**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE SUB-REGISTRY OF MWANZA**
**AT MWANZA**

**CIVIL APPEAL NO. 59 OF 2023**

*(Originating from Matrimonial Cause No. 23/2022 of Misungwi Primary Court and arising from Matrimonial Appeal No. 04/2023 of Misungwi District Court)*

**KULWA CHARLRES MIGEKA.....APPELLANT**

**VERSUS**

**PRISCA GERVAS.....RESPONDENT**

**JUDGMENT**

*07th February & 16th February, 2024.*

***Kilekamajenga, J.***

The appellant sued the respondent in the Primary Court of Misungwi seeking a decree of divorce and division of property that he acquired with the respondent during their joint stay as husband and wife. The information contained in the file shows that, the respondent is a traditional healer who officially contracted her marriage with Michael Ng'wakami on 27th July 2013. There is no evidence to prove whether such a marriage was ever dissolved by the court. On his side, the appellant alleged to have cohabited with the respondent from 2019 until in 2022 when the appellant discovered that the respondent is still married to another man. The appellant alleged to have acquired several properties with the respondent prompting a claim for division of such properties.

In his evidence, the appellant alleged to have acquired the following properties with the respondent: six houses, four of those houses are roofed with iron sheets while two are roof grassed huts; three cows, thirty iron sheets, one bicycle, two bags of maize, two bags of dried cassava, four bags of dried sweet potatoes chips (mchembe) and two million shillings. On the other hand, the respondent's evidence showed that, the appellant lived with the respondent as a mere client who sought traditional healing and never became her husband because she is still married to another man. After considering the evidence, the trial court ordered the sale of all the above properties and equal division of the same.

Being unhappy with the decision of the trial court, the respondent appealed to the District Court of Misungwi which quashed the decision of the trial court on the ground that doctrine of presumption of marriage does not apply where one of the couple was still under a subsisting marriage. The appellant was aggrieved hence appealed to this court with five grounds of appeal coached thus:

1. *That the trial court erred in law and fact for failure to recognise and appreciate the appellant contribution in acquisition of matrimonial asset.*
2. *That the trial court erred in law and fact by using evidence and exhibit D3 which is marriage certificate in the absence of adulterous association.*
3. *That the trial court erred in law and fact for failure to consider that the evidence adduced in the Misungwi Primary Court in matrimonial cause No. 23/2023 proved without doubt that the appellant and the respondent lived*

*as husband and wife for more than 2 years in the circumstance of unknown of another marriage.*

4. *That the trial court erred in law and fact for failure to consider the evidence adduced in the Misungwi Primary Court in Matrimonial Cause No. 23/2023 that the appellant and the respondent lived as husband and wife for more than 2 years in the circumstances of concealment behaviour developed by the respondent that she was married to another man before.*
5. *That the trial court erred in law and fact for failure to consider the evidence adduced in the Misungwi Primary Court that the appellant and the respondent obtained matrimonial assets while living together as husband and wife and that the matrimonial properties must be divided equally to the parties.*

The hearing of the appeal brought the attendance of both the appellant and respondent. Whereas the appellant appeared without representation, the respondent appeared with the legal services of the learned advocate, Mr. Vian Mbuya. In addressing the grounds of appeal, the appellant who was a lay person impugned the decision of the District Court of Misungwi because it denied him the right to own his properties. He urged this court to reverse the decision of the District Court arguing that he lived with the respondent as his wife for three years i.e. from 2019 to 2022. During their union, they jointly acquired some properties namely, three plots of land in his name at Ng'ombe village within the hamlet of Chamela. He bought such pieces of land from Deus Musa Matungelo, Toma Mhoja and Maria Shilinde Mpanduji. The two plots had houses and one plot had no house;

they thereafter constructed four houses. The appellant worked as a small miner at Kakola gold mine and was therefore financially stable to purchase the contested properties. During the purchase of the plots, he was the one signing the sale agreements. However, he had no proof whether he was giving money to the respondent.

He further argued that, during the trial of the case, he summoned two witnesses namely, Makoye Mashindano and Joseph Lupande and tendered some documents. However, the persons who sold the pieces of land to him testified against his case because they requested money before they could appear for the testimony. The appellant told the court that, after they lived together for such a period, the respondent chased him away. As the dispute continued, he lodged the dispute in the Primary Court where he won the case. The respondent appealed to the District Court where she won the case hence the instant appeal. He implored the court to consider the grounds of appeal and decide in his favour.

In response, Mr. Vian Mbuya for the respondent argued that, the appellant lived in the respondent's home as a client because the respondent is a traditional healer. The appellant could not have been considered a husband as per section 160 of the Law of Marriage Act, Cap. 29 RE 2019. During this time, when the appellant lived in the house of the respondent, the respondent's husband who is Michael

Gw'akami Paulo Mwasela and a business man at Kisesa was visiting his family. The properties alleged to have been jointly acquired by the appellant with the respondent were, in fact, acquired by the respondent. The appellant failed to prove whether he purchased such plots of land in his own name. The exhibit tendered on the prove of ownership of the contested houses bear the name of the respondent (Prisca Gervas). All the persons who sold the plots of land to the respondent appeared before the trial court and testified in support of the respondent's case. The respondent got her income from the business of traditional healing and she had capacity to procure the contested properties.

He further argued that, the parties in this case cannot be considered as husband and wife under section 160 of the Law of Marriage Act because the respondent is still married to Michael Gw'akami and the same marriage has not been dissolved by any competent court. Under section 9(2) of the same Act, a monogamous marriage is a union of one man and one woman to the exclusion of all others. Also, section 15(1) of the Law of Marriage Act, prohibit a person in the monogamous marriage to contract another marriage while the first marriage subsists. Section 9 and 15 of the Law of Marriage Act are interpreted in the case of **Agnes Adam v. Erick John Shewiyo**, PC Civil Appeal No. 34 of 2021 at page 13 where the court quoted the case of **Francis Leo v. Paschal Simon Maganga** (1978) LRT No. 22. The case of **Agnes Adam** (*supra*) has similar facts to the case at hand and

therefore the circumstances of the case cannot lead to presumption of marriage. Based on the reasons stated, even if the appellant and respondent cohabitated, they cannot be presumed as husband and wife as per section 160 of the Law of Marriage Act because the respondent is still under a subsisting marriage.

In his view, section 114 of the Law of Marriage Act only applies where there is a decree of divorce or separation. Therefore, there must be a valid marriage. In the case at hand, there was no marriage because the respondent is still under a subsisting marriage. Allowing his appeal will fault the intent of sections 9 and 160 of the Law of Marriage Act. It is the principle of the law that, whoever comes to equity must have clean hands. Even if the appellant cohabited with the respondent, he is guilty of adultery because there is a valid marriage. He prayed for the appeal be dismissed with costs and the decision of the District Court be upheld.

When rejoining, the appellant urged this court to investigate this matter and reverse the decision of the District Court because he spent his energy in the contested houses and that, the whole community knew him as the respondent's husband. He urged the court to do justice in this matter.

In the instant case, as stated above, the appellant and respondent started to live together in the circumstances that may invite the application of the doctrine of



presumption of marriage. The appellant alleged to have cohabitated with the respondent since 2019 until 2022. The appellant later discovered that the respondent had a subsisting marriage which has not been dissolved by a competent court. In his claim, the appellant was entitled to the division of the properties that they had jointly acquired.

On the other hand, the respondent denied the applicant's allegation; she argued that, the appellant joined her family as a client who sought traditional healing. The respondent consistently denied to have any sexual relationship with the appellant. She alleged to have purchased the contested properties from the business of traditional healing. For academic reasons, I am tempted to test the provision of section 160 of the Law of Marriage Act to the circumstances at hand. The section provides:

> *"(1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*
> *(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."*

Precisely, the couple may benefit from the provisions of subsection 1 where, **first**, they lived together for two years or more; **second**, they have acquired a reputation of being husband and wife. Evidence from the surrounding community is always pertinent in proving whether or not they acquired the reputation of being husband and wife. When the community considered them as husband and wife, they may be presumed as husband and wife. **Third**, both of them must be competent to contract a valid marriage. In the circumstances where either of them is prohibited by law to contract a valid marriage, they cannot be presumed to be dully married.

In the case at hand, the parties are in agreement that, the respondent contracted a Christian marriage with Michael Ngw'akami in 2013 and such a marriage still subsists. A Christian marriage, unless the contrary is proved, is presumed to be a

monogamous marriage as **per section 10 (2) of the Law of Marriage Act**. The section provides that:

> *"(1) Marriages shall be of two kinds, that is to say–*
>
> *(a) those that are monogamous or are intended to be monogamous; and*
>
> *(b) those that are polygamous or are potentially polygamous.*
>
> *(2) A marriage contracted in Tanzania whether contracted before or after the commencement of this Act, shall–*
>
> *(a) if contracted in **Islamic form** or **according to rites recognised by customary law in Tanzania**, be presumed, unless the contrary is proved, to be polygamous or potentially polygamous; and*
>
> *(b) **in any other case, be presumed to be monogamous**, unless the contrary is proved."* (Emphasis added).

Also, inline with section 15 of the Law of Marriage, the respondent was incompetent to contract any subsequent marriage as long as the first monogamous marriage exists. I find it apposite to reproduce the section that:

> *"(1) No man, while married by a monogamous marriage, shall contract another marriage.*
>
> *(2) No man, while married by a polygamous or potentially polygamous marriage, shall contract a marriage in any monogamous form with any other person.*
>
> *(3) **No woman who is married shall, while that marriage subsists, contract another marriage.***
>
> *(4) Nothing in this section shall be construed as preventing the parties to a marriage to go through another ceremony of marriage: Provided that where*

*parties who are already married go through another ceremony of marriage, such subsequent ceremony shall not, subject to the provisions of subsection (5) of section 11, affect the status or the legal consequences of their first marriage."*

Consequently, the appellant's union with the respondent regardless of the length of time cannot constitute marriage. Such a union leads to a void relationship as per section 38(1) (c) of the Law of Marriage Act. The same stance was taken in the case of **Francis Leo v. Paschal Simon Maganga** (1978) LRT 22 where this court stated that:

*"A Christian who has neither renounced his faith nor divorced his wife has no capacity to marry another woman and therefore cannot invoke the presumption under section 160 in his favour."*

Possibly, the most relevant issue is whether or not the court may order division of properties jointly acquired by the parties after their union fails the tests of subsection 1 of section 160 of the Law of Marriage. In fact, that was the most nagging request from the appellant. The appellant consistently argued that, he jointly acquired several properties with the respondent and therefore deserves an order of division. In his view, he deserves the protection of section 160(2) of the Law of Marriage Act. In my view, for a person to benefit from the provision of subsection 2 the following elements must exist: **first**, the man and woman must have lived for two years or more; **second**, the presumption of marriage must have

been rebutted, in other words, the union has failed the tests of subsection 1. Now, where there is a child of that union and parties jointly acquired some properties, the following things may be done; **one,** the woman may apply for maintenance for herself and for every child of the union; **two**, either the woman or man may apply for other reliefs which are normally granted by courts after the order of divorce or separation.

On this point, I subscribe to the line of argument advanced by the appellant that, after the presumption was rebutted, he was entitled to the order division of assets. However, there must be evidence proving that he contributed towards the acquisition of the contested properties. In proving the contribution, the appellant tendered exhibit P1 and P2. The two exhibits intended to prove that, him together with the respondent purchased two pieces of land from Maria Shilinde and Deus Musa. Nevertheless, when Deus Musa and Maria Shilinde appeared during the trial, they denied selling any land to the appellant. The two witnesses testified to have sold their pieces of land to the respondent. Furthermore, the exhibits are photocopies which do not bear any photos of the seller and purchaser and have no persons who approved the sale of the land. In my view, the two exhibits did not qualify to be admitted into the record.



On the other hand, the respondent tendered three original sale agreements proving that she purchased pieces of land from Thomas Mhoja, Maria Shilinde, Stephano Maguzu and Deus Musa. When called for the testimony, Thomas Mhoja Maria Shilinde and Deus Musa all confirmed to have sold their pieces of land to the respondent. In other words, the appellant had no evidence to prove whether he contributed in the purchase of the contested properties. On the balance of probability, the appellant's case was so weak as compared to the respondent's testimony. I am actually saddened by the approach taken by the trial court for ordering sale and equal division of the respondent's properties despite dearth of evidence to prove the appellant's contribution. On this point, the District Court was justified in quashing and setting aside the decision of Primary Court. Based on the reasons stated above, I find no merit in the appeal and hereby dismiss it with costs. Order accordingly.

**DATED** at **Mwanza** this 16th day of February, 2024.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**16/02/2024**



**Court:**

Judgment delivered this 16th Day of February 2024 in the presence of the appellant but in the absence of the respondent. Right of appeal explained to the parties.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**16/02/2024**