

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA
CIVIL APPEAL NO. 39 OF 2004
FROM CIVIL APPEAL NO. 05 OF 2004 OF
REGIONAL COURT (VUGA) AND ORIGINAL
CIVIL CASE NO. 63/2002 OF MWANAKWEREKWE DISTRICT
COURT ZANZIBAR

ASHA VUAI MSHAMBA

APPELLANT/PLAINTIFF

VERSUS

JUMA PANDE MZEE

RESPONDENT/DEF.

J U D G E M E N T

MBAROUK, J.

This is an appeal which has been filed by Asha Vuai Mshamba who was unrepresented on one hand, whereas on the other hand Juma Pande Mzee the Respondent who has been assisted by Mr. Uhuru the learned Advocated who filed their cross objections in this appeal.

This appeal has its original from the Mwanakwerekwe District Court where the appellant/original plaintiff filed her main suit. However the appellant was dissatisfied with the decision of the trial District Court and she opted to file

her appeal to the Regional Magistrate's Court Vuga. The appellant was then aggrieved with the decision of the first appellate Court (RM'S) and she has filed her second appeal to this Court.

In her memorandum of appeal to this Court, the appellant has submitted four grounds of appeal namely :-

1. That, the Regional Magistrate and the trial District Magistrate erred in Law by failing to establish that the origin of the house in dispute is under the ownership of the Appellant who was the owner of the plot and as the one who has built a big portion of the house in dispute.
2. That, the Regional Magistrate and the trial District Magistrate erred in Law by failing to approve the evidence of the Appellant at the time she testified that the Respondent has partly contributed to the building of the "banda" only and not the whole house.
3. That, the regional Magistrate and the trial District Magistrate erred in Law by failing to establish that the Respondent owned his plot which he then sold it so as to grab the appellant her right.

4. That, the Regional Magistrate and the trial District Magistrate erred in Law by failing to go to visit the scene of the house in dispute, where if they went to visit the scene they would have acquired the truth of who is the owner of the said house.

At the hearing, the Appellant raised her opinion that it seems that the Courts below have not understood the real question in dispute, because the reality as she putted it is that there was an initial plot belonging to her, but she then gave it to the Respondent, and the Respondent opted to sell it. The appellant then said that she acquired a second plot of land which she bought it for T.shs. 120/= and the Respondent assisted her to build a "banda" which is attached to the main house. She then said that the main house has been built by her own effort with the exception of the "banda" attached to the main house, and she agreed that the Respondent contributed to the building of that "banda" as her former husband. The "banda" she said is having two rooms.

The Appellant proceeded without referring to her grounds of appeal by submitting that they have been husband and wife for many years and now the Respondent wants to take the house she has built on her own effort while the Respondent has a plot and he has already been paid on his pension, hence he can built his house on his plot.

Lastly the appellant prayed before this Court to consider deeply this matter and give a just decision.

On the other hand Mr. Uhuru Advocate for the Respondent, objected to all what have been stated in this appeal.

As for the first ground, Mr. Uhuru objected that the Appellant was the owner of the disputed plot of land, and submitted that according to the evidence brought before the Court, the said plot was evident that it was owned by the Respondent and he was the one who paid PW-1 Moh'd Othman Haji. He then proceed by contending that the whole house was built by the Respondent, for reason that the evidence has shown that the Respondent was employed as a soldier/army man and hence he had the capacity to build the said house and "banda".

Mr. Uhuru then reacted by saying that the Appellant has failed to show before the Court on how she was able to acquire that money for the building of that house in dispute. He said even though in the trial Court proceedings it has been shown that she was playing "upatu" as a source of the money for the building of that house and paying those who built the house, but she failed to identify the names of those who were playing "upatu" with and the amount she acquired or received from that "upatu".

Mr. Uhuru then proceeded by submitting that there was no evidence of any one who has been employed to build the house, whereby the only witness is the one who was employed for the making of cement bricks, and whereas when the said witness was cross examined he said that he did not know where the money came from even though he was given that money by the Appellant.

Without more clarification, Mr. Uhuru pointed out that there is evidence that the Respondent was the one who paid the masons (Mafundi) and payed for the items for building, such as cement bricks, cement and building sticks. He said that this shows clearly that the Respondent was the one who built that house as a whole. However as I said earlier no further elaboration of the evidence mentioned by Mr. Uhuru was adduced by him.

In his reply to the second ground of appeal, Mr. Uhuru pointed out that it can be argued with the first ground and he added by saying that the Appellant has not contributed anything in the building of that house in dispute.

As for the third ground, Mr. Uhuru reacted by saying hat the issue of another plot is not a subject matter in this suit, hence it is baseless.

In his answer to the last ground of appeal, Mr. Uhuru contended that the issue of visiting the scene is supposed not to be considered by the Court if there is no party who has prayed for that visit. He continued by saying that

there is no where in the proceedings of this case where it has been shown that the Appellant has applied for the visiting of the scene. He then said that the District Court was satisfied with the evidence and that is why it has not ordered for the visiting of the scene. He ended by saying that this ground too has no merit.

Finally, Mr. Uhuru prayed for this appeal to be dismissed with costs.

In her reply to the reaction of Mr. Uhuru, Advocate for the Respondent, the Appellant contended that the said cement bricks which the Respondent has claimed to have been made at the time while he was still in service as an army man/soldier are still there intact on the ground un used to build the house.

The Appellant then insisted that the Respondent has not contributed anything in the building of the main house, but she agreed that the Respondent has contributed to the building of the "banda" only. She then repeated her earlier argument that she was doing petty business and "upatu" which has helped her to build that house.

After the hearing of this appeal then followed the hearing of the cross objection which consisted of three main issue.

In submitting their first ground in their cross objection, Mr. Uhuru submitted there is no real evidence that the Appellant has contributed to the building of the disputed house, and there is no evidence of how the Appellant has acquired the money for the building of the said house. He then contended that the evidence of PW.2 is not sufficient in showing that the money and cement came from the Appellant's pocket or paid by her.

Mr. Uhuru then proceeded by pointing out that the Appellant was the wife of the Respondent and there was a great possibility that the one who was making those cement bricks and the buying of cement was paid by the Respondent and that is why the Respondent with his witness i.e. DW.1 and DW.1 and Dw.2 testified that the building materials were bought by the Respondent. Whereas he said Dw.1 testified in Court that he was the one who built the "banda" and the house.

His concluding remarks in his submission for the first ground in their cross object was that even the Regional Magistrate erred by being in agreement with the District Court who was dealing with the distribution of matrimonial assets after the dissolution of the marriage between the Appellant and the Respondent.

Finally, Mr. Uhuru said that because of those reasons he has stated, they are saying that the Respondent was the only one who built the said house, which

means that the Appellant has not contributed anything to the building of the said house.

As to their second cross objection, Mr. Uhuru said that it goes with the first cross objection and in addition to that he contended that the Regional Magistrate's court should have decided that the Respondent was the only one entitled to the ownership of the said house, because he was the only one who built it and he was the owner of the plot of land of the house in dispute as per the words of PW.1 who showed how the plot was acquired.

As to their third cross objection Mr. Uhuru submitted that the Regional Magistrate erred in his Judgment when he said that as far as there has been no documentary evidence, hence oral evidence alone cannot be relied upon. Mr. Uhuru said that oral evidence is accepted in Law and what the Court was required to weigh was the evidence of the two sides in that case and issue a just decision. Mr. Uhuru argued that the evidence of the Respondent is having more weight by showing that the said house in dispute is owned by him alone. Whereas he said that the appellant's evidence is very weak in establishing that the house is owned by herself alone.

Lastly, Mr. Uhuru prayed for their objection to be allowed and dismiss the Judgments of the Regional and District Courts and this appeal should also be dismissed, and issue the order that the said house is owned by the

Respondent alone and the appellant to pay costs and any order which this Court will deem fit.

In her reply to this cross objection, the Appellant claimed that the Respondent was her husband and he assisted her in the building of "banda" only and not the whole house.

After examining what have been submitted by both parties in this appeal and cross objection, I remain with a considered opinion that the issues which need the attention of this Court is to examine whether there is any contribution from either the Appellant or the Respondent contributed by either of them for the building of the house in dispute and to what extent if any. Also to examine whether the house in dispute is wholly owned by the Respondent or the Appellant.

The decision of this appeal and cross objection will be jointly discussed and considered as far as there is a close relationship, but more attention will be kept on the issues stated above. It will also rely upon the evidence adduced in the trial Court which basically is derived mainly from the testimonies of both the parties and their witness.

To some extent I concur with Mr. Uhuru when he said that oral evidence is accepted in law, but apart from that, in the situation we have in this case, the Court is supposed to be careful in handling such oral evidence. This is

because in the weighing of the balance of probabilities it has to be taken into consideration that no documents have been submitted by both parties in support of proving their claims. However as I have said earlier, there is no harm in relying upon the oral evidence in hand.

From the outset it has also to be borne in mind that this is not a case concerning the division of Matrimonial assets, but it is purely an ordinary Civil Suit where the Appellant/Original plaintiff is claiming ownership of the house in dispute. However it is just a coincidence that the parties were husband and wife.

