IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC CIVIL APPEAL NO. 10 OF 2021

(*Arising from the District Court of Songea at Songea in Misc. Civil Application No. 12 of 2021, Original Civil Case No. 56 of 2021 before Mfaranyaki Primary Court)*

ADBUL A. MILANZI ..... APPELLANT

VERSUS

ASHA MAKEO ..... RESPONDENT

JUDGEMENT

Date of last order: *31/03/2022*
Date of Judgement: *27/05/2022*

MLYAMBINA, J.

This case raises special issues which are likely to attract serious debate among members of the legal fraternity and the Public at large. At its embryo is; *whether Primary Courts in the United Republic of Tanzania are statutorily empowered to entertain matters involving presumption of marriage*. In a search to address such issue, the Court has encountered numerous challenges facing Primary Courts in application and enforcement of *section 160 (1) and (2) of Law of Marriage Act [Cap 29 R.E. 2019]*. The challenges are *inter alia*:

First, in respect of registration of cases, that is; *in Civil Register or Matrimonial Register? Second*, the modality of opening and trial of such cases. *Whether Parties living under presumed marriage must initially approach reconciliation Body as per Section 101 of the Law of Marriage Act. Third, in which manner should cases on presumption of marriage be tried by a Primary Court? Should the Parties open an application in light of Section 160 (1) of the Law of Marriage Act [Cap 29 R.E. 2019] to first determine their relationship status*? Or should the Parties proceed to open case of presumption of marriage as a Matrimonial Cause? *Fourth*, the usage of Marriage Form No.2 ("Hati ya Talaka") in presumed marriages. When the presumption of marriage is rebutted, among other relief(s), *should Parties be entitled to the divorce decree?* If the fourth issue is answered in the negative, *how will the issue of division of properties and custody of children be dealt with?*

The factual background comprising this appeal is simply summarized as follows; that the Respondent herein filed a petition for divorce before Mfaranyaki Primary Court where she prayed for an order of divorce, division of matrimonial property acquired jointly during their marriage and custody of their children.

During the hearing of the case before the trial Court, the Appellant herein alleged that; it was on 2000 when they started to live together as a husband and wife. They were blessed with four issues. They acquired different properties such as; a house situated at Making'inda area within Songea District, a cow, ¾ acre sugar cane farm and house utensils. In the year 2015, he married another woman (a second wife). The Respondent prohibited him to live with his newly wife. When the quarrel began, they referred their misunderstanding to Shekha and BAKWATA but all were in vain. Instead, the Respondent began travelling to different places without the Appellant's permission. Worse enough, she denied the Appellant his conjugal right. In the year 2020, the Appellant moved out of their house.

Records depicts that the Appellant used to beat the Respondent and he deserted her and their issues in 2020. She decided to refer their matter to the Social Welfare Officer where he agreed to take care of his issues. She added that, apart from the properties mentioned by the Appellant there is also one three-wheel motor cycle "bajaji", three plots at Shule ya Tanga area and 20 roofing iron sheets. As he left, the Appellant took some of the properties including; beds with their mattresses, radio, television, rice cooker and wire length 100 metres.

The Appellant conceded partly to the Respondent contention. Afterwards, the trial Court entered its judgement in favour of the Respondent. The Appellant was aggrieved by that decision and preferred an appeal but time had lapsed. He therefore lodged an application for leave to appeal out of time before the District Court of Songea. Unfortunately, his application for extension of time was dismissed by the District Court of Songea for want of merits. Undaunted he lodged the instant appeal with the following two grounds:

1. *That, the District Court erred in law when it failed to exercise its discretion power judiciously when it failed to consider that, in application for extension of time, the Court has to consider whether or not there are 'sufficient cause' for extending the time during which to entertain the appeal.*
2. *That, the District Court erred in law when it failed to extend time while there was a serious illegality on the face of record as the Primary Court lacks jurisdiction on presumption of marriage, use of the law of marriage [Cap 29 R. E. 2019] different sections that is section 9, 110 and 140 on the matter of presumption of marriage.*

At the hearing date of this appeal, Mr. Lazaro Simba and Mr. Edson Mbogoro both learned Advocates represented the Appellant and Respondent respectively. This appeal was argued orally.

On the first ground of appeal, the Appellant's Counsel averred that the District Court erred in law when it failed to exercise its discretional power judiciously. He argued that in an application for extension of time the Court has to consider whether or not there are sufficient cause not only for the delay but also sufficient cause for extending time during which an appeal can be entertained.

Mr. Lazaro Simba argued further that, paragraph 4, 5, 6, 7 and 8 of the Appellant's affidavit provides sufficient cause for his delay which is sickness. The sick sheet clarifies that from 12th April to 27th August within the same year the Appellant was sick. There is no dispute that the date when the impugned judgement was pronounced, the Appellant was present and he was supplied with the judgement within time. Due to his sickness, he was advised by a doctor to get more rest. The Appellant was admitted for only two days, the remaining days he was just attending as an outpatient. The Appellant accounted the days of delay from 7th August, 2021 to 20th August, 2021.

In a rebuttal to the above submissions, as to the first ground of appeal, senior Counsel Edson Mbogoro contended that paragraphs 4, 5, 6, 7 and 8 of the affidavit shows that in all time of delay the Appellant was sick and the District Court analysed the attachment on sickness in which there was four documents attached. The first one was before the judgement and it merely shows that the Appellant attended at Mzena Dispensary as an outpatient. There is no proof in the attached sick sheet which shows the Appellant was admitted. Mr. Mbogoro questioned, if the Appellant attended clinic monthly, why did he not appeal on time?

