IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 72 OF 2019

(Arising from the judgment of District Court for Temeke in Matrimonial Cause No. 75 of 2019)

MODESTUS ROGASIAN KIWANGO.....APPELLANT

VERSUS

HELLEN GABRIEL MINJA.....RESPONDENT

JUDGMENT

MASABO, J.L.:

This is a first appeal from the decision of Temeke district court in a matrimonial cause No. 75 of 2019. In the said case, Hellen Gabriel Minja, the respondent herein successfully petitioned for dissolution of marriage and distribution of matrimonial assets jointly acquired during the subsistence of their marriage. Being disgruntled by the decision of the court, Modest Rogasian Kiwango is now appealing in this court armed with five grounds of appeal:

1. That the trial court magistrate erred in law and in fact by addressing wrong matrimonial property also considering false testimonies
2. The person Thadeo Minja who acts as a witness in the clan meeting decision and testified the false statement is not among the participants

3. That the trial court magistrate erred in law and fact that not adducing evidence that the meeting was not registered and it is in customary form (CHAGA TRIBE). This make evidence that there is a monogamous marriage before see section 15(1) of Marriage Act that no man while married by monogamous marriage shall contract another marriage
4. That the trial court magistrate erred in law and in fact by not considering my wife Agnes Onael Munisi she is the one who supposed to benefit for the matrimonial properties without interruption
5. That the trial court erred in law and fact that petitioner is my partner by customary ceremony we also in the same culture, in "CHAGA" law there is no separation at all and petitioner knows this before and she agreed to stay with me to Agnes Onael premises and now she want to divide the property
6. That the trial court magistrate erred in law and in fact that the petition is a strange to my marriage and no document to prove that she is only my wife for proof of adultery"

The background facts to this appeal are that the parties herein were married under Chagga customary rites in 1986. The marriage subsisted to 25th December 2018 when it was dissolved by the the district court for Temeke, (Mushi SRM). The Marriage was blessed with two issues: Agripina Modest Kiwango and Alberto Modest Kiwango. It was alleged that their marriage which was throughout harmonious turned sour after the Respondent became an alcoholic and adulterous. By then, they acquired several assets including a matrimonial house, a ½ and ¾ acre plots all located at Gezaulole aree at Kigamboni district in Dar es Salaam, cows, goats, 2 moto vehicles, a

motorcycle bricks making machine and several home utensils. At the end of trial, the court was convinced that the petitioner contributed to the acquisition of assets in monetary terms and through labour. It is this decision which had disgruntled the appellant.

The appeal was argued in writing. In his submission, the appellant argued that the trial court erred in law in holding that there were matrimonial assets between the Appellant and the Respondent because all assets were jointly acquired by the Appellant and his beloved wife one Agnes Onaeli Munisi and in assistance of their daughters who used to carry water. He submitted that, the marriage between him and the respondent was secretly cerebrated under chagga customs to conceal it from being known by Agnes Onael Munisi who was at the material time already married to the Respondent. That, since the marriage was celebrated under Chagga customary law there is no divorce.

He further attacked the testimony of PW1, PW2, and PW4 for being concocted. He argued that the parties never owned the 2 vehicles. As for the cows he argued that the same were not his property as he was only keeping them on behalf of someone who has already taken them hence, they are no longer in his possession. Regarding the motor cycle he argued that it is a family property and regards the house he submitted that it was owed by his family which is constituted of six children and his wife Agnes Onaeli Munisi. He submitted further that the Respondent was an intruder to his first marriage and that when she realized that she was interfering in the marriage of the appellant to Agnes Onael Munisi she quitted and took with her all the house utensils and furniture. He further refuted the allegation that

he had no income generation activity. He argued that he was selling milk from which he earned about Tshs 1,500,000/= per month which was far higher than the Respondents monthly salary. The Appellant argued further that the Respondent is fully aware of this fact and she is aware that the Appellant's wife did not permit him to marry another wife. He further submitted that he funded construction using monies given to him by the PW5 who also testified to have given the Appellant some cattle. The Appellant also annexed several documents to the submission and in conclusion he prayed that this court be pleased consider the annexures and order the Respondent to return the family property she took with her and to subsequently quash and set aside the decision of the trial court.

In her reply submission, the Respondent having recited the Appellants submission she resisted the submission that the Appellant had a marriage. She briefly submitted that when they celebrated the customary marriage in 1986 none of them was married. She however confirmed later that she is aware that the Appellant has another wife with whom they have six children.

I have considered the grounds of appeal, the submission of the parties and the original records which I have thoroughly and painstakingly read. In essence, there are two issues for determination, namely:

(i) Whether the trial court erred in holding that there was a marriage between the parties and whether it erred in resolving it; and

(ii) Whether the trial court erred in holding that the parties had matrimonial assets and whether it erred in distributing the same.

