IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 55/04

KIDAYA ALLY ..... APPELLANT

Versus

AMIRI MLUGU ..... RESPONDENT

J U D G M E N T

MASSATI, J:

This is a second appeal. The Respondent, AMIRI MLUGU had sued the Appellant at Ukonga Primary Court for " divorce" and distribution of matrimonial property. The trial court found that a presumption of marriage was established but nevertheless proceeded to " dissolve" the marriage and to order an equal distribution of matrimonial property which consisted of one house at Kipunguni B and a 3 acre farm at Majohe. Aggrieved, the Appellant appealed to the District Court of Ilala. The District Court upheld the trial court's decision and dismissed the appeal. The Appellant has now appealed to this court against the decision of the first appellate court and the trial court.

Initialy, the Appellant employed the services of Mr. Mushumba, learned counsel who filed 5 grounds of appeal. Unfortunately Mr. Mushumba withdrew from the conduct of the appeal before the hearing. So the parties appeared and argued the appealin person.

In her submission in court, the Appellant said she had lived with the Respondent for 2 years. She said the Respondent found her with the house and the farm in dispute, when he moved in. She submitted as she had repeated in the Lower Courts that the Respondent contributed nothing, and urged this court to allow the appeal and set aside the two Lower Courts' decisions.

The Respondent submitted that he had lived with the Appellant from 1996 to 2001. He said they had undergone a customory marriage and in the course their cohabitation they aquired a house and a farm. In this court the Respondent said he contributed Shs. 180,000/= for the purchase of the farm whose price was 400,000/= and Shs. 150,000/= towards the purchase of a plot bought at Shs. 280,000/=.

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He said the said house is currently valued at Shs. 15,000,000/= and his own contribution was Shs. 1,800,000/= and said he was working at KIBO PAPER INDUSTRIES LTD and earning Shs 60,000/= per month up to 2002. All these assertions were refuted by the Appellant who said she had documentary evidence to prove that the properties were her own. She insisted that she met the Respondent in November 1998 and that is when he moved in to her house, and has never gone into any form of customary marriage. She therefore prayed that the appeal be allowed.

In order to be fair to the parties in this appeal, I will not only consider the submissions of the parties made in court but also the grounds raised in the petition of appeal which the Respondent had opportunity to traverse.

In her first ground of appeal, the Appellant criticised the trial court and the District Court for upholding that there was a valid marriage between the parties and yet finding that there was a subsisting marriage between the Appellant and one NASSIBU R. SADALLAH. The Respondent said this ground was baseless because the marriage between the Appellant and the Respondent was not dissolved by the court of law. Here in court, the Appellant said there was no marriage between them whereas the Respondent said there was a customary marriage.

From the judgment of the two courts below, there is no doubt that the two courts below have enmeshed themselves in a myriad of confusion as to the real meaning and purport of S 160 of the Law of Marriage Act 1971. This is evident from the following findings of the trial court on p 4 of the typed judgment:-

> " Kutokana na ushahidi wa pande zote kukiri kuishi pamoja kama mume na mke kwa zaidi ya miaka 2 miwili. Kutokana na hali hiyo ni haki na halali " ndoa" hii kuvunjwa kwa mujibu wa sheria."

So to the trial court a presumption of marriage is a form of a lawful marriage capable of being " dissolved" in law. This conclusion was cemented by the District Court when on p. 2 of the typed judgment it said:-

> " But according to my observation ..... as stated there above, and it has already " proved" (Sic) that the party

So according to the learned District Court Magistrate, a presumption of marriage is another form of " due " / legal marriage".

This court has taken slightly different approaches to the scope and purport of this Section. In FRANCIS S/O LEO VS PASCHAL SIMON MAGANGA (1 978) LRT 22, Mfalila J (as he then was) took the view that being duly married means going through the forms and procedures provided for under the provisions of the Marriage Act, and when the presumptios is rebutted, the children of the presumed marriage are illegitimate.

This view was followed by KAPOOR AG. J (as he then was) in ZAINA ISMAIL V SAIDI MKONDO (1985) TLR 239 that the intention of S 160 (1) of the Marriage Act is not to create an alternative procedure of contracting a marriage. While agreeing, in principle that a presumed marriage is not another form of official marriage, KOROSSO J. (as be then was) in [illegible] V AMINA RAJABU (1986) TLR 221, held:-

> " If the presumptios of marriage under S 160 (1) of the marriage Act has been rebutted ..... the woman becomes a deemed legal wife devoid only of the legal right to petition for divorce and separation."

The bottomline in all these cases is that presumption of marriage is not itself a formal marriage capable of being dissolved under S. 107 (2) (c) of the Marriage Act as the trial court has decided and upheld by the District Court. Therefore with or without a subsisting marriage between the Appellant and MASIDU R. [illegible], it was patently wrong for the two courts below to hold that there was any marriage at all between the Appellant and the Respondent. The first ground of appeal therefore succeeds.

The second ground of appeal is linked to the first one in that since the matter was not referred to a conciliation board the entire proceedings were a nullity.

In my view this ground cannot secceed. It is true that a petition for divorce must be accompanied by a certificate by a Board under S. 106 (2) of the Marriage Act. In view of the authorities I have cited above a party to a proceeding under S. 160 cannot "petities" for divorce. Therefore S. 106 of the Marriage Act does not apply. The proceedings were therefore valid. This ground of appeal therefore fails.

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The third ground of appeal is that the two courts below erred in law and in fact in ordering equal division of the matrimonial properties when in law there was no valid marriage. The Appellant submitted that there was no marriage between them, The Respondent said there was a customary marriage. On the facts there was no evidence of a lawful marriage between them. However, both the Appellant and the Respondent do not dispute that they had cohabited for at least two years. This brings the relationship within the provision of S. 160 (1) of the Marriage Act. There was a presumption of marriage which the parties rebutted by adduang evidence that they were not duly married ie not formally married as required under the Law of Marriage Act. Even a customary marriage demands evidence of certain rites recognised by the relevant customary law (See ZACHARIA LUGENDO V SHADIROCS LUMILANG'OMBA (1987) TLR 3.

But it is not true to say that division of property can only be ordered in a valid marriage. Under S 160 (2) of the Marriage Act courts have powers to order division once a presumption of marriage is rebutted as if in the dissolution of marriage or separatise. This position was drummed home by the Tanzania Court of Appeal in HEMED S. TAMIN VS RENATA MASHAYO (1994) TLR 197. In the present case, I have held above that there was a presumption of marriage and that presumption was amply rebutted by the parties. Consequantly the trial court had power to order the division of property that may have been acquired jointly during the cohabitation. I do not therefore find any substance in the 3rd ground of appeal.

The 4th and 5th grounds of appeal can conveniently be tackled together because they relate to the evaluation of the evidence on acquisition and contribution of the parties to the properties in dispute. The properties in dispute are one house at Kipunguni B and a 3 acre farm at Mahoje. On the evidence on record and which is not disputed both properties were acquired in the name of the Appellant as per Exhibit No. 3 and 4, on 15/9/96 and 10/12/98 respectivey. As the trial court rightly held this raises a rebuttable presumption under S 60 of the Marriage Act 1971 that the properties belong absolutely to the Appellant. Under the law of evidence, when the court is directed to presume a fact, it may either regard such fact as proved unless or until it is disproved, or it may call for proof of it. In this case the court allowed the Respondent to dispute the presumption.

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Before I proceed further with this point, I must first warm myself that this is a second appeal. It has been held that a second appeal would normally be entertained on a point of law, or mixed fact and law (See H. MOHAMED ALI KASHIM (1941) 8 E.A. C.A. 93, and not purely on a point of fact (JIVAN ALI (1945) 12 E.A. C.A. 109. But the question whether there is any evidence at all to support a certain finding is a matter of law though the question whether the evidence is sufficient (when there is some evidence) is a matter of fact. (P V TAIDALI MOHAMED ALI (1943) 10EA C.A. 66. In the present matter there are Exhs 3 and 4, which show that the properties belong to the Appellant and thereby a rebuttable prosumption has been raised. The Respondent had a duty of adducing evidence to disprove the presumption. It is therefore a question of law for this court to see whether there was evidence to rebut that presumption.

In evaluating the evidence on the acquisition and / or improvement of the properties in dispute for the purposes of division the court has to be guided by the principles set out in S 114 (2) of the Law of Marriage Act 1971, and case law. There are several considerations set out in that section but I think in the present case the relevant one is set out in S 114 (2) (b) that is:-

> (b) " the extent of the contribution made by each party in money property or work towards the acquiring of the assets."

Section 114 (3) of the Act extends the definition of acqusition to include efforts in substantial improvement of any property acquired by the parties either before or during the marriage or as in the present case, during the cohabitetion.

According to case law, it is now settled that contribution includes demostic services offerred by a spouse (BI HAWA MOHAMED V ALLY SEFU (1983) TLR. 32, or physical supervision of clearing a plot or contruction (URIYO V URIYO (1982), TLR 355.

In the present case, there is no dispute that, at least from what is admitted even by the Appellant herself, that the Respondent moved into her house in 1998 and lived there as husband and wife up to 2001 when the problems between them began. This was more than two years.