Moreover, Mr Edson Mbogoro asserted that Appellant Counsel agree that the Appellant received the copy in time. Even if the Court would agree with him that he was sick, he failed to account for each day of delay from 3rd August, 2021 up to 23rd August, 2021 when the application was filed before the Court. If he had monthly clinic, he could not fail to consult his Counsel. That is why the District Court was not satisfied with his ground of rest. Mr. Mbogoro submitted that even the stated distance was short too. The Appellant had no good reason to appeal out of time.

I have given consideration to the grounds, rival submissions from both sides on account of the present petition of appeal and I hereby make the followings remarks:

On discretionary power of the Court to grant leave to appeal out of time, it is a cardinal rule that it is the Court discretion to grant or refuse to extend the time to file an appeal out of time. However, that discretion has to be applied judiciously; which means, the Applicant has to provide not only the sufficient cause but also account for each day of delay. There are innumerable Court decisions where the term sufficient cause was defined. One of the decisions is the case of **Bertha Bwire v. Alex Maganga**, Court of Appeal of Tanzania at Dar es Salaam, Civil Reference No. 7 of 2016 (unreported) where the Court of Appeal stated that:

> *Whilst it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court discretion, the Court is enjoined to consider, inter alia the reasons for delay, the length of the delay, whether the Applicant was diligent and the decree of prejudice to the Respondent if time is extended. [Emphasis mine]*

Basing on the above guidance, this Court has found, as rightly as argued by the Counsel for the Respondent, that the Appellant has no good cause for delay. Sickness alone in the circumstances of this case is not enough to justify his delay.

I further went through the Appellant's affidavit together with the exhibit attached thereto and discovered that there is no dispute the Appellant was sick even before the judgement was delivered. The Appellant was not admitted rather an outpatient. He attended clinic sessions on a monthly basis and no any evidence which shows that he was in a serious condition that barred him from other activities. Taking into account that the Appellant was present in Court when the judgement was pronounced whilst attending hospital, it is unexplainable how he failed to consult his Advocate so that he could timely lodge an appeal.

Apart from the aforementioned arguments, the Appellant has failed to account for the days of his delay. It is a fundamental law that the Appellant has to account each day of delay even if it is a single day. In the case of **Ramadhani J. Kihwani v. TAZARA**, Civil Application No 401 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported), Mwambegele J.A, maintained that even a delay of a single day has to be

accounted for otherwise there would be no point of having rules prescribing period within which certain steps have to be taken.

Similarly, in the case of **Bushir Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, High Court of Tanzania at Arusha District Registry, (unreported) the Court speaking through Maige J. (as he then was) had this to say:

> *Delay even of a single day has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken.*

From the record, the Appellant failed to account for all days of his delay from 3rd day of August, 2021 up to 23rd day of August, 2021. Therefore, the first ground of appeal has no merit.

On the *second ground*, Mr. Lazaro Simba submitted that there was serious illegality on the face of record as the Primary Court lacks jurisdiction on presumption of marriage. He said, it is evident that, in the affidavit of the Appellant, under paragraph 10, it was stated that the proceedings and judgement of Mfaranyaki Primary Court are tainted with a lot of material illegality on the face of record.

Mr. Lazaro stressed that the Primary Court has no jurisdiction to entertain the issue of presumption of marriage and use of *sections 9,*

110, 140 of the Law of Marriage Act [Cap 29 R.E 2019] in matter of presumption of marriage. The Appellant Counsel argued further that, *section 76 of the Law of Marriage Act (supra)* provide concurrent jurisdiction from Primary Court to High Court to hear the matrimonial proceedings. The phrase matrimonial proceedings have been defined at *section 2 (1) of the Law of Marriage Act (supra)* to mean:

> *Any proceeding instituted under Parts II and VI of this Act or any comparable proceeding brought under any written law repealed by this Act, in any Court.*

Therefore, it was the view of Counsel Lazaro Simba that *Part II of the Law of Marriage Act (supra)* involves nature of marriage, its validity, procedure and the manner of contracting the marriage. As such, the issue of presumption of marriage does not fall under *Part II of the Law of Marriage Act.* Also, *Part VI of the Law of Marriage Act (supra)* caters for the following: Jurisdiction of the Court in matrimonial proceedings, petitions for divorce and separation, division of matrimonial assets, custody of children, maintenance and other relevant matters.

It was further the view of Counsel Lazaro Simba that the issue of presumption of marriage does not fall under *Part VI of the Law of Marriage Act (supra).*

Another point argued by Counsel Lazaro Simba was that the issue of presumption of marriage is covered under *Part VIII of the Law of Marriage Act (supra)* specifically under *section 160 of the Law of Marriage Act (supra).* As such, the Primary Court lacks jurisdiction on presumption of marriage as it is covered under *Part VIII of the Law of Marriage Act (supra).*

According to Counsel Lazaro Simba, if the claim filed concerns petition for divorce, and the issue of presumption of marriage is raised, then the Primary Court will not be barred from determination of that case. The reason is that the basic issue of divorce petition falls under *Part VI of the Law of Marriage Act (supra).* If the issue is not of divorce, the Primary Court, lacks jurisdiction to determine the issue of presumption of marriage. The case before the Primary Court in this case was on the presumption of marriage. It was not on divorce.

