IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL NO.64/2004

FESTAEL SADIKIEL MACHA..... APPELLANT

VERSUS

SALUM SHABANI..... RESPONDENT

Date of last order: 8/3/2006
Date of Judgment: 13/6/2006

JUDGMENT

MANENTO, JK:

Festael Sadikiel Macha is a divorcee of Salum Shabani. That is by the judgment of the Mkuza Primary Court in matrimonial suit No.24/2003 delivered on 31/10/2003. In that case, the said Festael Sadikiel Macha petitioned for divorce. Then divorce was granted as prayed. Then she went on to claim for equal division of matrimonial properties. The primary court, after hearing separate evidence for the division of matrimonial property, awarded the said Festael Sadikiel Macha 50% of the alleged jointly acquired matrimonial properties. Unfortunately, there was no issue for custody of children. The reason is that there were none. Salum Shabani, the said husband appealed to the Kibaha District Court. At the district court, Salum

Shabani filed eight grounds of the petition of appeal, but they all hinged in two points, that the trial primary court misdirected itself on dealing with divorce proceedings and subsequently granted the order for divorce whereas there was no marriage proved before the court. He contended that they cohabited as combines only. Secondly that, there was no any evidence as to how the Festael Sadikiel Macha had contributed towards the acquisitions of the alleged properties.

The district court allowed the appeal by saying that the parties never contracted a marriage so that their cohabitation never amounted into marriage. That the trial primary court erred in dissolving a marriage before it was proved that it existed. The appellate district court, having ruled that there was no evidence of marriage, did not direct its mind on the second issue about the division of the alleged properties jointly acquired during that cohabitation. He ordered that the case do start de novo before another magistrate of competent jurisdiction. Now, Festael Sadikiel Macha was aggrieved by that decision, hence appealed to this court. Thus, this is now a second appeal. None of the parties had the services of an advocate.

The appellant filed three grounds of petition of appeal, namely that:

1. That the district court erred in law and in fact in not appreciating/acknowledging the existence of the marriage

between the respondent and the appellant having stayed together under one roof for six years.

2. That the district court erred in law and in fact in not taking into consideration the appellants contribution towards the acquisition of joint properties before engaging in the division.
3. That the district court erred in law and in fact in not finding on the basis of evidence adduced that the marriage between the parties herein has broken down irreparably.

The appellant then prayed for this court to allow the appeal, quash the decision of the district court and uphold that of the primary court, costs of the appeal and any other relief(s) this Court deems fit to grant.

The facts of the petition as found in the primary court file No.24/2003 were that, the appellant have been living with the respondent since 22/7/1998 to 17/7/2003 when she petitioned for divorce due to cruelty, adultery and for the division of the properties jointly acquired during that period. By simple arithmetic, the time the parties stayed together is five years. In reply to what the appellant had stated, the respondent resisted the prayer for divorce, saying that he still loved his wife, that he had never assaulted her, committed

adultery or even sleeping outside their home. From those short facts, the court proceeded with the hearing of the evidence and eventually granted the divorce and ordered of the division of the matrimonial properties, jointly acquired during the five years of their cohabitation.

The district court on appeal ruled that there was no evidence of marriage, so that the issue of divorce could not have been raised and therefore, ordered for retrial, perhaps to given the parties another time to squarely deal with that issue. I am of the considered opinion that the district appellate court once it had ruled that there was no marriage between the parties, then, it should not have ordered for any retrial. That would have been an end to the case. Unfortunately, the appellate district magistrate did not give reasons for his decision. He based it on the petition of appeal and the respondent's short submissions in court that they were living as concubines. On the other hand, the appellant submitted that he had been selling in their shop, which was in the respondent's father's house and after they had finished building their house, the shop was transferred to their own home.

On reading the proceedings before the district appellate court, I found that the procedure adopted by the court was unusual. The appellate district court exhaustively cross-examined the parties each

after a time, and that is where each of them gave answers leading directly to the issues contained in the memorandum of appeal. The appellant submitted that they had contracted a customary marriage which the respondent had denied, by saying that their cohabitation never amounted to marriage. The respondent had said that their conflict had arised after he had discovered that the appellant had stolen the money from his shop, bought a plot at a place called kwa Mfipa and actually built a house there. That fact was admitted by the appellant, though she had denied to have stolen the money. She said that she had been given the money by the respondent as compensation for the assault he had inflicted on her at four different times, at shs.50,000/= in each time. It was on that basis again that the appellate district court ruled that there was no marriage between the parties.

The Law of Marriage Act, 1971 (Cap.29 RE.2002) recognizes peoples stay for a long period, in which, they live and behave as married couples. Thus section 160(1) of the Law of Marriage Act, allows evidence to be given that the life style of a man and woman, have made them to acquire a reputation that they are married persons. The section reads as follows:

> S. 160(1): Where it is proved that a man and a woman 'have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married".

The appellant and the respondent in this suit had stayed together for a total of five years. That was an undenied fact. The Mkuza primary court without dealing in detail on the issue, came into a conclusion that the couples were married, having in mind the reputable presumption. I don't blame the trial primary court for having reached to that conclusion. I say so because the respondent, Salum Shabani had himself and on uncertain terms, categorically opposed the grant of divorce, saying that he still loved his wife, that he had not assaulted her nor had he slept outside their matrimonial home with other women.

