IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MATRIMONIAL CAUSE NO. 12 OF 2022

ALBERT RWEYEMAMU.....PETITIONER

VERSUS

ALELIO LOWASSA..... .....RESPONDENT

JUDGEMENT

31st August & 18th October 2023

Rwizile, J.

This petition is for divorce. The petitioner is praying for a decree of divorce, custody, and division of their matrimonial assets. But before getting where they are today, parties to this petition lived together as husband and wife. Their association started in 1996 when they met in India while pursuing their first degrees. When they came back to the country after studies, their relationship was manifested into a wedding at Mwenge Roman Catholic Parish in 2000. Due to their brilliance, they were all employed in the banking sector.

While the petitioner was employed by the Bank of Tanzania, the respondent was employed by Standard Chartered Bank.

All was well with their marriage life and successfully created a modern family of two children Julia born in 2001 and Robert who was born in 2008. Sometimes later, the petitioner left the Bank of Tanzania after securing a well-paying job and was transferred to Nairobi Kenya.

The respondent also followed her husband. A few months later, she was promoted by her employer and then forced to come back to Tanzania. It is this period of time when their marriage relationship got into trouble. The parties have for some time not lived together and have serious misunderstandings about repaying loans they acquired when purchasing a house at Mikocheni and also the high costs of paying for their children's education expenses. In turn, the petitioner got no more and so petitioned this court for orders.

Represented by Mrs. Magdalena Rwebangira learned senior counsel and Mr. Antipas Lakamu learned counsel, the petitioner raised three key issues which were agreed upon by the respondent's learned advocates namely Ndurumah Keya Majembe and Martin Godfrey Sangira and were adopted by the court in that;

i. Whether the marriage between the parties has broken down irreparably

ii. Whether, during the substance of their marriage, the parties acquired properties subject to division

iii. Whether they have a joint responsibility to maintain their children and to what extent

iv. To what reliefs are the parties entitled?

The hearing of this case was done by presentation of oral evidence from the Petitioner Albert Rweyemamu (Pw1) and the respondent Alelio Ngoyai Lowassa (Dw2). Final submissions were filed in time as scheduled.

Based on the law and evidence, it has been clear to me that the first issue should be affirmatively determined. The reasons for holding so are clearly stated by the parties in their evidence and submissions. To form an opinion that the marriage has been broken down beyond repair has never been an issue of the evidence of the parties alone. It is also a legal question governed by section 107 of the Law of Marriage Act- [Cap 29 R.E 2019] LMA. It provides that there must be evidence proving one or more of the following; adultery, sexual perversion, cruelty, willful neglect, and desertion among others. When the petitioner pleaded financial infidelity on the respondent, absence of love and desertion, the respondent was of the evidence that the petitioner walked away from his home and as he comes from Nairobi resides in the hotel. In all, they have testified that

they have not lived as husband and wife for a period that exceeds six years.

In their submissions, parties were in agreement by citing the case of **Tumaini M. Simoga vs. Leonia Tumaini Balenga**, Civil Appeal No.117 of 2022 CA, which held that in the absence of love, no marriage can stand. It was added by the petitioner along the same line that the case of **David Mayengo vs. Catherina Malembeka**, PC Civil Appeal No. 32 of 2003 had a similar position. I do not only agree with the above finding but am also bound by the case of **Tumaini M. Simoga (supra)**.

Indeed, even though the respondent broke down in tears when asked about whether their marriage could still stand, she was clear that it could not. It seems to me; that the parties lived apart for quite a long time and may have developed other relationships tearing apart things (love) that held their marriage together, it is no doubt falling apart. In terms of section 107 and the cases of **Tumaini M. Simoga(supra) and David Mayengo (supra),** I am bound to hold that having lost love, communication, and financial trust in each other, there is no way their marriage can remain standing. It is dissolved and the decree is issued.

Next is an issue of whether, during the subsistence of their marriage, parties acquired properties subject to division. This is also a legal issue. It has been submitted and parties have testified that they acquired properties subject to division. It was submitted by both parties that under section 114(1) of the LMA, the court may divide assets that were acquired by joint efforts of the parties. In a further submission, the famous case of **Bi Hawa Mohamed vs Ally Sefu [1983]** TLR 32, **Yesse Mrisho vs Sania Abdul**, Civil Appeal No. 147 of 2016, and the case of **NBC Ltd vs Nurbano Abdallah Mulla**, Civil appeal No. 283 of 2017 were referred by the petitioner. On the other side, the respondent referred to the case of **Tumaini M. Simon** (supra), where it was held that matrimonial assets that may be divided must be by joint efforts acquired by the spouses.

Basically, it is clear to me that before the court contemplates the division of the matrimonial assets, it must be sure that they are those properties acquired during the pendency of the marriage between the spouses. This premise should be followed by other properties, which though acquired before marriage, have been substantially improved or developed through their joint efforts. The position is in terms of section 114 (3) of the LMA, which states as hereunder;

For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts

It was testified by Pw1 that during their early years of marriage, they acquired three plots of land No. 672 Block F, undeveloped Plot No. 671 Block F, and Block 630 Blok F all at Tegeta. It was testified that they also acquired a house on Plot 13 Block A at Mikocheni which was purchased on loan, and block No. 287/6 which is a ranch at Misenye. On the contrary, the respondent does not in toto agree with this position. According to her evidence and submission, jointly acquired assets are Plot No. 13 Block A, a matrimonial house in Plot 630, and Block No. 287/6 which is a ranch at Misenye. The rest of the properties including house plot No. 762, Block F, at Tegeta, House No. 412 at Jangwani allegedly acquired in 1991, and a plot at Kigamboni named to belong to the petitioner.

Basically, marriage does not prevent any spouse from owning his or her own property. Proof of that is on the registered name. In terms of section 60 of the LMA, as submitted, there is a rebuttable presumption that a property registered in the name of one spouse belongs to him or her in exclusion of the other. In my considered view, however, all properties

acquired during the period of marriage belong to both parties regardless of the name, this is what makes them family assets in terms of subsection 3 of section 114 of the LMA.

Having said what I have said, with respect to the second issue, in terms of evidence, it is clear to me that three plots of land No. 672 Block F, undeveloped Plot No. 671 Block F and Block 630 Blok F all at Tegeta, a house on Plot 13 Block A at Mikocheni, block No. 287/6 which is a ranch at Misenye and a plot at Kigamboni were jointly acquired and therefore subject to division. On the plot/house No. 412 at Jangwani Beach, there is no evidence that the same was acquired when the marriage subsisted or that it was improved when in their union by the petitioner or from the family sources of funds.

Ancillary to the above, it has been held by this court, whenever asked to determine the issue of division, that contribution towards acquisition of the same is the masterpiece. It is also clear that contribution must not necessarily be in terms of money; work and service are basically counted as a contribution towards the acquisition of the same.

Despite what was prayed in the petition, in his evidence and submission, the petitioner asked this court to grant him a house at Mikocheni Plot No. 13 Block A and a house at Block 630 at Tegeta, the rest of the properties be left as the share of the respondent. To this end, he will be able to pay for the education of their children. Otherwise, the school costs for their children be equally paid.

Before determining the share of each party, let me deal with the third issue of whether both parties are responsible for the school expenses of their children. In reference to section 129 (1) and (2) of the LMA, as submitted by the respondent, it is the duty of a man to maintain his children. Maintenance, although not defined by the LMA, includes the basic needs of the child. Education is among the basic needs because principally, the development of the child includes getting educated. It was submitted by the respondent in terms of the case of **Rajab Frank vs. Mariam Christian**, Matrimonial Appeal No. 1 of 2020, where this court emphasized the duty of the man to maintain his children in terms of section 129 of the LMA.

I have to add here that real men cannot avoid this duty. It is not only traditional but also legal, that children belong to a man. Indeed, men have to stand on the side of duty.

On the contrary, by their very nature women pose on the side of advantage, it is traditionally so, even though a wave of change is taking place in the form of feminism. The law of marriage act therefore imposes a duty on the woman to maintain children in the absence of their father or may be because he is incapable of providing for them. This position, however, was proper in the 1970s, when the Law of Marriage Act was enacted. When it comes to issues about children, the LMA should not be read in isolation. In 2009, the Law of the Child Act, (LCA) [Cap 13 R.E 2019] was enacted. It followed therefore that section 129(2) of the LMA should be read with section 41 of the LCA, which provides a duty to a parent to maintain the children, in terms that a parent in respect of whom an order of parentage has been made, shall have a duty to contribute towards the welfare and maintenance of the child, to supply the necessities for survival and development.

It is not therefore true to the respondent that as long as the petitioner is alive, she is absolved from her duty to also contribute towards the maintenance of their children. I think, even though it is her moral duty to do so still the LCA provides tools to consider before making such an order. Among the tools stated under section 44 of the LCA, the court has to consider; the income and wealth of both parents of the child or of the

person legally liable to maintain the child, any impairment of the earning capacity of the person with a duty to maintain the child, the financial responsibility of the person with respect to the maintenance of other children and the cost of living in the area where the child is resident.

In this case, the petitioner asked for custody of Bob who is below the age of majority. But later, he was of the evidence that Bob is close to 15 and has the right to choose who to be in custody of. The respondent was of the view that she is best placed to have custody of the same even though he is at school in Nairobi with the petitioner. It seems to me, that in the absence of clear evidence as to why should the court change custody, it has to maintain the status currently prevailing.

Inclusion and before going to reliefs, as I said before, what determines shares in matrimonial assets, is the amount of contribution proved by the spouses. In this case, there is no direct evidence proving how much one contributed towards the acquisition of their family assets. The respondent claimed a lion's share in almost all assets. For instance, she has testified that she has been paying loans in the development of the two houses, i.e a matrimonial home at Tegeta and the house at Mikocheni. She believed her contribution to the two properties is 90% and 80% respectively.

But she has also said, that at about the same time, and particularly in 2020, she acquired her own assets without the contribution of the petitioner. I have said before that all that is acquired during the subsistence of the marriage belongs to the spouses, what matters is the contribution proved. The petitioner on his part took his wife as having not disclosed relevant information on the payment of loans and how rent was spent. He believes all that was acquired in his absence was from the family income contributed by all. In my considered view, there is no direct evidence linking the loans taken by the respondent to have totally and directly been injected into the development of the two houses. In the absence of direct evidence to prove so, this court takes it that all parties contributed towards the acquisition of the two properties.

Lastly, the following are reliefs to the parties;

i. Their marriage has been irreparably broken down; it is therefore dissolved by a court decree.
ii. The properties jointly acquired to wit plot No. 672 Block F, Plot No. 671 Block F, Block 630 Blok F all at Tegeta, a house Plot 13 Block A at Mikocheni, a plot at Kigamboni, and block No. 287/6 which is a ranch at Misenye, have to be shared pari-passu

iii. The remaining properties should be in terms of 40% to the petitioner and 60% to the respondent

iv. The petitioner has an absolute duty to pay for school expenses for their children but because all parties are earning highly per month, they should equally contribute towards school education and other expenses.

v. No order as to custody of Robert, it is left for him to choose where to live:

> I am considering the fact that he should not be disturbed to change custody because of his studies. Parties are civilized enough to consider his best interest in whatever decision they make and have to make sure he participates whenever possible when a decision affecting his life is about to be made by both parents.

vi. Each party is to bear its own costs.

ACK. RWIZILE
JUDGE
18.10.2023