Regarding the use of different sections of the *Law of Marriage Act (supra),* which is *sections 9, 110 and 140* on the presumption of marriage, it was the submission of Counsel Lazaro Simba that the Primary Court of Mfaranyaki applied provision concerning marriage to the issue of presumption of marriage. That, the law is clear, presumption of marriage is covered under *section 160 of the Law of*

Marriage Act (supra). The Primary Court started well by stating so. Later, the Magistrate applied provisions of the *Law of Marriage Act (supra)* to the issue of presumption of marriage. This was not proper in law. The Court was supposed to extend time so that the illegality on use of provisions could be addressed by the Court on appeal. To buttress such point, Counsel Lazaro Simba cited the case of **Kalunga and Co-Advocate v. National Bank of Commerce Limited** (2006) TLR 235 in which it was stated:

> *A Court has a duty even if it meant to extend time for the purpose of ascertaining the point and if the said illegality is established in Revision application to take appropriate measures to put the matter and the record straight.*

In the light of the afore submissions, Counsel Lazaro finally maintained that the District Court had to extend time in order to put the record clear on appeal. He therefore prayed that this appeal be granted by nullifying and setting aside the order of the District Court and this Court extend time to the Appellant to lodge his appeal before the District Court.

In reply to the second ground, Mr. Edson Mbogoro submitted that the illegality was not expounded before the District Court. Even if

different provision were used, there was no any impact provided that *section 160 of the Law of Marriage Act* was applied. On the issue of jurisdiction of the Primary Court on presumption of marriage, he left it to Court to decide. Lastly, he prayed this appeal to be dismissed with cost.

In the light of the afore submissions, it is well known that illegality can be a good ground for extension of time. However, for illegality to be the basis of the grant, it is now settled, it must be apparent on the face of the record and of significant importance to deserve attention of the appellate Court. In the case of **Principal Secretary Ministry of Defence & National Service v. Devran Valambhia**[1992] TLR 387, the Court has this to say:

> *Where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute a sufficient reason...*

From the record the Counsel for the Appellant alleged that the District Court failed to extend the time while there was a serious illegality on the face of record. Which is that the Primary Court applied section 9, 110 and 140 of the *Law of Marriage Act (supra)* on a matter of presumption of marriage.

Admittedly, and for some reasons which will sooner than later become apparent in this ruling I am in concurrence with the Appellant's Counsel though with different reasons. *First*, the matter was filed as a normal Civil Case instead of being filed as a Matrimonial Cause. It was filed as *Civil Case No. 56 of 2021*. *Second*, the trial Magistrate applied *section 9, 110, 140 and 160 (1) of the Law of Marriage Act (supra)* on a normal Civil Cause. It appears the Magistrate was on a huge state of confusion as to whether the matter before him was a normal Civil Case or a Matrimonial Cause.

The issue of presumption of marriage is entirely governed by *section 160 (1) (2) of the Law of Marriage (supra)* which is found under Part VIII of the same law. For easy of reference, *section 160 (1) and (2) (supra)* provide:

> *(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.*
>
> *(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*

rebuttable 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 order or orders for maintenance and upon application made therefor either by the woman or the man, to grant such others relief including custody of children, as it has jurisdiction under this act to make or grant upon subsequent to the making of an order for dissolution of a marriage or an order for separation as the Court may think fit, and the provision of this act which regulate and apply to proceedings for and order of maintenance and other relief shall, in so far as they may be applicable ,regulate and apply to proceedings and orders of maintenance and other reliefs under this section.

According to the above provisions, the Court has power to make orders for division of matrimonial assets, custody of the children and maintenance subsequent to granting of a decree of separation or divorce. It is improper for the trial Court to deal with the division of matrimonial property, custody of the children and maintenance before satisfying itself if the parties lived under presumption of marriage and if

it is rebuttable or not. There are numerous decisions of the Court of Appeal which entreat to adhere to the requirement of *section 160 (1) (supra).*

In the case of **Richard Majenga v. Specioza Sylvester**, Civil Appeal No. 208 of 2019, Court of Appeal of Tanzania at Tabora (unreported), observed that; in any matter pertaining to marriage the first issue to be considered is whether such matter is a matrimonial proceeding as defined under *section 2 of the Law of Marriage Act (supra).* The Court was of the findings that: *One*, the first duty of the Court in a matter falling under *section 160 (1) & (2) (supra)* is to determine the presumption of marriage whether rebuttable or not. *Two*, granting of subsequent reliefs prayed should follow after satisfaction of the existence of the presumed marriage. In reaching its decision on the issue of granting divorce decree the Court held at page 7 of its decision:

> *Although the provisions of section 160 (2) empowers the Court to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce; however, that must be preceded after determination of the existence of the presumed marriage.*

However, in the case above of **Richard Majenga,** the Court of Appeal was not confronted with the issue of laying down the procedure on how the issue of presumption of marriage may be determined.

In the case of **Gabriel John Musa v. Voster Kimati**, Civil Appeal No. 344 of 2019, Court of Appeal of Tanzania at Dodoma (unreported). The Court held that:

> *... though both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial Court to satisfy itself if the said presumption was rebuttable or not.*

Similarly, in the case of **Odhiambo Eduor v. Jane,** Civil Appeal No. 21 of 2012 categorically stated that; presumption of marriage does not automatically convert concubines into wives it merely provides for rebutted presumption that the man and wife were duly married. The Court went further to observe that determination of the presumption of marriage is untenable where the man was duly married in accordance to the Christianity rites and it has not legally been put asunder.

