IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
PC. CIVIL APPEAL NO. 16 OF 2020

(Arising from the District Court of Ukerewe in Civil Appeal No. 7 of 2019
Originated from Ilangala Primary Court)

ANTHONY FELICIAN..... **APPELLANT**

VERSUS

SHANI KAKURU..... **RESPONDENT**

JUDGMENT

Last Order: 11.06.2020

Judgment: 18.06.2020

A Z. MGEYEKWA, J

In the first instance court, the Primary Court of Ilangala, the respondent successfully petitioned for divorce and maintenance of the child. She also prayed for the house to be returned to her since she is the one who built it by using her own money. The trial court

decided in her favour. The appellant being dissatisfied by the said decision appealed to the District Court of Ukerewe in Civil Appeal No. 07 of 2019, where the 1st appellate court partly faulted the decision of the trial court. Dissatisfied the appellant filed the instant appeal on the following grounds:-

1. *That the trial and the first appellate courts grossly erred in law and fact by entering and deciding the matter which is purely land matter and without considering the proof of ownership.*

2. *That the trial and first appellate courts misdirected itself and failed to evaluate properly the evidence adduced by the appellant's witnesses.*

3. *That the trial and first appellate court erred in law and fact by including the house and ordered the 95% to be given to the respondent while there was no any proof showing the contribution in the acquiring the said house by the respondent.*

4. *That the trial and first appellate courts erred in law and fact acted bias in disregarding the evidence adduced by the appellant witnesses and acting on presumption.*

5. *That the first appellate court erred in law and fact in ordering the appellant's to be given 5% of the house without considering that there was a lawful marriage between the parties and even without considering the contribution of parties to the disputed house.*

The hearing was done by way of written submission whereas the appellant submitted his written submission as early as 27th May, 2020 and the respondent filed a reply as early as 5th June, 2020 and a rejoinder was filed on 11th June, 2020.

Prosecuting the appeal, the learned counsel for the appellant argued that the evidence on record reveals that the parties had no marriage relationship thus difficult to determine matrimonial assets. In the opinion of the appellant's Advocate, the matter was purely land dispute than matrimonial one. She referred this court to section 167 (1) (a) – (e) of the Land Act, Cap.113 [R.E 2019] and argued that the provision put a mandatory requirement that all disputes, actions, and proceedings concerning land shall be referred to the Land Division of the High Court, District Land and Housing Tribunal and Ward Tribunal.

It was her further submission that no Magistrate's Court shall have civil jurisdiction over a dispute relating to land. To fortify her position she referred this court to Section 3 (1) and section 4 (1) of the Land Disputes (Land Dispute Settlement) Act, Cap. 216 [R.E 2019].

Arguing for the 2nd ground of appeal, the learned counsel for the appellant argued that it is clear from the facts that there was no any marriage relationship that existed among the parties. She referred this court to section 25 (1) of the Law of Marriage Act, Cap.29 [R.E 2019] which provides for different forms of contracting marriage. She further argued that another foundation under the Marriage Act is a man and a woman to live together under one roof for at least two years and acquire a reputation of a husband and wife and presumed to be dully married. To support her argumentation, she referred this court to section 160 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019]. She added that the parties' relationship did not fall under the said marriage relationship.

With respect to the 3rd grounds of appeal, she argued that it was unjust for the 1stappellate court to award a 95% share of the house under dispute to the respondent herein. Her reasons behind are that there is no proof anywhere at the trial Court that shows the respondent's contribution towards acquiring the disputed house.

Submitting on the 4th ground of appeal, she submitted to the effect that the trial court and the 1st appellate court abandoned the appellant's evidence in deciding the matter. The learned counsel for the appellant argued further that the appellant submitted purchasing receipts and the contract for sale to prove that the appellant was a purchaser and the respondent was a witness, while the respondent only tendered a notebook as evidence before the trial court claiming to be titled the ownership of the disputed house. In the opinion of the learned Advocate for the appellant, she thought that the appellant's evidence was more credible than that of the respondent. She argued further that surprisingly, both the trial court and the 1st appellate court awarded the respondent as the owner of the disputed house. The appellant's Advocated valiantly

argued that it is from this controversy that both the trial Court and the 1st appellate Court acted on presumption toward reaching their decisions in this matter.

