

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 25 OF 2017

(Originating from Matrimonial Cause No.27/2011 of Ilala District Court at Samora before Hon. Mwakalinga RM)

MARY RWEGASIRA..... APPELLANT

VERSUS

EVODI LAURENT..... RESPONDENT

Date of last Order: 1/12/2020

Date of Judgment: 18/12/2020

J U D G M E N T

MGONYA, J.

The Appellant herein above being dissatisfied and aggrieved with the Judgment and Decree of the Ilala District Court at Samora before Hon. Mwakalinga RM, appeals to this Honourable Court for the grounds set forth hereunder:

- 1. That, the trial Court Magistrate erred in law and facts when he considered that there was a presumption of marriage between the Applicant and the Respondent***

while the parties have never lived together as the husband and wife.

2. That, the trial Court Magistrate erred in law and facts when he considered the house of the appellant as the matrimonial asset and divide it among the parties where the Respondent is required to get 60% of his share and the Appellant 40% of her share while they were not husband and wife at all.

3. That, the trial Court Magistrate erred in law and facts when he denied to give the Appellant any chance to call her witnesses to testify on the issue of her relationship with Respondent. And also to testify on how she constructed her house.

From the above grounds of appeal, the Appellant prays for the following orders:

a) That, there was no presumption of marriage between the Appellant and Respondent;

b) That, the Respondent has no any share on the house of the Appellant;

c) That, the Appellant should be given chance to prove her case;

- d)That, the Judgment and decision of Ilala District Court be dismissed; and***
- e)Any other relief(s) this Honourable Court may deem fit and just fit to grant.***

Before I determine the said ground of Appeal, I have to state that this is one of the long stand Appeals in this Registry, one of 2017. The reason of its stay was due to the unavailability of the record from the trial Court as stated above. Efforts of both finding the record and the Respondent was done perpendicular. The efforts in search of the record was successfully while the Respondent's whereabouts for service of the instant Appeal proved failure. After getting some information from the Authorized leadership from where it is believed to be his resident as claimed by himself, this Honourable court ordered the Appeal be heard ***Exparte*** in order to protect the rights of both parties. The hearing of this Appeal was by way of oral submission, hence this Judgement.

As the Appellant's submission was brief to the point reflecting the three grounds of appeal. I don't intent in any way to reproduce the same and instead I prefer to straight determine the said appeal. Further in determining the above grounds of appeal,

I will determine only the 3rd ground of Appeal for the reason that I am going to reveal later.

Now as seen, the third ground of Appeal is to the effect that: The trial Magistrate erred in law and fact when he denied to give the Appellant any chance to call her witnesses to testify on the issue of her relationship with the Respondent and also to testify on how she constructed her house.

As I was going through the proceedings of the trial court in regard of this matter, it came across my eyes and knowledge that the matrimonial cause hearing at the trial court was ordered to be by way of written submissions.

Indeed, that order was adhered to, hence the Judgement which is subject of this Appeal. Now, one of the grounds as seen above is that the Appellant was not availed with time to call her witnesses to testify before the court in building her case.

I have to confess that upon knowing that the matter was disposed by way of written submission, and reading the judgement referring the exhibits there to, I was asking myself as to how can the case be heard by way of written submission and yet have exhibits in support of the parties' cases? How was the said exhibits tendered and admitted to be evidence of the case? I

say so since there was no any witness who was called for neither party nor admission of any exhibit in that respect. It came also to my knowledge that the **exhibits** that the trial Magistrate was referring was **annexures** which Parties annexed in support of their cases. These cannot be termed as **Exhibits**.

In order for the Exhibit to be admitted as evidence in a case, there must be a person, being a competent witness who will tender the same before the court and if not objected by the adverse party and from the court, then the same can be admitted for evidence. Annexures cannot form part of the evidence without being admitted by the court and become Exhibit that can be used by the court in support of the case. Failure to that, one cannot say that there were a fair hearing not only to the Appellant herein but also to the Respondent.

I was imagining as to how can a Magistrate reach to a point of declaring that there was a presumption of marriage without calling witnesses who will testify on seeing the parties living together? In that regard Witnesses be parties themselves or other people. When we are saying hearing of the matter in original jurisdiction, one is expecting to call witnesses and tender some exhibits if any to support his case. These are the important factors that will be used by the court to determine the matter and reach to a fair decision.

In the case of ***PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION V. AZANIA BANK CORP LIMITED; Court of Appeal in Dar es Salaam, Civil Appeal No. 117 of 2004 TLR 442***, it was observed that; Court should **NOT** dispense with witnesses. In further determination of the said Appeal, three Justices of Appeal held that:

"We have already stated that the learned judgement findings on disputed matters of mixed law and fact without evidence. In the absence of evidence such disputed matters cannot be determined on the basis of written submissions by learned advocates. Yet in his judgment, the learned judge was freely referring to "evidence" when there was none both oral and documentary.

In the result, we have no option but to declare the proceedings of the court from the 30.3.2004 and the judgment of the court a nullity. The omission to call witnesses was a fundamental procedural error. We order the hearing of the case to resume before another judge. Since no party is really the winner in this appeal, we make no order as to costs."

It is from the records of this matter that the obvious fact is that **the trial Magistrate did dispense with witnesses, an error which is fatal.** This error also caused failure by trial Magistrate to assess and evaluate evidence ought to have been adduced before him. As said, the termed exhibits in the judgement was not legally tendered but rather the same were just annexures to the written submissions of which cannot be regarded as evidence for determination.

In the case of ***STANSLAUS RUGABA KASUSURA AND THE ATTORNEY GENERAL VS. PHARES KABUYE, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 26 of 1981, [1982] TLR 338,*** held that:

"We have seriously considered whether we could assess the evidence of the witnesses from the typed record. We however are of the view that it is not possible to do so. We do not have the opportunity of seeing and hearing the witnesses. The trial judge should have evaluated the evidence of each of the witnesses assessed their credibility and made a finding on the contested facts in issue. He did not do so. In some cases and appeal court can be in as good a position as a trial court in evaluating the evidence of witnesses, but this is not one of those instances.

We have therefore no relevant material before us to base any finding.”

It is from the above legal anomaly and explanation thereto, I am of the firm view that, the judgement which emanated from the incompetent proceedings is fatally defective; it leaves contested material issues of fact unresolved. In fact, the same cannot be termed as judgement because it decided nothing, in so far as material facts are concerned. It is not a judgment which can be up-held or up-set. It can only be rejected. It is in fact a travesty of a judgment.

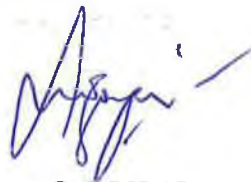
In the end result therefore, **I proceed to nullify all the trial court proceedings as they are nullity and set aside the trial court judgement for the reasons stated above.**

In that regard, **this appeal has merits and is therefore allowed.**

I don't make any order as to costs.

Right of Appeal Explained.

It is so ordered.



**L. E. MGONYA
JUDGE
18/12/2020**

Court: Judgment delivered in my chamber in the presence of the Appellant in person and Ms. Msuya Bench Clarke in my chamber today 18th December, 2020.



L. E. MGONYA
JUDGE
18/12/2020