

IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION

(Mbeya Registry)

(PC) CIVIL APPEAL NO. 38 OF 2002

(From Mbeya D/Court Civil Appeal No. 62/2000 -

Original Urban Pr. C. Civ. Case No. 21/2001)

MATHAR ELIAS APPELLANT

Versus

FRANK JACKSON RESPONDENT

JUDGEMENT

MREMA, J.

This is a second appeal. The central issue between the parties is division of matrimonial property, namely, the matrimonial house in which the parties lived between December, 1995 and June, 2001 during subsistence of their marriage.

From the evidence and the oral ^{submissions} of the parties during the hearing of this appeal, it is common ground that the marriage between the parties existed for 9½ years. It is not also in dispute that when the Respondent (FRANK JACKSON) got married to the Appellant (MATHAR ELIAS) in 1992 he was living at Simike, within the Municipality of Mbeya, as a tenant. He did not have a house of his own. Sometime in 1995 both the parties started to construct a three bed roomed house at Nzovwe and no sooner it was completed ^{than} they occupied it as residential matrimonial house. Their second born child was born in that house in 1998.

Two witnesses, namely WATSON MWAMPAMBA (PW.2) strongly corroborated PW.1's testimony to the effect that when the said house was being constructed the Appellant was seen busy carrying water to make bricks. ADIMINI MALIMO (PW.4) also reiterated the same.

In defence Frank Jackson (DW.1) did not call any witness. But he simply testified that the house in dispute belongs to his father. That the plot on which the house was erected belongs to his grandfather called

Philimon. It is also his testimony to the trial court that his role during the construction of the house was only supervisory, but the money for building it was dished out by his father. In that respect, therefore, he asserted, the Appellant is not entitled to have any share to the said house.

Jackson Tongile (DW.2), the Respondent's father, corroborated DW.1's testimony to the effect that he was the one who gave money to DW.1 and asked him to supervise the construction of the house. There is no dispute that the sale document in respect of the said plot on which the disputed house situates was issued in the name of JACKSON TONGILE (D'.2).

In their unanimous decision the members of the court of 1st instance gave judgement in favour of the Appellant (PW.1) using the following tone (at page 8 of the typed judgement):

Wapo mashahidi wengi wa upande wa Martha Elias ambaye alikuwa mke wa mdai (sic) wanaohibitisha kuwa walimuona akichotelea maji wakati wa ujenzi wa nyumba inayogombaniwa. Pamoja na kwamba kiwanja cha nyumba ile kilinunuliwa na baba wa mdai, lakini bado inaonekana kuwa ndugu Martha Elias ambaye ni mdaiwa katika kesi hii alitoa sehemu ya jasho lake hadi nyumba ile ikafanikiwa kujengwa. Hivyo basi ndugu Martha Elias kwa jasho alilotoa kwenye nyumba ile anatakiwa alipwe na mdaiwa Shs. 100,000/= (laki moja).

The above cited decision aggrieved the Respondent (DW.1) who appealed to the District Court.

Apparently from the judgement of the appellate district court the Learned Appellate Resident Magistrate (K. Revocati) was satisfied that the Appellant (PW.1) was "entitled to the division of the matrimonial assets for her contribution through her domestic performance. Domestic performance includes carrying water". However, the ^{appellate resident} Magistrate disagreed with the trial court as to the ownership of the house. She referred to the same agreement (Exhibit "DA") that confirms that the plot on which the disputed house was built belongs to the Respondent's father. She also relied on the testimony of PW.2 for reasons that PW.2 told the primary court that he

saw the father of the appellant (DW.1) buying the plot. Thus in conclusion she was of the view that the house could not be the property of the spouses but that of the present Respondent's father (DW.2), hence the house could not be subject of division between the spouses.

In turn, the appellate court's decision aggrieved the Appellant, hence the present appeal.

I considered the whole matter with miticulous mind. In the result I am inclined to accede to the Appellant's 2nd ground of contention that the judgement of the Resident Magistrate is misconceived, as it purportedly excluded the house in which both the parties and their children were living before their marriage was declared as irreparably broken down.

First, it is common ground that the said house even if it was built on a plot acquired by DW.1's father, PW.1 and DW.1 contributed their efforts to supervise the house when the same was being built. PW.2, PW.3 and PW.4 supported strongly to the effect that they saw PW.1 carrying water for building the said house. There is no evidence on record that shows that she was paid for her energy and time used in doing that business.

Unless there is evidence to the contrary she did that job because she knew and believed that the house would be their matrimonial property.

In my considered opinion, as long as PW.1 was married to DW.1, automatically, in law, PW.1 was absorbed to the family of DW.1's father (DW.2) and, therefore it was immaterial whether or not he was the one who bought the said land on which the disputed house was later on built.

Secondly, even if it was DW.2 who bought the piece of land in question there is no concrete evidence as whether he (DW.2) was the one who paid out the money to build the said house. He never produced receipts to support purchases of building materials, etc. And if DW.2 claims that the house belongs to him, equity also demanded that PW.1's contributions to the building of the house should not be ignored; she is entitled to adequate compensation.

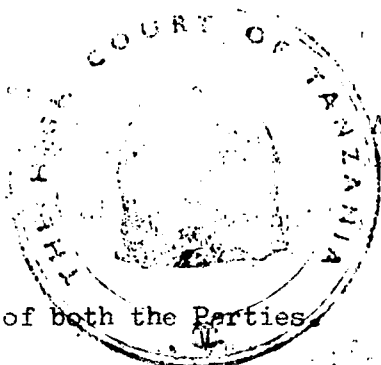
Thirdly, it is not true that PW.2 told the primary court that he witnessed the father of DW.1 purchasing the plot in question. Watson Mwampamba (PW.2) is on record as having told the primary court as follows (inter alia):

"Mimi ninajua kuwa aliyenunua kiwanja schemu
ilipojengwa nyumba ya wadaawa ni Py Philimon
Mwabeza na alisema anamnulia mjukuu wake "
(emphasis provided).

It was therefore incorrect on the part of the appellate resident magistrate to refer "Philimon Mwabeza" as Jackson Tongile (SU) - the Respondent's father. From the above cited piece of evidence it would follow therefore that the plot in question did not belong to DW.2 but to Philimon Mwabeza.

At the hearing of this appeal P.1 satisfied this court why she was unable to get the evidence of Philimon Mwabeza. There is nothing in the evidence that shows that P.2 has any relationship with any of the parties and, therefore, I find his evidence more credible than the testimony of DW.2 who definitely had interest to serve in the matter - since DW.1 and DW.2 are son and father respectively.

In the upshot I find the judgement of the appellate district court inconsistent with the evidence on record and in that light therefore that judgement and order cannot be sustained. I would therefore allow the appeal, quash the judgement and/or order of the appellate district court and in the result confirm the judgement of the Primary Court. The Appellant has told this court that she is not aggrieved by the judgement and decree of the court of first instance. Accordingly this appeal is allow with costs in this court and in both the courts below. It is so ordered.



A. C. MREMA

JUDGE

12.06.2003

AT MBEYA in the presence of both the Parties.

- Right of Appeal explained.

A. C. MREMA

JUDGE

12.06.2003