IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MATRIMONIAL CAUSE NO. 2 OF 2012

SCOLASTICA SPENDI.....PETITIONER

VERSUS

ULIMBAKISYA AMBOKILE SIPENDI.....1ST RESPONDENT

MARGERETH NGASANI RINGO.....2ND RESPONDENT

Date of last order: *16/03/2018*
Date of Judgment: *20/04/2018*

JUDGMENT

I. ARUFANI, J.

The Petitioner filed this matrimonial cause in this court against the respondents for the following reliefs:-

(i) Dissolution of marriage.

(ii) The matrimonial house on plot No. 256 Kunduchi Dar es Salaam, be valued and auctioned and the sale proceeds been divide equally between the petitioner and the 1st respondent.

(iii) General damages of Tshs. 80,000,000/= to be paid to the petitioner by the 2nd respondent for hurting the petitioners feelings which have inflicted pain and suffering to the petitioner.

(iv) Payment of arrears of maintenance for the upkeep of the family by the 1st respondent at the rate of Tshs. 500,000/= per month and reimbursement of education expenses paid

by the petitioner for the issues of marriage from 2007 to the date of judgment.

(v) Costs.

(vi) Any other relief deemed fit by the court.

The brief background of this matter is to the effect that, the petitioner and the first respondent contracted Christian Marriage on 3rd day of September, 1989. Their marriage was blessed with two issues born in 1990 and 1994. In 1996 the first respondent started having love affairs with the second respondent and out of their love affairs were blessed to have one issue born in 1997. In 2002 the first and second respondent contracted Civil Marriage and in 2007 the first respondent deserted their matrimonial home and went to cohabit with the second respondent.

During the hearing of the matter the petitioner was represented by Ms. Crescencia Rwechungura, learned advocate and while the first respondent was represented by Mr. Desideri Ndibalema, learned advocate, the second respondent was represented by Mr. Masinga Meswin and Mr. Mutakyamirwa learned advocates. The petitioner testified as PW1 and told the court that, the first respondent is her husband and they contracted their Christian marriage at Tukuyu Mbeya on 30th day of September, 1989. She tendered to the court their marriage certificate which was admitted in the case as an exhibit P1. She said in their marriage were blessed to have two issues namely; Kiba Irene Spendi born in 1990 and Mpoki Kerl Spendi born 1994.

She said that, the first born child has finished her studies at the University of Malaysia and said the first respondent paid his University fees for only one year and stopped. PW1 said to have paid the fees of USD 4,500 in the second year and USD 6,000 in the third year. She also said she used to pay money for her up keeping at the tune of USD 200 up to 250 for food and USD 150 for rent. She said to have paid Tshs. 3,500,000/= as fees for the second born child and she used to pay Tshs. 800,000/= per month and Tshs. 50,000/= per week. She said her salary is Tshs. 1,200,000/= per month and she used to get travelling allowance.

PW1 said that, they tried to settle their dispute through their father in law and Marriage Conciliation Board without success and decided to come to the court. She said father that, during the subsistence of their marriage they bought the house at Kunduchi Beach between 1994 and 1995 which was unfinished and they continue to live therein while continuing to finish the same. She said they purchased the house from one Ally at the price of Tshs. 40,000/=. PW1 said to have contributed in finalizing the house, fixing new doors and windows. She contended that, the second respondent colluded with the first respondent as his wife and take loan from the CRDB Bank. She said she has sued the second respondent because she has interfered with her marriage and caused her and the children to suffer. She said she was expecting her Christian Marriage would have been happy one but it has turn to be not and prayed the court to grant her the reliefs sought in the plaint.

When she was cross examined by Mr. Ndibalema she said that, she is social worker and is working with Tanzania Health Promotion Support from 2008. She said when she was married she was form four leaver. She said she attended the Advanced Diploma Course on Social Work at Kijitonyama Social Work Institute, Dar es Salaam from 1996 up to 1999 and the first respondent was paying for her fees. She said the money for purchasing the house was paid by instalment and finished in 1999 when she finished her Diploma course. She also said that, after finding the respondents in the bedroom she called her in laws who tried to reconcile them and the first respondent promised to change.

