

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE HIGH COURT SUB - REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

MATRIMONIAL CAUSE NO.1 OF 2022

LUCIANA ABDI KIZWI @RUKIA ABDI KIZWI..... PETITIONER

VERSUS

XAVIER MASALU NDALAHWA..... RESPONDENT

JUDGMENT

30/3/2022 & 1/4/2022

I.C. MUGETA, J

The issue for my determination in this case is whether the marriage between the parties has irreparably broken down such that the only remedy to it is divorce. If this issue is answered in the positive, the consequent orders of division of the matrimonial assets, maintenance and custody of the children shall be addressed. The facts of the case are simple, mostly undisputed and straight forward as follows:

On 5/4/1997, the parties married at Mtongani Roman Catholic church after cohabiting since 1993 and being blessed with one issue. The petitioner was

a Moslem called Rukia. Upon marriage, she changed to Christianity, hence, the name Luciana. Her evidence is that they lived happily and are blessed with four children whose name I shall not disclose for preserving their identity. The oldest is 29 years and the youngest is 15 years old. The parties are in agreement that mistrust on account of extra marital affairs allegation against each other is the reason for this petition. The petitioner testified and the respondent did not dispute that she caught him in flagrante delicto having sex with their house girl in 1998. She testified further, which evidence I do not accept for being hearsay, that in 2002 the house girl told her that the respondent raped her most of the time when she was at the University for studies. She concluded that in 2017 she found him exchanging love messages with her best friend and in 2019 he started the habit of leaving and staying outside the matrimonial home for days without explanation and finally in 2020 he deserted the family and stopped maintenance.

The respondent testified that troubles started in 2008 when he found this message in the petitioner's cellphone:

"Ona sasa umeamsha penzi langu kwako"

Upon inquiry, the respondent testified, the petitioner conceded the message was from her childhood lover whom she cannot part company



with because they married customarily since childhood. However, on cross examination the petitioner said the message in her cellphone read; "nimeku-miss sana mpenzi wangu" and it was from her former fiancée.

The parties agree in their evidence that the year 2017 was the breaking point as their relationship deteriorated from bad to worst. They started denying each other conjugal rights and both mutual respect and love and affection escaped through the window. Based on this evidence they concede that their marriage has broken down irreparably and its remedy is divorce.

Reasons upon which divorce can be granted are enumerated under section 107 of the Law of Marriage Act [Cap. 29 R.E 2019] (LMA). They include adultery and willful neglect under section 107 (2)(a) and (d) of the LMA respectively. In this case, by overt acts and by necessary implications of the love messages proved to have been found in their respective cellphones, I find that adultery has been proved against each party. The denial of conjugal rights is also proved which indicates that no more love between them. Further, willful neglect has been proved against the respondent. Proof of any or all of those acts is sufficient to ground a divorce order. In this regard, I pronounce the marriage between the parties as

having been irreparably broken down. I, hereby, dissolve it. Divorce decree to issue.

In his evidence the respondent prayed that instead of divorce the court should annul the marriage because he entered into the marriage upon misrepresentation by the petitioner that she was unmarried while she had a customary marriage. I find this allegation unproved because the only evidence about that marriage is the alleged words spoken by the petitioner to the respondent. Such evidence, having come from the respondent and not the petitioner, is hearsay which is inadmissible under section 62 (1) of the Evidence Act [Cap. 6 R.E 2019].

The dissolution of the parties' marriage takes me to the consequent issues of division of matrimonial assets, maintenance and custody of the children. During happy moments of their marriage, the parties acquired several properties. These are three houses at Makonde Road – Kilimahewa, Salasala, Plot No. 380, Block '13', Mabwepande, four houses at Green acres – Salasala, three houses at Salasala – Lugalo/Makokotoni, plot No. 21/3, block 'N', Pangani – Kibaha, plot No. 171, block 'G' – Kimbiji Kijaka, Kigamboni, Milling and sunflower seeds grinding machines located at Mpemba – Songwe, a farm at Fukayose – Bagamoyo, three farms at

Zagero, Mlandizi – Pwani, a business booth at Mbezi Makonde Market, block 'G' and three motor vehicles T. 354 DNV, T. 615 DRY and T. 307 DHK whose makes are undisclosed.

