IN THE HICH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC MATRIMONIAL APPEAL NO. 3 OF 2016

(From Ruangwa District Court, Matrimonial Appeal No. 4 of 2015, Original Ruangwa Primary Court, Matrimonial Case No. 19 of 2015)

MAZOEA SELEMANI.....APPELLANT

VERSUS

ESHA AMIRI.....RESPONDENT

19/07/2016 & 01/09/2016

J U D G M E N T

Twaib, J:

The parties herein were husband and wife, having contracted an Islamic marriage on 30/09/2013. Before they formerly married they cohabited for some time, during which they were blessed with one issue and acquired some properties. Their relationship deteriorated immediately after they formerly married, each accusing the other as being the source of the worsened relationship. An attempt by BAKWATA conciliation board to have their differences reconciled proved futile. Hence they resorted to court proceedings. The Primary court of Ruangwa granted a decree of divorce and made some pronouncement with regard to the custody of the child and division of the properties as follows:

HATMA YA MTOTO

kwa kuwa mtoto ni mdogo wa mlaka 4, atakaa kwa mama na baba (mdaiwa) atakuwa anapeleka matunzo na atakapokuwa mkubwa atachagua pa kukaa....

MALI

1. Kiwanja cha heka moja mdaiwa atapata nusu na mdai nusu au mmoja amfidie mwenzake kwa makubaliano.

2. Nyumba itabaki kwa mdalwa (baba) na atalazimika kumpatia mdai tofaii za kuchoma elfu saba (7,000) ndani ya miezi mitatu. Mdaiwa asipompatia tofaii hizo ndani ya mda wa miezi 3 nyumba ya mdaiwa (baba) itagawanywa na mdai atapata robo ya nyumba hiyo (yaanl watagawana vyumba na uwanja wa nyumba hiyo na mdaiwa atapata robo tatu na mdai robo au itauzwa kila mtu apate chake.

3. Banda la biashara litagawanywa na mdai atapata nusus na mdaiwa nusu kwa kuuzwa au kukubaliana na mdai na mdaiwa.....

The appellant while not in dispute with the decree of divorce, he was dissatisfied with the decision of the trial court on the custody of the child and division of matrimonial properties. However on appeal to the District Court of Ruangwa, his appeal was dismissed with costs. Still aggrieved, he lodged this second appeal relying on seven grounds which centres on the custody of the child and division of matrimonial properties.

At the hearing of the appeal before me the parties were unrepresented and they appeared in person to argue their respective sides of appeal. In support of the appeal the appellant submitted that he had relevant documents to show that he owns the properties which are: a house at Likunje Ruangwa; a commercial property at Likunje

and a farm at Likunje with one$1^{1/2}$ and care. He submitted further that the first two properties are solely his property as he acquired before marriage. But the farm was acquired during the marriage. They also acquired some goats and also developed together the property in which they lived by building additional structure. He insisted that the documents attached in this appeal indicate that the properties were acquired before they got married.

Responding to the above submission the respondents argued that she has lived with the appellant for a total of 9 years. Eight years of them was during their engagement and were blessed with one issue born in 2011 aged 5yeard old. At the start of their cohabitation in 2006 they had no any property. She started running a small restaurant and later they changed a restaurant business to a shop which they ran together. They later bought a plot of land and built the matrimonial home together from the proceeds of the shop. They also bought a farm and kept some goats.

He added that the fact that the appellant has the documents does not mean that the properties belong to him. It was so because, as a man the document were written in his name. She concluded by praying that justice be done to her as she still lives in a rented house while the appellant is using all the properties which are in his hands.

In his rejoinder the appellant submitted that it is not true that he lived with the respondent for nine years. He returned to the village in 2010 and that is when he met her and started cohabiting with her until they married in 2013.

Further in view of a complaint by the appellant that the trial court refused to accept his documents relating to ownership of the properties in question, this court by way of additional evidence in terms of section 76 (1) (d) of Civil Procedure Code Cap 33 R.E 2002 allowed the parties to testify and produce the relevant documents.

In his testimony before this court, the appellant Mazoea Selemani (PW1) testified that he has relevant documents to show that he is the owner of the properties in dispute. These documents are: One, a sale agreement for a farm with $1^{1}/2$ dated 24/07/2013 bought from Said Mpini at a price of Shs 100,000/=. Two, Sale agreement in respect of a commercial building dated 13/05/2009 which he bought from Selemani Said Chakupewa at a price of 300,000/=That at the time of buying the same he had only shs 150,000/=. He got the other 150,000/= from Hajibu Hamisi Mnali who took half of the plot not in dispute. Three, sale agreement for the residential house which he bought it on 23/01/2004 from Hassani Chilambo at shs 75,000/=. He finally prayed to tender these documents as exhibits. The court admitted the documents as exhibits PA1, PA2, and PA3 respectively without objection from the respondent.

When he was cross examined by the respondent the appellant admitted that the respondent contributed in the construction of the house. That she contributed the building blocks and painting. He added that he used to build the house step by step and continued to build even after marriage and he finished in 2013.

On her part the respondent Esha Amri (DW1) testified that the documents do not show the truth. They began their courtship and became engaged when the appellant had no property. That at first they stayed together at the house of the appellant's father for many years and then they moved to a rented house before they began to build their own house. He added that they also bought the commercial property and farm together.

Responding to the question posed by the appellant, the respondent further stated that she agreed for the document to be admitted because there is sufficient evidence to show that the properties were acquired when they were living together for about nine years and that she gave similar testimony at the trial court.

Having gone through the entire record and considered the additional evidence, the following issue must be resolved: One, whether the trial court erred in awarding custody of the only issue of the marriage to the respondent; Two, whether the division of matrimonial property was unfair and illegal in the circumstances of the case.

To start with the first issue, the appellant complained in the first ground of appeal that the trial court placed custody of the child aged four years old to the respondent without considering the welfare of the child as required under section 125 of *the Law of Marriage Act* Cap 29 R.E 2002. He grounded that the respondent is currently living with another man under polygamous marriage which is not good for the welfare of his child.

However *the Law of Marriage Act* Cap 29 R.E 2002 under section 125 (3) provides a rebuttable presumption that it is for the welfare of an infant below the age of seven years to be with his or her mother. Similar emphasis was made in the case of ***Andrew Martine v Grace Christopher***, *Civil Appeal No. 68 of 2003 (Unreported) HCT at Dar es Salaam (Unreported).* In his evidence before the primary court in relation to this complaint the appellant stated "*Mume/mchumba alipatikana kabla ya eda (3) na sasa wanaishi na mchumba*". However when the respondent was examine on the issue she stated *"sasa ninaishi kwangu na siishi kwa mume.* This evidence in my view did not suggest any bad character on the part of the respondent that would have warranted denial of custody to the respondent. The presumption was therefore not rebutted and the trial court was justified in awarding custody of the child to the respondent.

On the second issue the appellant claims that a farm with $1^{1}/2$ bought 24/07/2013 from Said Mpini at a price of Shs 100,000/=(Xhibit PA1) was acquired during marriage, but the other properties a house at Likunje and a commercial property are sorely his properties as he acquired them before marriage. The respondent on the other hand admits that some of these properties particularly a house and a commercial properties

were not acquired during marriage, but she was of the view that they were acquired during cohabitation because at the time they met the appellant had nothing.

Generally in view of the evidence given at the trial court and the documentary evidence tendered in this court the following facts are apparent: First, in view of Exhibit PA1 and the evidence on record a farm with $1^1/2$ was acquired during the marriage (formal marriage) and therefore in terms of section 114 of the Law of Marriage Act the same was subject to division.

Second, a commercial building (Exhibit PA2) was acquired on 13/05/2009. According to the respondent's testimony this property was acquired during cohabitation and by their joint efforts. The appellant's on the other hand claims that the property was acquired before marriage and before cohabitation, because according to him he met the respondent in 2010 and is when they started cohabiting. However this being an issue of facts I uphold the trial court findings that the property was acquired while the parties were living together. That is during cohabitation.

The evidence on the record clearly suggests that parties lived under a presumed marriage before they formerly married. This is so in view of section 160 (1) of the Marriage Act. Thus, whether such presumption is rebutted or not, the court has powers to divide properties acquired by the parties during their cohabitation. This is so, in terms of section 160 (2) of the Law of Marriage Act. That being the legal position; the trial court rightly included a commercial building acquired in 2009 among the properties which were divided. See also the case of **Hemed S. Tamim v Renata Mashayo** [1994] TLR 197 where it was held:

> *"Where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under S 160 (1) of the Law of Marriage Act*

1971/ the courts have the power under S 160 (2) of the Act to make consequential orders as in the dissolution of marriage or separation and division of matrimonial property acquired by the parties during their relationship is one such order."

Lastly is a plot where a residential house is built (Exhibit PA3). According to the evidence such property was acquired on 23/01/2004 before cohabitation, but was built and substantially improved during cohabitation and marriage. Section 114 (3) of the Law of Marriage Act provides: *For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts*. In line with this provision the appellant's testimony before this court when he was cross examined reads:

The documents are the basis for my claim that I owner the owner of the properties. ***I admit that you contributed in the construction of the additional two-bedroom house on the residential property. You contributed building blocks and painting. I used to build step by step and slowly. So I continued building after marriage. I finished building in 2013****. (Emphasis supplied)*

Therefore in view of the discussion above all properties listed by the appellant in this appeal were rightly pooled among the matrimonial properties which were the subject matter of the division. The court therefore had powers to divide those properties under sections 114 and 160 (2) of the Law of Marriage Act. The fact that the documents of ownership were in the name of the appellant could not be a ground for not dividing those properties. In **Chakupewa v Mpenzi and Another** [1999] 1 EA 32 it was held that although the suit property was registered in the name of the husband alone the

wife had a beneficial interest. Also in **Nderitu v Nderitu** [1995-1998] 1 E.A 235 (CAK) at page 237 Shah JA stated:

> *"In this instance, there was evidence to show that the appellant had made an equal contribution (albeit indirect) and she was therefore entitled across the board to an equal share* ***in all properties registered in the husband's name****" [Emphasis supplied]*

As to how much each of the parties contributed in acquiring these assets is difficult to say with any amount of certainty. There is however concurrent findings of the two courts below that the respondent has lived with the appellant under the same roof for more than eight years. Therefore his domestic services to the welfare of the family during all those years should be taken as a contribution towards acquisition of those assets in view of the authoritative decision of the case of **Bi Hawa Mohamed v Ally Sefu** (1983) TLR 32.

It should also be noted that the process of division of matrimonial assets has long been considered by courts as likely to be an imprecise mathematical exercise. This is so because the contributions made by the parties may not always be measured in financial terms. Even the factors for consideration under section 114 (2) of the Law of Marriage Act, are not exhaustive. Thus the trial court is given fairly broad discretion to make a division that is just and equitable. In our case the mode of division and the share allocated to the parties were upheld by the 1st appellate court. Since the same was based on facts, I think there should be a strong ground for such concurred findings to be disturbed by this 2nd appellate court. Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the first appellate court. See, **Keshar Bai v Chhunulal** [2014]1 S.C.R 166 at page 167; **Peters Sunday Post Limited** (1958) EA 424 at page 429. In **Neli Manase Foya v Damani Mlinga**, Civil Appeal No. 25 of 2002, CAT at Arusha (Unreported) at page 11 where it was held:

"It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such findings of fact

In view of the discussion above, I am of the firm view that the Appellant's dissatisfaction with the decisions of the lower courts is not well-founded in law. I see no need to interfere with the lower courts findings. In the result, this appeal is without merit and it is hereby dismissed. I will make no order as to costs.

DATED and DELIVERED at MTWARA this 1st day of September, 2016.

F.A. TWAIB

JUDGE