IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.265 0F 2021

(Originating from Matrimonial Cause No. 28 of 2019 from Kisutu Resident Magistrate's Court)

ADELAIDE BONIFACE SIMON TEMU.....APPELLANT

vs

APPOLLO BINOFACE SIMON TEMU.....RESPONDENT

Date of Last Order: 08/09/2022
Date of Judgment: 24/03/2023

J U D G M E N T

MGONYA, J.

The Appellant herein being aggrieved by the decision of the Kisutu Resident Magistrate's Court has appealed before this Court by presenting 3 (three) grounds of appeal to wit:

1. ***The trial Court erred in law by entertaining a matter which lacked jurisdiction;***
2. ***That, the trial Court erred in law and fact in improperly evaluating the evidence on record there by reaching to unreasonable conclusion/finding and made a decision by***

dividing the matrimonial properties to issues who were not party to the suit; and

3. ***The learned Trial Magistrate misdirected himself both in law and fact by reaching to a finding by basing on weak evidence from the Respondent and disregard strong evidence from the Appellant.***

When this instant appeal was scheduled to be heard, the Appellant enjoyed the legal services of **Mr. Tony Mushi** learned Advocate while the Respondent was represented by **Mr. Hassam Ruhanywa** learned Advocate. Mr. Mushi on the **03/08/2022** prayed before the Court for this appeal to be heard by way of written submission. The Court granted the prayer, after complying to the scheduled order on filing submissions. Henceforth follows the decision of this Court.

The Appellant's Counsel on the first ground of appeal submitted that, it is not disputed that the Appellant and the Respondent contracted a Christian Marriage at Dar es Salaam on **10/08/2002**, but before that the two had also already contracted a Civil marriage in the United Kingdom on **11/06/1997** which still exists to date. This led to rise of a point of law whether the parties can contract two marriages in different jurisdiction and both be recognized.

The Appellant's Counsel went ahead in citing **section 36 (a) – (d) and section 45 (1) of the Law of Marriage Act Cap. 29 [R. E. 2019] (herein after referred to as the LMA)** and argued the first appeal in the context and directives of the said section. Submission to the first ground was further extended to the provisions of **section 77 (3) and 38 (1) (c) of the LMA**.

Further, the Appellant questioned that if parties can contract two marriages at different jurisdictions and the same be legal, a question as to why then did Tanzania enact a provision in requiring foreign marriages to be registered is unavoidable. It is from this stance that the Appellant concludes that the marriage contracted in Tanzania while in existence of the Civil marriage contracted in London; renders the marriage in Tanzania void. The case of ***EVANGERINA KOKUSHUBIRA ELZEUS VS REVINA ANATORY, Civil Appeal No. 16 of 2021*** was cited in that respect.

Arguing the second ground of appeal, it was the contention of the Appellant that, the issues to the parties marriage are not citizens of Tanzania considering they were born in United Kingdom and posses all required documents to be recognized as citizens of the United Kingdom (hence for the UK). Annella Asseny Appollo Temu is already citizen of the above-named nation and soon will Arabella Elisia Apollo Temu. From such facts,

the Court could not order that Plot No. 504 at Goba Tanzania be registered in the names of the issues to the marriage. It is the law of Tanzania that a non-citizen cannot own land and hence the rights of ownership of the said property cannot pass to the issues of the marriage and that makes the Court's order be unlawful. For avoidance of doubt **section 20 (1) of the Land Act Cap. 113** was reproduced to cement the contention of ownership of land by foreigners.

With regards to the last ground of appeal, the Appellant claims that the Court reached the wrong decision by relying on weak evidence of the Respondent herein and disregarding her strong evidence. It was her submission that the plot at Goba was a gift given to them by the parents of the Appellant expecting the two will one day live on the premises, the same is within the landed property of the Appellant's parents. However, it is a shame in African customs for a man to claim over land that was a gift from the parents of the bride on the wedding day.

It was also stated that regarding the properties in the United Kingdom it was the Appellant who took a mortgage and it is the Respondent paying for the same to date. It was stated that the Respondent abandoned the Appellant and the issues to the marriage and relocated to Tanzania and is living with another

woman, leaving the Appellant in full responsibility of the issues without assistance.

On the issue of properties acquired by the parties the Appellant confesses that she is aware of the principle of joint ownership. However, the Court had the duty to have properly weighed the evidence and arrive to an outcome as to who has contributed more in acquiring the house in the United Kingdom. Further it should have considered that the Respondent is the source of dissolution of the marriage and hence he had no contribution to the acquisition of the properties in the United Kingdom.

In reply to the grounds of appeal, the Respondent on the first ground of appeal argued that, on jurisdiction of the Court the decree of divorce was brought under ***section 77 (3) (a), (b) and 81 (a) of the LMA***. Moreover, having the provisions of ***section 76 of the LMA*** the petition was properly filed. The fact that there existed between them a Civil Marriage that was contracted in UK and was not registered in Tanzania as a requirement of ***section 45 (1) of the LMA*** then it is immaterial for claiming the trial Court had no jurisdiction. The Christian Marriage which was contracted in Tanzania was in accordance to the requirement of the LMA and is fit within the law. It was further is submitted that it is the Respondent who filed the

petition for divorce in Tanzania because he is a citizen and is domiciled in Tanzania. ***Section 77 (3) (a) and (b) of the LMA*** provides for jurisdiction regardless of where the marriage was contracted.

On the second ground of appeal, on evaluation of evidence on record; the Respondent's Counsel states the same will not dwell much time on it. It is now settled principle of law that at an appellate level the Court only deals with matters that have been decided upon by the lower Court. The issue of citizenship of the issues of marriage or whether they can own property or not was not determined and was not part of the proceedings during trial and cannot be raised at this stage.

Arguing the last ground of appeal, the Respondent's Counsel avers that, the Court was proper in treating the plot at Goba as a matrimonial property despite being obtained by way of gift. The said property was a gift not made in contemplation of marriage and was not a condition for the marriage rather it was given for having contracted the marriage. In this regard it remains to be a matrimonial property.

Having ventured through the grounds and the submissions for and against the raised grounds of appeal, as filed by Counsel of both parties after the Court's order, it is from here that I directly proceed into determining the grounds raised as hereunder.

To begin with the **first ground** of appeal, that **the trial court lacked jurisdiction in entertaining the petition before it, based on a petition for divorce on a Christian marriage between the parties while there was an existence of a Civil Marriage that was contracted in the UK.** It was the admission of both parties that the two lived in United Kingdom and during their life in the UK the two contracted a Civil marriage, a fact that is undisputed and certificates of marriage in respect of the two forms of marriage were tendered as evidence before the court.

However, in the Respondent is submission,this fact was revealed and not disputed by the Appellant. It is stated that it is the Appellant who required a Christian Marriage to be contracted between them way back at home Tanzania, in the presence of her relatives and her parents. Out of love, the Respondent occasioned the same hence the existence of the Christian Marriage, of which the petition of divorce originates from. The challenge levelled to the trial Court for lacking jurisdiction the same demands this Court to make reference to ***section 36 and 45 (1) of the LMA***, Where the same states that; -

> **36. A marriage contracted outside Tanzania, other than a marriage contracted under section**

34, <u>shall be recognised as valid</u> for all purposes of the law of Tanzania, if-

(a) it was contracted in a form required or permitted by the law of the country where it was contracted;

(b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicile;

(c) both parties freely and voluntarily consented to the marriage or, where The Law of Marriage Act [CAP. 29 R.E. 2019], either party did not freely and voluntarily consent to the marriage, the parties have freely and voluntarily consummated the marriage; and

(d) where either of the parties is a citizen of the United Republic or is domiciled in Mainland Tanzania, both parties had capacity to marry according to this Act.

And section,

45.-(1) Where any person who is a citizen of the United Republic has contracted a marriage outside Tanzania otherwise than under the

provisions of section 34, he or she or his or her spouse may apply to the Registrar-General for the registration of that marriage under this Act and the Registrar-General, on being satisfied that the marriage is one that should be recognised as valid under the provisions of section 36, shall register the marriage.

