IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 26 OF 2023

(Arising from the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 180/2022 before Hon. Swai - SRM)

JOYCE EVERGREEN LUCAS.....APPELLANT

VERSUS

WILLIAM MKUKI.....RESPONDENT

JUDGMENT

07/02/2024 & 05/03/2024

S.S. SARWATT, J.

Before the District Court of Temeke (One Stop Judicial Centre) at Temeke, the appellant herein, instituted a case, matrimonial cause no 180 of 2022, for the following court declarations: first, if there was a presumption of marriage between her and the respondent and second, a declaration that the presumed marriage has been broken beyond repair hence the division

of matrimonial assets.

During the trial, the appellant contended that they lived together as husband and wife with the respondent for 17 years from 2000, and they jointly acquired a house located at Singida, 60 computers, and livestock. She thus prayed for equal division of the properties, an order for maintenance and arrears since 2012 when they separated, and a compensation of of Tsh. 501,000/= being the value of her personal properties destroyed by the respondent.

After a full trial, the presiding magistrate was satisfied that there was a presumption of marriage between the appellant and the respondent, which was irreparably broken down, and proceeded to break the same. However, he made no order regarding the division of the assets as there was no proof of the appellant's contribution towards acquiring the said assets. The outcome of the decision aggrieved the appellant. Thus, she challenged it through the present appeal with a total of eight grounds as follows;

1. That, the trial Court erred in Law and, in fact, for failing to declare that when the appellant and the respondent were living together under a presumption of marriage, they acquired a house at Puma, Singida, and 60 computers together.

2. That, the trial Court erred in Law and, in fact, for failing to order equal division (50%) of their matrimonial properties.

3. That, the trial Court erred in Law and, in fact, for failing to properly consider the appellant evidence when she said that she contributed to the acquisition of the house at Singida and goats and not the

house at Mabibo.

4. That, the trial Court erred in Law and, in fact, for not ordering the respondent to compensate the appellant Tsh. 501,000/=, which is the value of personal properties the respondent destroyed.

5. That the trial Court erred in Law and, in fact, for failing to order the respondent to pay Tsh. 300,000 per month as maintenance and its arrears from July 2012.

6. That, the trial Court erred in Law and, in fact, for failing to identify the appellant's contribution in the acquisition of the assets since the year 2000 when they started living together.

7. That, the trial Court erred in Law and, in fact for failing to consider the appellant's prayer and order the respondent to release her personal properties, which are two mattresses and a bed that are in the custody of the respondent.

8. That, the trial Court erred in Law and, in fact, for failing to consider the appellant's contribution as she was responsible for caring for the respondent and his 13 children from different mothers.

In his reply to the petition of appeal on the first ground of appeal, the respondent argued that the trial Court was not satisfied that there was presumption of marriage between them and that they did not acquire any property jointly. Thus, the trial Court was correct in not giving any share of the house at Singida since it was his house. Regarding the claim of having 18 goats, two calves, and 60 computers, the respondent insisted that those properties do not exist as the appellant failed to prove their existence.

On the ground No.2, the respondent replied that the trial Court was correct in dismissing the appellant's claim of equal division of the properties, as there is no presumed marriage between them. The respondent further argued that the appellant did not prove the existence of 60 computers before the trial Court.

Regarding ground No.3, the respondent, in his reply to the petition of appeal, supported the trial Court's decision. To him, the trial Court was correct in not ordering the assets' division.

Replying on ground No. 4, the respondent contended that the trial Court was correct in dismissing the appellant's claim of compensation of Tshs 501,000/= being the value of her personal properties as the claim is baseless and she failed to provide any evidence before the Court to prove it.

The respondent replied on ground No. 5 of the appeal petition that the trial Court was correct for not ordering Tsh 300,000/= as maintenance as there was no presumption of marriage between them.

In response to ground No. 6 on the appeal petition, the respondent insisted that the trial Court was correct in holding that there was no presumption of marriage between them as the appellant failed to prove the same.

On ground no 7 of the petition of appeal, the respondent replied that the appellant failed to prove before the trial Court that the respondent was holding her personal properties thus, the trial Court was correct in denying her claims.

On ground no 8 of the petition of appeal, the respondent, in his reply, argued that during the trial, the appellant did not produce any evidence that could have convinced the trial Court that she was responsible for taking care of 13 children of the respondent thus the trial Court correctly rejected her claim. Lastly, the respondent prayed for this Court to dismiss the appeal with cost.

At the hearing of this appeal, the appellant enjoyed the Women's Legal Aid Centre (WLAC) services while the respondent appeared in person. The hearing of the appeal proceeded by way of written submissions. Upon receiving the appellant's submission, the respondent prefers not to file his submission for the reason that his reply to the petition of appeal is sufficient.

In her submission supporting the appeal, the appellant argued together grounds No. 1,2,3 and 6 and submitted that the Law of Marriage Act (the Law), Cap 29 under section 114(1) gives power to the Court to order division of matrimonial properties which were obtained during the marriage by joint efforts of the married couple. The Law under section 114(1) & (2) (d) provides for the criteria the Court should consider when ordering the division of the assets. The appellant further submitted that the trial Court failed to identify her contribution to acquiring their matrimonial properties despite living with the respondent for 21 years. According to the respondent, she proved her claims in accordance with the provisions of sections 110,11, and 112 of the Law of Evidence Act, Cap 6 R.E 2022.

Submitting on grounds no.4 and 7, the appellant contended that the

respondent destroyed her personal properties, whose value is Tshs 510,000/= and despite proving her claim in accordance with sections 110(1), 111, and 112 of the Law of Evidence Act, the trial court decided nothing about her claim. The appellant further submitted that during the trial, she told the Court that the respondent possesses her personal properties which are two mattresses and a bed. However, the respondent ordered nothing about them.

Regarding ground no 5, the appellant submitted that since there is a presumption of marriage between her and the respondent, the Law under section 15 recognises the right of a wife to be maintained by her husband thus, the trial Court ought to have considered her prayer and order maintenance of Tshs. 300,000/= per month and its arrears since July 2012.

On ground No. 8, the appellant argued that the trial Court ought to have considered her contribution to caring for the respondent's children and performing other domestic activities, which made the respondent manage to obtain the properties. To cement her claims, the appellant cited the case of **Bi. Hawa Mohamed vs. Ally Sefu (1983) TLR 32 and Eliester Philemon Lipangahela vs. Daud Makuhuna, Civil Appeal no. 139 Of 2002, HC, DSM.**

The appellant prayed for the appeal to be allowed and the judgment of the trial Court be quashed. She also prayed for this Court to declare that a house at Singida, 18 cows, 2 calves, and 60 computers are matrimonial properties under the presumption of marriage and order equal division of the said properties (i.e., 50%). Furthermore, the respondent be ordered to

pay her the sum of Tshs. 501,000/= being the value of her personal properties, which he destroyed and also pay her Tshs. 300,000/= per month as maintenance and its arrears from July 2012, cost of the suit, and any relief this Court may grant.

Having gone through the trial Court's record, the reply to the petition of appeal by the respondent, as well as the written submission of the appellant, I am tasked to determine if this appeal has merit. In its judgment, the trial Court was satisfied that there was a presumption of marriage between the appellant and the respondent. However, it did not order the division of matrimonial assets because it was unsatisfied with the appellant's contribution. As per the trial Court's record, the parties started living together under one roof as husband and wife from 2000 to 2017, when a misunderstanding started between them. In my view, the trial Court was right to decide that there is a presumption of marriage between them as per section 160(1) of the Law, which says;

> "*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.*"

In the present situation where the presumption of marriage between the appellant and the respondent has been rebutted by themselves, in terms of section 160(2) of the Law, they have the right to claim reliefs provided for upon dissolution of marriage or separation.

In the instant appeal, the appellant claims equal division of matrimonial assets, including a house at Singida, 18 goats, two calves, and 60 computers. Among the said properties, it is only a house at Singida that the respondent agrees to exist. Since the respondent disputed the existence of those properties, then the appellant had the duty to prove their existence. As per the record, there is no evidence whatsoever adduced by the appellant before the trial Court to prove the existence of the said properties. In the circumstances, the house at Singida remains the only matrimonial property.

