

IN THE HIGH COURT OF TANZANIA
AT IRINGA

(PC) CIVIL APPEAL NO. 4 OF 2008

(From the decision of the District Court of Iringa
District at Iringa in Civil Appeal No. 1 of 2008
Original Matrimonial Cause No. 16 of 2007 of
Iringa Urban Primary Court)

MWINYI AMANI PILI APPELLANT

VERSUS

KUDRA BURHANI MLOSI RESPONDENT

JUDGEMENT

UZIA, J.

Mwinyi Amani Pili, Appellant and Kudra Burhani Mlosi, Respondent, were husband and wife before their marriage was irretrievably broken down and a formal decree of divorce was issued on 6th December, 2002 by the Primary Court at Iringa. Some of the reasons given by each of one of them were satisfactory to the trial magistrate and Court assessors that the said marriage had broken down irretrievably.

Having found that the marriage was irretrievable, the trial court divided the matrimonial assets to the parties; that is to say the matrimonial house and furniture. It was decided that, the respondent be given half value of the house and if the appellant would fail to do so the alleged house could be sold and the sale

proceeds be divided equally to both parties.

Dissatisfied with that decision of Primary Court, the Appellant filed the appeal to the District Court. Essentially the appeal was against the division of the matrimonial properties. The Appellant attacked the decision of the trial court that it erred in law and fact by ordering half share from the sale proceeds of the alleged house and other assets because there was no evidence of their existence and no evidence was led to support that the Respondent contributed anything in acquiring those items.

The District Court (J.W. Manolo, D.M.) based his decision on one of the statements of the Appellant in the trial court that the alleged properties were jointly owned,

"Tuna mali kama nyumba ya kuishi iko Isoka pamoja na vyombo vya ndani kama alivyosema mdai."

He therefore dismissed the appeal.

The appellant has preferred this appeal to this Court. Mr. Mkwata, learned counsel represented him. In his Memorandum of Appeal and written submissions by Mr. Mkwata, advocate, who submitted that the proceedings before the Primary Court were annulity for want of a prerequisite valid certificate from a competent Marriage Conciliatory Board. Secondly, both lower courts erred in law in holding that the Respondent was entitled to half value of the house and other matrimonial assets. That decision was made without having regard to the custom of the

community to which the parties belonged, the extent of the contribution made by each party towards the acquisition of the assets and the needs of the infant children of marriage.

With regard to the Certificate from the Marriage Conciliatory Board, Mr. Mkwata learned advocate argued that, Bakwata was not the proper forum and therefore could not issue the certificate declaring that that body had failed to reconcile the parties. The only body empowered is the Ward Tribunal under the Ward Tribunal Act No. 7 of 1985. He also cited to this court the case of **Ahmed Ibrahim Vs. Atikati Iddi**, High Court of Tanzania at Mbeya (PC. Civil Appeal No. 40 of 2003 (unreported)). Among other things, Justice Lukelelwa held;

"I go along with Mr. B.P. Mkwata, learned advocate of the appellant, Bakwata Conciliation Board which was a Community Conciliation Board established under Section 102 (2) of Law of Marriage Act, ceased to have jurisdiction in conciliation matters which could lead to an issue of a certificate that it has failed to reconcile the parties. In my view, Bakwata, is at liberty to undertake marriage conciliation activities and in case of failure they have to refer the parties to Ward Tribunals to continue with the process of conciliation and ultimate issuance of a certificate in case of failure."

Further to that, Mr. Mkwata, learned counsel argued that

the order regarding division of matrimonial assets did not take into account the infant three children of marriage and the extent of the respondent's contribution towards the acquisition of those assets vide Section 114 (2) (B) of the Law Marriage Act, 1971. In the instant case, a contribution by a spouse could be valued in money, property or work but not domestic chores.

On the other hand Kudra Burhan Mlosi, submitted that the requirement of the Certificate from the Ward Tribunal was a technicality which aimed at delaying justice to the parties. Therefore, it is not proper to declare the proceedings in the lower court null and void.

With regard to her contribution to the matrimonial assets, the Respondent further submitted that, cooking food for the family, washing clothes and other domestic chores were a contribution to the matrimonial assets and therefore entitle her to claim a share in the alleged assets.

In the light of the foregoing, two major issues emerge, these are as follows;

- (1) Whether the matter was referred to the Conciliation Board.
- (2) Whether the Respondent is entitled to a share in the matrimonial assets.

