IN THE HIGH COURT OF TANZANIA

(TEMEKE HIGH COURT SUB- REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MATRIMONIAL CAUSE NO. 01 OF 2023

BRIAN MATHEUS NGELANGELA .....PETITIONER

VERSUS

DAMIANA GODFREY MAKAYA

(A.K.A LULU MAKAYA A.K.A BEATRICE BUKURU).....RESPONDENT

JUDGMENT

Date of last order: 16/04/2024
Date of Judgment: 27/05/2024

OMARI, J.

The Petitioner and Respondent celebrated their marriage in the Christian form and rites on 30 August,1987 at Mwanjelwa in Mbeya, Tanzania. The two lived together in Tanzania and later emigrated to the United Kingdom where they lived together up to 2015 when they separated. During the subsistence of their marriage, the Petitioner and Respondent were blessed with two issues. According to the Petitioner, the Respondent moved out of the matrimonial home in 2015. The Petitioner later relocated back to

Tanzania leaving the Respondent and the two children in the United Kingdom.

Due to the somewhat non-existent marital life since 2015 the Petitioner filed this Petition seeking an order declaring that their marriage has irreparably broken down so it be dissolved and a divorce decree be issued. He also prayed for an order granting him custody of the minor child referred to herein as ABN and that the Respondent be granted access to the child. Further, he prayed for an order requiring him to maintain the children, any other reliefs the court deems just and fit to grant, and that each party bear their costs.

On her side the Respondent contested the Petition and vehemently denied all the Petitioner's allegations and accused him of being an irresponsible partner and the behind the misunderstandings which caused their marriage to be troubled.

When the case was called for hearing, Mr. Beatus Malima appeared as counsel for the Petitioner while Mr. Anindumi Semu appeared as counsel for the Respondent. To prove his case, the Petitioner, Brian Matheus Ngelangela (PW2) was accompanied by Shambara Matheus (PW1) as his witness. The Respondent, Damiana Godfrey Makaya a.k.a Lulu Makaya akaka Beatrice

Bukuru (DW1) was accompanied by Florence Nyalusasa Selusu (DW2) in her defence.

The parties' advocates did not comply with this court's order to file final submissions which were filed after the time allotted by the court. The court also ordered a Social Inquiry Report for Custody/Access and the same was submitted. In a bid to achieve brevity, I shall discuss the parties' testimonies and the submitted Social Inquiry Report while determining the issues.

From the pleadings and testimony in court, the following facts were not contested; first, the two were married on 30 August,1987 at Mwanjelwa Roman Catholic Church in Mwanjelwa, Mbeya and while together they have been blessed with two children only one of whom is a minor who I have already identified as ABN. Two, they own a matrimonial property in Birmingham, United Kingdom. Lastly, the parties agree that their marriage is no longer tenable as can be inferred from their testimonies.

What they are in dispute about is the custody of the minor child, ABN. The said child is 10 years old, male and currently residing with the Respondent in Birmingham United Kingdom where he was born and has lived since birth.

The Petitioner claims the Respondent is an unfit mother and it would not be in the interests of the child who is in the formative years of his life to be left

in the custody and care of the Respondent who among other things works at night and leaves the child alone at home or under the supervision of neighbours or friends. Further, she has been denying the Petitioner access to the child physically and via phone. On one occasion, she took the child out of school to go visit her relatives and attend a birthday celebration. The Petitioner further stated that once Respondent came to Tanzania with ABN and did not inform the Petitioner who eventually found out and arranged for the child to stay with him but the incident caused an unpleasant situation which necessitated the involvement of the Police Force and the Social Welfare Officer. The Petitioner also beseeched this court to consider that the child has on several occasions expressed that he would want to remain in Tanzania and or live with the Petitioner. PW1 supported the testimony of the Petitioner (PW2) when she testified.

The Respondent, on the other hand disputes all the allegations levelled against her stating that even though she took the child out of school it has not caused any harm since there is no bad report from the school. She also argued that despite of the work schedule which she keeps she has been the one taking care of the child; besides her work schedule is flexible because her employer is aware of her circumstances. She also explained that she

uses child care services or help of friends when she does have to work at night. It is her contention that the child has been well taken care of and there being no formal report of abuse and neglect that the Petitioner has lodged with the authorities then it cannot be said she is incapable of caring for the child; in any case she is the one who is caring and maintaining the child. This testimony was also supported by DW2. Throughout her testimony the Respondent was clear that she has no problem with allowing access to the Petitioner as long as he observed what she described as structure, stating that he is not good at dealing with structure.

