

IN THE HIGH COURT FOR ZANZIBAR

**HELD AT VUGA
CIVIL CASE NO...10 OF 2011**

SICHANA ALI MUSSA.....(PLAINTIFF)
VERSUS
HAJI MAKAME KIDENGE.....(DEFENDANT)

JUDGMENT

ABDUL-HAKIM A. ISSA J.

The Plaintiff, SICHANA ALI MUSSA filed a Civil Suit No. 10 of 2011 in the High Court of Zanzibar against his former husband, HAJI MAKAME KIDENGE the Defendant claiming the division of matrimonial worth 147,000,000/= whereby the Plaintiff is claiming half of that amount namely 73,500,000/=.

The Plaintiff in her plaint enumerates the facts which lead to that claim. In short the plaintiff got married to the Defendant on 1.8.1997 and stayed on that marriage until she was divorced in 2008. During this period they were blessed with five children. They started their married life in a house of the Defendant consisting of one room and the life was very hard for them. After consultation they agreed to start a business in the form of a small shop and the Plaintiff advanced 20,000 shillings for that purpose and brought bricks which were need in constructing the shop. They agreed that the business will be jointly owned by the couples.

The Plaintiff submitted that the couple through their joint efforts succeed in their business and the shop became bigger, and they finished the house in which they were living in. In 2005 they completed the house worth 60,000,000 (approx) and in the same year out of the profit from the shop the Defendant purchased a passenger car (Hiace) which was used for carrying passenger until it was sold in 2007 for 3,500,000 shillings. Again from the profit derived from the shop, they purchased a plot at Hamburu Nungwi and succeed to build another house which is also worth 60,000,000/= (appx). They further purchased a plot at Baobab Nungwi in 2008 and later it was sold for 20,000,000/= shillings and later the Defendant purchased another plot at Bububu worth 3,500,000/= Shilling. It is on the year 2008 when the Plaintiff was

divorced, and she claims half of those properties 73,500,000/= shilling and 5,000,000/= shillings being compensation for the pregnancy and maintenance of defendant's child, and further she asks for the maintenance to continue for the said child.

In proving these claims she testified as PW I and also brought three witnesses. The first witness, MAKAME HAJI ALI who is also the uncle of both the Plaintiff and Defendants testified that after the marriage of the Plaintiff and Defendant, they were living at Nungwi in Defendant's house. The shop was built later by bricks which came from Plaintiff's mother. He was the one who made those bricks from two packets of Cement. He further testified that the Plaintiff was the one who was in charge of the shop while Defendant was doing other things. He further testified that the shop was first small and then it was expanded. He also testified that he knew of the purchase for the two plots, one at Hamburu where another house was constructed and another plot at Bao bab. He was a witness in those purchases and he has the papers, but he did not know if they were purchased jointly or not. About the plot at Bububu he heard from the Defendant that he got it from his parents. He also testified that they had agreed in the family to solve the matter themselves and give the plaintiff what she is entitled, but the matter was not solved. On cross examination he testified that when they got married the Defendant was fishing and did not have other things.

The second witness who testified was called by the Plaintiff is RAMADHAN ALI MUSSA, the plaintiff's brother who testified that he knew how the business started. The couple after their marriage agreed to do business of shop and fruits and the plaintiff went to Jendele to take 20,000 shillings for the shop. The business grew and the shop was expanded. The first car was purchased, but it was not in good condition, so it was sold and another one (Hiace) was purchased. He used to work in that car as a conduction. Then a plot at Hamburu Nungwi was purchased and a house was constructed. They also purchased a plot at Baobao and Bububu where a foundation was build. The Defendant sold the plot and Bububu when he wanted to marry a second wife. It was at this time that the Plaintiff asked for the distribution for the properly. The Defendant sent the Plaintiff home with her belongings and called him and said he has divorced her. The Plaintiff went to Qathi's Court to seek clarification and when Defendant called he gave her three "talak". They went to Ministry of Women and Children and the Defendant agreed to distribute the property and it was agreed to solve the matter within the family, but the Defendant did not give her anything.

During cross-examination he was asked how did he know that they were doing business together. He explained that the Plaintiff went to their father and asked for 20,000/= for the purpose of doing business together. Further his father was providing them with fruits as he knew the business was jointly with his daughter. He testified that he is the one who took the Defendant to town for the first time to purchase goods for the shop. He had 30,000/= with him for the purchase of goods. He also testified that before opening a shop he was fishing using fishing line.

The third Witness is **SILIMA MCHUWA PANDU**, the present husband of the Plaintiff. He testified that when he wanted to marry her he was told that there are matters pending with her ex-husband and he should allow her to attend those matters. He testified that one day he called her in his presence and asked her to go to Mwembeladu where he will write to her about her properly and another day he went to their house at Fukuchani and sought permission to settle their matter with the Plaintiff.

But so far nothing has happened and their family has failed to settle the matter despite calling of several family meetings which he allowed the Plaintiff to attend.

On the side of the Defendant he testified that the Plaintiff was his wife and they are close even today. When they got married he already had two houses and has a proof of that. That proof was not produced in court. He further explained that the dispute started when he married a second wife, the plaintiff took two million and two mobile phones and left the house and demanded divorce.

He agreed about receiving 20,000/= but he testified that he had already asked her to take her 20,000/= back. Regarding payment of 75 million he testified that claim is baseless, but he agree to pay her 10,000/= shillings a month and he is ready to declare that one house should belong to their children. He is ready to pay her the amount which he can afford.

On cross examination he testified that about the two million the plaintiff took he reported the matter to his uncle, MAKAME HAJI, but did not take any action as she was on eda And she was the mother of his children. Regarding the claim of the distribution of property he explained that he will pay but according to his means. The house should remain the property of his children.

On examination by the Court he explained that he could pay 10,000/= a month as he does not have a business now. The shop

is closed and he is working as a fisherman. He is staying in Hamburu house and the other house is rented to tenants.

The Defendant before closing his case he called one witness, ALI MUSSA HAJI who testified that the Defendant was a businessman and a fisherman. He was having a shop before marrying the plaintiff. He further explained that he heard from the Defendant that the Plaintiff left with two million shillings. He also testified that he used to lend money to the Defendant to improve his business.

On cross examination by the Plaintiff he explained that the Defendant was doing business in his house and had a shop in that house before they are married. He used to sell products in the shop himself, after marriage they were helping each other.

On examination by the Court he testified that the Defendant is back in his fishing business and he does not have a shop. He has two houses one at school and the other at Hamburu. The first house was built long time ago, the house at Hamburu was built four or five years ago.

Having laid down a narration of the evidence adduced by both parties and their respective witness. I now proceed to determine the three issues framed namely.

1. Whether Plaintiff and Defendant lived as husband and wife before the dissolution of their marriage.
2. Whether during the period of their marriage they jointly acquired property if the answer is yes whether plaintiff is entitled to half of the property acquired during their marriage.
3. What remedies do parties entitled to.

With respect to the first issue on whether the Plaintiff and Defendant lived as husband and wife before the dissolution of their marriage. The plaint was annexed with copy of marriage return and divorce return. The marriage return showed that the parties got married on 1/8/1997 and were divorced on 15/6/2008. These documents were not tendered as evidence, but there was no contention on this issue, both parties submitted that they were married under Islamic Law and they were living as husband and wife. This was also corroborated by all witnesses from the plaintiff's side and defendant's side. Hence, the first issue is answered in the affirmative.

With respect to the first part of the second issue on whether during the period of their marriage they jointly acquired property. The Plaintiff in paragraph 5 of the Plaint explained that when they got married they were living in the house of the Plaintiff which contained only one room, and in paragraph 9 she explained that the said house was developed and by 2005 it was completed and it worths about sixty million shillings.

Besides that house they built another house at Hamburu which also worths sixty million. They purchased a car (Hiace) which worked and brought profit until it was sold in 2007 for three million five hundred thousand shillings. They further purchased a plot in 2008 at Baobab Nungwi and later sold it for twenty million and purchased another plot at Bububu and sold it for three million five hundred thousand. The total value of these properties are 147,000,000 in which the plaintiff claims half of it.

The Plaintiff called three witnesses, but only two testified about these properties. These two witnesses testified on how the parties lived soon after their marriage, how the shop was started and the contribution of the plaintiff on the construction of the shop by providing bricks and financially by providing the initial capital of twenty thousand shillings and physically by in charge of the shop. They also explained the acquisition of the plot of the plot of land at Hamburu, Nungwi, Baobab – Nungwi and Bububu and the construction of the house at Hamburu and the sale of other plots. They also explained about the purchase of the car in which the second witnesses was working as a conductor. All these purchases and sales took place during the marriage of the parties.

The Defendant on his side disputed this joint acquisition of the properties. He contended that when he married the Plaintiff he had two houses and he was doing business in his shop. He did not say anything about the plots he already sold and about the car. But he admitted receiving 20,000/= shillings though disputed its purpose, which he said was for these in their house, and he was ready to repay that amount. With regard to the Plaintiff's claim he disputed the amount, but agree to pay her 10,000/= shillings monthly and also to declare that one house belongs to their children. The Defendant called only one witness whose testimony is to the effect that to Defendant had a shop before marrying the plaintiff, but when examined by the court his testimony contradicts what is stated by the defendant. He testified that one house was build long time ago and the other house at Hamburu was build four or five year ago, which clearly demonstrate the defendant was lying, the house was build during their marriage.

On the analysis of these evidence it is very clear that the defendant had an unfinished house when he married the plaintiff, but the house was finished during their marriage and the other house at Hamburu and those plots of land and a car were acquired during their marriage. Further, it has been demonstrated that all these properties started from the shop which was constructed by joint efforts. The Plaintiff provided the bricks and the initial capital of 20,000/= and further she was in charge of the shop in terms of selling the goods.

