

TANZANIA / JUDGMENT

judgement Matrimonial Cause No

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1 January 2024

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
MOSHI MATRIMONIAL CAUSE NO. 18775 OF 2024 A. E.

T.....PETITIONER VERSUS S.M.

T.....RESPONDENT

JUDGEMENT

17th February & 26th March, 2025 MONGELLA, J. The parties herein are husband and wife. The two contracted a civil marriage on 20.04.2005 and later, in 2006, blessed their union vide Christian rites. The parties were also blessed with 4 issues; two of them are now demised. Alleging that their marriage has broken down irreparably, the petitioner, who is the wife, has preferred this matter against the respondent, her allegedly estranged husband. She seeks for the following reliefs:

- i) A declaration that the marriage between the petitioner and the respondent has broken down irreparably. Page 1 of 19 ii) A decree dissolving the said marriage. iii) An order for division of matrimonial properties. iv) An order for maintenance of the petitioner and the children.
- v) An order that custody of the children be to the petitioner. vi) Costs of the petition. vii) Any other relief this Honourable court may deem fit and just to grant. The respondent vehemently denied all claimed reliefs and assertions by the petitioner. In that respect, the following issues were found in controversy and agreed to guide the Court in determining the dispute:
 1. Whether the marriage between the petitioner and the respondent is broken down irreparably rendering a decree of divorce to be granted thereof.
 2. To whom between the parties the custody of children should be granted and on which terms.
 3. Whether an order for maintenance of spouse and children should be granted and to what extent.
 4. Whether there are any matrimonial assets and how they should be divided between the parties. The hearing of the case proceeded vide witness statements. Each party testified solely without calling further witnesses. While the petitioner tendered several exhibits

whereby seven (7) of them Page 2 of 19 were admitted, the respondent tendered none. In my deliberation, I shall address the issues in seriatim. Considering the 1st issue as to whether the marriage between the petitioner and the respondent is broken down irreparably rendering a decree of divorce to be granted thereof; it is well settled that for a court to issue a decree for divorce, it must satisfy itself as to whether the marriage between the parties has broken down irreparably. This position is enshrined under Section 108 of the Law of Marriage Act [Cap 29 RE 2019] (LMA), which states: “108. It shall be the duty of a court hearing a petition for a decree of separation or divorce-

- (d) in the case of a petition for divorce, where the court is satisfied that the marriage has broken down, to consider whether the breakdown of the marriage is irreparable.” It is undisputed that the petitioner and the respondent are husband and wife having contracted a civil marriage on 20.04.2005. Their marriage certificate admitted as Exhibit P1 attested to this fact. The petitioner, in support of her allegation of the breakage of marriage; testified that after contracting their marriage they lived in Moshi district. In 2009, she was transferred to Rombo District Court as a District Resident Magistrate in charge where she worked at the station till 2013. At such time she resided with their issues in Rombo. In 2013, she was transferred to Longido District Court where she worked until 2021. She claimed that from 2013 to 2021 the Page 3 of 19 respondent never visited her however during holidays she sent their issues to Moshi to visit him. She claimed to have been in continued separation since 2016, hence deserted. The petitioner further testified that the respondent began acts of cruelty against her in 2015. She explained that in the said year, he visited her at Longido and beat her badly. She also claimed to have been denied spousal affection and support in taking care of the welfare of their issues. That, at all the time, she tolerated the situation in hopes that he would change, but that was not the case. That, at some point she involved her parents who tried resolving the issue to no avail. Explaining the desertion further, she complained that the respondent has not been taking care of her and their children leaving her to carry all the burden in taking care of the family including caring for one of the respondent’s children obtained by him prior to their marriage. That, she took care of that child from infancy till she reached form four. The petitioner further testified that the respondent has been involved in extra-marital affairs whereby he has even sired a girl child out of wedlock. On the other hand, the respondent, as he pleaded, denied the claim for divorce. He claimed to still love his wife, though it was the petitioner that deserted him since 2015 and denied him access to his issues. Still shifting the blame on the petitioner, he alleged that the petitioner never came to visit him nor did she ever send their Page 4 of 19 children to visit him. He denied having any adulterous associations or being cruel to the petitioner. The Law recognizes several factors to serve as evidence of a marriage being irreparably broken down. Some of those factors are listed under Section 107 (2) of the LMA. They include; desertion by respondent for at least three years, cruelty, wilful neglect on part of the respondent, voluntary separation or separation by decree of court for at least three years and adultery. In her evidence, while she pleaded adultery on the part of the respondent, there was no proof submitted on the same by the petitioner. Even as she alleged that the