Needless, I must point out that the essence of section 160 of the Law of Marriage Act was stated in the *White Paper, 1969*. It was to

prevent children begotten under the association of his/her parents who never contracted a recognised marriage. The rationale or intention of the legislature was not to sanctify the relationship of man and woman who live together for more than two years that at a time they want to depart their marriage should be dissolved. However, today we have in place the *Law of Child Act [Cap. 13 R.E. 2019]* in which children are fully protected. As such, I find no necessity of retaining the said provision.

The same stance is shared by the *Law Reform Commission of Tanzania Report on the Law of Marriage Act* presented to the Minister For Justice and Constitutional Affairs, Dar es Salaam in April, 1994 at page 20 quoted *para 13 of the Government White Paper* (which is identical and culminated to the wordings of *section 60 (1) G. No. 1 of 1969* in respect of the Law of Marriage and which culminated to the enactment of the *Law of Marriage Act [Cap 29 R.E. 2019]. Para 13 (supra) read*:

> *The idea of presumed marriage was introduced in the Law of Marriage Act, 1971 with the aim of protecting women who live with men for a long period of time and bear children with them without legally being married. Also, to remedy the injustice such men inflict upon such women when the union fails. Such women*

could not sue the man for maintenance and their children were being treated as illegitimate.

In relation to the afore observation, the Law Reform Commission of Tanzania recommended for deletion of the said provision. The reason being that it has lost its usefulness.

Besides the above general observation, the inciting task before this Court is whether Primary Courts in Tanzania do have jurisdiction to adjudicate (or statutory empowered to adjudicate) issues arising out of presumption of marriage.

In order to appreciate the rationale of scrutinizing the jurisdiction of Primary Court in presumed marriages, I find apt to pinpoint a scenario were the Court of Appeal of Tanzania was brought nearer to the same. In the case of **Wilson Andrew v. Stanley John Lugwisha & Another** Civil Appeal No 226 of 2017, the case had originated from Primary Court, the Court of Appeal held *inter alia* that:

The jurisdiction of the Primary Court to entertain claims of damages for adultery where there is no petition of divorce against any person with whom his or her spouse has committed adultery are provided under Part V of the Law of Marriage Act which deals with miscellaneous rights of action...Thus, in terms of

section 75 of the LMA the PC can entertain a ***suit*** *in where the parties were* ***married in accordance with customary law or in Islamic form*** *or in case of a suit under* ***section 69 or section 71*** *if the Court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form.*

The Court went further to hold that:

Where the marriage form of the parties is not disclosed, the Primary Court cannot assume jurisdiction to entertain the claim of damages for adultery. It has to be certain that the couple contracted either customary or Islamic marriage which would cloth the PC the jurisdiction...In dealing with jurisdiction to determine a suit on the claim for adultery, the jurisdiction of Primary Court is conferred under section 75 of the LMA and not 18 of the Magistrates Courts Act.

The decision in the case of **Wilson Andrew** *(supra)* did not categorically address the issue of jurisdiction of Primary Court on presumption of marriage. It was specifically on the powers of the Primary Court in claim for damages on adultery. It must be re-noted, however, that *section 76 of the Law of Marriage Act (supra)* vests concurrent jurisdiction in matrimonial proceedings to the High Court,

Resident Magistrates Court, District Court and Primary Court. *Section 75 of the Law of Marriage Act (supra)* is a specific provision conferring jurisdiction on the issue of adultery to Primary Court where parties are married under Islamic or customary marriages or they would have proceeded in that manner.

Additionally, the following is a case law survey as regard jurisdiction of Primary Courts on presumed marriages.

In **Limbu Ntalima v. Ester Kaoande,** PC Matrimonial Appeal No 3 of 2019 before the High Court of Tanzania at Shinyanga (unreported), the case had ooriginated from the Primary Court. My Learned Sister, her Ladyship Mkwizu, J. while confronted with the same issue held *inter alia* that:

> *The Primary Court has jurisdiction to determine proceedings on presumption of marriage under s. 160(1) of the Law of Marriage Act...The Court in presumption of marriage has to satisfy itself on whether the marriage was irreparably broken and after finding so, section 160 (2) and 114 of the Law of Marriage Act should come into play.*

In **Mwanaisha Mohamed v. Hassan Mohamed**, PC Civil Appeal No.9 of 2019 before the High Court of Tanzania at Arusha

(unreported), the case had originated from the Primary Court. My brethren Gwae, J. was confronted with the issue of whether the Primary Court had jurisdiction on presumed marriage. Another issue incidental thereto was on time limitation for a claim of division of matrimonial properties. It appears the Law of Marriage Act is silent on the issue. The facts of this case were interesting. The Appellant and Respondent lived as wife and husband for a period of 10 years and succeeded to acquire assets. The Appellant then left and got married to another man whom she lived with for another 10 years before her husband demised.

Later, she resumed the relationship with the Respondent and after years they eventually underwent marriage which was conducted under Islamic rites. The Appellant, *inter alia* claimed for the properties allegedly to have been acquired during the period when they were living as concubines before she left. In his decision, his Lordship Gwae held in the affirmative that the Primary Court has jurisdiction to determine proceedings on presumption of marriage under *section 160 (1) of the Law of Marriage Act (supra).*

In **John Elija v. Helena Petro** PC Civil Appeal No.17 of 2019 before the High Court of Tanzania at Tabora (unreported), the case had originated from the Primary Court, my learned Sister her Ladyship

Bahati, J was of found view that; the Primary Court has jurisdiction to determine proceedings on presumption of marriage under *section 160(1) of the Law of Marriage Act (supra)*. Her Ladyship observed further that where the parties are not legally married that fact alone does not oust the jurisdiction of the Primary Court.