The defendant on the other side provide the place for constructing a shop and perhaps other necessary tools for finishing the shop. He way also in charge of buying the goods needed in the shop. Hence, this as a clear case of a family properly acquired by joint efforts of couples. Therefore, the first part of the second issue is also answered in the affirmative.

Coming to the second part of the second issue whether plaintiff is entitled to half of the properly acquired during their marriage. There is no Zanzibar which lay down principles on the distribution of matrimonial or family property after the dissolution of marriage. Hence, majority of people in Zanzibar being Muslims and entered into Muslim marriage they adopt the Islamic Practice, that is the husband is expected to give a purling gift to his former wife according to his abilities. The Islamic principle recognises' the concept of separate ownership of property, that is the husband has his own property and during marriage there are properties which he can acquire on his own and similarly the wife has her won property and during marriage she can acquire as many property as she can. Hence during the dissolution of marriage everyone retains his/her property, but in addition the husband has to provide a parting gift to his wife.

The case law in Zanzibar are equal divided, Justice **Mbarouk** (as he then was) in **Husna Issa Seif V. Idrisa Mussa Rashid** Civil case No. 31 of 2003 of High Court of Zanzibar (unreported) adopted the principle of joint acquisition of matrimonial property from the common law cases. He said:

"As for Zanzibar, unlike Tanzania Mainland do no have a specific principle or guidance of section of the law which guide a court in determining the shares of husband and wife in the division of the matrimonial or family assets after the dissolution of a marriage, hence in the absence of such ca clear principle or provision of the law, and as far as this is not a case within the Kadhi's Court Jurisdiction, hence I prefer to resort to the principle of joint acquisition of matrimonial property from the common law cases"

Justice Mbarouk also adopted the concept of joint effort as has been laid down in ***Bi Hawa Moh'd V. Ally Sefu (1983) LTR 32***. He said.

"The issue of joint effort.....is to some extent given a principle or good guidance which persuaded me as fair. In this case V Ally Sefu it was held that, "The Joint Efforts" and work towards the acquiring of the assets have to be continued as embarrassing the domestic"effols or works of husband and wife"....."

On the other hand Justice Makungu (as he then was) in Haji Omer Kheir V. Jokha Ali Juma Civil Appeal No. 10 of 2008 High Court of Zanzibar (Unreported) he held:

"The law in this point is very clear that the parties are Muslims and as such they belong to customs of the Muslim Community under Islamic Custom a divorced wife is entitled to a parting gift (Kithumn) from the former husband. In my opinion the law of Marriage Act (CAP 29 RE 2002) of Tanzania is not applicable in Zanzibar."

Hence, Justice Makungu did not adopt the principles of the "joint effort" as laid down in Bi. Hawa case. On my side these decisions of the High court are not binding on me. Father case of Bi. Hawa deals with the interpretation of Section 114 (1) of the Law of Marriage Act, 1971 which is not applicable in Zanzibar and we do not have a similar law in Zanzibar. On the other had we have Islamic principle which are being followed and as clearly laid down in Haji Omar Kheir case (supr). On the side of the concept of joint efforts "joint efforts" as laid down in Bi. Hawa case I am reluctant to adopt it as it is in the absence of then legislation stipulating the same. In my opinion that would encroach that principle in Islamic law.

But there are situation, which clearly shows that the parties intended to have joint ownership from the acts conducts of the parties. I believe it is in this situation that we have to depart from the notion of parting gifts and look on the intention of he parties. Was there an intention to have joint ownership of the property if the answer is a affirmative, the property should be distributed to the sponse.

Hence, the circumstances of this case demonstrates that there was an intention to have joint ownership. Hence the second part of the second issue is answered affirmative to that extent. On the issue of the amount to be awarded, there is no formula for the assessment for the division of matrimonial assets, it is a duty of the Court to decide the proper preposition to be awarded to the parties.

In the course of hearing of this case it transpires that not all the properties prentioned by the plaintiff are in existence. The plots at Baobab, Nungwi and Bububu have been sold as well as the car (Hiace) and we don't know where the proceeds of the those sales have Hence, when the marriage was dissolved those properties were not there and can not be said to be matrimonial assets. This leaves us with the Houses at Nundu ground behind Nungwi school and at Hamburu which care hereby found to be jointly owned. Therefore this Court makes the following orders.

- a) The plaintiff is awarded a house at Nundu ground behind Nungwi school and the Defendant will continue to own the house at Hamburu.
- b) The Defendant should provide maintenance to the Child by making monthly payment of 20,000/= shilling until the child rach the age of 7.
- c) There is no order to cost.

It is so ordered.

Sgd: ABUDUL-HAKIM A. ISSA, J
16/1/2012

COURT:

The judgment was read in the open Court on this 16th day of January 2012 in the presence of plaintiff and defendant.

Sgd: ABUDUL-HAKIM A. ISSA, J
16/1/2012

COURT:

The right of Appeal is explained.

Sgd: ABUDUL-HAKIM A. ISSA, J
16/1/2012

I certify that this is a true copy of the original.


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GEORGE J. KAZI
REGISTRA
HIGH COURT
Z A N Z I B A R

/HALLY/

