IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 05 OF 2023

(Originating from Matrimonial Cause No. 86 of 2020 of District Court of Kinondoni)

MATHAYO ANDREA YONA .....APPELLANT

VERSUS

SALAMA ALLY ATHUMANI.....RESPONDENT

JUDGMENT

Date of last order: 20/09/2023
Date of Ruling: 29/09/2023

OMARI, J.:

The background of the matter is that the parties herein lived together since 2003. They lived a happy life and were blessed with three issues. Things changed in 2017 and problems ensued which led the Respondent herein to file a Petition for divorce vide Matrimonial Cause No. 86 of 2020 at the District Court of Kinondoni seeking for *inter alia* a decree of divorce, equal division of matrimonial properties and custody of the couple's three children.

Before hearing parties, the trial court framed five issues for determination as can be seen on page two of its judgment to wit:

> *' 1. Whether there was marriage between the Petitioner and the Respondent. 2. If the first issue is answered in the affirmative, whether the said marriage is broken down irreparably. 3. Whether there was a jointly acquired matrimonial properties subjected to division. 4. Who is entitled to custody of the issues if marriage. 5. What reliefs are parties entitled to.'*

Having heard the parties, the learned trial magistrate found the first issue in the negative but proceeded to conclude that since the two had lived together for 16 years and they were not disputing this then they are under a presumption of marriage under section 160 of the Law of Marriage Act, CAP 29 R.E. 2019 (the LMA), went on to divide the properties and then made an order for custody and maintenance for the couple's children.

The Appellant being aggrieved by that decision is seeking to appeal against the judgment and decree rendered in Matrimonial Cause No. 86 of 2020 by the District Court of Kinondoni on 18 grounds as are listed in the Memorandum of Appeal which I will not reproduce due to volume and length.

On the date set for hearing, the Appellant had the services of Mr. Godwin Fissoo and the Respondent enjoyed the services of Mr. Francis Kajiru both being learned advocates.

Commencing his submission in favour of the appeal Mr. Fissoo informed this court that the appeal has 18 grounds, however, he intends to abandon the fourth and eighteenth grounds. He also informed this court that he intends to argue conjunctively the first, second and third grounds of appeal then conjunctively argue the fifth to the fifteenth ground thereafter he would finish with sixteenth and seventeenth grounds of appeal which he would also argue conjunctively; in effect reducing the remaining seventeen grounds to three groups of grounds of appeal.

For the first set of grounds Mr. Fissoo sought to address one issue, whether the Petition was correctly filed. He submitted that because it was undisputed that the parties had not contracted any marriage but the relief sought in the Petition was divorce, division of matrimonial property and custody of the issues which in his opinion was wrong. He cited section 2 (1) of the LMA and Rule 2 of the Law of Marriage Act (Matrimonial Proceedings) Rules which provide that matrimonial proceedings are those that fall under Part II and VI of the LMA. And, according to him the said Parts deal with formally contracted marriages. Counsel asserted that the trial court's judgment on page 6 through to 7 the trial magistrate raised issues one of which is there being a marriage between the two. Moreover, in determining the said issue the magistrate found there is no Marriage Certificate and proceeded to find the two lived under presumption of

marriage which counsel argues is not true and was not proved. Mr. Fissoo continued to submit that in the circumstances of the present case the trial court was wrong to determine the matter, that is presumption of marriage without first allowing the parties to prove or rebut the presumption of their marriage. He relied on the case of **Richard Majenga v. Specioza Sylivester,**Civil Appeal No. 208 of 2018 where the Court of Appeal in a similar case nullified the proceedings. He went on to argue that in this case, albeit posing to have a marriage in the Islamic form the Respondent failed to prove the same. Mr. Fissoo averred that, what the trial court did was to proceed to determine the matter whilst the Petition was not for presumption of marriage neither was there a prayer for the same. He went on to state that section 160 of the LMA was not meant to create an alternative procedure for contracting a valid marriage as it was held in in the case of **Zaina Ismail v. Saida Mkondo,** [1985] TLR 239 and that of **Hoka Mbofu v. Pastory Mwijage** [1983] TLR 286 both of which deny the applicability of section 160 of the LMA in concubine associations. Counsel further cited the case of **John Kirakwe v. Iddi Siko** [1989] TLR 215 which provides for the determinants of presumption of marriage. He concluded on this ground by averring that the learned magistrate erred to invoke section 160 of the LMA as a result holding there is presumption

of marriage between the Appellant and the Respondent which is not the case and the parties were not involved in framing that issue.

When he took the floor to submit on the first set of grounds Mr. Kajiru averred that section 160 of the LMA clearly and effectively addresses the issue of presumption of marriage. He stated that the law states that where a couple has lived together for two years it is presumed they are husband and wife. Counsel sought to rely on the case of **John Kirakwe v. Iddi Siko** (supra) which gives three conditions for presumption of marriage to stand and in his opinion the same are present in the case at hand. He also referred to the case of **Charles Rugembe v. Mwajuma Saleh** [1982] TLR 304 which was insistent on acquiring the reputation of husband and wife which automatically proves presumption of marriage.

In rejoinder Mr. Fissoo reiterated his argument that the trial court was wrong to proceed with the issue of presumption not agree by the parties and which is contrary to the Petition for divorce.

On the second set of grounds Mr. Fissoo stated that the said grounds deal with the issue of matrimonial property, contribution (to the acquisition) and division (of the said properties) whereby he contends that the issue is whether or not the trial magistrate was correct in determining and ordering distribution of

matrimonial property. He submitted that it is a procedure that the party seeking for an order for division of matrimonial property to plead in the Petition and prove in court that he or she has contributed to the acquisition of the said properties. He argued that an order for division of matrimonial property is not automatic, when it is not pleaded or proved under section 106 (f) and 108 of the LMA the court has no power to enquire and make an order to that effect. Counsel went on to argue that the court must first decide whether the marriage has irreparably broken down and hold as such it should proceed to decide whether properties are matrimonial property, where it finds as such it then orders division as per section 114(1) of the LMA. He relied on the cases of **Fatuma Mohamed v. Said Chambaka,**[1988] TLR 129 and **Samuel Moyo v. Mary Cassian Kayombo,**[1991] TLR 197 to cement his argument. He then went on to state that the case at hand is similar to that of **Hoka Mbofu v. Pastory Mwijage** (supra) where it was held that properties obtained during concubinage are to be divided as per Rule 93 and 94 of the Customary Law Declaration Order, GN. No. 279 of 1963. He ended his submission on the second set of grounds by praying that this court nullifies the proceedings, judgment and order because of irregularities during trial and because the parties were not afforded the right to be heard and prove presumption of marriage.

When it was Mr. Kajiru's turn to argue the second group of grounds he briefly stated that the trial court was correct to consider the properties as matrimonial properties. He sought to rely on the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] 32 TLR which applies section 114(1) of the LMA. He argued that the properties were matrimonial because there was joint effort (in their acquisition).

In his rejoinder, Mr. Fissoo disputed the applicability of section 114(1) of the LMA to this case. He went on to state that the case of **John Kirakwe v. Iddi Siko** (supra) insists of proof of presumption of marriage, yet the Respondent failed to prove presumption.

Submitting on the last set of grounds which pertain to the custody of the children Mr. Fissoo argued that the trial magistrate failed to consider the true situation of this case. He argued that the record depicts that the Respondent had left her home, abandoning and neglecting the children with the Appellant for two years, she starts to claim custody of the children after she filed the Petition. Counsel further argued that the placement would affect the best interests of the children. He went on to submit that the trial magistrate also erred to award TZS 200,000 per month as maintenance for the children without hearing the parties situations and abilities. He further added that the trial court had also failed to ascertain if the said amount is in accordance with the best

interests of the children. He concluded his submission by praying that the appeal be allowed and the proceedings, judgment and orders of the trial court be nullified for the irregularities.

In reply to the last set of grounds Mr. Kajiru sought to rely on the case of **Alice Mbekenga v. Respicious P. Mtumbala,**Civil Appeal No. 68 of 2020 in which this court quoted section 26(1) (b) of the LCA. He argued that the trial court had clearly and effectively considered the circumstances, that is why custody was given to the Respondent for the betterment of the children. He concluded his submission by praying that the appeal be dismissed with costs for being devoid of merit.

