

TANZANIA / JUDGMENT

GRACE JOHN HUKUMU

COURT
TANZLIIDECIDED
19 July 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA CIVIL APPEAL NO. 9751 OF 2024 (Arising from Civil No.0000004507 of 2024 before Meatu District Court By Godfrey Rwekiti) GRACE

JOHNAPPELLANT VERSUS JAMES

PETERRESPONDENT

JUDGMENT

12th June & 19th July 2024 F.H. MAHIMBALI, J. There is an African saying that “The quarrel of lovers is the renewal of love” or another “a happy man marries the girl he loves; a happier man loves the girl he married”. All this has been reverse in the current matter involving these two spouses. The appellant and the respondent were married couples since 2018. They are blessed with three children. The two had been in peaceful matrimonial life until 2021 when their marriage turned into soar. Efforts to settle it before marriage conciliation board proved futile. Thus, resorted to the trial court for divorce where the same was granted. Subsequent to the issuance of the 1 decree of divorce, division of matrimonial properties and custody of their three issues followed. Dissatisfied with the decision of the trial court the appellant has approached this court propped with four grounds of appeal which fall under the question of evidence and that the trial Court erred to base its decision by relying on contract which was defective and prepared by a person who had interest over the matter. Thus, the appellant is therefore challenging the decision of the trial court on the division of matrimonial properties as being not just and fair. During the hearing of this appeal the appellant enjoyed legal services of Mr. Mvungi learned advocate while the respondent appeared in person and unrepresented. Amplifying for the appeal Mr. Mvungi only argued the 1st and 2nd grounds of appeal as he abandoned the third and fourth grounds of appeal. Submitting for the second ground of appeal, Mr. Mvungi argued that with the division of matrimonial assets, the trial court based its decision on memorandum signed by the parties while the said memorandum was drafted and attested by the same advocate Mr. 2 Majura Mfungo. To him, that was a violation of the law. Surprisingly, even the reply to the petition of appeal to this court has been prepared by the same Majura Mfungo. Since the said memorandum of settlement was for purposes of distribution of matrimonial properties, the same is dated 5th October 2022. While by that time of preparing this memorandum, the parties were still spouses. On 5th March 2024, the respondent then filed a petition for divorce which was drawn by the same Majura Mfungo. It's Mr. Mvungi's assertion that by common sense the said advocate did not

professionally balance his legal duty fairly and the personal interest. The said advocate being the one who attested the memorandum of settlement, he was a potential witness. Therefore, he could not fairly later represent one party in the case. Mr. Mvungi banked his argument by reference to the case of Sylvia Marita Barner vs. Ahamed Zahran Said, Civil Appeal No. 144 of 2023, CAT at Zanzibar, at pages 6-9 in which it was held that an advocate who provided legal services to both parties cannot later choose side and represent the other as doing that is equal to breach of duty and provision of unbiased and professional legal services. It is Mr. Mvungi's averment that since Mr. Majura had witnessed the parties' contract or memorandum of settlement, he could not later take side and represent one party in the subsequent proceedings. 3 With the first ground of appeal, Mr. Mvungi fortified that the grievance is, the trial court erred in failure to consider the fact that the alleged initial amount given to the appellant (10,000,000/=) as part of 25,000,000/= had acquired as the result of the said distribution was later returned to the family and used it as part of the family expenditure in meeting some necessary demands. As per that deed of settlement - Para 2C of the memorandum contract, as per proceedings, the said money reverted to the respondent. So, their life continued/reverted as spouses. Even the stationery business, she was ordered to close it. The said 10,000,000/= was taken by the respondent for supermarket business and that herself was ordered to stay home. It was therefore important for the trial court to analyze the received evidence and arrived at the wrong destination. Though the said deed was not disputed, it was important for the trial court to scrutinize it well and arrived at just decision argued Mr. Mvungi who finally pressed for the appeal be allowed with costs. With the second ground of appeal, the respondent in his considered view replied that there is no any legal conflict of interests in this matter, as the lawyer who prepared the said document didn't come in court as it appeared in the authority provided by the appellant's 4 advocate. Therefore, so long as he didn't represent him in court, he doesn't see any conflict of interest as alleged. With the first ground of appeal, the respondent submitted that following what they had agreed had been dully witnessed by an advocate, he wondered how could it be possible that they entered into another agreement in the absence of a lawyer? The trial court was supplied with evidence on how the respondent up to 6th February 2024, he had already given her a total amount 19,500,000/= and by May 2024, he had already given her a total of 24,000,000/=. He further contended that the contract contained a lot of issues including subsistence allowance to the appellant, school fees, distribution of matrimonial properties (plots, houses and motor vehicle etc). Therefore, it is the respondent's formed view that this appeal is almost bankrupt of any merit. Thus, prayed that it be dismissed. By the way up today, the appellant is still receiving her entitlements as agreed. Resting his submission, Mr. Mvungi averred that with conflict of interest, provided the advocate was knowledgeable, that alone is a sufficient conflict in law. Despite the fact that the said advocate did not come to court, but by drafting that petition of divorce application, he was still conflicted. That case law is very relevant and guiding one. 5 As regards to the amount of money advanced to her, the trial court's proceedings are very clear on that and does not support the averment. The 10,000,000 issued to the appellant is said to have been dully returned. The trial court ought to have made a finding on that. He argued that this Court to ask itself, what precedes the other in a matrimonial proceeding: Divorce or distribution of matrimonial properties. Ordinarily, division of matrimonial properties