The same view was shared by my learned Sister, her Ladyship Mgeyekwa J in the case of **Warda Idrisa Sadick v. Ansbert Ameselm Mugisha,** Matrimonial Appeal No. 3 of 2020 before the High Court of Tanzania at Mwanza registry, the case that originated from the Primary Court. The later went further to hold:

> *Since the presumption was rebuttable, then the PC was rightly to issue divorce decree. A divorce can be issued where the marriage is broken irreparably, and the same can arise under the provisions of section 160 of the Law of Marriage Act.*

In the case of **Sumaiya Ally v. Philbert Chilahahwa,** Matrimonial Appeal No. 3 of 2021 before the High Court of Tanzania at Bukoba (unreported), the case originated from the Primary Court. My brethren Kilekamajenga, J. while confronted with the *inter alia* issue of jurisdiction of Primary Courts on presumed marriage was of found view that Primary Courts have and exercise jurisdiction in all matrimonial

proceedings in a manner prescribed under the *Law of Marriage Act (supra)*. His Lordship Kilekamajenga went on to hold that:

> *The jurisdiction of the Primary Court in matrimonial proceedings is governed by section 76 of the Law of Marriage Act falling under Part VI of the same Act. Regardless of a form of marriage, the PC may entertain such matrimonial proceedings...Section 160 of the Law of Marriage Act is falling under Part VIII, however where an issue of presumption of marriage arises under the petition for divorce, the PC cannot refrain from determining such a case because the original claim is based on petition for divorce which falls under Part VI of the LMA. It all depends on the original claim filed in the Primary Court. Most of spouses goes to Court seeking decree of divorce or separation. The Court cannot speculate their nature of marriage before the trial otherwise it may be so ironical.*

In **Samson Zablon Masija v. Joyce Seleman Kisunda,** PC Matrimonial Appeal No. 05 of 2021, High Court of Tanzania at Mosoma, originated from the Primary Court of Musoma Urban. My brethren Kisanya, J was of equal findings that the Primary Court is vested with

jurisdiction to entertain matrimonial proceedings on presumption of marriage.

In the case of **Mazoea Seleman v. Esha Amiri,** PC Matrimonial Appeal No. 3 of 2016, High Court of Tanzania at Mtwara (unreported), the case that originated from the Primary Court, my brethren Twaib J. (as he then was) held *inter alia* that:

> *The Court has power under s. 160 (2) of the Law of Marriage Act to make consequential orders as in the dissolution of marriage or separation.*

Another proposition with respect to presumed marriages is that no Court can issue divorce once the presumption is rebutted. This position can be reflected *inter alia* in the case of **Harubushi Seif v. Amina Rajabu** [1986] TLR 221 where the Court of Appeal stressed as follows at page 225:

> *It is clear that the Respondent and the Applicant having not been dully married in accordance with the formalities and procedures provided for in the Marriage Act, the Respondent had no legal right what whatsoever to petition either for divorce or separation. It was incorrect for the lower Courts to hold that the Appellant and the Respondent were dully married.*

The same position was maintained earlier on by the Court of Appeal in **Hemed S. Tamim v. Renata Mashayo** [1994] TLR 197. In this case, the Court having found that the parties were not dully married, it declared the decision of the lower Court regarding the dissolution of marriage void.

In Hidaya **Ally v. Amiri Mlugu** [2015] TLR 329, the Court of Appeal of Tanzania was of unanimous view that a presumption of marriage is not in itself a marriage capable of being dissolved under *section 107 (2) (c) of the Law of Marriage Act (supra).* Thus, the Court has power to order division of property once the presumption of marriage is rebutted. The Court held *inter alia* that;

> *it is wrong to issue divorce decree once the presumption is rebutted. The presumption of marriage is not in itself a formal marriage capable of being dissolved under section 107 (2) (c) of the Law of Marriage Act.*

In the case of **Peter M. Chale v. Sara J. Makala,** PC. Matrimonial Appeal No. 4 of 2016 before the High Court of Tanzania at Songea District Registry (unreported), the parties had stayed together for eight good years. Upon instituting a petition for divorce at Mbinga Urban Primary Court, it was granted together with other relief (s). The

Respondent successfully appealed to the District Court. On appeal to this Court, my brethren Mrango J (as he then was) declared the judgement and proceedings of the lower Courts to be null and void on ground that the Primary Court and the District Court has no jurisdiction to entertain the issue of presumption of marriage.

On the other side of the coin, by all necessary implications and with due respect, it appears that, recently, the Court of appeal affirms to the fact that a Primary Court has jurisdiction in presumed marriages and the Court can issue consequential orders thereof. Reference can be made to the cases of **Richard Majenga** (*supra*), **Gabriel John Mussa** (*supra*) to name a few. Equally, this Court (the High Court) has subscribed to the same view as depicted in some cases herein above including the cases of **Limbu Ntalima, Mwanaisha Mohamed, John Elija and Somaiya Ally** to name a few.

