IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MATRIMONIAL CAUSE NO. 01 OF 2020

ASHA SELEMANI MHINA ..... PETITIONER

VERSUS

ABDUL ALI FARAJI.....RESPONDENT

JUDGMENT

01/05/2023 & 28/06/2023

BWEGOGE, J.

The petitioner herein above-named has commenced matrimonial proceedings against the petitioner herein petitioning for divorce and distribution of the matrimonial properties, among others.

The brief facts of this case are as follows: The parties herein were married under Islamic rites on 01st September, 1992 and blessed with one issue. The duo had cohabited together peacefully, and acquired properties, until

2017 when strife marred their marriage. The centre of the controversy between the parties herein is the alleged extramarital relationship on the part of the petitioner of which she had hit the sky denying. Eventually, the petitioner left the matrimonial house in 2018, allegedly, having been kicked out by the respondent. The attempt to reconcile the parties herein proved futile. Hence, on 09th June, 2020, the National Muslim Council of Tanzania, commonly known as "BAKWATA" issued *talak* and referred the petitioner to the classical court to petition for divorce. Hence, the matrimonial proceeding herein.

The petitioner's case was buttressed by his sole testimony. Likewise, the defence case was constituted by the sole testimony of the respondent herein. In substance, both parties herein opined that their marriage has irreparably broken down and prayed for the dissolution of their marriage. It is the aspect of the distribution of matrimonial properties which has been viciously contested by the respondent. While the petitioner averred in her pleading and deponed in this court that there are jointly acquired properties liable for distribution, the respondent had vehemently denied the fact, contending that the enlisted matrimonial properties are, in fact, his personal properties, acquired before the marriage.

The petitioner and respondent herein were represented by Messrs Rajabu Mlindoko and Jumanne Fokasi Semgomba, learned advocates. The issues proposed by the above-named counsel and certified by this court for determination are as thus:

1. *Whether the marriage has irreparably broken down.*
2. *Whether the parties jointly acquired properties during the subsistence of their marriage.*
3. *To what reliefs are the parties entitled to.*

I would canvass the issues mentioned above sequentially commencing with the 1st issue. It is in the petitioner's statement that she was forced to vacate the matrimonial home, following the allegation of adultery in 2018. That it is over four years now that she has been separated from the respondent. The respondent subscribed to this fact. Likewise, it has been deponed by the petitioner that she filed her complaint to the Marriage Conciliatory Board in compliance with the law, namely, the National Muslim Council of Tanzania (BAKWATA) whereas the same failed to reconcile them and referred the matter to the classical court. The certificate issued by BAKWATA was admitted in evidence as exhibit P3. The said certificate entails that the Board had dissolved the marriage under Mohammedan law (Islamic rites), having the respondent issued talak which was not revoked on 24th July, 2019. Therefore, the Board

referred the matter to the classical court for the formal dissolution of marriage. These facts were not disputed by the respondent, though he shouldered the blame on the petitioner for their marriage breakdown.

I have directed my mind to the provision of section 107 (3) of the Law of Marriage Act [Cap. 29 R: E 2019] which provides viz:

Section 107:

> "(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 this 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.*

The provision of section 107 (3) of LMA reproduced above mention the three conditions precedent for a decree of divorce to issue, namely;

1. Parties should have been married in Islamic form.
2. Board has certified that it has failed to reconcile the parties.
3. Either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law.

It is needless to point out that the certificate has made it clear that the respondent has issued talak which he didn't revoke and the Board consequently, dissolved the marriage under Islamic law. These facts alone, sufficiently dissolve the marriage between the parties herein under the Islamic law.

Notwithstanding the above, the fact that the petitioner has left the matrimonial house over four years, alone, is sufficient to incline this court to issue decree of divorce under section 107 (2)(e) of the Law of Marriage Act. Therefore, I find that the marriage between the parties herein has irreparably broken down. The 1st issue is hereby answered in affirmative.

I proceed to tackle the 2nd and contentious issue in this case. The petitioner had averred in her pleading and further deponed that during the subsistence of their marriage, they had jointly acquired properties namely;

1. House No. 21 Kongo Street, Kariakoo,
2. House No. 11 Makanya Street – Magomeni Area.
3. House No. 23 at Kihonga Street, Magomeni Mapipa Area.
4. House located at Majani Mapana Street, Bagamoyo.
5. Farm at Kibaha kwa Mathias with two houses.

