IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 14 OF 2022
(Originating from the Resident Magistrates' Court of Arusha, Matrimonial Cause No. 8 of 2021)

GODSAVIOUR CHRISTOPHER URIOH ..... APPELLANT

Versus

AGNESS CHARLES KITOMARY ..... RESPONDENT

JUDGMENT

5th October & 13th December 2022

Masara, J.

The Appellant herein preferred this Appeal challenging the decision of the Resident Magistrates' Court of Arusha (henceforth "the trial court") delivered in favour of the Respondent on 11/11/2021. In the trial court, the Appellant petitioned for divorce vide Matrimonial Cause No. 8 of 2021. He also sought other declaratory orders such as: distribution of matrimonial properties which he prayed to be placed on their two children, custody of the two children, costs of the case and any other reliefs that the court deemed fit to grant. The trial court dismissed the petition holding that there was no evidence that the marriage had broken down irreparably.

Briefly, from the evidence at the trial, the Appellant and Respondent contracted a Christian marriage at the Free Pentecostal Church of

Tanzania on 06/12/2014. They had a happy marriage initially. They were blessed with two issues of marriage: Evelyne Godsaviour Urioh born on 12/10/2015 and Ethan Godsaviour Urioh born on 09/07/2018. They bought two plots at Imasenyi, Arusha and built a three rooms house thereon.

After their marriage ceremony, the two moved to Dar es Salaam where the Appellant works for gain as an Assistant lecturer at the University of Dar es Salaam. Things turned sour in 2015. The Appellant complained that the Respondent had extra marital affairs with her ex-boyfriend who he named as Eugene. When things worsened, the Respondent left the matrimonial home in Dar es Salaam and moved to their house at Imbasenyi, Arusha, where she lives with the children to date.

It was the Appellant's further testimony that he faced serious physical and mental cruelty from the Respondent. He accounted that the Respondent once stabbed him with a knife and that at some point she attempted to tear up his transport passport; further that he was frequently assaulted and insulted by the Respondent. The Applicant added that he has been paying school fees for the children and that he pays TZS 400,000/= monthly for the upkeep of the children despite his meagre salary take home of TZS 800,000/=.

On her part, the Respondent blamed the Appellant for having extra marital affairs with his students and other women. She named Witness as the woman sharing her husband. According to the Respondent, the Appellant and Witness attempted to contract another marriage in Tanga in March 2021. Having heard about the marriage notice, the Respondent went to Tanga and objected celebration of that illegal marriage. She added that she returned to Arusha in 2018 after they had agreed with the Appellant and it was the Appellant who drove her to Arusha due to endless misunderstandings. She denied to have inflicted any kind of torture on the Appellant, stating that the Appellant's motive is to contract another marriage, that is why he is pressing for divorce.

On the basis of the evidence adduced, the trial magistrate made a finding that what faced the spouses' marriage is just normal wear and tear in a marriage. In her view, the evidence adduced did not sufficiently prove that the marriage between the parties has broken down irreparably. She declined to order the decree of divorce and dismissed the petition. That decision did not please the Appellant, hence this appeal. The appeal is premised on three grounds as hereunder:

a) *That, the trial Magistrate of the Resident Magistrates' Court erred both in law and fact by not issuing a decree of divorce on a marriage which was proved to be broken down beyond repair;*

b) *That, the trial Magistrate of the Resident Magistrates' Court erred both in law and fact by deciding against what was not pleaded by the parties; and*

c) *That, the trial Magistrate of the Resident Magistrates' Court failed to analyse evidence on record properly and ended up in delivering erroneous decision.*

Basing on the above grounds of appeal, the Appellant urged the Court to quash and set aside the decision of the trial court, issue the decree of divorce and order costs of the appeal to be borne by the Respondent

From the day the appeal was filed, the Respondent never entered appearance, despite being dully served. In addition to summons to appear, the Respondent was also served with the Appellant's written submission but she did not bother to file a reply submission. Basing on the above, since the Respondent for reasons undisclosed failed to file a reply submission, it is as good as she failed to enter appearance in Court on the day the case is fixed for hearing. There is a plethora of authorities to that effect, one of them being the Court of Appeal decision in **NIC of (T) Ltd & Another vs Shengena Limited, Civil Application No. 20 of 2007** (unreported), where the Court made the following observation:

"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because ***failure to lodge written submissions***

after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case." (Emphasis added)

That is the position of the law. Nevertheless, despite the appeal being uncontested, I find it appropriate to determine whether it has merits or not. A similar stance was taken by the Court of Appeal in the case of **John Dongo and 3 Others vs Lepasi Mbokoso, Civil Application No. 14/01 of 2018** (unreported).

In this Appeal the Appellant was represented by Mr Sabato Ngogo and Mr Erick Akaro, learned advocates. As hinted out earlier on, the appeal was disposed of through filing written submissions.

Submitting in support of the first ground of appeal, Advocates for the Appellant contended that according to section 107(2) of the Law of Marriage Act, Cap. 29 [R.E 2019] (henceforth "the LMA"), grounds upon which Court can rely on to justify that a marriage has broken down irreparably, include, but not limited to the following: adultery or when adulterous association is continued despite protest, cruelty whether mental or physical inflicted by the Respondent on the petitioner and desertion of the Petitioner by the Respondent for at least three years. The Advocates amplified that the above elements are manifest in the appeal under consideration. In the first place, the Appellant pleaded and testified

on the adulterous association between the Respondent and Eugene who the Respondent admitted that they had love affairs before contracting marriage with the Appellant. The Appellant also pleaded cruelty on the part of the Respondent stating that she even stabbed him with a knife. In the petition for divorce and in his evidence, the Appellant also testified that the Respondent deserted him since 2017 as soon as she moved to Arusha and she does not intend to go back to Dar es Salaam.

It was their further submission that considering the pleadings, evidence and conduct of the parties, Parties herein are no longer in marital love, hence the only remedy is the issuance of the decree of divorce, which the trial court should have issued, but reneged. They also asserted that the spouses cannot be forced to live together, thus it is appropriate to grant the wishes of the parties. To support this contention, Counsel referred to the case of **Ahmad Said Kidevu vs Sharifa Shamte [1989] TLR 148.**

Elaborating the second ground of appeal, learned Advocates accounted that the trial magistrate disregarded the pleadings of the parties in deciding the dispute. They contended that in the Respondent's reply to petition, particularly on the reliefs, she prayed for dissolution of the marriage. According to the duo, the trial magistrate's finding was in violation of the long-time cherished principle that parties are bound by

their pleadings. To bring their argument home, they placed reliance on two Court of Appeal decisions: **Abbas Ally Athuman Bantulaki and Another vs Kelvin Mahity, Civil Appeal No. 385 of 2019**, and **Yara Tanzania Limited vs Charles Alloyce Msemwa t/a Msemwa Junior Agrovet & 2 Others, Commercial Case No. 5 of 2013** (both unreported).

It was their further submission that in the answer to petition the Respondent also prayed for an order for dissolution of the marriage, which ought to have been awarded by the trial court. That, in their view, was sufficient evidence that the marriage had broken down irreparably. They also relied on the decision in **Joseph Warioba Butiku vs Perucy Muganda Butiku [1987] TLR 1**, which had similar facts, and the decree of divorce was issued.

Regarding the third ground of appeal, the learned advocates contended that the trial court failed to analyse the evidence adduced at trial. That, in their evidence, both parties pleaded cruelty against each other, they also pleaded adultery against each other and they conceded that they were in separation for more than three years. Such evidence, in their view, warranted the issuance of the decree of divorce and division of matrimonial assets as well as custody of the two issues of marriage, which

the Appellant supported to be vested on the Respondent. Learned advocates for the Appellant prayed that the Court allows the appeal in its entirety.

Having considered the trial court record, the grounds of appeal and the submission by the learned advocates for the Appellant, two issues for determination are apparent. ***First***, whether the marriage between the parties herein has broken down irreparably; ***second***, if the answer to the first issue is in the affirmative, to what reliefs are the parties entitled to.