is preceded by divorce. So, in the absence of divorce, parties cannot jump to division of matrimonial properties. Having heard both parties on merit and upon a thorough scanning of the trial court's records, the issue for deliberation is whether this appeal is merited. As regards to the issue whether the said marriage has broken down irreparably, the trial court ruled in affirmative, relying on the fact that there were several conflicts between them emanating from adultery claims, fighting, misunderstandings between the parties and separation that in total culminated the finality of the parties' joint association. As the court cannot force parties to live jointly, equally it is not the parties' rubber stamp but should handle the matrimonial proceedings with judicial care. 6 Generally, as a matter of law, 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 refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing. However, amongst the factors that the court may take into account in ruling whether the marriage has broken down irreparably, proof of adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest; sexual perversion on the part of the respondent; cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage; willful neglect on the part of the respondent; desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is willful; voluntary separation or separation by decree of the court, where it has continued for at least three years; 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; 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 change of religion by the 7 respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage. In the current matter, digesting the facts of the case, I have not seen any fault that the appellant (then the respondent at the divorce proceeding) had committed that warranted the grant of the said divorce. What is clear as per facts from this case, is the fact that the respondent wants to benefit from his own wrong. As there is an allegation by the appellant that the respondent is in adulterous association with their own employee – shopkeeper, such an inquiry made the respondent angry and left the matrimonial home as reciprocity to the allegations laid against him. That, by itself could not ground basis of divorce unless the appellant had been dissatisfied by that conduct and filed the divorce proceeding. As she just inquired and seems to be tolerant, why then the respondent wished for the divorce if that allegation was not true? So long as the aggrieved party is tolerant, the wrong doer cannot benefit from his own wrong doing as by the way it is prohibited by law. The law is, in deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the 8 conduct and circumstances of the parties and, in particular shall refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing (see section 107(1) of the Law of Marriage Act, Cap 29 R.E 2022). My conclusion as to the facts of the present case, the respondent's acts in this case makes him benefit from his own wrongs if this court is to bless the divorce decree. By the way, not every misunderstanding in a