That, section 160(1) of the Law of Marriage Act requires that the man and woman must have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife in order to acquire that status of marriage couples. The appellant had urged that they had acquired that reputation of being husband and wife. That reputation must be acquired from the people who had known them and

respected then as husband and wife. That shall be obtained from the proceedings of the primary court. In those proceedings, PW3 Dola Iddi Makunga had stated that he was a leader in the area the parties lived, that they had failed to reconcile the appellant and respondent, whom he addressed as husband and wife. The appellant was insisting for divorce for reason of adultery. That she had caught flagrante delicto the respondent committing adultery with their house girl. PW4 Ramadhani Hassani, also a member of the conciliation board confirmed what PW3 had said. PW5 described the parties as married couples whom they failed to reconcile because the appellant was insisting on divorce due to cruelty and adulterous behaviour of the respondent. Other prosecution witnesses included PW6 Mwinshehe Sulemani, PW7 Daniel Pius who spoke the same evidence while PW9 Justine Stanslaus identified the appellant and the respondent as his land lady and land lord respectively, since he was renting and staying in their house. All those witnesses had testified to the effect that the appellant and the respondent were wife and husband.

Likewise, the respondent had stated that he had been living with the appellant since 1999 till 11/9/2003 when he was testifying in court. That the appellant was his wife. DW2 Yusufu Nasoro witnessed the appellant buying a piece of Plot for shs.160,000/= at Kwamfipa area. Others included DW3

Saidi Athumani, DW5 Saidi Alli, all spoke of the purchase of a plot by the appellant, a fact not in dispute.

Now, from the evidence, it is clear that the appellant had discharged her duty, by proving that their stay as woman and man had acquired the reputation of being husband and wife. Therefore, it was proper for the trial primary court magistrate to rule that the appellant and husband were husband and wife, and proceeded to deal with the issue of dissolution of the marriage, and having found that the marriage had broken down irreparably, granted the divorce.

The district appellate court erred in saying that there was no marriage between the appellant and the respondent without giving reasons contrary to what the trial court had done. He did not deal at all with section 160(1) of the Law of Marriage Act, 1971. After all, there was no issue of dispute about marriage at the primary court. The respondent had just ralsed it as a second thought, so the district appellate court was not to deal with an issue on appeal which was not an issue before the trial court. That disposes the first ground of appeal, and I uphold the decision of the primary court that the appellant and the respondent were wife and husband for all purposes of the Law of Marriage Act.

On the second ground of appeal, the appellant urged that the district appellate court erred in law and fact in not taking into consideration the appellant's contribution towards the acquisition of the jointly acquired properties before engaging in the division.

The trial primary court, having ruled that the appellant and the respondent lived as wife and husband, went on to deal with the issue of the properties. It ruled from the evidence that the properties they had been jointly acquired during the subsistence of their marriage. That was a fact. I agree with the trial primary court that the appellant had a share in the acquisition of the properties mentioned at during the trial before the primary court. However, as regard to the house built at Kwamfipa area by the appellant, on a plot bought by her, was also a matrimonial property, though built in the absence of the knowledge of the respondent. The appellant was a shopkeeper while the respondent was dealing with other works. I agree with the respondent that the money used for the purchase of the plot and subsequent built of the said house was the money taken stealthily by the appellant from the sales in their shop and other activities they owned. She was not paid any compensation by the respondent, her husband.

By the way, I don't agree with the appellate district court that if a woman stays with a man, in any term you can use, that of a concubine or a

partner that had no right to properties if jointly, acquired. It is not necessary that a man and a woman should first be married to own or acquire jointly properties jointly. A man and a woman could be living separately, but work together as partners, invest or even cultivate a piece of land, for a example, paddy farm, harvest ten begs of paddy and divide it equally as a produce of their joint effort. It could be different if the woman who lived as a concubine of a man has not taken part in the acquisition of those properties.

I agree with the formula used by the trial primary court that the properties jointly acquired between the appellant and the respondent be equally divided, including the house at Kwamfipa area.

Before I conclude this judgment, I would like to comment on how the proceedings of this case was conducted. First the trial primary court dealt with the evidence in regard to the divorce petition and then it recorded evidence in regard to properties jointly acquired as almost a separate case. That procedure is wrong. The procedure to be adopted in any matrimonial proceedings is that the pleadings must contain three issues, namely divorce, custody of the children of the marriage if any and their maintenance and thirdly division of the matrimonial properties jointly acquired during the subsistence of that marriage.

Secondly the appellate district magistrate having ruled that there was no marriage between the appellant and the respondent, and that there was no issue for the division of the properties, he ought to allow the appeal by the respondent and not to order a retrial. That was a procedural gross misdirection.

Except for the small variations in the properties of the parties jointly acquired, the appeal is allowed, quashing the decision of the district appellate court.

I don't see any good reason why I should make an order for costs, and therefore, costs shall lie where they fall. It is so ordered.

A.R. Manento

JAJI KIONGOZI

13/6/2006

Coram: I.P. Kitusi, DR-HC

For the Appellant/Respondent – Present in person.

For the Respondent/Appellant – Present in person

Cc: Frank.

Court: Judgment delivered in court in the presence of the parties this 13th day of June, 2006.

I.P. Kitusi
DISTRICT REGISTRAR

13/6/2006