As to the 5th ground of appeal, the learned counsel for the appellant insisted that there was no lawful marriage that existed between the parties herein and there is no credible evidence to prove the contribution of the respondent herein towards obtaining the house under dispute. Hence she finds it unlawful for the 1st appellate Court to award 5% to the appellant herein while the evidence is clear, that the contract for the sale of the plot shows that the appellant is the purchaser and the respondent as the witness. She prayed for this court to allow the appeal, set aside the judgment and decree of the trial and the first appellate Court.

The learned counsel for the appellant cemented more on the contention regarding whether there was a lawful marriage between the parties enough to regard the same as a matrimonial dispute. She insisted that the trial court while determining the marriage

relationship of the parties was of the view that; the parties herein were concubines hence it was upon them to end the said concubinage. She argued that the purported marriage relationship between the parties did not even fall under the presumption of marriage as provided under section 160 (1) of the Law of Marriage Act, Cap. 29 [R.E. 2019], as there was no element of marriage relation between.

She went on to state that in order matrimonial properties to be divided there must be proof of the existence of marriage between the parties capable of being broken down. To buttress this position she referred this court to the case of **Richard Majenga v Specioza Sylivester Civil Appeal NO. 208 OF 2018 where** the Court of Appeal of Tanzania at Tabora (unreported) stated that:-

> *"It is clear that the Court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation of divorce."*

She went on to argue that in the case at hand there was no lawful marriage recognized between the parties capable of being

separated or issued with divorce by the Court. She blamed the two courts below for admitting the fact that it is hard to establish a lawful and recognized marriage from the relationship that existed between the parties herein.

The learned Advocate for the appellant continued to argue that, for what she has submitted the matter before this court was a land matter and not a matrimonial dispute. She added that the proper avenue to entertain the same were the land courts as provided under section 167(1) (a-e) of the Land Act No. 4 of 1999 Cap. 113 [R. E. 2019], section 3(1), (2)(a-e), and section 4(1) and (2) of the Land Disputes (Land Dispute Settlement) Act No. 2 of 2002 Cap.216 [R.E. 2019].

In her reply as to the first ground of appeal, the respondent avers that the trial court and the first appellate court were correct in entertaining and deciding the suit based on the law. She argued that the suit before the trial Court was concerned with concubinage; the respondent was in concubinage relationship with the appellant. She went on to state that it is stipulated in both

judgments of the trial court and the first appellate court respectively. She went on to argue that before the trial court both parties agreed that they were living in concubinage, so this fact was proved, there was no doubt. The respondent rebutted that the appellant's submission that the matter was a land matter as per section 167(1) (a-e) of the Land Act No. 4 of 1999 Cap.113 [R.E 2019] and section 3(1)(2) (a-e) and section 4(1)(2) of the Land Disputes Court Act (Land Disputes Settlement) Act No. 2 of 2002 Cap.216 [R.E. 2019] which specifically given out the courts jurisdiction on the land matter cannot stand as the matter is not a land matter henceforth the trial Court had jurisdiction to entertain and determine the matter on merit.

On the second and fourth grounds of appeal, the respondent avers that both the trial and first appellate courts took into account the evidence adduced by both parties and there was no any sort of biasness as it stipulates in the judgments of both courts. She added that thus both courts reached fair decisions.

Arguing for the third ground of appeal, the respondent avers that the trial court and first appellate court were correct by including the house and ordered the 95% to be given to the respondent since the respondent proved beyond doubt that she is the owner of the disputed house as it is clearly shown in the judgment of the trial Court that the respondent bought the land and she is the one who spent her money in building the same. She referred this court to the judgments of both courts and stated that there is no point where the appellant had ownership of the disputed house.

Submitting on the fifth ground of appeal the respondent avers that the first appellate court was correct both in law and fact to order the appellant to be given 5% of the house as the appellant and the respondent was living in concubinage life. She asked the Court to dismiss the appeal.

In his brief rejoinder, the appellant's Advocate reiterated his submission in chief that the matter before the trial Court was a purely land case and not a matrimonial dispute as determined by the trial court and the 1st appellate Court. She went on to argue that it was

clear that concubinage is not marriage as per our law of marriage. She insisted that the main dispute remains on the ownership of the house under dispute; where it is clear that the same is a land dispute.

After having gone through the submissions made by both parties and having perused the records of the trial court and those of the first appellate court, I have come to the following firm conclusions regarding the appeal at hand. That from the submissions of both parties and the findings of the two courts below, parties herein were mere concubines and have never lived together under the same roof nor did they had a formal marriage. The question that arises is *whether it was justifiable for the trial court to divide the property in question in the ration of 95%:5% and or to declare one of the parties owners of the suit landed property*.

I must make it clear at this juncture that matrimonial assets can only be divided into the parting spouses after the grant of decree of divorce. This was clearly stated in the case of **Richard Majenga v**

Specioza Sylivester Civil Appeal N0. 208 OF 2018 where the Court of Appeal of Tanzania at Tabora (unreported) that;

> *"It is clear that the Court is empowered to make orders for the division of matrimonial assets subsequent to granting of a decree of separation of divorce."*

In other words, for the court to grant divorce it presupposes that there must be an existing legal marriage that is capable of being separated. In the present case, evidence on record reveals that the parties were not husband and wife nor were they living under the same roof to make them fall under the ambit of presumption of marriage. In their submissions before this Court, parties were in agreement that they were concubines and not husband and wife. Being the case, before the trial court there was no marriage under which divorce could be granted and the trial court ought to have ended dismissing the purported matrimonial matter before it.

The trial court and the first appellate court distributed the landed property at the rate of 95% and 5% to the respondent and the appellant respectively, the question is whether the courts were

justified so to do. In my firm view since the parties had no recognized marriage capable of being issued with a decree of divorce then the trial court could not have powers to proceed with the division of assets. I am holding so because in matrimonial disputes for the court to proceed with the division of matrimonial properties it must, first find out whether there is a marriage between the parties and then must have granted the decree of divorce. In the absence of decree for divorce, the court lacks jurisdiction to distribute properties.

I must state clearly that, concubinage is not a legal relationship recognized by the law in Tanzania. Thus courts in Tanzania cannot grant decree or divorce of concubinage and or divide properties acquired jointly by concubines. When the matter is referred to the court as a matrimonial dispute and the court finds it to the contrary, it should not proceed to divide assets arising out of that relationship. If at all parties are disputing on ownership of any property that is acquired out of their relationship which is found to be not marriage, they should be at liberty to refer their dispute to the proper forum for determination of the ownership of such property.

In the present matter, parties are disputing on ownership of landed property whereas the trial court which composed itself to determine the matrimonial dispute, proceeded to find it to be the property of the respondent herein. In my view, the Primary court was not the appropriate forum for the determination of the dispute of ownership of landed property. I am holding so since section 167 of the Land Act Cap. 113 [R.E 2019] and section 3(1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] vest jurisdiction over land matters only to the Ward Tribunals, District Land and Housing Tribunals and the High Court of the United Republic of Tanzania. Magistrates courts do not have powers over land matters, thus it was wrong for the trial court to declare the respondent owner of the land in question.

From the foregoing findings, I find that since there was no marriage relationship between the parties it was wrong for the Primary court to divide the assets. The court ought to have dismissed the matter and referred the parties to the proper forum for determination of ownership of the landed property. In that regard, I

find merits in the appeal. I proceed to allow the appeal, I quash the proceedings and orders of the two courts below. Parties are at liberty to refer their dispute on ownership of the landed property to the proper forum. No orders as to costs.

Order accordingly.

Dated at Mwanza this date 29th day of June, 2020.

A.Z.MGEYEKWA

JUDGE

29.06.2020

Judgment delivered on 29th day of June, 2020 via audio teleconference, and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

29.06.2019