

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 180 OF 2019**

**BETWEEN**

**RITHA MATHEW TEMU AND BERNARD ABRAHAM TEMU**

**(As Joint Administratrix /Administrators of the estate of the Late)**

**ABRAHAM BERNARD TEMU) ..... APPELLANTS**

**OLIVA AMULIKE ..... RESPONDENT**

*Date of last Order 21/4/2021*

*Date of Judgement 08/07/2022*

**JUDGEMENT**

**MGONYA, J.**

Appellants herein **RITHA MATHEW TEMU AND BERNARD ABRAHAM TEMU** as joint Administrators of the estate of the Late **ABRAHAM BERNARD TEMU**, are dissatisfied with the Judgment and Decree of the District Court of Ilala in **Matrimonial Cause No. 64 of 2009** between **Olivia Amulike** and **Ibrahim Bernard Temu** the Deceased, hence appealed to the High Court against the whole decision on the following grounds:

- 1. That, the learned Resident Magistrate erred in law and fact in holding that a presumption of marriage existed between Oliva Amulike and Abraham Bernard Temu deceased, while there was a subsisting Christian marriage between Abraham Bernard Temu (deceased) and Ritha Mathew Temu in doing so the learned Magistrate erred by taking to note that since marriage could not have existed over a subsisting Christian marriage;***
- 2. That, the learned Resident Magistrate erred in law and fact in ordering division of matrimonial assets and giving twenty (20%) of the landed property to the respondent; and***
- 3. That the learned Resident Magistrate erred in law and in fact in ordering the division of the property in "Uwanja wa Ndege: which was under joint occupancy of the late Abraham Bernard Term and Ritha Mathew Temu.***

Apart from the above grounds of appeal, the Appellants prayed the court the following orders:

- (a) Quashing and setting aside the decision of the District Court in its entirety;***

***(b) Costs of this appeal and the court below; and***

***(c) Any other relief(s) as the Honorable court may deem just to grant.***

At the hearing of the appeal, parties granted their prayer on written submissions. Appellants were represented by Samah Salah and Gaspar Nyika, Advocates from IMMMA Advocates while the Respondent appeared in person with assistance on drafting of the pleadings from the Legal and Human Rights Centre.

Submitting on the **first ground of appeal**, the Appellants' counsel stated that the presumption of marriage under **Section 160 (1) of the Law of Marriage Act, Cap. 29 [ R. E. 2019]** between the Respondent and deceased was rebutted where proved that the deceased contracted a Christian marriage with Ritha Mathew Temu. It is the Appellant's position that the said section of the law on presumption of marriage cannot be invoked where a party to matrimonial proceedings has contracted a marriage under the Law with a third party.

On the **second ground of appeal**, the Appellants' counsel submitted that the trial court misdirected to order division of the matrimonial properties to a non-existence of valid marriage. The Respondent and the Deceased were not legally married nor the evidence on record showing that the Respondent contributed to

the acquisition of the properties. So in the above circumstances, it is the Appellants' view that the court had not vested with the said power provided under **Section 114 of the Law of Marriage Act** to order division of matrimonial properties to the Respondent.

Further, the record showed that the deceased testified to have built three houses with the Co-Administrator Ritha Mathew Mushi, at Airport built in **1980-1983**, Ilala Sharif Shamba in **1983** and Tabata in **1982**. Then produced Residential licence (Exhibit D3), a Sale Agreement (**Exhibit D4**) and a receipt of payment of the third house (**Exhibit D5**) were not contradicted evidence to the Respondent.

Lastly, the Appellants' counsel submitted on the **third ground of appeal** that the illegality of an order for division of the property in Uwanja wa Ndege (Air Port). Based on the record, that the Deceased **DW1** built the **Exhibit DE3** in between **1980 and 1983**, Meanwhile, the trial court's record showed that the Respondent and deceased had commenced their relationship in **1987**. It is the Appellants' submission that the property at Airport (Uwanja wa Ndege) was matrimonial property owned by Deceased and Co-Administratrix Ritha Mathew Temu.

From the above submissions, the Appellants' counsel prayed the court to uphold the grounds of appeal and quash and set aside the trial court decision with costs.

In submitting against the appeal and in regard of the **first ground of appeal**, the Respondent avers that the presumption of marriage is only used as evidence to prove the possibility of the two parties temporally living together and putting their efforts together on the acquired property. The purposes exist are not only to declare the status of the marriage rather to help on how the court should distribute the joint effort regarding their contribution.

