IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

PC CIVIL APPEAL No. 55 OF 2022

(*Originating from Matrimonial Cause No. 9 of 2021 at Arusha Urban Primary Court and Civil Appeal No. 29 of 2021 at the District Court of Arusha*)

HERINA NASHON EMANUEL .....APPELLANT

VS

EMANUEL GODSON MASSAWE.....RESPONDENT

JUDGMENT

Date of Last Order 07/02/2023

Date of Judgment 07/04/2023

BADE, J.

The Appellant herein appealed before this Court against the decision in Matrimonial Cause No. 29 of 2021 which was heard and determined before the District Court of Arusha on the 27th of May 2021.

The Appellant's grounds of appeal are couched in the following terms:

i. That, both the Trial Court and the 1st Appellate Court erred in law and in fact as they failed to assess the extent of contribution of both parties herein on the acquisition of matrimonial properties and therefore reaching an erroneous decision.

ii. That, both the Trial Court and the 1st Appellate Court erred in law and in fact when ordered custody of the issues of marriage to the Respondent without a justifiable reason, thereby affecting the best interest of the children.

iii. That, the 1st Appellate Court erred in fact when it pronounced judgment on the 27th May 2022, whereas in the said judgment it is seen that the same was pronounced on the 24th November 2021, the difference of which hinder justice to the Appellate side.

The background of this appeal is that, the Appellant filed the matrimonial cause number 09 of 2021 before Arusha Urban Primary Court in which the Appellant petitioned before the trial court for three reliefs which are divorce, division of matrimonial properties, and maintenance and custody of three issues Erick Emanuel, Rachel Emanuel and Victoria Emanuel.

The trial Primary Court did not grant divorce as petitioned and an order was given that the custody of the said issues be under the Respondent and the two plots located at Sokoni 1 be under the possession of the Respondent. The Appellant was aggrieved with the trial Primary court's decision hence appealed before the District Court of Arusha relying on three grounds that Trial Magistrate erred in law and fact by failing to regard the evidence

adduced by the Appellant during the trial hence reaching into an erroneous decision, the other ground is that Trial Primary Court erred in law and in fact by not considering the best interest of the children regarding the current life situation and the last ground is that the trial primary court erred in law and in fact by failing to consider joint efforts of the parties on obtaining the said matrimonial properties. The appeal before the District Court of Arusha was heard and determined in the sense that, the first appellate court subscribed to the decision of the Trial Primary Court that there was no marriage since the relationship falls under the presumption of marriage under section 160(1) of the Law of Marriage Act, Cap 29 [RE 2019], in which case there was no marriage to be broken by a decree of a court. The first appellate Court further observed that, since there were issues obtained out of that relationship under the presumption of marriage, the Court ordered that the said issues be under the custody of the Respondent; while the properties alleged by the Appellant to be the matrimonial properties the Court ruled that there was no proof of how she contributed to the acquisition of the said properties hence she obtained nothing from the said order for division.

Aggrieved with the said decision by the 1st Appellate Court, the Appellant decided to appeal before this Court.

Since both parties were unrepresented, they had prayed and were granted an order to argue the appeal by filing written submissions, to which parties duly abided. Arguing the first ground of appeal that, both the trial court and the first Appellate Court erred in law and in fact as they failed to assess the extent of contribution of both Parties herein on the acquisition of matrimonial properties and therefore reaching an erroneous decision, She made submissions that, the Appellant had contributed to the acquisition of the two plots at Sokoni 1, as she gave Respondent Tsh 2,700,000/= and in the second time gave the Respondent Tsh 30000/= for buying the said plots.

It was her further submission that since the 1st Appellate Court agreed on page 6 of its decision where it answered in affirmative the fact that the two plots were part of the said properties. In her testimony, the Appellant testified to have contributed in a monetary form to the purchase of the said matrimonial properties which she gave to the Respondent who did not dispute or controvert the said fact.

The Appellant further submitted that, the trial Court only weighed the evidence of the Respondent who testified that he bought the said plots on the 5th of June 2012. It is her further contention that in the time-space over which it is alleged the Respondent bought the said plots she was already

cohabiting with the Appellant, and therefore she contends that it defies logic why the Appellant does not appear in the sale agreement which has been brought in Court as exhibit A, and thus it is improper to consider the Appellant to have contributed nothing towards the acquisition of the said properties. She insists that the parties even though not married, have been in a relationship that is under a presumption of marriage, hence they are entitled to relief as both contributed to the fruits of their relationship.

It is the Appellant's further submission that, she has engaged herself in the acquisition of the said joint properties for almost 13 years while cohabiting with the Respondent, and that, since the Appellant is a business woman, the profits she had gained in her businesses were directed to the welfare of the family. She relied on the authority of the case of **Zawadi Abdallah vs Ibrahim Iddi**, Civil Appeal No. 10 of 1980, where the Court's observation was that the contribution of the spouse towards the acquisition of matrimonial assets can be in the form of money, property, work or combination of all. She reasons that, it sounds strange that both the trial court and the first Appellate court failed to appreciate the contributory efforts of the Appellant in obtaining the said properties.

In support of the 2nd ground of appeal, the Appellant argued that both the trial court and the 1st appellate court erred when it ordered custody of the issues of marriage to the Respondent without a justifiable reason thereby affecting the best interest of the children. She argues that the law regulates matters of rights of the children and promotes, protects and maintains the welfare of the children, She further submitted that section 37 (2, 4) of the Law of the Child Act, Cap 13 [RE 2019] grants powers to the Court to make orders in relation to matters of custody of children.

It is her further submissions that, the said issues' custody has been ordered to be under their grandmother who is not their parent but rather a third party to them. She cited **section 125** of the Law of Marriage Act, Cap 29 [RE 2019] to substantiate her claim.

Supporting the third ground of appeal, the Appellant argues , that the 1st Appellate Court erred in law and in fact when it pronounced judgment on the 27th May 2022 whereas in the said judgment it is seen that the same was pronounced on the 24th November 2021.She submits that the variance in dates hinders justice to the Appellate side. She also submitted that, the 1st Appellate Court scheduled this matter for judgment on the 24th November 2021, but the same was not pronounced. Hence from November 2021 to

27th May 2022, when the matter was adjourned on different occasions without any justifiable reasons, it resulted in the delay of justice to the Appellant.

In Response to these arguments, the Respondent submitted that it is a rule of thumb that the one who alleges must prove, and in this case, the Appellant has failed to prove neither how she contributed to the acquisition of the said joint properties nor the extent of her contribution to the acquisition of the said properties. The Respondent relies on the authority of the case of **Bibie Mauridi vs Mohamedi Ibrahim** (1989) TLR 162 in which the court made an observation that, there must be evidence to show the extent of contribution before making an order for the distribution of matrimonial assets.

He further submitted that section 114(2) of the Law of Marriage Act, Cap 29 [RE 2019] was interpreted by the Court of Appeal in the case of **Gabriel Nimrod Kwirijila vs Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (Unreported), where the Court observed that the extent of contribution towards acquisition of matrimonial assets is of utmost importance to be determined when the court is faced with a predicament of the division of matrimonial properties in resolving the issue of the extent of contribution,

the Court will mostly rely on the evidence adduced by the parties to prove the extent of contribution.

Submitting in response to the issue of custody of the issues of their relationship, he maintains that the Court was clearly justified to order the custody of the said children to be under the Respondent because it heard the opinions of the children, which is among the crucial requirements in considering the best interest of the child. Not only that but there was filed a social welfare report which helped the Court in determining the custody of those children. The two elder children opined that they prefer to stay with their grandparents who are the Respondent's parents. He infers further that, the investigation conducted by the Social welfare officer, shows clearly that the nature of the Appellant and Respondent's works and the conduct of the Appellant when she decided to abandon her third child to the Respondent before the public market as evidenced by SU3 were all taken into consideration by the Trial Court with regard to children's best interests. He cemented his views in the authority of the case of **Alice Mbekenga vs Respicious P. Mtumbala**, Civil Appeal No. 68 of 2020, in which the Court stated in extenso the factors to be considered when granting custody of the children, holding that in applications for custody, the best interest of the

child is determined in consideration of such factors such as the age and sex of the child, the child's physical, emotional and educational needs, and the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent. He relied on further support on Sections 26, 39(2) of the Law of the Child Act, and Rule 73 (a) and (i) of the Law of the Child Act (Juvenile Court Procedure) Rules, GN No.182 of 2016.

In response to submissions to the third ground of appeal that the 1st Appellate Court erred in law and in fact when it pronounced the Judgment on the 27th May 2022 while the said judgment had been recorded to have been pronounced on the 24th November 2021, a variance which hinders justice to the Appellant's side, He maintains that that is not an error in law or in fact and the same has no any effect to the Appellant since the difference in dates does not prejudice anything on the part of the Appellant.

Having read both parties' submissions and going through the record of the two courts below, it is now for the Court to determine if this appeal is meritorious. While at it, this Court finds it crucial to point out that the areas of concern following this appeal appear to be two, that is the determination as to whether there was proper consideration on the division of the parties' jointly acquired properties with a bearing to the extent of each party's

contribution in the acquisition of the said properties. The other area of concern is the custody of the 3 issues borne by the parties. But before we delve into these, I am bothered by the record of the trial court which does not seem to have taken into account the legal requirement under section 160 of the Law of Marriage Act, which makes it a duty to the court to ascertain the presumption of the marriage and whether it has been rebutted or not. This as per the guidance of the Court of Appeal needs to be ascertained even if the parties would have not contested the same as is in the present circumstances.

In the case of **Richard Majenga vs Specioza Sylivester**, Civil Appeal No. 208 of 2018, when confronted with an akin situation the Court stated that:

> *"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 the presumption of marriage, there was a 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 to granting the subsequent reliefs prayed, before satisfying itself on the existence of the presumed marriage." [Emphasis added]

In the Case of **Gabriel John Mussa vs Voster Kimathi,** Civil Appeal No 344 of 2019, the Court of Appeal while approving, referred to its previous decision above, it was adamant in the holding that the trial court needed to make a finding basing on section 160 of the Law Marriage Act on the presumption of marriage. The Court 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. Unfortunately, in this case, that was not done."

Further from the above authority, the Court held

"....it is our considered view that, even in this case, *it was improper for the trial court to resort into granting the subsequent reliefs prayed before satisfying itself on the existence of the alleged presumed marriage."* [emphasis mine]

This means to say the first appellate court needed to consider the crucial legal matters as discussed above, it is erroneous for the trial court not to consider and guide itself on it on account of the reasons stated above.

In any case, the order for the division of jointly acquired properties following the parties' dispute as per the Court's orders, section 114(2) of the Law of Marriage Act, Cap 29 [RE 2019] is pivotal as it provides that each party has to prove the extent of their contribution in the acquisition of the properties alleged to be jointly acquired when the relationship lasted. But this becomes relevant only after the determination of the issue of presumption of marriage. The logic behind this is that, for a person to be entitled to a share upon the division of the 'jointly acquired properties' one has to prove their contribution to the acquisition of the said properties on one hand.

On the other hand and in line with the above guidelines, there is **section 160** of the Law of Marriage Act, Cap 29 [RE 2019], which makes the determination of what sort of relationship the parties have had mandatory.

With all fairness, it is notable that the determination of this ground suffices to dispose of the appeal since consideration of the other grounds should have also found their basis in the determination of the issue under section

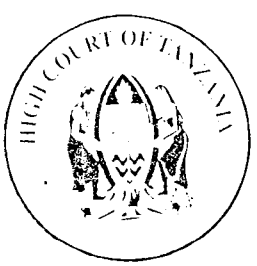
160 of the Law of Marriage Act. I thus find the appeal has merit and it is hereby allowed.

Consequently, the proceedings before the trial court and the first appellate court are vitiated, affecting the proceedings of the trial court from the stage of framing issues, and therefore I order as follows:

1. The judgment and all subsequent orders are quashed.
2. The case file is remitted back to the trial court directing that the hearing starts afresh from the stage of framing issues before another Magistrate with jurisdiction.
3. No order as to costs.

Order accordingly.

DATED at **ARUSHA** on the 7th April 2023.



A.Z. BADE
JUDGE
07/04/23