CHARLES s/o MANOO KASARE AND ANOTHER v. APOLINA w/o MANOO KASARE

COURT OF APPEAL OF TANZANIA AT MWANZA

(Kisanga, Lubuva, and Lugakingira, JJ.A.)

CIVIL APPEAL No. 84 OF 1998

(From the Judgment and Decree of the High Court of Tanzania at Mwanza, Chipeta, J. dated 29 October 1998, in Civil Case No. 15 of 1993)

Family Law – Matrimonial Property – Contribution to the acquisition of matrimonial property – Whether contribution by the wife must be direct and monetary.

Family Law – Matrimonial Property – Division of matrimonial properties – Property acquired through proceeds from the businesses of both spouses – Whether the wife has a right to such property.

Family Law – Matrimonial property – Division of matrimonial properties – Proportion of the property that the wife may be entitled to.

The appellants were the sons of the late Manoo Kasare who was married to the respondent under customary rites in 1967. In 1992 the husband died. During the life time of the deceased husband, the respondent had her own business in Musoma while the deceased husband had a pombe shop. From the proceeds of the businesses of both, they acquired more properties. After the death of the deceased husband the appellants sought to take over those properties and the respondent sued them for trespass and for a declaration that she was the owner of the properties and, in the alternative, that she be awarded half of the value of the properties. The High Court awarded her TZS. 6 000 000, being a quarter of the value of the properties and TZS. 2 500 000 being her share in the profit of the business. Dissatisfied, the appellants appealed against the decision.

Held: (i) That there was ample evidence to prove the monetary contribution by the respondent towards the acquisition of the properties;

A (ii) That a wife cannot be discounted from the business of her husband even if she makes no direct monetary contribution to it; her wifely services during the life time of her late husband from 1967 to 1992 would in itself entitle her to a share in the properties acquired.

B ***Appeal dismissed***

Mr *Kahangwa* for the Appellants

Mr Kweka for the Respondent

C

JUDGMENT

(Dated 19 November 2001)

D

Lubuva, J.A.: The appellants' father, the late Manoo Kasera was apparently a polygamist. Among other wives the respondent was married to the deceased in 1967 in Mombasa according to customary rites. She lived with her late husband first in Mombasa and later at Musoma E until 1992, when Manoo died. During the life time of her husband, the respondent had her own business in Musoma while the deceased husband owned and managed a *pombe* shop. From the proceeds of the businesses of both the respondent and the late Manoo Kasare F other properties including Banana Bar and Lodging, Rombo Timber in Musoma and two motor vehicles were acquired, all in the name of the late Manoo Kasare. These properties were the subject of a suit in Mwanza High Court Civil Case Number 15 of 1993, instituted G by the respondent against the appellants. The appellants were the sons of the deceased Manoo Kasare born of the other wives.

In the suit, the respondent claimed that after the death of her husband Manoo Kasare, the appellants trespassed to these properties. H She sought to be declared the true owner of the properties or alternatively that she is entitled to half the value of the properties which were estimated at a value of TZS. 40 Million. The High Court (Chipeta, J.) decided in her favour holding that the respondent had contributed I to the acquisition of the properties in dispute. She was awarded TZS.

6 million being a quarter of the value of the properties and TZS. 2 500 000 as her share in the profits of the business. The appellants were dissatisfied, they have appealed.

Mr Kahangwa, learned counsel for the appellants has filed a ten-point Memorandum of Appeal. In essence however, it is our view that only one central issue is raised. That is whether the respondent contributed towards the acquisition of the properties, the subject of the suit. Mr Kahangwa strenuously contended that the respondent did not contribute towards the acquisition of the properties in the businesses in Banana Bar and Lodge and Rombo Timber. These properties, he urged, were acquired through the earnings of the late Manoo Kasare alone. He went on submitting that as the respondent and her late husband ran their businesses separately, there was no evidence to prove that their earnings were put in one common account. Mr Kahangwa also strongly maintained that the respondent was not credible in her evidence because at some stage she said she and her late husband did business separately in order to avoid misunderstanding. In the same breath Mr Kahangwa went on, she contradicted herself when she said they had one bank account in the name of the deceased husband.

At the outset we wish to observe that the respondent as a wife cannot be discounted from the business even if she did not make direct monetary contribution to the business. As Mr Kweka, learned counsel for the respondent submitted, her wifely services during the life time of her late husband from 1967 to 1992, a period of about 25 years, would in itself entitle her to a share in the properties acquired. In this case, apart from her wifely services, there is, in our view, ample evidence to prove her monetary contribution towards the acquisition of the properties in the Banana Bar and Rombo Timber businesses. The respondent's claim that these businesses and the motor vehicles were acquired by use of the money realised from the businesses of both the respondent and the deceased husband is supported by Ayura s/o Kasare (PW2), the elder brother of the late Manoo Kasare. In his evidence he said:

> From their income they bought an old hut; then they demolished it and built a house. It was in Mkendo area. They also bought a house which is now a Bar – Konyagi Bar. They also bought two small motor vehicles. They got all these from their joint business. They also bought another plot in Lumumba area where they built another house where they live now. That house also has a timber sewing machine. Even that was from their joint earnings.

This evidence quite clearly supports the respondent to the effect that the bar and timber business were acquired from the joint proceeds from the respondent and the deceased husband's business. Furthermore, the evidence of Matola s/o Hassan (PW3) also supports the respondent. In 1967, he was the landlord of the respondent and her deceased husband. According to him, he assisted the respondent and her deceased husband in obtaining a plot where, apparently the Banana Bar building was built. He said the plot was paid for with money from the respondent and the late Manoo Kasare. He also supports the respondent's story regarding the timber business and the two motor vehicles. As these witnesses (PW1, PW2 and PW3) were found by the trial judge to be credible, we agree with Mr Kweka that the learned judge's finding that the respondent contributed towards the acquisition of the properties in dispute was justified.

We may even go further. On record, there is paucity of evidence that the respondent actively took part in the running of these businesses at Musoma. On the contrary, PW2 and PW3 categorically state in their evidence that they did not see the appellants in Musoma assisting in any way in the running of the businesses. This, it seems to us lends support to the respondent's version that the appellants surfaced as it were, in Musoma after the death of the late Manoo Kasare to lay claim on the business in which they had no hand before. So, in these circumstances, we think it is logical that in Musoma, in the absence of the other wives and the appellants who were in Moshi, the respondent was the likely close person available to assist the deceased husband in the running of the business. This, in our opinion, would be another factor in her favour showing that she assisted in running the business.

Finally, Mr Kahangwa had criticised the learned judge in awarding the respondent the amount of TZS. 8 500 000. He contended that no basis had been laid upon which this amount was arrived. With respect to Mr Kahangwa, we find no merit in this submission. In the plaint paragraph 11, the respondent had indicated TZS. 40 million as the worth of the properties involved in the suit. Neither in the Written Statement of Defence nor anywhere else in the trial was this amount controverted. In this light, Mr Kahangwa's submission that this amount was arrived at without any basis is, likewise unfounded. As a matter of fact, the respondent had prayed for half the value of the properties but was awarded only a quarter of the value. Consequently, for the foregoing reasons the appeal is dismissed with costs.

JUMA GARAGE *v.* CO-OPERATIVE AND RURAL DEVELOPMENT BANK

COURT OF APPEAL OF TANZANIA
AT MWANZA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 58 OF 1996

(From the Judgment and Decree of the High Court of Tanzania at Tabora, Koroso, J. dated 8 September 1994, in Civil Case No. 5 of 1985)

Contract – Privity of Contract – Respondent instructed to act for an insurance corporation – Whether such instruction makes the respondent an agent of the corporation.

Contract – Privity of Contract – Privity of contract and agency – Whether by acting for the principal the agent becomes party to contract.