

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 21/94

AHMAD KASONGO.....APPELLANT

VERSUS

SELINA STANSLAUSRESPONDENT

JUDGEMENT

This is a second appeal arising from the decision of Chamwino Primary court, within Morogoro District Concerning distribution of matrimonial property between the divorced spouses. The appellant, one Ahmad Kasongo had cohabited with the Respondent, one Selina Stanlaus, as husband and wife from sometime in 1982 to sometime in 1990 when the appellant took another woman and chased away the Respondent. It was the contention of the Respondent before the trial court that during such period of their cohabitation they had managed to acquire a plot which, to facilitate the process of allocation had to be allocated in the name of the appellant. It was however the case for the Respondent that she contributed Tsh. 60,000/= towards the construction of their matrimonial house which is a mudhouse, for the purpose of purchasing iron sheets, doors, window Looovers and cement. There were no receipts tendered in support of such expenses incurred. On the other hand, the appellant claimed that he had built such house himself and that the iron sheets used for roofing it had been given to him by his elder brother, who did not, however, testify before the trial court. It was further the appellant's claim that when we started cohabiting with the Respondent he had not completed such house. It was during his cohabitation with the Respondent that he moved into and started living in such house with the Respondent for the first time together with another woman whom he claims to be his first wife. Neither could he tell how much money was used in constructing such house. On the basis of such evidence the trial court awarded the Respondent Tsh. 20,000/= as his share out of such matrimonial property. The Respondent was dissatisfied with such award and therefore appealed to the lower appellate court. The lower appellate court found in favour of the Respondent and awarded her Tsh. 60,000/= being the amount of her alleged contribution of the matrimonial house plus Tsh. 40,000/=, which was said to be interest in respect of the amount said to have been contributed by her. That has aggrieved the appellant, hence this appeal.

Such decision of the lower appellate court has been challenged on the grounds inter alia that there was not evidence to establish the alleged contribution by the Respondent, that when the Respondent moved into and started living in the subject house the appellant was already living there with his first wife and children. And that the award made was done without assessing the actual value of the house.

On the issue that there was not sufficient evidence to establish the contribution alleged by the Respondent, it seems to me that the Respondent appears to have been more reliable and confident in her story than the appellant. Apparently the appellant, himself gave much more meagre evidence than the Respondent on his alleged own construction of the disputed house. He could not tell how much he spent on it. And while the Respondent claimed to have contributed money for the purchase of iron sheets, doors, Window loovers and cement all what the appellant could say is that he did not know the price of such iron sheets as the same had been given by his elder brother. And more damaging to his credibility is the fact that while in his memo of appeal he has claimed that when he started cohabiting with the Respondent he was already living with his first wife and children in the disputed house, before this court he had to change and say that when he started cohabiting with the Respondent the house in dispute was not yet completed and not yet started occupying it, but started occupying it soon after starting to cohabit with the Respondent. I am, therefore, as the lower appellate court did, more inclined to accept the Respondent's story as to the couple's joint effort in acquiring their matrimonial home.

Now accepting as I do, that the Respondent did contribute to the acquisition of the parties' matrimonial home, the next issue is to what share are the parties entitled to upon division of such matrimonial property? It is noted that the construction of the house was completed sometime in 1985 and the couple started occupying it in 1986. There is no doubt that by then building materials were much cheaper than is the case to day. There is no doubt that the value of the house in dispute must have very much appreciated. It would not therefore, be fair to pay the Respondent's share to her alleged monetary contribution only. One wonders as to how the lower appellate court came to Tsh. 40,000/= as interest. In the circumstances the better course should have been to seek the assistance of a Government valuer in order to determine the actual market value of the house at the time the judgement was entered, and then proceed to determine the share deserved by each.

Accordingly I allow this in part, by setting aside the award made by the lower appellate court with an order that the lower appellate court should look for and appoint a Government valuer to determine the current market value of the house in dispute and then on the basis of such value proceed to determine the shares of the parties, in equal basis, and order either to have the house sold through public auction or privately solicited buyer to the satisfaction of the parties, and have the proceeds divided between the parties, or to require whoever of the parties wants to remain with the house, to compensate the other his or her due share as determined by the court. I make no order for costs.

Sgd. Mwaikasu
Judge;

Dated 8/7/95

Delivered this day of July 1995, at
D'Salaam in the presence of.

14/7/95

Coram.- A.R. Manento - SDR-HC

Parties - Absent

C.C. - Livanga

Court: Judgement is read in the absence of the parties. Copies of the judgments to be forwarded to District Magistrate Morogoro with the case file for reading the judgments to the parties.

Sgd. A.R. Manento
SDR-HC
14/7/97

Certified true copy of the Original.

A.R. Manento
SENIOR DEPUTY REGISTRAR
HIGH COURT-DAR ES SALAAM