

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
CIVIL APPEAL NO. 50 OF 2022

(Originating from Matrimonial Cause No. 4 of 2021 of Kinondoni District Court).

ELIMBINZI ELISARIA MLAY.....APPELANT

VERSUS

MARYSTELLA KISANGA.....RESPONDENT

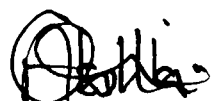
JUDGMENT

Date of last order: 30/08/2023
Date of Judgment: 06/09/2023

OMARI, J.

The Appellant, Elimbinzi Elisaria Mlay came to this court because he is aggrieved by the whole judgment and decree of the Kinondoni District Court in Matrimonial Cause No. 4 of 2021. He preferred the appeal on three grounds to wit:

1. That the district magistrate erred in law and in fact for not considering the evidence of the parties and proceeded to refuse to grant divorce.



2. That the district magistrate erred in law and in fact for not considering the evidence adduced in respect of the contribution of the matrimonial property.
3. That the district magistrates erred in law and in fact for entertaining new exhibits while the Petitioner had already closed his case.

It is on the basis of this that the Appellant prayed for orders that the decision of the district court be quashed and set aside; a decree of divorce be issued according to the evidence available. Further the Appellant prayed for the matrimonial property if acquired during subsistence of marriage be divided according to available evidence and any other order(s) this honourable court deems just to grant.

On the date set for hearing of this Appeal, the Appellant had the services of Wilson Mafie and the Respondent had the services of Eben Silayo both being learned advocates.

Submitting on the grounds of appeal Mr. Mafie stated that the first ground concerns divorce as it is provided for under section 107 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). He submitted that section 107 (2) (e) of the LMA provides one of the grounds of divorce is wilful desertion and

in this matter the record shows that the Respondent left her matrimonial home in 2019 up to the time the matter went to trial in 2021 therefore occasioning desertion. He averred that it is his client's belief that the district court did not properly construe and consider the evidence since the Appellant had been deserted by the Respondent and the only recourse for him is divorce. He prayed for this court to intervene and grant the divorce.

Submitting on the second ground which concerns the distribution of matrimonial properties, the learned counsel stated that when the district court was delivering its judgment it stated all properties are matrimonial properties and both parties have rights over them, this can be seen on page 10 of the judgment. Counsel went on to state that it is on the record and the Respondent testified that when she was married she found her husband with the house which she moved into after the marriage. He went on to submit that there is no evidence as per section 110 (1) of the Evidence Act, Cap 6 RE 2022. He stated that this court has made decisions in various cases including that of **Nelson Machibya v. Pendo Lukomanya** PC Matrimonial Application No. 5 of 2018. Counsel argued that the trial court erred in distributing the matrimonial properties while it did not grant the divorce in

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the first place, which is wrong and he prayed for this court to intervene on the same.

On the last ground of appeal, counsel stated that during the hearing the Respondent brought exhibits while the Petitioner had closed their case and in his view the district court erred to entertain the new exhibit as it is contrary to Rule 29 (2) of the Law of Marriage Matrimonial Proceedings Rules which provides for the application of the Civil Procedure Code, Cap 33 RE 2019 (the CPC) and in Order XIII Rule 1 (2) and 4 (1) the CPC provides for production of documentary evidence at first hearing.

Counsel ended his submission by beseeching this court to allow the appeal for the court below had erred.

When it was his turn, Mr. Silayo began his submission by stating that he objects and is contesting the Appellant counsel's submission. He stated that on the first ground of appeal the Appellant failed to adduce evidence for the court to make a determination of divorce. Counsel referred to page 7 of the district court's judgment where the magistrate noted that the Petitioner (who is now the Appellant) was unable to produce evidence that the marriage can be broken. He went on to state that it was the Petitioner who had the

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responsibility of proving that the two had not lived together and other than his own oral evidence he had no corroborating witnesses to prove this. Counsel concluded on this ground by stating that the trial court was correct in finding out that the marriage had not irreparably broken down and insisted that the Respondent still loves her husband and does not want the marriage broken.

On the second ground of appeal counsel submitted that despite what the Appellant's counsel submitted the trial court just summed up the evidence and did not divide the properties, it concluded that the Respondent had contribution in the acquisition of the properties which is not dividing the properties.

