

TANZANIA / JUDGMENT

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1 ,I IN THE HIGH COURT OF TANZANIA AT ARUSHA PC CIVIL APPEAL NO. 21 OF 2005 <CIF
Arusha District court Civil Appeal No. 80/2004> HALIMA
OBEDI APPELLANT VERSUS JUMA S/O
OMARY RESPONDENT

JUDGEMENT

R. SHEIKH, J This is an appeal against the decision of the Arusha District court in the exercise of its appellate jurisdiction in Civil Appeal No. so ~ of 2004. At the outset I must confess that this matter has caused me considerable anxiety. The appellant HALIMA OBEDI had successfully sued the respondent herein JUMA OMARY in Original Urban Primary court Civil case No 135 of 2003. The claim was for recovery of a house situated in sombeteni Area which the appellant claimed ownership. The plain_tiff:s\;case is that at the time of the construction of the house aforesaid the parties were husband and wife and that the . ' ' 2 respondent had supervised the construction on her behalf. They were married in 1990. The marriage between the parties was terminated in 1997 by "talaka" in accordance with Islamic rites /rules. The appellant averred that the respondent had wrongfully sold the house which belonged to her to another person. The Primary court decided in favour of the plaintiff /appellant herein. on appeal the District court in Civil Appeal No. 80 of 2004 reversed the decision of the primary court on the ground that the respondent/defendant had not been given the opportunity to cross- examine the appellant/ plaintiff in respect of documents relied on by the plaintiff which were tendered in court as exhibits. The Petition of Appeal raises two grounds. In the first ground the appellant is basically contending that the trial court had erred in law and fact in holding that the respondent was not given the right to cross examine the appellant with respect to the documents tendered as exhibits by the appellant. In the alternative, in the second ground the appellant has contended that the 1st Appellate court erred in law by not ordering a re-trial. The appeal is strongly resisted by the respondent. In his Reply to the Petition of Appeal the respondent has maintained that the judgment/decision of the appellate District court cannot be faulted. 3 He added that the matter being in any case res judicata the appeal ought to be dismissed once and for all. It is also contended that in any case the Petition of Appeal does not advance any complaint against the decision of the District court. At the hearing of this appeal the parties who were both unrepresented, opted to adopt their respective grounds for / against the appeal. Neither party had anything more to add thereto. I have carefully re-evaluated the evidence on record. It is undisputed that the parties were married. What is disputed is

whether the marriage is still in existence. Although this matter was not filed as a matrimonial case there are certain issues raised in the case which fall under the category of matrimonial issues. Indeed the plaintiff claimed that the house in question was constructed during the subsistence of the marriage and that the respondent had participated and /or assisted in the construction by supervising the construction work though he had not contributed towards the expenses. on the other hand the respondent while admitting that they had experienced matrimonial problems, denied that the parties were ever divorced. According to the defendant the parties are still man and wife. It seems to me that the trial court had overlooked the fact that the plaintiff in her plaint avers two important points- one, 4 that at the material time of the construction of the disputed house the parties were married to each other and that it is clear on the evidence of the appellant that the respondent then her husband, was the one who had supervised the construction of the house. In the light of such evidence the trial court ought in my view to have addressed and made a finding on the issue of the status of the marriage and the extent of the respondent's contribution in the acquisition and construction of the house and his rights if any, for such contribution. Indeed the issues. aforesaid are key to the determination of the appellant's claim for recovery of the house. I am therefore unable to make any orders before resolving the issues of the status of the marriage and the respondent's contribution to the house if any. coming back to the first ground of appeal it is the contention that the trial court had erred in holding that the respondent was not given a right to cross-examine PW2. There is clearly a mistake in this ground as it was the District court not the trial court that decided that the respondent was not given a right to cross-examine PW2. However in view of what I propose to do in this matter I shall say no more on this point for reasons which will emerge hereunder. 5 There is yet another point which the lower courts have overlooked and which has made me ponder anxiously. In her statement of claim or plaint the appellant had averred that the respondent had sold the house that she is claiming as hers to another person. The plaint does not mention the name of the alleged buyer of the house. Nor was the buyer made a party to the proceeding. However the evidence of the plaintiff and his witness does not support the alleged sale to another person. There is no evidence that the house was sold to another person. What is on record shows that the respondent after claiming that he had contributed shs. 100,000 = in the construction expenses, threatened to put the house on sale unless the appellant refunded to him the aforesaid sum. It is not clear on the evidence that the house was sold as alleged. However if at the time of filing the suit the house had indeed been already sold to a third party then the buyer of the disputed piece of land/house ought to have been sued jointly with the respondent for recovery of the house in dispute. Failure to join the buyer was fatal to the proceedings for it is not possible to make any orders in this matter without affecting the rights of the unnamed third party, if indeed the house was sold to another 6 person, who has not had any chance of being heard in this matter at all. (See the case of JUMA KADALA V. LAURENT MNKANDE). In the event I direct that this matter be remitted back to primary court with directions that the buyer, if indeed there is one be joined as a party to the case and that the subsequent trial will proceed in accordance with the law. The Primary court is also directed to address and decide on the matrimonial issues raised by the parties, in particular the status of the marriage between the parties, i.e. whether the parties are divorced or whether they are in law still man and wife and secondly the extent of the

respondent's contribution in the acquisition of the house in dispute. As it seems clear that the house was acquired by the parties during the marriage by their joint efforts, it will be just for the trial court to address this issue and decide whether or not to order a division between the parties of the proceeds of the sale if any. For the avoidance of doubt if at the hearing it is established that the house has as yet not been sold to anyone then it seems only fair that the trial court orders the sale of the said house and the division between the parties of the proceeds of the sale. 7 In the final result this appeal succeeds to the extent indicated. In all other respects it is dismissed. Each party will bear his/her own costs. i<_, R. SHEIKH JUDGE 7/01/2008 Judgment read out this 7/02/2008 in the presence of the appellant and in the absence of the respondent duly served, and fide 8/C. R. SHEIKH JUDGE 7/02/2008 /mm

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