IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MAKAME, J.A., RAMADHANI, J.A., And MROSO, J.A.)

CIVIL APPEAL NO. 10 OF 2001

BETWEEN

GHARIB ABDALLAH JUMA . . . . . APPELLANT

AND

KAY MLINGA . . . . . .RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Zanzibar)

(Lawan, J.)

dated the 5th day of April, 2000

in

Civil Case No. 22 of 1999

J U D G M E N T

MROSO, J.A.:

The appellant, a Tanzanian from Zanzibar, lived in Denmark. On 24th October, 1984 he married the respondent, a Tanzanian from the Mainland, in Denmark. Apparently, Denmark was one of those countries in Europe which practised (and perhaps still practises) the system of community of property to married people. So, in order to avoid the full effect of that system the appellant decided to enter into a marriage settlement with the respondent two days before marriage. At that time he owned a flat in Copenhagen and he wanted to exclude it from matrimonial property.

A translation into English of the marriage settlement supplied by the Royal Danish Embassy in Dar es Salaam reads as under:-

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"We the undersigned, ABDULLA JUMA GHARIB, born 9/7/1936 and joint undersigned KAY MLINGA; born 11/6/1948, both living at Manstalsgade 20, mezz., tv., 2100 Copenhagen O, hereby as consequence of our approaching marriage enter into the following

MARRIAGE SETTLEMENT

That flat No. 3 of Registration No. 3194 Udenbys Klaedebo Kvarter, situated at Manstalsgade 20, mezz., tv., 2100 Copenhagen, shall belong to me, Abdulla Juma Gharib, as separate property, which separate property shall furthermore include all proceeds from the flat and what may be gained from it.

Besides that there shall be complete community of property between us.

The present marriage settlement will be registered at my Abdulla Juma Gharib's venue in Copenhagen and at the flat No. 3 of Reg. No. 3194 Udenbys Klaedebo Kvarter.

Copenhagen, the 22nd October, 1984.

Signed
Abdulla Juma Gharib

Signed
Kay Mlinga"

According to the appellant, he had other properties before marriage (and the marriage settlement) but those properties were outside Denmark. Those were a house in Mwembeladu, Zanzibar which he said he inherited from his mother. He had another house at Mwanakwerekwe, also in Zanzibar, which he said he had bought and built to roof stage. Apparently, he had another house at Mfereji wa Maringo in Zanzibar, which he had built partially and modified.

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It also appears that he had a house at Kwahajitumbo which needed repairs.

Sometime after marriage the respondent went to live in Zanzibar and supervised the construction of some houses there, including the one at Mwanakwerekwe. After construction was completed the respondent leased the Mwanakwerekwe house and it is known that she realised a total of US$ 14,000.00 from the rent.

The marriage lasted some 14 years when they obtained a judicial separation and, finally, on 14th April, 1999 the couple were formally divorced. Both the judicial separation and the divorce occurred in Denmark. There was no order for division of matrimonial property.

After divorce the respondent brought a suit in the High Court in Zanzibar praying that matrimonial properties be divided amongst her and her former husband. She also prayed for costs. The properties which she wanted divided among themselves included those which the appellant owned before marrying her as well as properties acquired after marriage but before divorce. Such properties were:-

"(a) A house at plot No. 50A Mwanakwerekwe, Zanzibar.

(b) A house at No. 5/289 Mfereji wa Maringo, Mwembeladu, Zanzibar, together with various building materials stored therein and the plaintiff's personal effects.

(c) A house at Kwa Haji Tumbo, Mwembeladu.

(d) An unfinished house at Chukwani Juu, Zanzibar.

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(e) A fenced shamba at Chukwani Chini divided into 8 plots, one with a house foundation and two of which belonged to children.

(f) A plot at Tegeta, in Dar es Salaam.

(g) An unregistered motor vehicle, Toyota Pickup, 4 WD.

(h) A Container at Zanzibar storing building materials, household goods and farming effects."

The respondent based her claim on the marriage settlement which, after exeluding the flat in Copenhagen, provided for a "complete community of property" between the spouses.

In his defence the appellant said the respondent had contributed nothing to the acquisition of the properties of which she was claiming a share. Besides, he claimed, the marriage settlement related to properties in Denmark only and did not relate to properties which belonged to him before marriage and which he had inherited from his late mother. He further contended that the marriage settlement being "a Danish Contract" could not be "interpreted" (sic) (enforced?) in Zanzibar.

Even so, he conceded that the properties in items (d) (e) and (f) could be divided between the two. Those, of course, were the unfinished house at Chukwani Juu, the fenced shamba at Chukwani Chini and the plot at Tegeta, Dar es Salaam.

He counter-claimed the USD 14,000.00 which the respondent had realised from renting the house at Mwanakwerekwe. He had asked the respondent for the money but she declined to pay it over to him.

