

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 524 OF 2021

GEORGE WALTER MBWAMBO APPELLANT

VERSUS

NEEMA STEPHEN MUSHI RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Arusha)**

(Maghimbi, J.)

dated the 2nd day of May, 2017

in

Civil Appeal No. 1 of 2016

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JUDGMENT OF THE COURT

11th & 13th December, 2024

NDIKA, J.A.:

The appellant, George Walter Mbwambo, challenges the judgment in Civil Appeal No. 1 of 2006 from the High Court of Tanzania at Arusha dated 2nd May, 2017. By that decision, the said court partly reversed the judgment of the Resident Magistrate's Court of Arusha at Arusha, in favour of Neema Stephen Mushi, the respondent.

The respondent had filed a petition to dissolve her purported marriage to the appellant at the trial court. Additionally, she requested consequential

orders for the division of matrimonial assets, custody of a child born out of the alleged marriage in February 2007, maintenance for both her and the child, and costs of the action. The trial court concluded that, notwithstanding the completion of pre-marriage procedures in 2006, the couple did not ultimately enter into a customary marriage, as the respondent claimed. The court further believed that the appellant was in a concubinage with the respondent, given that he had been in a traditional marriage with another woman, Mwanahawa Temba, since 1999. Therefore, it was determined that there was no valid marriage between the parties that could be legally dissolved if proven to be irretrievably broken down.

However, the trial court ordered the appellant to provide for the child's maintenance in terms of daily sustenance, school fees, medical expenditures, and housing, and it gave the respondent custody of the child. The court also ordered the appellant to pay the respondent TZS. 1,000,000.00 being her contribution to the acquisition and development of their joint properties.

The respondent felt hard done by the trial court. On her first appeal, the High Court of Tanzania at Arusha found that, although the parties did not formally contract a valid marriage that could be subject to dissolution, there was sufficient evidence on record to suggest that the parties lived together

for five years until 2011 in circumstances that raised the presumption of marriage between them. The court stated further that, on the back of rebuttal of the said presumption, the respondent was legally entitled to a share of the matrimonial assets under the law. In the end, apart from upholding the trial court's orders of custody of the child and maintenance, the court awarded the respondent a 25% share of the value of:

"the property situated at Usa River where she lived before her departure in 2011. The said property shall be valued by a reputable government valuer out of which 25% of the value shall be the share of the appellant [the respondent herein]. Should any of the parties be ready to compensate the other party his/her percentage share in monetary [terms], he/she shall do so and the other party shall retain the property."

The appellant cites two grounds of appeal, alleging legal and factual errors as follows:

- 1. That, the learned appellate judge erred in law and in fact by holding that there was a presumption of marriage between the parties contrary to the conclusion reached by the trial court which heard the parties.*

2. That, the learned appellate judge erred in law and in fact by ordering division of the appellant's properties between him and the respondent while there was no valid marriage between them.

Prosecuting the appeal as a self-represented litigant, the appellant simply urged us to allow his appeal, maintaining that he only lived with the respondent for one year from 2009 to 2010. Having insisted that no presumption of marriage arose in the circumstances of this case, he rested his case as he urged us to allow the appeal and vacate the order for division of matrimonial assets.

The learned counsel for the respondent, Mr. Novatus M. Muhangwa, opposed the appeal. After examining the available evidence, he argued that we should affirm the High Court's finding that the parties were presumed married. He claimed that the finding was soundly based upon properly evaluated evidence, making the first ground of appeal moot.

Turning to the second ground, the learned counsel argued that, notwithstanding the absence of a valid marriage between the parties, the High Court was entitled to order division of matrimonial property once the presumption of marriage between them was refuted just like in instances of dissolution of marriage or separation. He referenced **Hidaya Ally v. Amiri**

Mlugu [2016] TZCA 323 on the standpoint. As regards the propriety of the ordered division of the property, he cited **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32 and **Sixbert Bayi Sanka v. Rose Nehemia Samzugui** [2023] TZCA 227 to hammer home the point that the said court duly considered the contributions made by the respondent to the acquisition and development of the matrimonial property in consonance with section 114 (2) (b) of the Law of Marriage Act, Cap. 29 (“the LMA”).

As hinted earlier, the first ground of appeal enjoins us to determine whether there was a presumed marriage between the parties herein.

First of all, it is undeniable that the lower courts correctly determined that the appellant and respondent were not legally married. Although they fulfilled pre-marriage rites, it was rightly believed that this did not result in a matrimonial relationship between them. Thus, their relationship could not be a subject of dissolution, even if proven to be irreversibly broken down. We observed that the High Court made the following reasoning in determining whether they had lived together for a minimum of two years to invoke the presumption of marriage through reputation as a married couple under section 160 (1) of the LMA:

"there was sufficient evidence on record to suggest that the parties lived together for five years. The testimony of the appellant [the respondent herein] before the trial court was that she and the respondent [the appellant in this appeal] had lived for five years and were blessed with one issue. The appellant's PW2 and PW3 proved that the duo had [executed the necessary pre-marriage formalities]."

Moreover, the said court established that the said cohabitation was corroborated by the appellant, who, in his testimony, admitted that the respondent lived in his house at Usa River in Arusha. To illustrate the point, we let a part of the transcript of his testimony on page 35 of record of appeal speak for itself:

"Neema was living in Ngulelo and later she [relocated] to Usa River area in my house. It was in 2009. In the house ... there were tenants. She stayed for two months. Later she stayed in the big house after she gave the tenants notices to leave the premises."

We understood the appellant's narrative reproduced above that in 2009 the respondent initially moved into an outhouse at the Usa River property, but subsequent to several tenants leaving after she served them with quit notices, she moved into the main house. As the High Court did, we question

how the respondent obtained the authority to kick out the tenants from the appellant's home if they did not acknowledge her as the appellant's wife. We are aware that while the appellant was resolute that the respondent stayed at Usa River for one year only, the respondent maintained that she left the property in 2011 after suffering a stroke and having sensed that all was not well in her relationship with the appellant. As we note that the appellant acknowledged in his evidence in chief on page 36 of the record of appeal that he went on providing maintenance to the respondent, we find the respondent's chronology of 2011 as more preeminent than that of the appellant.

Moreover, it is also undoubted that apart from taking care of the child she shared with the appellant, she also took care of at least one of the appellant's children that he sired with another woman. The High Court is also right that the existence of the appellant's customary marriage to Mwanahawa Temba with whom he was living in Mererani does not negate the fact that he cohabited with the respondent in Usa River at least until 2011.

On the evidence as discussed above, we find it highly preponderant that the parties herein cohabited for at least two years in the circumstances that raised the presumption that they were husband and wife in consonance with

section 160 (1) of the LMA. We thus uphold the High Court's finding to that effect. As a result, the first ground of appeal is rendered hollow.

The second ground asks whether the respondent had the right to a split of the matrimonial property even if she and the appellant were not legally married.

Section 160 (2) of the LMA governs the situation where the presumption of marriage under subsection (1) of that section is rebutted, as in the instant case. For clarity, we reproduce it in full:

*"(2) When a man and a woman have lived together in circumstances which give 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 therefor either by the woman or the man, to grant such other reliefs, including custody of 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 and apply to proceedings for, and orders of, maintenance and 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]

As stated in **Hidaya Ally** (*supra*), the wording of the above provisions indicate that any court of competent jurisdiction is empowered to order division of matrimonial property once the presumption of marriage is rebutted, as it happens in the instances of dissolution of marriage or separation. In that case, the Court quoted the main holding in its earlier decision in **Hemed S. Tamim v. Renata Mashayo** [1994] T.L.R. 197 thus:

*"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 an order. “[Emphasis added]

In view of the above settled position, the appellant’s contention that the High Court erred in ordering division of matrimonial property upon rebuttal of the presumption of marriage between him and the respondent is plainly a misreading of the law. As observed in **Hidaya Ally** (*supra*), it is a misconception for anyone to think that division of matrimonial property can only be ordered once a valid formal marriage is dissolved.

We note that the focus of the High Court’s division between the parties herein was the property in Usa River. In dividing it, the court not only considered that the appellant had another wife and many children, but it also reflected on the contributions made by the respondent towards its acquisition. Following the guidance in **Bi Hawa Mohamed** (*supra*), the court considered that, apart from taking care of the appellant’s children, which was an essential contribution to the welfare of the family, the respondent made substantial inputs towards the development of the property in Usa River as she was gainfully employed by Ngurdoto Hotel as secretary. Certainly, in terms of section 114 (2) (b) of the LMA, courts are required to have regard to the extent of the contributions made by each party in money, property or work

towards the acquisition of the matrimonial assets. We have examined the breadth of the division closely, notwithstanding the appellant's failure to directly contest it. In our view, it meets the justice of the case. Accordingly, the second ground of appeal fails.

In the end, we find no merit in the appeal. We dismiss it with no order on costs.

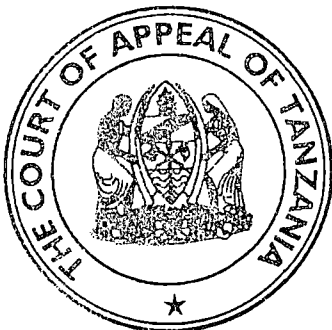
DATED at **ARUSHA** this 12th day of December, 2024

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

Judgment delivered this 13th day of December, 2024 in presence of appellant and respondent in persons - unrepresented is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. J. Kamala".

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL