

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT- SUB REGISTRY)
ONE STOP JUDICIAL CENTRE
AT TEMEKE
MATRIMONIAL CAUSE NO. 5 OF 2022
(ORIGINAL JURISDICTION)

NISILE JAMES MBONEKE.....PETITIONER

VERSUS

ERIC KAMOGA MUGURUSI.....RESPONDENT

JUDGMENT

17/01/2024 & 28/03/2024

M.MNYUKWA, J.

Parties to this case are couple who married in Christian rites. Their marriage survived for more than two decades, since 1993 when the parties said '*I do*' to each other in church.

A reason for this petition as ascribed under paragraph 8 of the petition was no other than accusation of witchcraft alleged by the respondent towards petitioner. Petitioner stated that, she was accused by the respondent that she was a witch who has been bewitching his step son causing his death. Petitioner lamented that this accusation tarnished her humanity.



Along with other reliefs, she sought for orders that their marriage be dissolved and decree of divorce be granted, division of matrimonial properties and maintenance order of a spouse to be given.

At the hearing both parties were represented, for the petitioner it was Mr. Emmanuel Safari, learned counsel assisted by Josepha Tewa, learned counsel. Whereas, Mrs Nakazael Tenga, learned counsel who was assisted by advocate Hamisi Mfinanga and Greyson Laizer appeared for the respondents. In the course of hearing of the case both parties appeared in person to know what is going on in their case.

Four agreed issues for determination were framed to wit;

- 1) Whether the marriage has irreparably broken down***
- 2) Whether petitioner is entitled to maintenance from date of separation to the date of grant of decree for divorce and to what extent.***
- 3) Whether there are matrimonial properties acquired jointly and what is the contribution of each party.***
- 4) To what relief are the parties entitled.***

It was petitioner who started addressing this court by laying out her evidence. Her evidence was led by herself who testified as PW1, and collaborated by nine witnesses namely; William Wambwe Manyama (PW2), Lusekelo Arthur Mandekesye (PW3), Bahati Mwambasi (PW4), Robina John Mwambasi (PW5), Hosana Lucas Kombo (PW6), Mary



Sangala Mwang'ombole (PW7), Jonathan Daniel Kadaso (PW8), Sadi Hussein Pindua (PW9) and Simon Rwimo (PW10). She also tendered 25 exhibits.

To avoid being wordy I shall group her evidence into three parts to which I consider crucial in determination of this matter. First part will be evidence on marital status of the parties, second; a source of misunderstanding, and third; matrimonial properties and the extent of contribution.

Starting with marital status of the parties. Petitioner testified that, she was married to respondent in Christian rites in 1993, but before their Christian marriage, they started cohabiting in 1992 and bride price was paid during that year. She asserted further that their marriage was a happy one and were blessed with three children who are now grownups. To prove her marital status, she tendered a marriage certificate (exhibit P2) which was issued in 1993. Along with this certificate, there were witnesses, PW1 to PW7 who testified to have known the parties as married couple. For instance, PW4 Bahati Mwambasi testified that she was a bride maid of the parties during their marriage.

Furthermore, petitioner testified that their marriage turned sour in 2008 when her step son (respondent's son) died and respondent accused

her of witchcraft and condemned her of bewitching his son causing his death. She added that as a result respondent give out instruction to house maid to deny her food, and she was sometimes chased out of the house. Worse enough, she said respondent installed CCTV cameras so that she can be watched. Sadly, she asserted that cameras were installed even in toilets, the act which she said was inhumane. Consequently, she said in 2022 she left her matrimonial house and reported the matrimonial dispute to the marriage reconciliation board which failed to reconcile them and issued Form No.3 which she tendered as Exhibit P18. She further stated that, she never went back to her house until this day, since she is living in her brother's house which she rented.

To collaborate her testimony there was PW3 Lusekelo Arthur Mandekesye who testified that, in 2019 he was called by respondent to go and meet him for a talk. He stated that, after they met, he was told by respondent that petitioner was a witch who has been bewitching the entire family even his deceased son. Therefore, he asked him to kill her and he will be rewarded.

And PW6 Hosana Lucas Komba testified that she has been working at Karibu Pharmacy since 2007 and has been close to the parties' family. She stated further that, one day she was asked by respondent to meet



him at Mbezi, where, respondent told her that petitioner was involved in witchcraft and wanted to know if she had seen some items in a grey bag which he said, was taken by the petitioner from their home.

On matrimonial properties and extent of her contribution, petitioner testified that during subsistence of their marriage they acquired a house on Plot No.258 Block B, Tegeta, a house on Plot No. 130 Ada Estate with 9 frame shops, Plot No. 200 Block F with a fence and guard house at Tegeta, Plot no. 674 Block B, Kinyerezi Dar es Salaam, Plot No. 396 Block A, Kabuhoro, Mwanza, Plots No. 22 &30 Block R Migungani, Bunda, 16 shops at Madale Kati kwa kawawa. Farms No. 3708, 3709, 3710, 3711 and 3712 with buildings for cattle, goats, poultry at Madale, Kinondoni Dar es Salaam, and a farm on unsurveyed land at Mbuyu, Kisegese in Rungwe District.

