IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL CASE NO. 102 OF 1997

MUKESH GAURISHANKER JOSHI.....PLAINTIFF
VERSUS

1. **GINTEX SUPPLIERS.....FIRST DEFENDANT**
2. **THE DAR ES SALAAM CITY COMMISSION.....SECOND DEFENDANT**
3. **DR. CHARLES TIZEBA ..... THRID DEFENDANT**

RULING

KALEGEYA, J:

The Defendants have raised preliminary objections in response to a suit filed by the plaintiff who claims, among others, for, a declaration that he is a registered owner of plot No. 1181/24, situated in the Central area of Dar es Salaam; Shs.500,000,000/= being an amount he would have received as a loan from **Simba Trading Co. Ltd** had it not been for the Defendant's trespass upon his plot, general damages including the pulling down and removal of the structure allegedly constructed on his plot. The Plaintiff is represented by Mr. Novatus Rweyemamu, Advocate, while Dr. Mwakyembe, Advocate is for the 1st Defendant. The 2nd and 3rd Defendants are defended by the City solicitor.

While all the Defendants insist that the plaint does not disclose a cause of action, the 2nd and 3rd Defendants add two more preliminary objections, that is: that there is a non-joinder of necessary parties: The Commissioner for Lands and the National Housing Corporation, and, lastly, that the plaint is not properly before the Court.

Parties made very long submissions but I find it unnecessary to go through them all because after a careful perusal and analysis thereof, including the plaint and the principles of law involved, I am convinced that the controversy is disposable by considering only one ground of the preliminary objections. This is whether the plaint discloses a cause of action.

All parties are agreed, and that is the true position of the law, that in determining on the existence or otherwise of a cause of action we should not look at anything else except the plaint and its annextures, if any (Joraj Sharif & Sons vs Chotai Fancy Stores (1960) E.A 375; East African Overseas Trading Co. vs Tansukh S. Acharya (1963) E.A 468). What was pronounced in the latter case tells it all:-

> *"The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of facts in it are true."*

Now, what does the plaint tell us? Paragraphs 1 – 6 contain the usual information regarding parties, their addresses and positions. Paragraphs 7 – 15 rumble into the history regarding plot No. 1181/24, on how it changed hands for one reason or another including being wrongly granted to TRICO Ltd; how the controversy found its way up to the Court of Appeal which finally decreed that it rightly belonged to Plaintiff. In para. 16 the Plaintiff states that in compliance with the development conditions contained in the Certificate of Occupancy he,

> *"entered into a loan agreement with Messrs Simba Trading (DSM) Limited, Dar es Salaam ("SIMBA TRADING") dated 10th June, 1996, whereunder the sum of five hundred million shillings (shs.500,000,000/=) would be made available to the Plaintiff for financing the construction, on behalf of the Plaintiff, of a building on the suit premises, and whereunder the Plaintiff undertook, inter alia, to clean and clear the suit premises for commencement by contractors appointed by SIMBA TRADING of the construction work on or before 31st August, 1996."*

The following paragraphs 17 – 20 are the centre-piece of the plaintiff's claims as a result, I find it necessary to reproduce them in extenso:

> *"As the Petitioner is a foreigner working with International Development Agency, with good income, persuaded the Respondent* ***to form a real estate venture as property developers.*** *Both the Petitioner and the Respondent were in agreement and the Petitioners invested surplus earnings of his salary to acquiring real property.*
> *Because of the Project, the Respondent resigned from her work as a civil servant and fully concentrated on the business." (emphasis added)*

The trial Court, rightly observing that none of the parties had a legal capacity to marry because each had a subsisting monogamous marriage, dismissed the novel prayer for separation. However, regarding property, the trial Court held that it had jurisdiction to decide on division of assets acquired during cohabitation and relied on S. 160 (2) of the Law of Marriage Act, No. 5 of 1971. It then proceeded to decide on the property acquired as follows,

> *" I grant the petitioner the Mikocheni house as his share of what they acquired through their unlawful cohabitation and leave the rest of the properties namely the red brick house at Mbezi near Bagamoyo Road and the two other plots as well as the villa and the other plot to the respondent. This means that the respondent will remain with the two houses and four plots. That is the remaining two plots at Mbezi near Bagamoyo Road where the red brick house is built, and one of the plots and the other one at Mbezi where the villa is built. If it is possible for her to get the plots near the ocean which are said to have been encroached by the Army, she can as well get the plots."*

In arriving at the above conclusion the Court believed Petitioner's version of what transpired: that they cohabited between 1982 – 1992 and his finances were the ones used to acquire the various plots and effect the enumerated developments thereon, and

completely disbelieved Appellant's version that the Petitioner was a mere a boyfriend and used to visit him when her late husband was away on safari and that in effecting the developments she used monies accruing from her various businesses and assistance from her late husband.

I will start by saying that the evidence clearly shows that the parties were a very unique and courageous couple who all along knew that they were engaged in adulterous relationship **BUT** cared not what the world around, let alone their spouses, thought of them! They knew that their relationship was far from suggesting a presumption of marriage. For that matter there is no way facts of this particular case can bring it under S. 160 of the Law of Marriage Act, 1971 as purportedly held by the trial Court. In invoking S. 160 the trial Court observed,

> *" I do agree with Mrs Tenga that division of matrimonial assets is considered after a decree of separation and divorce but I will add that there is also another section which empowers the court to consider dividing what was acquired by the parties during their period of cohabitation.*
>
> *This is section 160(2) of the Law of Marriage Act, 1971 where a presumption of marriage is raised and disputed. Under such circumstances, the court has jurisdiction to make orders as it would have been made subsequent to granting of divorce or separation."*

Their respective marriages may have been on rocks and thus sought solace in direct exposure of the adulterous relationship but that is the only furthest extent we can go. There are no roots at all for a presumption that they were married and they all along knew of this naked fact.

Even the Petitioner's driver (George Walule) whom he called as witness was very categorical in not believing that they were married, for, he stated:

"I knew that both Peter and Helen were married to someone else".

And, in fact he knew the husband, Adam. Obviously then he knew that they could not be married while holding such capacities. S. 160 of the Marriage Act comes into play in cases where parties have capacities to marry and not otherwise.

The said S. 160 provides,

> *"160. – (1) Where it is proved that a man and woman have lived together for two years or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*
>
> *(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for and orders of maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section."*

Would it have been possible for example, if the adulterous relationship had given forth to a child, for Appellant to have asked for maintenance from Respondent of that issue or of herself? The answer is No. Paternity would have remained with Adam though not the sirer and Appellant would not be heard to ask for maintenance when she

was still legally married to Adam. Otherwise it would be a mockery of justice if the courts were to be used to bless and protect adulterous relationships of the kind and their concomitants.

Thus, in order for the Court to have considered acting under S.160(2) there should have been in existence a presumption of marriage, and which was rebutted. On the facts at hand the said presumption could not even be thought of. Who could better be placed to appreciate the non-existence of this presumption than the Petitioner himself who exposed the truth in his own words in the following part of his deposition:

> *"I knew she was married to another man who was a teacher. I never saw the other man and I did not know his name. Nothing happened to her marriage. She tried to divorce the husband but she failed. That is what she told me."*

Again, as late as 1988, according to a document he tendered in Court, this petitioner who insists in his deposition to have cohabited with Appellant since 1982 comes out with the truth of the matter as he concedes therein that Appellant is somebody's wife but that they cohabited since 1984. The document, witnessed by one Mr. B. Krogh and Mr. H.S.T. Jensen on 5/4/88, reads in part,

> *"RE: COHABITANT*
>
> *For later discussions with DANIDA I would like to state, that MRS HELLEN ADAMS has been my cohabitant in Dar es Salaam since February, 1984"*

It is not disputed that Appellant's husband was known by the name of Elisha Adam, so clearly Respondent Petitioner is referring to Hellen Adam in her capacity as Mrs Adam.

With all the above it is very surprising that the Petitioner had the audacity of Petitioning for separation, and even of telling the trial Court,

"I lived with her as my wife"!

What a contradiction in terms! There could not be such relationship let alone a presumption of marriage.

Also, the Respondent's counsel strenuously tried to impress, in his submission, that they (Appellant and Respondent) lived in a MERETRICIOUS relationship hence Appellant could be termed a "meretricious spouse". With respect, baptising the relationship "meretricious" does not salvage the situation. This is so because the term describes a relationship between parties who contract a marriage which is void by reason of legal incapacity. In such a situation the parties, unknown to them, enter a relationship which they both believe is legal marriage which however is not because legally they have no capacity to marry. It does not apply to situations where parties are quite aware that they are not married but simply are angaged in an adulterous splee as in the case here. I have above demonstrated that the Petitioner/Respondent was all along aware that Appellant was someone's wife and himself someone's husband which is enough to negate the existence of the alleged relationship.

In conclusion therefore, I respectifully hold that the trial Court erred in relying on S. 160 of the Law of Marriage Act. Indeed, they may have unlawfully cohabited for sometime and possibly had joint acquisitions but this is far from establishing that there was a presumption of marriage. The Petitioner should have resorted to other legal avenues of realising his interest, if any, instead of invoking the assistance of the Law of Marriage Act No. 5/71. His actions were deplorably non-starter in the process as the wrong law was invoked. This disposes the appeal. However, albeit for clarity I should touch as well on other issues raised by parties.

Even if we were to hold that S. 160 of the Law of Marriage Act is applicable (which is not) there are glaring misdirections by the trial Court which could not sustain the findings reached. These are in three segments though interrelated as follows:

First, regarding acquisition of the properties the trial Court rated Petitioner very credible and Appellant a lier. However, the said trial Court did not back up this finding with what was stated in Court. To appreciate the trial Court's line of reasoning let me reproduce the relevant excerpts from the judgement as they relate to the parties. For the Petitioner the Court observed,

> *"The issue is whether there is any property to be divided. I have expressed the impression created by the petitioner in this case. He is a very truthful witness. He stood at the witness box and told the court that he wanted to establish a real estate in partnership with the respondent by exploting the respondent's citizenship because he is a foreigner. He told the court that he was a financier of the various plots and houses which are held either under the name of the respondent or other names. His evidence is that the respondent was the one who dealt with the process of acquiring them either lawfully or unlawfully but whenever the aspect of payment for anything came in, he made the payments through the respondent. The petitioner said he wanted to be involved at every stage of the acquisition of the plots but he was kept away by the respondent on the reason of being a foreigner. According to the petitioner, the respondent told him that if he got involved they would pay expensively for the acquisition of the plots. As he trusted the respondent, he believed that the respondent was telling him the truth and he left the matters to go as the respondent had arranged them as he was not suspicious and he did not anticipate getting problems. The petitioner said that the respondent was poor and her employment as merely a Secretary did not earn her much."*

On the other, the trial Court had the following regarding Appellant Respondent:

The respondent on the other hand gave evidence that she acquired a lot of properties in the period 1982-1992 through her businesses of khiosks at Mwananyamala A and B, a shamba at Boke which is about fifteen acres, a rented house at Mwananyamala as well as funds realized from a dairy cattle project, rearing of chicken as well as selling of bricks and flowers. With funds from these businesses, she built the house on plot No. 368 – Medium Density Mikocheni, House No. 373 Mwananyamala – un- surveyed Area, House at Musoma Kiliba as well as acquiring plot No. 216 Mbezi Beach. The respondent said that her late husband used to assist her financially as well as supervising her projects and looking for persons to make the bricks. The respondent said that the petitioner did not contribute anything towards the construction of the Mikocheni house and that although he used to give him money he only gave money for make ups and nothing else and he did so as her boy friend. The respondent denied having done any business with Peter. The respondent prayed for the dismissal of the petition and with costs.

As stated before the respondent has not impressed me as a truthful witness. I say so because of a question put to her during cross examination to say how much did it cost her to construct the Mikocheni house until the stage it had reached at the time the court visited the area. He reply was that it had costed her T.shs.5,000,000/=. As stated the court visited the house at Mikocheni. It is a two storey building still under construction but by the time the court visited the plot it had costed for much more than shs.5,000,000/=. In deed it must have costed more than 100,000,000/= at the time the court visited the house on 28th September 1995. Her aim is to grab all that was acquired during her unlawful cohabitation with the respondent. Indeed the petitioner has proved to this court that he was a financier of everything. *It will be in the interest of justice for the two of them to share what they acquired during their unlawful cohabitation."*

From the above, is it not clear that the Appellant rightly complained in her memo of Appeal that the trial court misdirected itself on the standard of proof in civil cases? It will be noted that the Petitioner stated in his Para. 7 of the Petition that "*they formed a real estate venture as property developers*", and in his deposition he insisted,

> *"We went into a joint venture".*

Now, the only evidence regarding the alleged Petitioner's financing of the acquisition of the said property and found very credible by the trial Court is contained in the following extract of the Petitioner's evidence:

> *"We went into a joint venture. We bought plots and built houses. We bought two plots at Mbezi. They were two big Plots and they were neighbour plots. I cannot remember the numbers. She paid the cash. We got them straight from the surveyor. We constructed a Villa on one of them 200 square metres. The house is completed. I don't know who is living in the house. The plots were bought in two different names. She told me that was the custom here. She used names connected to her.*
>
> *We also bought other three big plots at Mbezi just near the road. One side of the plot is at Bagamoyo Road. I do not recall the numbers. We built a one family house on one plot and a servant quarter on each of the other plots. The house was completed many years ago. The respondent is living in that house with a new boy friend now. That is what she told me.*
>
> *Then we bought two other plots at Mbezi Beach. They are very close to the water.* ***We paid millions for them and that dried our savings.*** *We put a fence and an ashan house for each of the plot. We did not do any other development. We also employed askaris. I paid for the askari* ***I paid for each development. She was a Secretary. Her salary after tax was T.500/= p.m. at that time.***

> ***We started a Real Estate and I gave her money to buy a plot at Arusha. I gave her T.shs.5,000/=*** *to buy the plot at Arusha. We also buy another plot at Mikocheni for building a big house. It was near we were staying. I kept the house when we separated in 1992. It is plot No. 368 Mikocheni. We constructed a two floor house but we did not finish it. Up to now it is not finished. The house is not occupied. I gave the respondent* ***T.shs.2,000/=*** *to buy other plots but I have not seen them." (emphasis mine)*

Can we, on the basis of the above, genuinely and legally say that this petitioner has discharged the burden of proving that he was the financier of the projects? The law is clear: he who alleges must prove. One would have expected this "*real Estate developer*" to tell the Court the "*millions*" of shillings he pumped into the project. He did not. The question is, if he did supply the finances as claimed why not disclose the same? Are mere assertions as portlayed above enough? What yard stick did the trial Court use in upholding these assertions. Yes, the few disclosures of cash advancement to Appellant by Petitioner may have indeed taken place but this is not uncommon between lovers of whatever description. It is the price of such style of life. The Petitioner was supposed to go further than this in order to establish the joint venture activities and financing along that spirit. It is not of less significance that although he gave a string of plots purportedly acquired he could only point out just a few.

On the other hand the Appellant stated how she engaged in various businesses . She enumerated them. Of course she had no burden to offload or a wall to dismantle as Petitioner had not erected one. How then did the trial Court arrive at a finding contained in the extract quoted in full above when it concluded,

> *"Her aim is to grab all that was acquired during her unlawful cohabitation with the respondent. Indeed the Petitioner has proved to this Court that he was a financier of everything"!*

This was a glaring misdirection on a standard of proof required. The burden was shifted to the Appellant which in law was clearly wrong. The Court could only shift the burden after the Petitioner had adduced evidence in support of his assertions.

Secondly, the trial Court branded Appellant a lier because she said that up that time, the construction of the house had cost about 5,000,000/= when its real cost was over 100 million T.SHS!

With greatest respect to the trial Court where did it get the figure of 100 Million? Petitioner never uttered nor suggested it. None of the Petitioner's witnesses hinted at that let alone attaching any value thereto at all. The Court did not portlay itself as a quantity surveyor (and could not) and there was no expert employed or involved to give an estimated cost. I do appreciate that the Court visited the plots and structures but it should have had at its disposal more evidence before concluding that the Mikocheni structure was not worth shs.5,000,000/= as stated by Appellant but over shs.100 Million according to its observations. It is not uncommon for quantity surveyors or someone else who didn't effect the construction to arrive at figures ten times over the actual cost used in erecting a structure. This is so because while, in their quantifications they (quantity surveyors and independent valuers) use standard measurements, principles and pricings, in constructions which are privately supervised a lot depends on various factors including the mode of supervision, the type and grade of Engineers and related engaged, source of building materials and the ruling prices of the materials at the time of construction all of which could substantially reduce the otherwise potential or normal cost. The trial Court has not bothered to show us how it was guided in arriving at shs.100 Million. It is a wild conclusion which, legally, can't be supported.

Thirdly, the trial Court would still have been wrong in apportioning the property. The Petitioner prayed for just half of what he believed they acquired during their unlawful cohabitation. In his deposition he categorically stated,

"I pray for the division of the property in a 50% share"

Shortly thereafter he reiterated this,

"She should get a half of what we did together".

So, even if we were to uphold the finding that under the law the Court is claded with power to divide the property, the apportionment made by the trial Court would not be supported. The "*division*", already quoted above was not proved to be half-half of the property acquired. There was no attempt to get the value of all the said property which could have convinced the Court that what was left to the Appellant is half in value of all the property, meaning that it was equivalent to the value of the structure erected on the Mikocheni plot. Unsupportable approach and principles were employed.

There are yet other arguments which attract observations.

In the submission the appellant raised an issue of failure by Petitioner to refer the matter to the Conciliation Board. I can only observe that apart from the fact that it was abandoned before the trial Court; and that it is late in the process to be entertained because any preliminary objection should always be raised at the first opportunity available, and further that it does not form part of the grounds of appeal, that requirement has no ground on which to be pegged because as already held this was not a matrimonial matter legally tackled under the Law of Marriage Act.

Also, though not forming part of the ground of appeal, counsel for Appellant submitted that Petitioner as a foreigner could not own land unless armed with permission from Commissioner for Lands. Suffice to observe that this is irrelevant at this stage. A foreigner seeks permission to own land once such interest is indentified by him. That requirement would come in once it is finally decreed that the Mikocheni House should be owned by Petitioner.

On the whole therefore I hold that S.160 of the Law of Marriage Act is not applicable in the case at hand and thence the trial Court could not legally divide the

property as it did let alone entertain the action in the manner it was presented, and, even if it had such power the petitioner did not discharge the burden as required under the law. This however does not bar petitioner from founding another action on a different branch of the law – i.e. he all along alleged existence of a joint venture between the two, possibly he could prove its existence and breach of the same by the Appellant. Till then however there is nothing which can entitle Petitioner to the property disputed. The appeal stands allowed with costs.

L.B. KALEGEYA

JUDGE