

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

APPELLATE JURISDICTION

PC MATRIMONIAL APPEAL NO.06 OF 2016

*(Arising from Civil Appeal No.13/2016 Kahama District Court at Kahama. And
Originating from Civil Case No.07/2016 Isaka Primary Court)*

AMOS MDUZIAPPELLANT

VERSUS

CHRISTINA FAUSTINERESPONDENT

Date of last order: 21/11/2018

Date of Judgment: 25/01/2019

JUDGMENT

KIBELLA, J.

This is a second appeal. The appellant, AMOS s/o MDUZI, was successfully sued by CHRISTINA d/o FAUSTINE for claim of divorce before the Isaka Primary Court at Isaka within Kahama District, vide Matrimonial case No.7 of 2016.

At the end of the trial, even if the appellant had paid dowry, however, there was no evidence of customary marriage to constitute marriage, and that the parties had cohabited for five years, it found that there was no marriage between the spouses, therefore there was nothing to be declared broken down irreparably.

However, what the trial court decided was that since they have failed to live together in harmony what followed was to be separated under the

circumstances. Thus the parties since where not married they were allowed to live separately. But as they had lived and worked jointly and acquired joint properties, the trial court decided that each had a right of share in those assets of joint efforts albeit not at 50% division. The properties acquired jointly according to the evidence of the petitioner which was not disputed by the respondent were, two houses, two plots one at Majengo and one at Itogwang'holo, a shop, Bajaji for carrying goods (mizigo), a motor cycle, a bicycle (small), three beds plus their mattresses, a sofa set plus its cushions, five plastic chairs, TV, 2 DVDS, one fan and 2 solar.

The trial court went on that under section 114 (2) (b) of the Law of Marriage Act, (Cap.29 R.E.2002), the acquired properties/assets of joint efforts were divided where it stated:-

"....kwa kuwa mchango wa mdai sio asilimia 50% atachukuwa vifuatvyo:-

Kiwanja kimoja kilichopo Majengo, Bajaji ya mizigo, kitanda kimoja na godoro lake, makochi na mito yake, Deki DVD 1 na Solar1.

Mdaiwa atabaki na nyumba mbili, kiwanja kilichopo Itogwang'holo, duka, pikipiki, baiskeli, meza mbili, vitanda viwili na magodoro yake, viti vitano vya plastic, TV, DVD1, Feno (sic) na Solar 1."

The now appellant/defendant before the trial court, was dissatisfied with the above decision, hence appealed before the 1st appellate court, the Kahama District Court at Kahama.

His main complaint before the 1st appellate court was the extent of the division of the joint acquired properties. At the end, the 1st appellate court, upheld the decision of the trial court where it found that, it was the appellant who got a big share compared to the respondent before it (the petitioner).

Dissatisfied again, the appellant has preferred this appeal before this court challenging the decision of the 1st appellate court.

In his petition of appeal, the appellant advanced four grounds of appeal where basically all four grounds can be summarized only by his two grounds of appeal as hereunder:-

1. That both the primary court and the District court erred both in law and facts in ordering distribution of the alleged matrimonial properties whilst the claim filed before the trial court was for divorce or separation.
2. That, the trial court erred both in Law and fact in making an order for division of matrimonial assets whilst the respondent neither claimed for division of property nor substantiated how the same were acquired.

The respondent when served with the petition of appeal by the appellant, filed her reply to the grounds of appeal resisting the whole petition of appeal and raised a preliminary objection which later was abandoned and thus the hearing of the appeal proceeded.

At the hearing of the appeal, the appellant appeared in person and unrepresented. He had nothing to add to what is contained in his petition of appeal as well as in his rejoinder. Thus he prayed for the same to be considered so that justice be rendered.

The respondent as well appeared in person and unrepresented whereby she had nothing substantial to add to her grounds of reply to the appellant's petition of appeal. Thus, she prayed for the appellant's appeal to be dismissed.

Having gone through the evidence on the record, the grounds of appeal and reply thereto, as well as the submissions in support and rival thereto, the central issue for determination is whether the appellant's appeal has merits.

To start with answering this issue, this is second appeal as prior stated.

In this Country there is a rule of practice established for a long time by the Court of Appeal for East Africa and the Court of Appeal of Tanzania, that the court on the second appeal should not disturb concurrent findings of facts by the two lower courts unless it is clearly shown that there had been a misapprehension of evidence, miscarriage of justice or a violation of some principles of Law or Practice as was so held in the cases of **PANDYA V.R. (1957) EA 336** and **AMRATLAL D.M. AND ANOTHER T/A ZANZIBAR SILK STORE V. A. H. JARIWALA T/A ZANZIBAR HOTEL (1980) TLR 31**

Being guided by the above stand of the Law, now I revert answering the central issue in this appeal. First of all, there is no dispute between the appellant and the respondent that they were not legally married. Therefore, I find that the trial court and the 1st appellate court in their concurrent findings that even if dowry was paid, however, that fact alone could not validate the marriage, that under the circumstances, there was no marriage to be declared broken down irreparably and grant a divorce order.

However, since both parties conceded that they had lived together for five years under such concubinage and that it was the present respondent who followed the appellant and lived together. Certainly, I find that the Law of Marriage Act, (supra), was inapplicable for separation and the division of the assets jointly acquired where the parties were under such relationship. Therefore, I find the trial court went wrong and the 1st appellate court did not observe that flaw.

The right applicable Law under the circumstances is The Judicature and Application of Laws, (Cap.358 R.E.2002), 1st Schedule the Local Customary Law (Declaration) Order, G.N. No.279 of 1963, 1st Schedule, sections 94 and 95, where they state:-

"94. Kama mwanamume na mwanamke wameshirikiana kuanzisha mahala pa maisha yao, vifaa vilivyopatikana kwa kushirikiana hugawanywa hivi:-

Ng'ombe, vyakula viliyyomo ghalani, mazao ya kuuza mazao ambayo hayajavunwa, yanagawanywa sawa

sawa kwa hao watu wawili. Nyumba hupewa mwanamume na mwanamke huchukua vyombo vya jikoni. Kila mtu huchukua vitu vyake vinavyomhusu kama nguo mapambo n.k. pamoja na zawadi aliopokea toka kwa mwenziwe. Baada ya mavuno shamba ni mali ya Bwana.”

95. Kama mwanamke amemfuata mwanamume katika nyumba yake na kustarehe pale na kama wawili wameshirikiana kuendesha kazi kiwanjani mwao ama kama wote walikuwa na kazi maalumu, mwanamke ana haki ya kupata robo ya vitu vyote viliyopatikana kwa msaada wake isipokuwa vitu vyake mwenyewe kama ilivyoelezwa katika kifungu cha 94.” (Emphasis supplied).

Taking into consideration of the above Law, in the instant appeal and before the trial court, the petitioner/respondent when answered a question from one of the court assessors, she replied that they jointly acquired the following:-

"Nyumba mbili, kiwanja kimoja, viwanja viwili, duka, Bajaji moja na pikipiki moja, makochi na cusheni zake, baiskeli moja, meza mbili, Solar 2 na vyombo vya ndani, TV, viti vitano vya plastic na feni moja."

The respondent before the trial court now the appellant never challenged the above evidence and even in his defence never mentioned what they jointly acquired and which not. That impliedly meant that he

conceded to the evidence of the petitioner/respondent that what she mentioned was correct and nothing else.

However, to corroborate the above evidence, the now appellant and respondent before the trial court in his defence he as well conceded to have grown paddy together with the respondent/petitioner before the trial court where he stated inter alia that:-

"Nilimwambia arudi tuvune pamoja mpunga."

Therefore, from the above evidence, I find that, the assets mentioned by the petitioner before the trial court, certainly were rightly so jointly acquired by the couple under the above relationship and not otherwise.

As prior stated that, as the lower courts concurrently did find that there was no marriage between the couple, therefore there was nothing to be granted as divorce except separation, I find that the same could not be made under the Marriage Act, (supra) but the above mentioned Law, the Local Customary Law (Declaration) Order G.N. No.279 of 1963, 1st Schedule to the Judicature and Application of Laws (supra).


Now the left issue is whether the distribution of the acquired properties by the couple was 50% share to each other. The answer is obvious no. The trial court albeit wrongly applied the Law of Marriage Act, (supra), in distribution of such properties as the couple had failed to proceed living together under such concubinage however, the same distribution was correctly effected in accordance with the requirement of provisions of section 94 of 1st Schedule to the Judicature and Application of

Laws Act (supra), the Local Customary Law (Declaration) Order (supra) as under section 95 stated inter alia:-

"...Mwanamke ana haki ya kupewa robo ya vitu vyote vilivyopatikana kwa msaada wake."

Having observed how the same jointly acquired properties were distributed as above shown, it goes without saying as rightly the 1st appellate court said that, the now appellant got a big share. Certainly what the woman/now respondent got was to myself even less than quarter, if I may say so as some properties were not distributed.

For the foregone reasons and what I have endeavoured to discuss, I find that the appellant's appeal is devoid of merits. The concurrent decision by the lower courts are hereby upheld. The appellant's appeal is hereby dismissed whereby each party ordered to bear her/his costs. Order accordingly.


R. M. Kibella
JUDGE
25/01/2019

Order: Judgment delivered in chambers this 25th day of January, 2019, in the presence of both parties each present in person.

Right of Appeal fully explained.



R. M. Kibella
JUDGE
25/01/2019