

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 31 OF 2000

TATU MOHAMED..... APPELLANT

VERSUS

MAUA MOHAMED..... RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Dar es Salaam)**

(Maina, J.)

dated the 1st day of September, 1994

in

(PC) Civil Appeal No. 150 of 1993

JUDGMENT OF THE COURT

MUNUO, J.A.:

The respondent, Maua Mohamed, is the step daughter of the appellant, Tatu Mohamed. She was granted letters of administering the estate of her late father, Mohamed Mfaume Julu, in Probate and Administration Cause No. 223 of 1992 in Kinondoni District in Dar es salaam Region. Her late father had built a house on the plot of the appellant, her step mother, which house the respondent claimed is part of her late father's estate. The respondent has since died. She was, in this appeal, represented by Selemani Mohamed, the administrator of her estate.

The Courts below ruled against the appellant. She then lodged this third appeal seeking repossession of the house in dispute.

The appellant filed four grounds of appeal complaining that the trial court erroneously held that the house in dispute was a matrimonial asset whereas the plot is hers and she personally built the house thereon without any participation by her deceased husband. She stated in ground two of the memorandum of appeal that she has been paying property tax to the City Council which proves that the house in dispute solely belongs to her. In grounds 3 and 4 of the appeal, the appellant asserted that she accommodated the respondent because she had no shelter, and not because the house in dispute belonged to her late father.

As stated earlier on, the respondent died before the appeal was determined. The administrator of the estate of the respondent, Selemani Mohamed, urged us to uphold the decisions of the Courts below because the appeal lacks merit.

The issue is whether the house in dispute is part of the estate of the deceased Mohamed Mfaume Julu, the father of the respondent.

When determining the above issue, Maina, J., as he then was held that:

The house was not built for the appellant. It was a matrimonial home,

and the appellant is only entitled to a share in the house. She had no children so the deceased's children in the previous marriage, the respondent being one of them, have a right to inherit. The appellant should get a share, under Islamic law to what is commonly known as "kithumuni". The house should be valued as ordered by the trial court, and the respondent will be given a share. ---

The above decision, in our considered view, is fully supported by the evidence on record. The appellant testified that she solely built the house in dispute during the subsistence of her marriage with the deceased father of the respondent. She called no witnesses to support the said assertion. On the contrary, the respondent called two witnesses who corroborated her claim that the deceased built the matrimonial house in which he cohabited with the appellant and also lived with his two issues namely the respondent and SM IV Selemani Mohamed. Section 110 (1) of the Law of Evidence Act 1967 places the burden of proof on the party alleging a fact, here, the appellant's assertion that she built the house in dispute single handed, during the subsistence of her marriage with the late Mohamed Mfaume Julu. Section 110 (1) states:

110 (1) Whoever desires any court to

give judgement as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

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From the evidence adduced at the trial, we are satisfied that the appellant, did not, on the balance of probabilities, discharge the burden of proving that she built the matrimonial house in dispute without the assistance and contribution of her late spouse during the subsistence of the marriage from 1984 to 1992 when the deceased passed away on the 27th October. That the said house was a matrimonial home was evidenced by the fact that the late Mohamed Mfaume Julu lived therein with his two issues by his former marriage.

This, the appellant deposed in her testimony and gave the ages of the deceased two issues as well: Maua, the respondent was at that time, 1993, aged 32 while SM IV, Selemani Mohamed was 28 years, adults who would ordinarily not reside in the house if it were not their late father's matrimonial home. The interest of the deceased in the matrimonial home is protected by the provisions of Section 59 of the Law of Marriage Act, 1971 which state, *inter - alia*:

59 (1) Where any estate or interest in the matrimonial home is owned by the husband or wife, he or she shall not, while the marriage subsists and without the consent of the spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time

being in force relating to the registration of title to land or of deeds.

In this case, the spouses cohabited and lived in the house in dispute peacefully until the husband passed away on the 27th October, 1992. Their marriage was naturally dissolved by the death of the husband but the latter's interest in the matrimonial house remained to be inherited by his heirs. In that regard, the courts below rightly held that the respondent heir should get a share of the matrimonial house and that the appellant is entitled to a share called "kithumuni" under Islamic law.

Under the circumstances, we find no merit in this appeal. We accordingly dismiss the appeal with costs.

DATED at DAR ES SALAAM this 19th day of October, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR