

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL CASE NO.44 OF 2023

**(Arising from Matrimonial Appeal No. 22 of 2022 of Shinyanga District Court,
Original Civil Case No. 1 of 2022 from Usule Primary Court)**

FELISTER BONIFACE GUMSHUAPPELLANT

VERSUS

MHINDI SENDAMA NG'WANDU.....RESPONDENT

JUDGMENT

29th August & 18th October 2023

F.H. MAHIMBALI, J

The appellant and the respondent were in a long cohabitation as spouses (wife and husband respectively) since 2009. When it reached in 2022, the relationship between the two ran rancid to the extent that the appellant fled away from the matrimonial home on allegation of being deserted.

This irritated the respondent who successfully filed a divorce petition at the trial court and distribution of matrimonial properties. Upon full trial of

the case, the trial court made a finding that the two's relationship did not qualify to be a customary marriage as claimed as none testified on that aspect. It mainly considered it as a cohabitation having acquired the status of being presumed marriage in terms of section 160 of the LMA. However, it dissolved it and went ahead of ordering distribution of matrimonial properties jointly acquired between the parties.

The appellant is dissatisfied by both findings of the lower courts on the aspect of the division of matrimonial properties. Thus, the basis of the current appeal in which the main contest is on the division of matrimonial properties jointly acquired between them. The appellant's main grievance is based on the context that the distribution is not fair.

Before I proceed to determine the merit of the distribution, I wish to comment one thing that, since a presumption of marriage is not known a type of marriage but just a recognized long cohabitation of parties which needs legal protection as far as custody and maintenance of children is concerned in one aspect and also protection of assets jointly acquired by both parties during their cohabitation jubilation. That being not a marriage, the courts of law have no legal mandate of dissolving such a relationship. As

it is not legally recognized as lawful marriage, it is thus not dissolvable by courts of law but dissolved by the parties' own wishes.

Assuming that it was a lawful marriage, neither the village chair nor ward executive officer or any local leader can assume the conciliatory power but the Conciliation Board itself legally established (**see sections 100(1), 102 and 103 of the LMA**). Thus, the role of SM2 and SU2 assuming the powers of the marriage conciliation board was a nullity them being not part of the marriage conciliation board as per law.

On the issue of the said division of the matrimonial properties allegedly jointly acquired between them, for the same to form basis of distribution, there ought first to have been evidence of their existence and secondly evidence of each one's contribution. A mere mention of the said properties is not a conclusive proof that they are existing and that each one's did make contribution on their acquisition. Both of these aspects, is a question of fact which needs proof of it.

The courts' power or criteria in ordering division of properties jointly acquired between spouses who lived under a long cohabitation (presumed marriages) is the same as that criteria used in ordering division of

matrimonial properties between spouses upon dissolution of their marriage (See section 160 (1) and (2) of the LMA, Cap 29). Thus, for that to happen, there must be proof of the existence of the alleged properties jointly acquired and secondly, each one's contribution to their acquisition. A mere mention is not sufficient, but actual proof of their existence and what material contribution done to their acquisition or development.

Thus, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts. **See Bi Hawa Mohamed v. Ally Sefu (1983) TLR 32** and **Samwel Moyo v. Mary Cassian Kayombo [1999] T.L.R. 197.**

Though what constitutes matrimonial assets/properties for the purposes of section 114 has not been defined under the LMA, in **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018** and **National Bank of Commerce Limited v. Nurbano Abdallah Mulla, Civil Appeal No. 283 of 2017** (both unreported), the Court of Appeal defined matrimonial properties as those properties acquired by one or the other spouse before or during their marriage, with the intention

that there should be continuing provisions for them and their children during their joint lives. Likewise, the Court emphasized in **Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016** (unreported) that matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.

Section 114 of the LMA has been a subject of interpretation by the Court in a number of cases, in particular, **Bi Hawa Mohamed v. Ally Sefu (supra)**. The Court has underscored the principle envisaged in section 114 of the LMA as compensation for the contribution towards acquisition of matrimonial property regardless whether the contribution is direct or otherwise see: **Mohamed Abdallah v. Halima Lisangwe [1988] T.L.R. 197.**

Further, the Court emphasized that services of a wife entitle her to division of matrimonial properties regardless of her direct contribution or otherwise. In the case of **Reginald Danda v. Felichina Wikesi, Civil Appel No. 265 of 2018** (unreported), it was held that a wife is entitled to division of matrimonial properties even if she had not made any direct contribution to their acquisition for, she has that entitlement so long as she was a wife who made indirect contribution through domestic chores.

I am aware that the issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. In **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) this Court stated that,

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."

In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018** the Court of Appeal made an insistence that the extent of contribution is question of fact which then must be established by evidence.

Now, coming to the vital question in this case, whether there are in existence of the alleged assets, secondly, the assets must have been acquired by them during their long cohabitation and thirdly, they must have been acquired by their joint efforts. I have not seen any evidence by the appellant establishing the existence of the said assets, manner the said assets were acquired and how much she contributed on their existence or

further development. A mere mention of them, is not conclusive proof of their existence, acquired during their cohabitation lifespan/jubilation and how she contributed.

That said, in the absence of the actual proof, I wonder on what basis the appellant founds her claims against the findings of the first appellate court backing up the trial court's findings.

The appeal is thus dismissed for want of merits. This being a matrimonial case, parties shall bear their own costs.

It is so ordered.

Right to appeal on a legal point to any aggrieved party is hereby explained.

DATED at **SHINYANGA** this 18th day of October, 2023.




F. H. MAHIMBALI

JUDGE