From the available documentary evidence the plot on which the house in dispute was built was acquired on 15/9/96 in the sole name of the Appellant. As this was documentary evidence no oral evidence could and was adduced to contradict it. As the two corts below rightly pointed out this raised a presumption is favour of the Appellant in under S 60 of the Law of Marriage Act 1971 that the property belongs to her to the exclusion of any other person. But acquisition of a plot did not mean construction of a house.

Evidence of the monetary contribution of each party towards the construction of the house is certainly in adequate, but as I said above the presumption is in favour of the Appellant. Before the trial and the District Court and even in this court the Respondent claimed that he contributed Shs. 1,800,000/= toward the construction of the house. This figure was not substantiated in any way. Even if the trial court had the opportunity to accept this evidence on the basis of credibility, it was not entitled to do so because there was no basis for doing so. It was thus unreasonable for the two courts below to act on this bare assertion of the Respondent. The Respondent ought to have given deteils such as the souce of the income, The dates and manner in which these payments were made, and so how the figure was arrived at. But even assuming this was true, was the trial court justified in dividing the property in equal shares? I think it would not be fair to do so, unless the cost of construction was known. For instance if the costs of construction turned out to be, say, Shs. 15,000,000/= and the Respondent has admitted contributing Shs, 1,800,000/= would it be fair and equitable to award the Respondent half the value of the house? I will come to that later.

There was of course, I think however, sufficient evidence to show that the Respondent was seen supervising the construction of the house. On the principl set out under S 114 (3) of the Law of Marriage Act and the decision in URIYO V URIYO (supra) this was contribution towards the acqusition of the house.

It is, however, different with the acqusition of the farm. As with the acqusition of the plot for the house there was documentary evidence that the farm was acquired by the Appellant in her sole name. The Respondent's role was to ascart her and act as her witness to the purchase. The Respondent alleged at the trial court and in this court that he contributed monetorily toward the acqusition of the farm.

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That was oral evidence attempting to contradict documentary evidence, it was not admissible. Apart from these assertions the Respondent did not unlike in the case of the house, contribute anything in the form of work towards the substantial improvement of the farm. In my view there was no evidence in law to show that the Respondent contributed anything towards the acquisities of the farm, as found by the lower Courts below. I will accordingly exclude the farm from the list of properties eligible for distribution between the parties.

The next question in, how should the house, which I found above to be eligible for distribution to be divided? The answer is partly provided in S 114 (2) (d) of the Law of Marriage Act 1971, which is that, in the absence of any evidence of the extent of contribution made by each party, debts, or children the division shall incline towards equality. In the present case there is only word of the Respondents monetory contribution of Tshs. 1,800,000/= towards the construction of the house. But as I observed above even if this is accepted this does not per se justify equal division, unless the cost of construction was also known. This property consists of a plot of land and the buiding itself. The plot was acquired in the sole name of the Appellant. To give any meaning to S 60 of the Law of Marriage Act I would allocate 50% of the value of the property to the land alone and therefore to the sole owner for the land as her contribution.

The value of the house (building) for the purposes of division shall be allocated the remaining 50%. Although the R spondent has claimed he contributed some Shs. 1,800,000/= his contribution in kind / work is not known. And since the Appellant has also not shown how much she had spent in constructing the house, it means, that, the cost of construction and the exact contribution of each party is not known. In terms of S 114 (2) (d) it means, the cost of construction of the building is to be divided equaly between the parties by allocating 25% to each party. This means the Appellant shall be entitled to 75% of the shares in the cost of construction of the house.

In BI HAWA MOHAMED'S case the Court of Appeal sounded a warning that in acquiring matrimonial assets the parties must be taken to be working not only for the current needs but also for the future

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needs and such future needs must be provided from the matrimonial assets. Which means that in ordering division of property the courts must take into account the value of the property in real economic terms. In my view this can be taken care of by a valuation of the current market value of the house in question.

This means that this appeal is substantially allowed. The judgment of the two courts below are set aside. There shall be no order for the division of the farm. It shall remain the sole property of the Appellant. The house shall be valued to determine its current market value. The Appellant shall get 75% of the said market value, and the Respondent 25%. The Appellant shall pay out the Respondent by paying him his share within three months from the date of submitting the valuation report to the trial court, and the parties being in informed thereon. If the Appellant fails to pay, the house shall be sold by public auction and the proceeds distributed accordingly. These shall be no order as to costs.

Order accordingly.

S. A. Massati
JUDGE
2/08/2004

Judgment delivered in chambers this 2nd day of August 2004 in the presence of the Appellant and the Respondent.

S. A. Massati
JUDGE
2/08/2004