

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

MATRIMONIAL CAUSE NO. 03 OF 2021

ARON TRYPHON MUGABIRO..... PETITIONER

VERSUS

ESTHER SIMON NKONOKI.....RESPONDENT

EX PARTE JUDGMENT

Date of last order: - 29/11/2022
Date of judgment: - 1/03/2023

OPIYO, J.

The petitioner herein prays for judgment and decree as follows;

1. A declaration that the marriage between the petitioner and the respondent has irreparably broken down.
2. A divorcee decree to be issued.
3. For orders that custody of the issue of marriage be granted to the petitioner.
4. Cost of this petition be awarded
5. Any other relief that this honourable court may deem fit to grant and equitable to grant.

On 20th July 2022, the court issued an order for the matter to proceed *ex parte* against the respondent as she opted not to attend even after she had been served as per the WhatsApp printout submitted in court.



In hearing the matter *ex-parte*, the petitioner enjoyed the services of counsel Patrick Lusana. Only one witness was paraded, PW1 was Aron Tryphon Mugabiro, stated that they got married on 14th October 2000 at St. Peters Catholic Church. Marriage certificate No. 00153311 was admitted and marked as exhibit P1. Their marriage was blessed with one issue named Lucy Aron Mugabiro in 2001 who is now 20 years old. The marriage got sour during preparation for the marriage of his young sister, Jesca Mugabire as the respondent was collecting money for the Kitchen Party and send-off, but never accounted for the money. The matter was reported to her parents who refunded only a small amount. They tried to reconcile through church, but in vain. A letter by a priest dated 26th May 2003 (St. Peters Church) was admitted as exhibit P2.

Later, PW1 had to visit the reconciliation board at Kinondoni District and the respondent was summoned several times but failed to appear. PW1 was availed with Form No. 3, dated 11/5/2004 which was admitted and marked as exhibit P3. He further stated that he delayed to file for divorce for all that long because he was hoping for their marriage to work out, but it did not.

About the issue of marriage, he stated that she was left with him when she was just 2 years old. She is now 20 years of age. He concluded his testimony by stating that for a short period of about 1 year and 9 months they stayed together in matrimony they never acquired any joint property through their joint efforts. She found him with a house and a motor vehicle. That, as they have lived separately for a long time, about

18 years, their marriage has broken irreparably. He thus prayed for the divorce decree to be issued and custody of their only one issue of marriage.

The first issue for determination is whether marriage has broken irreparably? **Section 99 of the Law of Marriage Act, Cap 29, R.E 2019, (LMA)** simply provides for the right to petition for separation or divorce but a party wanted to pursue that right must be subjected to sections 77, 100 and 101 of the **Law of Marriage Act**(*supra*). In the instant petition, the petitioner is a Tanzanian, who resides in Survey Area, Kinondoni District-Dar es Salaam, and their marriage has subsisted beyond 2 years. The petitioner has also complied with the requirement of section 101 of the LMA (*supra*) which prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Marriage Conciliation Board and the Board certifying that it has failed to reconcile the parties. Also see the case of **Fidelis Francis v Paschalia Malima, PC: Matrimonial Appeal No. 3 of 2020, HC, at Mwanza (unreported) and Shillo Mzee v. Fatuma Ahmed [1984] TLR 112** which emphasized the requirement. The petitioner herein, tender **exhibit P3** which is form No. 3 from the reconciliation board with **ref. No. UJ/BU/180/03** dated **11/5/2004** certifying that the board has failed to reconcile the parties due to the non-attendance of the respondent. That means all preliminary procedures were adhered to.

Divorce is not an automatic right, as stated in the case of **R v R (2004) T.L.R 121**, there must be proof that the marriage has broken irreparably. In deciding whether or not a marriage has broken down,

the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and the party must prove that there are some factors necessary to warrant divorce (see **section 107(1) and (2) of the LMA (supra)** from the petition filed and petitioners testimony what caught my eyes is the duration of separation. **Paragraph 7** of the petition filed stated that the parties have been separated since 2003. This fact was corroborated by **exhibit P2 and P3** which shows the parties had been apart for since 2003 to date, almost two decades now. **Section 107(2)(f)** LMA provides for voluntary separation where it has been continued or last for three years as one of the grounds for divorce. From 2003 to 17th September 2021 when this matter was filled is more than statutory three years. From the facts the parties have been separated for too long and regardless of the efforts from the priest and family members, the parties have failed to reconcile. This means the marriage has been broken down irreparably. This leads to the inevitable affirmative answer to the first issue.

On the issue of division of matrimonial properties, PW1 stated that they stayed together for a period of 1 year and 9 months and they did not acquire any tangible matrimonial properties. This assertion was not countered by the respondent as she did not appear in court, hence, this court relies on the petitioner's statement that, there is no joint matrimonial property to be divided in this matter.

On the issue of custody, this court by the virtue of **section 125 LMA (supra)** has the power to make an order for custody. Reading carefully the wording of **sections 125(1) and (2) of the Act**, the word used is

"*infant*" which is the child who has not attained the age of eighteen years. **Section 4(1) of the Law of the Child Act, Cap 13, R.E 2019** defines a child as a person below the age of 18 years. In the instant petition, PW1 stated that during the subsistence of the marriage, they obtained one issue named Lucy Aron Mugabiro who is now more than 20 years. Thus, by virtue of the said sections, Lucy Mugabiro is no longer a child and she was not brought to court to state her preferences. However, since the said child has been in the care of the petitioner it is preferable not to disturb the arrangement that has already worked well for her wellbeing.

Based in the above observation, this court declares that the marriage between the petitioner and the respondent has irreparably been broken down and continues to dissolve the same. Decree of divorce is hereby issued. No order regarding division of matrimonial properties as there is none and custody of the issue of marriage who is no longer an infant. I also make no order as to costs.



A handwritten signature in blue ink, appearing to read "M. P. Opiyo", is written above a horizontal line.

**M. P. OPIYO,
JUDGE**

28/02/2023