I begin with whether the marriage is irreparably broken down, thus warranting dissolution. In this regard, the parties agree that they have each been living separately since 2015 and with various accusations meted out to either party. Going through the evidence one can see that there is no love between the parties as such that situation is what led one of them to knock on the doors of the trial court seeking a divorce decree, thus, there is nothing to salvage. Section 107(2) (f) of the Law of Marriage Act, Cap 29 R.E (the LMA) recognizes voluntary separation that has continued for at least three years as evidence that a marriage has irreparably broken down.

This court has held the view that whenever spouses can no longer co-exist as such then they should not be forced to live together. In the case **John David Mayengo v. Catherine Malembeka,** PC Civil Appeal No. 32 of 2003, this court observed that:

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

The **John David Mayengo v. Catherine Malembeka** *(supra)* decision was cited with approval by the Court of Appeal in **Tumaini M. Simoga v. Leonia Tumaini Balenga** (Civil Appeal 117 of 2022) [2023] TZCA 249 where in the Court had this to say:

> *"Be it as it may, we subscribe to the persuasive decision and satisfied that the trial court had properly analysed the evidence* ***and considered that the petitioner and the respondent had lost love with each other and denied each other conjugal rights for more than two years."*** (Emphasis supplied)

In my view, the parties herein have shown that in addition to having lived apart since 2015, they are both not interested to pursue their marriage. In that regard, I therefore find the marriage between the Petitioner and the

Respondent is broken down irreparably as per section 107 (2) (f) of the LMA and is hereby dissolved. A divorce decree is to be issued.

Having found as above, I am now at liberty to canvas the division of matrimonial property and the only issue in contention is the custody of the minor child, ABN.

Section 114 of the LMA empowers courts when granting or subsequent to the grant of a decree of divorce, to order the division between the parties that they have acquired while married by their joint efforts. The Petitioner's testimony was that they have two properties one in Kimara,Dar es Salaam and another in Birmingham,United Kingdom. It was his prayer that the property in Kimara be granted to the Respondent and the one in Birmingham be granted to the couple's children. The Respondent did not dispute the suggested arrangement.

As for the house in Kimara, there is not much that should detain me. The said house is granted to the Respondent. As for the house in Birmingham, United Kingdom it is my view that the Petitioner's prayers are faulty. This being a matrimonial court is empowered by the law to order the division of assets between the parties. Section 114 (1) of the LMA provides:

> *"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."*(emphasis supplied)

The above provision has three conditions related to the division of matrimonial assets, the first there must be a decree of separation or divorce, the second is that the there has to be assets that were acquired by the parties during the subsistence of their marriage, and the said assets must have been acquired by joint efforts of the parties. This means, it is the parties that are concerned with the division of the properties that were acquired or belonged to them during the subsistence of the marriage. Ordinarily, a third party cannot be granted matrimonial property for a simple that they are not parties to the marriage. Children are a product of matrimony; however, they are not party to their parent's marriage. This is why their needs are part of the consideration that the court needs to have regard to when dividing property as per the provisions of section 114(2) (d) of the LMA which states:

> *"In exercising the power conferred by subsection (1), the court shall have regard to—(a)...and (d)* ***the needs of the children, if any, of the marriage,***

and subject to those considerations, shall incline towards equality of division."

This, however, does not preclude the parties to a matrimonial dispute and more specifically the parties herein if they so wish, to arrange for the transfer of their respective shares, if any, to their children. That said, neither side contested the others' contribution to the acquisition and no conflicting evidence was adduced in respect of either party's contribution in that regard I am persuaded by this court's decision in **Joyce Nyantori v. Ibrahim Yeremiah Mwayela**, PC Civil Appeal No. 12 of 2021 where it was stated that unless there is evidence otherwise distribution of matrimonial assets should automatically proceed in equal terms. I therefore divide the property in Birmingham, the United Kingdom equally between the Petitioner and Respondent who as I have already said are at liberty if they so wish to arrange for the transfer of their respective shares to their two children.

Lastly, I now segue to the custody of the minor child ABN. As I have previously stated this was the only issue in contention by the parties. They are at loggerheads as regards who is to be granted custody of the child.

