

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CIVIL APPEAL NO. 14 OF 2022

(Originating from Mbinga District Court in Civil Case No. 06 of 2021)

MALISELINO B. MBIPI APPELLANT

VERSUS

OSTINA MARTINE HYERA RESPONDENT

JUDGMENT

Date of Last Order: 16/03/2023

Date of Judgment: 25/04/2023

U.E Madeha, J.

To begin with, this appeal emanates from the decision of Mbinga District Court in Civil Case No. 06 of 2021 in which the Respondent petitioned for the declaration that the parties were living under presumption of marriage, division of jointly acquired properties, custody and maintenance of the child born while living under the presumed marriage.

It is important to note that, the background of the parties' life is to the effect that, in the year 2014 the Respondent's husband died. The Appellant started cohabiting with the Respondent. That is to mean; living together

under the same roof as husband and wife. Similarly, in the year 2018 they were blessed with an issue that is, one Weston Maliselino Mbipi.

It is worth considering that, after six (06) good years of their relationship things changed and the Respondent filed a petition before the Trial Court and she prayed for the above orders. It seems to be true that, before the Trial Court the Respondent alleged that in their relationship, they managed to acquire several properties such as a house which was built in the plot of land that was bought by the Appellant and a coffee farm.

On the same note, after a full trial the Trial Court found the parties were living under the presumed marriage and it ordered the Appellant to pay a compensation of an amount of Tanzanian shillings four million (4,000,000/=) to the Respondent for the jointly acquired properties. To add to it, the child's custody was vested to the Respondent and maintenance order for the child to both the Appellant and the Respondent.

Basically, being dissatisfied with the Trial Court's decision the Trial Court, the Appellant brought this appeal on the following grounds:

- i. That, the Trial Court erred in law and fact to entertain the matter contrary to the law.*

- ii. That, the Trial Court erred in law and fact to order payment of an amount of Tanzanian shillings four million (4,000,000) contrary to the evidence.*
- iii. That, the Trial Court erred in law and fact to order the appellant to pay an amount of Tanzanian shillings four million (4,000,000) contrary to the pleading.*

As a matter of fact, this appeal was canvassed by way of written submissions. The Appellant was represented by none other than Mr. Dickson Pius Ndunguru, the learned advocate whereas the Respondent enjoyed the service of Mr. Moses Ndunguru the learned advocate. Arguing the appeal the Appellant's learned advocate filed his written submissions on time so did the Respondent's learned advocate resisting the appeal.

As much as the first ground of appeal is concerned, Mr. Dickson Pius Ndunguru submitted that the Trial Court erred in fact and in law by ordering division of matrimonial properties since the Respondent (petitioner) petitioned for an order of declaration of presumption of marriage and not for separation or divorce as the parties were not duly married.

In addition, he stated that the orders given by the Trial Court were contrary to the law. To buttress his argument, he made reference to the case

of **Richard Majenga v. Specioza Sylivester**, Civil Appeal No. 208 of 2018, Court of Appeal in which the Court held that:

"... the court is empower to grant division of matrimonial assets subsequent to granting of a decree of separation of divorce ..."

On the second ground of appeal the Appellant's learned counsel submitted that the Trial Court erred in law and fact by ordering compensation of an amount of Tanzanian shillings four million (4,000,000/=) to the Respondent without ascertaining the contribution of the Respondent and the value of the said matrimonial house.

Also, he added that the house was built before the existence of the relationship between the Appellant and the Respondent. Moreover, he further submitted that there was no evidence to justify that the house was built by the parties. Therefore, an order for the award of the compensation of an amount of Tanzanian shillings four million (4,000,000/=) was not justified respectively.

Apart from that, on the third (3rd) ground of appeal Mr. Dickson Ndunguru the learned counsel argued that the Trial Court erred in fact and in law to order for compensation of an amount of Tanzanian shillings four

million (4,000,000/=) since the Respondent (petitioner) never pleaded for compensation order. In that case, he stated that the Respondent (petitioner) in her petition she pleaded for division of the jointly acquired properties and not for an order for compensation as the Trial Court did. He added that by ordering compensation the Trial Court departed from the pleadings and offended the ageless principle that parties are bound by their pleadings as it was held in the case of **Makobi Wassanga v. Joshima Mwaikambo and Another** (1987) TLR 88, in which the Court stated that:

" ... a party is bound by his pleading and can only succeed according to what he has averred in his plaint and proven by evidence. He is not allowed to set up a new case ..."

To add flavor to it, he made reference to the case of **Pasineth Adrian v. Giro Gest Limited and Another** (2001) TLR 89 in which it was stated that in civil cases the court may decide those issues which were raised in the pleadings and not otherwise. To crown it all, the Appellant's learned counsel prayed for this appeal to be allowed and the decision of the Trial Court be quashed.

On the Contrary Mr. Moses Ndunguru, submitted that as much as the first ground of appeal is concerned, the submission made by the appellant's learned counsel are not correct and the learned counsel misdirected himself.

In that regard, he added that the position on presumption of marriage is well provided under section 160 of the *Law of Marriage Act* (Cap. 29, R.E. 2019) which provides that upon rebuttal of a presumed marriage, the Court has jurisdiction to grant reliefs as it has upon or subsequence to making an order for divorce or separation.

