IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

HIGH COURT MATRIMONIAL APPEAL NO. 1 OF 2007

(Original Civil Case No 12 of 2004 in the
District court of Magu at Magu)

THEREZA PATRICK.....APPELLANT

Versus

NDEBETO BUCHENJA.....RESPONDENT

JUDGMENT

8/9/2009 & 10/12/2009

NYANGARIKA, J.

The parties in this appeal celebrated their marriage sometimes in 1984 and live happily until on February 2004 when their marriage was resolved.

Although it is not on record how and where the marriage was dissolved, these are among the matters which are not in dispute before this appellate court.

The only dispute which prompted the present appeal to this court is the issue of division of matrimonial properties between the spouses.

On 15/12/2006 the District Court of Magu at Magu (hereinafter referred to as the trial court) dismissed the suit filed by the appellant regarding distribution of matrimonial properties on the ground that there was no enough evidence to the standard required showing the existence of alleged matrimonial properties.

It is from the Judgment and decree of the trial court that the appellant had preferred this appeal to this court.

In this appeal, Mr. Butambala, learned advocate appeared for the appellant and Mr. Kitwala, learned advocate appeared for the respondent.

According to Mr. Butambala, the evidence led by the appellant showed that the parties had acquired houses during their marriage. He said that they purchased the first house in 1991 and later on used the money they have generated from their shop amounting to 6,000,0000/= to purchase another second house.

The learned counsel for the appellant submitted that the evidence of Pw2 and Pw3 support the testimony of Pw1 (i.e. appellant).

Mr. Butambala submitted further that since the appellant was taking care of the family when the respondent was doing his work as a driver then, she is deemed to have jointly contributed in the acquisition of those matrimonial properties.

In my view, I think Mr. Butambala is of the view that whenever the question of distribution of Matrimonial assets arises, a magistrate handling the matter must always bear in mind that even non monetary contribution does play an important part in acquisition of matrimonial assets.

The learned counsel also submitted that the trial court was wrong to hold that the evidence of Pw1, Pw2 and Pw3 needed corroboration instead of weighing such evidence in determining the suit.

The learned counsel for the appellant submitted that the trial court was wrong in doubting the testimony of Pw1 on the ground that the houses were purchased without documentation. He said that taking into account that the parties hails from a remote village and being spouse, there was no need of documentary evidence.

The appellant counsel submitted that the evidence of Dw4 was doubtful due to his old age as he could not even identify the documents he was shown and therefore the trial court did not act judiciously in receiving those documents.

Mr. Butambala referred me **to Section 114 of the Law of Marriage Act (cap 29 RE 2002) and the case of Hawa Mohamed versus Ali Seif [1983] TLR 32 (CA)** to the effect that the appellant has joint efforts in the acquision of those matrimonial properties.

The learned counsel for the appellant was of the view that the matrimonial properties should have been divided between the appellant and respondent in accordance with **Section 114 of the law of marriage Act, 1971** and went on to suggest that the appellant should have been awarded 40% and the respondent 60%.

In reply, Mr. Kitwala, learned counsel for the respondent, supported the finding of the trial court. He said that the evidence of Pw2 and Pw3 were doubtful because Pw2 was born in 1986 but testified that one of the houses was purchased in 1991 when she was just 5 years old.

He said that the evidence of Dw4 was strong than that of Pw2 because there was Exhibit D1 tendered in court.

However, Mr. Kitwala conceded to the fact that Dw4 could not identify Exhibit D1 because of old age and sight. However he submitted that the appellant alleged that on of the house was purchased at a price of 450,000/= while infact the testimony Dw4 and Exhibit D1 show that it was purchased at a price of 230,000/=.

The learned counsel for the respondent said that the appellant failed even to call her neighbours or friends to testify on the existence of the house at Mashineni.

He further said that the evidence of Dw2 show that the house at Mwandale was constructed in 1978 while the respondent was living with another wife called Mama George, the evidence which was supported by Dw3.

The learned counsel said further that the allegation by the appellant that there was a shop where a total of Tshs 6,000,000/= was generated by selling edible oil is not true. He said that the evidence of Pw3 that there was a third house was also not credible. The Advocate for the respondent said that the evidence of Dw4 show that the parties were invited to live at Mashineni house as they have no money for renting.

Finally the learned counsel for the respondent said that the appellant is not entitled to anything as she did not contribute in acquisition of the houses and invited me to dismiss the appeal with costs.

In his short rejoinder, Mr. Butambala submitted that the procedure of admitting Exhibit D1 was not proper as it was tendered by an Advocate

instead of a witness as it appears on page 10 and 11 of the trial court proceeding.

I must admit that it had been very difficult for me to comprehend some of the crucial parts of the recorded proceedings of the trial court by the incomprehensible use of confusing English words and phrases in recording evidence.

For example on page 7 of the typed proceedings where the testimony of Pw3 had been recorded, beneath, there is a word "court" where it has been recorded as follows:

Court:

> **"The accused is (sic) show a document which shows that she came back in 2001. That all the time we were living (sic) on father. My mother was the 1st wife of my father. I do not know the year the items were purchased. All the properties (sic) and with my father. I am not allowed to visit my father. I have all of my grand father still alive (sic) now of (sic) then his at (sic) any time built a house one house has been extended by a tenant and this is among those we are claiming."**

The record is confusing as no one knows whether on the gist of the above record tells that Pw3 was being examined by the court or the court was recording what it was observing from Pw3.

Surprisingly, the record of proceedings has been certified to be a true copy of the original. I don't think the trial magistrate spent much

enough of his time going thoroughly through the proceedings before certifying it.

Also on page 10 and 11 of the record of proceedings, the evidence of Dw4 is recorded by the trial court as follows:

DW4: Magesa Ndaki, Tanzanian, 100 Years,
Tanzania, RC, Sworn and States.

XXD by Kitwala:

I live at Muda Nyakuge, I have come to give evidence on my house... I purchased the house in dispute from one man called Said Nassoro 19 Yrs ago. The transaction was documented and I would like to produce the document as Exhibit.

Court: The document is in duplicate.

Plaintiff: I am objecting the same because it is a duplicate.

Mr. Kitwala: I am ready to produce the original agreement for sale.

Witness: "I have built another house in the plot so that I conduct business ... The contract to repair the house was documented. I do not recall the year the contract was drawn and this is due to old age. I cannot identify the documents, if shown to me."

First and foremost, from the above records it is not easy to comprehend or relate or differentiate between **Dw4** and **witness** in the record of proceedings.

Secondly, we do not know whether Dw4 is the same as the witness or these are different witnesses.

Thirdly, although the witness is recorded to have told the trial court that he cannot identify the documents even if they are shown to him, still, the trial court has recorded that the witness has identified the document and admitted them in court without considering the objection raised and without giving any reason.

I therefore agree with Mr. Butambala, learned Advocate that the proceedings is not only erroneously but pathetic as it is misleading.

This appellate court cannot with such kind of record be in a better position of understanding and comprehending what transpired in the trial court to enable it to decide the appeal on merit.

I am pointing out this fact not to discourage the learned trial magistrate in question but rather to alert him so that he improves, lest he become complacent and continue on gaining experience doing the right way.

If it is any consolation in case of injured ego, I should point out that for most of us, English is not our language, yet it is necessary tool in our profession and as such continuous learning is an unavoidable imperative.

If an appellate court fails to comprehend, or follow or understand a crucial portion of the record of proceedings of the subordinate Court while in the process of deciding an appeal, as in this case, is as if there is no proper and correct record before it for purposes of the appeal.

For consolation we can get some guidance from the case of **R. versus Abdu Moge & 3 others [1948] EACA 86** where an appellate court was not aware that two pages were missing from the record and dismissed the appeal. On further appeal to the court of Appeal of East Africa, the Court of Appeal of East Africa quashed the proceedings because the missing pages prejudiced the appellants. The learned justices of East Africa Court of Appeal observed at page 87 as follows:

> **"In the experience of this court, the case is a unique one and we hope it will remain so. It is not, however, the first time that a court in East Africa has acted on the same principle as were are acting now. In the case of Simpson v. Nakuru council [XIX K.L.B 27], the supreme court of Kenya quashed a conviction on the ground that as the record was indecipherable it was impossible for the court to judge the merit of the appeal."**

This appellate court must in determining an appeal before it hold the scale of justice evenly between the parties.

Although the above cited case originates from Criminal Case record but it give a similar guidance even in civil cases on what an appellate court can do if the record of proceedings has some problems as in this case.

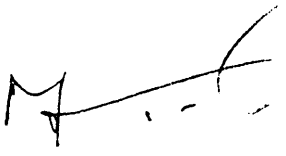
In the case of **Joseph s/o Masumbuko v. R [1972] HCD No. 90,** the records of proceedings were destroyed by fire before the trial court, on appeal, the High Court after assessing the position, held as follows:

> **"It is not possible to judicially assess the merit of this appeal without the notes of evidence and exhibits. The petitions of appeal of appeal cannot be a proper guide ... it**

would be unjust to base any decision on these taken together with the judgment only..."

Therefore for the reasons I have given, the entire proceedings is hereby nullified and the judgment and decree of the trial court is quashed and set a side. The suit shall be heard denovo by another competent Magistrate in accordance with law. There will be no orders as to costs.

Order accordingly.



K. M. Nyangarika

JUDGE

At Mwanza

10th December, 2009