IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And MANDIA, J.A.)

CIVIL APPEAL NO. 21 OF 2012

ODHIAMBO EDUOR .....APPELLANT
VERSUS
JANE THOMAS ABUOGO.....RESPONDENT
(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba,J.)

dated 16th April 2010
in
Civil Case No.10 of 2002

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JUDGMENT OF THE COURT

29th June & 6th July, 2012

KIMARO, J.A.:

The respondent who was the plaintiff in the trial court sued the appellant as the defendant in the High Court of Tanzania claiming for half share of the properties alleged to have been jointly acquired from proceeds of an alleged partnership business. In the alternative to that relief, she prayed for a monetary amount of Tshs. 28, 380, 000/=. She also prayed for interest on the alternative prayer, at current commercial rate from January, 1998 till the date of judgment and thereafter interest at court's rate of 7% from the date of judgement till satisfaction and costs of the suit.

It was alleged by the plaintiff in the plaint at paragraphs 3 and 4 that the plaintiff met the defendant in 1976 and for a period of 22 years they cohabited together as husband and wife in a presumed marriage. In paragraph 5 the plaintiff avers that the parties acquired jointly several properties from an oral partnership business of brewing and selling various types of local liquor as well as selling beers and beverages. The said business was conducted at various places within Tanga Municipality namely, Maendeleo Bar in Usagara, New Usagara Guest House, Tembo Bar at Street No. 16 First and Last Bar, Mlimani Bar in Kwaminchi , Mzalendo Bar in Majengo and Mikumi Bar in Usagara.

The plaintiff averred further that the relationship ended in 1998. The acquired properties which are movable and immovable are estimated to be worth Tshs 58, 760,000/=, which the plaintiff prayed that they be divided as aforesaid.

The defendant on his part denied existence of a presumed marriage between himself and the plaintiff. He also denied that there was in existence any partnership business. He averred that he was doing his own business of brewing local liquor and selling beers and various beverages to the places mentioned, while the plaintiff was a member of a cooperative society for those dealing with that business. As for the properties the plaintiff alleged that they were acquired jointly from partnership business, the defendant averred that they were properties acquired through his own efforts.

years. *It is now settled law (See* ***SALWIBA V. OBERA*** *(1975) LRT No.52 and* ***LEO V. MAGANGA*** *(1978) LRT 22 that section 160 (1) of the Law of Marriage Act, 1971 does not automatically convert concubines into wives at the end of two years co-habitation.*

It merely provides for rebuttable presumption that the man and the woman were dully married. *It is also trite to observe that the presumption that a man and woman were dully married may be rebutted if it can be proved that if one or both parties had no capacity to enter into a marriage contract.* ***It therefore follows as day follows night that a Christian who has neither renounced his faith nor divorced his wife has no capacity to marry another woman."*** *(Emphasis added).*

Since no appeal was preferred against that decision, the issue of a presumed marriage between the appellant and the respondent was conclusively determined by Mkawa J. as he then was. Under section 9 of the Civil Procedure Code, [CAP 33 R.E.2002] the issue of a presumed marriage between the appellant and the respondent was closed. It was ***"res judicata."*** It was wrong for the learned trial judge to re-open it. See the case of **UMOJA GARAGE V NBC HOLDING CORPORATION** [2003] T.L.R.339 where this Court held that:

"Since by the time the previous suit was filed the facts giving rise to the cause of action in the subsequent suit were known to the appellant, the matter raised in the subsequent case are deemed to have been a matter, directly and substantially, in issue in the previous case and the principle of res judicata applies."

The issue of a presumed marriage having been determined in Civil Appeal No. 1 of 2000 it was wrong for the respondent to file the subsequent suit basing the division of properties jointly acquired in a presumed marriage. What Mkwawa J. said in respect of properties alleged to have been acquired jointly by the parties in Civil Appeal No.1 of 2000 was that:

"In the instant case it is evident from the recorded evidence that the appellant and the respondent had jointly acquired a handsome amount of property from their proceeds of sale obtained from native beer-brewing-and selling activities/shares...the question that poses in this instant matter for consideration is whether in the instant matter the respondent should be summarily disposed of whatever property that she had expended labour in acquiring it . I venture to say in all earnestly and sincerity that both equity and commonsense will answer that

question in the negative. As to do otherwise would be a travesty of justice. ..It is in the light of the foregoing, reasons, ***that the respondent is hereby enjoined to file an independent suit, which for the reasons I have given in this judgment is outside the ambit of these proceedings, if she is desirous to receive any remedy for her labour and sweat.*** *" (Emphasis added).*

From the decision of the High Court in Civil Appeal No. 1 of 2000 what the learned trial judge had to address is the properties which were acquired, how they were acquired, and the extent of contribution made by the respondent in the acquisition of the properties without linking the same with a presumed marriage between the parties. That was the important issue the learned trial judge had to determine. For this matter we will confine ourselves on this matter in this appeal.

It was argued before the learned trial judge that since the respondent contended that the property was acquired in a partnership business and she did not prove that the partnership business was registered as required under the Business Names Act, then she was not entitled to anything. The learned trial judge rejected this argument. She held that the parties were carrying on the business under their real names and not in a name of a firm. She held further that the law does not require such businesses which are not carried out in the name of a firm to be registered. The learned trial judge said that there was no doubt that

the respondent committed herself into the business and her sweat was invested in the joint property. Taking into account all the relevant matters, the learned trial judge awarded the respondent 30% of the total property she said was jointly acquired.

The defendant was aggrieved and he filed this appeal. Through his advocate he filed seven grounds of appeal challenging the decision of the High Court. In the first ground of appeal the learned trial judge is faulted for holding that the joint business the respondent claimed to be in existence between her and the appellant did not require registration while the respondent answered in cross-examination that the joint business was known as New Usambara Bar. In ground two of the appeal the trial court is faulted for granting the appellant 30% of the properties while the respondent did not know how much she spent in acquiring any of the properties. As for ground three, the complaint is that the respondent was granted judgment basing on the value of the properties while she did not know how much she spent for each one.

Regarding ground four, the learned judge is faulted for entering judgement for the respondent on a specific claim without specific evidence from the respondent. In ground five the learned trial judge is faulted for granting the respondent a prayer which she never prayed for. In ground six the trial court is faulted for failing to analyse the evidence properly and see that the respondent was claiming division of matrimonial assets rather than properties acquired in a joint business. On ground seven the complaint is that the respondent was granted judgment while she failed to adduce specific evidence to prove specific claim. Lastly, the trial court is

faulted for failure to take into consideration the evidence of the appellant who said that there was no evidence to establish a partnership business.

During the hearing of the appeal, the appellant was represented by Mr. Steven Leon Sangawe, learned advocate. For the respondent she was represented by Mr. Alfred Josephat Akaro, learned advocate.

In arguing the appeal, the learned advocate for the appellant decided to argue ground one, six and eight separately, and combined grounds two and three and then four and seven. As for ground one, the learned advocate said that since the respondent answered in cross examination that they had a joint business known as New Usambara Bar, and that evidence was corroborated by Daniel Amani Abuogo (PW2) who said that the parties started with New Usagara Bar when the parties started the business, the parties were not trading in their individual names. In that respect, contended the learned advocate, the business had to be registered under the Business Names Registration Act, sections 4(a) and (b). Citing the case of **Florent Rugarabamu V Hassan Maige Goronga** [1988] T.L.R. 242, the learned advocate said since the business was not registered; it could not be enforced under the law. He prayed that this ground of appeal be allowed, particularly because the learned advocate for the respondent admitted that the respondent mentioned New Usagara Bar as a joint business and there is no evidence of its registration. On his part the learned advocate for the respondent admitted that the respondent said that the parties had a joint business in the name of New Usagara Bar. However, said the learned advocate, that was only one of the properties mentioned by the respondent. He said for the rest of the properties, the

respondent said they were places where they were sending their commodities, and what was realised from the business, was used to either buy or build the properties.