She said that, they also have fish processing plant at Mwanza, pharmacy shop by the name of Karibu Pharmacy at Kariakoo, Dar es Salaam and shares and profit in a consultancy company with a name of Mugurusi Environment and Climate Change Consultancy. Further, she testified that they also acquired 7 motor vehicles which are registered in the names of respondents. Her evidence was collaborated by Simon

Rwimo (PW10) who affirmed that all those motor vehicles are registered in the names of the respondent.

Petitioner asserted more that she had contributed to the acquisition of the properties by providing money and works. She testified that, when she was married, she was employed, but later, since she was a certified pharmacist, she started a pharmacy business where she earned money which she used to run and pay family expenses, like paying for water bills, electricity, house maids. She stated more that, most of the time she was the one who ran their projects including agricultural and grazing activities since respondent was employed as director of environment and was travelling outside the country. According to the petitioner, their businesses and constructions activities were supervised by her.

Collaborating her testimony was William Wambura Manyama (PW2) who testified that in the year 2000 the parties acquired a 30 acres farm at Madale which was cleared by him assisted and supervised by the petitioner. He also said, petitioner supervised a building of a house at Bahari beach, and construction of a fence on a plot at Tegeta of which she was the one who paid for 3000 bricks used for fencing. He added that, the parties had acquired a house at Kinondoni and built 16 frames



at Madale. PW2 said respondent was travelling outside the country due to the nature of his work.

Similar to what was testified by PW2, were PW3, PW4 and PW7 who stated that, petitioner was the one who supervised a farm at Madale. On top of that, PW5 and PW7 testified that petitioner was involved in selling fish and milk. Where, PW7 stated that he was doing business of fish which was owned by the parties but all the business affairs were reported to the petitioner.

As for PW6 she asserted that, for that time when parties travelled to Israel and Nigeria, she was using the proceeds of sale from Karibu Pharmacy to buy necessities of life to the remaining family members of the parties. And the amount of money used was not refunded.

After the closure of petitioner's case, defence case was open, whereby, respondent testified as DW10. And, he called nine witnesses namely; Mogege Malaya (DW1), Nasibu Malaya (DW2), Brown Ambilikile (DW3), Wambura Paulo (DW4), Fadhili Said Machaka (DW5), Sheni John Mwambe (DW6), Kamoza Oden Ngando (DW7), Ausoni Mtafungwa (DW8) and Waitasha Marwa (DW9). He also tendered two exhibits.

In respondent's testimony he admitted to have married the petitioner in 1993 but he denied the fact that before their marriage they

cohabited in 1992. According to him they did not cohabit in that year, rather he stayed with the petitioner for few months to enable her deliver safely since she was pregnant with their first child.

Respondent asserted that, the cause of misunderstanding in their marriage was witchcraft activities done by the petitioner after they marry. He added that, as a result petitioner moved out of their bedroom and slept in his son's bedroom or at the sitting room and sometime outside. According to him, he was denied his conjugal rights. Further, he said they travelled to Israel and Nigeria, where he was told that petitioner was dealing with witchcraft.

Testifying on acquisition of matrimonial properties and extent of his contribution, he asserted that before he married the petitioner, he had his own properties which are/ were Plot No. 135 Block 5 Mbezi Beach, Plot No. 25 Block B Bahari Beach, Plot No. 200 Block F, Ununio Tegeta, a storey building on Plot No. 170,172,174 Block A Mikocheni which he said to have sold it when he got a scholarship to go to America. He also had three motor vehicles, Toyota Corona, Nissan Skyline and Pickup Hilux.

He stated further that other properties which were acquired during marriage, including farms at Madale were acquired by him through his income which he generated from his employment since he was the



director of environment working in the Vice President's Office. He alleged that petitioner did not contribute in money or work in acquisition of the properties rather he said, what she was good at was to sabotage family projects.

Furthermore, respondent testified that petitioner used his money to acquire properties which he had no knowledge of. He stated more that, petitioner bought a 19 acres farm in Mbeya, 50 acres farm at Handeni, two houses at Salasala. These facts were collaborated by Mogege Malaya (DW1), Nasibu Malaya (DW2), Brown Ambilikile (DW3) Wambura Paulo (DW4) and Auson Mtafungwa (DW8).

DW1, DW2 and DW3 testified about the farms which are alleged to be owned by the petitioner, where, DW1 testified that he sold his 1.5 acre farm to petitioner, while DW2 testified also that he sold a 2 acre farm to the petitioner. On the other hand, DW3 testified that, he was the one who bought those 3.5 acres of farm on behalf of the petitioner. He asserted that, money was sent via his phone and he made payment to respective seller.

As for DW4 he testified that, he is aware of the fact that petitioner has a farm of 50 acres in Handeni, Tanga. His testimony was that, he was once employed by petitioner to cultivate maize, cassava and cashew nuts



in her farm in Handeni. He stated further that, he was told by the petitioner that it was her farm.

Respondent called DW8 to testify about the petitioner's houses at Salasala where, DW8 told this court that he is a mason who used to work for the respondent. On the material day when he was working at respondent's property at Kunduchi he was instructed by the petitioner that her brother at Salasala has a renovation work for him to do. When he went to Salasala he was told to set tiles to the house of which when he asked to whom it belong to, he was told by petitioner's sister-in-law that it belonged to the petitioner.

Disputing petitioner's evidence concerning her contribution towards acquisition of matrimonial properties, respondent testified that, petitioner was not the one who cleared the farm at Madale, he asserted that the same was done by the labourers he employed after the petitioner and DW2 failed to watch over the farm as a result it was invaded. He claimed that neither agricultural activities nor grazing activities were performed by the petitioner on that farm, rather he said there are livestock for the family use only.

To collaborate his testimony, he called DW5 who testified that he is the respondent's neighbour at Madale. He said, he knows that the farm is



owned by respondent who is visiting every month. He stated that he only saw petitioner once in 2022 at the farm. He added that, there are more than 6 cows, goats and sheep.

Moreover, there were DW6 and DW7 who also testified to have known the respondent's farm at Madale. DW6 testified that in the farm there are 16 frames which were constructed by respondent. Whereas, DW7 asserted that he had never seen petitioner at that farm, he only saw respondent who directed some youth to clean up the farm. He also said, there were neither agricultural activities conducted in the farm nor business of milk in that farm. When cross examined, he said he was not around when the farm was cleared for the first time.

Last but not least was DW9, Waitasha Marwa who said he is living in the respondent farm at Madale since 2018 as the supervisor of the farm. He stated that there are livestock in the farm which are 6 cows, 14 goats and 3 sheep. He added that livestock at the farm are for family use only since milk obtained from cows are used by respondent's family.

When cross examined, he stated that when he came to Dar es Salaam, he found the farm but he didn't know who cleared it to be a farm. He also said, there are other persons who built their houses in that farm.



And, was the respondent who showed them where to build. He testified that they started building between year 2020 to 2021.

After the parties' testimonies, learned counsels prayed for time to file final submissions, a prayer which was granted and the same was filed as scheduled. I thank counsel for parties for their submissions which I will therefore give a brief submission of both counsels.

Submitting on issues, learned advocate for the respondent submitted on the first issue that, since the petitioner moved out of the matrimonial home and since then she was adamant about divorce, respondent has no choice than to accept the dissolution of their marriage. To support her argument, learned advocate cited the case of **Tumaini M. Simoga vs Leonida Tumaini Balenga**, Civil Appeal No. 117 of 2022 (Unreported).

As for the second issue of whether petitioner is entitled to maintenance as prayed in her petition Mrs. Tenga argued that depending on needs and means of the parties, it was testified by the petitioner who said she is an entrepreneur who owns a pharmacy and earns her income, according to learned advocate the petitioner is therefore capable of maintaining herself. Whilst, she submitted that respondent being a retired civil servant is incapable of maintaining the petitioner. Also, she added

that, since the petitioner left her matrimonial home on her own and deserted the respondent who is old, she cannot claim for maintenance. Moreover, it was the learned advocate's submission that, petitioner is living in her house not in her brother's house as alleged, so according to her, petitioner is paying no rent hence her prayer for rent is unjustifiable. Learned advocate refers this court to section 63(a) (b), 115(1) (e), (2) and 116(a) (b) of the Law of Marriage Act, **Cap 29 R.E 2019 (the Act)**

Learned advocate submission on the third issue started with citing section 58, 60 and 114(1) of the Act, her argument was when respondent married the petitioner was 45 years of age and was employed as director of environment working in the Vice President's Office, therefore according to learned advocate, respondent had his own properties which he acquired using his income. On the other hand, she argued that petitioner was 25 years old a graduate from university with no employment. According to the learned counsel, it goes without saying that there was no contribution of the petitioner in money or works in relation to these properties.

Furthermore, it was her argument that even for properties which were acquired during the pendency of their marriage, for example a farm at Madale which according to respondent was acquired three months after



marriage, learned counsel said, petitioner did not contribute to its acquisition since she had no income. Consequently, it was the learned advocate submission that in absence of proof of contribution, there is no way petitioner can reap where she didn't sow.

Also, learned advocate added that, what was testified by the petitioner that she did some agricultural activities and husbandry keeping in that farm and earned some money from the same, then deposited in the respondent's bank account, were not substantiated by evidence. According to learned counsel petitioner tried a tomato project which failed and her testimony concerning a milk business was termed to be a total lie with intent to acquire share on the farm which she does not deserve.

Learned counsel submitted further that, since petitioner acquired her own properties as was testified at the trial by DW1, DW 2, DW3, DW4 and DW8 that she has 19 acre farm in Mbeya, 30 acres farm in Handeni and houses at Salasala, it's fair that she remains with her properties to which respondent does not claim any share.

Submitting on domestic chores performed by the petitioner as part of her contribution on acquisition of matrimonial properties, learned counsel submitted that petitioner did not involve herself in domestic chores since there were house helpers who are doing the same. Mrs



3
Tenga said, petitioner was spending most of her time at her pharmacy at Kariakoo, therefore according to learned advocate a principle in the case of **Bi. Hawa Mohamed vs Ally Seif** (1983) TLR 82 as far as domestic duties are concerned cannot apply in this case.

About the motor vehicles, learned advocate argued that the list of motor vehicles stated by the petitioner shows that all of them were registered in the names of the respondent and owned by him. It was her submission further that petitioner failed to prove her contribution on acquisition of the same. Learned advocate stated that marriage perse does not give a spouse property right. To buttress her argument, learned counsel cited the cases of **Yesse Mrisho vs Sania Abdu**, Civil Appeal No. 147 of 2016 (Unreported) and **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 CAT at Tanga.

On the last issue, learned counsel argued that apart from the prayer of divorce which respondent supports, other prayers by the petitioner have to be dismissed with costs.

On the other hand, in the petitioner's closing submission learned advocate started his argument by comparing the petitioner evidence with that of the respondent. His view was that, petitioner's evidence is heavier compared to that of the respondent, since according to him, respondent's

evidence is based on lies, contradictions and manipulative as reflected in the testimony of the first respondent's witness who lied about his identity as he impersonates himself as Mogege Malaya while he was not hence his testimony cannot be trusted. Learned counsel contended more that, even exhibits D1 and D2 tendered in court cannot be relied upon for they lack petitioner's signature as the buyer as it was alleged so.

Submitting on the issues raised, learned counsel argued on the first issue that despite the parties being in agreement that their marriage has broken down, even the marriage reconciliation board certified that it has failed to reconcile the parties as proved by exhibit P18. Learned counsel argued that it is the law which requires before decree of divorce is granted, courts have to be satisfied that marriage has broken down irreparably and the board should certify that it failed to reconcile the parties.

As for maintenance, learned counsel submitted that petitioner deserves to be granted maintenance since it is a legal duty of a husband imposed by the law. Learned advocate cited section 63 of the Act which states that it is the duty of the husband to provide for accommodation, clothing and food to his wife or wives.



Learned advocate argued further that in this case petitioner was forced to leave her matrimonial home in 2022 due to psychological torture, harassment and accusation of witchcraft since 2008 and rented a house which was proved by exhibit P19. According to learned advocate, respondent did not maintain the petitioner from the date when she moved up to date, henceforth it was the learned counsel's contention that respondent should pay the petitioner maintenance from March 2022 to the date of the decree of divorce since it is an obligation of a husband imposed by law.

Additionally, he submitted that in assessing amount of maintenance to be paid, court should base on the means and needs of the parties as stated under section 116 of the Act. Therefore, he asserted that since respondent owns a consultancy company and undertakes local and international consultancies, he therefore has means to pay for the maintenance for the petitioner.

Furthermore, it was the learned advocate's contention on the third issue that matrimonial properties should be distributed equally between the parties. Since, he said, it is a requirement of law that properties acquired during the subsisting of marriage are matrimonial properties. Therefore, it was his argument that properties which were mentioned by



the petitioner in her petition are matrimonial properties subject to division. He even included those which were said to be acquired before marriage by the respondent with an argument that despite being acquired before marriage but they were improved during marriage as stated under section 114(3) of the Act. To prop his argument, he cited the case of **Bi. Hawa Mohamed vs Ally Seif** (1983) TLR 82.

Submitting on the extent of petitioner's contribution toward acquisition of matrimonial properties, learned advocate stated that petitioner contributed in taking care of the family by performing domestic chores. In addition, learned advocate submitted that she also contributed economically by paying school fees of their son when he was in form four in 2020, not only that but also paying for electricity bills, water bills, salary to house helpers which were collaborated by exhibits P 20, P 21 and P 22.

Learned advocate argued further that petitioner contributed in improving a farm at Madale, supervising fish business at Mwanza, a pharmacy business and cultivated tomato, all of those activities were done by the petitioner for the good welfare of the family. Learned advocate stated further that it was testified at the trial that all businesses were supervised by the petitioner since respondent was busy at his work. To bolster his argument, he cited the cases of **Gabriel Nimrod Kurwijila**

vs Theresia Hassan Malongo, Civil Appeal No. 102 of 2018 CAT (unreported) and **Sixbert Bayi Sanka vs Rose Nehemia Samzugui**, Civil Appeal No. 68 of 2022 CAT.

Learned counsel argued that all of the petitioner's witnesses were not cross examined, therefore it was his view that, their evidence was sufficient to establish petitioner's contribution.

Another argument by the learned counsel on the extent of contribution was that petitioner contributed in money, works, and supervision in improving Plot No. 200 Block F, Tegeta by building a fence and guards' house while on Plot No. 258 Block B by building a matrimonial house therein. Consequently, he contended that alleged disposition done by respondent to some of the matrimonial properties like Plot No. 200 Block F, and part of Madale farm should be declared unlawful for being done without petitioner's consent. Learned counsel cited section 138 of the Act to buttress his argument.

Moreover, learned counsel submitted that it was testified by the petitioner that all monies which were obtained from family business and from rentals she used to deposit in the respondent's bank account No. 0111025002300 at CRDB, account which respondent refused to produce in court despite petitioner's notice to do so. It was therefore learned



counsel's argument that respondent's said conduct suggested that his intention is to deprive the petitioner her distribution on the said monies.

On the last issue Ms. Tewa, reiterated what were prayed in the petitioner's petition that a decree of divorce be granted, maintenance of Tshs 700,000/= per month from the date of separation of the parties to the date of grant of decree of divorce, refund of rent to the tune of Tshs 350,000/= per month from the date of separation to the date of grant of decree of divorce and equal division of matrimonial properties as proposed in the petition and petitioner's final submission.

Having heard the parties and examined pleadings and exhibits tendered in court, first and foremost, and before I delve into the deliberations of the matters in controversy, I would like to express my profound appreciation to the learned advocates for their commitment and tireless effort into making sure that this case came to an end. I appreciate that despite the tight schedule and late hours we left the courtroom still, learned counsels never missed a session.

However, I would like to express my disappointment to the defence whose witness, DW1 testified impersonating his father as if he was one Mogege Malaya while knowingly that he was the son of Mogege Malaya. I am of the satisfied mind that what was testified by DW2 and DW3 when



cross examined by Mr. Safari regarding DW 1 identity was genuine with no doubt that DW1 was in fact, not Mogege Malaya. This disappointment extends to the senior learned advocate Mrs. Tenga who prepared and led this witness to his testimony when I ask myself this question, would it be possible that a senior advocate was tricked by a witness to the point that this witness lied to this court about his identity and testified in impersonation without learned advocate being aware of her witness's identity or it was all planned so that respondent could win his case by any means possible.

Be it as it may, I therefore struck out the testimony of DW1 and exhibit tendered thereof from the record of this court. And urge the learned counsels to assist the court in reaching fair and just decision to both parties for the justice to be not only done but seen to be done. Indeed, the proper administration of justice needs a fair play game by all stakeholders.

That being said, let now go to deliberation of the issues above, starting with the first issue *whether the marriage between the parties is broken down irreparably.*

It is settled law that for decree of divorce to be granted it must be proved that the marriage has broken down irreparably. This is the



requirement of section 99 of the Act which provides that a married person can petition for separation or divorce on the ground that his marriage has broken down. However, no decree of divorce can be granted unless the court is satisfied that the breakdown is irreparable.

Additionally, the Act under section 107(2) and (3) sets out matters which can be evidence that the marriage has broken down but it shall be the duty of the court to make a finding that the breakdown is irreparable and grant a decree of divorce.

Coming to this case at hand, petitioner testified that her marriage broke down when she was constantly been accused of witchcraft by the respondent who according to her started this accusation in 2008. She testified that due to these accusations she suffered psychological and emotional distress as a result she moved out of her matrimonial home since March, 2022.

Her testimony was collaborated by PW3 and PW6 who testified that, respondent asserted to them that petitioner was involved in witchcraft which caused the death of his son. This fact was also admitted by respondent under paragraph 6 of his answer to petition when he averred that, matters relating to witchcraft started in the first year of their marriage when petitioner planted witchcraft item around their house.



Consequently, this accusation can be said to be evidence as stipulated under section 107 (2) (c) of the Law of Marriage Act, Cap 29 R.E 2019.

Relatively, petitioner tendered exhibit P18 which is Form No. 3 from Marriage reconciliation board which certified that they failed to reconcile the parties as per Section 101 of the Act. Also, it is undisputed fact that the parties live in separation since March, 2022 when petitioner left their matrimonial home, consequently the meaning of marriage stated under section 9(1) of the Law, that, the union of a man and a woman which was intended to last for their joint lives was defeated.

Apart from reasons stated above, it is also vividly at the respondent's prayer in his reply to petition, that their marriage has broken beyond repair when he consented to the petitioner's prayer that their marriage be dissolved and decree of divorce be granted. Considering the foregoing analysis, I thus subscribe to the decision of the Court of Appeal in the case of **Tumaini M. Simoga vs Leonia Tumaini Balenga**, Civil Appeal No. 117 of 2022 which the Court quoted with approval decision of this court in the case of **John David Mayengo vs Catherina Malembeka**, Pc Civil Appeal No. 32 of 2003 which stated that a crucial ingredient in marriage is love and once the same disappears the marriage is in trouble. Going by the said decision it is clear that this crucial



ingredient has disappeared from the parties' marriage judging by the way they live in separation.

It follows therefore that, my scrutiny to the evidence in relation to this issue, my mind is settled and satisfied that, marriage of the parties has broken down irreparably, henceforth as per section 110(1) (a) of the Act, I hereby dissolve the marriage of the parties and issue a decree of divorce thereof.

Coming to the second issue, *whether petitioner is entitled to maintenance from date of separation to the date of grant of decree for divorce and to what extent.*

In tackling this issue, I am guided by section 63 and 116 of the Act whereby the law established a legal duty to a husband to maintain his wife or wives. Though, this duty has exceptions which is expressive by the law that when the couple live in separation by either agreement or decree of the court the duty ceases. The law under section 63 (a) of the Act provides that;

63. Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court-

(a) it shall be the duty of every husband to maintain his wife or wives and to provide them with such



accommodation, clothing and food as may be reasonable having regard to his means and station in life;

Considering the provision above it is my humble view that, the spirit and rationale behind this section was to enable a wife to be maintained while living at her matrimonial home, that is why the above provision is crystal clear that when parties are separated the duty to maintain ceases.

Relatively, the law provides for circumstances to which courts can order for maintenance of wife or wives. The same are provided under section 115 (1) of the Act which for ease of reference is hereinafter reproduced;

115.-(1) The court may order a man to pay maintenance to his wife or former wife-

(a) if he has refused or neglected to provide for her as required by section 63;

(b) if he has deserted her, for so long as the desertion continues;

(c) during the course of any matrimonial proceedings;

(d) when granting or subsequent to the grant of a decree of separation;

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(e) when granting or subsequent to the grant of a decree of divorce;

(f) where the parties were married in Islamic form, for the customary period of iddat following the date on which The Law of Marriage Act [CAP. 29 R.E. 2019] 68 the divorce takes, or is deemed to have taken, effect;

(g) if, after a decree declaring her presumed to be dead, she is found to be alive:

Having the foregoing provision in mind, the issue for determination is whether petitioner is entitled to maintenance. It is undisputed that the parties in this case are living in separation since March, 2022 when petitioner moved out of her matrimonial home and rented a house of her brother at Salasala as testified by petitioner herself and her witnesses.

According to the petitioner a reason which forced her to leave their matrimonial house was witchcraft allegation which was directed to her by the respondent. She asserted that, this allegation tortured her psychology and caused her emotional distress. She also testified to have been denied food, and chased out of the house by the respondent. Also she testified further that, her life was threatened when respondent conspired to kill her.



The law of evidence is settled that for any fact alleged in court must be proved by whoever alleges. Therefore, this duty to prove fact alleged in court bound the petitioner too who, with all due respect failed to prove that she was either chased out of her matrimonial house or denied food by respondent, since none of her witnesses collaborated this fact.

Nevertheless, I cannot deny that respondent accused petitioner of witchcraft, and this fact was proved in court by PW1, PW3 and PW6. However, what was not proved was the fact that these witchcraft allegations caused petitioner to suffer psychological torture which necessitated her to flee from her matrimonial home. Also, I am aware of what PW3 testified in court about the conspiracy of the respondent to kill the petitioner, still I humbly think those were matters ought to have been reported to the police to prove that there was a threat on petitioner's life which left her with no choice other than, to leave her matrimonial home.

Regrettably, nothing of sort was done, therefore it suffices to say, petitioner left her home due to her own reasons which do not fit to circumstances stated under section 115(1) of the Act. It is therefore apparent that, petitioner deserted her husband the day she moved out of her matrimonial home. Consequently, an order for maintenance cannot be granted to her favour since she is not entitled to it. There is a say in law



that, he who comes for equity, must come with clean hand. That being said, this issue is answered in negative.

The third issue is *whether there are matrimonial properties acquired jointly and what is contribution of each party.*

For better scrutiny of this issue, it is best to know what constitutes matrimonial properties or assets. As perfectly provided by the law under section 114 of the Act which has to be read together with section 60 of the Act states that, all properties which were acquired by one party or both during the pendency of matrimony are said to be matrimonial properties or assets. Additionally, the Court of Appeal in the case of **Bi. Hawa Mohamed** (supra) held that matrimonial assets (properties) are those things which are acquired by one or other or both of the parties, with intentions that they can be used for the benefit of the family during their joint lives.

After the above analysis of what constitutes matrimonial properties, it is in record that among the petitioner's prayer to this court is division of their matrimonial properties. Certainly, the law is settled on the principles guiding division of matrimonial properties, whereby, courts are enjoined to consider three factors which are; **first**, properties acquired during the subsistence of marriage, **second**, must be acquired by their joint efforts



and **third**, the extent of contribution of each party towards acquisition of the properties. Nevertheless, division of matrimonial properties includes also those which were acquired by one party but substantially improved during marriage by other parties or by their joint efforts. For ease of reference let me reproduce provision which addresses division of matrimonial properties, that is, section 114 of the Act, which states: -

114.-(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 the 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.

These principles were also stated in the case of **Yesse Mrisho vs Sania Abdul**, Civil Appeal No. 147 of 2016, when the Court of Appeal held that;

Section 114 of the LMA provides for division of properties acquired by parties by their efforts during the pendency of matrimony, and it requires the courts, when considering the issue, to ensure that the extent of contribution of each party is the prime factor.

Understanding the above provision, it can be a standing stone in tackling our issue at hand. The issue at hand has two limbs first is to ascertain whether there are matrimonial properties acquired by the parties jointly and two, what is the extent of contribution of each party.

Starting with the first limb, whether there are matrimonial properties acquired jointly is ease. It is in record where parties testified at the trial that, all properties which were stated in the pleadings and during



testimonies are matrimonial properties except for Plot No. 135 Block 5 Mbezi Beach, Plot No. 25 Block B Bahari Beach, Plot No. 200 Block F, Ununio Tegeta, a storey building on Plot No. 170,172,174 Block A Mikocheni and three motor vehicles to wit; Toyota Corona, Nissan Skyline and Pickup Hilux which were alleged by the respondent to be acquired before marriage. Despite the petitioner's admission on the said plots being acquired before marriage but she asserted that the same were improved during marriage by their joint efforts, this fact was collaborated by PW2, PW4 and PW5.

This fact was not disputed by the respondent rather collaborated by DW8 who testified to have been improving the parties' properties at Plot No. 200 Block F, Tegeta and Plot No. 258 Block F, Bahari Beach during the subsistence of marriage. It follows therefore that; these properties fall under the properties referred under section 114(3) of the Act which states:-

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.



Considering the provision above it goes without saying that these properties are also matrimonial properties.

Moreover, despite respondent's assent that there are properties which were acquired during the pendency of their marriage he refused to refer them as matrimonial properties. His argument was that, since most of them were registered in his name, they are his properties acquired by his own income. According to him they cannot be matrimonial properties. Respectful, I think this is misconception since the law under section 60 (a) of the Act is very clear when it states: -

60. Where during the subsistence of a marriage, any property is acquired-

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

As for this case, considering the provision above it is apparent from the record that this presumption was rebutted by the petitioner and her witnesses when they testified that properties of the parties were acquired during the existence of their marriage.



Similarly, the Court of Appeal in the case of **Asile Ally Said vs Irene Redentha Emmanuel Soka and Another**, Civil Appeal No. 80 of 2020 (Unreported) at page 7 – 8 held that;

It is now a settled law that, a property acquired by a husband or wife during the subsistence of their marriage, is a matrimonial property. Irrespective of the fact that where purchased, the purchase money is provided by one spouse, that property is taken to have been acquired through their joint efforts.

At page 45 of the judgment, the court underscored the position that, a property acquired during marriage is matrimonial property because, even if the same is purchased and registered in the name of an individual spouse, it is taken to be matrimonial property because it was acquired through the joint efforts of a husband and wife.


Subscribing to the above decision, I therefore hold that, properties of the parties are matrimonial properties regardless of who acquired the same were as long as they were acquired during the pendency of marriage by parties' joint efforts or by one party and substantially improved by other party or by their joint efforts. It follows therefore that the first limb to this issue is answered in affirmative.



Coming to the second limb which is what is a contribution of each party. In this case it is undisputed that petitioner before engaged herself in a pharmacy business in 2014, she was employed as a nurse at the white house in 1993 after she was married (see exhibit P1). On the other hand, it is undisputed that respondent was also employed as director of environment working in the Vice President's Office. It was respondent's argument and testimony that since most of the properties except two farms which are Farm No. 3709 and 3708 which they own jointly, are registered in his name, he therefore asserted that he is the one who acquired them without petitioner's contribution.

Disputed by the petitioner who testified that during their marriage, as far as the acquisition of the matrimonial properties is concerned, she contributed by work and money.

She testified that, she was the one responsible for clearance of Madale farm and doing agricultural activities. One of the project she did back in the days was tomato project which she claimed to be successful. This fact was collaborated by PW2, and PW8, whereby respondent witness (DW9) admitted to the tomato project which was supervised by the petitioner.



Respondent disputed that clearance of Madale farm was done by the petitioner but he failed to prove his argument that he was the one who cleared it. This is due to the fact that his witnesses when cross examined, they testified to have found the farm already been cleared.

She also testified to have supervised the fish business in Mwanza since they had a fish processing project in Mwanza. She called PW7 who testified to have been employed by the parties to do fish business, where he was supervised by the petitioner. Above all she owned a pharmacy called Karibu pharmacy, where she earned some income which were used to pay for water bills, electricity and house helpers. She tendered exhibit P20, P21 and P22 which shows mobile money transaction when she was paying for the said expenses.

On the other hand, respondent claimed that petitioner sabotage his fish projects and other project which he initiated. He also asserted that all those monies which was used to pay bills and other expenses were from him. It is unfortunate that these assertions were not proved.

Also, he claimed that, petitioner owns 19 acres of farm in Mbeya and 30 acres in Handeni. His witnesses, DW2 and DW3 testified to only three acres of which this court doubt the authenticity of exhibit D2 which was not signed by the petitioner as a buyer. And, DW3 who testified to have

purchased the farms on behalf of the petitioner, failed to prove under which capacity he purchased the said farms. That is to say, was he under principal - agent relationship, record are silent on the same. However, petitioner testified to have acquired together with respondent a farm in Mbeya (see exhibit P14), therefore a claim by respondent that petitioner owns a 19 acres farm in Mbeya is a fallacy. Likewise, to the alleged 30 acres farm in Handeni which respondent testified to have been told by DW4 and produced no evidence to prove the said ownership apart from DW4 who said he was told by the petitioner without any other evidence to collaborate his allegation, I found the same to be unfounded. The law is settled under section 110 of Evidence Act Cap 6 R.E 2019 which has to be read together with section 62 of the same Act.

It follows therefore that, considering what petitioner has testified and proved about her contribution towards acquisition of matrimonial properties I am of a satisfied mind that despite most of their matrimonial properties being registered in the names of the respondent, petitioner also has contributed to the acquisition of the same.

Before going to the petitioner's prayer for division, it was alleged by the petitioner that there are some matrimonial properties which were sold by the respondent without her consent. While, respondent testified that



properties which were sold are known to the petitioner since she consented when the same were disposed of. Also, DW9 when cross examined, he admitted to disposition of some areas of Madale farm which respondent sold to other people. He testified that, the same was done between the years 2020 – 2021. In tackling this issue, I humbly think if disposition of the properties were done before their separation in 2022, petitioner had a duty to prove that she never consented to the same, which she failed to prove since no evidence on the same were produced in court. However, if the disposition was done after they separated, an inference is made that petitioner never consented, still, it is not clear which properties were sold after the parties separated, since the testimony by PW2 about the sale of the property was hearsay evidence which has no legal value. It follows therefore that; I refrain from addressing this issue since there is no sufficient evidence showing what properties were disposed of and that disposition of the alleged properties was done after the separation of the parties in 2022.

Thus, division of matrimonial properties will be as follows; petitioner shall get 30% of a house on Plot No. 130 Ada Estate with 3 frames shops situated in that house, 35% of a house on Plot No.258 Block B at Tegeta Kinondoni, A plot No.674 Block B Kinyerezi, Dar es Salaam, A Plot No. 396 Block A, at Kabuhoro, ilemela, Mwanza, Farms No. 3709 and 3710 at



Madale, two frames shops at Madale kwa Kawawa, a farm at Mbuyu, Kisegese in Rungwe, a pharmacy shop by the name of Karibu Pharmacy, a Suzuki Twin Couple with registration No. T360 BAK, Mitsubishi Pajero with registration No. T682 ADE and Toyota Vitz with registration No. T179 BAE, half of the number of livestock found in the farm at Madale, one refrigerator, one TV set, three simtanks, three cupboards, one sofa set, and half of other household utensils depending on their number and condition thereto.

Whereas respondent shall get 70% of a house on Plot No. 130 Ada Estate with 6 frames shops, 65% of a house on Plot No.258 Block B at Tegeta Kinondoni, Dar es Salaam, Plot No. 200 Block F, Tegeta Kinondoni, Plots No. 22 and 30 Block R, Migungani area, Bunda, 14 frames shops at Madale Kati kwa Kawawa, Dar es Salaam.

Madale farms No. 3708, 3711 and 3712, Kinondoni, Dar es Salaam, fish processing plant at Mwanza, Mugurusi Environment and Climate Change Consultancy Company. Half of the number of all livestock found in the farm at Madale during execution since the evidence on record does not establish the exactly number of the livestock, 2 refrigerators, 2 TV Sets, 2 sofa sets, dining table and its 6 chairs, 4 Simtanks, 2 Cupboards and half of other household utensils.



Motor vehicles; Fusso with registration No. T703 AUY, Nissan Pick - up with registration No. T315 BBY, Landcruiser Prado with registration No. T648 DYE and Toyota Vitz with registration No. T812 BAE.

Before I quit from this issue, I urge the parties, especially for properties which are shared and given in percentage that, whoever wishes can buy out the other.

On the last issue, this can not detain me much as it is evident hereinabove that the parties' marriage has broken down beyond repair therefore, parties are entitled to decree of divorce and division of matrimonial properties which has already been done. I make no orders as to costs since parties were spouse.

It is so ordered.

Right of appeal explained to the parties.



M.MNYUKWA

JUDGE

28/03/2024

Court: Judgment delivered in the presence of the parties' counsels.

M.MNYUKWA

JUDGE

27/03/2024