

IN THE HIGH COURT OF TANZANIA

AT DODOMA

**PC CIVIL APPEAL NO. 1 OF 2008
(ORIGINAL CIVIL CASE NO. 91 OF 2004
OF DODOMA DISTRICT COURT AT DODOMA)**

**REHEMA SAID APPELLANT
Versus**

1. FLORA MOSHI 2. GAUDENCE PATRICK SHAYO 3. KONDOA AUCTION MART & COURT BROKER	} RESPONDENTS
---	----------------------------

21/07/2009 & 25/09/2009

JUDGEMENT

HON. MADAM, SHANGALI, J.

This appeal has a protracted history. Sometimes in early 1980's one **GAUDENCE PATRICK SHAYO** contracted a civil marriage with one **REHEMA SAID**, the present appellant. They were blessed with six issues of the marriage. Within the same period of peaceful cohabitation the spouses were able to acquire several properties cum matrimonial properties, namely a house situated on Plot No. 6 Block 40 "A" Dodoma Municipality, a house at Plot 55 Block "A" Chamwino, Dodoma, one lorry make Leyland Reg. No. DO

– 3024, lorry Tipper Reg. No. TZ 40287 and lorry Tipper with Registration No. ARD 19.

In 1990, and during subsistence of their marriage **GAUDENCE PATRICK SHAYO** contracted another marriage with one **FLORA MOSHI @ MUSHI** the present first respondent. That marriage was contracted and celebrated without **REHEMA'S** consent and all efforts made by **REHEMA** to block it ended in vain. Nonetheless, that second controversial marriage never lived long. In early 2003 misunderstandings among the spouses arose and eventually the marriage broke down irreparably and divorce issued in 2004. At that time they were blessed with three children.

Consequence to the breakdown of that marriage, **FLORA MOSHI @ MUSHI** filed a Civil Case No. 91 of 2004 against **GAUDENCE PATRICK SHAYO** claiming for division of the matrimonial properties acquired during the subsistence of their marriage.

In her claims **FLORA** listed all properties registered in the name of her ex-husband **GAUDENCE** namely; a house located in plot 6 Block 40 Area "A" Dodoma Municipality a house located at Area "C" Chamwino, Dodoma, one lorry make Leyland with Reg. No. DO 3024. One lorry Tipper Reg. No. ARD 19 and one lorry Tipper Reg. No. 40287.

On 15th September, 2006, the trial District Court pronounced a judgement in favour of the plaintiff (first respondent) **FLORA MOSHI @ MUSHI** and proceeded to distribute/divide the alleged Matrimonial properties between the parties and their three children without considering the elder wife of the defendant (Rehema Saidi) and her six children of the marriage. It must be remembered that at all this time the marriage between **GAUDENCE PATRICK SHAYO** and **REHEMA SAID** was still subsisting.

When the alleged properties were listed for attachment, and when the execution was about to take place, **REHEMA SAID, VENANCE YOKOMIA KISESA** and one **KHALFAN SELEMANI KABOZA** filed an objection proceedings on the attachment against both **FLORA MOSHI @ MUSHI; GAUDENCE PATRICK SHAYO** and **KONDOA ACUTION MART AND COURT BROKER** claiming interest over the properties. **REHEMA SAID** maintained that the listed properties were acquired during the existence of her marriage with **GAUDENCE PATRICK SHAYO** and before his second marriage to **FLORA MOSHI @ MUSHI**.

In its ruling dated 14th November, 2007 the trial court dismissed the objection raised by **KHALFAN SELEMANI KABOZA** and declare that the house located on Plot No. 16 block 72 Area "C" was acquired during the subsistence of the marriage hence subject to division as matrimonial property. On the objection raised by Mr.

