THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA.

MATRIMONIAL APPEAL NO. 8 OF 2020

(From Matrimonial Appeal No. 1 of 2020, In the District Court of Mufindi District, at Mafinga, Originating in Matrimonial Cause No. 15 of 2019, in the Primary Court of Mufindi District, at Kisanga).

BETWEEN

DORIS KILUMBI.....APPELLANT

AND

NAZARETH SANGA..... .....RESPONDENT

JUDGEMENT

01st September, & 14th November, 2022.

UTAMWA, J:

In this second appeal, the appellant DORIS KILUMBI was aggrieved by the judgment (impugned judgment) of the District Court of Mufindi District,

at Mafinga (The District Court) exercising its appellate jurisdiction. She thus, filed the present appeal challenging the impugned judgment.

The brief background of the matter is that, the appellant and the respondent (NAZARETH SANGA) started living together in 1980 as wife and husband respectively. In 2003 the respondent started love affairs with another woman. During the subsistence of the parties' marriage, they were blessed with six (6) issues. The respondent then had two issue with the said other woman. Later in 2014 he started living with that other woman. The appellant decided to petition for divorce in the Primary Court of Mufindi District, at Kasanga (The trial court) due to the desertion by the respondent and his failure to maintain her. The trial court granted the divorce and ordered for division of matrimonial properties.

The respondent was discontented by the said decision of the trial court. He appealed to the District Court. In turn, the District Court held that, the division of some matrimonial properties was unfair. It therefor, re-divide the same. The re-distribution aggrieved the appellant, hence the appeal at hand. The present appeal was based on the following five grounds which I quote verbatim for ease of reference:

1. That, the Hon. Resident Magistrate misdirected himself in fact and in law by making a decision without considering the contribution made by the appellant in accumulating the matrimonial properties as adduced in the trial court.
2. That, the Hon. Resident Magistrate misdirected himself in fact and in law by making unequal and unfair division of matrimonial

assets for the mere reason of children while all children are neither dependent nor living with their father (The respondent).

3. That, the Hon. Resident Magistrate misdirected himself in fact and in law to enter judgment without the present of the parties.
4. That, the Hon. Resident Magistrate erred in fact and in law by being bias to the appellant when making the decision.
5. That, the trial court erred in granting a divorce when there was no any certificate of marriage issued during the marriage.

The respondent resisted the appellant's appeal.

At the hearing of the appeal, the appellant was represented by various advocates, but lastly by Mr. Raymond Byombaliwa, learned counsel. On the other hand, the respondent appeared in person and unrepresented. The appeal was argued by way of written submissions.

In supporting the first ground of appeal, the learned advocate for the appellant argued in his written submissions that, the trial court record shows that the appellant told the court how the matrimonial properties were accumulated through joint efforts of the parties since 1980 when they started living together as husband and wife. The matrimonial properties listed were two commercial buildings located at Kibao Mgeluka, a supermarket, a plot of trees measuring 20 acres, a plot of trees measuring 9 acres and one motorcycle. The trial court therefore, did not take into consideration the efforts of the appellant in procuring such properties. This is because, her duty was not only taking care of their children, but she also performed commercial and domestic activities. Participating in these

activities entitled her to the division of matrimonial assets as per the holding in the cases of **Bi Hawa Mohamed v. Ally Seif [1983] TLR 32** and **Bibie Mauridi v. Mohamed Ibrahimu [1989] TLR 162.**

The appellant's counsel also contended that, the appellant lived with the respondent from 1980 to 2019 making it a period of 39 years. In that material period she performed the said domestic and commercial activities which led to the acquisition of the matrimonial assets. The appellant is therefore, entitled to equal shares of the assets. To bolster his contention, he cited the decision by the Court of Appeal of Tanzania (The CAT) in the case of **Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016, CAT, at Mwanza** (unreported).

On the second ground of appeal, the learned advocate for the appellant submitted that, the learned Resudebt Magistrate misdirected himself in fact and in law by making unequal and unfair division of matrimonial assets basing on issues of the marriage. This is because, the issues do not live with any of their parents. Besides, division of matrimonial properties has nothing to do with the custody of children.

Regarding the third ground of appeal, the appellant's counsel submitted that, the learned Resident Magistrate misdirected himself in fact and in law to enter judgment without presence of both parties. This was contrary to Order XX Rule 1 of the Civil Procedure Code, Cap. 33 RE. 2019. The above cited provisions is couched in mandatory terms since the word "shall" is used. The provisions must thus, be complied with in the light of section 53 (2) of the Interpretation of Laws Act, Cap. 1, RE. 2019. He added

that, the judgment was delivered on 15th May 2020 in the absence of the parties without any notice being issue to them or their respective advocates. That course was against the law. To cement his contention, he cited the cases of **Dr. Maua Abeid Daftari v. Fatma Salmin Said, Civil Appeal No. 88 of 2008** (unreported), **Robert Edward Hawkins & Another v. Patrice P. Mwaigomole, Civil Appeal No. 48 of 2006** (unreported) and **Awadhi Idd Kajass v. Mayfair Investment, Civil Application No. 281/17 of 2017** (unreported). These precedents, he contended, were referred to in the case of **Mashishanga Salumu Mashishanga v. CRDB Bank Plc & 2 Others, Civil Appeal No. 355 of 2019, Court of Appeal of Tanzania (CAT) at Mbeya** (unreported).

In relation to the fourth ground of appeal, the appellant's counsel submitted that, the honourable Resident Magistrate was biased in making the impugned judgment. He cited some paragraphs in the impugned judgment as examples of signs for the said bias. One of them was the holding that he (The Resident Magistrate) had gone through the records, but he did not see where the appellant had said that she had been deserted by her husband (The respondent). The learned counsel added that, the District Court also dealt with issues which had not been raised before the trial court and had not been discussed by the parties.

Concerning the fifth and last ground of appeal, it was the submission by the learned advocate for the appellant that, the trial court erred in granting a divorce when there was no any certificate of marriage issued to the parties. In law, a decree for divorce is issued only to parties who have been married upon the court proving that there is a certificate of marriage

issued and registered by recognized institutions as required under section 43 of the Law of Marriage Act, 1971, Cap. 29 (The LMA). He supported the contention by citing the case of **Shillo Mzee v. Fatuma Mohamed (1984) TLR 112.** The parties in the present case lived only under the presumption of marriage as per section 60 of the LMA. The trial court was not thus, supposed to issue a decree of divorce and make the division of matrimonial assets between the parties.

Owing to the above reasons, the appellant's counsel urged this court to allow the appeal with costs, nullify the proceedings and impugned judgment of the District Court. He further prayed for this court to grant any other reliefs it deems fit, just and equitable to grant.

By way of replying submissions, the respondent submitted only on the fifth ground. This was because, in his view, this ground had the effect of disposing of the entire appeal. He contended that, parties in this appeal never contracted a formal marriage recognized by the law. It was thus, wrong for the trial court to issue the decree of divorce. The trial court was supposed to establish and finally determine the issue of presumption of marriage between the parties and upon proof that the same existed. It was also required to issue the decree of separation and proceed with the division of matrimonial assets. It is trite law that, the court cannot proceed with division of matrimonial properties without first granting the decree of separation or divorce as held in **Richard Majenga v. Specioza Sylivester, Civil Appeal No. 208 of 2018, CAT at Tabora** (unreported). He thus, urged the court to nullify the proceedings by the trial court and the District Court without costs and the parties be advised to reconcile.

I have considered the record, the submissions by both parties and the law. In deciding this appeal, I opt to firstly discuss and determine the fifth ground of appeal. This is because, it may have the effect of disposing of the entire appeal if it will be upheld as rightly contended by the respondent. If need will arise, I will also consider the rest of the grounds of appeal.

The fifth ground of appeal calls for the issue of *whether it was proper for the trial court to grant the decree of divorce under the circumstances of the case*. It is undisputed in the present case and according to the record that, the parties were living together without any formal marriage contract, hence without any issued and registered certificate of marriage. Nonetheless, Section 160(1) of the LMA provides for the presumption of marriage. It guides *inter alia*, that, 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 my view therefore, since there was no formal marriage between the parties, the trial court could not have proceeded to grant the decree of divorce as correctly agreed by the parties. A decree of divorce must be preceded by a marriage certificate. In the case of **Harubushi Seif v. Amina Rajabu (1986) TLR 221**; the late Korosso J; stated as follows: -

> "it is clear that the respondent and the applicant having not been fully married in accordance with the formalities and procedures provided for in the Marriage Act, the respondent had no legal right what so ever to petition either, for divorce or separation."

The same view was envisaged by the CAT in the case of **Hemed S. Tamim v. Renata Mashayo (1994) TLR 197**.

Furthermore, in the case of **Hidaya Ally v. Amiri Mlugu, Civil Appeal No. 105 of 2008, CAT at Dar es Salaam [2016] TZCA 323**, the CAT also held that, a presumption of marriage is not in itself a formal marriage capable of being dissolved. Again, in the case of **Abdul Milanzi v. Asha Makeo, DC Civil Appeal No. 10 of 2021,** High Court of Tanzania, at Songea (unreported) it was held thus:

> "One presumed marriage is not listed under the marriages contracted in the manner as per section 25 of the Law of Marriage Act. As such, it lacks a certificate of marriage. Two, a divorce decree must be preceded with a marriage certificate. There cannot be a divorce decree without marriage certificate. Three, technically presumed marriage is not a marriage it is presumed to be a marriage. A presumption of marriage can only be rebutted, it cannot be dissolved."

In the present case therefore, since the consequential orders on division of matrimonial assets were based on the decree of divorce which the trial court did not have mandate to grant, then the entire exercises of granting the decree of divorce and dividing the matrimonial assets were a nullity.

Due to the findings I have just made above, I find no need for testing the rest of the grounds of appeal since the above findings are capable of disposing of the entire appeal as hinted earlier. Otherwise, examining the rest of the grounds of appeal will amount to performing an academic exercise which is not the core objective of the adjudication process like the one I am performing currently.

I accordingly allow the present appeal, nullify and quash the proceedings of the trial court. I also set aside its judgment. Likewise, I nullify and quash the proceedings of the District Court and set aside its impugned judgement for basing on the nullity proceedings and judgement of the trial

court. The appellant is at liberty to process her petition afresh according to the law if she so desires. I make no orders as to costs since in this matter, the two courts below also actively contributed to the irregularities mentioned above which have led to the orders I have just made. It is so ordered.

JHK UTAMWA
JUDGE
14/11/2022

14/11/2022.
CORAM; JHK. Utamwa, J.
Appellant: present in person.
Respondent: present in person.
BC; Gloria, M.

Court: Ruling delivered in the presence of both parties in person, in court, this 14th November, 2022.

JHK UTAMWA
JUDGE
14/11/2022.