Under the Law, the division of matrimonial assets depends largely on the contribution one renders to acquiring the same. This is provided for under section 114(2) of the Law which says;

> *"(2) In exercising the power conferred by subsection (1), the Court shall have regards*
>
> *a. N/A*
>
> *b. to the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets,"*

The underlying principle of the above cited Law regarding the division of matrimonial properties is to the effects that a married couple is to be compensated to the extent of what they contributed to acquring the matrimonial assets. The Court normally ascertains that through the evidence adduced by the parties during the trial. The Court of Appeal in the case **of Gabriel Nimrod Kurujwila Vs Theresia Hassani Malongo Civil Appeal No.102/2024** held;

> ***"It is clear, therefore, that the extent of contribution by a party in a matrimonial proceeding is a question of evidence.*** *Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision.* ***In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove the extent of the contribution."***

(The emphasis is mine).

In the present appeal, it is undeniable that the appellant took care of the respondent and his children and performed domestic duties. This should be considered as her contribution towards acquiring matrimonial assets and entitle her to a share but not necessarily 50% as she wishes. (see the case of **Bi Hawa Mohamed vs Ally Seif (1983) TLR 32).** In the circumstances, I believe 25% of the house's value is enough to compensate for her contribution, and it is hereby ordered that the appellant get 25% of the house's value at Singida. The respondent will remain with 75% of the house's value.

Regarding grounds no 4 of the petition of appeal, which faulted the trial Court for not ordering the respondent to compensate her Tsh. 501,000/= being the value of her personal properties that he destroyed, I went through the trial Court record and observed that, despite advancing this claim on her petition, the appellant did not produce any evidence to prove

the same during the trial. Since she is the one who advanced this claim, she had the burden of proving, first, that the respondent destroyed her properties and, second, that those properties had the value of 501,000/=

The Law of Evidence Act, Cap 6 under sections 110,111, and 112, requires that whoever wants a particular fact to be believed by the Court has the burden of proving that specific fact exists. For easy reference, the Law reads;

> *"110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *110(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*
>
> *112.The burden of proof of any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by the Law that the proof of that fact* shall lie on any other person."

Since the appellant failed to produce any evidence to prove her claim the trial Court was correct in not ordering the payment of compensation.

This is the same as ground no 7 of the petition of appeal, which faulted the

trial Court for not ordering the respondent to release the appellant's personal properties. There is nowhere in evidence that the appellant claimed before the trial Court that the respondent withheld her personal properties. This was not the issue before the trial court, as the appellant raised it during this appeal.

The Court of Appeal of Tanzania at Tabora, in the case of **Richard Majenga vs. Specioza Sylvester, Civil Appeal No.208 of 2018,** quoted the decision in the case of **Hotel Travertine Limited and two others vs. National Bank of Commerce [2006] TLR 133**, where the Court stated

> *"As matter of general principle, an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."*

The appellant raised this matter on appeal without proof before the trial Court that the respondent is holding her personal properties, it goes without saying that this ground of appeal fails.

Concerning ground no 5 of the petition of appeal, since there is a presumption of marriage between the parties, which has been rebutted, though section 160(2) of the Law provides for the right of women to apply before the Court for any order of maintenance, it should be noted that the duty to maintain a spouse is provided for under section 63 of the Law, which primarily provide for a duty of the husband to support his wife and provide her with such food, clothing, accommodation as may be reasonable having regard to his means and station in life during the marriage except

when they separate by agreement or court decree.

According to the evidence of the appellant, she and the respondent have been separated since 2017, when she decided to move out of the house. Since the parties are long separated and considering that an order for maintenance depends on the means and station of life of the parties, a fact for which no evidence was given during trial, a claim for maintenance and its arrears can not succeed.

In the final result, I find the appeal partly meritious. For the reasons stated, I find and hold that the appellant is entitled to 25% of the value of the matrimonial house at Singida. Other grounds for appeal are dismissed.

It is so ordered.

S.S.SARWATT

JUDGE

05/03/2024