Submitting on the last ground of appeal Mr. Silayo stated that what the Appellant's counsel cited was the general rule as regards to admission of evidence, and the same Order XIII Rule 4(2) of the CPC allows for admission of documentary evidence at any stage where the person seeking to do so shows good cause. Counsel went on to state that the record shows a Ruling on the same by the magistrate and since the trial court was satisfied with the reasons it allowed the documentary evidence.

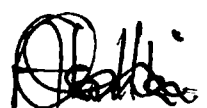
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In the counsel's view the trial court did not error to accept the evidence further the said documents show the Respondent's contribution. He then prayer to have the Appeal dismissed with costs and for the decision of the district court to be upheld so that the couple can continue to live happily in their marriage.

By way of rejoinder Mr. Mafie argued that Order XIII R (2) allows admission of documentary evidence at any stage however the same seeks for the court to only do so if good cause is shown, in the circumstances there should have been an Application seeking to produce the said evidence before doing so and not the way the trial court did it. He finished off by praying for the appeal to be allowed.

Having considered the parties submissions for and against this appeal there is only one issue for my determination, that is whether the appeal is meritorious and in doing so I shall confine myself to the issue of the marriage between the parties, whether or not it is irreparably broken down and if so what is the way forward for the parties.

From the trial court's record, the background to this matter is quite simple; the Appellant and the Respondent, Marystela Kisanga contracted a marriage

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in the Christian form on 25 November, 2017 soon thereafter problems began and in March 2019 the Respondent left the matrimonial home to date.

The Appellant testified in the trial court that when he reported the matter to the Marriage Conciliatory Board (the MCB), the Respondent did not attend when summoned and the MCB issued Form No. 3 stating that it had failed to reconcile the parties. He thus, petitioned for divorce vide Matrimonial Cause No. 5 of 2021.

The two are not blessed with any children and while the Petitioner testified that after a week of the honeymoon his wife was in short not performing her wifely duties and would disappear without telling him where she went and come back home late hours. He also testified that his new bride was asking him to add her name to the house they lived in and that she was having extra marital affairs.

Conversely, the Respondent testified to have enjoyed marital bliss for a couple of months then the Petitioner began getting upset and angry over minor things and he would beat her for the same minor things or for no reason. According to her testimony, she reported this state of affairs to the

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parents who reconciled the parties and back to live together however, the beatings and verbal abuse from the Petitioner continued.

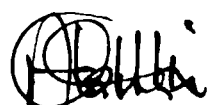
It is also in the Respondent's testimony that attempts at reconciliation by relatives and by the Church were all in vain. She stated that she went to her sister's house but did not stay there for long. She further testified that she was not ready for the divorce as there was no genuine reason for the marriage to break down irreparably and that she still loves her husband.

The trial court framed three issues wit:

- i. Whether the marriage between the parties is broken down irreparably.
- ii. Whether there are matrimonial assets acquired during the marriage.
- iii. To which reliefs are the parties entitled to.

When canvassing the first issue the trial magistrate was of the considered opinion that the Petitioner failed to prove genuine reasons for the marriage to be declared broken down irreparably. He cited section 107 of the LMA wherein evidence that a marriage has broken down is provided for.

The learned magistrate went on to explain that there is nothing in the Petitioner's testimonies that tallies with the said provision in so far as proving

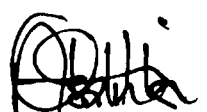
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that the marriage is irreparably broken down. He concluded that there is no evidence to prove that there are grounds for the marriage to be considered irreparably broken down.

As regards to the second issue which also relates to the second ground of appeal; the magistrate cited section 114 of the LMA, the cases of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 and **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 then went on to state that the Respondent has rights over the matrimonial assets which are the house and plots as long as they were acquired during their marriage.

And, on the last issue the learned magistrate found that the said Petitioner did not prove his claims against the Respondent on balance of probabilities therefore the marriage is not broken down, he then dismissed the Petition.

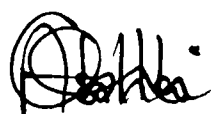
Perhaps it is best to begin with where it all started the Petition. On paragraph 5 of the Petition the Appellant stated that their marriage was not a happy one. Then on Paragraph 6 went on to list a number of what he termed as matrimonial misdeeds ranging from desertion since 2019, extra marital affairs, lack of communication and that he does not know his wife's

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whereabouts. In the Respondent's Answer to the Petition which she wrongly named Reply she disputed the contents of paragraph 5 and stated that the allegation of desertion from the matrimonial home was occasioned by the Petitioner chasing her from the home.

