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

Date of last order: 18/10/2016
Date of Judgment: 15/11/2016

J U D G M E N T

Twaib, J:

The parties herein were husband and wife, having contracted an Islamic marriage on 30th September 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. They thus resorted to court proceedings. The Primary Court at Ruangwa granted a decree of divorce and gave orders regarding the custody of the child and division of the properties as follows:

> *HATMA YA MTOTO*
> *kwa kuwa mtoto ni mdogo wa miaka 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 mdaiwa (baba) na atalazimika kumpatia mdai tofali za kuchoma elfu saba (7,000) ndani ya miezi mitatu. Mdaiwa asipompatia tofali hizo ndani ya mda wa miezi 3 nyumba ya mdaiwa (baba) itagawanywa na mdai atapata robo ya nyumba hiyo (yaani 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 nusu na mdaiwa nusu kwa kuuzwa au kukubaliana na mdai na mdaiwa.....

While not disputing the decree of divorce, the appellant not satisfied with the decision of the trial court on the custody of the child and division of matrimonial properties. His first appeal to the District Court, Ruangwa, was dismissed with costs. Still aggrieved, he lodged this second appeal relying on seven grounds which centre on the two issues: 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 make their respective arguments. In support of the appeal the appellant submitted that he had relevant documents to show that he owns the disputed properties, which are: a house at Likunje Ruangwa; a commercial property at Likunje and a 1½ acre farm at Likunje. He submitted further that the first two properties are solely his property, and that he acquired them before marriage, but admitted that the farm was acquired during the marriage. They also acquired some goats and together developed the property in which they lived by building an additional structure. He referred to the documents attached in this appeal as proof that the properties were acquired before they got married.

Responding to the above submissions, the respondent argued that she has lived with the appellant for a total of nine years. Eight years of them were during their engagement and they were blessed with one issue, born in 2011 aged 5 year old. At

the start of their cohabitation in 2006, they had no property, she submitted, and that she began running a small restaurant, which they later turned into 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.

The respondent 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 the appeal be dismissed.

In his rejoinder the appellant denied having lived with the respondent for nine years. He said 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 them.

In his testimony before this court, the appellant Mazoea Selemani (PW1) testified that the documents show that he is the owner of the properties in dispute. These documents are: One, a sale agreement for a farm with 1½ acre, dated 24th July 2013 bought from one Said Mpini at a price of Shs 100,000/=; Two, sale agreement in respect of a commercial building dated 13th May 2009, which he bought from Selemani Said Chakupewa at a price of 300,000/=. He testified that at the time of buying the same he had only Tshs 150,000/=. He got the other 150,000/= from Hajibu Hamisi Mnali who took half of the plot. That part is not in dispute. Three, sale agreement for the residential house which he bought it on 23rd November 2004 from Hassani Chilambo at Shs. 75,000/=. The respondent did not object to the admission of these documents, and they were admitted as exhibits PA1, PA2, and PA3 respectively.

When he was cross-examined by the respondent, the appellant admitted that the respondent contributed in the construction of the house, and 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. The construction was completed in 2013.

On her part, the respondent Esha Amri (DW1) testified that the documents do not show the whole truth. She said that they began their courtship and became engaged when the appellant had no property; that they at first 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. She added that they also bought the commercial property and farm together.

Responding to a question posed by the appellant, the respondent stated that she did not object to the admission of the documents because there was 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 issues 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, then aged four years, on 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 said that the respondent is currently living with another man under a polygamous marriage which is not good for the welfare of the child.

However, under section 125 (3), the Law of Marriage Act provides a rebuttable presumption that it is in the interest 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*". But when the respondent was examined 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 states that a 1½ acre farm bought of 24th July 2013 from Said Mpini at a price of Shs. 100,000/= (Exhibit PA1) was acquired during the marriage, but the other properties, a house at Likunje and a commercial property, are solely his properties as he acquired them before marriage. The respondent, on the other hand, admits that some of these properties, particularly a house and commercial properties were not acquired during marriage, but it was her case that they were acquired during cohabitation because at the time they met the appellant had no property.

Hence, the parties agree that the 1 ½ acre-farm was acquired after the exchange of marriage vows and is therefore indisputably matrimonial and the same was subject to division.

My analysis of the remaining evidence shows that the respondent is right on this point: Exhibit PA2 relates to what the parties refer to as the commercial building, which was acquired on 13th May, 2009. According to the respondent's testimony, this was at a time

when the parties had commenced cohabitation and was thus acquired by their joint efforts. On the other hand, the appellant claims that the property was acquired before marriage and before cohabitation because, according to him, he met the respondent in 2010, which was when they started cohabiting. This is an issue of fact. The trial court believed the respondent's testimony to the effect that at the time the property was acquired, the parties were living together in cohabitation. I see no reason, on the totality of the evidence adduced, to differ from those findings.

The evidence on record further suggests that parties lived under a presumed marriage before they formerly married. In terms of section 160 (2) of the Law of Marriage Act, in such a situation, irrespective of whether the presumption is rebutted or not, the court has powers to divide properties acquired by the parties during their cohabitation. I thus hold that the trial court was right in including the commercial building acquired in 2009 among the properties which were to be divided. In the case of **Hemed S. Tamim v Renata Mashayo** [1994] TLR 197, 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, there is a plot where a residential house is built (Exhibit PA3). According to the evidence, the property was acquired on 23rd January, 2004. That was before cohabitation began. But the evidence presented by both parties 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 the trial court when he was cross-examined reads:

"The documents are the basis for my claim that I am 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, the appellant's own testimony supports the lower court's view that the property in question was substantially improved during the marriage and the respondent contributed to that improvement.

What all this means is that the trial Court was right in pooling together all these properties as part of matrimonial assets. As such, the court had powers to divide them among the parties 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 the same. 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. See also the Kenyan case of *Nderitu v Nderitu* [1995-1998] 1 E.A 235 at 237, where the Court of Appeal of Kenya 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, it is difficult to say with any certainty. There are, 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, her domestic services to the welfare of the family during all those years should be taken into account as 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 Court is given a fairly broad discretion to devise a formular of division that is just and equitable according to the circumstances. In the case at hand, 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, only very strong grounds can justify a departure from such concurrent findings on a second appeal. Indeed, the law presumes 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 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 court's 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 15th day of November, 2016.

F.A. Twaib

Judge