IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC CIVIL APPLICATION NO. 99 OF 2017

(Originating from PC Civil Appeal No. 24 of 2015 Arusha High court)

BANKO MAGEKA.....APPLICANT

VERSUS

CLEMENSIA THOMAS NYAKAKA.....RESPONDENT

RULING

20/9/2018 & 2/11/2018

MZUNA, J.:

BANKO MAGEKA has filed this application for certification on a point of law with leave to appeal against **CLEMENSIA THOMAS NYAKAKA.** The application has been preferred under Section 5 (1) (c) and 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 45 (a) and Rule 47 of the Tanzania Court of Appeal Rules, GN No. 36 of 2009. The application is made by chamber summons supported by an affidavit deponed by Frida Magesa. There is also a counter affidavit of Aziza Ahmed Shakale in opposition.

During hearing of this application Mr. Joshua Mambo and Ms. Aziza Shakala the learned counsels appeared for the applicant and respondent respectively.

Apparently according to the available facts on record the appellant and the respondent had a relationship which resulted into being blessed one issue. There seems to be a different version the exact period when they started to cohabit and whether at the time they got that issue there was a recognized marriage. There was also raised issue of a house and whether it was subject for division.

Arguing this application, the learned counsel opted to adopt the filed affidavit and the memorandum of appeal whereby the said points of law have been discussed.

He argued that the first point of certification is that there was the marriage between the intended appellant and intended respondent which was customarily made after dowry and having cohabited for 8 years of marriage whereby they obtained one issue.

The second point is that cohabitation started in 2001 not 2006 as found by the trial Judge. Then it ended in 2009. That, even assuming it started in

2006 still there was a presumption of marriage as the community knew them and had one issue.

The third point is that they cohabited for more than two statutory years which shows there existed a presumption of marriage.

The fourth point of law is that there was no need of legitimization of a child born inside the wedlock and therefore there is need for the Court of Appeal to determine it. He prayed for this application to be granted.

In reply, Ms. Aziza Shakale the learned counsel submitted that their counter affidavit be adopted and specifically at paragraph 4 where it is argued that there is no point of law involved. That all the points which have been raised both in the affidavit and during hearing of this application were discussed by this Honourable court and therefore there is nothing new worth consideration by the Court of Appeal. That, only deserving cases should reach the Court of Appeal. She prayed for this application to be dismissed with costs.

In his rejoinder submission, the learned counsel for the applicant reiterated his points that the application should be allowed.

Having considered the submissions from both counsels, I agree entirely with the learned counsel for the applicant that there exist points of law worth consideration by the Court of Appeal, namely:-

First, whether there existed marriage between the intended appellant and intended respondent?

Second, whether the child was born inside the wedlock or outside the wedlock that would need legitimization?

Ms. Shakale the learned counsel has argued that all points were discussed by this court, however there is also a different version from the District court which would need for the Court of Appeal to put the record on the points of law right.

For the above stated reasons this application is allowed with no order for costs.

HIGH COURT OF TANZANIA

M. G. MZUNA,

JUDGE. 21/11/2018