

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

MATRIMONIAL CAUSE NO. 01 of 2023

ELISIMBO SHADRACK NATAI PETITIONER

AMANDA JANE ELISIMBO NATAI RESPONDENT

JUDGMENT

28/11/2023 & 31/01/2024

SIMFUKWE, J.

The Petitioner and the Respondent lawfully contracted a Christian marriage on 25th April 2009 at Moshi in Kilimanjaro Region. Their marriage was blessed with two issues: Chase and Cody Elisimbo Natai who were born in 2009 and 2012 respectively.

It has been alleged by the Petitioner in his petition that they lived a very happy life until 2018 when the respondent escaped with both children to Australia. Since then, the respondent has totally deserted the petitioner and refused to come back to Tanzania with the children. It has been

averred that the respondent had never communicated any matrimonial problem to the petitioner and the petitioner had no reason to believe that their marriage had any irreconcilable difference apart from normal matrimonial differences. Their separation has lasted for four years and there is no hope that the respondent will come back to her matrimonial home in Tanzania. He stated further that their marriage has broken down irreparably and a certificate dated 02nd December 2022 was issued by the Marriage Conciliation Board to that effect.

The Petitioner stated further that through joint, mutual and equal effort, the couple acquired the following properties:

- a) A safari company by the name of African Scenic Safaris;
- b) Volunteer Hostel by the name of Hostel Hoff;
- c) Empty land situated at Weruweru;
- d) A residential house in Australia; and
- e) Savings of over \$ 450,000 in accounts opened and operated in Australia.

He proposed that the court orders division of the aforesaid assets in the following manner:

- a) The Petitioner keeps all the properties situated in Tanzania which are:

- i. Safari Company by the name of African Scenic Safaris;
 - ii. Volunteer Hostel by the name of Hostel Hoff;
 - iii. Empty land situated at Weruweru; and that
- b) The Respondent keeps the house situated in Australia which is more valuable than the properties in Tanzania and due to the fact that the Respondent has no intention of coming back to Tanzania.
- c) The savings in Australia be equally divided;

Wherefore, the Petitioner prays for judgment and decree against the Respondent for:

- a) Divorce;
- b) Shared custody of the issues of marriage Chase and Cody;
- c) Equal visit rights;
- d) Non-molestation of the Petitioner;
- e) Any other relief that this court may deem fit and appropriate to grant

Advocate Bashir Ibrahim Mallya replied the petition for the respondent. He noted most of the facts and added that, the petitioner used to harass the respondent, he was extremely controlling, bullying and even hiding the travelling passports of children (Chase and Cody). He contended that, the respondent did not desert the matrimonial home on her own as she

was harassed, bullied and extremely controlled by the petitioner which led her to run to Australia for her safety and of the children.

Concerning division of matrimonial assets, the respondent requested that the Petitioner makes open the business and personal accounts for division as the petitioner seeks division of un-existed personal account of the respondent. Also, the respondent prayed for an order that all assets in Tanzania be valuated including the personal account of the petitioner before the same are subjected to division.

The respondent prayed for the following orders and reliefs:

- a) A declaration that the marriage between the petitioner and the respondent is broken down beyond repair.
- b) A court decree for dissolution of the marriage.
- c) Court to uphold the decision of the Juvenile Court of Moshi at Moshi on custody of children.
- d) An order for valuation of all assets in Tanzania before division of matrimonial assets in equal share including the profits of the two businesses for the last 4.5 years.
- e) An order against the petitioner for half contribution of maintenance for the children including school fees, medical care, extra-curricular

activities and other compulsory expenses.

- f) An order restraining the petitioner for holding the respondent or the children whenever they visit Tanzania.
- g) An order for non-molestation of the respondent and children.
- h) Any other relief that this court shall deem fit and just to grant.

When the matter was set for hearing, the following issues were framed:

1. Whether marriage between the petitioner and the respondent has broken down beyond repair.
2. Which party is entitled to custody of children?
3. Whether there is any matrimonial property to be subjected to division.
4. Whether the decision of the Juvenile Court of Moshi at Moshi in Misc. case No. 10 of 2019 should bind this court on the issue of custody and maintenance of children.

Both parties had no witnesses to call, they testified themselves.

The petitioner testified on oath as PW1. He stated among other things that, on 25/04/2009 he married Amanda (the Respondent). Thereafter, they lived as husband and wife at Moshi Shanty town. They were blessed with two issues. That, in 2018 the respondent left to Australia with kids without his consent. She never came back and never brings the kids back

to Tanzania. PW1 did his best to convince her to come back home, unsuccessfully. He informed this court that, meanwhile, they are no longer husband and wife as there is no more love. He prayed this court to end the marriage between them. Also, he prayed for custody of the two issues of marriage Chase and Cody. Moreover, he prayed for division of what they earned together.

RW1 Mrs Amanda Jane Elisimbo Natai gave her testimony on oath. She said that, she met the petitioner in 2008 and they were married on 25th April 2009. Their marriage was celebrated in Moshi, Tanzania.

Contesting the accusation against her, the respondent stated that, in 2018 she left with children because of physical abuse to her and their elder child who was being hated by Elisimbo (Petitioner). If RW1 intervened, the Petitioner would turn on her. In May 2018, RW1 travelled to Australia to do promotion of their business. Few weeks later, the Petitioner was supposed to take the children to Australia. However, RW1 was informed that the Petitioner was not going there. When the petitioner refused to take the children to Australia for holiday, RW1 flew back to Tanzania. Then, the Petitioner told RW1 that she will never go back to Australia unless he gave her permission. RW1 discovered that the

Petitioner had hidden children's passports. The control became so bad that RW1 feared for her safety and of the children.

RW1 stated further that, they did a lot of things to try to save the marriage; counselling, mediation with RW1's family members and many discussions. She alleged that, leaving Tanzania was the resort because she had no option as the relationship was becoming so volatile. She conceded that they have been separated for more than five years. She has been responsible for all the basic needs of the children: School fees, food, housing, medical expenses, fees for football as Chase is playing for Juniors National Premier League in Australia and other expenses. She noted that the only contribution from the Petitioner is school uniform for Chase in one occasion.

RW1 informed this court that Chase was about to finish year eight, the second year of secondary school. He was still having four more years. Cody was in grade five with one more year left in primary school. She recalled that, after they had arrived in Australia in 2018, the Petitioner went three days later demanding them to come back to Tanzania. He stayed there for a month. They attending marriage counselling in Australia to try to save the marriage. Elisimbo travelled back to Tanzania

and later went back to Australia. Then, proceedings began in Australian court. They had a case of custody which ended in favour of the Respondent. The Australian court ordered that their children should live with the Respondent in Australia. Part of Australian order stated that the orders must be read in Tanzanian court. For that reason, the Petitioner filed an application in Juvenile Court in Moshi for registering the said orders. Meaning that, they had a judgment from a Juvenile Court in Moshi in relation to custody. RW1 said that she had the order, court proceedings and Memorandum of Settlement from Juvenile Court in Moshi. She prayed to tender the order, proceedings and Memorandum of Settlement from the Juvenile Court in Moshi. The Order, Court proceedings and Memorandum of Settlement were admitted without objection as exhibit R1, R2 and R3 respectively.

RW1 testified further that, the order which had not been fulfilled was an order for divorce which was happening in this matter. She elaborated that, no one among them had appealed against the order of Moshi Juvenile Court.

Responding to the issue of matrimonial assets, RW1 stated that, during their marriage they acquired a farm at Weruweru, ten acres, two

businesses: African Scenic Safaris and Hostel Hoff, they had one house in Australia which they had paid half and had a bank loan for the other half. RW1 informed this court that African Scenic Safaris was the most profitable and it was commenced by both parties.

It was averred that, when the Respondent met the Petitioner, the Petitioner was a Safari guide while the Respondent was a travel agent. So, they started the business together and they used the personal money of the Respondent from Australia to buy a Safari vehicle. That, the Petitioner did not have any money at that time to start the business. For nearly ten years that the Respondent was in Tanzania she worked for the business as a Travel Agent, talking to clients and doing the booking for clients from Australia. The Respondent acknowledged that she worked together with the Petitioner for their business.

Concerning the hostel business, the Respondent explained that the said business was started by another person. They took over in 2010. The said business was paid with some money from Australia and a loan which they paid off. That, previously, the Respondent had managed that hostel for one year as a manager. Thus, she knew it very well that's why they bought it. The Respondent asserted that, they were the original owners

of African Scenic Safaris. Later on, the Petitioner registered his family members as shareholders so that it could be easier to do business. The same situation happened to Hostel Hoff as the Petitioner removed the Respondent and registered family members as shareholders. The Respondent believed that the Petitioner prayed to retain the assets in Tanzania so that she retains the assets in Australia because he knows that the assets in Tanzania are more valuable. She stressed that, both businesses are very successful and the Petitioner makes money from those businesses. That, African Scenic Safaris is the most successful Safari company in Moshi as they had seven vehicles that may have changed. The Respondent contended that, the Petitioner makes ten times the salary which she had in Australia. Thus, he has financial ability to support the children. She contended further that, she had no problem if the Petitioner retains the properties in Tanzania even though the properties in Tanzania are more valuable.

Concerning her personal account, the Respondent made it clear that she does not wish to share what is in her Australian account as the same was from her salary and it is not matrimonial money. She believed that the Petitioner has his personal account in Tanzania which he should keep while she keeps her personal account in Australia.

The Respondent prayed that the orders from Australian court and Moshi Juvenile Court be upheld. Meaning that, the children should be ordered to live with the Respondent in Australia as the children are very settled there. They are good at school, they have friends, Chase has a lot of extra-curricular activities in Australia. Both issues play football and Chase has the second contract to play football for the National Premier League and aspires to be a professional footballer. That, Cody is very good at football following the same steps of his brother. The Respondent explained further that, the children have never lived without her. So, she did not think that it will be good for them to live without her. She said that she used to work when they were at school, thus, she was always there for them. She did not think that the Petitioner will be able to do that and manage the businesses as well. She believed that the Petitioner was not married. So, if he had the custody of the children, they would be cared by the staff.

In conclusion, the Respondent prayed for dissolution of marriage, that the Petitioner retains the Tanzanian assets so that she retains Australian assets, that she keeps what was in her personal account and the Petitioner keeps what is in his personal account. Also, she prayed that this court upholds the decision of Moshi Juvenile court in regard to

custody of children, an order of half contribution from the Petitioner for school fees, medical care, extra-curricular activities and other compulsory expenses for the children. Moreover, the respondent prayed for an order restraining the Petitioner from holding the Respondent and the children whenever they visit Tanzania, an order for non-molestation of the Respondent and the children and any other reliefs which this court thinks are fit to grant.

During cross examination, the Respondent stated inter alia that she had no evidence of how much was being earned by African Scenic Safaris. However, when re-examined by her counsel, she stated that the company was always successful. When she left, it was making approximately USD 30,000/= per year.

That was the end of the testimonies of both parties. The learned counsels of both parties were granted leave to file their final submissions.

In his final submission, Mr. Madeleka for the Petitioner submitted inter alia that it is trite law that where the marriage has broken down beyond repair, parties can no longer live together as wife and husband. That, in determining whether marriage has broken down beyond repair, the court should be guided by the principle of law under **section 107 (2) (a) to**

(i) of the Law of marriage Act, Cap 29 R.E 2019. That, once the court is satisfied that the marriage between the spouses has broken down beyond repair, it can grant a decree of divorce together with any other ancillary reliefs and custody of children of the marriage if any under **section 110 (1) (a) and (3) of the Law of Marriage Act** (supra).

Concerning the powers of this court in relation to custody of children of marriage, Mr. Madeleka submitted that the same is provided under **section 110(1) (a) of the Law of Marriage Act** and cannot be ousted by Juvenile Court. He supported his argument with the case of **Godfrey Kirula v. Beatrice Buyogera, PC Matrimonial Appeal No. 2 of 2019** (unreported) in which Hon. I.C. Mugeta J stated inter alia that:

"I fully subscribe to this holding and I hereby do find that these clear words or necessary implication ousting jurisdiction of ordinary courts on matters of custody of children are absent in the LCA. While I would wish all cases on custody of children to be filed in Juvenile courts, it is not true that those who knock the doors of ordinary courts on the same issue are strangers for want of jurisdiction. The first complaint, therefore, has no merit."

In his conclusion, Advocate Madeleka was of the view that the main

dispute between the parties herein, is on custody of children. That, the Petitioner had testified that he has enough financial muscles to support the children in their necessities including education. That fact was supported by the Respondent who did not demonstrate her financial position to sustainably be able to support the welfare of children should the court order the custody of the children in her favour. He prayed this court to be pleased to order custody of children to be in the care of the Petitioner.

Mr. Bashir Mallya learned counsel for the Respondent in respect of the contentious issue of custody, submitted that it may come to the attention of this court that, that issue has already been decided in the Juvenile Court of Moshi at Moshi in Misc. Civil Application No. 10 of 2019, where it was concluded in favour of the Respondent. That, the court decided upon settlement deed between the parties herein, which the Respondent tendered in this court and marked as exhibit R1. He added that, it is not disputed by both parties that to date their children are residing with their mother as required by the Law of the Child. He prayed this court to be guided by **section 44 (a), (b), (c), (d) and (e) of the Law of the Child Act, 2019**. That the income of the Respondent is stable as she testified that she is currently working as a Community Worker by which

she can manage the costs of living.

Advocate Bashir cited **section 8 of the Law of the Child Act**, (supra) which provides that:

"8. -(1) It shall be the duty of a parent, guardian or any other person having custody of a child to maintain that child in particular, that duty gives the child the right to-

(a) food;

(b) shelter;

(c) clothing;

(d) medical care including immunization;

(e) education and guidance;

(f) liberty; and

(g) play and leisure.

(2) A person shall not deprive a child access to education, immunisation, food, clothing, shelter, health and medical care or any other thing required for his development.

(3) A person shall not deny a child medical care by reason of religious or other beliefs.

(4) A person shall not deprive a child the right to participate in sports, or in positive cultural and artistic activities or other leisure activities, unless in the opinion of the parents, guardian or relatives such participation or activity is in the best interest of the child."

Mr. Bashir elaborated that the Respondent herein has been fulfilling the duties provided in the above sections fully as testified by the Petitioner himself during cross examination when he confessed to have never provided anything to the children apart from one uniform for Chase and Christmas and birthday gifts. The facts which were also corroborated by the Respondent. The learned counsel buttressed his point with the case of **Prudence Mganga v. Janeth Joseph Moshi, Civil Appeal No. 9 of 2022** (unreported) which stated that:

*"According to the provisions of **section 8 of the Law of the Child Act**, the Appellant has the duty to maintain his children even if such children are in custody of the Respondent."*

Mr. Bashir was of the opinion that, the Petitioner should not be entitled to custody of children as to the fact that his priorities are only matrimonial

properties rather than the health and the living of the children. Another reference was made to **section 125 (2) (b) of the Law of Marriage Act**, (supra) which provides that:

"(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-

(b) the wishes of the child, where he or she is of an age to express an independent opinion; "

Mr. Bashir went on to cite **section 129 (1) of the Law of Marriage Act** (supra) which provides that:

"129. -(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."

He prayed this court to uphold the decision of Juvenile Court of Moshi regarding custody of children to remain with their mother.

On the issue whether the decision of the Juvenile Court of Moshi in Misc. Application No. 10 of 2019 should bind this court on the issue of custody and maintenance; Mr. Bashir submitted that, since the Juvenile Court of Moshi is a creature of statute and established under **section 97 (1) of the Law of the Child Act** and conferred with jurisdiction over Juvenile matters and custody of children under section 98 of the same Act; therefore, for interest of justice its decision is binding on this court.

Concerning the issue of division of matrimonial assets, Mr. Bashir submitted inter alia that the properties which were acquired jointly by the parties, should be divided equally to each party. That, other properties which were not acquired jointly should not be subjected to division. He cemented his argument with **section 114 (2) (b) and (d) of the Law of Marriage Act** (supra). That, basing on evidence of the parties on record and their pleadings, it is clear that the above assets were acquired by joint effort.

Having considered the pleadings of the parties, their evidence and final submissions of their learned counsels, I now turn to determine the raised issued on record.

The first issue is whether marriage between the Petitioner and the

Respondent has broken down beyond repair. **Section 107(1) (a) and (b) and (2) (a) to (i) of the Law of Marriage Act** (supra) provides things to be considered for a marriage to be found to have broken down irreparably. The section reads:

"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-

(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 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.”*Emphasis added

In this case, the Petitioner prays for dissolution of their marriage on ground of desertion and separation of more than three years. The Respondent supported the petition and alleged that she decided to run to Australia to escape the torture of the Petitioner who was harassing, over controlling and bullying her. The Respondent admitted that, their separation is more than four years and a half and she is not intending to come back to Tanzania or to bring the children unless and until the court dissolve their marriage and she is assured of her safety and of the children.

The Petitioner attached to his petition Form No. 3 a certificate from the Marriage Conciliation Board of the Evangelical Lutheran Church, Northern Diocese, which certified that marriage between the parties has broken down as there is no longer love between them. Also, it was certified that efforts to reconcile the spouses had proved futile. In the circumstances, this court finds that the marriage between the Petitioner and the Respondent has broken down irreparably pursuant to **section 108 (d)**

of the Law of Marriage Act which provides that:

"108. It shall be the duty of a court hearing a petition for a decree of separation or divorce

(d) in the case of a petition for divorce, where the court is satisfied that the marriage has broken down, to consider whether the breakdown of the marriage is irreparable."

Having found as such in respect of the first issue, **section 110 (1) (a) of the Law of Marriage Act** provides that:

"110. -(1) At the conclusion of the hearing of a petition for separation or divorce, the court may-

*(a) if satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief;"*Emphasis added

Since I am satisfied that marriage between the Petitioner and the Respondent has broken down irreparably, I hereby grant the decree of divorce to the Petitioner as prayed.

The next issue is which party is entitled to custody of children which I

think should be resolved together with the fourth issue, whether the decision of the Juvenile Court of Moshi at Moshi in Misc. Application No. 10 of 2019 should bind this court on the issue of custody and maintenance of children.

Section 125 (2) (a), (b) and (c) of the Law of Marriage Act provides that:

"125. (2) In deciding in whose custody, a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong."

In our case, each parent wishes to have custody of the issues of marriage, unfortunately, the wishes of the children were not procured before the court and the parents (parties) come from different customs. However, the Memorandum of Settlement in a compromise suit made under **Order XXIII rule 3 of the Civil Procedure Code, Cap 33 R.E**

2019, is to the effect that parties had agreed that the custody of their children shall be under the Respondent herein subject to the terms and conditions some of which they had agreed before the Australian Court and the Juvenile Court of Moshi. I am of considered opinion that the Memorandum of Settlement is still binding to the parties as to date they have not varied it. Paragraph 15 and 16 of the Settlement read as follows:

"15. The parties agree that the children will be habitually resident in Australia with the Respondent notwithstanding the children's travel to the United Republic of Tanzania to spend time with the Applicant.

16. Both parties agree that their children's best interest shall be their primary consideration in all actions concerning their children."

It may be noted that paragraph 16 of the Settlement quoted above, conforms with **section 125 (2) of the Law of Marriage Act** (supra). Guided by the law, what the parties had agreed before the Juvenile Court and the fact that the children have been staying with the Respondent since 2018 when they left the United Republic of Tanzania; it is a considered opinion of this court that it is in the welfare and best interest

of the children for them to continue staying with the Respondent their mother in Australia. The said children have been studying in Australia since then and it is almost six years. Thus, I hesitate to place them under the custody of the Petitioner as it may affect their studies and aspirations.

Regarding the issue whether the decision of the Juvenile Court binds this court, on the outset, based on the fact that the Juvenile Court is subordinate to this court, its decision cannot bind the High Court. Rather, the parties are bound by such decision. This court has two options: either to uphold or vary the said decision as it may deem just and fit. As for the parties, they are not allowed in law to depart from their Memorandum of Settlement which they filed before the court and marked as decree on settlement. Therefore, I hereby grant custody of the two issues of marriage to the Respondent.

The last issue is whether there is any matrimonial property to be subjected to division. In their evidence, both parties listed the following assets as matrimonial:

- a) African Scenic Safaris
- b) Volunteer Hostel by the name of Hostel Hoff.

- c) Empty Land situated at Weruweru.
- d) A residential house in Australia.

It was the prayer of the Petitioner that the properties in Tanzania be retained to him and that the savings in Australia be equally divided; while the Respondent retains the house in Australia. On the other hand, the Respondent prayed that the Petitioner retains the assets in Tanzania so that she retains the house in Australia. She also prayed that the Petitioner should retain what is in his personal account while she retains what is in her personal account. However, in her pleadings, she prayed for the court to order evaluation of all the assets in Tanzania before division of the same equally including the profit of the two businesses for the last 4.5 years.

The respondent has departed from her pleadings by agreeing that the petitioner should retain the properties in Tanzania and she retains the properties in Australia. Impliedly, the respondent abandoned the reliefs which she had pleaded in respect of division of matrimonial assets. At the same time, she conceded to the reliefs sought by the Petitioner in respect of their properties in Tanzania.

Since the respondent agreed for the petitioner to retain the properties in

Tanzania, I find no need of discussing or ordering otherwise than what has been conceded by the parties.

I am aware that parties are bound by their own pleadings. However, in the case at hand the respondent in her testimony did not seek the reliefs which she sought in her reply to the petition.

I have examined the final submission by respondent's counsel who insisted that the properties should be divided equally. With due respect to Mr. Mallya, the court is guided by the testimony of the respondent who conceded and agreed that the petitioner should retain the properties in Tanzania while she retains the properties in Australia. I wish to remind the respondent's counsel that final submission is not evidence which the court should rely on when deciding the matter. It has persuasive value only. In the case of **Sunlon General Building Contractors Ltd & Others vs KCB Bank Tanzania Ltd** (Civil Appeal 253 of 2017) [2020] TZCA 353 the Court quoted the decision in the High Court case of **Southern Tanganyika Game Safaris and another v. Ministry of Natural Resources and Tourism and Others** [2004] 2 E.A 271 which held that final submissions are only intended to provide a guide to the court in resolving the framed issues.

Having said that and done, it is ordered that the properties in Tanzania namely, Safari Company by the name of African Scenic Safaris, Volunteer Hostel by the name of Hostel Hoff, Empty land situated at Weruweru are divided to the petitioner while the house in Australia should be owned by the respondent.

The contentious issue remains the money in the respondent's account which the petitioner prayed the same to be divided equally. During cross examination, the petitioner explained that the said money is in the respondent's personal account.

This was disputed by the respondent who said that each has his/her own account and each should keep what is in his/her account.

With this evidence, I hesitate to divide the money in the respondent's account due to the following reasons: First, the properties which are subject to division must be matrimonial properties. This is in accordance to **section 114(1) of the Law of Marriage Act** (supra). Second, the petitioner failed to point out how the said account was matrimonial property as he did not explain his contribution thereto. I wish to refer to the case of **Tumaini M. Simoga vs Leonia Tumaini Balenga (Civil Appeal 117 of 2022) [2023] TZCA 249 (12 May 2023)** Tanzlii the

Court of Appeal at page 10 held that:

"... there is no dispute that section 114(1) vests powers to the court to order division of assets between the parties which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, they are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts."

Basing on the above argument and the cited authorities, this court is of the opinion that the respondent's bank account is not subject of distribution as it is not a matrimonial asset.

In the upshot, the matter is partly decided in favour of the Petitioner to the extent discussed herein above. Hence, it is ordered and decreed as follows:

- a) The marriage between the Petitioner and the Respondent is hereby dissolved and a decree of divorce is hereby granted.
- b) Custody of children of marriage, Chase and Cody Elisimbo Natai is

granted to the respondent subject to the terms and conditions agreed by both parties in the Memorandum of Settlement filed in the Juvenile Court of Moshi.

- c) Maintenance of children which includes school fees, medical care extra-curricular activities and other compulsory expenses should be shared equally by both parties.
- d) The matrimonial assets in Tanzania should be retained by the Petitioner while the Respondent should retain the house in Australia.
- e) Both parties have equal visitation rights.
- f) The Petitioner is restrained from holding the Respondent and the children whenever they visit Tanzania.
- g) No order as to costs.

It is so ordered.

Dated and delivered at Moshi, this 31st day of January 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

31/01/2024