It can, therefore, be safely found that a Primary Court has jurisdiction in presumed marriages. Another point to be taken into consideration is that *section 76 of Law of Marriage Act* confers original jurisdiction concurrently in all Courts on matrimonial proceedings. The said section states that:

Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a Court of a resident magistrate, a district Court and a Primary Court

As correctly stated by Mr. Lazaro Simba, the term matrimonial proceeding is defined under *section 2 of the Law of Marriage Act* to mean *inter alia*, "any proceeding instituted under *Parts II and VI of the Act* or any comparable proceeding brought under any written law repealed by the same Act in any Court." The name "Court" is also defined under *section 2 of the same Act* to mean any Court having jurisdiction under *section 76 of the Law of Marriage Act.*

Indeed, *Part II of the Law of Marriage Act (supra)* involves nature of marriage, its validity, procedure of contracting a marriage and the manner of contracting the marriage. Also, *Part VI of the Law of Marriage Act (supra)* covers on jurisdiction of the Court in matrimonial proceedings, petitions for divorce and separation, division of matrimonial assets, custody of children, maintenance and other relevant matters.

Up to that juncture, I find the argument of Counsel Simba that Primary Courts lacks jurisdiction in presumption of marriages is devoid of merits. It can be derived that presumed marriages do fall under the category of matrimonial proceedings because section *160 of the Law of Marriage Act*

(supra) refers to "any Court of competent jurisdiction". Above all, the word Court as defined under *section 2 (1) of the Law of Marriage Act (supra)* means any Court having jurisdiction under *section 76 of the Law of Marriage Act (supra).* It is *section 76 of the Law of Marriage Act (supra)* which vests concurrently in the High Court, a Court of a resident magistrate, a district Court and a Primary Court.

Under the definition part of the *Law of Marriage (Matrimonial Proceedings) Rules, G. No. 246 of 1997,* the word "subordinate Court" is defined to mean; a Court of Resident Magistrate or a Court of District Magistrate but does not include a Primary Court.

However, *G.N. No. 246 of 1997 (supra)* does not apply in Primary Courts. It applies only in the District and Resident Magistrates Courts. As such, it cannot be validly said that the issue of presumption of marriage neither fall under *Part II or Part VI of the Law of Marriage Act (supra).* The reason is that under the same *section 160 (2) of the Law of Marriage Act,* the Court is given jurisdiction to make order or orders for maintenance and upon application made thereof either by the woman or the man to grant such other relief(s) including custody of the children as it has jurisdiction under the Law of Marriage Act (supra) or grant upon

subsequent to the making of an order for dissolution of a marriage or order for separation as the Court deems fit.

Therefore, a Primary Court can apply the provisions under *Part II and VI of the Law of Marriage Act (supra)* to issue necessary orders on presumption of marriage as it deems appropriate.

Further, it should be noted that under *Part VIII of the Law of Marriage (Matrimonial Proceedings) Rules, G. No. 246 of 1997,* the term subordinate Court include the Primary Court as that part specifically deals with appeals.

It is the finding of this Court that, the afore definition of the term subordinate Court be modified in order not to let persons skip *Part VIII* which extend the application of the Rules to the Primary Courts.

From the record, the trial magistrate in the instant case acted under the provision of *section 110 (1) (a) of the Law of Marriage Act (supra)* specifically at page 10 on the second paragraph of the typed judgement where he declared that the relationship among the parties was broken beyond repair. For easy of reference the said *section 110 (1) (a) of the Law of Marriage Act [Cap 20 R.E 2019]* provides that:

> *At the conclusion of the hearing of a petition for separation or divorce, the Court may- (a) if satisfied*

that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief.

It is my considered view, the trial Magistrate erred in law by employing the above provision because *section 110 (1) (a) (supra)* vests power to the Court, where there is a petition on separation or divorce to grant a decree of separation or divorce.

Before I pen off, I am hauled to address the challenges facing Primary Courts in application and enforcement of *section 160 of Law of Marriage Act [Cap 29 R.E. 2019]* as hinted earlier on the first page of this Judgement.

Regarding, the first challenge in respect to registration of cases. That is; *in which register should such cases be admitted or in which Judicial Statistics Dash Board (JSDS) category should they be registered?* Research shows that in Primary Courts only the following registers exist: Rejesta ya Mashauri ya Jinai (Criminal), Rejesta ya Mshauri ya Madai/ Daawa (Civil), Rejesta ya Mashauri ya Ndoa na Talaka (Matrimonial) and Rejesta ya Mashauri ya Mirathi (Probate) na Rejesta ya Mashauri ya

Rufaa kutoka Baraza la Kata. To be specific, the query is that; *should they be registered in Daawa or Talaka category?*

It is the opinion of this Court that such cases be registered in a Matrimonial register due to the reason that presumed marriage follows under matrimonial proceedings as reasoned on page 28 to 29 of this Judgement.

The second challenge is on the modality of opening and trial of such cases. That is*; whether parties living under presumed marriages must initially approach a reconciliation board as per section 101 of the Law of Marriage Act (supra) and thereafter obtain "Form 3" in order for their case to be registered.* It is the opinion of this Court that passing through a board should not be mandatory because *section 101 of the Marriage Act (supra)* refers to situations of marriages and not presumed marriages.

On the other hand, the hurdle is on trial of such cases. That is, *in which manner should presumption cases be tried in a Primary Court?* Must the Primary Court first open an application in light of *section 160 (1) of Law of Marriage Act (supra)* to determine and declare the relationship status of the parties so as to be certain on how to handle the matter. Afterwards, re-open the main case where it shall proceed

with determining the marriage (grounds of granting separation /divorce), the division of properties plus orders of custody and maintenance if any.

If the above premise is to be answered in affirmative, then; *in which register or JSDS category should such initial application and the consequential suit (if any) be opened /admitted?* Being mindful that practise reveals that there exist no "miscellaneous civil application registers" in Primary Courts. That once the presumption is rebutted will such a suit fall under the category of civil (daawa) or matrimonial (Talaka)? It is the findings of this Court that there is no need for a Primary Court to entertain an application determining the relationship status of the parties. Primary Courts should entertain such cases as a matrimonial case and not as a civil case.