She said further that, when the house was bought she had no job but she was looking after the house and said she contributed in the house in 1999. When cross examined by Mr. Mutakyamirwa she said that, when she was taking her Diploma Course she used to stay at home and during examination she used to stay at the Institute. She said that, she want the house to be sold and the proceeds be distributed among herself and the first respondent. She said that, as their children are above 18 years old they can decide to whom they can stay with. She stated further that, she stopped having sexual relationship with the first respondent from 2007. She also said the first respondent had another child with another woman before entering into their marriage.

On his side the first respondent testified as DW1 and told the court that, the petitioner is his wife and they married each other on 30th day of September, 1989 at Tukuyu Mbeya and they have two issues

of marriage namely Karl Mpoki born in 1994 and Irene Kiba born in 1990. He said that, when he married the petitioner he was working at Kilombero Sugar Company as an Engineer. He said to have worked in the said company from 1986 up to 1992 when he joined AMI and thereafter he was employed by UDA up 1997. He said to have done business and in the year 2000 he was working with Japanese Embassy. He said that, when he married the petitioner, the petitioner was not in employment. He said after marrying her he took her to Dar es Salaam School of Accountant where she studied ATEC1 and procurement courses. He said that, in 1996 the petitioner went for the course of Advanced Diploma in Social Worker which she completed in 1999.

He said that, in 1996 they purchased a house at Kunduchi from one Ally Swalehe at the price of twenty million shillings and the agreement for purchasing the said house was admitted in the case as an exhibit D1. He said that, the house the plot where the house situates was surveyed in 1998 and 1999 and said when he bought the house the petitioner did not contribute even a single cent or did nothing to acquisition of the house as she had no income. He stated further that, the problem of misunderstanding in their marriage started long time even before entering into their marriage.

He said the course of their misunderstanding is that, they had different vision and perspective. He said to have told the petitioner to go to contract their marriage at UK but she refused. He also said that, the petitioner started being unfaithful to their marriage as she started having love affairs with her boss Mr. Barabora and when he asked

her as to why she did so she refused and said their relationship was normal. He said between 2006 and 2007 he left matrimonial home and went to stay with the second respondent. He said to have returned to their matrimonial home on March, 2015. He said that, though he has returned home but he don't wish to continue to have marriage with the petitioner.

He said he was taking care of the education of his children and he took the first born child to Malaysia for her degree. He tendered to the court various CRDB Bank paying slips which were admitted in the case as an exhibit D2 and D3 together with Air Ticket for Irene to go to Malaysia which was admitted in the case as an exhibit D4. He said that, apart from education expenses he was also paying for all the items for daily use for his children. He said that, it is true that he Mortgage the house. He said after telling the Petitioner she consented but she refused to sign the relevant document and he gave the same to second respondent who signed the same and said the loan has already been discharged.

He said further that, there was a time the petitioner took two million shillings from Calvin Chiwango who is the young brother of the petitioner and sent to their daughter Irene while at Malaysia and said he refunded the same. He said for the time being and from January, 2017 the petitioner has departed from their matrimonial home and is living at Kimara and himself is living in their house at Kunduchi Beach. He said that, sometimes their son lives with his mother and sometimes lives with him at Kunduchi Beach. He said the petitioner is living with another man called Peter Mutungi. He

also said that, their children used to live in their matrimonial home and if it will be sold they will be having nowhere to stay.

He said he has been taking care of his son and added that, he don't know the claim of Tshs. 500,000/= prayed by the petitioner is for what. He prayed the court to grant the prayer of divorce but the family house to remain as it is because the petitioner has other two houses and she contributed nothing in the house. He prayed the court to order the petitioner to bear the costs of the suit as she was not faithful in their marriage and he educated her.

When DW1 was cross examined by the learned counsel for the petitioner he said he entered into the marriage with the petitioner though were not compatible on believes that, she would have changed but she didn't change. He said he took the petitioner to school so that she can change but she didn't change. He denied to have deserted the petitioner and said they agreed each other to separate. He conceded he has the child with the second respondent whose age is twenty years and said he started knowing the second respondent before entering into marriage with the petitioner. He told the court that, when he married the petitioner, the petitioner was a voluntary nurse but after coming to Dar es Salaam she became a house wife.

He said they started living in their house at Kunduchi between 1999 and 2000. He also said their marriage has not been broken down by the child born out of their marriage. He told the court that, they didn't take their marriage problem to the church as he didn't want to break his marriage. He said their house is a family house

by the counsel for the petitioner he said that, they had no contract that all the money sent to Irene should pass through him.

Lindika Omari Lindika testified as DW3 and told the court is a carpenter. He told the court that, in 1997 he was employed by the first respondent to fit kitchen cupboards and windows in his house at Kunduchi Beach. He said by that time the first respondent was living with his wife and children and sometimes the children of the first respondent who one of them was about eleven years used to tell him their mother had gone to school. He said the first respondent is the one gave him the work and he was the one who was paying him. He said he has never being given any work by the petitioner.

The second respondent testified as DW4 and told the court that, she started knowing the first respondent in 1980s when she was a student at Korogwe Girls High School and the first respondent was a student at the University of Dar es Salaam. She said that, when she was in the University of Dar es Salaam she lost contact with the first respondent and after completing her degree course she was married in 1991. She said to have proceeded with her marriage life up to November, 1993 when her husband died. She said in 1994 she met with the first respondent who requested her to proceed with their relationship but she didn't accept. DW4 said that, after the first respondent told her he was not in good terms with the petitioner they started their love affairs in 1996. She said on September, 1997 were blessed to have a baby boy and in 2002 they contracted a Civil Marriage.

She said that, after entering into marriage with the first respondent they proceeded with their life and the first respondent used to tell her about his issues of life. She said in 1996 the first respondent involved her in his intention of purchasing a house at Kunduchi and said she contributed Tshs. 1,000,000/= which the first respondent paid to the seller of the house one Ally Salehe. DW4 said that, when the first respondent stopped continuing with his employment she used to give him money for maintaining his family and he was using her motor vehicles. She said she was also taking care of the children of the first respondent born by other women and she has educated some of them including the children on the petitioner.

She said she has failed to understand how she caused pain to the petitioner who is claiming from her the compensation of Tshs. 80,000,000/=. She said she don't know how she induced the first respondent to start relationship with her and she has failed to understand why the petitioner kept quiet for all that period from 1996 up to 2012 while she knew she was in relationship with the first respondent. She said that, may be the petitioner want to spoil her image or she has been cheated she will get money from her as she is alleging she has committed adultery with her husband. She said is also surprising why the petitioner has not joined other women who have been in love affairs with the first respondent and prayed the court to dismiss the petition.

When she was cross examined by the counsel for the petitioner she said that, the name of her former late husband was Leonard

(1) Whether the marriage between the petitioner and the first respondent has broken down irreparably.

(2) Whether there was an illicit relationship between the respondents.

(3) If the second issue is answered in the affirmative whether the petitioner entitled to any damages.

(4) To what reliefs are the parties entitled to.

Starting with the first issue which is asking whether the marriage between the petitioner and the first respondent has broken down irreparably the court has found that, as indicated in the marriage certificate of the petitioner and the first respondent which was admitted in this case as an exhibit P1 these parties contracted Christian Marriage which was celebrated at Mbeya on 30th day of September, 1989.

In order to be able to determine if the marriage between the petitioner and the first respondent has broken down irreparably the court has found as rightly submitted by the counsel for the petitioner the factors which are supposed to be considered are provided under section 107 of the Law of Marriage Act, Cap 29 R.E 2002. The court has found that, a close evaluation of the evidence from both sides shows the factors mentioned in section 107 (2) and specifically its paragraphs (a), (c), (e) and (f) have been established in the evidence of the petitioner and were not disputed by the respondents.

The court has arrived to the above finding after seeing that, the issue of the first respondent to engage into love affairs with the

second respondent which resulted into being blessed with one issue namely Brian Spendi while his Christian Marriage with the petitioner was still in existence is not in dispute. The court has also found that, the petitioner and the first respondent stated in their testimony that, they separated each other whereby each of them slept in his or her own room. The petitioner stated further that, from 2007 they have not conjugated their marriage and the first respondent deserted the petitioner and went to live with the second respondent. That being the undisputed evidence of the petitioner and the first respondent the court has found as provided under section 107 (2) (e) and (f) of the Law of Marriage Act those are sufficient grounds to establish a marriage has broken down irreparably.

After finding the above stated factors are clearly established in the evidence of the petitioner and the first respondent and after seeing the Marriage Reconciliation Board failed to reconcile them and each of them is beseeching the court to grant a decree of divorce which means they are not ready to continue to live together as husband and wife the court has found without much ado that, the marriage between the petitioner and the first respondent has broken down irreparably hence the first issue is supposed to be answered in affirmative.

Coming to the second issue which is asking whether there was an illicit relationship between the respondents the court has found that, as stated by the petitioner in her evidence and admitted by the first respondent in his testimony and also corroborated by the marriage certificate admitted in this case as an exhibit P1, the petitioner and

the first respondent were in Christian Marriage which is a monogamous marriage they contracted in 1989. They continued with their marriage life up to 1996 when the respondents started having love affairs which in 1997 resulted into being blessed with a male issue called Bryan Spendi. The respondents continued with their relationship up to 2002 when they decided to contract Civil Marriage while the Christian Marriage between the petitioner and the first respondent was still subsisting.

The second respondent stated in her testimony and supported by what is stated in the submission of the learned counsel for the first respondent that, when the respondents started their relationship she was not aware of the subsistence of the marriage between the petitioner and the first respondent until when she was served with the petition of this matter. It is stated in the submission of the second petitioner that, the respondents continued with their relationship up to 2002 when they contracted their Civil Marriage and said in their society polygamous marriages are allowed. To support her argument she referred the court to the case of **Salome Herman V. Mohamed Iddi Mtandika**, HC PC Civil Appeal No. 24 of 2003 (Unreported).

After going through the evidence from both sides and the rival final submissions of the counsel for the parties in relation to the second issue the court has found proper to adopt the meaning of the term "illicit relationship" used in the second issue as given in the **Mitra's legal & Commercial Dictionary,** Fifth Edition by A. N. Saha cited in the submission of the second respondent. The said term is defined as sexual intercourse between persons not united by marriage or by

union or tie which though not amounting to marriage but they are recognized by the society or community they belong as constituting quasi marital relationship. In the light of the above meaning of the term "illicit relationship" it is the finding of this court that, as the respondents started their love relationship in 1996 and in 1997 were blessed with a child while were not united by marriage or any other union which would have gave them status of being recognized were in any form of marriage their relationship fall under the meaning given in the above referred dictionary.

The argument that, the second respondent was not aware that the petitioner and the first respondent were in Christian Marriage which is monogamous marriage has been found by this court that, as rightly argued by the learned counsel for the petitioner it is difficult for this court to believe that argument after seeing the second respondent stated in her testimony that, she resumed their relationship with the first respondent in 1994 and she came to know the petitioner in 1995. She also said that, after being told by the first respondent that he was not in good terms with the petitioner they started their love relationship in 1996.

To the view of this court and as rightly argued by the learned counsel for the petitioner the court has failed to believe what the second respondent who is a lawyer and know the consequences of entering into love affairs and marriage of whatever type with a man who is in marriage relationship with another woman would have entered into love relationship with the first respondent without asking him and be satisfied the relationship is entering is proper and

will not be illicit relationship. The court has also failed to believe the evidence and argument of the second respondent that she was not aware of the marriage of the petitioner and the first respondent after seeing the petitioner said in her testimony and without being disputed that, the petitioner knew the second respondent from 1992 or 1993 as she was introduced to her by the first respondent as the girl friend of his young brother and said the respondent was their family friend and she used to visit their home. Under that circumstances it cannot be said the second respondent would have entered into their relationship without asking the status of the relationship between the petitioner and the first respondent.

Her further argument that they entered into customary marriage before entering into Civil Marriage and when they were entering into the Civil Marriage in 2002 they announced the same and there was no objection raised by the petitioner or anybody else has been found by this court cannot be a ground for purifying their illicit relationship because the first respondent knew he was in Christian Marriage with the petitioner which was monogamous marriage and he was not allowed to enter into any other marriage while their marriage was still subsisting.

The court has come to the above finding after seeing the position of the law in relation to a person entering into love affairs or marriage with a person who is in Christian Marriage with another person was held in the case of **Kristina d/o Hamisi V. Omari Ntalala & another** [1963] 1 EA 463 to be invalid. Spry, J (as he then was) stated in the said case that:-

"The respondent, having contracted a Christian Marriage was incapable, while that marriage subsist, of marrying any other person."

The court has gone through the case of **Salome Herman Chitumbi V. Mohamed Iddi Mtandika** (Supra) used by the second respondent to support her argument that their relationship is not illicit and find that, the facts of the said case are somehow different from the facts of the case at hand because in that case the parties had separated with their spouses for long time before entering into their relationship that is way it was stated in the said case that, their former marriage were like empty shell. In the case at hand when the respondents were entering into their relationship the petitioner and the first respondent had not separated and their marriage was still subsisting. It is in the light of the above stated reasons the court has found it cannot be said the relationship and subsequent marriage between the respondents is not illicit. In the premises the court has found the second issue is supposed to be answered in affirmative.

The second respondent raised another argument that, the claims directed against her by the petitioner is out of time because the petitioner kept quiet for sixteen years from when she started her relationship with the first respondent. She argued that, as the claim of the petitioner falls into the category of tortious claim the same was supposed to be filed in court within three years. The court has found the claim of the petitioner against the second respondent is general damages of Tshs. 80,000,000/= for hurting the petitioner's feelings which inflicted pain and suffering to the petitioner. This point was

not refuted by the petitioner in her testimony she adduced before the court and her learned counsel did not state anything in relation to this point in her final submission.

Although the said point was not framed as one of the issues to be determined in this matter but as is a point of law and as it was raised in paragraph four of the second respondent's answer to the petition and argued by the second respondent in her evidence the court has found it cannot be said the petitioner and her learned counsel were not aware of that point. That being the position the court has found is duty bound to determine the same. The court has found as rightly argued by the learned counsel for the second respondent adultery which the petitioner call it in paragraph six and seven of the plaint as an illicit relationship being a tortious action its limitation of time to be filed in court is provided for under paragraph 6 of part one of the first schedule to the Law of Limitation Act, Cap 89 R.E 2002 which requires the suit of that nature to be instituted in court within three years from the date of arising of the cause of action.

The evidence adduced in the instant case by both sides shows the respondents started their relationship in 1996 and in 1997 were blessed to have one male issue and in 2002 the respondents contracted their Civil Marriage. If you count from 1996 up to 2012 when the instant matter was filed in this court you will find as rightly stated by the counsel for the second respondent about sixteen years had passed and if you count from 2002 when they contracted their Civil Marriage up to 2012 you will find about ten years had passed.

If you also count from 2007 when the petitioner said the first respondent deserted her and went to live with the second respondent you will find about five years had passed up to when the matter was filed in this court.

Since the period of time upon which the petitioner was supposed to file the matter in court for claim of damages arising from the illicit relationship or adultery alleged to have been committed by the second respondent is three years it is the finding of this court that, if you count from any of the above stated events as a date of accruing of the cause of action of the petitioner's claim against the second respondent you will find the period of three years provided in the above provision of the law had already elapsed. It is from the above reason the court is agreeing with what is stated in the final submission of the learned counsel for the second respondent that, there is no way it can be said the claim of general damages arising from tort of adultery lodged in this court by the petitioner against the second respondent was properly filed in this court as it was filed in court after expiration of the period of time prescribed by the law.

Coming to the third issue which is asking whether the petitioner is entitled to any damages the court has found that, despite the fact that the court has found the second issue is answered in affirmative that there was an illicit relationship between the respondents but the court has found the petitioner is not entitled to the general damages claimed against the second respondent which is based on the stated illicit relationship as the claim was filed in court after expiration of the period of three years provided by the law and without seeking for

extension of time to lodge the same in court out of time. The remedy for the said claim which was filed in court out of time as provided under section 3 (1) of the Law of Limitation Act is a dismissal of the claim.

As for the fourth issue which relates to the reliefs the parties are entitled the court has found as there is no dispute to the prayer for grant of divorce to the petitioner and the first respondent it is proper to go to the prayer of division of the matrimonial house on plot No. 256 in Kunduchi Dar es salaam to the said parties. The court has found that, while the petitioner is praying the house to be valued and the proceeds of the sale to be divided equally between her and the first respondent, the respondents are disputing grant of the said prayer on the ground that, the petitioner did not contribute anything to its acquisition.

The court has found as rightly submitted by the learned counsel for the petitioner the issue of distribution of matrimonial properties after grant of decree of divorce and the factors to be taken into consideration when exercising the said powers are provided under section 114 (1) and (2) of the Law of Marriage Act which states as follows:-

> *"(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."*

(2) In exercising the power conferred by subsection (1), the court shall have regard–

(a) to the customs of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(c) to any debts owing by either party which were contracted for their joint benefit; and

(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division."

Upon reading the above provision of the law the court has found it has power under that provision of the law to order the matrimonial property to be divided or sold and the proceeds obtained thereof to be divided to the parties. That being the position of the law the court has carefully considered the testimony of the parties and after going through the final submission filed in this court by the learned counsel for the parties it has found that, despite the fact that the respondents disputed the said prayer of the petitioner to be granted on the ground that the petitioner did not contribute anything towards acquisition of the house is seeking to be divided but as provided under section 114 (2) (b) of the Law of Marriage Act the contribution which the court is supposed to consider here is which was made by each party in terms of money, property or works done towards acquiring of the said house.

(2) In exercising the power conferred by subsection (1), the court shall have regard–

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The court has found that, although the evidence adduced before this court and specifically exhibit D1 shows the house was purchased around 1996 and by that time the petitioner was a house wife cum a student of Social Welfare Collage at Dar es Salaam but it cannot be said she didn't contribute anything towards acquisition of the said house. The court has found that, the evidence adduced before the court shows the petitioner and the first respondent married each in 1989 and from that year they were living together as husband and wife up to when the said house was purchased. To the view of this court though the petitioner was a house wife from when they came to Dar es Salaam up to when the house was purchased and as she was unemployed she didn't contribute cash money to the purchase of the said house but as a house wife she was taking care of the family and give room to the first petitioner to go to his employment where he earned the money he used to purchase the said house.

In addition to that, the petitioner said in her evidence when she was re-examined by her learned counsel that, she purchased the doors, windows and paint the house. To the views of this court and as provided under section 114 (2) (b) of the Law of Limitation Act, that is a contribution which entitled her to a share of the energy she exerted in the acquisition and finishing construction of the house. The issue of recognition of not only the work done like the one stated to have been done by the petitioner but also domestic work of taking care of the family was considered by the Court of Appeal of Tanzania in the case of **Bi Hawa Mohamed V. Ally Seif**, [1983] TLR 32 cited

by the counsel for petitioner to support her submission and the court stated that:-

(i) *"Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets;*

(ii) *(ii) the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts' or "work" of husband and wife."*

In the light of the above decision of the Court of Appeal of Tanzania it is the finding of this court that, even if it will be said the appellant did not contribute cash money in acquiring the house sought to be divided but she contributed through doing domestic works and supervising finishing construction of the house. On that basis she deserve to get share of her contribution to the acquisition and finishing the construction of the house. The argument by the first respondent that the petitioner was not faithful and she engaged in love affairs with her boss one Barabona, even if it would have been found to be true it cannot be used as a criterion for denying her to get the share of her contribution to the house because as stated in the case of **Omari Chikamba V. Fatuma Mohamed Malunga** [1989] TLR 39, loose and immoral character of a woman does not forfeit her share, in the division of matrimonial property.

Having find the petitioner is entitled to a share from the matrimonial house the court has found the next issue to consider is whether the division of the said house between the petitioner and the first respondent should be equal. The court has gone through section 114 (2) (d) of the Law of Marriage Act which states in dividing the matrimonial properties the court shall incline towards equality of division and read the cases of **Miller V. Miller** [2006] UKHL 24 Family Division, **Paulo Laurence V. Chausiku Halfani**, Misc Civil Appeal No. 2 of 2002, HC at DSM (Unreported), **Eliester Philemon Lipangahela V. Daudi Makuhana**, Civil Appeal No. 139 of 2002 HC at DSM (Unreported) cited in the submission of the learned counsel for the petitioner.

The court has found that, although some of the above cases insisted on equal division of the matrimonial assets but to the view of this case the said provision of the law and cases cited does not state division of matrimonial assets in all matters where a decree of divorce has been granted must be equal. To the view of this court the equality referred in the said provision of the law does not mean division of matrimonial assets in all matter must be in fifty percent but it depends on what one has contributed in acquisition of the asset to be divided. The above view of this court is supported by what is provided under section 114 (2) (a) and (d) of the Law of Limitation Act which requires the court to consider the custom of the community to which the parties belong and the need of infant children if any.

Since the petitioner has not disputed the money for purchasing the house was issued by the first respondent and as stated by DW3 expenses of fitting the kitchen cupboards and windows were issued by the first respondent and the contribution of the petitioner to the house is by doing house work, taking care of the family and purchasing some of the doors and windows fitted in the house it is the view of this court that, under that circumstances it cannot be said the division of the house must be equal. The court has arrived to the said finding after seeing the first respondent stated in his evidence that, it is not only that he purchased the house by using own money but he also educated the petitioner up to the level of decree by using his own money. The petitioner is now employed and she has managed to build her own two houses and that evidence was not disputed by the petitioner.

Again the court has found the first respondent said in his evidence that, the said matrimonial house which is now being used by himself, sometimes their issues of marriage and other members of his family and find instead of ordering the house to be sold and its proceeds to be divided to them as prayed by the petitioner it is proper to order the first respondent to pay the petitioner an estimated part of the value of the house as the share of what she contributed in the acquisition and finishing construction of the house.

With regards to the claim of arrears of maintenance for the upkeep of the family at the rate of Tshs. 500,000/= per month from the year 2007 up to the date of judgment the court has found that, although the first respondent did not dispute to have departed from

his matrimonial home in the mentioned year and went to live with the second respondent but the petitioner did not adduce any evidence to establish she was spending the claimed sum of money to maintain the family. The court has also found the petitioner did not tell the court what was the income of the first respondent in the period is praying to be paid maintenance for upkeep of the family.

The court has also found the education expenses claimed by the petitioner is not supported by any evidence like a receipt issued for the claimed education expenses. The court has also find while the petitioner is saying the first respondent paid the fees for their child Irene in only one year but the first respondent produced to the court various documents and others were tendered by DW2 and admitted in this case as exhibit D1, D2 and D3 which shows he was sending money to the child in 2009 up to 2013. In the premises the court has found even if it can be said the petitioner is entitled to be reimbursed the costs of maintaining the family and education expenses she used to pay to the children while in school and the first respondent had a duty under section 129 (1) of the Law of Marriage Act to maintain his children but not to the above claimed rate.

Having said all what is stated hereinabove the court has found the petitioner has partly managed to prove her claims against the first respondent hence the judgment and decree is hereby entered in her favor and granted the following reliefs:-

(1) The marriage between the petitioner and the first respondent is hereby dissolved as prayed.

(2) The first respondent is ordered to pay the petitioner the sum of Tshs. 30,000,000/= as her contribution to the acquiring of the matrimonial house.

(3) The first respondent to pay the petitioner the sum of Tshs. 20,000,000/= as payment of arrears of maintenance and reimbursement of education expenses for the children.

(4) The petitioner is granted costs of this petition and the same to be borne by the first respondent.

Dated at Dar es Salaam this 20th day of April, 2018

I. ARUFANI
JUDGE
20/04/2018