IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

MATRIMONIAL APPEAL NO. 2 OF 2022

(Arising from Matrimonial Cause No. 20/2006 of Tabora RM's Court)

MRS JAMILA SURENDRA..... APPELLANT

VERSUS

MR. SURENDRA DHARAMSHI JUTHA
@ MOHAMED DHARAMSHI JUTHA ..... RESPONDENT

JUDGMENT

Date of Last Order: 27/09/2023
Date of Judgment: 13/10/2023

MATUMA, J.

This judgment results from the marriage of the parties herein which turned from being a lovely one into hostility.

Briefly, it is stated that the appellant and the respondent became lovers in 1989 at Nzega District in Tabora Region and started to cohabit in 1990. After almost fourteen years of the cohabitation as a husband and wife the two decided to marry. As the Respondent was a Hindu and the Appellant was a moslem, he converted to Islam and finally married the Appellant under Islamic rites in 2004. By that time, they had already two issues namely Tariq

and Ahlaan. They however, to conceal that their two issues were born out of wedlock, decided to backdate their Marriage Certificate to read that their Marriage under Islamic rites was contracted way back on 30/03/1990. Such marriage certificate was tendered in evidence as exhibit P4.

It is unfortunate that soon as they got married just in two years' time they fell into untold quarrels. They deserted their love which resulted in a serious misunderstanding leading to various cases in different courts, this case being one of them instituted at the Resident Magistrate's Court of Tabora at Tabora in which the appellant sought divorce, custody of children, equal distribution of matrimonial properties, maintenance, costs of the petition, and any other reliefs. They had also Matrimonial Cause No. 1 of 2006 which was consolidated into this Matrimonial Cause No. 20 of 2006.

In his Written Statement of defense, the respondent raised a counter-petition for among other reliefs a declaration that he had no valid marriage with the appellant because at the time they contracted such marriage the appellant had an existing marriage with one Said Mohamed, annulment of his purported marriage with the appellant, division of matrimonial assets which were acquired jointly, costs and any other reliefs.

The parties agreed and the trial court drew eleven major issues for determination and two sub issues. The issues covered the Consolidated Petitions and the Counter Petition. After a full trial, the trial court held that the appellant at the time of contracting the marriage with the respondent, had no capacity to marry because she had an existing marriage with one Said Mohamed which had not yet been dissolved by a court of law. As a

result, it pronounced that the appellant was a mere concubine to the respondent who should go empty-handed for there cannot be joint efforts by concubines in the acquisition of properties. Just to quote the trial court held at page 12 paragraph two;

> *"The court feels sympathy to the petitioner who spent almost 17 (seventeen years) with the respondent but as a concubine. It is unfortunate that there is no any law stated by the learned counsels protecting rights of the concubines. The court fails to come across the said law and as such there was no joint efforts from Jamila and Sulendra towards the acquisition of the properties enlisted on paragraph 21 of the respondent's counter petition and also on paragraph no. 7 of the Petition as a husband and wife."*

Aggrieved with these findings of the trial court which denied her everything on the ground that she was not a legally married wife to the respondent, the appellant is now before this court by way of this appeal whereas her memorandum of appeal contains a total of nine grounds.

At the hearing of this appeal both parties were present in person and had legal representations. M/s Rose Suleiman and Mr. Simon Kamkolwe learned advocates represented the appellant while Mr. Kamaliza Kayaga learned advocate represented the respondent.

The learned advocates for the appellant at the outset abandoned three of the grounds of appeal and condensed the rest to read two major complaints namely;

i) That the trial court erred to disregard Islamic Law on

marriage and divorce.

ii) That the division of matrimonial properties was not fair.

By considering that the central issue at the trial was the legal capacity of the appellant to marry allegedly that she had an existing marriage with one Said Mohamed, I required the parties in addition to the grounds of complaint supra, to address me on;

> *Whether a discussion made at the trial court regarding Said Mohamed's family affairs and subsequently determined that the appellant is his legal wife did not violate the principles of natural justice for the right to be heard of the said Said Mohamed and what would be the effect thereto.*

I will start with this issue as raised by the court supra. Submitting to it, Mr. Simon Kamkolwe learned advocate for the appellant argued that it was not right to have the said Said Mohamed discussed without being heard. That the trial court either on its own motion or by being moved by the parties ought to have summoned the said Said Mohamed either as a witness or a party to testify on whether he had an existing marriage with the appellant.

The learned advocate submitted further that since Said Mohamed was not a party to the suit nor was summoned as a witness, the decision of the trial court affected him without affording him the opportunity to be heard.

Mr. Kamaliza Kayaga learned advocate on his part was of the view that Said Mohammed was not affected anyhow because he was not a defendant or a plaintiff.

With due respect to Mr. Kayaga learned advocate, in the circumstances of this suit one cannot legally establish that Said Mohamed was not affected by the trial court's findings under the impugned judgment. The trial court at page 11 of the impugned judgment held;

> *"It is therefore crystal clear that the marriage between Said Mohamed to the petitioner was still subsisting when she contracted the second marriage to the respondent and it is still subsisting hitherto."*

Such holding no doubts declared the appellant as a legal wife of the said Said Mohamed. In that respect, all duties and obligations by the husband to the wife are direct foreseeable consequences against Said Mohamed in favor the Appellant herein. Also, such decision ties the appellant to the estate of the said Said Mohamed as a wife.

In that respect I agree with Mr. Simon Kamkolwe learned advocate that it was necessary for Said Mohamed to be heard before such adverse decision was given against him. This is because it was the Respondent who raised allegations that the appellant was a wife of Said Mohamed without giving any evidence to establish the same. He raised so under paragraph 3 of the Written Statement of defense in Matrimonial Cause no. 1 of 2006 and I quote;

> *"That the allegations contained in paragraph no. 4 of the Petition are partly admitted and only to the extent that the petitioner and the respondent celebrated their marriage under Islamic rites in 2004 at Nzega Township.* ***But the respondent states further***

that the purported marriage between the petitioner and the respondent was and still is void for want of capacity on the part of the petitioner who was already married to another man in 1988 and that her previous marriage had not been dissolved."

He repeated the same in his Written Statement of defense and Counter Petition in Matrimonial Cause no. 20 of 2006 under paragraphs 4 and 24.

The appellant in both Petitions; no. 1 of 2006 and no. 20 of 2006 did not even in a single paragraph state to have been married prior to marrying the respondent. In fact, in her Reply or Answer to the Respondent's Counter Petition she disputed categorically to had ever been married to any man other than the respondent. To put it clearly; she stated vide paragraph 5 thereof;

"The Petitioner further states that she had never celebrated any marriage other than this one."

In the circumstances that the respondent alleged existence of marriage between the appellant and Said Mohamed and the fact that the appellant disputed such alleged fact, the trial court could not legally declare existence of a marriage between the appellant and the said Said Mohamed without first obtaining impeccable evidence regarding when, where and how such alleged marriage was contracted or celebrated and before whom as a licensed and Registered Minister or Kadhi for the purposes of celebrating Religious marriages in accordance to section 30 of the Law of Marriage Act. The trial court did not even bother whether such an alleged marriage was

legally contracted in accordance with whatever governing law and therefore it was valid. It is upon determination of all these, the trial court could legally pronounce that the appellant had a valid marriage which was still in existence and therefore could not contract any other marriage.

But all these whether Said Mohamed married the appellant and whether he subsequently divorced her or not, was a matter that could have not been resolved in the absence of Said Mohamed as a necessary party or even as a witness. I am therefore in agreement with Mr. Simon Kamkolwe learned advocate that it was wrong for the trial court to discuss and determine Said Mohamed's family affairs without affording him the opportunity to be heard. The law is settled that for effectual and complete adjudication and settlement of all questions involved in the suit, all necessary parties must be involved. That is the spirit of Order I Rule 10 (2) of the Civil Procedure Code, Cap. 33 R.E. 2019 which provides as follows;

> *"The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,* ***or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit,*** *be added."*

In the instant matter, it was the respondent who alleged that the appellant was a married woman to a third party. It was him therefore in terms of section 110 (1) & (2) of the Evidence Act Cap. 6 R.E. 2002 or even R.E of 2019 to establish not only that Said Mohamed really married the appellant before they got into extra–marital affairs and subsequently contracted another marriage on the existing one, but also that the alleged marriage was valid in accordance to the law it was celebrated.

The respondent raised such allegations without proving them and left for the appellant to prove or disprove the same contrary to the requirements of section 110 (1) & (2) of the Evidence Act supra which provides that whoever desires the court to give judgment as to any legal right or liability dependent on existences of facts which he asserts must prove that those facts exist and the burden so to prove lies on him.

I am aware that the appellant during the trial at page 7 of the typed proceedings testified that she was married to one Said Mohamed Seif in 1988 but divorced in 1989 in accordance to Islamic law. That was however contrary to her pleadings and against the settled law that parties are bound by their pleadings.

The same evidence was given by PW2 Sudi Said her father who also tendered "***Talak***" as exhibit P8 purportedly issued by Said Mohamed. The evidence of the appellant and PW2 Supra was however not conclusive proof that she had any legal marriage with Said Mohamed more so when no marriage certificate was tendered to that effect and Said Mohamed was not summoned to confirm such fact or allegations.

Therefore, the allegations for existence of marriage between the Appellant and one Said Mohamed which became a central story at the trial court to deny the rights of the parties, had no impeccable evidence to establish such allegations on the following reasons;

One; the alleged first husband was not party or witness to the suit at hand, ***Two;*** no marriage certificate to that effect was tendered to establish existence of such marriage, ***Three;*** The specific date and month of the alleged marriage was not disclosed, ***Four;*** the "***kadhi***" as defined under section 2 (1) of the Law of Marriage Act who celebrated the alleged marriage in accordance to section 30 (3) and (4) of the Law of Marriage Act was not disclosed or called as a witness to authenticate the alleged marriage and its validity in accordance to the four pre-conditions of a valid marriage under Islamic Law as explained by Sheik Mohamed Mbega (PW3) at page 26 of the typed proceedings of the trial court. Clear facts and evidence establishing the existence of a valid marriage between the appellant and the said Said Mohamed ought to have been given to avoid implicating another unheard, ***Five;*** For the period of seventeen (17) years in which the parties herein lived together as a husband and wife and blessed with two issues, nobody including Said Mohamed had interfered with them claiming that the respondent was living with someone's wife. The allegations of a previous marriage thus came as afterthoughts and a projectile weapon by the Respondent against the Appellant to frustrate her rights accruing from their marriage, ***Six;*** PW1 and PW2 who purported to give evidence that there was a first marriage contradicted their pleadings and were incredible worthy to be relied upon because they participated in forging the marriage certificate

in the instant matter. In the case of ***Mohamed Said versus Republic, Criminal Appeal no. 145 of 2017 and Zakaria Jackson Magaya versus The Republic***, Criminal Appeal no. 411 of 2018 it was held;

> ***"a witness who lies in an important point cannot be believed in others."***

Lying on the date of marriage and forging the marriage certificate to cover children born out of wedlock not only offended Islamic Law but also section 33 (1) of the Law of Marriage Act which requires issuance of a marriage certificate on the date the marriage was celebrated. That is an important part both under Islamic Law and under the Law of Marriage Act as it establishes the date of the commencement of the marriage which is very important in ascertaining the rights of the parties that accrued before and after the marriage. Therefore, whoever lies on it, is not entitled to credence. ***Seven;*** Even if PW1 and PW2 were to be trusted then they categorically testified that such marriage got broken down and completely dissolved in accordance with Islamic Law before the parties herein got married. A marriage dissolved in accordance to Islamic law shall be dealt when determining the first ground of complaint.

In that respect, both **marriage** and **divorce** between the appellant and Said Mohamed were not sufficiently proved to enable the trial court to declare either the existence and validity of the alleged marriage or the validity or otherwise of the talaks by Said Mohamed.

Since marriage imposes legal obligations, duties, and liabilities to husbands over wives in accordance with the Law of Marriage Act Supra and

even in accordance with Islamic Law, it was totally wrong for the trial court to take lightly the alleged marriage between the appellant and Said Mohamed. As I have said earlier, the decision of the trial court had the effect of making the appellant the legal wife of Said Mohamed. Said Mohamed was not a party to the suit nor was summoned anyhow. Wherever he is, he is unaware that there is a judgment pronouncing the appellant as his lawful wife, and as a result, he may be subjected to various liabilities because the appellant might by using such judgment claim several legal rights of a woman against a husband or against the husband's estate.

In our jurisprudence, it is a condemned act to give any judgment against a party unheard. In fact, the Constitution of the United Republic of Tanzania, 1977 as quoted by the Court of Appeal in the case of ***Mbeya – Rukwa Auto Parts and Transport Ltd versus Jestina George Mwakyoma (2003) TLR 251*** requires anyone to be adjudged, to be heard fully before any right or obligation is declared for or against him. To put it clear the court held;

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental Constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law and declares in part;*
>
> ***(a)*** *Wakati* ***haki na wajibu*** *wa mtu yeyote* ***vinahitaji kufanyiwa uamuzi wa mahakama*** *au chombo kinginecho kinachohusika,* ***basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu . . . .***"

Since Said Mohamed was not afforded the opportunity to be heard, all what was adjudged relating to him was a nullity and I am obliged to protect his fundamental right as it was emphasized by the Court of Appeal in the case of ***Nuta Press Limited versus Mac Holdings and Another, Civil Appeal no. 80 of 2016*** in that;

> *"This court has always emphasized that **the right to be heard** is a fundamental principle which is enshrined under the Constitution and **courts must jealously guard the same.**"*

Emphasizing the right to be heard, the Court of Appeal held in a number of cases that the decision reached or arrived in violation of such right will be nullified even if the same decision would have been reached had the party been heard. See; ***Abbas Sherally & Another versus Abdul S.H.M. Fazelboy, Civil Application no. 33 of 2002.***

I therefore nullify the proceedings touching the welfare of Said Mohamed, nullify the decision that declared the appellant as a legal wife of Said Mohamed and quash the order of the trial court to that effect.

The remaining proceedings are therefore only that which relates to the parties herein, the decision reached thereof and the order or reliefs given to the parties which are going to be dealt herein below in accordance with the grounds of complaint supra.

The first ground of complaint is that the trial court erred in law by disregarding Islamic law on marriage and divorce. Submitting on this Mr. Simon Kamkolwe learned advocate argued that Islamic Law or Shariah is one

of the applicable Laws in our jurisprudence relating to the parties who abide their lives to the Quran.

As such, the learned advocate submitted that the trial court erred for ruling out that the marriage between the appellant and the respondent was void. He argued further that the Laws of the Land recognize Islamic law on marriage and divorce and cited to me the case of ***Razia Jaffer Ali versus Ahmed Mohamedali Sewji & 5 others Civil Appeal no. 63 of 2005*** (CAT) in which the Court of Appeal explained several ways upon which Islamic marriage can be dissolved including "***Talak***".

Responding on this ground Mr. Kamaliza Kayaga learned advocate argued that he stands by the Law of Marriage Act as against Islamic Law on "***Talak***". He argued that section 10 (1) and (2) of the Law of Marriage Act describes types of marriages including Islamic marriage but when it comes to dissolution of such marriage, it must be by one of the ways stipulated under section 12 of the Act which are the death of either party, by a presumption of death, by decree of annulment, by a decree of divorce or by extra–judicial decree.

He then concluded that since Jamila the appellant had contracted the first marriage and the modes of dissolving such marriage were not adopted, the first marriage still exists and as such the appellant was incapable in terms of section 15 of the Law Marriage Act to contract another marriage with the respondent. Insisting that Islamic "Talak" is not enough to dissolve the marriage, the learned advocate cited section 107 (3) of the Law Marriage Act arguing that the same requires the couples to go to court for the decree

of divorce even when they have exhausted Islamic law on divorce. To fortify such arguments, the learned advocate cited to me among other cases that of ***Bibie Maulidi versus Mohamed Ibrahim (1989) TLR 162*** and ***Haruna Makwata versus Fatuma Mselemu (1978) LRT 8***.

From the rival arguments of the parties as narrated supra, the issue is whether marriage under the Law of Marriage Act can only be dissolved in accordance to section 12 of the said Law.

In accordance with section 107 (3) (a), (b) (c) of the Law of Marriage Act supra, the Law is very clear that when it is proved to the satisfaction of the court that the parties married in Islamic form and the Board has certified that it has failed to reconcile them **and either of them has done any act** or **thing** which in accordance to Islamic law **dissolves the marriage,** the court would merely make a finding that the marriage between the parties has broken down irreparably and proceed to grant the divorce decree. I entertain no doubts that the cited provisions of the Law of Marriage Act were enacted not to offend Islamic law on divorce but to honor **any act** or **thing** that dissolves Islamic marriage under Islamic Law as a conclusive dissolution of Islamic marriage and mandatorily requires the court to merely make the finding that such marriage has broken down irreparably.

In fact section 107 (2) (i) of the Law of Marriage Act provides that change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage is a conclusive proof that the marriage has broken down

irreparably. In that respect the Law of Marriage Act was not enacted to offend religious beliefs.

Therefore, a valid Talak under Islamic Law is a conclusive dissolution of Islamic marriage. The only issue would therefore be should every Muslim couple who has divorced under Islamic Law and has no whatsoever dispute goes to court for a divorce decree?

> My answer is No, courts of Law are creatures for resolving disputes. If the parties have dissolved their marriage in accordance with Islamic Law and none of them is disputing either the divorce or any subsequent outcomes thereto; they are not obliged to go to court for a mere finding that their marriage has broken down irreparably the fact which is not contentious. To rule otherwise would be fracas because it would amount to offend Islamic rules on divorce as provided for under **Surat At Talaaq verse 1** that men should marry and live lovely with their wives and if need be to divorce, then the divorce should be carried on without hostility. It provides in part; "***....Basi wanapofikia muda wao , ima warejeeni muwaweke kwa wema au farikianeni nao kwa wema;...***"

In fact, in this Country, divorce decree is grantable through arbitration processes but arbitration is not the only way disputes are resolved in accordance with the laws of the land. We have as well the Alternative Dispute Resolution (ADR). If parties resort into the alternative ways to resolve their disputes including religious ways and or customary rules, they should not be forced to go to court. The alternative ways adopted by the parties when sufficiently proved would be conclusive and protected by the rule of estoppel under section 123 of the Evidence Act, Cap. 6 R.E. 2019.

Even when Islamic couples go to court for a divorce decree still the Law of Marriage Act section 112 (3) provides that the decree for divorce issued shall be deemed to have taken effect on the date when the **act** or **thing** by either of them dissolved the marriage in accordance with Islamic Law. Therefore, irrespective of the date when the decree for divorce is granted by the court, the marriage shall be deemed to have been dissolved from the date when in accordance with Islamic law the marriage was dissolved. That means if it is a **Talak** then the marriage shall be deemed to have been dissolved on the date it was issued, if it is **divorce mubaraat,** then from the date when mutual consent for spouses to divorce was entered, if it is **Khului,** from its effective date in accordance with Islamic Law. These are inspirations of section 112 (3) of the Law of Marriage Act supra which provides;

> *"Where a decree of divorce is granted pursuant to the provisions of subsection (3) of section 107,* ***the marriage shall,*** *unless the court otherwise directs,* ***be deemed to have been dissolved as from the date when the dissolution would,*** *but for this Act,* ***have taken effect in accordance with the Islamic law".***

The Law of Marriage Act with such clear provision was therefore not enacted to offend or supersede Islamic Law regarding Talak as purportedly held by the trial court but to recognized various ways of dissolving Islamic marriage including Talak.

In the same and very similar situation, my learned brethren Honourable Justice Mwalusanya as he then was, held in the case of ***Halima***

Athumani versus Maulidi Hamisi (1991) TLR 179 that under section 107 (3) of the Law of Marriage Act, a Muslim wife may secure her release from the marriage by way of **khului** through payment back of the dowry, or seek divorce mubaraat which is a mutual agreement to divorce while a male Muslim can issue up to three talaks to end up his marriage. The learned Judge then concluded that the Muslim couples having dissolved their marriage in accordance with Islamic law would merely go to court to have their divorce officially registered without toiling to prove that their marriage is irreparably broken down.

I am aware of the Editorial Note in which the readers of such case law are advised that;

> *"Readers are advised to disregard the advice given by the Judge for courts do not register divorces but only determine whether to grant or refuse to grant petitions for divorce under the Law of Marriage Act 1971"*

With due respect to such Editorial Note, the learned Judge did not give advice but made a decision interpreting section 107 (3) of the Law of Marriage Act which was enacted purposely for Muslim divorces. Such provision is enacted to the effect that once a Muslim marriage is dissolved in accordance with Islamic law, it is gone, and the court cannot revive it by whatever order and that is why section 112 (3) of the Law of Marriage Act as quoted supra goes further to state the date when the Islamic marriage is deemed to have been dissolved. It is the date when any act or thing in

accordance with Islamic law such marriage is dissolved and not on the date of the decree of divorce by the court.

Having said all these I now proceed to allow the first ground of complaint to the effect that the trial court erred in law to disregard Islamic Law on marriage and Talak. Section 12 of the Law of Marriage Act cannot be read in isolation of other provisions of the same law. It should be read together with section 107 (3) and 112 (3) of the same law which provides the manner under which Islamic marriage is dissolved. Had the trial court given any due regard to Islamic Law and the Law of Marriage Act as explained in details supra, it would have observed and ruled that the appellant was a free woman at the time she married the respondent because even if there would have been evidence showing that the Appellant was really married to Said Mohamed there is undisputed evidence that she divorced in accordance with Islamic law.

I therefore proceed to declare that the appellant was lawfully married to the respondent. This is due to both documentary exhibits and oral evidence from both parties. When I talk of documentary evidence, I don't refer to the Marriage Certificate dated 30/03/1990 because the same is not authentic, it is a falsehood document. But in law more so under Islamic Law, Marriage is the ceremony itself, Certificate is mere evidence to the marriage. The marriage is not invalidated merely for lack of a Certificate. Therefore, in the absence of a marriage certificate marriage can still be proved by other evidence. In the instant matter both parties do not dispute to have married each other under Islamic rites.

Going by the evidence of the respondent himself at page 29 – 35 of the proceedings he categorically admitted to have married the appellant under Islamic rites. Thus, for instance, at page 30 he testified;

> *"I met with the petitioner since 1988. I loved her from that time . . .. I loved her and she loved me .....We decided to live together in 1990 at Tabora up to 1994....."*

At page 31,

> *"I was born a Hindu. In 2004 I changed my religion to Moslem and my name was Mohamed.* ***We decided to marry each other in 2004. The Marriage was contracted in my home following moslemic rules."***

At page 31 supra, the respondent acknowledged the documentary evidence exhibits P5 and P6 respectively which were the talaks he issued to the appellant when they became tired of living together. The first Talak is dated 4/7/2006 and it reads;

> ***"Bismillah Rahman Rahim***
>
> *Kwako Bi. Jamilah Soud, Mimi Mohamed Dharamshi Jutha nikiwa na akili zangu timamu* ***nimekuacha kwa talaka moja si mke wangu kuanzia leo tarehe 04/07/2006.***
>
> *Kama alivyotuamrisha Mwenyezi Mungu kwamba muoane kwa wema na ikibidi kuachana muachane kwa hisani. Hivyo kwa yote uliyonifanyia nimelazimika nitekeleze agizo hilo la Mwenyezi Mungu la kuachana kwa wema."*

The second Talak is dated 16/07/2006 with similar contents but this time it was given in the presence of two witnesses; Ustaadh Bakari Malingumu and Mwalimu Hassan Kafuku. The same way as well approved and endorsed by Sheikh Mwazbani Mbwana.

These two documents being undisputed by both parties were issued to dissolve the marriage between the parties and thus corroborate the oral evidence of both parties that they married each other.

There are several other documents that were written by the respondent to authenticate that he had married the appellant. Some of them are correspondences between him and the Appellant's father dated 11th April, 2006 and that of 14th April, 2006. The marriage between the appellant and the Respondent was thus valid and lawful in accordance with Islamic Law, and it is so determined. In that respect, the order of the trial court nullifying this marriage is hereby set aside.

That takes me to determine whether the marriage between the parties is broken down irreparably. This was one of the issues at the trial court but wrongly neglected on the pretext that there was no valid marriage between the parties. I step into the shoes of the trial court to determine it. The guidance is under section 107 (1) and 3 (a) (b) & (c) of the Law of Marriage Act which provides;

> *"107. (1) 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, in particular, shall:-*
>
> *(3) where it is proved to the satisfaction of the court that –*

(a) The parties were married in Islamic form;

(b) a Board has certified that it has failed to reconcile the parties; and

(c) subsequent to the granting by the Board of a Certificate that it has failed to reconcile the parties, ***either of them has done any act or thing which would,*** *but for the provisions of thus Act,* ***have dissolved the marriage in accordance with the Islamic Law,*** *the court shall make a finding that the marriage has irreparably broken down and proceed to grant a decree of divorce."*

In the instant matter no doubt, that the parties married under Islamic rites, the reconciliation of their dispute was not successful and the respondent did acts which dissolved his marriage under Islamic law. He issued Talaks. By that act, the law supra mandatorily requires the court to make a finding that the marriage has broken down irreparably and proceed to grant a decree for divorce. Since the respondent issued such talaks and the same was endorsed by Sheikh to the effect that it was a valid talak; ***"Mimi Sheikh wa Mtaa Bakwata Mwazbani Mbwana nimethibitisha kuwa Talaka hii imeswihi"*** this court has no other option than to make a finding as I hereby do that the marriage between the appellant and the respondent is broken down irreparably. I subsequently grant a decree of divorce to the appellant against the respondent. But in accordance with section 112 (3) of the Law of Marriage Act supra as I have discussed in detail the decree granted herein shall be of the effect that the marriage between the parties herein was dissolved in accordance with Islamic law on the date the second Talak dated 16/07/2006 was issued.

Even if I were to determine whether such marriage is broken down irreparably under section 107 (1) and (2) of the Marriage Act supra which relates to divorce generally and not under subsection 3 thereof which relates to divorce of Muslim marriage only, still there is sufficient evidence on record that the marriage between the appellant and the Respondent is broken down beyond repair. We have on record the evidence that the appellant accused the respondent for theft which instigated criminal charges against him, we have evidence on record that the Respondent chased the appellant from their matrimonial home and employed security guards to prevent her from entering therein, we have evidence on record that the respondent restricted the relatives of the appellant not to visit his home, and it is apparent that the parties are living apart for a period of nearly eighteen years now because they separated since 2006. All these factors are enough for the purposes of establishing that the marriage between the appellant and the respondent is irreparably broken down.

That takes me to the second ground relating to the distribution of matrimonial properties. For the appellant, it was Rose Suleiman learned advocate who argued this ground. She contended that the trial court abrogated section 114(2) of the Law of Marriage Act which requires the court to make a fair distribution of properties jointly acquired by considering the extent of contribution by each spouse.

She faulted the trial court to have even dispossessed the appellant's own registered properties contrary to section 60(a) of the Law of Marriage Act. She argued that the trial court unfairly gave to the respondent all properties registered in the appellant's name and at the same time left to

the respondent all properties registered in his name. She named plot no. 151 Block "R" Nzega Urban as a property registered in the name of the appellant but given to the respondent and a motor vehicle Scania Lorry TZA 2611 with its trailer TZA 2612.

She further argued that the division of matrimonial properties does not depend on the validity of marriage but on the extent of contribution. She then argued that the appellant being a business woman explained her physical contribution towards the acquisition of the properties. She mentioned the properties allegedly jointly acquired by the parties to be; Nappol Oil Mills on plots no. 68, 69 and 70 Block "H" Industrial area Nzega which is also referred to as Namaskar Oil Mills, Kunal Transportation Company at Nzega, Tippcon Rice Mills, Virgin Venture Ltd, and Dattan Bus Company which owns four buses.

The learned advocate argued that the trial court was duty bound to determine the extent of contribution by both parties. To that effect she cited to me the case of ***Yesse Mrisho versus Sania Abdul, Civil Appeal no. 147 of 2016*** to the effect that even domestic duties amounts to contribution. She also argued that under Section 114 (3) of the Law of Marriage Act supra, even properties acquired before marriage but which have been substantially improved by joint efforts are liable to distribution. To that effect, she cited to me the case of ***Hidaya Ally versus Amiri Mlugu, Civil Appeal No. 105 of 2008*** (CAT).

She was of the further view that the Scania Lorry was the property of the appellant and therefore it was wrongly given to her as a share in the

matrimonial properties. She finally prayed this appeal to be allowed and plot no. 151 Block "R" supra be given back to the appellant and at least one of the plots number 68, 69 and 70 in Namaskar and Tippco companies as well as a share in the Virgin Venture.

Mr. Kamaliza Kayaga learned advocate for the respondent in response thereof argued that the trial court was right in its decision towards the distribution of the matrimonial properties. He argued that the party seeking distribution is required to prove the extent of contribution and not mere allegations but the appellant failed to prove the extent of her contribution towards the properties as she merely alleged supervision but during cross-examination, she admitted to have not been sure whether the petrol station was the respondent's property and also that some of the properties collapsed since 2001 and 2006 including the oil mills but yet the appellant sought distribution thereof. He also argued that the properties named are owned by shares with third parties but the appellant failed to establish the respondent's shares in those properties and therefore it could have not been possible for the trial court to distribute properties owned by shares between the respondent and third parties.

To the contrary, the learned advocate argued that the respondent gave clear evidence to the effect that he did not involve the appellant in his business and construction activities. That he used to hire an independent contractor one Michael Lukelelwa who testified in court to that effect and had a supervising manager to his businesses thus the appellant had no physical involvement in the properties.

The learned advocate further submitted that Virgin Venture was bankrupt since then and some claimed properties are not in existence. In respect of plot no. 151 Block "R" supra, the learned advocate admitted that it is registered in the name of the appellant but argued that it was the respondent who constructed the business thereof in the name of NUFAIKA and thus the appellant would only be entitled to a small share thereof for a mere fact that it is her name which is registered there.

In respect of plots no. 68, 69 and 70, the learned advocate admitted their existence but argued that within those plots it is where Namaskar Produce and Oil Mills Limited is established and that it is a Company owned by three different Directors including the respondent who owns only 30% of the shares therein. Other shareholders are named to be R.G. Karya a Kenyan national owning 40% of the shares and S.K. Said a Tanzanian National owning 30% of shares thereto. That Kunar Bus was a family-owned Company in which the respondent owned one share which he later surrendered. He finally argued that the Lorry Scania was not the appellant's property but she was only given it to supervise the business. He then called this court to dismiss this ground and the appeal as a whole for having no merit.

On this, I should start by agreeing with the appellant's counsels that plot no. 151 Block "R" is evidenced to have been bought by the appellant herself and is registered in her own name as admitted by the respondent. Unfortunately, the appellant was denied even a meager share thereto without any justifiable reason by the trial court despite the respondent's

admission in his Written Statement of Defence and counter-petition that such a plot was a jointly acquired property.

My determination is that Plot no. 151 Block "R" Nzega Urban which is registered in the name of the appellant is solely owned by her and is not a matrimonial property. Likewise, all other properties registered in the names of the respondent are his own properties solely owned by him whether by 100% or by any particular shares.

