IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MATRIMONIAL APPEAL NO. 3 OF 2020

(Arising from Matrimonial appeal No. 11 of 2018 of Shinyanga District court from original Matrimonial Case No. 15 of 2018 in Shinyanga Urban Primary Court)

SALUM MAGEMBE..... .....APPLELLANT

VERSUS

HILDA OTARU .....RESPONDENT

JUDGMENT

Date of the last Order: 16th June, 2020
Date of the Judgement: 14th August, 2020

MKWIZU, J.:

The Respondent HILDA OTARU filed a matrimonial proceeding in Shinyanga Urban Primary Court. After hearing the parties and their witnesses, the trial court found that the parties were staying in concubinage. It went ahead to dissolve their union, **HILDA OTARU** was given custody of the children and SALUM **MAGEMBE** was ordered to maintain the children at the tune of 100,000 monthly under section 125 and 130 of the Law of Marriage Act. The trial court also ordered the sale of the house built by the parties jointly and the proceeds thereof to be divided equally between the two. Appellant was not happy with the trial court's decision, he appealed to the District Court. The district Court dismissed the appeal for lacking in merit. Dissatisfied,

again, appellant has filed the present appeal on three main grounds as follows:

1. *That the trial magistrate erred in law and fact in ordering equal division of matrimonial property without considering the fact that there was no lawful marriage between the parties.*

2. *That the trial magistrate erred in law and fact by issuing the order of broke the relationship which is not know/recognized by law.*

3. *That the trial magistrate erred in law and fact in ordering equal division of house while the said house was not acquired jointly by them rather the appellant was given by his father*

The appeal was disposed of by way of written submissions. Mr. Shaban Mvungi learned counsel represented the appellant while the respondent had the services of Mr. Pharles Focus Malengo also learned advocate.

Submitting in support of the appeal, counsel for the appellant faulted the trial court for ordering equal division of matrimonial property without considering the fact that there was no lawful marriage between the parties. He cited section 9 (1); 25; 27(1) and 33 (1) (2) **of the Law of Marriage**

Act Cap 29 RE 2019 which provide the manner on which a marriage be it Christian or Islamic should be contracted.

Mr. Mvungi went ahead explaining that, the relationship that existed between the parties herein did not fall under section 160 (1) of the Law of Marriage Act as no evidence that parties lived together under one roof for two years or more consecutively.

On the issue of division of matrimonial property, Mr. Mvungi submitted that for there to be a matrimonial property, there must be an existing marriage and that such matrimonial property must be a result of a joint efforts between the spouse at issue. He suggested that, where there is no legal known marriage between the parties, then there could be no matrimonial property which can be subject to division. He refereed the court to section 114 (1) (2) and (3) of the Law of Marriage Act No. 5 of 1971

On the 2nd ground of appeal, Mr. Mvungi submitted that, trial magistrate erred in law and facts by dissolving the relationship not known/recognized by the law. Having concluded that there was no any marriage relationship

between the parties, trial Magistrate had nothing to dissolve as nothing legally existed between the parties.

Regarding the 3rd ground of appeal, Mr. Mvungi submitted that, the trial Magistrate erred in law and in fact in ordering equal division of the house while the said house was not acquired jointly by the parties. He urged the court to allow the appeal and set aside the lower court's decisions.

In response to the appeal, Mr. Pharles for the respondent contended that the respondent's evidence at the trial court established that she lived with the appellant for more than two years and were blessed with two issues and that they acquired the status of husband and wife within the meaning of section 160 (1) of the Law of Marriage Act. He cited the case of **John Kirakwe Vs Iddi Siko [1989] TLR 215**

Mr. Pharles explained further that, having established that parties had acquired the status of a husband and wife, under subsection 2 of section 160, the court correctly made an order for maintenance of two issues and division of the house which was acquired by the parties

during their cohabitation. He cited the case of Francis **Leo Vs Paschal Simon Maganga [1978] LRT No. 22** and **Harubushi Seif Vs Amina Rajabu [1986] TLR 221 (HC)** in support of the above assertion.