At the outset, I should state that this being the first appellate court, it is entitled to re-evaluate the evidence and come up with its own findings. In addition to the case cited to me by the Appellant's counsel, I am also inspired by the decision in **Makubi Dogani vs Ngodongo Maganga, Civil Appeal No. 78 of 2019** (unreported), where it was held:

> *"We wish to note that this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision."*

As I was urged by the Appellant's advocate, and based on the above principle, I will subject the entire evidence to a re-evaluation.

In his petition for divorce, the Appellant, under paragraph 4 thereof, stated that their dispute arose after noting that the Respondent was in an

extra-marital affair with his ex-boyfriend, Eugene. According to paragraph 7 of the petition, the Respondent left the matrimonial home in Dar es Salaam in 2017, where they were living, to Arusha. In the same petition the Appellant alleged that he was exposed to cruelty both physical and mental, inflicted on him by the Respondent, as stated under paragraph 13 of the petition. He further alleged that the Respondent deserted him for four years from 2017.

Despite that nothing was tendered in evidence to prove the allegations by the Appellant, in her answer to the petition the Respondent also seem to have admitted some of the contended facts. That made their continued relationship difficult. It is evident that in her answer to the petition, the Respondent denied the allegations, stating that it is the Respondent who engaged himself in extra marital affairs with his students and other women. She added that the Appellant attempted to contract another marriage in Tanga but she managed to stop it by making a formal objection. Further, in the reliefs, the Respondent also prayed for dissolution of the marriage and grant of the decree of divorce as reflected at paragraph 23(i) of her answer to the petition. In her evidence, the Respondent disputed the application but prayed to be granted custody of the children.

From the above set of facts, it is undisputed that both parties herein are no longer in harmony and are not living together. From their pleadings, both are at one that the marriage be dissolved and decree of divorce issue. Although the Respondent seems to dispute the issuance of divorce decree in her evidence, she admitted that she lives in Arusha while the Appellant lives in Dar es Salaam. She also admitted that she moved from Dar es Salaam in 2018 when they had some misunderstandings. The Appellant complained that he was denied conjugal rights from 2017 when the Respondent left for Arusha. Although the Respondent disputed this assertion, she did not explain the last time she met the Appellant, least of all shared a bed. This, in my view, is a clear proof that parties herein were in separation from 2017 when the Respondent left to Arusha.

There is another allegation by the Respondent that in March 2021, the Appellant planned to contract another marriage in Tanga with a woman known as Witness. This evidence, though denied by the Appellant, saves to augment the contention that parties herein are no longer interested to have their marriage sustained. As correctly pointed out by counsel for the Appellant, each party herein is alleging adultery against the other. It is also on record that the dispute between them was referred to their church leaders for reconciliation, which efforts proved futile. I, therefore, agree,

albeit reluctantly, with the Appellant's contention that courts should not be seen to compel unwilling spouses to live together when love between them, like in this case, appear to have faded or expired.

In my view, circumstances obtaining in this appeal warrants issuance of the decree of divorce. It is undisputed that the Respondent deserted the Appellant from 2017 when she moved from Dar es Salaam to Arusha. Also, there are allegations of continued adultery by both parties. There is also a claim by the Respondent that she agreed with the Appellant that she stays in Arusha and she was driven by the Appellant to Arusha. That assertion, if true, amounts to a voluntary separation which is one of the factors to consider when determining whether a marriage has broken down beyond repair in terms of section 107(2) of the LMA. The cumulation of all those grounds leads to an impeccable conclusion that the marriage between the parties herein has broken down irreparably.

I should also add that, in addition to the factors apparent from the evidence, as alluded to earlier on, the Respondent, in her answer to the petition filed by the Appellant also prayed that the marriage between them be dissolved as prayed by the Appellant. Paragraph 23(i) of her answer read as follows:

> *"An order for dissolution of marriage and grant of the decree of divorce by this Honourable court."*

This prayer was not repeated by the Respondent in her testimony. She appeared to have a change of heart. In her evidence, the Respondent contested the petition stating that the decree of divorce should not issue. This was done without the Respondent craving to amend her Response to the Petition. Our jurisprudence on this matter is to restrain parties from departing from what they plead before court. In the case of **James Funke Gwagilo vs Attorney General [2004] TLR 161** for example, the Court of Appeal held:

> *"From that same decision we reiterated another equally important principle of law that* ***parties are bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded."*** (Emphasis added)

Inspired by the above position, since the Respondent had conceded on the dissolution of their marriage in the pleading, it was not open to her to deny the same in her evidence. What can be gathered from the pleadings is that parties herein had agreed that their marriage has broken down irreparably and that they should ask the court to bless their resolve to live separately. This position was reaffirmed by this Court in the cited case of

Joseph Warioba Butiku vs Perucy Muganda Butiku (supra), where it was held:

> *"In this matrimonial suit, both parties have by their counsel agreed on more than sufficient issues of fact and of law raised in their pleadings. The Petitioner in his petition, and the Respondent in her answer, establish that the marriage has irreparably broken down, as both assert it has, and each spouse is praying for a divorce. Consequently, I have no slightest hesitation in formally finding that the marriage has in fact and in law broken down. Accordingly, it is hereby ordered that a decree absolute dissolving the marriage is to issue."*

The facts in the above case are similar to those obtaining in this appeal. Since both the Appellant and Respondent agreed in their pleadings that the marriage has broken down irreparably and prayed for its dissolution, I have no option but hold that the marriage between them has indeed broken down irreparably. In a similar vein, I order a decree of divorce to issue. This resolves the first issue in the affirmative.

I now revert to the second issue which pertains to the rights of the parties. Both the Appellant and Respondent in their pleadings and in the evidence, admitted that the house and plot at Imbasenyi be given to their children Evelyne Godsaviour and Ethan Godsaviour. Since both parties have made a voluntary agreement in respect of the properties jointly acquired during

subsistence of their marriage, I have no reason to interfere with their own wishes. Thus, the matrimonial house and plot located at Imbasenyi-Maji ya Chai Arusha, be allocated to Evelyne Godsaviour Urioh and Ethan Godsaviour Urioh. Since the Respondent has been living with the said children, the said properties are entrusted in the Respondent for the benefit of the children. Upon attaining the age of 18 years, the said properties shall be transferred to the two children. Both parents shall participate in safeguarding the properties allocated to the children and ultimately ensure that title of the properties pass to them at the age of majority.

Regarding custody of the two issues of marriage, it is clear that both the Appellant and Respondent are at one that custody be vested on the Respondent, since they have been under her custody since birth. The record shows that the Appellant filed application applying for custody of the children in the trial court vide Misc. Civil Application No. 34 of 2020. In its ruling delivered on 19/11/2020, the trial court granted custody of the two children to the Appellant. In his evidence, the Appellant accounted that although he was granted custody, the Respondent declined to hand over the children to him.

As things stand, the order of the trial court granting custody to the Appellant still subsists. It has neither been varied nor reversed by a superior court. Since the Appellant persistently insisted that the children be left with the Respondent, the best available remedy open to him is to go back to the trial court and ask the said court to vary its order dated 19/11/2020. Otherwise, the order of the trial court vesting custody to the Appellant remains unaltered. Notably, this is not a Juvenile Court. Custody of the said children was conclusively determined by a competent court, which decision I cannot vary. That order remains unchanged until revoked or vacated as per section 37(3) of the Law of the Child Act, Cap. 29 [R.E 2019], which provides that *"the court may, at any time, revoke the grant of custody to one person and grant the custody to another, approved residential home or an institution, as it may deem necessary."*

Guided by the above analysis and authorities, the appeal has merit. It is allowed as explained above. The decision of the trial court is hereby quashed and set aside. In lieu thereof, I make the following orders:

a) **The decree of divorce to issue to the parties as the marriage between the Appellant and the Respondent has broken down irreparably;**

b) The Matrimonial properties acquired during subsistence of the marriage which are a plot and a house located at Imbasenyi, Arusha are hereby granted to the children of marriage: Evelyne Godsaviour Urioh and Ethan Godsaviour Urioh. The Respondent is entrusted the said properties for safe custody. The same to be passed over to the said children upon attaining the age of majority;

c) Custody of the two children is as per the order of the Juvenile Court dated 19/11/2020; and

d) Each party shall bear their own costs.

Y.B. Masara

JUDGE

13th December 2022.