IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 20 OF 2020

(C/F Matrimonial Cause No. 5 of 2018, in the District Court of Arusha at Arusha)

HAPPYNESS SAULO KIMARO.....APPELLANT

VERSUS

LEONARD RICHARD MMBAGA.....RESPONDENT

JUDGMENT

27/07/2021 & 05/10/2021

GWAE, J

The appellant herein felt aggrieved by the decision of the District Court in Matrimonial Cause No. 5 of 2018 dated 26th March 2020. She has filed this appeal with the following grounds of appeal;

1. That, the trial Magistrate erred both in law and in fact for making a finding that the declaration in which the petitioner brought in court as evidence of marriage is not valid for want of registration certificate from the registrar of marriages.
2. That, the trial Magistrate erred both in law and in fact after she has made a finding that what existed between the appellant and respondent was a presumption of marriage but did not go further to make a finding as to whether the same is rebuttable or irrebuttable.

3. That the trial Magistrate erred in law and in fact in making an order that since the appellant has already taken various house hold items, appliance and furniture, she sold motor vehicle Reg. T 915 AXK and 40 sacks of maize then the residential house to remain with the respondent.
4. That, the trial Magistrate erred both in fact and law for basing his finding on who to have custody of a child on hearsay evidence of the respondent instead of calling the child for questioning by the court.
5. The trial Magistrate erred in law and in fact for failure to critically evaluate evidence on record hence arriving at unjust decision.
6. The trial Magistrate erred in law for failure to order division of residential house situated at Baraa in Arusha region after she made a finding that it is a matrimonial property acquired through joint efforts of the parties.
7. The trial Magistrate erred in law for failure to issue a decree of divorce on reasons that there was no formal legal marriage between the parties.

Brief background of the matter giving rise to this appeal is best captured from the trial court record and it as follows; That, the appellant and the respondent were husband and wife respectively, according to the appellant who appeared and testified as PW1 informed the trial court that she got married to the respondent on 27/07/2018 through a customary marriage (Chagga Customs). She further tendered the so called a declaration of marriage (PE1). The appellant further stated that during the subsistence of their marriage the couple was blessed with one issue and had jointly acquired the following properties; a house at Moshono, a

house at Korogwe and a shop at Maji ya Chai as well as a car which was however sold the appellant. The appellant's basis for the petition for divorce was adultery, cruelty and failure of the respondent to maintain his family. That, the parties' family had tried to reconcile the marriage but in vail, subsequently, the matter was referred to Baraa Ward Tribunal however the dispute was not amicably and mutually resolved.

The appellant thus filed her petition for divorce seeking for the orders that the marriage between the petitioner and the respondent has broken down irreparably, a decree of divorce, an order for division of matrimonial properties, maintenance of the petitioner and the child, an order that custody of the child be placed to the petitioner and costs of the petition.

That, it was the contentions by the respondent that he was leaving with the appellant as husband and wife until when the appellant decided to leave their matrimonial home. The respondent alleged that it was the appellant who left their home together with all the household items, furniture car, keys and a sale agreement of the said car. He added that he was a welding technician at Tanzanite One while the petitioner at different times worked in different places. He further stated that he is the one who built the house at Baraa Moshono and bought the motor vehicle at Tshs. 6,000,000/= however the appellant was the one keeping the money in her bank account. The respondent also stated that it was the

appellant who supervised the finishing of the house and the amount that was used was Tshs. 12,000,000/= while Tshs. 14,000,000/= remained into the appellant account. As to the alleged house at Korogwe the respondent stated that he does not have a house at Korogwe and the alleged plot at Lushoto, he stated the same was given to him by his father.

With regard to the maintenance of his son, the respondent alleged that he is the one who is paying school fees for his son who is studying at Gloryland however he stated that his son is leaving with his mother however since she is busy most of the times his son stays with his aunt, the respondent also lamented that the school progress of his son is deteriorating as there is no close supervision of his class work.

On the contrary to the appellant's testimony; the respondent in his testimony denied to have contracted any marriage with the appellant. He further denied to have acquired properties together with the appellant.

After determination of the matter, the trial court's findings were such that; the couple had not contracted any marriage however they cohabited under the presumption of marriage the trial court went on to declare that no marriage has broken down irreparably. Regarding the sought division of matrimonial properties, the learned trial magistrate was of the view that the properties which were proved to have jointly been acquired by the parties were a house at Baraa Moshono, motor

vehicle make Toyota Corolla with registration No. 915 AXK and various house hold items, appliances and furniture.

In dividing the properties, the trial magistrate considered the evidence of the parties together with the guidance from the case of **Bi Hawa Mohamed vs. Ali Seif** [1983] TLR 32 the trial court was of the view that both parties participated in the acquisition of the properties however since the evidence established that the appellant had sold the motor vehicle together with 40 sacks of maize, it was also established that the appellant took all the household items, appliance and furniture therefore the remaining property which is the house at Baraa to remain with the respondent as the appellant had already taken her part of contribution.

On maintenance of the child, the trial court considered the undisputed evidence that the child spent much time with his aunt as his mother is always busy, the trial court ordered the child to be under the custody of the respondent as there was no need of a child to be taken care by his aunt while his father who is providing basic needs for him is around and willingly to take care of him.

On the date fixed for hearing of this appeal the parties were represented by **Ms. Neema Mtayangulwa** and **Mr. Gospel Sanava** respectively and with leave of the court the appeal was disposed by way of written submission which I shall consider while determining the appellant's grounds of appeal.

Having read the appeal records together with the parties' submissions, three issues will guide my determination of this appeal, these are; **firstly,** whether the trial magistrate was legally justified not to issue a decree of divorce, **secondly,** whether the trial court properly distributed the matrimonial properties between the parties and **thirdly,** whether the trial court was justified to place the child under the custody of the respondent.

Starting with the **first issue as to whether the trial Magistrate was legally justified not to issue a decree of divorce.** From the wordings of the trial court's judgment, it was the finding of the court that the parties here in had not contracted a formal/legal marriage but rather a presumption of marriage and therefore a decree of divorce could not be issued. With due respect to the Hon. Trial tribunal this was a total misdirection and a misconception of the interpretation of section 160 (1) & (2) of the Law of Marriage Act, (Cap 29, Revised Edition, 2019).

It is evident from the record that, the parties herein started cohabiting from the year 2007 until 2014, therefore from the wording of section 160 (1) of the Law of Marriage Act the parties lived under the presumption of marriage as there has not been any proof of a formal/legal marriage contracted by the parties. Therefore, since it has been established that the relationship between the parties based on a presumption of marriage then, the trial court was duty bound to inquire as to

whether the said presumption was rebuttable or irrebuttable. I am guided by a recent decision of the Court of Appeal of Tanzania in the case of **Gabriel John Musa vs. Voster Kimati,** Civil Appeal No. 344 of 2019 (Unreported) where the parties lived under presumption of marriage and the Court of Appeal stated that;

> "At any rate, even if both parties' pleadings were not disputing that they were cohabiting as husband and wife, the trial court was still required to satisfy itself if the said presumption was rebuttable or not, grant decree of separation or divorce then award those subsequent reliefs."

In the same case the Court cited the case of **Richard Majenga vs. Specioza Sylivester,** Civil Appeal No. 208 of 2018 (Unreported) where it was stated as follows;

> "It is dear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not. In the circumstances, we are in agreement with both learned counsel for the parties that it was improper for the trial court to resort into

granting the subsequent reliefs prayed, before satisfying itself on the existence of the presumed marriage."

Being guided by the above authorities and as correctly submitted by Ms. Mtayangulwa, in this particular case, the trial court having established that there was a presumption of marriage it had a duty to establish also whether the said presumption was rebuttable or irrebuttable before determining whether their relationship was irreparably broken down so that it could be in a better position to either issue a decree of divorce or separation.

Nevertheless, this being the first appellate court entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny (See the case of **Makubi Dogani vs. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (CAT-Unreported). From the records it is undisputed fact that the parties herein were living under the presumption of marriage, the fact which has not been rebutted by the parties. Therefore, the presumption of marriage under these circumstances is irrebuttable. Though, looking at the evidence in its totality it is apparent that the relationship between the parties has irreparably broken down, and being guided by the above judicial decision in the case of **Gabriel John Musa vs. Voster Kimati** (supra), this court therefore proceeds to issue a decree of divorce to the parties.

On the second issue with regard to the division of the matrimonial properties, the trial court findings in this aspect were to the effect that, the respondent should remain with the matrimonial home since the appellant had already taken her shares by taking the household items and selling the car. The principle in division of matrimonial properties has been well explained in the case of **Bi Hawa Mohamed vs. Ali Seif** [1983] TLR 32 which was further expounded in the cases of **Bibie Mauridi vs. Mohammed Ibrahim** [1989] TLR 162and **Samwel Moyo vs. Mary Cassian Kayombo** [1999] TLR 197 where in the latter the Court of Appeal authoritatively held that;

> "...its apparent that the assets envisaged there at must firstly be matrimonial assets, secondly, must have been acquired by them during the marriage and thirdly, they must have been acquired by their joints efforts. The three conditions must exists before court's power to divide matrimonial or family assets under section 114 (1) of the Law of Marriage Act is involved....."

In this instant matter, it is plainly clear from the record that, the property subject to division is the house located at Baraa-Moshono, notwithstanding the fact that the appellant in her testimony established another property which is a house at Korogwe District in Tanga Region yet the same was not proved nor was there any evidence establishing how it was acquired. In proving her extent of contribution to the house located at Baraa-Moshono the appellant testified that at

the time of construction she also contributed as she was also working. She further testified to be the custodial of the money that was used for the construction of the house the fact that was also supported by the respondent who testified that the money for construction was kept at the appellant's bank account. The appellant also tendered a building record (PE2) as she used to supervise the construction and she kept all the records. On the part of the respondent, he insisted that, the appellant had not contributed anything in the construction of the said house and that he was the one who built it.

Looking at the above summary of the evidence between the parties, it is apparent that the appellant's contributions cannot be disregarded towards the acquisition of the said house. Even if this court assumes that the appellant was a housewife yet, the position of law is so clear that performance of domestic works by a housewife suffices to be considered as a contribution in acquisition of matrimonial properties as was correctly stressed in the case of **Bibie Mauridi vs. Mohammed Ibrahim** (supra). The rationale behind this legal position is to salvage housewives who were previously left with nothing on account that they had no any source of income which could contribute towards the acquisition of the matrimonial properties ignoring their physical contributions towards acquisition of matrimonial assets such as supervision in the constructions, taking of the family and related duties.

That being said, this court is consequently of the considered view that, the trial court had misdirected itself by distributing the matrimonial house to the respondent alone on the account that the appellant had already taken her shares. Although the records reveal that the appellant had taken the household items and also sold a car but yet that alone could not exclude her right to the division of the matrimonial property. Having considered the extent of contribution by both parties, and the fact the appellant had taken household items and the said sale of the motor vehicle for her own benefit, this court is of the considered estimation that the appellant and respondent are entitled to 40% and 60 % respectively of the value of the matrimonial house located at Baraa-Moshono. Either of the parties has an optional right of buying the said house and pay another party his or her shares. Failure of exercising such optional or priority right an auction of the said house shall follow.

On the **third issue concerning the custody and maintenance of the child**, it was the finding of the trial court that the child be placed under the custody of the respondent on the reasons that; the appellant was busy and in most cases the child was taken care by his aunt. It is general principle that, in granting an order for a custody of a child the paramount consideration is on the best interest of the child, however, looking at the proceedings the child subject to the custody was born in the year 2010, thus at the time of hearing of this case he was 9 years,

therefore he was capable of express his wishes as to his custody. Nevertheless, taking into account that a child should not be deprived his right to have parental love and care from both his father and mother, therefore placing him in the custody of only one parent will be depriving the child to have access to the other parent and even the other parent will be deprived his right of taking care of his child.

Considering the best interest of the child in this case and taking into account that, both parents work for gain, it is the opinion of this court that the child be under the custody of both parents who should make requisite arrangements of to whom the child will stay with. However, paramount consideration should be to either of the parents who stays near the school where the child is or will be studying.

In the event this appeal succeeds to the extent explained above. No orders as to costs taking the nature of the relationship of the parties.

It is so ordered.

M. R. GWAE
JUDGE
05/10/2021