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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 68 OF 2003

ANDREW MARTINE.....APPELLANT

VERSUS

GRACE CHRISTOPHER.....RESPONDENT

JUDGEMENT

ORIYO,J.

The appellant, Andrew Martine appealed against trial court decision in Matrimonial Cause No.5/99. He had three substantive complaints, namely:-

- i) failure by the trial court to properly evaluate the evidence on record and failure to appreciate the the appellants evidence;
- ii) Trial court erred in the distribution of matrimonial assets
- iii) Trial court erred in granting custody to the respondent.

The brief background of the matter was that the appellant and the respondent lived together from 1988 to 1998; when the appellant started cohabitation with another woman. During the parties' subsistence of their relationship, they were blessed with two issues in June 1989 and June 1993. At the end of the relationship, the respondent initiated proceedings for the following reliefs:-

- a) Custody of the children
- b) Maintenance for herself and the children
- c) Division of Matrimonial Assets
- d) Costs

The trial court awarded the respondent custody of the children and the appellant was ordered to pay for their maintenance at shs 40,000/= per month. On the division of matrimonial assets (Comprised of 40 items listed under Index I to the application); the respondent and the children were jointly awarded one unfinished house on Plot No. 12, Block "C", Kihonda Morogoro. She was also awarded some house hold furniture; that is; 2 sets of couches, 2 beds and mattresses, a deep freezer, an electric cooker and a fan. Also awarded were a kiosk at Wami Magole area, a cosmetics shop situated at Wami,Bank Street,Shs 350,000/= cash and her personal belongings such as clothes and jewellery she had left behind at

the appellant's house. The rest of the matrimonial assets were awarded to the appellant including the house at the Kiwanja cha Ndege area.

With regard to the evidence at the trial; the appellant attacked the trial court on two fronts, that is, failure to evaluate the evidence and failure to appreciate appellant's own evidence. He cited as an example the trial court's holding that cohabitation began in 1988 whereas his testimony was that cohabitation began in 1989; which had meant that the Kiwanja cha Ndege house acquired in 1988 did not qualify as a matrimonial asset. On the division of matrimonial assets, the appellant contended that it was unfair, in particular, in awarding the respondent the kiosk and the shop both of which generate good income. He also faulted the court for awarding the Kihonda property to the respondent despite his testimony that it had been surrendered to the Municipality due to the parties failure to develop it.

But, all in all, the appellants most serious concern was that the trial court made a division of the matrimonial assets without having at first declared the marriage irreparably broken down followed by an order of divorce or separation. It was also contended that the appellant was entitled to have custody of the children because they were over seven years of age.

On the other hand, the respondent, was in support of the trial court decision despite the fact that the appellant was awarded more in the division of the matrimonial assets than what she got.

In determining on whether the trial court failed to properly evaluate the evidence on record and failed to appreciate the appellant's evidence; the trial court took in to account the opposing testimonies on the date they began cohabitation. Whereas the appellant contended that it was 1989; the respondent stated that it was 1988, October. The trial court was inclined to agree to the date of 1988 stated by respondent and which was supported by other factors such as acquisition of most of the matrimonial assets, the birthdate of the first issue in June 1989, etc. It is apparent that the appellant's insistence on 1989 was intended to deprive the respondent a share of some of the matrimonial assets in particular, the Kiwanja cha Ndege house. For those reasons, I agree with the trial court that parties cohabitation began in 1988.

The second ground of appeal was that the court erred by distributing matrimonial assets before declaring that the

marriage had irreparably broken down followed by an order of divorce or separation. I am of the firm view that the appellant has confused the rebuttable presumption of marriage under Section 160 (1) of the Law of Marriage and a marriage that has been solemnized through some form of a ceremony; whether formal or customary but one recognized under the law. Since the appellant and the respondent merely cohabited for a period of ten (10) years without any form of a marriage ceremony; the presumption of their being "duly married" is rebuttable but the respondent is entitled to the same reliefs as any other woman upon dissolution of a formal marriage pursuant to the provisions of Section 160 (2), Law of Marriage Act. In the case at hand, there was no marriage to dissolve or for which a separation court be ordered for that matter. In the case of HARUBUSHI SEIF VS AMINA RAJABU [1986] TLR 221; the late Korosso J; stated at page 225 as follows:-

".....it is clear that the respondent and the applicant having not been duly married in accordance with the formalities and procedures provided for in the Marriage Act, the Respondent had no legal right what so ever to petition either, for divorce or separation."

(underlining mine)

That is the legal position of the respondent in the case at hand.

The same view above was endorsed by the Court of Appeal in the Case of HEMED S.TAMIM VS RENATA MASHAYO [1994] TLR 197 where it was held:-

“ Where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under S 160 (1) of the Law of Marriage Act 1971, the courts have the power under S 160 (2) of the Act to make consequential orders as in the dissolution of marriage or separation and division of matrimonial property acquired by the parties during their relationship is one such order.” (underlining provided)

That being the legal position; the trial court divided the matrimonial assets and granted the other reliefs sought, pursuant to the provisions of SECTION 160 (2) and could not have issued orders of divorce or separation because the parties had not undergone any formal marriage known in law. Under these circumstances this ground of appeal fails and is dismissed.

The last ground of appeal is on the award of custody of the children who are over 7 years of age to the respondent and not to the appellant. The law is very clear that in deciding on the custody of a child, the court's paramount consideration is the welfare of the child more than anything else; see CELESTINE KILALA and HALIMA YUSUFU VS RESTITUTA CELESTINE KILALA [1980] TLR 76; and SECTION 125 of the Laws of Marriage Act.

It is the law that there is a rebuttable presumption that custody of a child below the age of seven years is better placed with the mother. For those over 7 years of age; custody is determined on the basis of the welfare of the child principle and

“ the court shall, have regard to the undesirability of disturbing the life of an infant by changes of custody ” (Section 125 (3) Law of Marriage Act).

It is evident on record that initially the children were in the custody of the appellant. Apparently the appellant and his new girlfriend (a step mother to the children) did not farewell

and the children had to be removed and placed in their biological mother's custody; the respondent. Under such circumstances the trial court was justified to place the children in the respondent's custody. However, in case of changes of circumstances which render the respondent unfit to have the custody of the children; the appellant may move the court to rescind its earlier order. Until such time, the trial courts order on the custody and maintenance of the children is upheld; and the third ground of appeal is also dismissed.

On the foregoing reasons the appeal lacks merit and is accordingly dismissed with costs.


K.K.Oriye

JUDGE

29/7/05

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