Before this petition was filed, the parties agreed on how they should share between them the matrimonial properties. They prepared a document to that effect which is in evidence as exhibit P1. Out of their wish they gave some properties to their children. While it is settled that when dividing the matrimonial assets giving share to children is out of context as they are not party to the marriage, I shall not disturb their arrangement because they did it before the case was filed. I treat those properties as gift to those children from their parents. Properties given to children are the business booth at Makonde Mbezi beach Market, three houses at Makonde Road, Kilimahewa/Salasala and a farm at Zegero – Mlandizi, along Kisarawe road which has in it a security guard house and planted with coconut trees. I declare that these properties are no longer matrimonial assets. The rest of the properties are amenable to division between the parties. In so doing, I take into account their arrangement in exhibit P1 and proceed to distribute the matrimonial assets as follows:

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The respondent shall get plot No. 380, block 13, Mabwepande, three houses at Salasala – Lugalo/Makokotoni, the farms at Fukayose – Bagamoyo, the farms at Zegero Mlandizi – along the road to Zegero village and the motor vehicle No. T.354 DNV. The petitioner shall get the four houses at Green Acres – Salasala, Plot No. 171, block G, Kimbiji – Kijaka Kigamboni, Plot No. 21/3, block N, Pangani – Kibaha, the milling and sunflower seeds grinding machines at Mpemba – Songwe, and two motor vehicles T. 615 DRY and T. 307 DHK.

In his evidence the respondent moved the court to consider dividing as matrimonial asset the 60% shares the petitioner owns in ABA Company Limited. Indeed, the petitioner owns such shares. However, such shares were acquired upon mortgaging the house at Mabwepande to buy the milling and sunflower grinding machines. This house has been given to the respondent. The mortgage has been redeemed by the petitioner and the title deed was given to the respondent herein Court. Upon such redemption the petitioner is discharging the loan by installments by deduction from her salary on personal loan arrangements. In such state of things, it shall be unfair to consider that property as a matrimonial asset. I so hold having considered that the arrangement to redeem the mortgage at the expense of the petitioner's salary was entered to settle these matrimonial proceedings

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and enabled the parties to execute exhibit P1 which has a condition that should the petitioner fail to redeem the mortgage, her property at Green Acres Salasala would be forfeited to the respondent.

What about custody of the children? The youngest child is aged 15 years. The petitioner asked for his custody and the respondent did not resist it. I grant his custody to the petitioner with right of visitation by the respondent. As per the parties' agreement in exhibit P1, I order that the respondent shall take care of his education to university level. His prayer that since the houses given to the children are rented, part of it should go to him to assist payment of school fees is rejected. Under section 129 (1) of the LMA it is upon the father to maintain his children and such properties, having been given to them, is at the children unconditional disposal.

I wish to comment on one thing before concluding this judgment. In his evidence, the respondent admitted that the matrimonial dispute was, indeed, referred to the marriage conciliation board. He however noted that the board issued a certificate addressed to the Primary Court at the One Stop Judicial Centre and not this court. Therefore, he is somewhat challenging the jurisdiction of this court as the certificate of failure to reconcile the parties is not addressed to it. While I agree the form was not

addressed to this court, I do not agree that that misnomer deprived this court its jurisdiction. Section 101 of the LMA requires reference of the dispute to the marriage conciliation board which issues a certificate in a prescribed form when it fails to reconcile the parties. The prescribed form is form No.3 under the Marriage conciliation Boards (Procedure) Regulations, GN.240/1971. This form has no addressee requirement. In this case, the board concerned has modified it by inserting the addressee's section. The rest of the contents are similar. In my view what matters is the fact that the board attended the parties, failed to reconcile them and issued a certificate to that effect. The rest are matters of form which are irrelevant to the fact in issue. This court, I hold, has jurisdiction to entertain this matter.

In the event, I hereby grant the petition without orders as to costs. The cross prayer by respondent that the petitioner be ordered to clear the loan relating to mortgaged property Plot No 380, block 13, Mabwepande is dismissed for being overtaken by events. The title deed of that property has been given to the respondent as stated herein above.

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I.C. MUGETA

JUDGE

01/04/2022

Court: - Judgement delivered in chambers in the presence of Miss Magreth Kisoka advocate for the petitioner and the petitioner who appeared in person, respondent is absent.

Sgd: I.C. MUGETA

JUDGE

01/04/2022