IN THE HIGH COURT OF TANZANIA

AT IRINGA

MATRIMONIAL APPEAL NO.1 OF 2010

(From Matrimonial Cause No.1 of 2007 of Njombe District Court)

YOKOBETI SIMON SANGA.....APPELLANT

VERSUS

YOHANA SANGA.....RESPONDENT

JUDGMENT

UZIA, J.

Way back on 14th January, 2002, the marriage between Yokobeti Simon Sanga (the appellant) and Yohana Sanga (the respondent) was dissolved before the Primary Court of Makete District at Lupalilo. However, the question of division of matrimonial assets was not properly determined. Therefore the petitioner now the appellant lodged a petition in the District Court of Njombe District at Njombe for the division of the matrimonial assets. Among others, she prayed to the court for division of the assets and for distribution of profits of the business from 2002 to the date of judgment. Unfortunate, things turned against the petitioner/appellant as the District Court of Njombe presided over by Hon. P. S. Mazengo learned Resident Magistrate dismissed the petition with costs. She dismissed the appeal on the ground that the petitioner failed to prove on the balance of probabilities the existence of the properties as she listed

thereto, that the existed properties were not registered in the name of the respondent, that the question of joint efforts did not arise and that many properties obtained after separation of the parties.

The appellant being dissatisfied with the Judgment and Decree of the trial Court appealed to this court against the same. The Memorandum of Appeal contains five grounds which can be summarized as follows;

One, the lower court erred in law and fact in holding that a separation of married spouses is equal to dissolution of marriage. **Two**, the lower court erred in law and fact in holding that the appellant had deserted the respondent, her husband for 25 years. **Three,** the lower court erred in law and fact in holding that the appellant was not entitled to a share of property acquired jointly during the existence of her marriage from 1966 to 2002. **Four,** the lower court erred in law and fact in holding that the appellant did not prove the existence of matrimonial property when the respondent did not dispute or challenge the existence of the said property as evidenced by the appellant's son PW2. **Five**, lower court erred in law and fact in not ordering the equal distribution of the said matrimonial property.

The appellant is represented by Mr. Mkumbe, learned counsel and on the other side Mr. Mbogoro, learned counsel represented the respondent. This Court allowed them to argue the appeal by way of written submissions.

In support of the Memorandum of Appeal, Mr. Mkumbe opted to argue the said five grounds together as they are closely intertwined and hinge on the question of the alleged separation of the parties.

He submitted that, there was no decree of separation issued to the parties by any court of law. He cited section 106 (1) of the Law of Marriage Act, [Cap.29 R.E. 2002] and stated that in brief, the section says that every petitioner for a decree of separation or divorce shall file a petition for the same. That, filing for a decree of separation must mandatorily made by petition to the Court. He contended that in the matter at hand, there was no such decree of separation issued by any Court. It was in his submission that the trial lower court erred in law and fact in holding that there was a separation between the parties while the relevant decree was never issued.

He further strengthened his argument by using the case of JOHN KAHAMILA v. PASCHAL JONATHAN (1986) TLR. 104, that a marriage may only be dissolved by a court of law and not by long separation of spouses. That until the marriage is properly dissolved the second respondent is stil the appellant's wife, their separation notwithstanding. That being the case there was no separation at all between the parties for 25 years as it was held by the trial court.

Mr. Mkumbe went on submitting that, apart from the argument on

separation, there are facts which show that, the parties were never separated at all. He described the said facts as follows. **One,** the respondent claimed in the trial court that the appellant had separated for 25 years and for all those 25 years there were no communication, that was not true because, despite of this situation, still the respondent did not take any legal action to redress the same. **Two,** the respondent is a knowledgeable person because he knew that for a decree of divorce to be issued, he had to petition the Court under section 106 of Cap.29 which also caters for separation. That it defies any logic as to why the respondent did not also use the same section 106 of Cap.29 to petition for separation if it is true that he had separated from his wife for 25 years without communication.

He further submitted that the fact that the respondent did not take any action for 25 years shows clearly and tallies with the appellant's assertion that, it was the respondent who told the appellant in 1977 to go home for the purpose of assisting him in attending farm business which was their joint business. The respondent was transferred to the farm in Makete District so that he could take his second wife MARIAM SIMON (DW5), who happened to be his second wife. The facts disclosed were that, in 1977 DW5 moved into the matrimonial home of the appellant and the respondent before marriage between him and the appellant was dissolved. He therefore submitted that all the talks about separation were of no use to the respondent by denying the appellant's rights to matrimonial property while DW5 is enjoying the appellants sweat.

