

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO.24 OF 2003

(From the Decision of the District Court of Kibaha in Civil Appeal No.17 of 2002 P.K. Lunyelele, H.M)

SALOME HERMAN CHITUMBI.....APPELLANT

VERSUS

MOHAMEDIIDDI

MTANDIKA

.....
RESPONDENT

JUDGMENT

A. Shangwa, J.

The Appellant in this case is appealing against the decision of the District Court of Kibaha which held in Civil Appeal No.17 of 2002 that she was not legally married to the Respondent and that therefore she was not entitled to an order of division of the matrimonial assets.

Both the Appellant and Respondent met for the first time in 1973 at Mifumbati village in Nachingwea District, Lindi Region. Earlier before they met, the

Appellant had contracted a Christian marriage with another man who left her alone in the village and came to Dar es Salaam where he stayed for five years without going back to the village and without corresponding with her in any way. He has never been heard of since then.

At one time when the Respondent was working at Nachingwea, his former wife with whom he had contracted an Islamic marriage decided to go back to her home village and left him alone with the children. While she was away, he asked the Appellant to assist him in looking after those children. She agreed. Thereafter, the following events took place:

In 1974, the Respondent was transferred from Nachingwea where he was working with NAFCO to Ruvu station. He went to Ruvu with the Appellant

together with his children. After sometimes, he went to Nachingwea and asked his former wife to go with him to Ruvu. She refused to do so. He returned to Ruvu and decided to live with the Appellant as husband and wife. While at Ruvu, he opened a Pombe club and started business of selling charcoal. The Appellant was assigned to run both types of business. Also, they started business of grinding maize which was supervised by the Appellant's young brother. In addition to that, they started cultivating rice and selling timber.

From their business operations, they bought a house at Morogoro which was under construction. They completed its construction Between 1974 and 1979, the Respondent bought a three bed room mud house at Mlandizi and gave it to the Appellant. In 1979, he bought a plot at Mlandizi and built a house thereon. In 1990, he retired from work at NAFCO. In

1996, he fell in love with another woman. He started living with her at Vigwaza village and deserted the Appellant.

After sometimes, the Appellant went to the village office and to the office of the ward secretary for being reconciled with the Respondent. Both offices failed to reconcile them. She decided to go to the Primary Court of Mlandizi and Petitioned for divorce and division of matrimonial assets. The said Primary Court ordered for the division of the assets which they acquired during the period when they were living together as husband and wife. The primary Court's decision was reversed by the District Court on ground that the Appellant was a mere concubine.

The question to be considered by this Court is whether or not there was a legal marriage between the parties and if so, whether the Appellant is entitled to an order of divorce and division of the matrimonial

assets. This question is somehow difficult. What makes it difficult is the fact that in 1974 when the Respondent decided to live with the Appellant as husband and wife the Appellant had earlier before contracted a Christian marriage with another man which had not been dissolved by the Court and the Respondent had earlier before contracted an Islamic marriage with another woman which had not been dissolved by the Court.

In order to resolve this difficult question, I have decided to address myself to the status of the Parties' former marriages. In doing so, I have realized that at the time when they decided to live together as husband and wife, their former marriages were like empty shells. By then, both of them had matrimonial problems. These problems are that the Appellant had been deserted by her former husband and the Respondent had been deserted by his former wife.

Under such circumstances, I think both of them were free to marry each other in a way they decided to do it. That is by opting to live together as husband and wife until when their relationship fell apart. They lived in that way for a period of twenty two years counting from 1974 to 1996. The Respondent's contention that they used to live as concubines does not hold water. I think that his contention was intended to defeat the course of justice. The District Court's holding that both parties used to live as concubines and that no order of division of matrimonial assets can be issued under such relationship is based on technicality. If such a technicality is allowed to prevail in this case there will be no justice. As I have already mentioned, when the parties decided to live together as husband and wife their former marriages had already broken down irreparably.

In my opinion, as the parties lived together for a long period as wife and husband, and as their former marriages had already broken down irreparably by the time they decided to live together as wife and husband, it can properly be presumed that they were duly married within the meaning of S.160 (1) of the Law of marriage Act, 1971.

Thus, the Primary Court of Mlandizi could not have been blamed had it granted a divorce to the Appellant in clear terms. I wish to observe that the said Court was justified in ordering for the division of the matrimonial assets which were acquired by the parties through their joint efforts for the period of twenty two years within which they lived together as husband and wife. That is from 1974 to 1996. These properties include the house at Morogoro.

In my judgment, I set aside the decision of the District Court of Kibaha and restore the decision of the Primary Court of Mlandizi which entered judgment in favour of the Appellant for the division of their matrimonial assets. Therefore, I allow this appeal and order that each party should bear its own costs.

A. Shangwa,

J. 6/12/2005

Delivered in open Court this 6th day of December
2005

A. Shangwa,

JUDGE

6/12/2005