

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 5 OF 2010

*(From Civil Appeal No. 13 of 2009 before Temeke District Court, Original
Matrimonial Cause No. 95 of 2006 before Temeke Primary Court*

MUSSA SELEMANI MKONGE APPELLANT

VERSUS

MWANTUMU AHMAD RESPONDENT

*Date of last order – 2/12/2011 .
Date of Judgment – 28/3/2012*

J U D G M E N T

Shangwa, J.

This appeal is against the decision of the District Court of Temeke delivered in Civil Appeal No. 13 of 2009 which originated from the decision of the Primary Court of Temeke in Matrimonial Cause No. 95 of 2006. It is based on six grounds but I will consider the 1st and 2nd grounds only. This is because the 2nd ground of appeal is merely academic. The 4th and 5th grounds are interrelated to the

2nd ground and the 6th ground is a mere submission and not a ground of appeal.

. . . As a whole the 1st and 2nd grounds of appeal are sufficient to dispose of this appeal. They read as follows:-

1. That the Appellate Magistrate erred in law and in fact when she failed to consider the fact that the house given to the Respondent by the Primary Court Magistrate was acquired before she was married by the Appellant . . .
2. That the Appellate Magistrate erred in law and in fact when she refused permission to adduce documentary evidence to establish that the house in question was bought without the contribution of the Respondent.

Before I consider the said grounds of appeal, I wish to look at the back ground to this appeal which is as follows:-

The Appellant Mussa Selemani Mkonge and Mwajuma Ahmad are former husband and wife respectively. They got married on 30th October, 1981. Their marriage was dissolved by the Primary Court of Temeke on 7th January, 2009 in Matrimonial Cause No. 95 of 2006 after finding that it had broken down irreparably.

During their marriage which lasted for a period of about 28 years, they were blessed with 11 (eleven) children. Nine of them are alive. Two died. During this period, the Appellant used to work with Tanzania Harbours Authority, Dar es Salaam and the Respondent was house wife. The Appellant has now retired.

There are three houses which are alleged by the Respondent to have been acquired during the subsistence of her marriage with the Appellant through their joint efforts. These are as follows:-

1. A house at Chamazi (Mbagala rangi tatu).

2. A house at Chalambe (Mbagala area).

3. A house at Kiparang'anda (Mkuranga).

Apart from those houses, it was alleged by the Respondent that both of them did acquire five acres of land at Kiparang'anda, three acres of land at Mbagala and two plots of land one at Kiparang'anda and another one at Mkuranga.

In her decision, the Primary Court of Temeke (Mrs. Haji Mbaga) found that during the subsistence of their marriage, both parties acquired the aforementioned houses through their joint efforts. The said Primary Court Magistrate found that the Respondent's contribution in the acquisition of those houses is that she supervised construction of those houses and that during that period, she did a lot of domestic work in the upbringing of their family. So, she ordered that the Respondent should be given the house at Chalambe (Mbagala area).

The Appellant was not satisfied with the said order. He appealed to the District Court of Temeke against the said order contending that the Primary Court Magistrate erred in law and fact by ordering that the house at Chalambe, Mbagala should be given to the Respondent as it was not acquired through joint efforts of both of them.

The District Court of Temeke, Kalli PRM upheld the decision of the Primary Court of Temeke upon being convinced that the house at Chalambe was built after contracting their marriage and through their joint efforts. The appeal was therefore dismissed with costs. Thereafter, the Appellant decided to appeal to this court.

In his appeal before this court, the Appellant faults the decision of the District Court Magistrate at Temeke in confirming the decision of the Primary Court Magistrate at Temeke for ordering the house at Chalambe (Mbagala) to be given to the Respondent. On the 1st and 2nd grounds of

appeal as well as in his oral submissions, the Appellant strenuously argues that the decision by the courts below of giving the house at Chalambe to the Respondent is quite wrong as he never acquired it with her through joint efforts. He said that he bought it before getting married to the Respondent and that the courts below did not allow him to tender documentary evidence to show that he bought it before marrying the Respondent.

The point to be considered now is whether or not the house at Chalambe which was given to the Respondent by the lower courts was acquired by the parties during their marriage and through their joint efforts. First of all, let us look at what the Appellant said before this court and the trial Primary Court. Before this court, he said that he married the Respondent on 30th October, 1981 and that before marrying her, he had a house which he built in

1978 and that in 1988 he sold it and bought the house in issue from one Hamisi Ally.

Before the trial Primary Court, the Appellant did not specifically state that the house in issue was bought with the money which he obtained from the sale of the house which he built in 1978 before marrying the Respondent. He simply called Hamisi Ally to testify on his behalf. During his testimony, Hamisi Ally simply told the trial Primary Court that the Appellant bought a house from him which had six rooms. He did not mention the location of that house and the date when he sold it to him.

Let me comment here that the Appellant's allegation on the 2nd ground of appeal that the trial Primary Court and the Appellate District Court refused to admit his documentary evidence to prove that the house in issue was bought without contribution of the Respondent is not correct. As a matter of fact, the records of the courts below

do not show that the Appellant asked the courts to produce those documents and was refused permission to do so.

In her testimony before the trial court, the Respondent said that the Appellant had no house at the time of marrying her. The trial Primary Court believed her and gave her the house at Chalambe.

In my view, the Appellant had weaknesses in expressing himself when he failed to tell the trial court that the Respondent did not contribute anything in the acquisition of the house in issue on grounds that he obtained it out of the sale proceeds of the house which he had built in 1978 before marrying her.

Despite his weaknesses in failing to express himself properly before the trial Primary Court, I think the house in dispute i.e. the house at Chalambe was not acquired through joint efforts of the Respondent and the Appellant. I believe that the Appellant bought the house in dispute by

using money which he obtained from the sale of the house which he built before marrying the Respondent. In my opinion, I think it was wrong for the courts below to give the house at Chalambe to the Respondent as she did not contribute anything in its acquisition. Therefore, I quash the decision of the courts below for giving the house at Chalambe to the Respondent.

What the trial court ought to have done is to order for the distribution of the properties which were acquired through joint efforts by the parties. These properties are the house at Chamazi (Mbagala rangi tatu), the house at Kiparang'anda, five acres of land at Kiparang'anda and three acres of land at Mkuranga.

It was common knowledge that the Respondent did not contribute any money towards the acquisition of the above mentioned properties as she was a mere house wife. Notwithstanding the said fact, the volume of domestic work

that she shouldered such as bearing and taking care of their 11 (eleven) children during the subsistence of their marriage when the Appellant was busy doing other things is quite great. For the aforesaid reasons, I pass the following orders:-

1. The house at Chamazi which is located at Mbagala area should be distributed equally between the parties.
2. The house at Kiparang'anda at Mkuranga area should as well be distributed equally between them.
3. The house at Shimo la Mchanga at Kiburugwa area which the Appellant himself said that he gave it to the Respondent should remain to be her property.
4. Five acres of land at Kiparang'anda should be distributed equally between them.

5. Three acres of land at Mkuranga should also be distributed equally between them.

Finally, I allow the appeal to the extent mentioned herein and I order that each party should bear own costs before this court and the courts below.



A. Shangwa
A. Shangwa

JUDGE

28/3/2012

Delivered in open court this 28th day of March 2012 in the presence of the Appellant and the Respondent.

A. Shangwa
A. Shangwa

JUDGE

28/3/2012