The appellant and the respondent would only be entitled to distribution in the property or properties of the other upon proof of his or her extent of contributions towards the acquisition or improvement of such properties.

In the instant matter apart from the matrimonial home on plot SQM 49X99 Low-Density area Nzega Urban (Uzunguni area Nzega) in which the couple herein lived and upon which an inference of indirect contributions might be drawn, but we cannot do so by reason that the parties have a separate suit relating to the said property, the rest of the properties stand owned by their respective registered owners. Without impeccable evidence by either party towards any direct or indirect contributions be it on acquisition or improvement of the property registered in the other's names, this court cannot assess the contribution and make the division accordingly.

The respondent in his evidence at page 30 of the typed proceedings testified that Plot no. 151 Block "R" supra is registered in the appellant's name because he loved her but it is him who constructed some business thereof in the names of NUFAIKA by using the contractor one Michael Lukelelwa. He did not however establish how comes; it is the appellant who

bought the plot by her own name in accordance with the evidence on record. He and his witness Michael Lukelelwa gave bare statements relating to the development of the said Plot without tendering any document such as a contractual agreement between Michael Lukelelwa and the respondent to develop such plot because as a registered Contractor it is reasonably expected to perform contractual duties in writing for among other purposes; government Revenues.

Even suppliers of building materials were not summoned to confirm that it was the respondent who was paying them nor any evidence was tendered by the Respondent to show how and where he bought the building materials for that plot. I cannot therefore stand by mere allegations or averments by the respondent towards Plot no. 151 Block "R" supra.

During cross examination DW2 Michael Lukelelwa was totally confused. He could not know the identity of such a plot when he was cross-examined by advocate El-Maamry. The evidence on record is very clear that the appellant was not a mere housewife. She was a businesswoman. It is in evidence that when she got married to the respondent, her father gave her one Lorry Scania Track ARQ 579 now T 461 AHV although the respondent alleged that they bought it from the appellant's father without stating even the consideration for the alleged purchase or tendering the purchase contract thereof.

Even if we have to agree that it was the respondent the source of all money towards the acquisition and construction of structures on Plot no. 151 Block "R" supra, by using the appellant's name alone without his name even

as a joint property, it does not have any other meaning than that; all that he intended by whatever he did to the property was to make the appellant sole owner of the same. That can be seen by inference that he did not register other properties in the name of the appellant despite of the existed love but by his own name. He is thus estopped to deny such inference within the meaning of section 123 of the Evidence Act supra.

Under the Law of Marriage Act, a marriage is not a bar to either spouse to acquire and dispose any property in his or her own name. That was well held in the case of ***Hapyness John versus Bavesh Hindocha & Others, Land Case no. 10 of 2017,*** HC at Shinyanga. I therefore find that the respondent failed to prove any contribution to Plot no. 151 Block "R" at Nzega Urban and the same is declared the property of the appellant alone and not liable to distribution. By whatever reasons under the principle **Quicquid Plantatur solo solo cedit** in the meaning that whatever attached to the land belongs to it, plot no. 151 Block "R" supra with all its fixtures and fittings belongs to the owner of the land who is the Appellant herein.

The track TZA 2611 and its trailer TZA 2612 shall remain the property of the appellant as decreed by the trial court and not appealed by the respondent. The trucks which the appellant was given by her father shall remain her lawful property to the exclusion of the respondent.

In the same manner, I find that the properties registered in the names of the respondent or those owned by him through shares are not liable to distribution because no clear evidence was adduced by the appellant on the

specific shares owned by the respondent in each property because she admitted in evidence that some of the properties are owned by shares.

It is dangerous to distribute the unascertained shares as that might prejudice third parties and that would amount to condemning them unheard. The appellant is not even entitled to such respondent's shares merely because she was his wife. Distribution of matrimonial properties as rightly submitted by both parties is determined by the extent of contribution and not a mere marriage.

In the instant matter, the evidence shows that each party was busy with his/her own business. Therefore, although they were living together each was running his/her own business in his/her own name.

To make it safe, I find it that each should remain with his/her own property registered in his/her name.

In the final analysis, this appeal is allowed to the extent herein above stated. The parties having not pressed for costs I grant no costs to either party.

The right of further appeal to the Court of Appeal of Tanzania subject to the Laws and Rules governing appeals thereto is hereby explained.

It is so ordered.

MATUMA

JUDGE

13/10/2023

Court; Judgement delivery in the presence of the appellant in person and in the presence of the respondent with his advocate Mr. Kamaliza K. Kayaga.

MATUMA

JUDGE

13/10/2023