Further submitting on the **second ground of appeal**, that the Respondent maintained the facts she lived together with the deceased for more than two years then they acquired joint properties. Joint properties were not only acquired in legal marriage or legal union rather what matters is the joint effort applied to acquire properties. It is the Respondent's concerns that she did not see the contradiction between the presumption of marriage or existence of another marriage and acquisition of joint properties with another person separately.

Moreover, on the **third ground of appeal** the Respondent also submitted that she lived with her late husband since **1995** in

line with customary marriage as a result made efforts jointly and acquired assets including the property in Uwanja wa Ndege. The Respondent maintained that the Appellants' question on legality of division of the property was baseless.

In rejoinder, Appellants' counsel maintained that what they have submitted on the trial court that misdirected on the principle of presumption of marriage and illegality of the order of division of matrimonial properties which are reflected in their submission in chief. Thus prayed for the Appeal be granted.

In determining this appeal before the Honourable court, the crucial question here as to whether the appeal before the court has merit.

Basing on the **first ground of appeal**, that the essence of **Section 160 (1) of the Law of Marriage Act** is to create a rebuttable presumption of marriage between a man and woman, to prove that they lived together for two or more years and acquired the reputation as husband and wife. There is nothing under the law which only suggests that presumption of marriage is for purposes of distribution of jointly acquired properties.

The trial court's records shows that the Deceased had contracted Christian marriage with Co-Administrator Ritha Mathew Temu and undeniable facts that the Deceased had

relationship with the Respondent which resulted to have three children.

From the above facts, it is obvious that the Respondent and the Deceased were not qualified under the law to that presumption of marriage as were no proof undertaken to legalize their relationship in any way. Considering the **Exhibit DE1** (a marriage certificate of the Deceased Ibrahim Temu and Ritha Mathew) which proves the legal marriage and encompasses the environment of **Section 15 (1) of the Law of Marriage Act**, states that; *"No man, while married by a monogamous marriage, shall contract another marriage."* Also, it was held in the case of **YOHANE AMANI LYEWE V. THEODORY MWAYA, Civil Appeal No. 22 of 2017 (Unreported)**, that:

*"The law is clear that no man, while married in a monogamous marriage, shall contract another marriage see section 15 (1) of the Act. Under the circumstances, presumption of marriage under section 160 of the Act - cannot stand."*

However, the presumption of marriage is only used as evidence to prove the possibility of the two parties temporally living together and putting their efforts together on the acquired property. The joint contribution must be established and proved

by the party who asserts it, a mere mentioning properties cannot be taken as evidence to the court of law. The purposes exist is to help on how the court should distribute the joint effort regarding their contribution. Thus the first grand have merits.

In determining the **second and third grounds of appeal** as to whether the order of the trial court on division of the matrimonial properties and giving **twenty (20%)** to the Respondent was proper. The records shows that the Deceased and the Respondent had relationship for years. The Deceased was a businessman and the Respondent was employed as the record depicts that she had a regular source of income. The property which mentioned of Uwanja wa Ndege said to be of joint effort, was acquired or built in between **1980 and 1983** and there was no more evidence on record to show that the Respondent contributed to the acquisition of the properties. It is mere the trial court's assumption that the Respondent had a regular source of income and hence she contributed towards the properties.

In my firm view that, the above circumstances the trial court was not vested with the said power provided under **Section 114 of the Law of Marriage Act** to order division of matrimonial properties to the Respondent. First the property in Uwanja wa



Ndege was not a matrimonial or joint property to the Respondent and the Deceased, and **second**, there was no evidence brought before the court to prove her contributions to the deceased properties where this court could consider in distribution. In the case of **ZAKARIA KISANGALE VS MARIAM ATHUMAN, PC Civil Appeal No. 55 of 2017, (Unreported)** it was held that:

*"... 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..."*

Further, the records depict that the deceased have built his three houses until or around **1983** and before he met the Respondent, this signified that the Respondent did not in any way contributed in the acquisition of the properties. Hence the division of the properties at Uwanja wa Ndege based on wrong principle of law. **The two grounds all together are meritorious.**

In the event therefore, **the Appeal before this honourable court is hereby allowed and the trial court decision is set aside to the extent of legal status of the Deceased and the Respondent, and the division of the matrimonial assets for the said 20%.**

No order as to costs.

Right of Appeal Explained.



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**L. E. MGONYA**

**JUDGE**

**08/07/2022**

**Court:**

Judgement delivered before Honourable **J. Luambano Deputy Registrar** in the presence of the Respondent in person and in the absence of the Appellant; and Mr. Richard RMA on this 8<sup>th</sup> day of July, 2022.



A handwritten signature in blue ink, appearing to read "Mgonya".

**L. E. MGONYA**

**JUDGE**

**08/07/2022**