Having considered the counsel's submission in detail it is for this court to determine the appeal. However, before going further I should comment by way of reminding myself that this being the first appellate court this court is required to go over the evidence of the trial court and re-evaluate it and if need be arrive to its own conclusion as was held by the Court of Appeal in the case **of Faki Said Mtanda v. Republic,** Criminal Application No.249 of 2014 where the Court cited the decision of then East African Court of Appeal in the case of **R.D.Pandya v. Republic** [1957]EA 336 quoting the same where it was stated that:

> *'It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion'*

This being a first appeal then I am mandated to go back to the evidence that is available on the record, to re-evaluate the same and arrive at a conclusion, which is what I have done in this appeal. See also **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021.

That said, I will start by the first set of grounds of appeal, however focusing on the issue of presumption of marriage. The Appellant's complaint in the first two sets of grounds partly that the parties were not given an opportunity to be heard on and prove the issue of presumption of marriage which was neither pleaded nor proved in addition to being brought up in the determination of a Petition for Divorce. I have laboured to comb through the trial courts record and I agree with Mr. Fissoo's averments that the issue of presumption of marriage was not pleaded, it was not among the issues framed and agreed to and the parties have not addressed the court on the same. It is something that the trial court must have come up in the course of composing the judgment. I shall come back shortly to this anomaly.

In the case of **Richard Majenga v. Specioza Sylivester** (supra) the Court of Appeal observed that presumption of marriage is governed by section 160 of

the LMA which empowers the court to make orders for division of matrimonial assets and custody of children after it is satisfied itself that the said presumption is rebuttable or not. The Appellant's counsel argued that this matter was neither pleaded nor were the parties heard on it. The Respondent's counsel chose to only state that section 160 of the LMA is clear and effectively deals with presumption of marriage.

In my considered view, the question of presumption of marriage having presumably cropped up during the composition of the judgment, and, if at all the trial court wanted to consider the same, then under the principles of the right to be heard, should have called the parties to address the trial court on the said issue or any other that may have arisen before making a determination while the parties were unheard. It is the cornerstone of our justice system that courts need to avail parties their right when determining disputes between them. In the case of **Director of Public Prosecutions v. Rajab M. Ramadhan,** Criminal Appeal No. 223 of 2020 (unreported) the Court of Appeal held as follows:

> *'It is a rule against person being condemned unheard. Any decision arrived without getting adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard.'*

Such principles are supposed to facilitate fair trials by ensuring both parties are heard before a decision is made. In an earlier case of **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 the Court also had this to say:

> *'... no decision must be made by any court of justice, body or authority entrusted with die power to determine rights and duties so as to adversely affects the interests of any person without first giving him a hearing according to the principles of natural justice...'*

Therefore, the learned magistrate was duty bound to accord the parties a right to be heard on the issue of presumption of marriage going ahead to *suo motu* raise it and decide on the same. In **Abbas Sherally and Another v. Abdul Fazalboy**, Civil Application No. 33 of 2002 the Court of Appeal further emphasized that:

> *'The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. For example, in the case of General Medical Council Vs. Spackman, [1943] A.C 627, Lord Wright said: "If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the*

absence of the departure from the essential principles of justice. The decision must be declared to be no decision"....'

In the present appeal, in addition to the fact that it was not pleaded the parties were not accorded with an opportunity to be heard on the issue of them living under a presumption of marriage. Accordingly, the first set of the grounds of appeal is allowed. As this alone is enough to dispose of the Appeal, I find it unnecessary to venture into the other grounds of appeal as they are consequently related.

The appeal is consequently allowed, I quash the judgment and decree and set aside orders of the trial court. A party that is interested to pursue the matter is at liberty to institute fresh proceedings in accordance with the law. No order as to costs.

It is so ordered.

A.A.OMARI

JUDGE

29/09/2023

Judgment delivered on 29th September, 2023.

A.A.OMARI

JUDGE

29/09/2023