From, the two provisions above the same entail to us what is a marriage contracted outside of Tanzania. The law provides that for recognition of such a marriage in Tanzania, a party to the said marriage may apply for its registration and upon such application the Registrar General shall register the same and it will be recognized if it falls under the meaning of the above sections. I From the provisions above I find that stating the trial Court has no jurisdiction in existence of the Civil marriage contracted in UK to have no place in the Context of the provisions above.

However, the records are silent on the said civil marriage as to whether it was registered as required by law, of which is also not a mandatory requirement from the wording of ***section 45 of the LMA***. It is in that circumstance, I do not find that the said forms of marriage concurrently existing together makes the Christian form of marriage between the parties void. The two

forms of marriage were contracted between the same persons that is the Appellant and the Respondent, the position would have been different if one of the forms of marriage involved another person different from the parties herein.

Moreover, it is in the records and was not controverted by the Appellant that the need of having the Christian marriage was for the intention of recognizance to the family members that she was getting married. The Appellant granted her wish and hence it was in her knowledge that she was getting into two forms of marriage. It is trite law that the Appellant's silence in the face of the Respondent's assertion is considered an admission of fact. To me it appears is that since she challenges the same now to be illegal she had that same knowledge from the time she insisted of the second form of marriage. And hence her action in disputing the existence of two forms of marriages to the same parties an afterthought for reasons best known to herself.

It suffices to say that since the marriages contracted in the UK and the one in Tanzania are both recognized in the eyes of the law and the Respondent having resided in Tanzania, he is vested with all colour of rights to file for Petition before the Court for dissolution of the marriage. **The above is immense to show that the first ground of appeal has no merits.**

In determination of the **second ground** of appeal, relating to division of the matrimonial properties to the issues of the marriage, the Appellant states the Court erred to have reached such decision since the issues of the marriage were never party to the suit and the issues of the marriage according to them being birthed in UK are citizens of UK hence making them foreigners to Tanzania, and thus the law in Tanzania does not allow noncitizens to own landed property. The Respondent on the other hand was brief on this ground by arguing the matter of citizenship was never raised in the trial Court hence can not find room to be entertained in this Court.

Division of matrimonial properties is handled under ***section 114 (1) of the LMA*** where the Court is vested with power to do the same. **Section 114 of the LMA**, extends its content in defining what is a matrimonial property. From the said provision of law I find no need of the second ground to detain us since the law is direct as to who is entitled to division of matrimonial properties. I reproduce the said provision for ease of reference: -

> ***114.-(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, <u>to order the division between the parties</u> of any assets acquired by***

them during the marriage by their joint efforts or to order the sale of any such asset and <u>the division between the parties</u> of the proceeds of sale. (emphasis is mine).

It is the law that governs the division of matrimonial properties, since the same instructs that the division is between **parties to a marriage** and according to their joint efforts. In this aspect, leaving matters of citizenship of the issues aside, I find the decision of the trial Court dividing **plot No. 504 Block G situated at Goba** to the issues of the marriage of the parties herein to be contravening the position intended by the law; **hence forth I find the second ground of appeal having merits.**

On the **third ground** of appeal, the Appellant contends the court reached its finding on weak evidence of the Respondent by disregarding her strong evidence. It was further stated that the Respondent has no rights in claiming a share from the plot at Goba since it was a gift to the parties on their wedding from the parents of the Appellant. And that claiming the same is shameful in African culture. The Appellant's complaint extended to claiming that in respect of the property in England it is the Appellant who has a larger share in its acquisition since she has been the one paying the mortgage and the maintenance of the

issues since the Respondent left or rather abandoned the Appellant and the issues to the family. And that the Court erred to consider not to have jurisdiction over the house in UK. That the same had jurisdiction only if the provisions of **section 46 of the Family Law Act of UK** would be found intact with the requirements therein. The Respondent stated that the trial Court had jurisdiction of the property in UK and that the Plot in Goba still forms a matrimonial property despite the same being acquire as a gift.

This ground is basically on the division of matrimonial properties being the plot at Goba, whether it forms part of matrimonial assets and the house in England whether the Court has jurisdiction?

To begin with the Plot at Goba. The existence of the said **Plot No. 504 Block G Goba** originated from the same being granted to the parties as a gift on the wedding day. To me a wedding literary marks the beginning of a matrimonial life. Hence being gifted the said plot already the matrimonial life had already begun hence the property in the context of section **114 of the LMA** qualifies to form part of a matrimonial property.

Secondly, in consideration of the house in the UK where both parties admit is where the family lived and was bought for the purpose to serve their young family. I am of the view that

the house at Edinburg, EH11 3SX UK, forms part of a matrimonial property. I say so since parties do not dispute that fact. Both of them are in admission that the house was mortgaged by the Respondent herein and the Appellant also admits to have continued paying the mortgage in respect of the same property.

It is from the above that the parties have revealed to have acquired the above two properties during their subsisting christian marriage. In respect of jurisdiction the Appellant has assisted the Court with the provision of **section 46 of the Family Law Act 1986 of UK** which provides for recognition, it states: -

46 (1) The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognized if;

(a) The divorce, annulment, or legal separation is effective under the law of the country in which it was obtained; and

(b) At the relevant date either party to the marriage;

i. Was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

ii. Was domiciled in that country; or

iii. Was a national of that country.

It is the law that division of matrimonial properties is governed by **section 114 (1) of the LMA.** The section demands that division of the properties be done by consideration of the contribution of each party in acquiring the said matrimonial property.

The Appellant in this suit admits that the two properties were acquired in the subsistence of their marriage, hence the same have to be distributed to the parties in accordance to contribution of each party. That is the **house in United Kingdom and Plot No. 504 Block G Boko.** The Appellant has stated that it is true that the Respondent had bought the house in UK and since he left, it is the Appellant that has been paying for mortgage of the same. The Respondent is also noted to have stated that at a certain period of time he was the one paying for the mortgage and other expenses until later when had to ask the Respondent to continue paying for the mortgage and maintenance of the children and the same was in agreement between them. It was also claimed by the Respondent it was the Appellant who demanded the Respondent to vacate their matrimonial home after their conflict, a fact not disputed by the Appellant.

Having the records in regards to the acquiring of the matrimonial properties between the parties and having said all the above, this Court fully engages the powers vested over it under the provisions of **section 114 of the LMA** in distributing the said properties between the Appellant and the Respondent in the following manner;

One, the house at 57 West Fairbrae Crescent, Edinburg, EH11 3SX, Scotland, United Kingdom, a valuation of the house be made by competent authority with powers to conduct an evaluation. ***The value of the said house shall then be divided equally at 50% to each party***. Any party interested in keeping the said matrimonial property is at liberty to refund the other with the 50% and hence keep the property.

Two, the property that gifted to them on their wedding being property located at **Plot No. 504 Block G Goba Area in Dar es Salaam,** a valuation of the plot be made by competent authority with powers to conduct an evaluation. **The value of the said plot shall then be divided equally at 50% to each party.** Any party interested in keeping the said matrimonial property is at liberty to refund the other with the 50% and hence keep the property.

This Court having gone thoroughly the records in consideration of the nature of the matter, being a matrimonial

cause, the Court finds the trial Court to have made a decision of the matter without determining the crucial legal rights of the issues to the Marriage. The trial Court having had determined a Matrimonial Cause with evidence that the same were blessed with issues ought to have ordered on custody and maintenance of the issues since both parties admit the said issues to be from their marriage.

Having omitted the above, the trial Court is the one with jurisdiction to have entertained the above so as to determine this matter once and for all without having multiplicity of suits. It is from here I remit the said file to the trial Court for the orders of **custody** and **maintenance** to be determined by the said Court expeditiously.

In the event therefore the appeal before this Court is partly allowed in the extent of the above analysis.

Considering the matter being a Matrimonial Cause, I make no orders as to costs.

It is so ordered.

L. E. MGONYA

JUDGE

24/03/2023