Before I proceed further, let me first address the appropriateness of the annexures appended to the submission in support of the appeal. As stated earlier, the appellant has appended several documents to his submission including a copy of the minutes of a clan meeting and copy of marriage certificate between him and the said Agnes Onael. It is trite law that annexures should not be appended to submission save where the said annexure is an extract of a judicial decision or text book. This principle is well articulated in many cases including in **VETA v. Ghana Building Contractors,** High Court, Dar es Salaam, Civil Case Number 198 of 1995 (unreported); **M. Rutakyamura v. Peter Joseph** [1996] T.L.R 49 and the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** [2005] TLR 41. In the latter case, Massati J (as he then was) having cited the two cases above, he held that:

> "It is now settled, that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts. Their annexure to submissions has been condemned by several decisions of this court.....Those decisions have held that where there are such annexures, they have to be expunged from the submission and totally disregarded." I will do the same in respect to the annexures attached to Mr Nyagarika's written submission. All the documents annexed to his

submissions are accordingly expunged; and shall be ignored."

On the strength of these authorities all the annexures appended to the Appellant's submission are hereby expunged from the record. I will in addition ignore them entirely.

Regarding the merit of the appeal, the original record reveals that the question whether or not there was a customary marriage between the parties was well established through uncontroverted testimony of PW1, PW2, PW3, PW4, PW5 and PW6 who all testified that the parties herein were married and cohabited under one roof for several years. In fact, the same was confirmed by the Appellant who told the court in page 20 of the trial court proceeding that *"my wife"*[referring to the Respondent] *filed this case knowing that.....".* In fact, it is on record that in the same page he told the court that he was still in love with his wife and she wanted her to return home so that they can continue with life. Having loudly admitted in daylight that the Respondent was his wife, he cannot at this juncture retrieve his words. The argument that she was an intruder is baseless as there was sufficient evidence to this fact which included among others the appellant's own admission which is the best of all the testimonies rendered on this issue.

Having answered the question above what remains to be determined in the first issue is whether or not the trial magistrate erred in dissolving the marriage. In my view this too was correctly determined by the trial magistrate. The records reveal that the trial magistrate correctly addressed himself to the law regarding dissolution of marriage and upon correctly analysing uncontroverted evidence of PW1, PW2, PW3, PW4, PW5 and PW6

he reached at a conclusion that the Respondent established on the balanced of probabilities that the marriage between her and the Respondent has broken down owing to the appellant's cruelty to the Respondent as per section 107(2)(c) of the Law of Marriage Act and long term separation as per section 107(2)(e) of the same Act. Since it was clear from evidence of the above listed witnesses that the Appellant used to beat the Respondent and to threaten him by a knife and since it was a common ground between the parties that they had been living apart for a period of seven years, there is nothing to fault the finding of the trial court. With respect, the assertion that marriage under customary laws are not dissolved is archaic and baseless. The Law of marriage recognizes customary marriage as valid marriage and does not make any distinction between civil marriage and customary marriage in matters of dissolution. Under the law, a marriage whether celebrated in a civil form, Christianity, Islamic marriage or customary marriage is a valid marriage and subject to the law of dissolution of marriage if it is established to have broken down irreparably.

Regarding the second issue on whether the trial court erred in holding that the parties had matrimonial assets and whether it erred in distributing the same, the position of the law of that a person who alleges a certain fact must prove its existence. (See Section 110 and 111 of the Evidence Act, cap 6 RE 2002. Articulating this principle, the Court of Appeal in **Godfrey Sayi and Anna Siame as Legal Representative of the Late Mary Mndolwa Civil Appeal No. 114 of 2014,** (unreported) firmly stated that:

> " It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by

> the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:-
> 110. Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist.
> 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.

Therefore, in this case the burden to prove the assertion that they had matrimonial assets rested on the Respondent. The matter between the parties being of civil nature the standard of prove was on the balance of probabilities which simply means that the court will accept evidence which is more credible and probable [See **Antony M. Masanga v. (1) Penina (Mama Mgesi) (2) Lucia (Mama Anna),** Civil Appeal No. 118 of 2014, CAT (unreported). It is on record that the Plaintiff discharged her duty by bringing material witnesses to support her case that the two had assets and that she contributed to their acquisition. Thereafter the burden shifted to the Appellant who instead of bringing evidence to contravene the Respondent's story he spent his time attacking the Respondent for making up her story. The only relevant rebuttal was in respect of the cows which he alleged that he was given the same by his uncle. This, was in line with the evidence adduced by his uncle one Damas Daudi who testified as PW5. This witness told the court that he gave the Appellant a shamba at Nguvu kazi, 6 cattle and sand for starting construction.

The trial court judgement demonstrates vividly that the trial court magistrate was not oblivious to this fact. He correctly directed himself to the fact and the position of law regarding division of matrimonial assets and in particular, asserts acquired by one of the parties prior to the conclusion of marriage as articulated under 60 of the Law of Law of Marriage Act and the case of **Anna Khanugha v Andrea Knugh**a [1996] TLR 194. Under the premise, there is nothing to fault him on the point of law. However, considering that it was uncontroverted that the Appellants uncle gave him six cows prior to the marriage, I have found it to be in the interest of justice to slightly vary the distribution.

Accordingly, the appeal is dismissed save for the last order on distribution of matrimonial assets to which it is order the cattle be distributed at equal halves. As for the rest of the properties the trial court order is sustained. This being a matrimonial cause the parties will bear their respective costs.

DATED at DAR ES SALAAM this 19th day of May 2020

J.L. MASABO

JUDGE