IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. MATRIMONIAL APPEAL No. 29 of 2021

(Arising from the judgment of Ilemela District Court at Ilemela in Matrimonial Appeal No. 06/2021 which originated from Ilemela Primary Court in Matrimonail Cause No. 134/2020)

ANASTAZIA CLEMENT .....APPELLANT

VERSUS

JEREMIAH LIACURTUS KUNSINDAR ..... RESPONDENT

JUDGMENT

10th February & 4th March, 2022

L. ITEMBA, J.

This is a second appeal by the appellant Anastazia Clement. The respondent Jeremia Liacurtus Kunsindar had petition for divorce and distribution of matrimonial properties in Matrimonial Cause No. 134 of 2020 before Ilemela Primary Court. According to the respondent, he met the appellant sometimes in 1988 and lived with her up to around the year 2015/2016. The appellant states that the respondent was his partner for 35 years whereas in 2015 he had later left his matrimonial home and stated cohabiting with another woman.

The two were blessed with 2 issues in 1989 and 1996. There was no formal marriage between the parties, nevertheless the trial court went on

to dissolve the marriage and ordered that the appellant to be awarded Tanzanian shillings two million as a parting gift and that the appellant should vacate the respondent house.

The appellant unsuccessfully appealed to the District Court of Ilemela her main claim was a share to the matrimonial property which is a house situated at Mecco-Kivule Ilemela. The District court having heard both parties, decided that the appellant misused the money which she was given by the respondent to build the house in dispute and on top of that that she sold five motor vehicles which were family properties therefore, those acts reduced her share out of matrimonial property. The award amounting to Tshs. 2,000,000 issued by the Primary Court was maintained by the District Court.

Still aggrieved, the appellant filed the instant appeal raising three grounds of appeal as hereunder:

i. *That the 1st appellate magistrate erred in law and fact for upholding the decision of the trial court which failed to distribute properly the matrimonial asserts between the parties.*

ii. *That the 1st appellate magistrate erred in law and fact by holding that the appellant misused the matrimonial properties without any sufficient reason to prove the same.*

iii. *The 1st appellate magistrate erred in law and fact by shifting the burden of proof to the appellant.*

At the hearing of the matter the appellant enjoyed the service of Mr. Frank Abeid Kabula, against Mr. Yuda Kavugushi, for the respondent.

The appellant's submission in support of the appeal was laconic. Submitting on grounds 1 and 2, the contention by the appellant's counsel is that the 1st appellate court was erroneous in its decision. He argued that based on appellant contribution to the said home, she deserved among others a fair and proper share as she engaged herself in petty food business known as "mama ntilie" in order to ensure they complete their home, but the court failed to take that into account. He challenged the said amount of two million shillings that it was not justified because it was not proved that two million is how much percentage out of the acquired matrimonial property. Regarding the misuse of matrimonial properties, the appellant's counsel argued that the said properties were never under the

appellant's watch and care as respondent handled those cars to their son. That, it was the respondent and their son who agreed to sell them, so appellant has nothing to do with the said sale.

In ground 3 of the appeal, the appellant's argument is that it was legally wrong for the 1st appellate court not to accede to the appellant's prayer for fair distribution of the disputed matrimonial home. He argued that the one who alleges must prove, if it was respondent's allegation that it was appellant who sold his cars, how can the court ask the appellant to prove that she did not sell any of the respondent's cars? The learned counsel explained that it is only the owner of a property who can sell the said property which actually bears his name and not otherwise.

The appellant's counsel urged the Court to set aside both lower court's decisions and order distribution of property accordingly based on the evidence adduced in the Primary Court.

In his reply the respondent through his advocate Mr. Kavugushi, submitted that, each case should be decided on its own merit. He argued that both lower courts were justified by awarding the appellant Tshs. 2,000,000/=. He cited section 114 of the Law of Marriage Act, (herein

LMA) stating that distribution of matrimonial property will be awarded basing on the evidence by the both side showing to what extent each side contributed in obtaining such property. The learned counsel added that the parties were not married to each other so anyone could have moved on with another partner. He argued that the evidence is clear that the plot in dispute was acquired when the parties were cohabiting but the money used to purchase the plot was issued by the respondent after applying for a loan, nonetheless after appellant failed to supervise construction of the house in dispute the respondent had to leave his work and do the supervision himself.

The respondent's counsel argued futher that, the appellant had misused the matrimonial property as she failed to supervise the house and sold the matrimonial properties which were four motor vehicles make Toyota Hiace and one motor vehicle make Nissan Safari, without the respondent's consent. That the respondent managed to recover one motor vehicle.

Referring to the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] T. L. R. 32 the learned counsel stated that in that case the Appellant misused matrimonial properties an act which amounted to 'matrimonial misconduct' therefore her contribution was reduced to zero. He argued further that

there was no proof that it was the parties' son who sold the said cars, and either way how could a minor enter into a sale agreement? He thought that the appellant should have called the said son as a witness and added that even if the cars were not in the appellant's name because they were matrimonial properties anyone could have sold them and the appellant was capable of doing anything to sell the cars including forgery and that this sale is the source of all the dispute leading to divorce.

The appellant finalized by satisfying that there is no formular in distributing matrimonial properties it depends on the evidence enshrined before the court of law. He prayed for the Court to maintain the lower court's decision.