VENANCE YOKONIA KISESA that he purchased house located on plot 6 Block 40, area "A" from **GAUDENCE PATRICK SHAYO** on 13th January, 2006, the trial Court dismissed the objection on grounds that **GAUDENCE PATRICK SHAYO** had no authority to sell the alleged house during the pendance of a matrimonial case before the court. At that time the alleged house was a subject in the litigation pending in court. The trial District Court found the said house to be a matrimonial property acquired during the subsistence of the marriage, hence ordered **GAUDENCE PATRICK SHAYO** to refund the sale proceeds back to the objector (Kisesa).

The third objection was that of **REHEMA SAID**, the first wife of **GAUDENCE PATRICK SHAYO**. She objected on the attachment of a house on Plot No. 55 Block "A" Chamwino where she has been residing with her children. Her objection also included the attachment of Lorry Reg.No. TZ 40287 and DO 3024 on the ground that the above properties and others were acquired during the subsistence of her marriage with **GAUDENCE PATRICK SHAYO**. She complained that the house was transferred to her name in 1998 and insisted that her marriage with **GAUDENCE PATRICK SHAYO** was still in existence. The trial District Court dismissed the objection on the ground that all properties were adjudicated upon before the court and no appeal was filed to challenge the decision of the trial District Court.

The appellant **REHEMA SAID** was dissatisfied with the decision of the district court hence this present civil appeal No. 1 of 2008.

It is unfortunate that during the pendance of this appeal the second respondent **GAUDENCE PATRICK SHAYO** met his untimely death. He passed away on 3rd July, 2008. His daughter **SONIA GRACE GAUDENCE PATRICK**, mothered by the appellant was appointed an administrator of the deceased's estate and consequently stepped into the shoes of her late father and conducted this appeal as the second respondent.

The appellant raised three grounds of appeal, namely;

1. That, the trial Magistrate erred in law and fact when he reached at the decision without considering the weight of evidence adduced by the appellant which was also supported by the second respondent in his counter affidavit.
2. That, the trial magistrate erred in law and facts when he misconceived the evidence adduced by the appellant and also misconceived the provisions in the former judgement and as a result he led into unjust and unsagacious decision.
3. That, the trial magistrate erred in law and fact in deciding the case without adjudicating on other matters as prayed for by the appellant. The trial court did not direct its mind to

the issue of legality of marriage between first respondent and the second respondent raised by the appellant.

On 28th April, 2009, I allowed the application made by the appellant and supported by the second respondent's administrator and third respondent to proceed with the appeal in the absence of the first respondent **FLORA MOSHI @ MUSHI**. In fact the first respondent has been playing no show person before this court for a long time. It appears that she has lost interest to prosecute her case. On the same date, I allowed the parties to argue the appeal by way of written submission.

Before I venture to discuss the grounds of this appeal and replies thereof, I think it is important to start with an apparent circumventing fundamental irregularity pertaining in the original (DC) Civil Case No. 91 of 2004.

According to the evidence on the record of proceedings there is no dispute whatsoever that the second respondent, the late **GAUDENCE PATRICK SHAYO** contracted a civil marriage with the appellant, **REHEMA SAID**. That was on 3rd August, 1982. They were blessed with six children namely; **ADAM GAUDENCE, SONIA GRACE GAUDENCE, EVA GAUDENCE, FREDRICK GAUDENCE, ANITA GAUDENCE AND CAROLINE GAUDENCE**.

It is also not in dispute that in 1990, the second respondent, the late **GAUDENCE PATRICK SHAYO** contracted another marriage with the first respondent, **FLORA MOSHI @ MUSHI**. The question whether that subsequent marriage was lawful or not is not material at this stage because the marriage was solemnized and later dissolved by the District Court in Matrimonial Cause No. 7 of 2002. What is available now is the fact that the second respondent (deceased) and his second wife (first respondent) were blessed with three children namely **HAPPY, PAULINA** and **IRENE**. When this second marriage was dissolved in 2002 the second respondent (deceased) was ordered by the trial court to maintain his three children who were below 18 years of age.

From those facts it is apparent that from 1982 to 1990, the second respondent (deceased) was maintaining a monogamous marriage with his first wife **Rehema Said**, the appellant. Then from 1990 to 2002 the second respondent (deceased) enjoyed a polygamous marriage with both first wife **Rehema Said** (appellant) and second wife **Flora Moshi @ Mushi**, the first respondent.

There is also ample evidence on record that during the pendance of the monogamous marriage the spouses were able to acquire several matrimonial properties. It is also not in dispute that during the pendance of the polygamous marriage, the spouses (meaning Rehema Said, Flora Moshi and their husband Gaudence)

were able to acquire some matrimonial properties. Let me repeat here again that, the second marriage between second respondent (deceased) and first respondent did not dissolve the first marriage between the appellant and second respondent (deceased). In my opinion that marriage continued to subsist until the unfortunate early demise of the second respondent on 3rd July, 2008.

From the above facts and reasoning, it means that the appellant **REHEMA SAID** and her late husband (second respondent) have interest in the matrimonial properties acquired from 1982 to 2004, while the first respondent **FLORA MOSHI @ MUSHI** have interest in matrimonial properties acquired during the subsistence of the polygamous marriage from 1990 to 2004 only. It is stance of the law that any property jointly acquired during the subsistence of a polygamous marriage should be distributed equally among the matrimonial couple i.e. husband and his wives.

The record of proceedings of the lower court indicate that following the dissolution of the marriage between the first respondent and second respondent, the former filed a Civil Case No. 91 of 2004 against the later claiming for division of jointly acquired matrimonial properties. In that suit the first respondent listed and included both the properties acquired during the subsistence of the first marriage (monogamous) between the appellant and second respondent (deceased) and those acquired during the subsistence of

the polygamous marriage (second respondent, first respondent and Appellant) for division. Incidentally the first respondent managed to convince the trial District Court to the extent of distributing the alleged matrimonial properties without considering the interests of the appellant, the first wife of the second respondent. In its judgement dated 15th September, 2006, the trial District Court distributed all the properties to the first respondent, second respondent (deceased) and their three children while leaving the appellant with her six children empty handed. It is not even clear why the trial District Court decided to distribute the matrimonial assets to the children of the first respondent and second respondent.

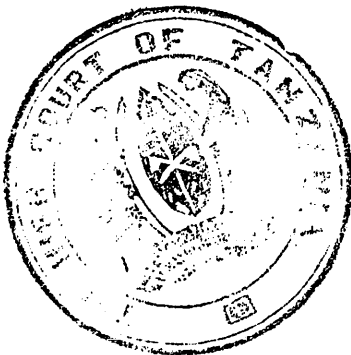
Be it as it may, the whole exercise is tainted with irregularity which occasioned gross injustice to the appellant. Both in law and logic, the appellant is entitled to get a share from jointly acquired matrimonial properties which were unlawfully distributed and attached.

I am aware that the second respondent (deceased) failed or neglected to appeal against that decision of the trial court dated 15th September, 2006. However, there is ample evidence that, the interested party, the appellant has been fighting that unjust decision since begging of the attachment proceedings without success.

In the circumstances of this matter and without relying much on the grounds of appeal, I am convinced beyond doubt that this is a proper case to invoke my revisional powers suo motu under section 44 (1) (b) of the Magistrate Court Act, Cap. II, R.E. 2002. In so doing, I hereby set aside the decision of the trial District Court dated 15th September, 2006 for failure to consider the interests of the appellant who is equally important and interested party in the distribution and division of the matrimonial properties involved.


Having quashed and set aside that decision, the appeal is hereby allowed. The decision of the District Court dated 14th November, 2007 is equally set aside.

Each party to bear its own costs.




M.S. SHANGALI
JUDGE
25/09/2009

Judgement delivered todate 25th September, 2009 in the presence of the appellant and her advocate Mr. Njulumu and in the presence of the second respondent's administrator.


M.S. SHANGALI
JUDGE
25/09/2009