With regard to the issue of property acquired before the Law of Marriage Act which was passed in 1971, Mr. Mkumbe among others submitted that, all marriages consummated before 1971 were recognized to be legal marriages as if they had been made under the Law of Marriage Act. He referred the court to Section 165(1) Cap. 29. He further submitted that the cited section had the retrospective effect of bringing under the ambit of the 1971 Law of Marriage Act all marriages existing before 1971. That is to say, the matrimonial property acquired before 1971 is liable for division under the present Act. On the strength of law Mr. Mkumbe argued that the properties which existed before 1971 and which the respondent does not dispute, is the house on plot No. 15 Block C in Njombe Town. That the trial lower court excluded it from the assets acquired jointly by the appellant and the respondent.

On the issue of proof of the existence of matrimonial properties, Mr. Mkumbe strongly faulted the holding of the trial magistrate by referring to page 13 and 14 of the trial court's proceedings in which the assets were displayed and which they were alleged to have existed. He also stated that the respondent did not dispute that the said properties existed. He faulted the trial magistrate and submitted that according to practice in Tanzania, a litigant does not have to prove a point or fact which is not denied or disputed by the opposite party. That there was no need for the appellant to prove the existence of the properties which the respondent had not denied or disputed. That the trial court itself had perused the registration cards of the motor vehicles and the plot for the houses.

That the same were not tendered as exhibits and for that reason the learned counsel prayed this court to peruse copies attached to the written submission. He cited Order XXXIX Rule 27(1) (a) of Cap.33 R.E. 2002 to support his prayer.

Mr. Mkumbe forcefully countered the trial court on issue of motor vehicle registration cards. He further submitted that the appellant in her evidence stated that in 1977 she was told by the respondent to go home to assist in farming. That they had a farm business too which they owned jointly. These farms were in Makete and they basically grew crops for food purposes. Infact that statement was not challenged by the respondent. Mr. Mkumbe went on submitting that the respondent was able to buy or own all those motor vehicles and houses because the appellant was taking care of the farms in Makete and growing food crops like maize and beans for food. Naturally the respondent would not have had the strength and mental composure to enable him buys the said properties if him and his family were had no food. The efforts of the appellant in producing food contributed to the acquisition of the cars and houses. He strengthened the contention by citing BI HAWA MOHAMED v. ALLY SEFU (1983) T.L.R. 32

It was alleged that there were family problems occasioned by the appellant. Mr. Mkumbe, learned Counsel countered that allegation and contended that the allegations contained in the trial Court's proceedings at pages 6; 8 and 11 were questionable and irrelevant. He submitted that the issue before the lower court was that of division of property, not concerning a guilty party

neither about divorce. That, it was presumptuous for the court to hold that the appellant was the source of the family problems simply because she did not oppose the divorce. With regard to his argument Mr. Mkumbe cited the case of ROBERT ARAYO v. ZENA MWINJUMA (1984) TLR.7

He thereafter concluded his submissions by urging the court to quash the decision of the District Court and order division of matrimonial assets on a 50/50 basis between the parties.

In reply Mr. Mbogoro, the learned Counsel argued and contended that there was no decree of separation issued by any court of law, but the truth remains that the parties were separated. He submitted that the question of separation may or may not be a consequence of a court decree. That, separation which is ordered by the court is the type of separation requiring a decree to be issued but the separation at hand occurred between the two parties does not require a court decree as it is a *defacto* separation.

Mr. Mbogoro learned Counsel referred this court to the trial court's record which explains the reason why the parties were separated. That the applicant had a habit of stealing some matrimonial properties and entrusting them to her relatives. That, this act caused the respondent to take the Appellant back to her relatives, Makete District, in order that she can be taught the manners of living with a husband. That, after sending her back to her parents, the respondent

waited for sometimes to see any reaction from the appellant and her parents but did not see any attempt to return back to her matrimonial home at Njombe.

Mr. Mbogoro went further contending that the respondent did make a follow up trying to convince the appellant to return home but the appellant had no *animus revertendi* (intention to return). Those series of meetings at both church as well as parents levels which were held aiming at requesting the appellant to return to her matrimonial home did not bear fruitful results.

Mr. Mbogoro submitted that for separation to be recognized for purposes of division of matrimonial assets, no court decree is mandatory, since separation is a matter of fact and not law. He insisted that separation may exist even in absence of court decree since it is a question of fact. That, section 106(1) of the Law of Marriage Act [Cap. 29 R.E. 2002] is applicable in circumstances where the said separation is to be ordered by court.