marriage union is remedied by divorce. The conditional precedent before a marriage is dissolved is court's satisfaction that a marriage has been broken down irreparably. It is normal in any marriage association that there can be some misunderstandings between the contracting parties. These misunderstandings if persistently, may amount to marriage breakdown. However, the marriage breakdown to ground a decree of divorce but one which in the court's inquiry and satisfaction not only has broken down but that it is irreparably broken down (S.108 (d) of the LMA, Cap 29 R.E 2022). In the current matter, I had expected such a critical inquiry done by the trial court to its satisfaction that justify the grant of the decree of divorce as issued. Doing otherwise, it is like becoming a party's rubber stamp which is contrary to the law. Yes, the court cannot force parties to live together as spouses, however, being a matrimonial court in a matrimonial proceeding must be very reasonably inquisitive so as to gather detailed and hidden facts surrounding the parties before it issues appropriate orders as far as the Law of Marriage Act can do in a matrimonial proceeding. Nevertheless, since the parties seem not angered by the grant of the said divorce decree, I should not undo what has not aggrieved the parties, but just a gentle reminder to matrimonial courts to make a thorough legal scrutiny and get satisfied whether there are sufficient grounds circumventing the case to justify the sought award. The appellant's first grievance in this appeal is that, the trial court failed to consider her evidence on the fact that the amount of money purportedly portioned to her was later returned to the respondent. This proposition was objected by the respondent on the stance that there ought to have been clear evidence on that. The respondent even queried, how the so alleged money was returned to him without clear evidence. Since there was a written contract in that effect, it could not be easily returned without there being recorded so or clear evidence to that effect. I have grasped the records of the trial court at page 9 of the electronic proceedings, the appellant agreed to have received 10,000,000/= and when wanted to return it to the respondent the same 10 was not received. There is no further evidence as to where again such money was taken. "I failed again to get transfer, so I told him to return 10,000,000 and to continue as before. But he failed to accept it and said, there is an employee who has contracted with her and all properties are in the system" At page 13 of the typed proceedings, the appellant when cross examined by the respondent, she admitted to have received 10,000,000/= and reduced into writing in the contract. "you gave me 10,000,000/= we reduce our writing in the contract" Clearly, from the extract above there is no suggestive evidence establishing that the appellant returned the alleged amount to the respondent. Mindful, this court is a creature of law, thus one who alleges must prove it. I once – elsewhere held in the case of Republic vs. John Simon and Another, Criminal Session Case No. 87 of 2022 H.C Shinyanga Registry at page 59 that; 11 "One cannot just collect stories from unknown such as a stationery product and confidently wants to make this court admit the purported dust as evidence and prop on that as one's reasonable defense. This is a court of law, it must not accept the rubbishes and baptize them as legal evidence." Therefore, I am inclined to agree with the submission of Mr. Mvungi that the alleged money was returned to the respondent as it has not been evidenced. Moreover, on the validity of their contract, the appellant had complained over conflict of interest on the advocate who attested a contract for separation, division of matrimonial assets and prepared the pleading (a petition for divorce) on behalf of the respondent for it to form the legal basis of the distribution. It's Mr. Mvungi's assertion that the acts by such

advocate was erroneous and amounted to conflict of interest in judicial proceedings thus led to the nullity the whole proceeding of the trial court, as held in the case of Sylvia Marita Barner vs. Ahamed Zahran Said, (supra). I have scanned the alleged pleading and exhibit P4 a copy of contract, indeed it is true that the petition for divorce was drafted by advocate Majula Magembe Mfungo, similarly a petition for divorce. 12 Apparently, the said advocate was retained for drafting only and did not appear before the trial court either as an advocate or a witness as correctly argued by the respondent. However, it remained the same. Since the foundation of any civil claim is the court's pleading filed by the parties, evidence is only led to establish facts alleged in the pleading. Thus, for an advocate who prepared and attested the documents before the parties, even if he does not represent that party to the case but is engaged in drawing the necessary pleading such as plaint, holds the same value and thus conflicted as a matter of law. Such an advocate is precluded from siding with any party in anyhow save becoming a potential witness of either party in court in case of any dispute. However, guided by the case law cited to me by Mr. Mvungi, the Court of Appeal nullified the trial proceedings and judgement only because the advocate who drafted the deed of sale was the one who initiated the suit before the court of law by filing it, and he was the same advocate who helped the parties in execution process of the deed of sale. In the case at hand, the alleged advocate firstly drafted contract between the parties but later sided with the respondent to draft him the plaint. Though he did not represent any of the parties in the case, but 13 professionally remained precluded to side with any. The siding extends up to drafting of any pleading as it may in one way or another influence the case in consideration of the fact that a pleading lays the basis of foundation of any case. In the absence of pleading, there is no case. In normal parlance, I have asked myself on how the appellant was prejudiced by the act of the alleged advocate. Mindful, it is trite law that parties are bound by the agreements they freely entered into, see section 10 of the Law of Contract Act. The cardinal principle of the law of contract being the sanctity of the contract as expounded in numerous cases including Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R. 288 and Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009 (unreported). It is also trite law that a party who enters into the contract freely, is estopped from denying it. See section 123 of the Law of Evidence Act. See also the case of Trade Union Congress of Tanzania (TUCTA) vs Engineering System Consultants Ltd and 2 Others, Civil Appeal No. 51 of 2016 (unreported). Though parties' arrangements in the distribution of matrimonial properties jointly acquired can be equated as their agreement, the same should not strictly be considered as other social or commercial binding legal contracts unless the court upon its due scrutiny is satisfied that it is reasonable. That notwithstanding, as 14 each case is considered by its own facts, in the current matter, though Mr. Majura's conduct as advocate in the matter is rebuked, however in the circumstances of this case, I have not seen the visible harm directly occasioned as per his only role of drafting the pleading after he had also attested the said contract. Thus, there is no notable prejudice in the matter so far explained. Notably, the trial court's decision on division of matrimonial assets is based on the alleged contract which the parties assented and reduced it into writing. The question to pose in this matter is one, whether the said parties' personal arrangements qualified to be the division of matrimonial properties in the ambit of the provisions of section 114 of the LMA. It is trite law that upon dissolution of the parties' marriage,

what follows is the court's power to order division of matrimonial properties jointly acquired by the parties. In exercising this power, the court shall have regard to the customs of the community to which the parties belong; the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; any debts owing by either party which were contracted for their joint benefit; and the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division. The law is, 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. Reading the facts of the case, it is clear that the parties had agreed and made their personal arrangements as regards maintenance and the division of any matrimonial property. The issue for consideration is whether the court was satisfied with that arrangement that it was reasonable. I say so because, even if there are personal arrangements done by the parties themselves as recognized by the law under section 108 of the LMA, yet it is the mandatory duty of the trial court hearing a petition for a decree of separation or divorce amongst other inquiries, to inquire into the arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable. The issue for consideration now is whether the said arrangement was reasonable as per court's scrutiny. The answer to that can be traced from the arrangement itself contained in exhibit P.4 duly signed by both parties 16 and dated 5th October 2022 in which had the following terms, and the same read:

1. Kwamba katika maisha ya ndoa MUME na MKE walibarikiwa kupata watoto watatu ambao ni Christina James Chamba, Morgan James Chamba na Givan James Chamba. Kutokana na hati hii, wankubaliana pia kama ifuatavyo:
 - a. Kwamba Mume atakua akimpatia Mke kiasi cha shilingi laki tatu za kitanzania kila mwezi ikiwa ni gharama za huduma mbalimbali za kila siku za familia na kwamba Mme atawajibika kulipa ada za watoto wake kwa kipindi chote watakachokua wanasoma
 - b. Kwamba mzazi yoyote (Mme/Mke) atakua na haki ya kuona watoto wakati wowote ikitokea wakawa wanaishi sehemu tofauti.
2. Kwamba mume na mke katika kipindi ndoa yao walibarikiwa kumiliki mali zifuatazo: nyumba mbili zilizoko Mwandoya, Viwanja vitatu (03), Gari aina ya BMW X3, Duka, vitu vya ndani na stock ya mpunga yenye thamani 17 yenye thamani ya shilingi milioni mbili na laki tano. Mgawanyo wa mali hizi utakaua kama ifuatavyo:
 - a. Mume atachukua na atamiliki nyumba moja iliyoko Mwandoya ambayo haijakamilika na kiwanja kimoja kilichopo Mwanhuizi. Mke atachukua na atamiliki nyumba iliyokamilika iliyoko Mwandoya na Viwanja viwili vilivyoko Mwandoya.
 - b. Mke atachukua vitu vyote vya ndani atakavyoona inafaa

- c. Kwamba kwa upande wa duka na gari, Mume atampatia Mke shilingi milioni ishirini na tano (25,000,000/=) pesa ambayo italipwa kwa utaratibu ufuatao: tarehe ya kusaini makubaliano haya italipwa shilingi milioni kumi taslimu (10,000,000/=), na kiasi kilichobaki yaani milioni kumi na tano kitalipwa kwa kila mwezi shilingi milioni tatu hadi kitapoisha, na kwamba kadi halisi ya gari itakua katika uangalizi wa Mke hadi kiasi hicho tajwa kitakapokamilika. 18
- d. Bila ya kuathiri kilichoandikwa hapo juu, gari aina ya BMW X3 na duka vitachukuliwa na vitakuwa mali ya mume.
- e. Kwamba kwa upande wa stock ya mpunga yenye thamani ya shilingi Milioni mbili na Laki tano (2,500,000/=), mali hiyo itagawanywa kwa uwiano sawa kwa maana ya kwamba mke atachukua milioni moja na laki mbili na elfu hamsini, vivyo hivyo mume nae atachukua kiasi hicho.
- f. Kwamba baada ya makubaliano haya kila upande utakua na haki ya kumiliki na kutumia mali yake pasipo kuingaliwa na upande mwingine ila matumizi hayo yasiwe kinyume cha makubaliano yaliyopo katika aya (g).
- g. Makubaliano haya ni ya kudumu na yatawabana pande zote mbili na pia mali hizo za wanandoa zimegawanywa kama ambavyo pande zote zimekubaliana, matumizi ya mali hizo yanapaswa kuwa kwa maslahi ya watoto 19 wa wanandoa hawa kama walivyotajwa katika makubaliano haya na si vinginevyo. From this arrangement, though dully signed by both parties, it being a matrimonial matter, the trial court was supposed to inquire into the said arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable. Did the trial court then get satisfied by that arrangement? On this the trial magistrate states at page 7 of his

judgment:

“As it appears in the pleading and the parties’ evidence, there is no dispute on the existence of this contract. The petitioner prayed for this court to find that the contract binds them. The respondent responded that, this contract defuncted (sic) natural death as the money she was given, returned to the petitioner, and actually that money is what was used to annex a service of money transaction and banking agency to the mainstream shop. Paragraphs 2(a) to

- (e) of the exhibit P4 exhibits the wishes of these parties as echoed herein above. It is the legal principle and well settled that, when parties set terms and conditions in the contract 20 and both agree to them, then it means formally accepts legal arrangement binding them..... “ He concluded on this by saying that: “....From the above excerpt extracted from Unilever Tanzania Ltd Vs. Benedict Trading as Bema Enterprises (supra), it is the duty of this court to enforce what was agreed by the parties that, all joint properties acquired during their relations from 2013 up to 5th October 2022 were dully distributed to the parties. Each party has to abide with what they agreed upon. So, the court rules that no joint property to be redistributed...” This being a matrimonial proceeding, the trial court ought while

considering the said pre - arrangements done, to have scrutinized it to its satisfaction whether it was reasonable and not to consider it as other commercial or social contracts done by the contracting parties. Here we are talking of the division of matrimonial assets jointly acquired by the spouses. Thus, it is not merely a question of contract but court's satisfaction that whether the arrangements done are reasonable as per court's eyes. For example, it was important to establish the value of the said vehicle BMW X3 and the shop (s) at the time of arrangement and 21 the extent of contribution each one had done towards its acquisition. It was therefore very important to have established the capital value of the said shop (s) and profits accrued from it and how it was used for the acquisition of other properties or run the family life. It is from this scrutiny; the trial court would have been in a proper position to correctly adjudge other than rubber stamping on what was proposed mainly by the husband. That was not proper in law. That said, I think this is the only place where the court's scrutiny could be faulted for lack of due scrutiny. I thus invoke the revisionary powers of this court and quash the distribution arrangement of the matrimonial property in respect of the motor vehicle and the shop, and task the trial court to receive evidence on this aspect and rule accordingly whether the 25,000,000/= apportioned to the appellant was fair and justifiable. For avoidance of bias, this determination be done by the other competent magistrate present in the station. To that end, the appeal is partly allowed. Since the matter is matrimonial one, I will not issue an order for costs. Right to further is explained. DATED at SHINYANGA this 19th day of July, 2024. 22 F.H. Mahimbali Judge. 23

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/314915/source_file/23f59863b8269156/GRACE_JOHN_HUKUMU.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/grace-john-v-james-peter-divorce-tanzlii-2024>

Prepared on 14 October 2026 · Esheria