The law on who is to be granted custody and what considerations the court should pay heed to when doing so, is very clear, a court may order custody to either parent and where there are exceptional circumstances a third

person as is stipulated under section 125 (1) of the LMA. However, I find it important to put it to pen that while granting an order as to custody a court is required to also have regard to section 125 (2) as well as consider the rights of the child as enumerated under section 26 of the Law of the Child Act, Cap 13 R.E 2019 (the LCA). The determination as to who should be awarded custody is based on what is in the best interests of the child and not otherwise. Therefore, what becomes a paramount consideration is the welfare of the child, that is; under whose custody will the child progress well in terms of care, love and affection, needs, etc. The mere fact that a spouse is the same gender as the child is not conclusive that he/she is unsuitable to have custody of the children. In other words, a court has to take into consideration the totality of all matters that go with the welfare principle into consideration before deciding on who should be given custody of children. Furthermore, section 26 (1) of the LCA provides for rights to the child (a child's rights) where parents separate or divorce. For clarity, I reproduce the section here under:

> *"Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to— (a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced; (b)*

> ***live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child;*** *and (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.'*(Emphasis supplied)

A court is not only empowered to grant custody to a party or in exceptional circumstances a third person, but it also has to bear in mind that the child has the right to live with the parent (person) who in the opinion of the said court is capable of raising and maintaining the child in a manner that supports the best interests of the said child. The above section should be read together with section 125 (1) of the LMA which in part states:

> *"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—...."*(Emphasis supplied)

During the hearing, the Petitioner and his witness intimated that the child had expressed his wishes that he wants to live with the Petitioner and live in Tanzania, these are what would be called other factors that the court should look at when determining custody specifically the wishes of the child. This is provided for in section 125 (2) of the LMA which states as follows:

> *"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) ..."* (Emphasis supplied)

From the above provision it can be seen that there are other considerations that a court can have regard to, however the paramount consideration is still the welfare of the child, which is to be read as the best interests of the child when all things are considered. Clearly, what a court should aim at is a placement that is in the best interests of the child. Such mandatory requirement in determining all issues involving children as provided for under section 4(2) of the LCA, the section reads:

> *"The* ***best interests of a child shall be a primary consideration in all actions concerning children*** *whether undertaken by public or private social welfare institutions, courts or administrative bodies."*(Emphasis supplied)

A court, before it can pronounce which of the two parents (or even a third party) is to be granted custody of a particular child has to assess and determine the best interests of each child in the specific situation.

In the case of **Festina Kibuntu v. Mbaya Nganjimba** [1985] TLR 42 it was stated that the views of children of tender age should not be permitted

to subvert the whole law of the family unless the best interests and welfare of the child cannot otherwise be secured. Looking at the case at hand it is clear, the child, ABN was born in the United Kingdom and that is where he has lived all his life, he has visited Tanzania a number of times but has all along been living with the Respondent. In that regard, I must state that I am also aware of the importance of continuity of care for a child whose parents are divorcing. In this case, this is key as it is not just a question of choosing which parent the child should have primary custody of the child and which one should have access to the said child. This case involves a child who was not born in Tanzania and he has never lived in Tanzania; save for occasional visits. The court ordered Social Inquiry Report also noted that the welfare and education system in the United Kingdom differs from that of Tanzania thus, any changes in custody will disturb the life of the child.

During the hearing, the Petitioner was adamant that the child would adjust and he would take care of him for he is ready to provide. While I agree with him that at the formative stage he is at the boy needs a father figure that would mould him as per the African traditions. Nonetheless, I have to look beyond just that one factor. The Petitioner failed to provide any concrete evidence that the Respondent is an unfit mother explaining that he did not

report her neglect and abuse of the child to the authorities as they would take stern measures against her which would in turn affect her family for she would not be allowed to work.

Based on the above, I order that the minor child ABN be under the custody of the Respondent. I also order that the Petitioner has the right to access and visitation in a manner that shall not interfere with the child's education and training program as the case may be. The Petitioner and Respondent are to agree on the manner they will contribute to travel and related costs for the child when the access and visitation involves travelling.

The only remaining question is that of costs. This being a matrimonial matter I shall order that each party bears their own costs. In the event I hereby grant the Petition and order as hereunder:

1. Decree of divorce to issue.
2. The property in Birmingham, United Kingdom is to be divided equally between the Petitioner and the Respondent.
3. The is child to remain in the custody of the Respondent. The Petitioner has the right to access and visitation in a manner that shall not interfere with the child's education and training programme. The Petitioner and Respondent are to agree on the manner they will

contribute to travel and related costs for the child when access and visitation(s) involve travel.

4. No order as to costs.

A.A. OMARI

JUDGE

27/05/2024

Judgment delivered and dated 27th day of May, 2024.

A.A. OMARI

JUDGE

27/05/2024