The third challenge is in relation to the usage of Marriage Form No.2 ("Hati ya Talaka") on presumed marriages. That is, *where the presumption is rebutted and the Primary Court has concluded the subsequent relief(s) of parties, must it abide to the practise in ordinary divorce cases of issuing a certificate of divorce?*

Besides, it is worth noting that the *Law of Marriage Act (supra)* not explicit on the grant of such divorce certificate. It is the findings of this

Court that a certificate of divorce should not be issued in presumed marriages for three reasons. *One*, presumed marriage is not listed under the Marriages contracted in the manner as per section *25 of the Law of Marriage Act (supra).* As such, it lacks a certificate of a marriage. *Two*, a divorce decree must be preceded with a marriage certificate. There cannot be a divorce decree without marriage certificate. *Three*, technically presumed marriage is not a marriage. It is presumed to be a marriage. A presumption of marriage can only be rebutted. It can not be dissolved.

Another issue is; *whether a Primary Court must initially entertain an application to determine the relationship status of the parties, should the parties be allowed to bring their witnesses and they be sworn before testifying?* Should the Petitioner/Applicant be the one to start? There after both parties have presented their cases ruling should be given? It is the observation of this Court that there is no need for the Primary Court to entertain an application rather when the issue of presumed marriage arises, Primary Courts should have a case within a case to establish existence of such marriage. In so doing parties and their witnesses should be sworn before testifying in accordance to *Rule 46 (1)*

(2) of the Magistrate Courts (Civil Procedure in Primary Courts) Rules G.N No.119 of 1983.

Again, what follows after the outcome of such proceedings? Will it be final submission or decision? It is the findings of this Court that just like in normal suit, after closure of the Applicant/Petitioner's case, the Respondent will be given a right of defence. Thereafter, there will be final submissions (if a need be), followed by a ruling to that effect.

Last challenge is on consideration of jurisdiction. In circumstances where the presumption is or not rebutted, should a Primary Court in such (matrimonial causes) confine itself to adherence of *section 76 of the Law Marriage Act [Cap 29 R.E 2019]* or at some point (where the presumption is not rebutted) be cautious of the ordinary civil jurisdiction as provided under *section 18 (1) of the Magistrate Courts Act [Cap 11 R.E. 2019].*

It is the view of this Court that, as per the Law of Marriage Act (supra) Primary Court has jurisdiction in all matrimonial cases including presumed marriages because the word **"Court"** as applied under *section 160* is being defined under the interpretation section as referred under the provisions of *section 76 of the Law of Marriage Act (supra)*

which vests concurrent jurisdiction to the High Court, a Court of Resident Magistrate, District Court and Primary Court.

Last but not least, while attempting to tackle this matter, I learnt that there exists no specific form for use in Primary Court while petitioning on matrimonial causes. Practice shows that Primary Courts use Form No.2 "Hati ya Madai". The said form does not meet the requirement of a petition for decree of separation or divorce as required under *section 106 of the Law of Marriage Act [Cap 29 R.E 2019]*. For that reason, this Court has come out with a proposed extract herein below titled "HATI YA MAOMBI YA TALAKA" as a sample worthy of being used in matrimonial proceedings by all Primary Courts.

JAMHURI YA MUUNGANO WA TANZANIA

MAHAKAMA YA TANZANIA

Katika Mahakama ya Mwanzo ya Wilaya ya .....
Kituo cha .....
Mkoa .....
Shauri la Talaka Na...../20 .....
..... Mwombaji
..... Mjibu Maombi

HATI YA MAOMBI YA TALAKA

(fungu la 106 la sheria ya ndoa na 5 ya mwaka 1971)

1. TAARIFA ZA WADAAWA

a) Taarifa za Mwombaji

Jina la Mwombaji.....*MKE/MUME,
Umri (miaka)..... Kazi .....
Anakoishi ..... Kabila .....
Dini..... Namba ya simu..... Barua pepe .....

b) Taarifa za Mjibu Maombi

Jina la Mjibu Maombi.....*MKE/MUME
Umri (miaka).....Kazi .....
Anakoishi ..... Kabila.....
Dini..... Namba ya simu .....Barua pepe.....

2. MAELEZO YA NDOA

a. Taarifa za ndoa

iii. Ndoa ilifungwa tarehe .....
iv. Ndoa hii ni ya Kiislamu, Kiserikali, Kikristo, Kimila, yenye cheti na ndoa namba ....
v. Wasimamizi wa ndoa hii ni ..... na .....
vi. Mahali ilipofungiwa ndoa ni.....
vii. Muda walioishi pamoja.....kwenye ndoa/bila kufunga ndoa

b. Taarifa za watoto

i. ..... Jina .....
Umri..... Jinsia .....
ii. ..... Jina .....
Umri ..... Jinsia .....
iii..... Jina .....
Umri ..... Jinsia .....
iv. ..... Jina .....
Umri ..... Jinsia .....
v..... Jina .....

Umri ..... Jinsia .....

3. **Maelezo juu ya ukweli unaoipa Mahakama Mamlaka**

   a. Naomba kuvunja ndoa/kutenganishwa baina yangu na mume/mke wangu kwa sababu

      i. .....
      ii. .....
      iii. .....
      iv. .....
      v. .....

   b. Nimepeleka lalamiko langu baraza langu bodi ya usuluhishi tarehe..... Mwezi ..... Mwaka ..... na imeshindwa kutusuluhisha.

4. **Maelezo kama kulikuwa na mashauri ya ndoa kati ya Wadaawa;**
   a. Tumewahi/hatukuwahi suluhishwa na .....

5. **Maelezo ya tuhuma zinazotegemewa katika kuthibitisha kama** Ushahidi wa kuvunja ndoa/uhusiano;
   Ushahidi wangu ninaotarajia kuuleta Mahakamani ni .....
   .....
   .....
   .....

6. **Kama Mjibu Maombi amekuwa na tabia mbaya katika ndoa/mahusiano eleza tabia hizo na eleza kama aliwahi kukubali tabia hizo;**
   Mdaiwa amekuwa akinitendea tabia za.....
   ..... na aliwahi kukubali tabia ya .....

7. **Masharti ya makubaliano yote kuhusu kugawana huduma au ugawaji wa mali ya pamoja na utunzaji wa Watoto, na kama hakuna makubaliano yaliyofanyika, basi mapendekezo ya**

Mwombaji ni .....

8. **Habari za ombi linalotakiwa kutoka kwa Mwombaji;**

Naomba mahakama hii inipe .....

Tarehe: ..... Mwezi .....Mwaka .....

.....
Sahihi ya Mwombaji

Ithibati, mimi..... nathibitisha kwamba yote yaliyoelezwa hapo juu ni ya kweli tupu, kwa kwa kadri nijuavyo.

Tarehe: ..... Mwezi..... Mwaka .....

.....
Sahihi ya Mwombaji

Imewasilishwa leo tarehe .... Mwezi..... Mwaka.....

.....
Sahihi ya Karani wa Mahakama

Ada ya shilingi..... Namba ya malipo.....

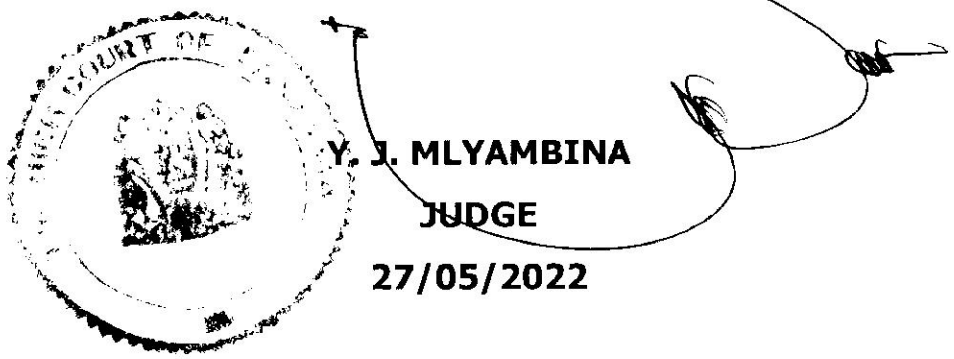
ya tarehe..... Mwezi ..... Mwaka .....

In the upshot, I concur with the arguments of Mr. Lazaro Simba that there was an illegality on the face of record though with a different reasoning. The Primary Court Magistrate wrongly applied *sections 9, 110 and 140 of the Law of Marriage Act* on *Shauri la Madai No. 56 of 2021.*

The trial Magistrate erred on trying a normal civil case by applying *the Law of Marriage Act (supra)*. It was expected that the matter could have been registered as a matrimonial cause. Subsequent thereof, the trial Magistrate could have correctly applied the said *sections 9, 110 and 140 of the Law of Marriage Act (supra) as per Section 18 (1) (b) of the Magistrates Courts Act (supra).*

Henceforth, I have no flicker of doubt that this appeal is meritorious. As a result, I hereby invoke the revisionary powers of this Court under *section 44 (1) (b) of the Magistrate Courts Act [Cap 11 R. E. 2019]. Consequently,* the proceedings, judgement and orders thereof of both the Primary and district Court are entirely set aside/ quashed for being a nullity. I make no orders as to cost.

It is so ordered.

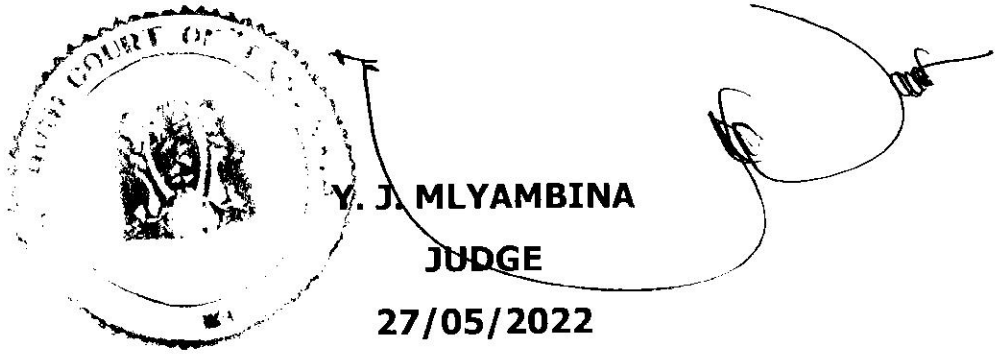


Y. J. MLYAMBINA

JUDGE

27/05/2022

Judgement pronounced and dated 27th day of May, 2022 in the presence of both parties in person. Right of appeal fully explained.



Y. J. MLYAMBINA

JUDGE

27/05/2022