During trial the Respondent testified that after leaving the matrimonial home she had lived with her sister for 8 months then went on to her brother's house then to rent a house at Bunju. She also testified that in her opinion the MCB did not consider her side of the story they only considered the Appellant's which is lies then went on to state she loves her husband and there was no reason for the marriage to be broken down. She also disputed the allegations of extramarital affairs and noted the lack of communication. In her Answer to the Petition as well as during testimony she stated that the disputes and violence were actuated by the fact that they had no children and the Appellant was alleging the Respondent could not bear children.

During cross examination the Appellant is recorded to have said he does not have other reasons for divorce other than what he stated in his testimony, it would seem the Appellant was not amiable to reconciliation whether by the family or the church. She also averred that should the court deem it fit to break the marriage then there be a discussion of the matrimonial assets

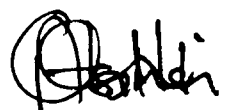
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and prayed for maintenance from the date she left the matrimonial home to date of hearing.

The testimony of DW2 supports the Respondents allegations of physical abuse. In DW2's testimony the Respondent went to her house with bodily injuries in April of 2019 stating that she was beaten by her husband. She also supported the Respondents testimony that the Petitioner was not amenable to reconciliation. DW2 stated that she wanted the court to do justice according to the law, like division of matrimonial assets.

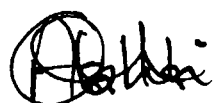
The learned trial magistrate when finding the first issue in the negative cited section 107 of the LMA which provides evidence that a marriage has broken down. Section 107 (1) and (2) provides as follows:

(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—(a) unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and (b) have regard to the custom of the community to which the parties belong. (2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any

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such matter shall not entitle a party as of right to a decree—(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest; (b) sexual perversion on the part of the respondent; (c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage; (d) wilful neglect on the part of the respondent; (e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful; (f) voluntary separation or separation by decree of the court, where it has continued for at least three years; (g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed; (h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or (i) 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.

In reaching the decision it reached the trial court was of the view that the Petitioner had failed to adduce evidence on any of the above listed grounds.

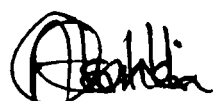
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I am at this juncture eager to pause and consider what this court has decided in the case of **John David Mayengo v. Catherina Malembeka**, PC Civil Appeal No. 32 of 2003. In the said case this court was of the view where love disappears between those in marriage, no magic wand can be waved to make a party love a person they no longer have that emotion for, it held:

*Marriage being a voluntary union of a man and a woman intended to last for their joint lives., it is the parties themselves who are the best judges on what is going on in their joint lives. **A crucial ingredient is love. Once disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him.*** (emphasis supplied)

In this Appeal the parties are not in agreement as to their feelings towards each other. The Appellant wants a divorce and the Respondent even in this appeal declared her love for her husband. This is perhaps what makes the case complicated.

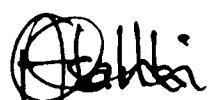
Nonetheless, it is my considered view that had the trial court considered the circumstances of the parties in this appeal, as they adduced in evidence it

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would have made a decision that it was futile to compel them to live together as spouses for it is evident that there is no more love on the part of the Appellant, and even for the Respondent it is not clear how after suffering the beatings which she testified and brought on DW2 to support her testimony she is still declaring her love for the Appellant. What is interesting is the fact that DW2 is recorded to have stated that she hopes the court does justice to the law like division of matrimonial assets as depicted on page 29 of the typed trial court proceedings. This in a manner cements the statement by PW2 who is recorded to have stated that the two should be divorced on page 15 of the typed trial court proceedings.

As alluded to earlier, what is complicated about this case is that the parties do not agree on the fate of their marriage, however if one chooses to be practical even the Respondent has to be asking herself having left the matrimonial home in April of 2019 to date is the said marriage still viable regardless of the circumstances that led to her leaving the said home.

In the case of **Tumaini M. Simoga v. Leonia Tumaini Balenga**, Civil Appeal 117 of 2022) the Court Appeal cited with approval the **John David Mayengo v. Catherina Malembeka** (supra) case which basically means a court when faced with a situation akin to the present appeal it should

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consider the parties circumstances before denying them divorce for at least one of them no longer has interest with the marriage while the other has left the matrimonial home. In an earlier case of **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293, the Court of Appeal held that:

'It is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be the deserter. It is imperative for there to be conduct which amounts to dismissal from the consortium.'