In resolving this issue it is important to know what in law amounts to partnership. This is defined in section 190 (1) of the Law of Contract, [CAP 345 R.E.2002] to mean a relationship which subsists between persons carrying on business in common as defined with a view of profit. Under section 190 (2) persons who have entered into partnership with one another are called collectively a *"firm"* and the name in which their business is carried on is called the *"firm name."*

Section 4(a) and (b) of the Business Names Registration Act, [CAP 213 R.E.2002] provides for a category of businesses which mandatorily requires registration. It is:-

(a) "every firm having a place of business in Tanzania and carrying on business under a business name which does not consist of the true surnames of all partners who are individuals and the corporate names of all partners who are corporations without any addition other than the true names of individuals partners or initial names:

(b) every individual having a place of business in Tanzania and carrying on business under a business name which does not consist of his true names or the initials thereof;"

shall be registered in the manner directed by this Act. In the case of **Florent Rugarabamu** (supra), the Court held:

> *"(i) Section 15 of the Business Names Ordinance provides for disability to enforce "by action or other legal proceedings whether in the business name or otherwise" where there is non- compliance with the provisions of section 6 of the Ordinance.*
>
> *(ii) The partnership has been tainted by the illegality arising from the failure to comply with the requirements of sections 11 and no partner can enforce a right under the tainted partnership."*

In this case the evidence led showing that the parties were doing business in a name of the firm was that of New Usambara Bar. This business was required by law to be registered. So any right under that business cannot to be enforced under the law. But for the rest of the places mentioned in paragraph 5 of the plaint, namely Maendaleo Bar, Tembo Bar, Mlimani Bar, Majengo Bar and Mikumi Bar, evidence was led showing those places did not belong to the parties. They were just conducting their business there. So for this issue it is only allowed to the extent that so long as the New Usagara Bar was a Business firm which was not registered, the respondent could not be considered for the division of any property acquired through the proceeds of that business. Proceeds from businesses conducted in other places were not affected by non-registration of the business because they were not by law required to be

registered. In any event, they did not even belong to the parties. The parties did their business in those places using their real names. In this respect, we only fault the learned trial judge for making a general statement covering all places mentioned in paragraph 5 of the amended plaint without making a distinction of which business required registration and hence denied the respondent the right to sue to enforce any right under it, and the ones which did not require registration and the respondent could in law sue for her rights. This ground also disposes of ground eight of the appeal which was argued in the alternative.

As for the second and third issue the grievance is the award of 30% of the properties to the respondent. The learned advocate for the appellant said the respondent did not adduce evidence to show how much she contributed to each of the properties she was claiming for division and the learned trial judge admitted so in her judgment when she remarked that the respondent's claim was merely pegged to the market price. To counter his submission, the learned advocate for the respondent admitted that the learned judge did not say how she arrived at that amount of percentage of 30%. However, he was of the considered opinion that the learned judge considered the efforts expended by the respondent in the business.

As she led evidence to show her contribution, the respondent said that she made a monetary contribution of Tshs. 50,000/= when the business started. They started brewing 50 litres of liquor which they sold at shilling 250/= per litre. The liquor was distributed to different pubs and they collected about Tshs. 60,000/= to 70,000/= per day. According to

her, the cost of preparing 50 litres of liquor was Tshs. 4,000/=. She used to travel to Moshi to buy barley and bananas for brewing local brew which they sold to the different pubs. The business grew and they were also in a position to sell beer. From the proceeds they were able to build and buy the houses and other movable properties. The only shortfall in her evidence was failure to mention the exact amount of her monetary contribution in the acquisition of the properties.

In our considered opinion that shortfall cannot be equated to failure to lead evidence of contribution to the acquisition of the properties. Indeed the learned judge considered this aspect. She said:-

> *"There is evidence that the defendant and his family were members in a cooperative society and they took part in the brewing and ferrying the native brew to bars/pubs. The sweat of the defendant's family has to be considered as contributing to the acquisition of the defendant's properties. The family members have their rights which has to be protected by the court.*
>
> *The plaintiff was not in a position to know how much was the profit from their joint venture business. Furthermore, she did not know how much was spent in acquiring any of the listed properties. Her claims were merely based on the "market" value price during informal*

evaluation. Having considered all these grounds, I am convinced that not all the properties were acquired from the proceeds of sale of the partnership local-brew-business... However; there is no doubt that the plaintiff committed herself into the business and all her sweat was invested in the joint property. Taking all this into account, I am opined that the plaintiff deserves 30% (thirty percent) of total property listed in the plaint."

The properties listed in the plaint are seven houses and four undeveloped plots. Going arithmetically, minus the New Usambara Bar which the respondent cannot sue for her right, one third of the six houses would be two houses. As for the plots it would be one plot. The respondent was not given that much. She was given just one house out of the six houses and no plot out of the four plots.

We will resort to this point later. At the moment let us look at the other grounds of appeal. We will tackle grounds four, five and six together because they are related. In ground five the complaint is that by ordering the respondent to remain in the house she is staying, the learned judge erred in granting a prayer which the respondent did not ask for. The learned advocate for the appellant said that the respondent had an obligation of proving that she was entitled to that house.

As for grounds four and seven the complaint does not differ with those given in grounds two and three. That is the failure by the respondent to adduce evidence specifically for each of the properties she alleged was acquired through the proceeds of the joint business. The learned advocate for the respondent agreed that the grievance in ground four and seven are not different from grounds two and three. He also agreed that the relief granted to the respondent was not specifically pleaded for. However, contended the learned advocate, it was the wisdom of the court that she be granted that property as her share in the property jointly acquired from the proceeds of the partnership business.

Let us come back to the issue we said we will resolve later. In this case the contest was on division of properties jointly acquired through profit realised from a joint business. The properties as indicated are houses and undeveloped plots. The respondent also made an alternative prayer of monetary relief. As indicated, the respondent had prayed for half division. In this case we do not agree with the learned advocate for the appellant that the respondent did not lead evidence to show how much she contributed. As shown she indicated the monetary amount she contributed when the business started. She said she contributed Tshs. 50,000/=. To keep the business going, she used to travel to Moshi to buy bananas and barley. She also said she was engaged in the work of doing the brewing of the liquor. The only thing she failed to say was the exact amount of the profit that was expended for either buying or building the houses or the plots. But as correctly pointed out by the learned trial judge, apart for the initial monetary contribution made by the respondent, she

considered the labour that was expended by her in making the business going. Labour is an important component in any business. It was the labour of the respondent that made that business to grow and yield profit. As already said, the respondent made alternative prayers. First, was the division of the immovable properties that is the houses and the undeveloped plots, and second, its equivalent in monetary terms. The learned trial judge in her wisdom granted division in the immovable property and she opted to give the respondent the house she has been living in. At the time of hearing the appeal, the Court was informed that the respondent is still living in the house. In our considered opinion given the contribution the respondent said she made in the business the learned trial judge committed no error in awarding her the house she was and still living in. It is a more guaranteed relief in the sense that she will be relieved of the execution process which could be costly and time consuming. For this reason we do not see any reason for upsetting the decision of the learned trial judge on the relief she granted the respondent. For this reason grounds two, three, four, five and seven have no merit and they are dismissed.

Lastly is ground six. For this ground we need not waste our time on it. We remarked at the beginning of this judgment that the question of a presumed marriage between the parties was already decided by the High Court in a previous case and the court was ***"funtus officio"*** on the matter. But the learned judge considered the efforts made by the respondent in terms of money and labour and that is how she arrived at a point of deciding what the respondent was entitled to. As indicated, given

the list of properties the respondent said was acquired jointly from proceeds of the joint business, we cannot say that the respondent parted with the share she was granted undeserving. After all it is not even 30% of the total properties that she listed. She was entitled to reap from the contribution she made and the labour she spent towards the business which led to the acquisition of the properties.

We thus find the appeal has no merit and we dismiss it with no order for costs

DATED at TANGA this 5th day of July, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTCE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL