

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC. MATRIMONIAL APPEAL NO. 7 OF 2021

SUSANA MADUHU.....APPELLANT

VERSUS

HUSSEIN MALONGO.....RESPONDENT

[Appeal from the Decision of District Court of Shinyanga at Shinyanga.]

(M.O. Mchomba RM)

dated the 22nd day of March, 2021

in

Matrimonial Appeal No. 19 of 2020

JUDGMENT

5th July, 2022 & 7th February, 2023.

S.M. KULITA, J.

This is a second appeal by the Appellant. In a nut shell, the appellant had sued the respondent at Kizumbi Primary Court seeking for divorce and division of matrimonial properties. She supported her prayer for divorce due to cruelty she claimed to have been suffering from the respondent.

The case was heard, and finally, the trial court found that there was no marriage to grant divorce. However, as there was evidence that the duo lived together for a couple of years, the trial court under section 160 of the Law of Marriage Act ruled out that, there was a presumption of marriage. On that account, an order for division of matrimonial properties was given only to the properties found to have been jointly acquired by the parties.

In reaction, the appellant filed an appeal to the District Court claiming that there was a valid marriage and that division of matrimonial properties was unfair. In its judgment, the first appellate court found the trial court was correct on all aspects, that is, on marriage status and division of matrimonial properties. The said judgment aggrieved the appellant again.

For a second bite, the appellant has now approached this court in this appeal with three grounds of appeal; **One**, that the first appellate court failed to consider that there was a valid marriage between the parties, **two**, that the first appellate court failed to consider that, the houses and other properties were acquired during the subsistence of their relationship, **three**, that the first appellate court failed to know that if

there is no valid marriage then there should be no division of matrimonial properties.

On 19th April, 2022, this appeal was scheduled for hearing through written submissions. Both parties complied with. Ms. Jesca Makalwe Advocate, represented the appellant whereas Mr. Audax Theonest Constantine Advocate represented the respondent.

Submitting in support of the appeal Ms. Makalwe stated that, the parties contracted a customary marriage. She insisted that, the same is provided in the Law of Marriage Act, and for whatever irregularities the same becomes valid. She cited sections 25(1)(d) and 41(a) (e) and (f) of the Law of Marriage Act, to support her argument.

On the second ground of appeal, Ms. Makalwe stated that, the respondent's evidence at the trial court shows only that he acquired the plots but never developed them. She went ahead contending that, unlike the appellant who showed that, she was involved in development of the houses in plot No. 163 Block T Majengo, plot No. 159 and another plot situated at Negezi. As the appellant was involved in developing the same, it was her submissions that, the appellant is entitled for a share on them. She supported her argument with section 114(1)(2)(a) and (b) and (3) of

the Law of Marriage Act and the case of **Bi Hawa Mohamed vs. Ally Seif [1983] TLR 32.**

Concerning the last ground, Ms. Makalwe was of views that, according to section 114(1) of the law of Marriage Act, division of matrimonial assets follows after the court has granted decree of divorce. To her, the act of ordering division of matrimonial assets without granting divorce was a contradiction.

In reply Mr. Audax Constantine stated that, unlike the testimony adduced by the respondent at the trial court that he paid dowry, there is no any evidence from the appellant as to how and when they got married. He went ahead stating that, the appellant never stated anywhere when and whether the Sukuma Marriage cerebration (BUKOMBE) took place. For those reasons, Mr. Audax concluded that, the parties were merely living in concubinage association. To bolster his assertion, he cited the case of **Zacharia Lugendo vs. Shadrack Lumilang'omba [1987] TLR 31.**

Concerning the second ground of appeal, Mr. Audax made reference to pages 2 to 5 of the typed proceedings. To them he contended that, the appellant was not specific on the properties she was involved in developing. He insisted that, the appellant never stated on how and when

she developed the said properties. He added that, the appellant failed to prove the money extent, property or work towards acquisition of the said properties. On that account, Mr. Audax was of views that, the appellant went contrary to the dictates of the case of **Mariam Tumbo vs. Harold Tumbo [1983] TLR 293** which seeks for a proof on joint acquisition of the matrimonial assets.

On the last ground of appeal Mr. Audax was of views that, division of matrimonial properties follows even in a situation where the parties were living in concubinage association. She cited the case of **Hoka Mbofu vs. Pastory Mwijage [1983] TLR 286** and prayed for this court to make reliance to it.

In rejoinder Ms. Makalwe reiterated her submissions in chief and argued that the authorities cited in reply submissions are distinguishable to the case at hand. That was the end of both parties' submissions.

I have taken into consideration both parties' submissions, the available records and the rival issues as well. I am going to attend the grounds of appeal one after the other.

Concerning the first ground of appeal, the appellant states to have contracted a valid customary marriage with the Respondent. She made

reliance to section 25(1)(d) of The Law of Marriage Act. However, in the cited case of **Zacharia Lugendo** (supra), while referring to the same section, for a customary marriage to be valid, it was said that;

"Marriage unlike concubinage in a solemn and serious institution. There ought to be evidence of customary law marriage to constitute marriage, such as handling over ceremony by parents of the girl to the boy or evidence of certain rites recognized by the relevant customary law of that tribe like a festival of pombe or other like ritual. See, section 25(1)(d) of the law of Marriage Act No. 5 of 1971."

The issue is whether the appellant in her testimony at the trial court provided evidence in proving contracting a valid customary marriage. As correctly submitted by Mr. Audax, the appellant testified as PW1 at the trial court. Throughout all of her testimony, she never given the court any evidence on the customary marriage ceremony. She just mentioned Bukombe having been done when she was so asked by assessors. Like the dictates in the above excerpt, as the appellant has failed to give evidence on the contract of the customary marriage, this court fails to

fault the two courts below for holding that, the appellant and the respondent had no valid marriage to grant divorce.

Concerning the second ground of appeal, the respondent claimed that, the appellant has not been specific and has never provided any proof on how she participated on the acquisition of the matrimonial assets. The appellant on her part subscribed to the need of proving joint acquisition of the matrimonial properties as set in the case of **Mariam Tumbo (supra)**, yet she added that she adhered to it.

I have gone through the appellant's testimony at the trial court. It is true that, she never given evidence on how she participated in developing or improving the matrimonial properties. This issue is only seen when the appellant was asked by the court assessor. Her answer was that, her participation was on doing domestic works and watering the bricks. However, I agree that under the dictates of the **Bi Hawa Mohamed (supra)** those works are counted for in division of matrimonial properties.

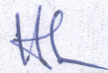
However, the respondent in his testimony, provided evidence on how and when he acquired the disputed 4 (four) houses plus a kitchen in one plot. His evidence was to the effect that, the same were acquired before he had started living with the appellant. He averred that he

acquired the money from selling other lands, cattle and rent to build those structures. His witness Lucia Samwel (SU3) too, subscribed to that respondent's version towards acquisition of the said four houses in one plot.

I understand, in civil cases proof is on the balance of probabilities. In a situation like this, when the appellant has never provided any proof towards acquisition of the matrimonial properties till at the stage of questions, when compared to the respondent's side that has provided proof towards acquisition of the four houses in one plot, I see no point to fault the decisions of the two lower courts below in their holding that the four houses in one plot are not among the properties subject for division.

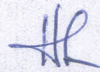
On the last ground of appeal, the same will not detain me much. This is because, the order for division of matrimonial assets does not follow only when the marriage is valid. The court has always been mandated to order division of assets even in the situations where marriages are presumed under section 160 of the Law of Marriage Act, also in dissolution of couples who live in concubinage. Thus, it is not contradiction for the trial court, that has found no valid marriage, to order division of the assets that were acquired jointly during the parties' relationship.

On account of the foregone discussion, as all grounds of appeal have failed, I see no point to fault the trial and the first appellate courts' judgments. Their decisions and orders are hereby confirmed. The appeal is therefore dismissed for being unmeritorious. No order as to costs.



S.M. KULITA
JUDGE
07/2/2023

DATED at **SHINYANGA** this 7th day of February, 2023.



S.M. KULITA
JUDGE
07/2/2023