6. Farm at Nyanza – Bagamoyo Area.
7. Two cars namely, Nissan Extrail and Toyota Noah.
8. House appliances and furniture.

When cross-examined pertaining to the validity of her claim, PW1 had conceded that she found the petitioner in possession of House No. 21 Kongo Street, Kariakoo and House No. 11 Makanya Street – Magomeni Area. That the remaining properties were acquired by their joint efforts during the subsistence of marriage. Further, PW1 clarified that the houses at the Majani Mapana Street in Bagamoyo; Kihonga – Magomeni Mapipa; and the farm at Kibaha kwa Mathias with two houses, were acquired during the subsistence of their marriage. And, PW1 enlightened this court in that the farm at Kibaha was purchased from her grandmother whereas the house at Majani Mapana Street at Bagamoyo, was purchased from the respondent's aunt, namely, Bi Sophia Majee. Likewise, PW1 had informed this court that the vehicle make Nissan Extrail was purchased by the respondent whereas the vehicle make Toyota Noah was her personal belonging.

During the re-examination, PW1 stated that when she was married to the respondent, their residence (House No. 22 at Kongo Street in Dar es Salaam) was built with mud. It was reconstructed with bricks during the

subsistence of their marriage. And, it was during the subsistence of their marriage that the servant quarter was built to the main house at Makanya Street, Magomeni Mapipa, under her supervision. However, PW1 conceded the fact that she was a mere housewife when the respondent acquired the matrimonial properties. It wasn't until 2007 that PW1 started doing business and purchased the vehicle mentioned above which is in her possession.

On the other hand, the respondent (DW1) herein vehemently disputed the claim that the properties in his possession were jointly acquired during the subsistence of the marriage with the petitioner. He contended that the properties enlisted were acquired prior to his marriage with the petitioner. DW1 conceded that the properties namely, house No. 49 Block Y, Magomeni area; The Farm at Kibaha and house No. 21 located at Kongo Street Kariakoo, belong to him. However, he contended that the house at Magomeni above mentioned was built before the marriage with the petitioner; the farm situated at Kibaha was acquired without contribution from the petitioner; and the house at Kongo Street, Kariakoo was inherited from his deceased father. In respect of the house at Bagamoyo, DW1 contended that the house belongs to one Kassimu Saidi, not his

personal property and the farm at Nyanza Bagamoyo, belongs to the family of his uncle.

Otherwise, DW1 deponed that he has no title deed of any of the properties mentioned above, as he lost the same. He attempted to tender a loss report to prove the fact whereas the petitioner's counsel objected on the ground that the purported exhibit was not annexed to the pleading and, or enlisted among the documents intended to be relied upon by the same. The objection was sustained by this court.

The counsel for the respondent filed a final written submission to augment the defence made by the respondent. It is the submission made by the respondent's counsel that the petitioner herein was a mere house wife who was neither employed nor a businesswoman to have earned income and be able to contribute to the acquisition of matrimonial properties. That the petitioner failed to provide evidence of her contribution to the acquisition of matrimonial properties. Hence, this court cannot grant equal distribution based on verbal prayer.

Further, the defence counsel reiterated in his written submission that the property at Magomeni (House No. 49, Block "Y" Magomeni - Makanya) was inherited by the respondent from his father; the farm at Kibaha

belongs to the respondent's daughter living in England, who has built a house thereof; and the property at Kongo Street, Kariakoo, constitutes the estate of the respondent's deceased father. And he reiterated that the property (house No. 23 Kihonga Street Magomeni) and farm at Nyanza Bagamoyo, belong to the respondent's family.

The counsel concluded his submission by opining that this court has no power to distribute the properties that don't belong to the respondent.

From the outset, I find it pertinent to put it clear that the submission made by the respondent's counsel in that the farm at Kibaha belongs to the respondent's daughter living in England, and the property at Kongo Street, Kariakoo, constitutes the estate of the respondent's deceased father are facts which were neither pleaded nor deponed. Therefore, they are matters which featured in the submission from the bar.

To the contrary, it is in the testimony of DW1 that the properties at Kongo Street, Magomeni (House No. 49 Block "Y" Magomeni - Makanya) and a farm at Kibaha are his belongings. He had ascertained that the property at Kongo Street, Kariakoo were inherited from his deceased father and the property at Makanya Street, Magomeni was acquired before marriage

and the farm at Kibaha was purchased without contribution from the petitioner.

It is a rule of law that parties are bound by their pleading. See the cases; **Martin Fredrick Rajab vs. Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434; **James Funke Ngwagilo vs. Attorney General** [2004] TLR 161; **Lawrence Surumbu Tara vs. The Hon. Attorney General and 2 Others**, Civil Appeal No. 56 of 2012, CA (unreported); and **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453. Specifically, in the case of **Makori Wassaga vs. Joshua Mwaikambo & Another** [1987] TLR 88 the Court expounded: -

> *"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."*

And, in the case of **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875 the apex Court opined:

> *We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.*

Therefore, based on the above revisited principle, I would ignore the facts raised by the respondent's counsel in his closing submission which were not pleaded neither deponed by the respondent.

Further, I find it pertinent to address another matter raised by the respondent's counsel in that the petitioner herein was a mere housewife who was neither employed nor a businesswoman to have earned income and be able to contribute to the acquisition of matrimonial properties. That the above fact, coupled with the petitioner's failure to provide evidence of her contribution to the acquisition of matrimonial properties disentitled her to the distribution of the matrimonial properties claimed for. The assertion by the respondent's counsel above is patently misconceived in the eyes of the law. The provision of section 114 of the Law of Marriage Act provides as thus:

> *"(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce,* ***to order the division*** *between the parties of* ***any assets acquired by them during the marriage*** *by* ***their joint efforts*** *or to order sale of any such asset and the division between the parties of the proceeds of sale.*

(2) In exercising the power conferred by subsection (1), the court shall have regard to –

(a) the customs of the community to which the parties belong;

(b) the extent of the contributions made by each party ***in money, property or work*** *towards the acquiring of the assets;*

(c) any debts owing by either party which were contracted for their joint benefit; and

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) 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.*

[Emphasis added].

The provision above is clear in that the court has power to order the division of matrimonial properties acquired during the marriage, subsequent to granting decree of divorce, of the assets acquired by them during the subsistence of marriage by their joint effort based on the extent of their contribution by each party**.** The term extent of contribution encompasses contribution in terms of "**money," "property"** or **"work"** towards the acquisition of the assets. And, it is loudly provided that 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**. See also the case of **Yesse Mrisho vs. Sania Abdul** (Civil Appeal No. 147 of 2016) [2019] TZCA 597.

In the case of **Bi Hawa Mohamed vs. Ally. Seif** [1983] TLR 32, the Apex Court appositely expounded:

> *".....since the welfare of the family is an essential component of the economic activities of a family man or woman. So, it is proper to consider* ***contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets****."* [Emphasis mine].

And, it was opined:

> *"" ..... we are satisfied that the words "****their joint efforts****" and "****work towards the acquiring of the assets****" have to be construed as embracing the domestic "****efforts****" or "****work****" of husband and wife."* [Emphasis mine].

In the same vein in the case of **Bibie Maulidi v. Mohamed Ibrahim** (1989) TLR162, the Apex court opined that: -

> *"Performance of domestic duties amounts to contribution towards acquisition but not necessarily 50%."*

See also same view in the cases; **Yesse Mrisho vs Sania Abdul** (supra); and **Helmina Nyoni vs Yeremia Magoti** (Civil Appeal No. 61 of 2020) [2022] TZCA 170.

Therefore, in view of the foregoing, the petitioner's domestic work as housewife, in itself, amounts to her contribution towards the acquisition of matrimonial properties and entitles her to shares thereof, regardless of the fact that she didn't directly make a financial contribution for their acquisition.

The petitioner had deponed that their former residence (House No. 22 at Kongo Street in Dar es Salaam) was built with mud. It was reconstructed with bricks during the subsistence of their marriage. And, it was during the subsistence of their marriage that the servant court was built to the main house at Makanya Street, Magomeni Mapipa, under her supervision. These facts were not expressly controverted by the respondent in his defence.

The petitioner had further provided details that the houses at Majani Mapana Street in Bagamoyo, Kihonga – Magomeni Mapipa, and the farm at Kibaha (comprising two houses thereof), were acquired by their joint efforts during the subsistence of their marriage. It was further deponed

by the petitioner that the farm at Kibaha was purchased from her grandmother whereas the house at Majani Mapana Bagamoyo area was purchased from the respondent's aunt, namely, Bi Sophia Majee. In the same vein, failure by the petitioner to explain how the farm at Nyanza within Bagamoyo was obtained, clearly depicts that the said farm is not part of matrimonial properties jointly acquired.