For I have considered the rivalry arguments between both parties and courts' records herein. The issue is whether this appeal is meritorious. To start with, both Primary and District Court treated the parties as if they were married. However, there was no any formal marriage between the appellant and the respondent. As there is no dispute that the two have lived together for at least two years, their relationship falls within the purview of section 160 (1) of the LMA, entailing that there was a rebuttable presumption of marriage, and that they rebutted that presumption by

giving evidence that they were not dully married. It was held in the Court of Appeal decision of **HIDAYA ALLY v AMIRI MLUGU** Civil Appeal No. 105 Of 2008 that:-

> *"A presumption of marriage is not in itself a formal marriage capable of being dissolved under section 107 (2) (c) of the LMA, therefore that it was wrong for the trial court and the District Court to hold that there was any marriage at all between the parties".*

Therefore, there was no marriage to dissolve. That notwithstanding courts have power to order distribution of properties once a presumption of marriage is rebutted under section 160(2) of the LMA. (See also **Hemed S. Tamim v Renata Shayo** (1994) TLR 197.

Moving back to the grounds of appeal, as the three grounds of appeal are inter related, I will respond to them jointly. Section 160 (2) of the LMA states that:-

> *"(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of*

the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and ***the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit,*** *and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section." [Emphasis supplied].*

Therefore, as it was held in the case of **HIDAYA ALLY v AMIRI MLUGU** (supra), the wording of section 160(2) of LMA are to the effect that:-

"the courts have power to order division of property once the presumption of marriage is rebutted just like in instances of dissolution of marriage or separation. See the case of **Hemed S. Tamim v. Renata Shayo (supra).** In that case the Court held that:- "*where the parties have lived*

together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under s 160(1) of the Law of Marriage Act 1971, the courts have the power under section 160(2) of the Act to make consequential orders as in the dissolution of marriage or separation, and division of matrimonial property acquired by the parties during their relationship is one such order."

On deciding whether or not to order distribution of matrimonial property the court must take into account the question of contribution by the parties as intended by section 114 (2) (b) of the LMA. That section provides that: -

(2) In exercising the power conferred by subsection (1), the court shall have regard: -

(a) NA

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets."

It should be noted that, the parties acquired the property indispute when they were living together under the presumption of marriage. The evidence in record reveals that the trial court denied the appellant any share of the matrimonial properties because she had mishandled the matrimonial properties. However, the appellant disputed the fact stating that it was their son who sold the cars. I think the respondent who actually introduced to the court the issue of the appellant selling the cars, had a duty to prove those allegations. The respondent could have either brought his son as a witnesses or he could have called the said buyer whom the respondent redeemed his car to explain who exactly sold the cars to him? In absence of that evidence the court could not rely on mere words to prove transactions of five different motor vehicles. There should be more evidence to support those transactions.

I should mention also that the respondent's counsel in his submission, he introduced assumptions that the parties' son was a minor so he could not sell the said cars and that the appellant could have forged the sale documents. Nevertheless, it is not traced anywhere in the court records that the said son was a minor.

Therefore, the trial court relied on matrimonial misconduct to deny the appellant any share in the property while there was no evidence to prove such misconduct.

Further the trial court awarded the appellant Tanzania shillings Two million while value of the house was not established before the court. Therefore, it cannot be ascertained whether the two million which was ordered is reasonable as compared to the total value of the house in question.

I am of the firm view that in the current appeal, the evidence which remains undisputed is that the parties acquired the property in 2016 when they were still cohabiting and that the respondent instructed the appellant to supervise brick making as part of construction on the said plot. It is also noted that it was the respondent who issued the money to purchase the plot and that the respondent was not satisfied with the quality of supervision by the appellant that is why he stepped in by himself. The evidence about contribution of the appellant was not supported by any evidence. Likewise, the evidence that the appellant sold the matrimonial

properties, was not supported by any evidence especially the parties who are alleged to have been involved in the said sale.

> Section 114 (3) of LMA provides that: *"(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.* "

According to this section, supervision of construction of a house such as in the present circumstances is amongst the inputs which constitute contribution. The Court of Appeal in the landmark case of **Bi Hawa Mohamed** decided domestic services offered by the spouse amounts to contribution towards matrimonial assets. The case of **Uriyo v. Uriyo** (1982) T.L.R 355 went further and expounded that physical supervision of clearing a plot or construction constitutes contribution.

It should be noted that the respondent did not establish his source of income apart from stating that he was working, he bought the plot and five motor vehicles and that he was supporting the family throughout. Secondly, although it appears that the respondent was the main bread winner, all the time when the parties were cohabiting it was the appellant who was staying with the children, especially when the respondent left the

matrimonial home. The respondent kept on supporting the family financially, he alleges, but it was the appellant who stayed with the family and this was her contribution as one of the domestic chores. Apart from that she supervised construction of the house regardless of the quality of supervision but she managed to supervise. Thus, I am of the firm opinion that, the appellant deserved a share out of the house in dispute, albeit not on equal terms with respondent.

The trial court awarded the appellant Tsh. 2,000,000/=. The value of the house is not established before the court therefore it cannot be said whether the two million which was ordered is reasonable as compared to the total value of the house in question.

I take the view that the concurrent findings of the lower courts on the distribution of the matrimonial, did not bode well with the requirement of ensuring that spouse gets their right in term of **section 114 of the Law of Marriage Act.**

It is under these considerations that this court has being guided to allow this appeal and to reverse the decision of the lower courts.

Hence this court, in reversing those decisions orders as follows:-

1. The appellant is awarded 30% of the share of the matrimonial house at Mecco-Kivule Ilemela
2. The respondent is allowed 70% of the share of the matrimonial house at Mecco-Kivule Ilemela.

Each party shall bear own costs.

Order accordingly.

DATED at MWANZA this 4th day of March, 2022.

L. J. ITEMBA
JUDGE
4/3/2022