

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 202 OF 2016

WILLIAM MORIS..... APPELLANT

VERSUS

Dr. PHILIS MESHACK NYIMBI RESPONDENT

19/6/2018 & 5/7/2018

JUDGMENT

I.P.KITUSI,J

The marriage between William Morris the appellant and Philis Meshack Nyimbi the respondent lasted from December 2001 to February 2016 when the Resident Magistrate's Court of Dar es Salam at Kisutu ordered divorce. From the facts both pleaded by the appellant and testified to by him, after the Christian marriage in December 2001 he went to work as a Medical Doctor in the United States leaving the respondent in Tanzania. The appellant returned to Tanzania in April 2009 to find the respondent carrying a baby whose father turned out to be one Rev. Josephat Mwingira.

The appellant therefore went to Court to petition for an order of divorce and division of matrimonial assets. As it shall soon be clear the issue of dissolution of the marriage seems to have gone well with both parties so that the only question that was contested during the trial and forms the subject of these proceedings is in relation to division of matrimonial assets. What was the evidence in the regard.?

The appellant testified on about four major assets which he solely acquired. The first is a house at Kibaha. According to him while he was in the Us he sent the respondent Us dollars 28,000 to buy land and construct a house, and indeed there is a house although the respondent's story as to how it was required is different. On top of this, the appellant was sending the respondent Us dollars 10, 000 every two weeks via Western Union money transfer services. The respondent disputed this story. Secondly the appellant purchased land at Bomang'ombe area on which he intended to build a hospital to be run by a Non-Governmental Organization (NGO) which he registered as Global 2000- 2010 International. Thirdly , when he was about to travel back to Tanzania to join his wife (the respondent) the appellant purchased medical equipment and supplies for the planned Hospital. He put these medical equipment and supplies, as well as motorvehicles and household items in two containers which were shipped to Tanzania. According to the appellant, the Medical equipment and supplies were worth 6.5 million dollars.

The appellant's version is that the respondent cleared the containers and sold all the medical equipment to Rev. Mwingira, her paramour. The house remains unfinished as of the date he testified in court and the motorvehicles had been taken by the said respondent.

There were more pieces of land related in the appellant's story. 90 acres at Bungo area in Kibaha, purchased from one Daudi, 31/2 acres at the same area, near the house, 4 acres at Zirazira area within Kibaha and 31/2 acrea at Bunju area near Bagamoyo.

The appellant went on to state that the respondent obtained a loan of Shs 19 million which was required to clear the containers, and according to him this was her contribution in the acquisition of those assets. He also referred to another loan of Us dollars 5000 which was added to the clearance costs.

He named the assets which are matrimonial as the house at Kibaha and the pieces of land at the same area, stating that there are apartments on one of the pieces of land. The piece of land at Bunju was also listed as matrimonial property and so were all the motor vehicles except one described as Isuzu Rodeo. The appellant's testimony was that the rest of the assets belonged to the NGO and thus are not matrimonial property. He tendered a parking list for those items and it was admitted as Exhibit P4, describing details of items that were parked in 3 containers for shipping to Tanzania. A good number of the items in the containers were hospital equipment and supplies which he said were meant for the hospital which was to be constructed on the land at Bomang'ombe. These, according to the appellant are not matrimonial property.

The appellant's testimony that the house at Kibaha is a matrimonial asset was supported by one Emmanuel Nyari(PW3) the mason who was hired to construct it and Edison Masogwa Manoni (PW2) the mason's helper. The latter was subsequently employed by the couple to take care of pigs which the couple were keeping at the premises.

The respondent's version, which the appellant disputed during cross-examinations, was that the house at Kibaha belongs to her mother. Aniten Nkomola (DW1) the said mother testified in support of the fact that the house was built by her and her husband when the appellant was living in the USA. She recalled that the piece of land was purchased by them in 2004 and the house was built in 2007 before her husband's death in 2009. She further stated that the document for the purchase of the land was handed to her daughter, the respondent.

The respondent gave a story of how she married the appellant in 2001 and he left for USA in 2002 where he stayed until 2009. She gave an account of the appellant's unfulfilled promises to get her to join him in the USA and how she got frustrated as a result. About the hospital equipment she admitted that the appellant shipped them to Tanzania but as he had no money for clearance the authorities of Tanzania Revenue (TRA) decided to sell the said equipment.

Losing the equipment was going to be a big blow to the appellant so the respondent, a practicing medical doctor herself, obtained a loan and purchased them. The equipments and other household items were kept locked in the house at Kibaha where the couple used to live. At that time the respondent was working at Songea in Ruvuma Region.

She testified that the appellant took away the equipments on a night when she was not there and the neighbours informed her

about what had taken place. She reported the matter at police but the equipments were never traced.

About the house she testified that it belonged to her parents with whom she used to live. According to her, the appellant a poor man did not contribute to the acquisition of the house. She said she was fending for the appellant to the extent that she had to buy even his air tickets including the one to the USA when it was agreed he had to go back to avoid shame.

Of other piece of land she denied being aware of any and said she wished they existed. She denied owning any motor vehicles apart from what she referred to as scrap materials.

The respondent was cross examined at length by the counsel for the appellant, in the course of which she stated that her father would have given an account of how he built the house being a fisherman and livestock keeper at Lake Nyasa area.

She admitted having a child with another man justifying it with the appellant's absence for eight years. She stated that the appellant accepted that child, named David as his, and even purchased a motor vehicle for him although he was just seven years.

One Ajuaye Ada (DW3) a neighbor at Kibaha where the house is located testified that he saw the appellant and respondent purchase for the respondent's parents the piece of land on which the house was later built. He stated that during the construction of the house he was

a casual labourer who was getting paid by the respondent's father or by DW1 or by the respondent herself. Later the appellant and respondent lived in that house

The trial court concluded that the marriage was broken down beyond repair, which is unchallenged, and went on to deal with the issue of division of the matrimonial assets in a manner that has attracted this appeal. The Court ordered division of the Hospital equipment and opted not to pronounce itself on other assets.

The appellant faults the learned Principal Resident Magistrate for not deciding all issues that were before him and presses for an order of retrial. It has also been submitted by Mr. Respicius Ishengoma learned counsel for the appellant that the learned Principal Resident Magistrate did not give reasons for his decision to leave out some of the assets. Counsel cited the case of **Alnoor Shariff Jamal Vs. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006, CAT (unreported) to support his point as to contents of a judgment. He also challenged the court's decision to order distribution of the hospital equipment despite being satisfied that the same belonged to company. Counsel submitted that the fact that the respondent allegedly contributed money to the clearing of the containers at the port, that did not make the assets fall under matrimonial property.

In response and for the respondent Mr. Ereneus Swai learned advocate submitted that the court made findings in respect of the other assets such as land where it held that there were to

documentary support. Further it held that the appellant's contention that he sent the respondent money to buy land and build house had no proof and even if it had, the money was not enough. As regards the containers, it has been submitted that the court's finding was that they were matrimonial property because of the respondent's financial contribution in clearance costs. The learned counsel further submitted that the motor vehicles were left out because the court found no documentary proof supporting the appellant's story.

In the trial court's judgment the learned PRM made a passing remark whether the appellant being a non-national could legally own land in Tanzania. This remark was also a subject of complaint in these proceedings. Mr. Swai justified the remark by saying that the court was addressing the issue of legal ownership as opposed to ownership resulting from matrimonial relationship.

With respect although the learned trial Magistrate's remark may have been innocently made, the possibility that it prejudiced his conclusion may not be totally overruled. I have noted another rather unfortunate and unsolicited remark that was made by the learned PRM in respect of whether or not the appellant's contributed to the acquisition of the house. While accepting the appellant's story that he may have sent the respondent US dollars 28,000, the learned PRM went on to state that the said amount would not have been adequate to construct a house after spending a portion of it to buy the plot. This was clearly an instance of the Magistrate jumping into the arena.

The law is clear that in weighing evidence of parties in a case, the court should not reflect double standards. In the case of **Morogoro Hunting Safaris Limited V. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011 CAT at Dar es Salaam (unreported) it was held that such approach violates Article 13 of the constitution of the United Republic.

For the foregoing reasons I am inclined to accept the invitation by Mr. Ishengoma learned advocate to quash the proceedings and order a retrial, which I do. Let the case be retried by another Magistrate competent to do it.

This appeal is, to that extent, allowed but I make no order as to costs because none of the parties is to blame for the errors



I.P. KITUSI

JUDGE

5/7/2018