IN THE HIGH COURT OF TANZANIA

AT MTWARA

PC. MATRIMONIAL APPEAL NO. 3 OF 2007

Arising from Nachingwea District Court
in Civil Appeal No. 8 of 2004

Original Nachingwea Urban Primary Court
Civil Case No. 4 of 2004

SYLVESTER ROMANUS ..... APPELLANT

VERSUS

NAOMI PAUL ..... RESPONDENT

Date of Last Order – 06/10/2009
Date of Judgment - 18/12/2009

JUDGMENT

MIPAWA, J.

The respondent in this appeal Naomi Paulo successfully petitioned for divorce and distribution of matrimonial asserts or properties before the primary court [Nachingwea Urban Primary Court] aggrieved the appellant in this case Sylivester Romanus filed an appeal in District Court of Nachingwea where he lost the appeal. This is the second appeal.

Briefly the gist of the matter before the trial court was that the appellant and the respondent were living peacefully together as wife and husband. They were blessed with three issues before their

marriage turned soar. According to the Respondent Naomi Paulo who was the petitioner in the trial court told the court that the appellant's unpalatable manners of having sexual intercourse with other womens to the extent of bringing to the respondent [her wife] the ejaculated spermatozoa in a condom chilled their marriage. There were a lot of such other bad incidents the appellant was doing to her wife [respondent]. Efforts by the Respondent to put their problem in a Straightline before a Local Council Baraza proved futile. The witness who supported the respondent [then petitioner] in the trial court was PW.2 Mohamed Bilali this witness alleged that the respondent was at the material time a wife of the appellant when the appellant bought a cashewnut farm from his (PW.2) father. On the other hand the appellant accused the Respondent in the trial court that she was not in love with him [appellant] she started a habit of drinking local brew heavily and even sleeping outside the matrimonial home. According to the appellant the Respondent had the habit also if insulting him. He [appellant] complained before the local Baraza. At the local Baraza the appellant told the lower court that the respondent only insisted to be given a "talak" and nothing else.

In final analysis the Primary court found that the appellant had inflicted to the Respondent mental torture and psychological torture. The Respondent was upset by unpalatable acts and deeds of the appellant. The learned Primary Court Magistrate observed that;

> ..... mdaiwa alikuwa anamtesa mdai kiakili,....pale anapodaiwa kuwa, alikuwa anamchukulia shahawa kwenye mfuko wa kondomu, baada ya kutenda tendo la ndoa na

> mwanamke mmoja... ushahidi huo haukukanushwa na ushahidi wa upande wa utetezi.

The trial court also observed in its judgment that the Respondent was appeased and cheated by the appellant to leave behind all what they have achieved together i.e matrimonial properties at the expense of the talak which the Respondent was hotly in need and that was what the appellant did before the local Baraza. However the primary court after noting that the local Baraza failed to investigate the claims and the properties acquired together by the spouses granted – the claims of the Respondent-petitioner in the trial court - the District Court joined hands with the trial court and dismissed the appellant's appeal. The learned District Magistrate in his judgment said ***inter-alia;***

> ..... the evidence records from the primary court shows that the Respondent was entitled to the share as ordered by the trial court because she contributed to clear the shambas and planting (sic) cashewnuts..... since the testimony of the Respondent [original petitioner] told the trial court how she participated to the maintenance of the shambas and in planting cashewnuts to the shamba she is entitled to the share....

I have gone through the grounds of appeal of the appellant and taken due consideration. In essence the grounds of appeal are deeped in the division of matrimonial asserts where the appellant does not agree especially on the cashewnut farms. However a cursory glance on the evidence shows that the wife Respondent had contributed towards the matrimonial asserts over the three cashewnut farms.

The wife told the court that;

> .....Nilikuwa ninakuangalia msimamo. Mimi ninakudai mashamba ya mikorosho matatu (3) shamba la kwanza tulilipata kutokana na fedha za nguruwe. Tulinunua kwa bei ya shs.50,000/=, shamba la pili tulinunua kwa bei ya shs.10,000/= kwa Maria Salum. Shamba la tatu tulinunua ekari moja ya misitu tukapanda mikorosho shamba hili la tatu tulibadilishana na kalageni. Shamba hili tulinunua mwaka 1999. Tulipanda mikorosho hiyo tukawa tunamwagilia maji....

The evidence of PW.1 was corroborated by PW.2 as regards to the purchase of the "mikorosho farms" PW.2 had told the trial court that he sold his cashewnut farms to the appellant who was living with the Respondent as his wife. It can be noted from the record that the act of the appellant having sexual intercourse with other women and showing his wife the sperms he ejaculated while doing the act of adultery – the sperms being in a condom he used – chilled their marriage. I can define adultery in the following words; [I think] adultery is an illicit physical act of sexual union between married persons of the opposite sex not lawfully wedded to each other.

The law of marriage act section 107(2) provides that;

> ..... the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a part as of right to a decree
>
> (a) Adultery committed by the Respondent particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest....
>
> (3) where .....

The evidence on record shows that the appellant's acts of adultery were in fact beyond apprehension and continuous as it is evidenced on two critical occasion, the first one is where the appellant brought to his wife sperms in a condom to show that he had had sexual intercourse with another woman, the seconds was when the appellant used the piece of cloth of his wife to clean his private parts and that of the other woman after they had completed the sexual act and which he threw the sperms polluted piece of cloths under the bed which wife later discovered them. I think, to my mind, the divorce was only a proper way as the trial court did.

The appellant also assets that since the respondent did not claim any property from him when he was receiving his divorce and hence the trial magistrate erred in apportioning to her the matrimonial properties. This ground is devoid of merit because the Respondent had insisted ***ab-initio*** when the case was before the trial court that she claimed three cashewnut farms from the appellant; see the Kiswahili version quoted from the trial court's proceedings. It also seems to me in this connection that, the trial court was by and large right to hold that the wife Respondent was cheated and appeased by the appellant to leave behind the matrimonial properties to the appellant at the expense of the talak or divorce I also find that the appellant cannot put the defence that since his wife after getting the divorce decided to leave without claiming any assets, this cannot deprive the respondent to an equitable distribution of matrimonial properties acquired by the spouses during their marriage.

Nevertheless there is evidence that the wife had needed the properties when he was testifying in the trial court.

Our law Cap.20 R.E 2002 the marriage Act clearly stipulates under section 114(1) that;

> ..... The court shall have power..... to order the [distribution] 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.
> (2).....
> (3)..... for the purpose of this section reference to assets acquired during the marriage include assets owned before marriage by one party which have been substantially improved during the by the other party or by their joint efforts....

In its judgment the trial court ordered that;

> Katika kudai talaka.... Alilazimishwa aache mali yote kwa mdaiwa kwa vile alimdai talaka mdaiwa, naye mdaiwa (sic) ili apate talaka lakini kukubali kwake mdai kulikuwa ni kwa shingo upande... B/kata halikutaka kuchunguza kwa makini zaidi juu ya kazi hii. Hivyo mdai anadai haki katika madai yake. Mdaiwa amgawie mdai mali yao yote waliyoipata kwa pamoja....

The Kiswahili version "amgawie mdai mali yao yote waliyoipata kwa pamoja" as not clear it might mean that the appellant [respondent in the trial court] should give the respondent all the matrimonial properties acquired jointly. There is no clear word that the trial court meant to divide or make division of the matrimonial properties.

However in his judgment the learned District Magistrate after hearing the appeal said that;

> ..... the evidence... from the primary court shows that the respondent was entitled to the share as ordered by the trial court because she contributed to clear the shambas and planting (sic) cashewnuts.....

Nevertheless, it seems to me that the trial court did not at any degree apportion the properties say $^{2}/_{3}$ or $^{1}/_{3}$ or $^{1}/_{4}$ to be given to the wife and the husband to remain with a certain portion. I must state here categorically that; in assessing the contribution of spouses in acquisition of matrimonial property each case must be dealt with in the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness. Indeed I find it that the wife in our case was entitled to the division of the matrimonial properties inspite of the allegation by the appellant that she did not need or in other words there was no agreement inter-parties. I should strengthen my argument here by quoting an English authority in ***Hazell v. Hazell [1972] I ALL ER 923*** where the court of appeal held that;

> .... In order to entitle the wife.... To a share in the proceeds of the matrimonial home it was unnecessary to show an agreement, express or implied, that the wife should have a share; it was sufficient if the contributions made by the wife to the family expenses were such as to relieve the husband from expenditure which he would otherwise have had to bear. Thereby helping him indirectly.....