I would start with the first issue, whether the matter was referred to the Conciliation Board.

I am given to understand that, the circumstances differ from one case to another. In this case, circumstances suggest that there was cruelty to the part of the Appellant therefore making difficult to the Respondent go to the Ward Tribunal for reconciliation. The Appellant chased the Respondent and then married another woman before the marriage was formerly dissolved in the court of law.

The trial court record speaks by itself;

Ugomvi ulikuwepo kidogo kidogo mnamo tarehe 28.1.2007 mlalamikaji alirudi kutoka safarini alidai kwamba mimi ni mwizi wa mifuko (sulphate) ya kutunzia pumba hivyo alitaka niondoke kwake. Aliomba nikusanye kila kilicho changu. Nilimkatalia alisema kwa nini ninang'ang'ania ndani. Alifunga mlango alichomoa kisu alitisha kunichoma. Nilimuomba asiniue ndipo nilipofunga nguo za mtoto nikaondoka kwa gari tena aliyokodi yeye.

Niliondoka tarehe 29.1.2007 tarehe 11.2.2007 mdaiwa alifunga ndoa na mtu mwingine....".

In view of the respondent's statement in the lower court there was an element of cruelty and desertion, the appellant was a deserter.

Desertion is defined in the case of **Marim Tumbo Vs. Harold Tumbo** 1983 TLR 293, as follows;

"It is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be deserter, it is imperative for there to be conduct which amounts to dismissal from consortium".

In the instant appeal the behavior of the Appellant amounted to deserter, because he compelled the Respondent to leave the matrimonial home.

That being the case then, it would be difficult for her to go to the ward tribunal to seek certificate which would show that there was a reconciliation before the matter was sent to court.

The circumstances of this appeal are relevant to Paragraphs (a) and (f) of the Proviso to Section 101 of the Law of Marriage Act, 1971 Cap. 29 R.E. 2002, that the court is at liberty to dispense with reference to the Marriage Conciliatory Board where it is satisfied that the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse".

and

(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable."

In combination of two instances mentioned above the Respondent did not find any way to reconcile with the Appellant before going to court. Bakwata Certificate was enough to commence the proceedings in the Court of law.

The case of **Ahmed Ibrahim Vs. Atikati Iddi**, (supra) is different from the present case, because in that case the Judge was of the view that, Section 101 (a) – (f) of the Law Marriage Act, 1971 were not applicable.

Coming to the issue of division of matrimonial assets, I am given to understand that the Respondent was a housewife, that alone did not deny her rights in the matrimonial assets.

The Court of Appeal speaking through Nyalali, C.J. as he then was in the case **Bi Hawa Mohamed Vs. Ally Sefu** 1983 TLR, held;

"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 to the acquisition of the matrimonial or family assets, the 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."

The case referred above is a breakthrough to housewives and infact it has done away with archaic (very old-fashioned) ideas which prevailed those dark days when a woman was regarded as a mere chattle.

Surprisingly in this appeal, the Appellant himself supported the principle found in Bi Hawa's case (supra), that the alleged

assets the house inclusive were jointly owned. This is what he said in the trial court;

"Tuna mali kama nyumba ya kuishi iko Isoka pamoja na vyombo vya ndani kama alivyosema mdai."

In view of that statement, the Appellant admitted that the assets were jointly owned. That being the case, I do not see the reason why those properties should not be divided equally.

The issue concerning children who were born at the time the marriage was still subsisting was equally resolved by the trial court and it was not brought by anyone on appeal. It is therefore not a subject which will affect the division of the matrimonial assets.

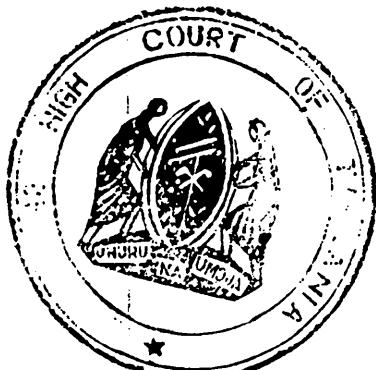
In sum, I would dismiss this appeal with costs and confirm the decision of the Primary Court and that of the District Court.


L.M.K. UZIA,

JUDGE

27/8/2009

Right of appeal explained.




L.M.K. UZIA,

JUDGE

27/8/2009