Mr. Pharles conceded to the 2nd grounds of appeal. He said, the woman under the circumstances of this case is deprived of the right to petition for divorce or separation. He relied on his earlier on cited cases of Harubushi **Seif Vs Amina Rajabu (Supra)]** and **Joseph Sindo Vs Pasaka Mkondola** Civil Appeal No 132 of 1991 (Unreported).

On whether the trial court erred in ordering equal division of the house, Mr. Pharles contended that, the ground has no merit as the evidence on the record proved that the house was acquired by parties during their cohabitation. He said, the respondent contributed in acquisition of the house by purchasing building material for the construction of the house as per the evidence of DW2 who was taking food to the site for the consumption of the masons. From that submission he requested the court to dismiss the appeal.

Having considered the parties' submissions and lower courts' records, the questions to be considered by this Court are:

1. *whether or not there was a marriage between the parties,*
2. *whether the respondent is entitled to an order of divorce,*
3. *Whether the house in question was jointly acquired by the parties.*

It is noteworthy pointing out that, this is a second appeal therefore, the court will be guided by the principle set out in **Amratlal Damodar and Another V A.H. Jariwalla** [1980] T.LR. 31 where it was held that:

> *"Where there are concurrent findings of the facts by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

The first issue goes to determine the status of the marriage between the parties. Going by the records, both parties agree that their life together started in the year 2006 when appellant introduced himself

to the respondent's parents for purposes of marriage. He was directed to go for dowry payments in Moshi. From there on, the duo stayed together as a husband and wife. On this aspect, Respondent was recorded at page 3 and 4 of the trial courts records to have said:

> *"mimi na mdaiwa tulianza kuishi toka mwaka 2006 kabla hatujaishi wote alifika kwa wazazi wangu lubaga akiwa ameongozana na mama yake mdogo baada ya hapo alipewa utaratibu jinsi ya kutoa mahali na baada ya hapo tulianza kuishi pamoja..."*

On his party, appellant testified that

> *"nilienda kujitambulisha mjomba wake nikiwa na mama yangu kaka yangu na tulipangiwa twende Moshi tukatoa mahari..."*

It is also evident from the records that the duo lived together as a husband and wife until when their relationship fell apart. They lived together for a period between 2006 to 2009 when they separated and came together again in the year 2010 to 2012 when their relationship came to an end. The record also is to the effect that during their cohabitation, they were blessed with two issues.

Does this relationship amount to marriage under the law?. In John **Kirakwe Vs Iddi Siko** [1989] TLR 215, His lordship, Mwalusanya J (as he then was) said:

> *"...the judgment of Mfalila, J. (as he then was) in **Francis s/o Leo v Paschali Simon Maganga:** [1978] L.R.T. n. 22 that insists that for a presumption of marriage to succeed it must be proved that the parties had gone through a ceremony of marriage recognized under the law of Marriage Act, has been discredited; and it is no longer good law. The only three important elements to constitute a presumption of marriage are:*
>
> *(a) that the parties have cohabited for over two years;*
>
> *(b) that the parties have acquired a reputation of being husband and wife; E*
>
> *(c) that there was no formal marriage ceremony*
>
> *between the said couple." (Bold is mine)*

It is common ground from the records that SALUM MAGEMBE and HILDA OTARU lived together for over two years and that their relationship acquired the reputation of husband and wife. It is also clear that the parties herein were not married, they started to live

together after appellant had introduced their relationship to the respondent's guardians. That is enough to constitute marriage under the stipulations of the above cited decision.

Now, having established that parties lived under the presumption of marriage, the court is duty bound to do what is required under section 160 (2) of the Law of Marriage Act that:

> " *when a man and a woman have lived together in the circumstances which gives 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 thereof either by the woman or the man, to grant such other reliefs, including custody of the 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 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"* (Emphasis added.)

The above position was emphasized in the case of **Hemed S.Tamim Vs Renata Mashayo** [1994] TLR 197 where it was held:

"Where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under S 160 (1) of the Law of Marriage Act 1971, ***the courts have the power under s 160 (2) of the Act to make consequential orders as in the dissolution of marriage or separation and division of matrimonial property acquired by the parties during their relationship is one such order***_" *(bold is mine)*

See also the case of **Harubushi Seif Vs Amina Rajabu** (Supra) at page 225

The second ground of appeal faults the trial court for dissolving the

relationship not known in law. I have revisited the records. On its decision, trial court had found that there was no marriage between the parties, that parties were living in concubinage, it however, went ahead to dissolve their relationship. This was an error. In **Hemed S. Tamim Vs Renatta Mashayo** [1994] TLR 197 The court said:

> *"Having found that the parties were not duly married, the decision of the lower court regarding the dissolution of marriage is void."*

Guided by the above authority, and having concluded that parties contracted no marriage whatsoever, the dissolution of their union cannot arise. The trial magistrate could not therefore have issued an order dissolving what is not existing because the parties had not undergone any formal marriage in law. The order for the dissolution given by the trial primary court is hereby set aside. And for this reason, second issue is answered in the negative.

Coming to the last issue on whether there is evidence to support the equal division of the house. Section 114 (2) (b) of the Law of Marriage Act,

plainly provides that, the scope of distribution determines the amount of division. In explaining her extent of contribution, respondent said at page 4-5 of the trial court's proceedings:

> *"Nilitoa baadhi ya hela kwenye mtaji wangu nikiwa nakopa kwenye chama hela nyingine tulijenga ile nyumba ilipofika mwaka 2012 nilinunua vitu, mabati bando tano sement mifuko 20, misumari, mbao za kupaulia nyumba na mpaka mafundi nilikuwa nikiwalipa mimi wakati tunamalizia nyumba nilikuwa na ujauzito wa mtoto wa pili na dhumuni letu ilikuwa nijifungue ndiyo tuhamie kwenye nyumba."*

There is enough evidence on the records that appellant got the plot from his father. Exhibit annexure B2 tendered by the appellant, a letter addressed to the land authorities dated 4th October 2008 states:

> *"YAH: KUMKABIDHI MWANANGU KIWANJA BLOCK QQ No. 134 NDUGU SALAUM MAGEMBE.*
> *Rejea kichwa cha barua hii hapa juu chahusika.*
> *Mimi Hassan Magembe mmiliki halali wa kiwanja Plot No. 134 Block QQ kilichopo Ndala B (Upongoji) kulingana na shughuli nilizonazo nimeamua kumkabidhi mwanangu niliyemtaja hapo juu akiendeleze.*
> *Natanguliza shukrani katika ujenzi*
> *wa taifa"*

However, while the appellant said he got it without pay, respondent said they paid 800,000. She claimed that, she contributed some of the money towards acquisition of the plot but could not come clearly how much was contributed. In relation to parties 'contribution on the acquisition of the house Appellant said:

> *"Aliachiwa duka tukaanza kukopa hela benki ikafika mahala rejesho likawa linasumbua ndoa haikufika mbali ikaja tena ikafa akapata bwana wa Buzwagi maisha yakaendelea"*

It is therefore proved that though the plot was given as a gift to the appellant, parties contributed to its development by building a house together. The issue for my determination therefore is on the extent of each parties' contribution. From the analysis above, I think, parties deserve 50% share as far as the house is concern. Now because the house and the plot are inseparable, the division should go to 70% for the appellant and 30 % to the respondent. This is after taking into account the uncontroverted fact that the respondent did not contributed to the acquisition of a plot but she contributed to the construction of the house. The trial courts decision that the house be

sold and its proceeds be shared equally by both parties will deprive the rights of the appellant.

This said and done, the appeal is partly allowed as explained above, the rest is dismissed for lacking in merit.

Having considered the parties relationship and the general nature of the matter, I make no order as to costs.

DATED at **SHINYANGA** this 14th Day of **AUGUST**, 2020

E.Y.MKWIZU
JUDGE
14/8/2020

Court: Right of appeal explained.

E.Y.MKWIZU
JUDGE
14/8/2020

THE HIGH COURT OF TANZANIA