respondent.

The trial court's findings were that the two had contracted a customary marriage and that the appellant took a bank loan of Tshs. 17,000,000/= as a startup for a shop business jointly with the respondent. The court dissolved the parties' marriage and ordered the respondent to pay the appellant Tshs. 20,000,000/= as her contribution in the said shop, plus interest. The rest of the properties were to remain with the

respondent. The respondent was aggrieved with the decision and filed an appeal before Geita District Court, where it was decided that there was no valid marriage between the parties. The 1st appellate court ruled out that payment of dowry by itself, does not constitute a valid customary marriage unless the said marriage is registered. The court went ahead and stated that the parties' relationship amounts to neither presumption of marriage no concubinage, because there is no evidence that the two lived for more than two years.

In respect of the Tshs. 17,000,000 payments to the appellant, the 1st appellate court was of the view that, as the was no valid marriage between the two, the said money was not matrimonial property but just a loan between lovers. Therefore, the appellate court revised the trial court's decision as it did not find any justification for the appellant's to be paid by the respondent an amount of Tsh 20,000,000/=. The appellant was aggrieved with that decision, hence the present appeal.

At the hearing, the appellant was represented by Mr. Liberatus John while the respondent had the services of Mr. Amos Gondo, both learned advocates.

The appellant had filed 5 grounds of appeal as follows:

1. *That, the first Appellate Magistrate grossly erred in law for not treating the relationship between the Respondent and the Appellant as the marriage which in law falls into all corners of presumed marriage.*

2. *That, the first Appellate Magistrate grossly erred in law and fact for not taking into consideration that no matter how the status of relationship the parties were, the Appellant was entitled to be awarded her contribution, i.e Tsh 17,000,000/= which up to date is subjected to interests.*

3. *That, the first Appellate Magistrate grossly erred in law and fact for failing to take into consideration that the Appellant's contribution in the relationship between her and the Respondent was 17,000,000/= which was the fact not contested by the Respondent before the Trial court, i. e the Primary Court of Geita District at Katoro.*

4. *That, the first Appellate Magistrate erred in law and fact for not evaluating the evidence properly and justly, hence reached the erroneous conclusion.*

5. *That, the first Appellate Magistrate Court erred in fact for ruling that the Appellant had to further prove that she handed Tsh 17,000,000/= to the Respondent something which naturally, according to the nature of relationship, does not demand so.*

In support of the application Mr John stated that; the district court erred by not treating the relationship between the appellant and respondent as a presumption of marriage while the appellant had testified that she had lived with the respondent for more than two years, between 2018 and 2021. He argued that according to section 160 of the Law of Marriage Act, Cap 29 [R.E 2019], herein the LMA, the parties' relationship qualified for presumption of marriage and therefore the court had a duty to dissolve it and issue an order for distribution of matrimonial properties based on each parties' contribution.

The learned counsel added that, the respondent paid a dowry of 10 cows to the parents of the appellant, the fact which is undisputed. He stressed that even if the relationship between the appellant and respondent did not amount to presumption of marriage, the appellant had a right to her share of money which she contributed in the relationship.

He admitted that any proper traditional marriage must be registered as per section 43(5) of the LMA, thus if the parties' relationship did not

amount to customary marriage, in the alternative, it should be treated as concubinage. He moved the court to refer to the persuasive cases of **Moshi Masharubu v Oliva Tasha Mahala** PC Matrimonial Appeal No. 3 of 2020 (High Court, Kigoma) and **Halima Rashid Mdaha v Jospeh Laurent Fundi** Civil Matrimonial Appeal No. 2 of 2019 (High Court, Moshi).

The counsel for the appellant stated that page 2 and 3 of typed proceedings shows that the appellant had contributed Tshs. 17,000,000/= and she tendered exhibit KE1 to that effect. He added that this fact has never been disputed and he cited the case of **Nelson Onyango v R** Criminal Appeal No. 49/2017 which stated that failure to cross examine a certain factual issue, amounts to admission. The counsel for the appellant also faulted the 1st appellate court by considering the appellant's loan of Tsh 17,000,000/= as a personal loan while it was her contribution to the capital in the shop business. He also argued that the trial court was justified in awarding the appellant Tshs. 20,000,000 because the appellant had taken a loan of 17,000,000/= which was subject to interest. He finalized by stating that, in a husband and wife relationship, traditionally, it is not practical to put in writing everything which is given between the two, because the relation thereof is built on trust. Therefore, it was

enough for the appellant to testify orally and if the respondent was objecting, he would have cross examined on the same.

In reply, Mr. Gondo challenged the appeal by stating that in order for relationship to fall in the presumption of marriage, parties must prove to have lived together for 2 years or more and attain the status of wife and husband, and the parties did not meet these conditions.

He dmitted that the respondent paid a dowry in 2018 and nothing more was done thereafter, that the appellant went to Dar es Salaam and she was back in 2019 and since then she had never lived with the respondent. Therefore, he argued, there is no evidence to support their status of husband and wife.

The learned counsel also stated that presumption of marriage has never been an issue in the lower courts and that it is a principle of law that if issues were not raised in the lower court they cannot be brought in appellate court for decision. He cited the cases of **Ng'waja Joseph Sengereta @ Matako Meupe v Republic** criminal Appeal No. 417 of 2018 and **Halid Maulid Mdaha v Joseph Laurent Fundi** Civil Matrimonial Appeal No.2 of 2019. He submitted further that, if the appellant could not establish any type of marriage, the court was justified in not issuing any order of distribution of properties. The learned counsel

distinguished the cases of **Moshi Maharubu** and **Halima Rashidi** stating that they are not related to the present case as in both cases the parties had lived for more than 2 years and attained the status of husband and wife. He added that the status of concubinage is not there to violate the requirements of section 160 of LMA.

Regarding parties' contribution to the shop, he stated that the law requires proof of contribution as per section 114(2)(b) of the LMA. He submitted that there was no evidence showing that the appellant applied for a loan of Tshs. 42,000,000/= from CRDB bank and that she was later issued with Tshs. 17,000,000/= an amount whicha was later injected in the business. Further, he argued that the court was justified in not awarding Tsh 20,000,000/= to the appellant because it was satisfied that there was no formal marriage, between the parties.

Arguing the 5th ground, Mr. Gondo submitted that even if the appellant had contributed the said Tshs. 17,000,000/= to the shop. She cannot claim the exact amount because the profit comes out of joint efforts with the respondent.

In his rejoinder, Mr. John stated that presumption of marriage was an issue before the lower courts and that as per the records, there is no evidence which state that the appellant went to Dar es Salaam and never

came back to Katoro. Thus, the conditions for presumption of marriage were met. He added that there is no law denying a person to pray for the amount which she contributed. The appellant did not pray for Tshs. 17,000,000/= but Tshs. 42,000,000/= and wisely the Primary Court awarded her Tshs. 20,000,00/=. The said Tsh 17,000,000/= was not from joint efforts but was an amount the appellant injected in the business and the respondent does not dispute it.

Having gone through the rivalry arguments from both sides and the court's records herein, the issue whether there was a valid marriage between the appellant and respondent and what are the parties' reliefs.

I have to point out that, contrary to what the respondent's counsel is alleging, the type of relationship between the two, and presumption of marriage were issues in both trial and appellate court as they appear in both proceedings and judgments. Secondly, the circumstances in the two High court cases referred by the counsel for the appellant are different to this case hence, I will not refer to them.

Starting with the 1st ground, section 160(1) of the LMA states that:

> *"(1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife,*

there shall be a rebuttable presumption that they were duly married."

Regarding the time which the parties live together, while the appellant's counsel states it is more than 2 years the respondents' states that is it less than that. The trial court reveals through SM1 that after the respondent paying the dowry to the appellant's family in 2018, misunderstanding arose in 2019. SM1 states that

"*mgogoro wetu ulianza mwezi 10/2019 baada ya kuwa nimetoka Dar es laam*".

Meaning that the misunderstanding started in 2019. The respondent admits to have paid the dowry in 2018 and that he never lived with the appellant, he states further that he married another woman in September 2020. I have gone through the trial court evidence and I will explain further later that, there is evidence that the two lived together. Nevertheless, I do not see anywhere which shows that after payment of dowry in 2018, the appellant lived with the respondent up to 2021. Under these circumstances it has not been established that the parties have lived for more than 2 years. Thus the conditions for presumption of marriage were not met.

However, there is undisputed evidence that respondent paid dowry to the appellant and customarily, the appellant's family considered that move

as a marriage between the two. The appellant, (**SM1**), when questioned by assessor she states that she met the respondent while she was studying in O-level (secondary school, ordinary level). In her examination in chief, she starts by stating that "**tulifunga ndoa ya kimila mwezi 10/2018** kwa mahari ya ng'ombe 10 hatukufanikiwa kupata mtoto **tulikuwa tukiishi Katoro** kabla sijapata kazi mgogoro wetu ulianza mwezi 10/2019 baada ya kuwa nimetoka Dar es Salaam kazini....." (emphasis supplied)

This part of testimony shows that after the respondent paid dowry, that was the traditional marriage and that he lived together with the appellant in Katoro.

Further, **SM2** who is the appellant's biological father explained that he acknowledges the respondent as the one who paid the dowry to him, the respondent has been at his place twice and one time he (the respondent) went at his place with his father. SM2 adds that later he invited **SM3** who is not a relative, and together they went to collect the dowry at the appellant's home within Mwanasele in Bariadi where they met one Simiyu Kulwa the biological father on the respondent. SM3 sated that

"alikuja baba yake kwana ndipo tukaitwa, tulikua watu 10"

meaning that it was the respondent's father who visited the appellant's family then SM3 and the appellants were called to visit the respondent. They were 10 in number when they went there. Then, the appellant's sister (SM4) clarified more during examination by assessor that *"dada alikua anakaa Dar es salaam, baada ya mahari tuliwahalalisha"*

"walikua wameshaanza kuishi pamoja kabla" meaning that the appellant was living in Dar es salaam, after the dowry payment, the two were officiated, they were living together even before (the dowry payment).

Although the respondent insisted that there had to be a wedding after dowry payment and it was just their parents who agreed on the dowry but he had never lived with the appellant, the respondent's father (**SU2**) also identified the appellant as his daughter-in-law because the respondent's family paid dowry and there is evidence that sometimes the appellant and the respondent were reconciled by SU2 but the reconciliation didn't work.

Based on this evidence, it shows that the two lived together only that it is not certain how long before and after 2018. I am of the view that, regardless of one's wealth, no family can visit each other, from a long distance, introduce to each other and offer 10 cows out of nothing. With

or without a wedding party the acts done by the two families visiting each other and payment of dowry and the parties living together before and after the said payment of dowry shows that, in 2018 the parties celebrated a customary marriage and they involved their family members and friends.

Thus, the primary court was justified in stating that the relationship between the two amounted to customary marriage. As to the argument by the respondent that customary marriage needs to be registered, I have gone through section 43(5) the CPC and apart from that requirement, it does not state that failure to register renders the marriage void. To me, registration would have documented the process but all the evidence adduced before the trial court points nowhere but to the fact that the appellant and the respondent had a customary marriage celebrated according to the parties' customary rites. Therefore, as said above, the trial court was justified in holding that the parties were married customary and by dissolving the said marriage.

The second, third, fourth and fifth grounds will be answered jointly as they are inter related. Having determined that the parties were duly married, the issue is distribution of matrimonial properties. The law is clear that distribution is upon proof of contribution of each party. (Section 114(2) of the LMA.

Based on records, the only property which is in dispute is the shop. As to whether the appellant had contributed towards acquisition of the said shop, it has been argued by the counsel for the respondent that there is no evidence on record to support that. In the Primary Court's proceedings, the appellant (**SM1**) stated that "*mume wangu alisimamishwa kazi maana alikuwa mhasibu tukashauriana tuanzishe biashara yeye akawa hana hela akaniomba nichukue mkopo nikawa nimekopa 17,000,000....*"

"*Baada ya kuacha kazi ulikuja kwangu Dsm tulienda hadi Mbezi Luis CRDB.....*"and then in the cross examination the appellant stated that *"mimi ndiye nilikua nanunua bidhaa na kuzituma" .....*

"ndipo duka likaanza" "nilitoa pesa yote tukanunua mzigo wa duka"

This evidence summarily translates that, the appellant, after being dismissed from his job as an accountant, he agreed with the respondent to start a shop business, she took a loan form CRDB Bank, the two went to CRDB Mbezi Louis in Dar es salaam, she was also involved in buying products and sending them and she contributed to the capital of the shop. And; as correctly argued by the appellant's counsel this evidence was undisputed by the respondent. SM2 and SM3 also using different words testified that the two had a joint shop/clothes business.

The respondent in his testimony, had stated that he started the business on his own since 2016 and in 2019 he took a loan of Tshs. 10,000,000/= and he changed into a shop business. To me, the fact that the respondent took a loan for the business does not mean that the appellant could not have taken the loan as well. As any person who qualifies for a bank loan can apply for the same, independently. I believe that the appellant's oral testimony supported by SM2 and SM3 is sufficient enough to prove that she was involved in the shop business. She contributed financially to the tune of Tshs. 17,000,000/=; she was also involved in running the business by buying products and sending them in Katoro. Therefore, the appellant has a right to a share in the said shop.

I also agree with the appellant's counsel that based on the previous relationship and closeness between the appellant and respondent, it is not practical to document each contribution towards the business thus oral evidence suffices to prove the fact so long as they remain unchallenged and the witnesses appear to be credible.

As regards the issue of interest accrued from the said loan, to my mind, the trial court was not justified in ordering an amount of Tshs. 20,000,000/= to the appellant, as any allocation will depend on the current financial status of the shop. Even this court, is not in a position to

determine the same as the trial court's records are silent as to the current status of the business. Although, based on the respondent's testimony it appears, he still runs the business on his own.

In order to allow the smooth and appropriate distribution, I direct that, the said shop should be valued. Based on the value of thereof; the distribution should be as follows; the appellant should get 40% of the value and the remaining 60% allocated to the respondent.

Finally, the appeal is allowed to the extent explained above.

Considering that the matter is matrimonial there are no orders as to costs.

It is so ordered.

DATED at **Mwanza** this 1st day of April 2022.

L. J. ITEMBA
JUDGE
01.4.2022

Judgment delivered at Mwanza this 1st day of April 2022, in the absence of both parties, in the presence of Mr. Pascal. Court Clerk.

L. J. ITEMBA
JUDGE
01.04.2022