Lord Denning MR also had this to say as regard to the matrimonial assets division if; in ***Chapman v. Chapman [1969] 3 ALL ER 476, 477***

> ....it is still the law that when the matrimonial home or the furniture is acquired by the couple as a joint venture each of them contributing directly or indirectly.... Then it is to be regarded as belonging to them jointly.....

I therefore hold the viewed that the wife, respondent in this appeal, was entitled to the division of the matrimonial assets and I entirely and respectfully agree with the two courts below and dismiss this appeal in its entirely. And in the circumstances of the case, I think rightly that the wife respondent should be given $^1/_3$ of the matrimonial assets acquired by the spouses during their marriage this includes also assets owned before marriage by the one party which have been substantially improved during the marriage by the other party or by their joint efforts as per s.114(3) of the law of marriage Act Cap.29 R.E 2002.

The evidence is clear that; in the trial court the wife Respondent claimed three shambas from the appellant the shambas which he participated to clear and planted cashewnuts together with the appellant. The Respondent when being cross-examined by the appellant in the trial court, she answered thus;

> ..... Mimi ninakudai mashamba ya mikorosho matatu (3) shamba la kwanza tulilipata kutoakana na fedha za nguruwe. Tulinunua kwa bei ya shs.50,000/= shamba la pili tulinunua kwa bei ya shs.10,000/= kwa Maria Salum, shamba la tatu

> tulinunua ekari moja misitu, tukapanda mikorosho shamba hili la tatu tulinunua mwaka 1999 tulipanda mikorosho tukawa tunamwagilia maji.....

Although appellant in his evidence before the trial court alleged that the Respondent (wife) did not left any cashewnut farm of which she planted except areas which were unplanted after clearing the bushes: The appellant told the lower court that:

> .... Wakati tunaishi pamoja mimi na mdai tulinunua msitu kwa kalageni nalo lilifyekwa na ekari mbili... shamba la mahidi lilikuwa ekari 1... sehemu isiyofyekwa ilikuwa ni ekari 2 ndani ya mashamba hayo hamkuwa na mikorosho mwaka 2001 baada ya kumchukua mke mwingine tuliweza kupanga mikorosho... mdai hakuacha shamba la mikorosho kwangu.....

However on the balance of probabilities the trial court rejected the assertion by the appellant that she did not contribute towards the acquisition of the shambas which I agree with the trial court as well as the first appellate court which stated that;

> ..... she pointed out ***inter-alia*** that it was proved that there were shambas with cashewnuts. She added that she was the one who was maintaining those cashewnut [farms] shambas that she is the one who cleared the shambas and planted cashewnuts.... She further said that for the shamba purchased by the appellant's (sic) she is the one who cleared the shamba and planted [cashewnuts] tree.....

Section 114(3) of the Law of Marriage Act Cap.29 R.E [2002] is clear on the assets acquired jointly by the parties during marriage that they are subject to division inter-parties as well as the assets owned

before marriage by the one party which have been substantially during the marriage by the other party or by their joint efforts as per s.114(3) and this case falls in all corners that there were efforts by the wife towards the acquisitions of the matrimonial assets, the three shambas and which the wife respondent substantially improved the same. There is no reason why I should disturb the findings of the two courts below.

On the foregoing this appeal fails and it is dismissed in its entirely as the two courts below found the respondent was and is entitled to the share as ordered by the trial court because she contributed to clear the shambas and planted cashewnuts. As I have said above the division of the matrimonial assets should be in the formula of 1/3 to the wife respondent and 2/3 to the husband the appellant.

I order no cost.

I.S. Mipawa,
Judge
18/12/2009

Delivered today in the presence of the appellant but in the absence of the Respondent.

I.S. Mipawa,
Judge
18/12/2009

Further rights explained.

I.S. Mipawa,
Judge
18/12/2009