# IN THE HIGH COURT OF TANZANIA

## AT DAR ES SALAAM

## CIVIL APPEAL NO. 120 OF 2006

*(Originating from the Matrimonial Cause No. 12 of 2004 by Hon. M. Mnzava, PDM)*

**SADIKI M. MANDARI . . . . . APPELLANT**

**VERSUS**

**SAUM S. MANDARI . . . . . RESPONDENT**

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*Date of last order – 28/2/2008*
*Date of Judgment – 31/03/2008*

## J U D G M E N T

**Shangwa, J.**

The Appellant SADIKI M. MANDARI is a retired officer who used to work with the Ministry of Foreign Affairs. He was not satisfied with the decision of the District Court of Temeke in Matrimonial Cause No. 12 of 2004 delivered on 27/10/2005. In its decision, the District Court of Temeke held inter alia that the parties shall equally divide between themselves the jointly acquired matrimonial properties. The

Appellant has raised two grounds of appeal against the said holding namely:-

1. *That the trial court erred both in law and fact by ordering the division of properties without taking into consideration that the properties were solely acquired by the Appellant.*

2. *That the trial court erred in law and fact by not considering the evidence tendered by the Appellant.*

The trial court's record shows that both the Appellant and Respondent lived together as husband and wife respectively for a period of 37 years having contracted an Islamic marriage on 3/10/1967. During their marriage, they were blessed with six children. Their marriage was dissolved by the trial court on grounds that it had broken down

irreparably. It was dissolved on 27/10/2005. the properties which the trial court ordered to be divided equally are listed at paragraph 8 of the petition filed in the trial court. They are as follows:-

1. *Two houses, one is located at Plot 37 'A' within the Municipality of Moshi with Certificate of title No. 195. Another one is located at Plot No. 251/1 Block 'C' at Chang'ombe Keko Bora.*

2. *One motor vehicle make Camry TZN 6117 CC 2000.*

3. *One computer and its accessories.*

4. *One photocopy machine and a fax machine.*

*5. Various households such as sofa sets one freezer, one refrigerator, TV sets, Radio Cassette etc etc.*

In his testimony before the trial court, the Appellant said that the issue of division of matrimonial properties has to be referred to BAKWATA. He said, the Respondent is his third wife and that if the matrimonial properties are divided between him and the Respondent other wives will remain with nothing.

On the other side, the Respondent told the trial court in her testimony that she was working with RTC as cashier up to 1993 and that she used to take care of the Appellant and their children. Also, she told the trial court that she used to give her salary to the Appellant and that during the subsistence of their marriage, they built two houses one at Himo town Moshi and another one at Chang'ombe Keko Bora area Temeke District. In addition to that, she said that in

1997 they bought a motor vehicle Reg. No. TZN 601 make Toyota Camry. She said they have one refrigerator, one freezer, cookers etc etc.

Counsel for the Appellant Mr. Mmanda submitted that the Appellant worked in the foreign services for more than 30 years. He said that during trial, no evidence was adduced to show how the Respondent contributed to the acquisition of the properties in issue. He said that for quite a long period, the Appellant was working as First Secretary in Egypt, Sudan and Saudi Arabia and that during that period the Respondent was a mere house wife and that all domestic work was done by house maids who were hired and paid for by the Government. He said that the issue of division of the matrimonial properties was not properly analysed by the trial Magistrate who wrongly held that the Appellant did admit in paragraph 1 of the Answer to the petition that the properties listed at paragraph 8 of the

petition were jointly acquired through the parties efforts. He said that during trial, the issue of division of matrimonial properties was contested and that it needed a thorough analysis by the trial court before making its decision.

Learned counsel for the Respondent Mr. Masaka submitted that the decision of the trial court was proper because the Appellant admitted at paragraph 1 of his Answer to the petition that all the properties listed at paragraph 8 of the petition filed by the Respondent were jointly acquired by him and the Respondent. He contended that as the Appellant admitted that the properties listed at paragraph 8 of the petition were jointly acquired, the trial court had no need to evaluate further the evidence on record except to pronounce judgment as it did in this case. He said that the Appellant is bound by his admission of the contents of paragraph 8 of the petition and that he is estopped from denying his own admission of the contents of

the said paragraph which he made in paragraph 1 of his Answer to the petition. He referred to the case of **MAKORI WASSAGA VS. JOSHUA MWAIKAMBO AND ANOTHER** (1987) TLR 88 CA in which it was held as follows:-

> *"A party is bound by his pleadings and can only succeed according to what he has averred in his pleadings and proved in his evidence . . ."*

I have looked at paragraph 1 of the Answer to the petition and found that the Appellant admits the contents of paragraph 8 of the petition that he jointly acquired the properties mentioned therein with the Respondent.

It is common knowledge that where the defendant or respondent in a suit or petition admits any fact either on the pleading or otherwise, the court may give judgment in favour of the plaintiff or petitioner upon such admission. The provision under which judgment may be given on

admission is O. XII r. 4 of the Civil Procedure Code [Cap. 33 R.E. 2002] which provides as follows:-

> *" r. 4 Any party may at any stage of a suit, where admissions of facts have been made either on the pleading or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order or give such judgment, as the court may think just."*

In my view, although there was no application by the Respondent for judgment on admission of the contents of paragraph 8 of the petition; it is quite clear from paragraph 1 of the Answer to the petition, that the Appellant

categorically admits the contents of the said paragraph in which the fact of having jointly acquired the properties mentioned therein is admitted. The trial court was therefore entitled to order that the matrimonial properties mentioned at paragraph 8 of the petition be divided equally. It has to be appreciated that the Respondent lived with the Appellant for 37 years. It cannot be believed that during the said period, the Respondent was just sitting idle without contributing anything towards the acquisition of the matrimonial properties mentioned in paragraph 8 of the petition. All of the properties mentioned therein were acquired during the period of their marriage. There is evidence to show that the Appellant was for a long period before retirement been working with the Ministry of Foreign Affairs outside the United Republic of Tanzania. As already said, during that period he worked in Misri, Sudan and Saudi Arabia. It is quite obvious that for the whole of that period,

that Respondent spent a lot of her efforts caring for him and doing domestic services.

The argument raised by counsel for the Appellant that the Respondent did not contribute anything to the acquisition of the matrimonial assets is not correct. The domestic services which she used to render during 37 years of their marriage counts a great deal. In the land mark case of **Bi HAWA MOHAMED VS. ALLY SEFU** [1983] TLR at page 32, the Court of Appeal of Tanzania held that *"since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets; and that "joint efforts"* and *'work towards the acquiring of the assets"* have to be construed as embracing the domestic *"efforts"* or *"work"* of husband and wife.

Apart from the fact that the Respondent used to do domestic work, she also used to give the Appellant some money received as salary from RTC where she used to work as cashier for sometimes. The fact that the Respondent used to give some money to the Appellant earned from her salary was not disputed by the Appellant before the trial court. Although the Respondent did not state in her testimony as to how much money she gave him, I believe that whatever amount she gave him did contribute to the acquisition of the matrimonial assets listed at paragraph 8of the petition.

The Appellant wanted the issue of division of the matrimonial assets to be referred by the court to BAKWATA. The trial court did not want to do that. That was quite o.k. Indeed, the power to order for the division of matrimonial assets where the marriage has been dissolved by the court is conferred upon the court and not upon any religious

institution. This sort of power is conferred upon the court under S. 114 (1) of the Law of Marriage Act [Cap. 29 R.E. 2002] which provides as follows:

> *"S. 114 – (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale".*

The Appellant's argument that the order for equal division of the matrimonial assets will affect the interest of his other wives is not backed by law. The other wives who are married to him will enjoy whatever properties will remain

with him after the division of the matrimonial property in issue has been executed.

For these reasons, I hereby dismiss this appeal but order that each party should bear its own costs.

A. Shangwa

**JUDGE**

31/3/2008

Delivered in open court this 31st day of March, 2008 in the presence of Mr. Masaka for the Respondent and in the absence of the Appellant.

A. Shangwa

**JUDGE**

31/3/2008