Mr. Mbogoro further replied that there are minutes of meeting of church elders to resolve the differences that existed between the parties and persuading the appellant to go back to her husband but all in vain.

Mr. Mbogoro went on insisting that the separation which existed between parties was caused by the appellant's own misconduct of stealing matrimonial properties and giving the same to her relatives. He once again stated that

separation of fact and not law and that one needs no knowledge of law to know that the two things or people are separated. He submitted that the argument of counsel for the appellant which is grounded on the case of JOHN KAHAMILA v. PASCHAL JONATHAN (supra) is irrelevant as to establish the question of whether or not the parties were separated, rather it would be meaningful to employ the same for purposes of establishing marital status of the parties thereto. That if the respondent equated the long separation with divorce then had no reason to petition for divorce, but he petitioned for divorce on an understanding that they were still husband and wife until a divorce decree was granted.

Mr. Mbogoro further replied that the story that the appellant was at Makete farming matrimonial farms for 25 years is a concoction and an afterthought. His submission is that the parties were married and lived together for eleven years from 1966 t0 1977. It is also not true that the respondent did not take any action to rescue the long separation and therefore there were meetings at different levels with a goal of pursuing the appellant to return to the matrimonial home.

On the issue of division of matrimonial assets the learned counsel cited and reproduced section 114 (2) (b) of Cap.29. He invited this court to look on the same section in which the law clearly states that the extent of contribution made by each party is a factor relevant to be considered in making an order for distribution of matrimonial assets. He submitted that with a separation of 25

years, the appellant living in Makete district to her parents' home and the respondent living in Njombe, with all the children of the marriage being under the care of the respondent, that, would mean that no contribution would one expect from the appellant towards acquisition of the said assets as to entitle the appellant to any division.

The division of which could be accommodated in mind of any reasonable person would have been of the properties which were acquired from 1966 up to 1977 when the parties were living together. That, even if there exist anything obtained within the above stated period of 1966 to 1977 still the share of the appellant could be doubtful as she was proved to steal some properties and money to give her relatives. That factor becomes relevant in distribution of assets obtained in that period, he urged the Court to consider the decision in the case of OMARI CHIKAMBA v. MOHAMED MALUNGA (1989) TLR. 39.

He went further and contended that it would be illogical to claim division of assets which were acquired during separation, because in no way the appellant can be said to have contributed towards acquisition thereof. The law is clear that, before the court makes an order for distribution of matrimonial assets, there must be evidence adduced to prove that there was contribution from both parties. He supported the argument by using the case of BIBI MAURID v. MOHAMED IBRAHIM (1989) TLR. 162. He also cited section 114(1) Cap. 29

On the question of joint efforts, Mr. Mbogoro submitted *inter alia* that what the land mark case of BI HAWA MOHAMED v. ALLY SEFU did is to redefine joint efforts so as to include those unquantifiable choirs done by a spouse at home while the other was actually accumulating the wealth which turns out to be matrimonial property but the requirement of living under the same roof was not dispensed with by that case. The logic is that one can only participate and contribute in the joint efforts by cooking food, washing clothes, cleaning the house, caring for the sick etc, if and only she is living together with other spouse. He once again invited the Court to consider the decision of the Court in Probate Cause No.1 of 2008, FLORANCE KIMARIO v. DAMAS SHOKOLE KIMARIO AND ANOTHER, SONGEA REGISTRY (Unreported).

With regard to the appellant's Counsel on application of Order XXXIX Rule 27(1) (a) of the Civil Procedure Code Act [Cap.33 R.E 2002], Mr. Mbogoro submitted that the said provision of law is irrelevant and inapplicable to the facts of this case as the trial court did not refuse to admit the said documents but rather the Appellant for reasons best known to herself and her counsel did not tender them. He submitted that this court should not have regard of them at all.

On the issue of house on plot No 15 Block "C" Njombe area which was built in 1968 he submitted that much as the LMA was passed in 1971 and was retrospective in so far as marriages celebrated before 1971 were concerned. He stated that it is the court of appeal which for the first time in 1983 introduced

the principle of equal distribution by widening the definition of the words joint efforts in section 114 of the LMA. That this was in the land mark case of BI HAWA MOHAMED. That before that contribution to the acquisition of matrimonial assets by joint efforts had to be strictly proved. He further went on and contended that now the rule in BI HAWA MOHAMED's case was not retrospective but prospective i.e. applicable from 1983 onwards. For the above reasons Mr. Mbogoro prayed that the appeal be dismissed with costs.

In the rejoinder, Mr. Mkumbe submitted that there is no iota of evidence to show on record that the appellant was a thief. That the question of *animus revetendi* does not arise because the appellant had acceded to the respondent's instructions to move to Makete to assist in farming there. Also he countered the cited case of BIBIE MAURID and stated that is no longer good law because was in the High Court hence it cannot have an overriding effect in view of Court of Appeal decision in the case of BI HAWA MOHAMED. He also faulted the argument based on the case of FLORENCE KIMARIO and stated that the same is quite distinguishable from the present case.

As observed earlier, this appeal is against the decision in matrimonial proceedings no 1 of 2007. As properly contended by learned advocate for the appellant, it became clear that the whole matters are closely intertwined and hinge on the question of separation of the parties hereto.

On the issue of a separation I am of the view that, separation is there so as to enable parties to cool their tempers down and prepare them to resume cohabitation after successful conciliation. Separation basically is of two categories if not three. **One,** voluntary separation which is essentially a private agreement between spouses and does not require the intervention of any court of law. **Two,** Judicial separation/ statutory separation which is available to a petitioner on proof that the marriage has broken down and it is governed by a statute concerned for instance statutory separation as provided for under sections, 99 and 108 of the Law of Marriage Act [Cap. 29 R.E. 2002].

On voluntary separation *Bromley, P.M.*, Family Law, 4th Edn, 1971 at page 134 states that;

> *The essence of separation agreement is that husband and wife agree to live separate and apart. It is usual for a separation agreement to contain provisions for the maintenance of the wife and children, but this of course is not always true; conversely, it is possible for an agreement to be framed placing the husband under a duty to maintain his wife whilst they are living separately without, however, binding the spouses to live apart.*

On statutory separation the law of Marriage Act under Section 99 provides as hereunder;

Subject to the provisions of sections 77, 100 and 101, any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable.

The same law under section 106(1) among others provides for particulars to contain in every petition for decree of separation

In the light of the above authorities I am in all fours with both Mr. Mkumbe and Mr. Mbogoro that there was no judicial separation between the parties. I also agree with the contention as submitted by Mr. Mbogoro that separation may exist even in absence of court decree. However, according to Bromley (supra) I am of the firm consideration that in the absence of court/judicial decree, separation agreement/voluntary separation between the couples is inevitable. This in itself must contain several conditions like the one which place the husband under a duty to maintain his wife whilst they are living separately. Any other separation arrangements which do not fall in the above ambits can not constitute a separation which is enforceable at law.

Upon perusal of the trial court's findings, I have never obtained and see a copy of separation agreement which entered between the two. This indicates

that there was no legal separation between the parties hereto. Minutes of meeting of church elders to resolve the differences that existed between the parties and persuading the appellant to go back to her husband do not constitute separation in themselves though might be a ground for legal separation. Under this circumstance and with due respect to the counsel for the respondent, I am of the firm holding that the issue of separation of the parties hereto is devoid of merits.

On the issue of property acquired before the Law of Marriage Act was passed in 1971. I am persuaded by the contention as submitted by Mr. Mkumbe, that all marriages consummated before 1971 were recognized to be legal marriages as if they had been made under the Law of Marriage Act. Section 165(1) Cap. 29 as properly cited by Mr. Mkumbe clears the doubt. The section states thus;

> *Any subsisting union between a man and a woman which under any written or customary law constituted a valid marriage on the coming into force of this Act, shall continue to be such, notwithstanding any provision of this Act which might have invalidated it but for this section.*

As rightly submitted by Mr. Mkumbe, the principle of joint efforts as shown in the land mark case of BIHAWA MOHAMED (supra) should be duly

considered during division of matrimonial property. The law of Marriage Act under section 114(1) (2) among other things under sub section (b) provides for circumstances to be considered when the court is about to order the division between the parties of any assets acquired by them during the marriage by their joint efforts .That the court shall *inter alia* have regard to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets. I am of the opinion that the proviso hereto are in all fours with the holding of the court of appeal in BI HAWA MOHAMED.

