IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CIVIL APPEAL NO. 2 OF 2013

(Appeal from the judgment of the Lindi District Court in Civil Appeal No. 4 of 2013

(J.J. Waruku R.M.)

(Original Lindi Urban Primary Court Civil Case No. 26 of 2012)

MATHIAS KALLO ..... APPELLANT

Versus

HADIJA RASHIDI ..... RESPONDENT

Date of last order 20/11/2015

Date of Judgment 03/12/2015

JUDGMENT

F. Twaib, J:

In the Urban Primary Court at Lindi, the respondent sued the appellant for an order of divorce, division of matrimonial assets and maintenance of three children of their marriage. The appellant responded that no marriage ceremony was ever conducted to solemnize the alleged marriage, that one of the children (the second born) was not his, and that most of the properties the respondent claimed were not acquired by joint efforts.

The trial court found it as a fact that even though the appellant had formally expressed to the respondent and her parents his intention to take the respondent as his wife ("*alimchumbia*"), no marriage ceremony had

taken place between them. The trial court (Pilly, PCM) held that even for customary marriage to be found to exist, there must be a ceremony of some sort recognized by the relevant customary community constituting a recognized marriage. Without such ceremony, there could be no marriage.

However, the learned trial Magistrate was satisfied that there was ample evidence that the two of them had lived together for many years in a relationship that resulted in a presumption of marriage in terms of section 160 (1) of the Law of Marriage Act. He relied on the case of *John Kirakwe v Iddi Siko* [1989] TLR 215. Further, citing the decision of this court in *Harubishi Seif v Amina Rajabu* [1986] TLR 221, the learned Magistrate refused to discuss the issue of divorce, saying that that question cannot be considered in a presumed marriage. The case supports the following proposition, among others:

> *"...Where a man and woman who have cohabited together in concubinage for over two years or upwards but whose presumption of their having married has been rebutted, because the man and woman have been proved to have not been duly married, still the woman assumes a special legal status."*

However, in view of the many principles that the above case lays down on the issues that are relevant in this appeal, I would set out the rest of the relevant part of the holding of Korosso J *in extenso.* His Lordship held (at 224):

> *By virtue of the provisions of section 160 (2) of the Marriage Act once the woman has satisfied the Court of her continuous cohabitation with the man then she automatically becomes entitled to claim for maintenance for herself and every child of the union. It is noteworthy that such concubinage acquires the title of a union and the children are referred to as children of the union. The*

woman becomes entitled to apply for maintenance and for custody of children. The children of such parties are neither for the maternal side nor for the paternal side. They are under the Marriage Act vested with the status of being a man and woman of the union. Either the woman or the man may apply for custody of the child or children, and undoubtedly in granting custody to either of the parties, the Court will apply the principles as provided. In other words, the child or children of such union are deemed legitimate children and not illegitimate children. Thus the children of the Appellant and Respondent are deemed legal children.

At the end, the trial Magistrate summarized his findings in this case and ordered as follows:

1. *As there was no marriage ceremony between the parties, the court could not issue an order of divorce;*

2. *Since there was evidence of properties acquired through the joint efforts of the parties, the court would distribute the same as under:*

    i. *The respondent (original petitioner) shall have the farm at Ngongo while the appellant (original respondent) shall have the farm at Kineng'ene;*

    ii. *The house on Plot No. 386 Block "Z" shall be valued and the petitioner shall get 1/3 of the value while the appellant (original respondent) shall get 2/3 thereof;*

    iii. *The petitioner shall get two head of cattle and the original respondent shall get three heads of cattle and two calves;*

    iv. *The petitioner shall get two beds and mattresses and the appellant shall have four beds with their mattresses;*

v. *Each party shall have one table;*

vi. *Each party shall have two chairs.*

The appellant was not satisfied. He appealed to the District Court at Lindi. The District Court (Waruku, RM) partly allowed the appeal and held that the farm at Ngongo was not matrimonial property. He however dismissed the rest of the appellant's grounds of appeal and left the Primary Court's orders otherwise intact. Undeterred, the appellant has filed the present appeal.

The Petition of Appeal contains eight grounds. The appellant's main prayer is for this court to set aside the District Court's judgment. However, simply setting aside that decision would restore the Primary Court's judgment, which is, in fact, less favourable to the appellant, as it recognizes the farm at Ngongo as a matrimonial asset. What the appellant must have meant, which was the gist of his submissions before me, was that both the two judgments of the lower courts were wrong in most of their conclusions with regard to matrimonial assets.

The appellant is also challenging the findings on the dates of commencement of his relationship with the respondent, and his fatherhood of the second born child, the boy Rashidi Mathias. However, all these are an afterthought. They formed no part of his appeal to the District Court. For that reason, he ought not to include them in this appeal. I am therefore not going to consider them in this judgment.

In his submissions before me, the appellant stated that all the properties in dispute were subject of an earlier case between him and another woman, one Devotha, in Matrimonial Cause No. 7 of 2001. The Primary Court dealt with this issue and found that the farm in dispute in that case was a cashewnut farm and the appellant had himself told the court in that

case that the farm had a dispute and no longer under his ownership. Hence, the trial court agreed with the respondent that the farms at issue in this case were acquired during the pendency of the union between the parties in this case. The court also visited the *locus in quo* and was satisfied that the farms were matrimonial assets (even though the Ngongo farm was later removed from this category by the District Court on appeal).

These are essentially matters of fact. The appellant maintains that all the property in dispute in this appeal were the subject of the earlier matrimonial case between him and the said Devotha. The trial court did not agree with him and its reasoning cannot, in my view, be faulted. The District Court also agreed with the trial court as regards all the properties except the farm at Ngongo.

It is trite that there must be very strong reasons to justify a second appellate court departing from findings of fact by both courts below. Indeed, as the respondent has said, the said Devotha did not get anything from the appellant which could be considered to have been removed from the matrimonial assets acquired jointly by the appellant and the respondent.

The trial court visited all the immovable assets and was satisfied from the evidence gathered that the properties did not belong to the said Devotha and anybody else except the appellant or are joint assets with the respondent. Just like the first appellate court, I see no reason not to accept these findings of fact by the trial court. For the same reason, I accept their findings as to the number of cows belonging jointly to the parties.

The appellant's claim that he is not a farmer but an ex-employee of the Ministry of Water and a carpenter, which form one of his grounds of

appeal, will not assist him either way. The respondent was able to prove her contribution as a presumed wife and mother and as a person who directly participated in the acquisition and improvement of all the relevant properties.

In the premises, I see no merit in this appeal. The same is dismissed with costs.

DATED and DELIVERED at Mtwara this 3rd day of December, 2015

F.A. Twaib

Judge

01/12/2015