Based on the above, it becomes obvious that this marriage is no longer viable and nothing can be done to force the one who no longer wishes to remain in the union to do so as opposed to what the trial court concluded. That being the case, and in consideration of the above cited authorities, this court finds that granting divorce is inevitable in the circumstance of this case as parties' marriage is broken down beyond repair. I therefore proceed to grant decree of divorce to the parties.

Upon granting divorce, this court is inclined to discuss subsequent orders. From the records and testimony by the Respondent, it is the house in Bunju that was introduced as matrimonial property which the Appellant is arguing the trial court was wrong in considering the same as matrimonial property.

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Before delving any further, I wish to refer to section 114 (1) of the LMA which states:

'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 the sale of any such asset and the division between the parties of the proceeds of sale.'

The section is clear that it is upon or subsequent to granting a decree of separation or divorce that the court can order division of any assets that are acquired by the couple jointly during their marriage. Further to this section 114(2) of the LMA provides in part as follows:

*'In exercising the power conferred by subsection (1), the court shall have regard to—(a)...(b) **the extent of the contributions made by each party in money, property or work towards the acquiring of the assets** (c) ...(d)...and subject to those considerations, shall incline towards equality of division.'* (emphasis supplied)

In the trial courts record the Appellant is averring that the Respondent had no contribution to the asset, that is the house in Bunju she has referred to as matrimonial property. Other than on page 25 of the typed proceedings

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where the Respondent is recorded to have testified about various transactions in the form of money transfers from the Appellant into her bank account stating that some of the money was for the construction of the house without stating what sort of construction exactly albeit she herself had already said the Appellant had built the said house which they went to live in after their honeymoon.

When one scrutinizes the record further they can see that it is perhaps DW2's testimony that the said house changed over time from the semi-finished house she saw on her first visit to a finished house she saw in her subsequent visits. However, this testimony did not in any way or form detail or provide evidence of the Respondent's contribution to the said house or the subsequent changes.

On page 8 of the judgment the learned trial magistrate after quoting section 114 (3) of the LMA and the case of the **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra*) and that of **Yesse Mrisho v. Sania Abdu** (*supra*) concluded as follows:

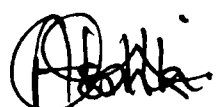
'Therefore, in the light of the above it is clear that the Respondent has rights over the matrimonial assets which are the house and plots of land as long as they both the Petitioner and him (sic) they (sic)



acquired during their marriage time (sic), and the issue of the Petitioner to claim (sic) that the wife doesn't contribute anything the properties (sic) is just like a trick to exploit her rights over the matrimonial assets they acquired together in their marriage.'

This conclusion and the paragraphs preceding it is problematic on three levels; the first being that the learned magistrate did not grant a divorce decree or an order for separation, it is thus, not clear why they chose to venture into the issue of division of matrimonial assets. The second is the reliance of section 114(3) to explain improvements that the Respondent did not testify or adduce evidence on.

Lastly and this hinges on the third ground of appeal, there is nothing in the whole of the proceedings as regards to the exhibits tendered by the Respondent on her contribution to the said matrimonial properties. Moreover, during this Appeal the counsel for the Respondent submitted that the alleged new evidence was admitted after determination of the objection by the Appellant and the court delivered a Ruling regarding the same which allowed them to admit the evidence. The record does not support any of these averments. In my considered view the ground of appeal is not

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supported by the record and therefore brings a new matter at appeal stage. In that regard the last ground of appeal cannot be entertained.

All the same when one looks at the available record the Respondent failed to adduce evidence of her contribution to the acquisition or improvement of the said house. I will not comment on the plots that the trial court referred to as the Respondent did not list them as matrimonial properties. This being the case I am of the considered opinion that the said house in Bunju is not a matrimonial property. Thus, the second ground of appeal is found to be meritorious.


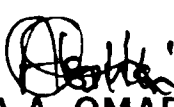
The complaints of the Appellant in this court have merit. Consequently, this appeal is allowed to the extent explained above. The decision of the trial court is quashed and set aside. For purpose of clarity, this court concludes as follows:

1. The marriage between the Appellant and the Respondent has irreparably broken down and a decree for divorce is subsequently issued.
2. No order as to division of matrimonial properties is made.

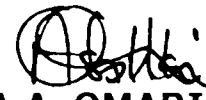
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Considering the relationship between the parties to this matter, no order for costs.

It is so ordered.

 
A.A. OMARI
JUDGE
06/09/2023

Ruling delivered and dated 06th day of September, 2023.


A.A. OMARI
JUDGE
06/09/2023