

**IN THE HIGH COURT OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
MATRIMONIAL CAUSE NO. 3 OF 2023**

SALOME LAURIAN MGANGAPETITIONER

VERSUS

MICHAEL PETER MOTAURESPONDENT

EX PARTE JUDGMENT

*Date of last order: 03.04.2024
Date of Judgment: 15.04.2024*

OMARI, J.

The parties herein contracted a marriage in the Christian form on 22 June, 2019 as evidenced by Exhibit PE 1. However, things did not work out and the parties have been living separately since August, 2021. The Petitioner then came to court seeking a judgment and decree as follows: -

1. A declaration that the marriage between the parties is null and *void abinitio*;
2. Annulment of the marriage between the parties;
3. Costs of this matter; and

4. Any other reliefs that the court may deem fit and just to grant.

During the hearing the Petitioner enjoyed the services of Subira Omari learned advocate, and in addition to herself called one witnesses, Laurean Mganga who testified as PW1 while she testified as PW2. Counsel also filed a submission which I shall consider together with the witnesses' testimonies' and Exhibits.

The Respondent appeared in person during the hearing of the Petitioner's case and despite several attempts to avail him an opportunity to defend the case he did not show up. Thus, this matter is determined after hearing only the Petitioner, that is *ex parte*.

At the commencement of the hearing, two issues were framed and agreed upon as follows:

- i. Whether the marriage between the parties is *void abinitio*?
- ii. To what reliefs are the parties entitled?

In her testimony the Petitioner stated that the Respondent and herself had a short courtship and practiced abstinence throughout the courtship. This was the Respondent's idea which she went along with as they are both religious. She testified that upon completion of the dowry formalities and

procedures she tried to initiate sexual intercourse with the Respondent as to her they were as good as married, however, the attempt failed. The Respondent told her that he was too excited and shy so he had failed to get an erection. On their wedding day, after the church ceremony and the reception that followed the two went for a honeymoon. They were unable to consummate the marriage on the first night despite the Petitioner's attempts. The Respondent implored fatigue and explained that they had all the time as they were now married.

Petitioner explained several occasions where they have tried to have penetrative sex and failed as even if the Respondent got an erection he would become flaccid at any attempt of having penetrative sex. She also explained that the Respondent had to resort to various forms of foreplay as a means of trying to satisfy her. This, according to her caused her anguish and health problems which have sent her to India for treatment of severe headaches and other associated ailments. She testified further that it was after they had gotten married and after several conversations and attempts to seek medical advice that she realized that the Respondent was impotent, thus, incapable of consummating the marriage. She also alleged that the

Respondent knew of his condition but did not disclose this fact to her. Having found out, the Petitioner resolved to end the marriage.

Both the Petitioner and PW1 testified that her family was informed and through the marriage intermediary PW1 involved the Respondent's family. Family meetings were called. Both the Petitioner and the Respondent were heard and the Respondent admitted that he is unable to consummate the marriage and or have penetrative sex. According to both witnesses, at the family meeting the Respondent likened himself to a snake on a lime tree using the Kiswahili saying; *joka la mdimu*, which means the snake lingers on the lime tree but because it cannot consume the limes, it only deters those who can, from approaching the tree.

It is after the family meeting(s) that the parties' families agreed that since the Respondent has admitted to being impotent then the Petitioner should commence the process to annul the marriage. The matter was referred to the Dioces Marriage Tribunal of the Archdiocese of Dar es Salaam which heard the two and issued its findings vide a letter dated 11 August, 2022. This letter was tendered and admitted as Exhibit PE3 states that the marriage between the two is *void abinitio* for the Respondent's non-disclosure. Although it is not clear what it is that the Respondent did not disclose, the

same is discernible from the Petitioner's testimony as well as that of PW 1 that it is failure to disclose his impotency, thus failing to consummate the marriage with the Petitioner. It is after getting the letter from the Archdiocese of Dar es Salaam that the Petitioner came to court to institute the current Petition.

The Petitioner's advocate through her final submission prayed for this court to answer the first issue in the affirmative stating that the Respondent has not and is incapable of consummating the marriage he contracted with the Petitioner and this has been the state of affairs from 22 June, 2019 when the two contracted the marriage to August 2021 when they separated.

All of this has not been objected to by the Respondent as he neither cross examined PW1 nor objected to or cross examined the evidence and testimony of the PW2, the Petitioner. The Petitioner tendered Exhibit PE 2 and Exhibit P4 which are print out of message conversations between her and the Respondent, where although not in unequivocal terms on the nature of the problem, he all the same admitted he had a problem and agreed that the Petitioner should commence procedures to end the marriage. This is backed up by the fact that Exhibit PE 3 was also not objected to nor was the Petitioner cross examined on the same.

Since the Respondent chose not to cross examine either of the witnesses or object to any of the Exhibits tendered as regards his impotence and or ability to consummate the marriage then it is as good as an admission. This is based on the strength of the Court of Appeal's decision in the case of **Emmanuel Saguda @Sulukuka and Another v. The Republic**, Criminal Appeal No. 422 B of 2013 .

The Law of Marriage Act, Cap 29 RE 2019 (the LMA) is clear under what circumstances can a marriage be said to be voidable, section 39(a) (i) states:

"Subject to the provisions of sections 97 and 98, a marriage shall be voidable if—(a) at the time of the marriage—(i) either party was incapable of consummating it;..."

This means where two people have been married and one is incapable of consummating the marriage their marriage may be termed as voidable.

"Consummating" is not defined by the LMA, however in Black's Law Dictionary (see Bryan A. Garner, editor, Black's Law Dictionary 9th ed., West Group, 2009 at page 335) the word consummate is defined as follows:

"1. To bring to completion; esp., to make (a marriage) complete by sexual intercourse"

Additionally, Black's Law Dictionary (*supra*) defines the phrase consummation of marriage as:

"The first post marital act of sexual intercourse between a husband and wife"

From the above definitions, there is no refuting that consummating a marriage is an act that makes the marriage complete done by the parties to the marriage which in this context is having sexual intercourse.

In the present case the Petitioner, testified how she initiated intercourse before their marriage at no avail and how her wedding night was also not a typical one of the first post marital act of sexual intercourse, more so for the two who had been practicing abstinence. She also informed this court of several other attempts to have sexual intercourse with the Respondent that did not yield any fruit. It is her testimony and she brought evidence that he knew that he was incapable of engaging in sexual intercourse and thus incapable of consummating the marriage as evidenced by Exhibit PE 3 and the communication between the two as can be depicted through Exhibit P2 and Exhibit P4.

As already explained the Respondent chose to act as a bystander and not defend the case. All the same, in cases like this one a court has to be guided by section 97 and 98. Section 97 (1) provides as follows:

"Subject to the provisions of subsection (2), a petition for annulment of a marriage may only be

brought by one of the parties to the marriage and where the petition is founded on an allegation of facts of which one party was ignorant at the time of the marriage may only be brought by that party and where the petition is founded on the wilful refusal of one party to consummate the marriage, may only be brought by the other party."

The Petitioner in her testimony and evidence tendered has demonstrated that she was ignorant of the Respondent's incapacity to consummate at the time of the marriage. When it was proposed by the Respondent, she agreed that the two should abstain from pre-marital sex for religious reasons so she could not have known. Upon marriage, sexual intercourse also never happened.


In that regard, I pronounce that the marriage between Salome Laurian Mganga and Michael Peter Motau is void as per section 39 of the LMA and therefore subject to an annulment. Having found the above, I can now go to the consequent question, what is the effect of an annulment of the parties' marriage. Section 98 of the LMA provides as follows:

*"The parties to a marriage which has been annulled by a decree of the **court shall be deemed never to have been married: Provided that,...**"*(Emphasis supplied)


This means, after a court makes a declaration that the marriage is void thus it is annulling it, then it is as if the two were never married. In conclusion, therefore, the marriage between the parties is annulled, and a decree of annulment to issue.

No orders as to costs.




A.A. OMARI
JUDGE
15/04/2024

Judgment delivered and dated 15th day of April, 2024.


A.A. OMARI
JUDGE
15/04/2024