I, therefore, refuse the statement made by the respondent in that houses located at Majani Mapana Street in Bagamoyo and Kihongaa Street Magomeni Mapipa, belongs to his relative. This fact was not proved. And the fact that the respondent attempted to establish that he lost all his title deeds in respect of the properties under his possession, lead this court to infer that the respondent has deliberately intended to hide the truth pertaining to actual ownership of the properties liable for distribution. I need not reiterate the fact that the attempt by the respondent's counsel to establish that the farm at Kibaha is under ownership of another person, contrary to the respondent's testimony, likewise, was intended to mislead this court.

For the foregoing premises, I am of the considered opinion that the properties namely, A house at Kihonga Street; a house at Majani Mapana Street; and a farm at Kibaha with two houses were acquired by joint

efforts during the subsistence of marriage between the parties herein. And, the properties namely, the house at Kongo Street, Kariakoo; and the house at Makanya Street at Magomeni, were obtained by the respondent prior to his marriage with the petitioner though improved during their subsistence of marriage through their joint efforts. The remaining property namely, a farm at Nyanza at Bagamoyo, likewise, is not matrimonial property. The vehicles under possessions of the parties herein are their personal properties. The 2nd issue is hereby answered in the affirmative.

Now, I would conclude my discuss with the last issue as to reliefs which parties hereto are entitled.

In her 1st and 2nd prayer, the petitioner prayed for declaration that the marriage is broken irreparably; and decree of divorce. This court has found that the marriage between the parties herein has broken beyond repair. Hence, the decree for divorce should issue, as I hereby do.

In her 3rd prayer, the petitioner prayed for equal distribution of matrimonial properties. This court found that the parties herein have jointly acquired properties namely, the house at Kihonga Street; house at

Majani Mapana street in Bagamoyo; and a farm at Kibaha area comprising two houses.

Likewise, this court found that the properties namely, the houses at Kongo Street, Kariakoo; and Makanya Street, at Magomeni, were obtained by the respondent prior to his marriage with the petitioner though improved during the subsistence of marriage through the joint effort of the parties hereto.

Therefore, the petitioner should be allowed to retain the whole property namely, a house at Kihonda Street; and half share (50%) of the properties namely, a house at Majani Mapana area in Bagamoyo and a farm at Kibaha area comprising two houses. And, each party shall retain the vehicle in his/her possession.

In her 4th prayer, the petitioner prayed to be reimbursed the costs incurred to rent a house to reside during the separation. She prayed for payment of TZS 7,200,000/. The evidence tendered, a letter issued by BAKWATA headed to OCD Msimbazi Police Station (exhibit P.3) indicates that the petitioner was forced to vacate the matrimonial house before 12/07/2018, the date scheduled for hearing of the dispute by the Board (BAKWATA). The rent paid, as per exhibit P1 (lease agreement) was TZS. 300,000/=

per month. This court is of the considered opinion that the petitioner is entitled to be reimbursed the costs incurred for renting residence from the period she was forced to vacate the matrimonial house until the date BAKWATA issued the divorce. The petitioner should be refunded TZS. 3,600,000/=, the expenses incurred for renting a house within the period of one year.

Lastly, the petitioner prayed for costs of this suit. I am of the view that though the successful party is entitled of costs, yet, considering that this is the matrimonial proceedings, it would be prudent that each party to shoulder his/her own costs of litigation.

Given the foregoing, this court finds that the petition herein succeeds. It is hereby ordered as under.

1. The marriage between the parties herein is irreparably broken down. Hence, the decree for divorce is hereby issued.
2. The petitioner should be allowed to retain the whole property namely, **a house at Kihonga Street**, **Magomeni Mapipa** and half share (50%) of the properties namely, **a house at Majani Mapana Street in Bagamoyo** and **a farm at Kibaha area** comprising two houses.

3. Each party shall retain the vehicle in his/her possession.
4. The petitioner to be reimbursed cash money to the tune of TZS. 3,600,000/= being expenses incurred for renting residence having forced to vacate the matrimonial house.
5. Each party to bear his/her own costs.

So ordered.

DATED at DAR ES SALAAM this 28th June, 2023.

O. F. BWEGOGE
JUDGE