GHARIB ABDALLAH JUMA *v.* KAY MLINGA

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Makame, Ramadhani and Mroso, JJ.A.)

CIVIL APPEAL No. 10 OF 2001

(From the decision of the High Court of Zanzibar at Vuga, Lawan, J., dated 5 April 2000, in Civil Case No. 22 of 1999)

Contract – Validity and enforceability – Agreement entered into in a foreign jurisdiction – Whether the agreement is valid and enforceable in Zanzibar.

Family Law – Marriage Settlement agreement – Marriage settlement agreement executed in Denmark and not registered in Zanzibar but giving a spouse an interest in the other spouse's landed properties in Zanzibar – Whether the marriage settlement is valid and enforceable in Zanzibar.

Conflict of Laws – Right to property – Right to own land in Zanzibar – Whether a Tanzanian who is not a Zanzibari may own land in Zanzibar – Section 24 of the Constitution of the United Republic of Tanzania and section 8(1) of the [Zanzibar] Land Tenure Act 1992 Number 12 of 1992.

The appellant, a Tanzanian from Zanzibar, and the respondent, a Tanzanian from the Mainland, were married in Denmark. Their marriage was subject to a marriage settlement agreement executed on the eve of their marriage excluding the appellant's flat in Copenhagen from the operation of the system of community of property to married people; under Danish law and practice, that system gives the parties to a marriage a right to each other's properties. After 14 years the spouses obtained a judicial separation, and a formal divorce a year later, both occurring in Denmark. The respondent then brought a suit in the High Court of Zanzibar praying for division of matrimonial properties located in Zanzibar, including properties acquired before marriage. She based her claim on the marriage settlement agreement which, save for exclusion of the flat in Copenhagen, provided for a "complete community of property" between the parties. The appellant argued that the marriage settlement related only to property in Denmark and did not cover properties acquired before marriage, and further that the marriage settlement was a Danish contract that was not enforceable in Zanzibar. The High Court found the marriage settlement valid and enforceable in Zanzibar, and that it covered all properties owned by the parties before and after the marriage, be it in Denmark, Tanzania, or elsewhere. This was an appeal against that finding.

Held: (i) As there was no dispute that the marriage settlement was valid and enforceable in Denmark, and it was never argued that it was illegal in Zanzibar, the High Court rightly accepted it as a valid marriage settlement;

(ii) The wording in the marriage settlement agreement shows that the appellant did not intend to exclude his property, other than the flat in Copenhagen, from the community of property arrangement; therefore, all other properties acquired before or after marriage, in Denmark or elsewhere, were not excluded from the operation of the community of property system;

(iii) The marriage settlement created in favour of the respondent an interest in land in Zanzibar and if given effect in Zanzibar the respondent would thereby own land in Zanzibar;

(iv) Land and other immovable properties, as well as any interest therein are governed by the law of the place where the land is situated;

(v) The respondent's claims for a share in the appellant's immovable properties in Zanzibar are subject to the laws of Zanzibar relating to land;

(vi) section 24 of the Constitution of the United Republic of Tanzania does indeed confer a right to own property, movable and immovable, in Tanzania but the legal conditions for exercising that right in Zanzibar are contained in section 8(1) of the Land Tenure Act 1992 which provides that only a Zanzibari can own land in Zanzibar;

(vii) In the absence of evidence that the respondent became a Zanzibari, she cannot realize her rights under the marriage settlement to own her share of the immovable properties in Zanzibar; she can only get a monetary value of that share, which should be paid to her by the appellant.

Orders accordingly

Cases referred to:

(1) *Pulcheria Pundugu v. Samuel Huma Pundugu* [1985] T.LR. 7

(2) *Mariam Tumbo v. Harold Tumbo* [1983] T.L.R. 293

(3) *Bi Hawa Mohamed v. Ally Seif* [1983] T.L.R. 32

(4) *Rashid Abdulla Rashid El-Sinani and another v. Musa Haji Kombo and another* CAT – ZNZ – Civil Application Number 6 of 1998 (unreported)

Statutory provisions referred to:

(1) Constitution of the United Republic of Tanzania 1977, section 24

(2) Law of Contract Decree Chapter 149, section 25(1)

(3) Registration of Documents Decree Chapter 99, section 4(1)

(4) Land Tenure Act 1992 Number 12 of 1992, section 8(1)

Mr Mnkonje for the Appellant

Professor Shaidi, for the Respondent

JUDGMENT

(Dated 11 April 2002)

Mroso, JA: The appellant, a Tanzanian from Zanzibar, lived in Denmark. On 24 October 1984 he married the respondent, a Tanzanian from the Mainland, in Denmark. Apparently, Denmark was one of those countries in Europe which practiced (and perhaps still practices) 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:

> We the undersigned, ABDULLA JUMA GHARIB, born 9 July 1936 and joint undersigned KAY MLINGA; born 11 June 1948, both living at Manstalsgade 20, mezz., tv., 2100 Copenhagen 0, hereby as consequence of our approaching marriage enter into the following.

MARRIAGE SETTLEMENT

> That flat Number 3 of Registration Number 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 Number 3 of Registration number 3194 Udenbys Klaedebo Kvarter. Copenhagen, the 22 October 1984.
>
> Signed Signed
>
> Abdulla Juma Gharib 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.

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 know that she realised a total of USD. 14 000 from the rent.

The marriage lasted some 14 years when they obtained a judicial separation and, finally, on 14 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 Number 50A Mwanakwerekwe, Zanzibar.

(b) A house at Number 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.

(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, 4WD.

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

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

In his defence the appellant said the respondent had attributed 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 which the respondent had realized from renting the house at Mwanakwerekwe. He had asked the respondent for the money but she declined to pay it over to him.

The High Court in its reasoned judgment of 5 April 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 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 criticizing 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 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 un-maintainable. 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 Chapter 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 Chapter 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.

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. (See Dicey and Morris – **The Conflict of Laws**, (12 ed), 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 state to discuss whether the decision of the trial judge that "the marriage settlement Exhibit 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, **The Conflict of Laws,** (12 ed) 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 subsistence 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."

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.

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* (1); *Maria Tumbo v. Harold Tumbo* (2); *Bi Hawa Mohamed v. Ally Seif* (3), 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.

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 Morrison, 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 Chapter 99 provides that no document executed after the first 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 1 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 *Rashid Abdulla Rashid El Sinani and another v. Musa Haji Kombo and another* (4), that section 4(1) of the Registration of Documents Decree Chapter 99, provides for compulsory registration of documents relating to immovable property, the marriage settlement document does no fall under that provision.

Section 8(1) of the Land Tenure Act Number 12 of 1992, however, is significant and relevant. It provides that only a Zanzibar 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 Number 12 of 1992 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 ever 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 to realize her rights under the marriage settlement to own her share of 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.

FREEMAN AIKAELI MBOWE AND THE ATTORNEY GENERAL v. ALEX O LEMA

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Samatta, C.J., Kisanga, Lubuva, Lugakingira and Mroso, JJ.A.)

CIVIL APPEAL No. 84 OF 2001

(From the decision of the High Court of Tanzania at Moshi, Mandia, J., dated 20 September 2001, in Miscellaneous Civil Cause No. 1 of 2001)

Civil Practice and Procedure – Appeals – Leave to appeal – Leave to appeal refused by High Court – When leave to appeal is necessary.

Civil Practice and Procedure – Appeals – Appeals in election petitions – Appeal against interlocutory orders in an election petition – Whether permitted.

Court of Appeal – Full Bench – Reversal of Court's earlier decision by Full Bench of the Court – Articles 117(4) and 83(4) of the Constitution – Section 5(1) of the Appellate Jurisdiction Act 1979.

Statute – Interpretation of statutes – Interpretation of Article 83(4) of the Constitution – Whether the provision allows a party aggrieved by a decision of the High Court to appeal as of right to the Court of Appeal – Ngalai's case revisited.

The respondent had petitioned the High Court seeking, *inter alia,* avoidance of an election result and a declaration that the first appellant was duly elected a Member of Parliament for Hai Constituency in Kilimanjaro Region. In that petition, the respondent had alleged corruption against the first appellant. The first appellant had raised a preliminary objection to the effect that the allegations of corruption disclosed no cause