Regarding the question of joint efforts, I concur with the argument of Mr. Mbogoro that the contribution to the acquisition of matrimonial assets by joint efforts had to be strictly proved. However, the position of the Court of Appeal in the case of BI HAWA MOHAMED sets the standard of interpretation of section 114(1) (2) of the Law of Marriage Act of 1971 [Cap. 29 R.E 2002] proving the same that;

> *"Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets;*
>
> *The "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts' or "work" of husband and wife;"* (Emphasis supplied)

On the strength of BI HAWA Mohamed's case, I find the appellant proved to balance of probability that she contributed to the alleged properties. This kind of contribution was also stated in the case of KIVUITU V. KIVUITU [1990–1994] 1 EA 270, where Omolo AJA, stated :-

> *"There is no difficulty as to what a direct financial contribution is; either the wife or the husband has paid so much money towards the purchase of the property. Again there is little difficulty in what an indirect financial contribution is where both the wife and husband are in salaried employment of one or the other of them and uses the income to pay household expenses such as food, clothing, school so on, such a spouse is making an indirect contribution to the purchase of the property because the other spouse can then use his or her income to pay for the price. What about the ordinary housewife in Nairobi and other urban centres where this type of dispute is likely to occur? She remains in the house preparing food for the family, and generally keeping the house going. She ensures that the children are in a position to go to school in clean uniforms and that the husband also goes to work in clean clothes and general attends to matters which enhance the welfare of the family. True, the money to do all these often provided by the husband, but can it be said that such a woman is making no contribution to the family welfare and its asset?*

Or take the not too uncommon situation in Kenya where the wife is left in the rural home tilling the land and generally keeping such home going. The husband is in paid employment in an urban centre and probably sends money home to the wife at the end of each month. The wife may, apart from running the home, be growing and looking after crops such as tea, coffee, maize and such. She may even be left with the children who attend rural schools. The husband using money from his job acquires property in the town. Can such a wife be said to have contributed nothing towards the acquisition of such property and can only depend on the charity of the husband?

For my part, I have not the slightest doubt that the two women I have used as examples have contributed to the acquisition of the property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the household chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even a bigger contribution on to the family welfare by tilling the family land and producing either cash or food crops. Both of them, however, make

a contribution to the family welfare and assets. So that where such a husband acquires property from his salary or business and registers it in the joint names of himself and his wife without specifying any proportions, the Courts must take it that such property, being a family asset, is owned in the equal shares."
(Emphasis added)

On the issue of proof of the existence of matrimonial property. The law of Evidence Act [Cap. 6 R.E. 2002] under section 3 (2) (b) provides that in *civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probabilities.* Also Sarkar."The Law of Evidence", Vol.2, at page 1586 states that;

It has been stated earlier that the ordinary rule is that the burden of proof is the person making the affirmative allegation.

On the strength of the above cited authorities, I am in full agreement with the counsel for the respondent that the appellant was duty bound to prove the allegation concerned. The standard required is on the balance of probalities. Record of the trial court indicates that the appellant (former petitioner) testified during the trial that the properties existed. It was also fortunate that the respondent was represented by an advocate who did not raise an objection to

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this court to take additional evidence. However, at this juncture I am not prepared to grant the application as prayed. I think, if I grant this application the respondent would be grossly prejudiced as he should have no opportunity of challenging the same. For the reason, the application is devoid of merits.

Moreover, the learned trial magistrate in his judgment is reportedly to have stated that the cars are registered in the name of the respondent and there being no evidence that the appellant had contributed to the acquiring of the cars. Basing on that fact the issue of existence of the alleged movable and immovable properties was the truth and that fact becomes to be on the side of the appellant. So long as the issue of contribution has been discussed at lengthy there is no doubt the appellant has a share in those properties alleged to be in the name of the respondent.

On the issue of misconduct on the part of the appellant, that she used to steal matrimonial properties as contended by the advocate for the respondent, I am far from believing that the allegation is true because it is a misconception of the law of the land. Stealing is a criminal offence which is punishable under the penal code. Further, the Constitution of the United Republic of Tanzania of 1977 as amended time to time vide Article 13 (6) (b) provides for the presumption of innocence that, no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence. The appellant at hand was not only proved to have stolen the said properties but also was not charged

to any court of law. To my view there is no any evidence which was tendered before the trial court in support of the alleged misconduct.

For the reasons stated, the trial court erred both in law and facts to hold that there was a separation and that the question of joint efforts does not arise, that the appellant did not prove the existence of the alleged properties and the extent of her contribution and finally the appellant stole the matrimonial properties.

It is also my considered view that the appellant is entitled to the share of the Matrimonial properties, to be specific; the appellant deserves 50% of all matrimonial properties for the entire period of the life of their marriage. The distribution of the said properties is on 50% of the market value of the immovable and movable properties proved to be in existence by the appellant.

For the stated reasons, this appeal is allowed. Each part should bear its own costs.

L.M.K. UZIA

JUDGE

30th September, 2010