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The High Court in its reasoned judgment of 5/4/2000 found the marriage settlement valid and enforceable in Zanzibar. It covered "all the properties owned by the parties before and after the marriage be it in Denmark, Tanzania or anywhere." It also dismissed the appellant's counter-claim. It ordered that all the properties mentioned in the judgment be valued and distributed between the parties.

The appellant was aggrieved by that judgment and has appealed to this Court. In the memorandum of appeal he listed eleven grounds with an alternative ground that the learned judge of the High Court had erred in law and fact in including as matrimonial property liable for distribution the properties of which ownership had not been established. According to the appellant, only the properties which were acquired subsequent to marriage were matrimonial property which could be distributed according to contribution and that the marriage settlement was intended only for properties in Denmark and was void as regards properties in Zanzibar.

Before us, at the hearing of the appeal, Mr. Mnkonje, learned advocate, appeared for the appellant who was still living in Denmark, and Professor Shaidi, learned advocate, appeared for the respondent. Mr. Mnkonje argued only ten grounds, abandoning the seventh ground. He started by criticising the trial judge for admitting into evidence the marriage settlement. Indeed, at the trial its admissibility was objected to but the trial judge admitted it on the basis that it was a fact in issue.

Apparently, there is no controversy that the marriage settlement was valid in Denmark. It was contracted there under Danish law - "lex loci contractus". Like any other contract, it was

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enforceable in Denmark. The respondent, however, did not seek to enforce it in Denmark but in Zanzibar. No doubt, since the suit in Zanzibar was based on that contract, it was a crucial document. The absence of that document would make the suit hollow and unmaintainable. But the advocate for the appellant argued, both at the trial and before us, that the document was inadmissible in evidence because, it was contended, under the Zanzibar Law of Contract Decree, Cap. 149 it lacked consideration. We think that once it is accepted that the validity of a contract depends on the law of the place where the contract was entered into - "lex loci contractus" -, and there was no evidence that the marriage settlement was illegal under Danish law, the High Court in Zanzibar had no option but to accept it in evidence for what it was, a marriage settlement.

The learned advocate for the appellant cited section 25 (1) of the Zanzibar Contract Decree, Cap. 149 to support his contention that the marriage settlement was invalid. The provision reads:-

> "25 (1) An agreement without consideration is void unless
>
> (a) It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in near relation to each other;
>
> or unless
>
> (b) It is a promise to compensate for something done."

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The above provisions would be relevant in case of an agreement entered into in Zanzibar. Unless a marriage settlement as such is illegal in Zanzibar, and it was not so argued, it is enough if it conformed with the requirements of the law in Denmark where it was entered.

We agree, however, that the marriage settlement created in favour of the respondent an interest in land in Zanzibar. If the agreement is given effect in Zanzibar the respondent would thereby own land in Zanzibar. The general rule is that land and other immovable properties are governed by "lex situs", that is the law of the place where the land is situated. Similarly, any interest in land is situate where the land is situated. (See Dicey and Morris - The Conflict of Laws, 12th Edition, at page 934). But the question whether the respondent could own land in Zanzibar is distinct from that of admissibility of the marriage settlement document in evidence. We uphold the decision of the trial judge in admitting into evidence the marriage settlement.

Before we can consider the effect of the marriage settlement on properties in Zanzibar we think it convenient at this stage to discuss whether the decision of the trial judge that "the marriage settlement Exh. C cover all the properties owned by the parties before and after the marriage be it in Denmark, Tanzania or anywhere", is sustainable.

In explaining the system of community of property among married people Dicey and Morris on The Conflict of Laws, 12th Edition at page 1067 writes -

> "Under this system, marriage has the effect of vesting the property owned by either spouse at the time of the marriage or acquired during its subsistance in both of them jointly."

But in most systems of community of property the spouses can contract out of the system, if they so wish. This is what the appellant decided to do when he entered into the antenuptial settlement with the respondent.

In court the appellant attempted to explain the agreement by saying he had meant to protect his flat in Copenhagen and that he intended the agreement to cover only his property in Denmark, then existing and subsequently acquired. But did he in fact say so in the settlement document?

For all that is known, the only immovable property in Denmark which the appellant owned at the time of the settlement was the flat and, quite deliberately, he decided to exclude it from the anticipated community of property at marriage. He said "... as (a) consequence of our approaching marriage" the flat was reserved as belonging to him exclusively and as for the rest of his property he declared that "there shall be complete community of property between us". (Our emphasis).

It seems plain to us that the use of the words "complete community of property between us" meant that no other property whenever or however acquired was excluded from the community of property. If he had intended to exclude any other property from consequential joint ownership he would surely have said so.

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Why would he specifically exclude the flat which he had acquired before marriage and fail to exclude any other property if he had the intention to exclude such other properties? With respect, we agree with the trial judge that the only property he intended to exclude from the community of ownership was the flat in Copenhagen, which means that all other properties whether acquired before or after marriage in Denmark or elsewhere, were subject to the community property arrangement as qualified by the marriage settlement.