After having those brief comments, let me now consider the issues which need the attention of this Court. The first among those issues is the extent of the contribution if any to the building of the house in dispute. It is undisputed fact that at the time of the hearing of this appeal the appellant agreed that the Respondent has contributed to the building of that "banda" only but not the whole house. However she said that the contribution was provided by way of helping her as a wife from her former husband. Hence this leads us to say that there is no dispute that the Respondent did contribute to the building of the said "banda" section of the house. But what is the position of the contribution on the side of Appellant? According to the testimony of PW.2 Ali Juma Faki, he testified that he was given twenty packets of cement bags to make bricks and he made forty five bricks per bag and he was paid by the Appellant T.shs. 1,000/= per each bag of cement

until he finished all of those twenty bags. When cross examined by the Respondent/defendant PW.2 replied that he was not able to ask the Appellant where she acquired that money or where she is going to use those cement bricks for the building of the house.

On the issue of who acquired the plot, it seems PW.1 Moh'd Othman Haji was not so clear, but he said that "Niliwakabidhi hicho kiwanja nao wakajenga" i.e. he handed over the plot to them and they built on it. This means that the said plot was provided to both the Appellant and the Respondent, although PW.1 accepted shs. 120/= which has been paid by the Appellant.

Even though the evidence has not shown clearly where the Appellant has acquired that money for the building, but PW.2 Ali Juma Faki at least has said that he was paid by the Appellant shs. 1,000/= per each packet of cement to make those bricks. Then if that money was from the Respondent's pockets the evidence is silent on whether the Respondent gave the money to the Appellant or not. The only evidence we have is that the Appellant acquired that money by conducting petty business and playing "upatu".

By finishing the issue of the extent of the contribution from what we have examined above it has shown that both the parties in this appeal has contributed to some extent to the building of the house by taking into consideration the assumption that the Respondent was employed person as an army man and the acceptance from the Appellant that the Respondent

contributed to the building of the "banda" section alone. But the question to ask ourselves is why should the contribution of the Respondent should be to the "banda" section alone ?. Hence because of that I strongly believe that the Respondent's contribution extended even to the building of the main part of the house.

On the other hand as shown above there is evidence from PW.1 and P.W2 which has shown clearly that the Appellant did contribute to the building of that house in dispute.

Because of all that which has been stated above the balance of probabilities do favour the issue that both the parties in this appeal did contribute to the building of the house in dispute. Even though Mr. Uhuru strongly argued in their cross objection that the evidence of the Respondent is having more weight by showing that the house in dispute is owned by the Respondent alone, but when you look at his testimony at the trial Court you will see that there is a contradiction in his statements. There is a time when he said that "Nikiwa bado niko Jeshini nilikwenda kukopa matofali (300). Na hadi leo bado yapo nyumbani sikuwahi kuyamaliza ndipo ukatokezea mzozo huu". Whereas as when he was cross examined by the Appellant/plaintiff he replied by saying that "Nyumba kubwa matofali nimekopa Jeshini. Nimefyatua mimi mwenyewe na watoto wa mtaani na fundi".

Hence which statement is true it that he received those 300 bricks by way of credit at the time when he was employed as an army man or he made them on his own and the assistance of village children and a brick maker (fundi). However a brick maker was not called as a witness.

Let us assume that the Respondent Statement is true that he received 300 bricks by way of credit, butt if we also assume that the Appellant gave PW.2 twenty bags of cement to make forty five bricks per packet, that means those are 900 bricks. There is no evidence on whether the appellant did pay the masons but the Respondent brought his witness who testified that he was hired by the Respondent and he was paid by him.

From all what have been stated above I have no reason to disturb the lower Courts decision, hence this Court just like the Regional Magistrate's Court and the District Court holds that the suit premises is jointly owned the and cross objection are dismissed and the house in appeal dispute be sold by auction and each party to have his/her share.

Each party to bear his/her own costs.

Sgd: Mbarouk S. Mbarouk

Judge

This judgment has been delivered today 23/02/2005 in the presence of the Appellant on one side and on the other side Mr. Uhuru, Advocate for the Respondent and the Respondent were there.

Sgd: Mbarouk S. Mbarouk

Judge

23/02/2005.

Right of Appeal has been explained to the aggrieved party.

Sgd: Mbarouk S. Mbarouk

Judge

23/02/200

I hereby certify that this is true copy of the Original.

(ABRAHAM MWAMPASHI)

REGISTRAR

HIGH COURT

ZANZIBAR.

