

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

PC MATRIMONIAL APPEAL NO. 08 OF 2021

**(Arising from the Judgment of Misungwi District Court in Matrimonial Appeal
No. 95 /2020 originating from Misungwi Primary Court Matrimonial Cause
No. 16/2020)**

KALEKWA MALAHYA APPELLANT

VERSUS

MABULA SAYI RESPONDENT

JUDGMENT

28 & 31/05/2021

RUMANYIKA, J

Only with respect to distribution of matrimonial property, also it appears maintenance allowance for issues of the marriage the 2nd appeal is against judgment and decree dated 15.02.2021 of Misungwi district court.

If I were to reword the grounds of appeal they would revolve around two points mainly; (1) that in terms of the extent of contribution made by the spouses, the lower court misapplied the under laid principles (2) that the 1st appeal court erred in law and fact not holding that the trial court lacked jurisdiction.

Messrs Mathias Mashauri and Hidaya Haruna learned counsel appeared for Kalekwa Malahya and Mabula Sayi (the appellant and respondent) respectively.

When, though their mobile numbers 0766 308 358 and 0755 456 122 respectively the appeal was, by way of audio teleconferencing called on 28.04.2021 for hearing, I had to hear the learned counsel on a time-bar preliminary point of objection (the p.o) according to records formally registered on 22.04.2021 by the respondent's counsel. That whereas the trial court's decision was handed down on 24.11.2019, contrary to provisions of S. 80 (2) of the Law of Marriage Act Cap 29 R.E 2019 (the Act) without extension of time being sought and granted the appeal was far beyond the prescribe 45 days lodged on 11.12.2020.

On her side, in reply Ms. H. Haruna learned counsel submitted that actually the records had it all that the trial court handed down its decision on 24.11.2020 and well within time the appellant appealed on 15.03.2020.

I dismissed the P.O and reserved reasons therefor. Here there are reasons;

Actually having had twice and thrice read the records, the following facts should not have been disputed; that Misungwi primary and district

courts having had handed down their judgments and decrees on 18.05.2020 and 15.02.2021 respectively, therefore within the first 17 days hence well within time the appellant appealed, and according to records still aggrieved she appealed to this court on 15.03.2021 that is to say exactly thirty (30) days later, the appellant was all the time never time barred much as it is trite law that serious as they were, court records depicted only all what really had transpired and could not just casually be impeached. With greatest respect it was very unfortunate that Mr. M. Mashauri learned counsel chose to, and he raised the p.o. It is for these reasons that I dismissed the p.o on 28.04.2021.

Now on the merit part of the appeal starting with the issue of jurisdiction, according to the rule in the case of **Wilson Andrea v. Stanley Ruhumbiza**, Civil Appeal No. 229 of 2017 (CA) unreported Ms. H. Haruna learned counsel argued the grounds combined that with provisions of S. 75 of the Act the parties' marriage was neither Customary nor Islamic therefore it being on division of assets etc, the trial court had no jurisdiction much as also, the trial magistrate was on record having had admitted the fact. That in the alternative the trial court should not have ordered division of the matrimonial property because the marriage still subsisted that not only the court order was so omnibus that its execution

was next to impossible, but also all was simply left to the respondent's discretion. We humbly submit and pray that the court nullify the entire proceedings so that if wished, the parties may now start all over again. Ms. H. Haruna further contended.

Mr. M. Mashauri learned Counsel submitted that as long as provisions of S. 88 of the Act did specifically establish which court of law had the powers to entertain disputes of the nature, the trial court had jurisdiction much as according to records they cohabited in 2013 and some property was acquired between late 1970's and 1980's hence presumed customary marriage rightly so under S. 114 of the Act the court having had considered the extent of contribution to acquisition by them of the property at issue. The appeal is devoid of merits therefore liable to be dismissed with costs. Mr. M. Mashauri further submitted and prayed.

A brief account of the evidence on record reads thus;

SM₁. Kalekwa Malahya stated that that two having had acquired 150 acres of shamba at Geita, 2 acres of shamba at Ibilishi, two acres at Mapilinga, 2 tractors and, according to the list a considerable amount of wealth but the appellant constructively deserted for four (4) years, it culminated into her petition for divorce.

Sm₂ Emmanuel Kakungote stated that he was nephew of Sm₁ much as the latter and the respondent were wife and husband.

Sm₃ Milambo Mabula stated that he was son of the parties to the case that as, in year 2007 they owned several grounded motor vehicles, thereafter the parents borrowed two tractors, a motor vehicle make Toyota Coaster, they built a house also jointly acquired 150 acres of shamba.

Sm₄ Mahilya Paulo stated that the appellant and respondent cohabited in 1990's by that time the latter a driver employed by the appellant and another that as the two traded on paddy and at the appellant's request the couple had shifted to Misungwi, the respondent dealt with some soft drinks (soda) and the wife grew paddy thereat much as the respondent had paid no dowry.

Su₁ Mabula Sayi stated that as in the beginning the appellant resided away at Misungwi until in 2013 when he brought her home that in terms of maintenance he never ever neglected her only that following disputes he paid allowances through the local leader but the disputes persisted hence the case.

Su₂ Shaban Mageme stated that for quite long he was neighbor of the spouses, dates of marriages in brackest, the respondent having had his

first wife (1977), 2nd wife (1982), third wife (1998) and another one (2002), for the first time he saw the appellant around in 2014 alleged taking care of the children.

Su₃ Jumanne Shaban stated that he knew the parties before much as the respondent was married four times and the appellant wasn't one of the former's four wives.

Su₄ Sundi Sayi and Su₅ Donald Mtanda essentially they stated the same as Su₃ did only that say for seven (7) years now the appellant had lived away in a rented house.

Su₆ Wilfred Masalu stated that apart from such other two wives the parties were wife and husband and they owned a social hall.

Su₇ Mayenga Ncheye stated that the appellant wasn't amongst the respondent's wives much as two of the wives were dead.

Su₈ Samwel Sayi stated that all the property in the list were not matrimonial but only Mabula & Brothers Company owned it.

Su₉ Kuraish Nuru Juma stated that the respondent was married eight (8) times but the appellant wasn't one of the wives.

Su₉ Mbilizi Sayi stated that with effect from 2013 the appellant stayed at the respondent's home only as a worker not wife and the respondent had such good number of them much as the 50 acres of shamba only belonged to Mabula & Brothers Company.

The issue is not whether or not the parties were husband and wife but rather whether division of matrimonial property was proper. It was very unfortunate that on that one, contrary to the respondent's testimony Su₂, Su₃ and Su₄ recognized no marriage between the parties.

Fundamental as it was, I will begin with the issue of jurisdiction. It being from 1990's or as the respondent and SM₄ put it 2013 parties may have cohabited each other and were blessed with siblings then the fact probably remained that although, according to Sm₄ no dowry was paid, they stayed happily until the year 2019 when it turned bitter and sour. With all intents and purposes therefore with all fairness by all stretch of the imagination there had been both presumed and constructive marriage in my considered view therefore an extension of customary marriage much as for whatever reasons no one of the appellant's parents/guardians had denounced the marriage. In fact the trial court had jurisdiction. Now that partly though she was supported by Su₄, the appellant's evidence that she had suffered four years constructive desertion it was not sufficiently

disproved by the appellant much as the parties and community had it in mind that the marriage was irreparably broken. There is no wonder at some point in time the respondent gave appellant a house at Mitindo area Misungwi, 2 commercial rooms and sh. 50.0 million as parting gift. The issue of prematurely instituted matrimonial proceedings therefore it should not have been raised.

The trial court is on record having had awarded the appellant 30% company shares, one house "for the children" and maintenance allowance for the children only that in terms of physical location the house was unknown leave alone amount of the said maintenance allowance. It is very unfortunate that against weight of the evidence on record the 1st appeal court it declared the appellant "illegal" wife! Much as also, the respondent is on record having had stated that from Misungwi where she lived before, long at last he brought the appellant home in 2007 and paid her maintenance allowances! Leave alone Sm₄'s unchallenged evidence that the respondent had paid no dowry much as it is common knowledge that payment or nonpayment of dowry alone it was no proof of marriage or invalidity of the marriage.

Besides appellant the respondent may have been married to a good number of wives yes, but on this one, and, with respect to division of

matrimonial property the respondent should have used polygamous life style only as a shield not as a sword! The property may have only been belonging to Mabula & Brothers Company Ltd yes, but only with respect to the respondent's shares the appellant was entitled to share much as no copies of the respective Memorandum and Articles of Association were produced in court with a view to establishing the respondent's position and shareholding capacity.

In the upshot, the appeal is allowed to the extent as hereunder; (a) the appellant gets thirty (30%) of the Company shares (b) a house located at Misungwi along Mwanza/Shinyanga Road (c) Eight (8) acres of shamba at Geita (d) shs. 200,000/= (two hundred thousand only) per month being maintenance allowance for the children (e) custody of the children (f) shs. 50,000/= per month being the plaintiff's maintenance allowance until she remarried. Each party shall bear their costs.

It is so ordered.

Right of appeal explained.


S. M. Rumanyika
JUDGE
26.05.2021

The judgment is delivered under my hand and seal of the court in chambers this 31.05.2021 in the absence of the parties.



S. M. Rumanyika

JUDGE

31.05.2021