The arguments made before the trial court and before us regarding whether or not the respondent contributed to the acquisition of the assets of which the respondent wants to have a half share are irrelevant. Thus, the various cases such as PULCHERIA PUNDUGU v. SAMWEL HUMA PUNDUGU [1985] L.R.T. 7; MARIAM TUMBO v. HAROLD TUMBO [1983] T.L.R. 293; BI HAWA MOHAMED v. ALLY SEIF [1983] T.L.R. 32, all of which discuss the right of a wife to share in the matrimonial assets on the basis of her contribution to the acquisition of those assets, are not of assistance in deciding this appeal. As already mentioned, the respondent essentially based her claim on the marriage settlement. Those cited authorities, which we have not found necessary to discuss, would be relevant and helpful only if we found the marriage settlement to be either illegal or inapplicable.

Having said all the above there is a nagging question whether the marriage settlement can be fully executed in Zanzibar as the respondent has been urging.

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We said earlier in this judgment that the marriage settlement gave the respondent vested interest in appellant's properties in Zanzibar. Such properties were either houses or plots or a shamba. But, again as commented by Dicey and Morris, usually "all questions that arise concerning rights over immovable, (land) are governed by the law of the place where the immovable property is situate (lex situs). The general principle is beyond dispute, and applies to rights of every description ... because in the last resort land can only be dealt with in a manner which the lex situs allows." Which means that as regards the respondent's claims of a share on the immovable properties in Zanzibar, they are subject to the Laws in Zanzibar regarding land.

It has been urged rightly by the advocate for the appellant that section 4 (1) of the Registration of Documents Decree, Cap. 99 provides that no document executed after the 1st day of January, 1920 purporting or operating to create, declare or assign any right, title or interest in or over immovable property in Zanzibar shall affect any immovable property unless it has been registered.

It seems to us that the provision referred to above relates to documents executed in Zanzibar after the 1st of January 1920 and not to documents executed in a foreign jurisdiction, like the marriage settlement agreement which was executed in Denmark. So, although Samatta, J.A. (As he then was) was perfectly right when he said in Zanzibar Civil Application No. 6 of 1998 - RASHID ABDULLA RASHID EL SINANI AND ANOTHER v. MUSA HAJI KOMBO AND ANOTHER (unreported) that section 4 (1) of the Registration of Documents Decree, Cap. 99 provides for compulsory registration of documents relating to immovable property, the marriage settlement document does not fall under that provision.

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Section 8 (1) of the Land Tenure Act, No. 12 of 1992, however, is significant and relevant. It provides that only a Zanzibari can own land in Zanzibar. The respondent's contention that section 24 of the Constitution of the United Republic, 1977 confers on all Tanzanians a right to own property, including immovable property, cannot avail her. There must be a distinction between the right to own property and the legal conditions for exercising that right. Section 8 (1) of Act No. 12/92 provides the conditions for exercising the right to own land in Zanzibar.

She may have lived in Zanzibar for 10 years but that alone might not necessarily have made her a Zanzibari, as the trial judge assumed. Upon being married to the appellant the presumption was that she thereby acquired her husband's domicile, which was Denmark. (The appellant said in so many words that he was domiciled in Denmark). At the time of filing the suit she was already divorced and may have lost the domicile of her erstwhile husband. But even if it were argued successfully that she still retained her former husband's domicile, that would not avail her because domicile is not always co-extensive with residence or citizenship. Whatever may be the constitutional anomaly, and even danger, which is apparent in section 8 of the Land Tenure Act of 1992 (which we do not have to resolve in the present case and would have to wait for a more opportune occasion), the right to own property does not abrogate legal conditions regulating the exercise of the right. Which means that in the absence of proof that the respondent became a Zanzibari the courts of law cannot help her to realise her rights under the marriage settlement to own her share of the immovable property in Zanzibar.

The circumstances discussed above make it necessary for the court to quash and set aside the order of the trial court that all properties in the judgment be valued or estimated and distributed between the parties. However, the respondent can get the monetary value of her share of the immovable assets in Zanzibar after such value has been ascertained by a competent Government Valuer. As for the plot at Tegeta in Dar es Salaam the respondent can get it as part of her share in the matrimonial property. Similarly, the movable assets can be distributed to the parties in compliance with the marriage settlement. It is therefore ordered that the High Court should supervise the distribution of the assets which are owned jointly. The appellant should pay to the respondent the monetary value of her half share in the immovable properties. In the event the appellant fails to make such payment then the immovable assets should be sold and each party to get a half share of the total proceeds. The respondent is also to get half of the movable assets.

The trial court dismissed the appellant's counter-claim of USD 14,000/=. We uphold that decision. The respondent's explanation on how she spent the money was not effectively controverted by the appellant and the alleged misconduct of squandering the money was not proved.

The appeal substantially fails and the respondent is to get her costs.

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DATED at DAR ES SALAAM this 11th day of April, 2002.

L. M. MAKAME
JUSTICE OF APPEAL

.S.L. RAMADHANI
USTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR