IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC. MATRIMONIAL APPEAL NO. 01 OF 2019

(Arising from District Court of Dodoma at Dodoma in Matrimonial Cause No. 4 of 2019)

ALBOGAST ALFRED NGOE..... APPELLANT

VERSUS

JANEROSE JONATHAN CHEDEGO.....RESPONDENT

JUDGMENT

15/02/2022 & 05/04/2022

KAGOMBA, J

ALBOGAST ALFRED NGOE ("the appellant") and JANEROSE JONATHAN CHEDEGO ("the respondent") had lived under same roof for about eight (8) years to the extent that their neighbours presumed they were husband and wife. They were also blessed with two issues of the union. After that relatively long spell of living happily together, the respondent started noticing changes in the character of her presumed husband. She alleged to be beaten by him and that her man was no longer faithful as he was dating other women. For these reasons she lodged her petition against the appellant in the District Court of Dodoma, which was registered as Matrimonial Cause No. 4 of 2019 where the petitioner (now "the respondent") prayed for the following orders:-

a) Declaratory order that there is a presumption of marriage between the parties.
b) The petitioner be granted custody of the children.

c) The respondent (now "the appellant") be ordered to provide maintenance for the two issues to the tune of Tanzania shillings seven hundred thousand (Tsh.700,000/=) per month.

d) The respondent (now "the appellant") be ordered to send the children to school and pay for school fees and costs of medical treatment

e) An order for a paripassu division of matrimonial properties.

f) Costs of the petition.

g) Any further or other relief that the court may deem just and fit to grant in the circumstances.

After hearing the petition, the District Court entered judgment for the petitioner and decreed that:

i. The custody of the children be under the petitioner (the respondent)

ii. Respondent ("the appellant") is entitled to visitation of children.

iii. Respondent ("the appellant") to pay maintenance of Tsh. 300,000/= (three hundred thousand) monthly together with school fees and medical expenses when need arises.

iv. The petitioner ("the respondent") is entitled to one house located at Msalato Dodoma (the house she lives in) and two motor vehicles (Toyota Noah T 421 DEA and Toyota Wish T805DLL).

The rest of the properties as listed (by the petitioner) are granted to the respondent.

Having so decided, the appellant was aggrieved and decided to file this appeal which is premised on the following grounds;

1. That, the Trial Magistrate erred in law by entering judgment in respondent's favour without considering the fact that the pleadings which were filed were defective.

2. The Trial Magistrate erred in law and fact by deciding in favour of the respondent while she failed to prove her case on balance of probabilities.

3. The Trial Magistrate erred in law and fact by ordering division of matrimonial properties without considering contribution of each party, and the fact that there was no proof of existence of those properties which were brought before the Court.

4. The Trial Magistrate erred in law and fact by holding custody of the children to be placed under the respondent without considering she has no sufficient income generated to maintain them. And,

5. The Trial Magistrate erred in law and fact by holding the appellant to provide maintenance of the children Ths. 300,000/= which is excessive without determining income of each party.

Pursuant to the order of this Court dated 18th November, 2021 made upon prayer of Mr. Sosthenes Peter Mselingwa, learned advocate for the appellant, and which was not objected by Mr. Lingolopa, learned advocate

for the respondent, the hearing of the appeal proceeded by way of written submission. As far as convenient, we shall consider each ground of appeal as per the submissions made to the Court.

Submitting on the first ground of appeal, Mr. Mselingwa for the appellant argued that in the filed petition of the respondent, there are discrepancies that amounts to irregularity which are not curable before the eyes of the law, as following: -

i. The deed poll of the respondent to change the name of ROSE NGOE which she was using during the lifetime of her marriage with the appellant, to JANEROSE JONATHAN CHEDEGO, signed on 21/06/2018 before Maria Ntui, advocate lacks legality to stand. The same couldn't also warrant the respondent while filing petition to use the changed name in the said petition since it was not registered as compulsorily required by the law. Hence, in the eyes of the law, the respondent who was married to the appellant is a different person to who is the respondent in this case.

   Mr. Mselingwa cited to this effect the provision of Section 8(1)(a) and (b) of **the Registration of Documents Act, [Cap 117 R.E 2002].** According to him the cited provision clearly stipulates that the document should have been registered and necessary fees should have been paid, which was never the case. For this reason, Mr. Mselingwa was of the view that the pleadings were defective in the eyes of the law for being filed with a stranger to the suit.

ii. As the parties lived under presumption of marriage since 2008 to 2019 without as legal marriage, it was an obvious requirement of the law that before filing petition for divorce or separation, the petitioner must apply to the Court to order that there was a presumption of marriage, by filing chamber summons supported by affidavit. To this end the learned advocate, quoted from the impugned judgment of the District Court where amongst the prayers of the petitioner was "for declaratory order that there is a presumption of marriage between the parties", as appearing on page 1 of the said judgment.

Based on the above cited irregularities the learned advocate invited this Court to the law of marriage (Matrimonial Proceedings) Rules GN No. 246 of 1997 of which Rule 32(1) and (2) provides as follows:

> *Rule 32(1) -Every application for maintenance (whether for maintenance of a party to a marriage of children of marriage) or for the custody of the children of the marriage shall be by way of chamber summons supported by affidavit"*

> *Rule 32(2) -where any matrimonial proceedings is not by the Act or these Rules required to be instituted by a petition, the proceedings shall be instituted by way of chamber summons supported by an affidavit"*

Mr. Mselingwa therefore argued that based on the petitioner's quoted prayer and the cited provisions of the law above, the respondent wrongly filed the petition before applying for an order of presumption of marriage. He argued furthermore that even the petition did not state clearly the subject matter.

Mr. Mselingwa further cited another irregularity as lack of a certificate from Reconciliatory Board which, he said, is mandatorily required under Section 106 (2) of the Law of Marriage Act, [Cap 29 R.E 2019]. He concluded his submission on this first ground of appeal by asserting that the same suffices to allow the appeal and quash the proceedings and judgment of the District Court.

For reasons which shall be revealed shortly in due course, the Court shall not reproduce and deliberate on the appellant's submissions on the second, third, fourth and fifth grounds of appeal. There are pertinent matters raised in this first ground of appeal, which as the advocate for the appellant has submitted, may suffice to dispose of the appeal.

Responding to the issues raised in the first ground of appeal, Mr. John J. Lingopola, advocate for the respondent submitted as follows:

Firstly, on the legality of the Deed Poll, he said the same was tendered during trial as Exhibit PE 8 and was admitted without objection from the appellant.

Secondly, the Deed Poll was written to prove that the person stated in receipts is the one and same person as the one who filed the petition. He clarified that the respondent had always been Janerose Jonathan Chedego since her childhood; that the name of Rose Ngoe was used in receipts when she was buying building materials. prayed the ground of appeal be disregarded by this Court. For this reasons Mr. Lingopola

The appellant has attempted to tell this Court that Section 8(1)(a) and (b) of the Registration of Documents [Cap 117 R.E 2002] (now R.E 2019) "clearly stipulates that, the document that a person has interests needs be registered like Deed Poll and not otherwise". He submitted that since the Deed Poll was not registered and the required fees were not paid to warrant the respondent to change the name, the pleadings were defective.

With respect, the Court differs with the appellant's advocate submission. Section 8 (1) (a) and (b) provides for compulsory registration of the following documents, which in our considered view, Deed Poll is not among them. The cited provision is crafted as follows:

> *"8. Documents of which registration is compulsory*
> *(1) The registration of the following documents if executed made after the commencement of this Act is compulsory*
> *(a)* ***non-testamentary documents which acknowledge the receipt or payment of any consideration*** *on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest;*
> *(b) non-testamentary documents which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest.*

The above cited provision, makes it compulsory the registration of such non-testamentary document "which acknowledge the receipt or payment of any consideration", and such receipt or payment should be in respect of creation, declaration, assignment, limitation or extinction of such right, title or interest. The words "acknowledging receipt or payment of any consideration" are very important to exist for a

document to be compulsorily registrable. The Deed Poll for merely changing the respondent's name wouldn't be said to acknowledge receipt or payment of any consideration. This Court, therefore holds that, a Deed Poll is not compulsorily registrable under the Registration of documents Act, [Cap 117 RE 2019].

We also concur with the learned advocate for the respondent on this limb of the first ground of appeal, that the appellant ought to have raised the objection to the admission of the Deed Poll at the right time. The right was the time when the document was being tendered as evidence during trial. Since we have hold that registration of the said Deed Poll was not compulsory, there is no point on of law to challenge legalityof the said Deep Poll that can be raised at this stage.

On the second limb of the first ground of appeal, we find merit in the argument raised by the appellant's advocate that procedure adopted by the respondent to file a **petition** for declaratory order that there is presumption of marriage between the parties and proceed in the same petition to seek orders for custody of the children, maintenance for the children, and division of matrimonial properties defied the law, as we shall demonstrate below.

The respondent when she petitioned to the District Court she used the said petition to seek for the following orders, among others:

a) Declaratory order that there is a presumption of marriage between the parties.
b) That the petitioner be granted custody of the children.

c) That the respondent be ordered to provide maintenance for the two issues to the tune of Tanzania shillings 700,000/=
d) That, the respondent be ordered to send the children to school.
e) For a paripassu division of matrimonial properties.
f) Cost of the petition
g) Any further or other relief the Court may deem just and fact to grant.

According to the typed judgment of the trial Court, on page 12, the advocate for the appellant is on record submitting as a respondent's advocate that the petitioner wrongly filed the petition, instead of filing an application for maintenance of herself and children. He also enjoined the trial Court to consider the legal provision under Section 160 (1) and (2) of the Law of Marriage Act, Cap 29 R.E 2002 to the effect that where there is a dispute between the parties, one can make an application for custody of children and maintenance. He went further to refer to the procedure of how such an application can be made under Rule 32(1)(2) of the Law of Marriage (Matrimonial Proceedings) Rules, GN 246 of 1997 which provides that the same shall be by way of Chamber Summons and affidavit.

I have considered the Law of Marriage Act, and the Rules cited above by the learned appellant counsel and I am of a settled mind that the petition was wrongly filed. Section 160 (1) of the Law of Marriage Act, [Cap 29 R. E 2019] provides for presumption of marriage where two parties have lived together under one roof to the extent of a rebutted presumption to be made that they were husband and wife.

According to the testimony of DW1, the appellant, the presumption was rebutted. He did not recognize the respondent as his wife. He said the respondent was his co-parent. Under such circumstances the trial Court should have been guided by Section 160(2) of Law of Marriage Act as to what relief the then petitioner had under the law. Section 160(2) provides:

> *"(2) when a man and woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any Court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the Court that she and the man did in fact live together as husband and wife for two years or more, and the Court shall have jurisdiction to make order or orders for maintenance and,* ***upon application made therefor either by the woman or the man, to grant such other reliefs, including*** *custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for separation, as the Court may think fit, and the provisions of this Act which regulate and apply to proceeding for and orders of maintenance and other reliefs under this section".* (Emphasis added)

In interpreting the above provision, the Court of Appeal in **GABRIEL JOHN MUSA V. VOSTER KIMATI, Civil Appeal No.344 of 2019** held:

> *"Following the above provisions, it is clear that the Court is empowered to make orders for division of matrimonial assets subsequent to granting a decree of separation or divorce. Therefore, in the case at hand, it was improper for the trial Court to frame and determine only two issues of (i) division of matrimonial property and (ii) the reliefs* ***while leaving a apart a substantive issue of whether the presumption of marriage between the parties was rebuttable or not and whether their relationship was irreparebly broken down or otherwise".*** (Emphasis added); (see page 11 of the typed judgment of the Court of Appeal)

It is acknowledged that the trial Court framed, almost properly the following issue for determination:

"1. Whether the parties lived under presumption of marriage.
2. Whether there were properties acquired jointly
3. If issue number 2 is answered in affirmative, what is the extent of contribution made by each party.
4. Whether the petitioner is entitled to the custody of the children.
5. What reliefs are the parties entitled".

The trial Court went ahead to determine the first issue in affirmative that the parties lived under presumption of marriage. It is not clear whether by so holding the trial Court also addressed the issue whether the presumption of marriage between the parties was rebuttable or not. If it is to be assumed that the trial Court intended to hold that the presumption of marriage was not rebutted, it should have not ended there. The trial Court should have declared that, according to the evidence adduced, the parties were in a legal marriage. It is this declaration which give rise to granting of decree of separation or divorce, if there were findings that the same was irreparably broken down.

This issue of status of marriage was not addressed by the trial Court. It is not one of the issues framed nor was it decided upon despite the parties pleading on it.

The appellant's advocate submitted during trial that the petitioner failed totally to prove the reasons why she is not ready to continue living and staying with the respondent (now "the appellant"). He argued that one cannot just walk in marriage and state that she is fed with the of relationship. I agree with the appellant's submission.

Again, in **GABRIEL JOHN MUSA V. VOSTER KIMATI (Supra)** the Court of Appeal stated:

> *"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.*
> (Emphasis added)

Similar position as above was discussed in **RICHARD MAJENGA VS SPECIOZA SYLVESTER, CAT Civil Appeal No. 208 of 2018.**

The above the work flow should have been observed by the trial Court in this case. No step should be jumped. In this case, the trial Court jumped to divide properties of the presumed marriage without granting of divorce or separation. In my view this was wrong, and fatal to the proceedings. Having observed such an irregularity in the proceedings of the trial Court, I find it incumbent upon this Court to invoke its revisionary powers under the Magistrates Court Act, Cap in R. E 2019 to nullify the proceedings of the trial Court and set aside its judgment.

Since the determination of the first ground suffices to dispose of the appeal, the Court finds merit in the appeal and the same is hereby allowed. The proceedings before the trial Court were vitiated by that serious procedural omission of not considering status of the presumed marriage.

The proceedings before the trial Court were also vitiated by the fact that the petition was packed as an omnibus with prayers which were, by clear rules, supposed to be brought up by chamber summons supported by affidavit. Such prayers were for maintenance and custody of children.

Section 160(2) of the Law of Marriage Act provides for maintenance and such other reliefs as custody of children for which the Court shall have jurisdiction to grant upon application. These in my considered view were to be applied for and not petitioned for. The two procedures are not one and same.

In the final analysis short the appeal is allowed. Since there are pertinent rights of the parties to be determined by observing the law, the Court orders retrial of this matter in accordance with the law. No order as to costs.

It is so ordered.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE
05/04/2022