

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

PC. CIVIL APPEAL NO. 21 OF 2023

(Originating from Mbinga District Court in Civil Appeal No. 17 of 2023, Original Matrimonial Cause No. 37 of 2022 of Mbinga Urban Primary Court)

NEEMA KOMBA APPELLANT

VERSUS

JOHN DAUD MWALONGO RESPONDENT

JUDGMENT

Date of last Order: 06/02/2024

Date of Judgment: 14/03/2024

U. E. Madeha, J.

This is a second appeal. The first appeal was dealt by the District Court of Mbinga (first appellate Court) in Civil Appeal No. 17 of 2023 deriving its origin from Matrimonial Cause No. 37 of 2022 whereby the Respondent herein above, moved Mbinga Urban Primary Court (the trial Court) for declaration that he lived with the Appellant as husband and wife and they jointly acquire several assets. The Respondent prayed for

the distribution of those properties and an order for custody of their children.

After full trial, the trial Court was satisfied that the Appellant and the Respondent were living under presumption of marriage as the legal requirements set-forth under section 160 (1) of the *Law of Marriage Act* (Cap. 29, R. E 2019) were met. Basing on the given evidence by both parties, the trial Court found their presumed marriage to have been broken and proceeded to dissolve it. The trial Court in its decision also ordered the Appellant to be granted with the house located at Lulambo Street and a retail shop located at Jimboni Street at Mbinga town. The Respondent was given financial agency transaction business on M-Pesa Agency.

Dissatisfied by the decision of the trial Court, the Appellant preferred an appeal before the first appellate Court which dismissed her appeal by confirming the decision of the trial Court. Again, the Appellant was aggrieved hence this appeal challenging the decision of the first appellate Court on the following grounds of complaint:

- 1. That, the first appellate Court erred in law and fact to confirm the decision of the trial Court which ordered the division of*

matrimonial properties without first granting a decree of divorce or separation as a prerequisite condition.

- 2. That, the first appellate Court erred in law and fact for determining the appeal without considering the principle of matrimonial properties hence arrived at unjustifiable and unjust division of matrimonial properties.*
- 3. That, the first appellate court erred in law and fact for determining the appeal without considering that the lower Court did not inquire as to whether the marriage had been broken down irreparably as per mandatory requirement of the law.*
- 4. That, the first appellate Court erred in law and fact for confirming the decision of the lower courts while the whole proceedings were tainted with lots of illegalities which occasion the failure of justice.*

Before this Court, as it was at the lower Courts, the Appellant was represented by Mr. Innocent Mbunda, the learned advocate and Mr. Eliseus Ndunguru, the learned advocate appeared for the Respondent. The appeal was argued by way of written submission following the prayers made by the learned advocates from both parties and leave of this Court being granted. The learned advocates from both parties filed their written submissions timely as scheduled by this Court.

Submitting in support of this appeal, Mr. Innocent Mbunda argued that; the trial Court skipped a crucial procedure by dividing the parties' properties without granting a decree of divorce or separation. He

averred that; it is not a legal principle that an order for division of matrimonial properties may be issued without granting a decree of separation or divorce. He argued that decrees for divorce or separation are issued under sections 110 or 160 (2) of the *Law of Marriage Act* (supra) and section 114 of the *Law of Marriage Act* (supra) requires the Court to divide the jointly acquired properties after issuing a decree for divorce or separation. To cement his stance, he invited this Court to be guided by the decision of the Court of Appeal of Tanzania made in the case of **Richard Majenge vs. Specioza Sylivester**, Civil Appeal No. 208 of 2018 (unreported), which was cited with approval in the case of **Marcel Kichumisa vs. Marry Venant Kabirigi**, Civil Appeal No. 52 of 2020 (unreported). He contended that the first appellate Court erred in law and in fact in dismissing this ground of appeal though it admitted that division of matrimonial properties must be done after issuing a decree of divorce or separation. He prayed for the whole proceedings and decision of the trial Court to be nullified and its decision be set aside.

On the second ground of appeal, Mr. Mbunda contended that the trial and first appellate Court erred in law and in fact by failure to evaluate properly the evidence given by the parties on matrimonial

properties. He averred that the lower Court decided the matter before it without considering the meaning of matrimonial properties since there were properties which the Appellant mentioned during trial but the lower Courts in their judgment had nothing to talk on those properties. He mentioned those properties to include the electronic shop, a modern house and a motor vehicle.

With regard to the third ground of appeal, Mr. Mbunda submitted that the trial Court in its decision stated generally that the relationship between the Appellant and the Respondent was broken down without stating the factors which made it to be seen broken down, no matter that they were living under presumption of marriage.

On the fourth ground of appeal, Mr. Mbunda contended that the first appellate Court erred in law when it confirmed that the trial Court was correct in its proceedings while it failed to record what facts were in dispute and the undisputed facts in order to determine what issues are in dispute, which needed evidence to be proved. He averred that failure to follow such procedure was an illegality which led to unjust decision. Lastly, he prayed for this appeal to be allowed by quashing the proceedings of the lower Courts and setting aside the judgment and orders of the lower Court.

On the contrary, Mr. Eliseus Ndunguru argued that the averments made by the Appellant's advocate that the first Appellate Court ordered division of matrimonial properties without granting a decree for divorce or separation is baseless. He added that a decree for divorce is granted where there is a valid marriage but in the instant appeal the parties were not married and the Court found the parties lived under presumption of marriage which was declared to be broken down and it proceeded to deal with the issue of division of the jointly acquired properties as stipulated under section 160 (2) of the *Law of Marriage Act* (Cap 29 R.E 2019). Fortifying his stance, he referred this Court to the decision made in the case of **Abdul A. Milanzi vs. Asha Makeo** (DC Civil Appeal No. 10 of 2021) [2022] TZHC 9859 (27 May 2022) (TanzLII) in which it was stated that; where the presumption of marriage is rebutted, Court cannot grant divorce but it may grant consequential orders such as maintenance, custody of children and division of the jointly acquired properties.

Replying on the second ground of appeal, Mr. Ndunguru contended that, before the trial Court there was no proof that the parties agreed to sale their electronic equipment's shop and buy a motor vehicle. He added that, since the Appellant's complaint is not on the proved jointly

acquired properties, there is nothing to be done by this Court on the properties which were not proved during trial.

On the third ground of appeal, Mr. Ndunguru was very brief and he stated that since the trial Court found that there was no formal marriage, the issue of granting divorce was not possible that is why the presumed marriage was rebutted and proceeded with the division of matrimonial properties.

Responding on the fourth ground of appeal, Mr. Ndunguru argued that the procedures adopted and used by the trial Court in reading the complaint and formulating issues followed legal steps and there is nothing wrong found in the proceedings of the trial Court. He contended that, since there is no any miscarriage of justice which has been occasioned to the parties, this appeal deserves to be dismissed and the Appellant be blamed to pay the costs.

In his party, the Appellant's advocate has no rejoinder submission. This allows me to proceed to determine the merit or otherwise of this appeal.

Basically, having passed through the petition of appeal and the submissions made by the learned advocates from both sides, the

complaints of the Appellant are on three main issues. The *first issue*, is whether the trial Court divided the jointly acquired properties without granting a divorce or separation order. The *second issue*, is whether the lower Courts failed to consider that there were other properties which were jointly acquired by the parties and the *third issue* is whether the trial Court failed to frame issue for the parties to know what they were to prove.

Division of the jointly acquired property is typically ordered where there was a matrimonial proceeding before the Court for divorce. However, there are some situations where division may be ordered even if there was no decree for divorce or separation. This occurs where the parties had no formal marriage or they lived under presumption of marriage in which a decree for divorce cannot be issued. See the decision of the Court of Appeal of Tanzania, the Apex Court in our land in the case of **Hidaya Ally vs. Amiri Mlugu** (2015) TLR 329.

In the instant appeal, it is clear that the parties had no formal marriage but they lived together a happy life as husband and wife from 2008 until 2020 when they voluntarily separated due to their long-term quarrels. Their jointly happy life was blessed with three issues and some properties. From the records of the lower Courts, the trial Court after full

trial found the parties lived together under presumption of marriage in accordance with the provision of section 160 of the *Law of Marriage Act* (supra) and proceeded to give other orders for division of the jointly acquired properties as provided under section 160 (1) of the *Law of Marriage Act* (supra).

The Appellant's advocate submitted that the lower Courts erred in giving an order for division of matrimonial properties without granting an order for divorce. Mr. Ndunguru, was on the different view that if the parties were living under presumption of marriage, there was no legal requirement of issuing a decree for divorce which is issued to the parties who celebrated a formal marriage. I agree with Mr. Ndunguru that, once a marriage is rebutted, the Court must proceed to grant an order for division of the jointly acquired properties since presumption of marriage is not a formal marriage capable of being dissolved and a decree for divorce to be issue. See the decision in **Hidaya Ally vs. Amiri Mlugu** (supra). The case of **Marcel Kichumisa vs. Mery Venant Kabirigi**, Civil Appeal No. 52 of 2020 [2023] TZCA 218 TanzLII is distinguishable since there was no order for presumption of marriage. Having determined the first issue, I find the first and third grounds of appeal has no merit.

On the *second issue*, of whether the lower Courts failed to consider that there were other properties which were jointly acquired by the parties, I have thoroughly passed through the testimonies given by the parties before the trial Court and the findings made by both the trial Court and the first appellate Court which found that, in their joint life, the parties managed to acquire a house and M-Pesa business. There were other properties which the Appellant mentioned to be jointly acquired in their joint life. The lower Courts found those properties were not proved to the required standard that they were jointly acquired.

It is a trite law that, for a property to be considered to be jointly acquired, there must be evidence to prove the same were obtained by joint efforts of the parties. In other words, each party must show his or her contribution in its acquisition as stipulated under section 114 (2) (b) of *The Law of Marriage Act* (Cap 29, R. E. 2019. Also see the decision of the Court of Appeal of Tanzania in **Shakila Lucas vs. Ramadhani Sadiki** (Civil Appeal no. 349 of 2020) [2024] TZCA 36 (14 February 2024) TanzLII. To prove the extent of his or her contribution a party needs to give evidence which may convince the Court that there was contribution made on it. In **Hamid Amir Hamid vs. Maimuna Amir** [1977] LRT No. 55, it was well settled principle that:-

"Where a dissolution of marriage is ordered, the question of distribution of matrimonial assets should not be settled until the extent of the contribution of each of the spouses towards the acquisition of the joint property is established."

See also the decision in **Sixbert Bayi Sanka vs. Rose Nehemia Samzugi** (Civil Appeal 68 of 2022) [2023] TZCA 227 (4 May 2023) TanzLII.

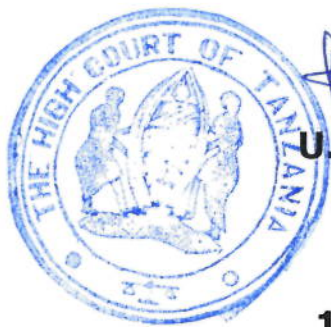
Before I pen off, I find it is important to reiterate that, a Court can rarely interfere with the concurrent findings of facts made by two Courts below save where there are mis-directions or non-directions on the evidence, or where there was a miscarriage of justice or a violation of some principle of law or practice. In the instant appeal, as it was decided by the two lower Courts, I am of the view that the properties which the Appellant alleged to be excluded or not considered by the lower Courts that they were acquired jointly were not proved sufficiently to the required standard to be considered to be jointly acquired. Therefore, I concur with the findings of the lower Courts and proceed to dismiss the second ground of appeal.

On the third issue that the trial Court failed to frame issues before the hearing of the case, I have gone through the proceedings of the trial

Court and find the issues were framed before the hearing of the case. I agree with the first appellate Court that there was no any illegality which led to injustice to the parties. I find the third ground of appeal has no merit and I proceed to dismiss it.

In view of the foregoing, I find this appeal to be devoid of merit and consequently dismiss it. I give no order for costs.

DATED and DELIVERED at **SONGEA** this 14th day of March, 2024.




U. E. MADEHA

JUDGE

14/03/2024

COURT: Judgment is read over in the presence of the Mr. Agustino Mahenge (advocate) holding brief for Mr. Innocent Mbunda the Appellant's advocate and in the absence of the Respondent. The Respondent to be notified. Right of appeal is explained.




U. E. MADEHA

JUDGE

14/03/2024