To add salt to it, he argued that in a petition for an order of presumption of marriage one cannot plead for an order for divorce or separation and section 160 of the *Law of Marriage Act* (supra) does not allow a Court to grant those orders. For more clarification, he further contended that reference is made to the case of **Richard Majenga v. Specioza Sylivester (supra)** which was cited by the appellant's learned counsel is inapplicable and irrelevant in the circumstances of this appeal.

As much as the second ground of appeal, he stated that the Respondent proved how she contributed in building the matrimonial house and the Trial Court was satisfied with the testimony of the respondent. As a

result, it proceeded to give an order for compensation. Thus, an order for compensation of an amount of Tanzanian shillings four (4,000,000) was correctly made.

It is worth considering the third ground that the Trial Court erred in fact and in law by granting the compensation order. Basically, Mr. Moses Ndunguru resisted the submissions made by the Appellant's learned counsel and averred that the Trial Court was correct to grant compensation order and there was nothing wrong on that order as the Court was satisfied that that was the contributions made by the Respondent in building that house. Principally, he added that the case of **Pasineth Adrian v. Giro Gest Limited and Another** (2001) TLR 89 is irrelevant in the circumstance of the instant appeal. Finally, he prayed for the dismissal of this appeal in its entirety with costs accordingly.

Notably, in his short rejoinder, the Appellant's learned counsel reiterated what he prayed in his submission in chief and added that the Trial Court erred in law and fact to order compensation to the Respondent while there was no neither divorce nor separation order.

To add to it, he insisted that the case of **Richard Majenga v. Specioza Sylivester (supra)** is relevant in this appeal. In addition, he further insisted that an order for compensation was unlawfully since it was not among the prayers made by the Respondent in her petition before the Trial Court.

As much as I am concerned, I have gone through the rival submissions made by both parties and the original records of the Trial Court. In fact, from the submissions made by the Appellant's learned counsel; on the first ground of appeal, the learned counsel is of the view that the parties were not married but they were living under presumption of marriage. However, he is challenging an order for division of properties as the Respondent never pleaded for before the Trial Court and it was not correct to grant such an order before granting an order for divorce or separation.

As a matter of fact, the Respondent's learned counsel vehemently resisted the submissions made by the Appellant's learned counsel and submitted that; presumption of marriage is guided by section 160 of the *Law of Marriage Act* (supra) and the Trial Court properly applied that provision of the law. He added that the Respondent before the Trial Court pleaded for declaration that the parties were living under presumption of marriage and

other orders such as distribution of the jointly acquired properties. Similarly, he further contended that the case of **Richard Majenga v. Specioza Sylivester** which was referred by the Appellant's counsel is irrelevant in the circumstances of the instant case since among the prayers of the Respondent before the Trial Court.

From the rival submissions made by the learned counsel for both parties, I am of the view that presumption of marriage is guided under section 160 of the *Law of Marriage Act* (supra) as clearly stated by the Respondent's counsel. For easy of reference, I find it is necessary to quote the said provision which reads:

160 (1) 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.

(2) When a man and a 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 an 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 the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section.

It is important to note, the proceedings of the Trial Court the Respondent in her petition pleaded for declaration that the parties were living under presumption of marriage in which the Court found that there was presumption of marriage. Moreover, after declaration of the presumed marriage other orders such as distribution of the jointly acquired properties, custody of the child and maintenance were granted.

To the best of my knowledge and from those records, I find that nothing was faulted by the Trial Court as it did exactly what is stipulated

under section 160 of the *Law of Marriage Act* (supra) with guidelines on how to deal with presumption of marriage.

As a matter of fact, I find the case of **Richard Majenga v. Specioza Sylivester** (supra), which was referred by the Appellant's learned counsel is irrelevant in the instant case the case. In the instant appeal the parties were not duly married and before the Trial Court there was a prayer for declaration that the parties were living under presumption of marriage which was granted and the Court proceeded to give orders for division of jointly acquired properties, custody of children and maintenance orders. Consequently, the first ground of appeal has no merit.

On the second ground of appeal, I am of the view that, the evidence given by the Respondent clearly proved that she contributed in the acquisition of that house but there was no justification of granting an order for compensation amounting to Tanzanian shillings four million (4,000,000/=) to the Respondent without ascertaining the value of the said house. The compensation order was not properly made by the Trial Court. I think it was important for it to order a percentage of the value of the house to be granted to the Respondent.

Moreover, on the third ground of appeal the Appellant's learned counsel is challenging on the propriety of the compensation order granted by the Trial Court since the pleading has no such prayer. Having gone through the Trial Court's records, I agree with the Appellant's learned counsel that an order for compensation was wrongly granted. As a matter of fact, in the pleadings the Respondent prayed for division of the matrimonial properties and not for compensation. To add to it, even the *Law of Marriage Act* (supra) does not speak on the issue of compensation. Therefore, I find the third ground of appeal has merit.

Last but not least, this Court do order that the Trial Court decision in respect of the matrimonial house is substituted to an order that the Appellant gets 70% while the Respondent is supposed to get 30% of the value of that house as it was built in the plot bought by the Appellant prior to their relationship.

To put it in a nutshell, the other orders of the Trial Court remain intact. As much as I am concerned and for the foregoing reasons this appeal is partly allowed. Finally, considering the circumstances of this case each party bears its own costs. Order accordingly.

DATED and DELIVERED at **SONGEA** this 25th day of April, 2023.




U. E. MADEHA

JUDGE

25/04/2023

COURT: Judgment is read over in the presence of the Appellant and the Respondent. Right of appeal fully explained.




U. E. MADEHA

JUDGE

25/04/2023