IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 55 OF 2017

(Arising from the decision of the District Court of Kinondoni in Matrimonial Appeal No. 11 of 2014, originating from the decision of Kinondoni Primary Court in Matrimonial Cause No. 137 of 2010)

ZAKARIA KISANGALE.....APPELLANT

Versus

MARIAM ATHUMANI.....RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

In the appeal at hand, the appellant herein is aggrieved by the decision of Kinondoni District Court in Matrimonial Appeal No. 11 of 2014. The appellant has raised three grounds of appeal which are as follows;

1. *That the trial court erred in law and fact by holding that the appellant and respondent had acquired the reputation of being husband and wife.*

2. *That the trial court erred in law and fact by saying that the appellant's house was is (sic) a matrimonial house and hence awarding 25% to the respondent.*
3. *That the trial court erred in law and fact by failing to vacate the order for maintenance to the tune of Tshs. 200,000/= per month.*

The facts leading to this appeal are that, the respondent being the petitioner, successfully petitioned for a divorce, division of matrimonial assets and maintenance against the appellant. The respondent alleged the appellant in their subsistence of marriage used to abuse her. The respondent further alleged they had managed to acquire jointly a house in 2008. She took a loan so as to finish the said house since it was unfinished. The respondent alleged further to have managed to buy domestic items with the appellant.

On the other side, the appellant at the trial court admitted to have been in a relationship with the respondent. He further admitted they got a son christened Alexander Zakaria on 3/10/1986 and on 12/1/2008 they

were blessed with twins. However, the appellant alleged that during this whole period he had already contracted a Christian marriage with one Helena Giriago. The parties herein were cohabiting while the said appellant's wife was away. The appellant insisted the misunderstandings started in 2010, but he admitted the fact that the respondent had witnessed the sale transaction of the disputed house.

The trial court determined the matter in the respondent's favour. The appellant unsuccessfully appealed to the first appellate court hence this is the second appeal. The appeal was to be argued by way of written submissions. Both parties filed their respective submissions within the prescribed time.

In a so far as the first ground of appeal is concerned the appellant submitted, he had not married the respondent since he had already recognized Helena Giriago as his lawful wife. The appellant was of the view that he had already a valid marriage when he started living with the respondent.

Regarding the second ground of appeal, the appellant argued the respondent had failed to prove on a balance of

probabilities as per section 3 (2) (b) of the Evidence Act [Cap. 6 R.E 2002] as towhether the said house in dispute was acquired during the subsistence of the marriage. The appellant further submitted, the relationship they had was rebuttable since there was no evidence to prove they were legally married. He referred this court to the cases of **Hemed Tamim Versus Renata Mashayo [1994] T.L.R 197 and Arubushi Seif Versus Amina Rajabu [1986] T.L.R 221**to cement his position.

On the third ground the appellant challenged the award of Tshs. 200,000/= per month to the respondent for maintenance of the children since. He submitted there is no clear criteria which the trial court applied to reach to the amount awarded.

In reply, the respondent argued the appellant was wrong to attach annexures in his written submissions. She prayed the same be expunged from the court records. She cited the Court of Appeal's case of **The Registered Trustees of the Archdiocese of Dar es Salaam Versus the Chairman of Bunju Village Government and 11 Others, Civil Appeal No. 147 of 2006 (Unreported)** and the High Court decision of **Bish**

International and Another Versus Charles Yaw Sarkodie and Another, Land Case No. 9 of 2006 (Unreported).

In respect of the first ground of appeal, the respondent submitted, there was the presumption of marriage between herself and the appellant under **section 160 (2) of the Law of Marriage Act.** She supported this position by citing the case of **Elizaberth Swaliba Versus Peter Obera [1975] T. L.R 52.**

On the second ground, basically the respondent argued the said house was acquired during the subsistence of their marriage. She further alleged even the appellant did not dispute the said fact.

The respondent on the third ground opposed the appellant's position. She was of the view that, the appellant has now come up with new evidence to suggest the amount awarded for maintenance was unlawful. The respondent prayed the lower court decisions be sustained.

In his rejoinder, the appellant reiterated what he had submitted in his submission in chief. The appellant went further by praying the court to order for maintenance of the said twins but under his custody. He prayed the appeal be allowed with costs.

The issue is whether the appeal has merits or otherwise. Before I venture into the merits of the appeal, I must first determine the legal effect of the appellant attaching some annextures in his written submissions.

The court record reveals the appellant in his written submission in chief had annexed the purported marriage certificate between the parties herein; documents suggesting the appellant built the house in dispute as well as the copy of the judgment from the Court Martial and a Pension cheque to prove his income.

The respondent in her written submissions prayed the same be expunged from the court record but the cited case laws in support thereof which were not supplied to the court for quick reading. Be as it may, I concur with the respondent's position that it is trite law, attachments are not required to be annexed in the written submissions. In the case of **Leila Jalaludin Haji Jamal Versus Shaffin Jalaludin Haji Jamal, Civil Case No. 373 of 2001 (High Court) (Unreported)** Hon. Kyando J. (as he then was) at page3 held;

'...I wish in conclusion to comment on the matter of the procedure or practice. Mr. Kayanga

has attached annexture to his written submissions...Exhibits cannot be annexed to submissions or they cannot be tendered during submissions. Submissions are supposed to be elaborations or explanations on evidence already tendered. They are intended to contain arguments on the applicable law. They cannot themselves carry with them evidence. I reject the annextures of Mr. Kayange. I direct that they be returned to him...'

In a similar vein, in the case of **Prismo Universal Italian S.R.L Versus Termocotant (T) Ltd, Commercial Case No. 42 of 2004 (High Court Commercial Division) (Unreported)** Hon. Dr. Bwana, J (as he then was) made the following remarks and I quote;

'...It is long settled and it is sufficient to repeat here, that the purpose of submissions is not to testify on the part of the Counsel but to assist the court in highlighting certain points so as to enable it reach a proper and just decision...'

Despite the fact that the above stated legal position was amplified by the High Court which is merely persuasive,

authority. It follows then in my respective opinion that, the fact that the appellant had a valid Christian marriage before living with the respondent rebuts the presumption of marriage between the appellant and the respondent.

It can safely be said and concluded that the appellant and the respondent were not legally married. There is a chain of authorities to this effect among them the case of **Hemed Taminu Versus Renata Mashayo [1994] T.L.R 187.**

Considering the above analysis, the presumption of marriage was rebutted and as already observed the consequence being that there was no lawful marriage. In the given circumstances the issue of marriage and it be irreparably broken down does not arise. By any standard, any future marriage or presumption of marriage is void. The lower courts had invoked the provision of section 160, 114 (1) and (2) of the Law of Marriage Act (supra) but as already observed there was no presumption of marriage between the two hence the cited provisions do not apply in this matter.

In view thereof the first ground of appeal succeeds.

The second ground is a consequence of the first ground. There being no legal marriage and no dissolution thereof, then the division of the alleged matrimonial properties has no legs to stand on. It was thus wrong for both lower courts to have proceeded with the division of the alleged properties. It was upon the respondent to seek for this relief and others under the relevant governing provisions of law. On this stance the second ground of appeal is allowed.

Lastly my reasoning in regards to the second ground of appeal should apply to the third ground of appeal.

In the upshot, the appeal is allowed as prayed and both lower court judgments, decrees and proceedings are hereby quashed and set aside. I make no order for costs given the kind of relationship that existed between the two conflicting camps.

It is so ordered.

B.R. MUTUNGI

JUDGE

30/4/2018

Right of Appeal Explained.

B.R. MUTUNGI

JUDGE

30/4/2018

Read this day of 30/4/2018 in presence of appellant and in absence of the respondent dully notified.

B.R. MUTUNGI

JUDGE

30/4/2018