

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL NO. 41 OF 2023

(Arising from Matrimonial Appeal No. 8 of 2022 of Maswa District Court, Original Civil Case No. 20 of 2022 from Malampaka Primary Court)

JIBUTA NKUBA.....APPELLANT

VERSUS

JOHN NTALIMBORESPONDENT

JUDGMENT

24th October & 1st November 2023

KAWISHE, J.:

The appellant and respondent lived together as wife and husband since 1983. They were not blessed with children. Their relationship continued up to 5th November, 2021 when the appellant left their residence after being chased by the respondent on a reason that she is old. That, she constantly received threats from the children of the respondent. They threatened to kill the appellant with machetes and caused chaos in her residence repeatedly.

Irritated with the constant threats the appellant filed a divorce petition and distribution of matrimonial property before Malampaka Primary

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Court. At the conclusion of the trial of the case, the trial court found out that there was no marriage existed between the appellant and the respondent as claimed by both of them as there was no evidence to prove the same. It considered the relationship as a cohabitation having acquired the status of a presumed marriage as per the provisions of section 160 of the Law of Marriage Act, Cap. 29 R.E 2019 (the LMA). Since there was no marriage contracted, the trial court did not attempt to dissolve the non-existing marriage. The trial court ordered distribution of matrimonial property between the parties.

The respondent dissatisfied with the decision of the trial court appealed to Maswa District Court. The first appellate court quashed the decision of the trial court on the ground of want of jurisdiction. The appellant dissatisfied with the decision of the first appellate court approached this Court seeking nullification of the decision of the first appellate court. Before this Court the appellant and respondent appeared in person.


This appeal is anchored on one ground only which this court is invited to determine. The appellant stated that, the first appellate court

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erred in law and facts for failure to acknowledge that the primary court has jurisdiction to entertain the matter originated on presumption of marriage hence reached a wrong and improper judgment.


At the hearing the appellant prayed to the court to adopt her ground of petition to form part of the submission. She made a very brief statement that she is suffering that is why she lodged the appeal. That she lodged her complaints in Maswa District Court and they confused her. She added that, she is asking for the distribution of matrimonial assets which they acquired when they lived together with the respondent. That, they had 15 herds of cattle, iron sheets, and 16 acres of land.

The respondent was brief in his submission. He stated that, he wants to engage an advocate, but he prayed that the court adopt his reply to the appeal to form part of his submission. He concluded his reply. To be clear, I wish to reproduce the reply to petition of appeal as stated by the respondent. That, the reason for the judgment of Appellate District Court was not wrong and therefore properly given.

In rejoinder, the appellant reiterated her prayer that her ground of petition be part of the submission. She closed her case. 

In this appeal the major question to be answered is, whether the trial court had jurisdiction in the matter of presumed marriage.

The first appellate court nullified the decision of the trial court on the ground that, the trial court had no jurisdiction to order distribution of matrimonial property once it decided that there was no legal marriage between the appellant and the respondent rather there was a presumption of marriage. At page 11 of the typed judgment, the Learned Senior Resident Magistrate while responding to the question, "*does the primary court have jurisdiction to entertain disputes (sic) emanated from presumption of marriage?*" rejected the authority cited by the respondent's counsel from **Abdul A. Milanzi vs. Asha Makeo**, DC Civil Appeal No. 10 of 2021 which affirmed jurisdiction to the primary courts. The Learned Senior Magistrate agreed with the position of the appellant's counsel that the primary court lacked jurisdiction in matters of presumption of marriage. He cited the case of **Hidaya Ally vs. Amir Mlugu**, Civil Appeal No. 105 of 2018 (CAT) stating that, from this case's principle, the primary court lacked jurisdiction in presumption of marriage. He cemented the views of the appellant's counsel position by stating that:



"it follows to me that, the Court of Appeal in Tanzania, its decisions cannot be changed by the High Court's decisions, therefore to that end, the primary court lacks jurisdiction over matters concerning presumption of marriage. And since it has already seen that, the trial court didn't have jurisdiction, and all what was done are nullity, ..."

From the above reasoning, I am of the view that, a confusion has been created which requires to be cleared between the two cited cases of **Abdul A. Milanzi vs. Asha Makeo** (supra) and **Hidaya Ally vs. Amir Mlugu** (supra). The reasoning of the Learned Senior Resident Magistrate gives an impression that there are conflicting principles between the Court of Appeal and High Court decisions on the jurisdiction of the primary courts over matters of presumption of marriage. The principle in the latter and the former on the jurisdiction of primary courts over presumption of marriage is the same. Both the Court of Appeal and the High Court referred to the provisions of section 160 of the LMA and both agreed that after the trial court is satisfied that presumption of marriage is proved may proceed to order distribution of matrimonial property as per the evidence adduced.

After I have cleared the confusion created, prudence demands that the issue raised be determined. The first appellate court was of the view

that, the trial court lacked jurisdiction once it found out that presumption of marriage between the appellant and the respondent was established. With due respect, the reasoning of the Learned Senior Resident Magistrate is not correct. The grounds for stating that the reasoning is not correct are based on statutory provisions and case law as hereunder elaborated:

First, section 76 of the LMA vests concurrent original jurisdiction in matrimonial proceedings both in the High Court, a court of a resident magistrate, a district court and a primary court. Pursuant to this section, the primary court has jurisdiction to entertain matrimonial proceedings. The trial court was right to find out that there was no marriage and no divorce can be ordered. Since there was no marriage, I am inclined to the observation made by his Lordship Hon. Massati, J (as he then was) in the case of **Hidaya Ally vs. Amir Mlugu** PC. Civil Appeal No. 55 of 2004 (High Court at Dar es Salaam) at page 4 of the typed judgment. He observed that:

"It is true that a petition for divorce must be accompanied by a certificate of a Marriage Conciliation Board (the Board) as per the provisions of section 106 (2) of the LMA. In presumption of marriage section 106 of the LMA does not apply. Thus, the trial court did not need certificate of a Board to entertain the

matter. The trial court was right not to demand for a certificate from the Board in a non-existing marriage as the parties did not qualify to approach the Board."

The honourable Judge gave that position as the matter before him was over distribution of matrimonial property after presumption of marriage was established. The appellant claimed that, there was a legal requirement which was not fulfilled, that is going through the marriage conciliation board. This position covers the appeal at hand, it is covered at the subsequent paragraph.

Further, jurisdiction of primary courts is provided for under section 18(1) Magistrates' Courts Act, Cap. 11 R.E 2019. It provides:

(1) A primary court shall have and exercise jurisdiction:

(a) in all proceedings of a civil nature-

(i) [...]

(ii) [...]

(iii) [...]

(b) in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act.

To be precise on the jurisdiction of primary courts and specifically on the trial court, at page 3 of the typed judgment of the first appellate court, it was submitted that, it is a legal requirement that before the matrimonial

dispute is taken to court, it must be referred to the marriage conciliation board as per section 101 of the LMA, the case of **Patrick Willium Magubo vs. Lilian Peter Kitali**, Civil Appeal No. 41 of 2019 CAT, was cited as an authority to that effect. It is my view that, this case and the appeal at hand are all matrimonial cases but with different status. The appellant and the respondent are battling on presumption of marriage where certificate from the Board does not apply. Whereas, the case of **Partick Willium Magubo vs. Lilian Peter Kitali**, (supra) the parties were legally married. Page 2 of the typed judgment reads:

"... the appellant and the respondent celebrated their marriage under Christian rites on 18th May, 2002."

Therefore, it is clear that there was a misconception of the principle or a deliberate maneuvering to mislead the first appellate court on the jurisdiction of primary courts over presumption of marriage.

Second, the decision of the Court of Appeal in the case of **Hidaya Ally vs. Amir Mulugu** (supra) did not revoke the decision of the High Court in the case of **Hidaya Ally v Amir Mulugu** PC. Civil Appeal No. 55 of 2004 (High Court at Dar es Salaam). The Court of Appeal appreciated

the decision of the High Court hence, dismissed the appeal. The case has almost similar facts with the appeal at hand. The appellant and respondent in that case lived together for more than two years, presumption of marriage was proved. There was no legally contracted marriage. No divorce was granted in presumption of marriage but distribution of matrimonial property. According to the judgment of the case, the appellant was disputing distribution of matrimonial property acquired during their cohabitation. The court held that, the respondent contributed to the matrimonial property and awarded him 25% of the matrimonial property. The Court of Appeal upheld the decision of the High Court, and the High Court upheld the decision of the primary court and district court serve for the order of divorce in the presumption of marriage. This proves that the trial court's order for distribution of matrimonial property was right as it was upheld up to the Court of Appeal. This justifies the jurisdiction of the Malampaka Primary Court in ordering distribution of matrimonial property in presumption of marriage matters.

Due to the findings, I made above, the question raised whether the trial court had jurisdiction in the matter of presumed marriage is answered in the affirmative.

I accordingly, allow the present appeal, nullify and quash the proceedings of the first appellate court. I also set aside its judgment. Consequently, I uphold the proceedings, judgment and orders of the trial court. This being a matrimonial case, I make no orders as to costs, each party to bear its costs.

It is so ordered.

Right to appeal by any aggrieved party is explained.

Dated at **SHINYANGA** this 1st day of November, 2023.



E.L. KAWISHE

JUDGE

01/11/2023

Court: Judgment delivered in chambers this 1st day of November, 2023 in the presence of the parties, and the advocate of the respondent Mr. Geofray Tuli.



E.L. KAWISHE

JUDGE

01/11/2023