respondent fathered a child out of wedlock, she did not prove the allegation. Her statement thus lays bare and unproved. The petitioner also pleaded cruelty. As to physical cruelty, the allegation remains unproved. I say so because while she pleaded cruel acts, there was no proof presented to that effect. With regard to mental cruelty, it seems somehow both parties are claiming the same, while on one hand, the petitioner claims to lack love and affection from the respondent, on the other hand, the respondent claims the petitioner vacated their matrimonial home with their issues and has never visited him. It is evident from the evidence of the parties that they both reside far from each other. Apart from the petitioner being away from her matrimonial home due to her career, it is still evident that the parties Page 5 of 19 were never together as a result of their misunderstandings. This is because, the petitioner complained of carrying the burden of caring for their children alone. Though, the respondent claimed to have been sending upkeep money directly to her children, I find the assertion unsubstantiated as the respondent could not clearly tell the frequencies he used to send the alleged upkeep money. His act of not caring for the family demonstrates wilful neglect. Further, the fact that the two could not visit each other during the time they lived apart, renders their testimonies that they separated due to misunderstandings proved. The act of being separate and not visiting each other signifies denial of love and affection. All these issues collectively considered, substantiate the petitioner's claim of psychological torture, which amounts to mental cruelty. Both parties alleged to have been deserted by the other. The petitioner, on one hand, alleged that she and her issues were deserted by the respondent from 2016 to date. On the other hand, the respondent alleged that it was the petitioner that left their matrimonial home at such period with their issues, hence deserted him. The respondent however, did not deny the fact that due to her work, the petitioner was relocated to various areas over the years. In addition, he never explained why he never followed her to her residence upon relocation considering his flexibility in movement as he is self-employed. The respondent as well admitted not contributing to their issues' welfare since then, though as observed Page 6 of 19 earlier, he unclearly claimed to be sending money directly to his children via phone transactions. On her part, the petitioner also appears to have never made attempts to stay at their matrimonial home since 2016. She even testified to have only sent their issues to visit the respondent, a fact he vehemently denied. The respondent admitted when questioned by the Court that they have indeed been in separation since 2015. It is apparent that rather than this being a simple act of desertion, the parties have shown to have been in voluntary separation since 2015 or 2016, which to date marks 9 or 10 years. Further, in 2020, the dispute was referred to Moshi Cathedral Catholic Church for reconciliation whereby the board declared to have failed to reconcile the parties. A certificate to that effect was issued and presented to this Court and admitted as "Exhibit P6". It is from the foregoing observations that I find the marriage between the petitioner and respondent broken down irreparably. The 1st issue is thus resolved as such. The 2nd issue is as to whom between the parties the custody of children should be granted and on which terms. This Court is enjoined with powers to make orders as to custody of children. There are however, paramount issues to be considered in exercising such role. These are well articulated under Section 125 (2) of the LMA, which I find pertinent to reproduce hereunder,

for ease of reference: Page 7 of 19

125. “(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to—
- (a) the wishes of the parents of the child;
 - (b) the wishes of the child, where he or she is of an age to express an independent opinion; and
 - (c) the customs of the community to which the parties belong.” I have considered the pleadings of both parties as well as the evidence in support thereof. It is not disputed that the parties were blessed with four issues; two of whom demised. They are now with two issues whose certificates of birth were produced and admitted as exhibits P2A and P2B. One issue was born on 13.10.2007 and the other on 10.06.2012. As I have indicated in the 1st issue, the petitioner has at all the time lived with their issues. She requested for them to be in her custody. The respondent has not denied this request, rather he sought for the right to visit their issues, which was not objected by the petitioner. It appears that the parties are in agreement that their issues should be in the petitioner’s custody as they have been prior and after their separation in 2016. There is also no doubt as to the petitioner’s capacity to look after their issues. I thus find it in best interest of the issues to grant the petitioner’s request for custody and the respondent’s request for the right to visit their issues. Page 8 of 19 The 3rd issue is on whether an order for maintenance of spouse and children should be granted and to what extent. As the father of the two issues by the parties, the respondent has a duty to maintain his children. This duty is well recognized under Section 129(1) of the LMA, which states: “Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.” As evident from the above stated provision, there are factors to be taken in account, which include the means and station in life of the father. The petitioner pleaded several facts in relation to the respondent’s welfare. Her pleadings reflect that he is engaged in petty business and even inherited a family mills business. The respondent denied handling the mentioned family business in his reply to the petition. Such fact was noted by the petitioner in her reply to his response to the petition. This indicates her concession to his assertion that he did not operate the alleged family business. No accurate details have been provided concerning the respondent’s exact or estimated income. The petitioner failed to demonstrate the respondent’s means and income or station in life. When testifying, the respondent averred that he yields a profit estimate of TZS. 7,000,000/- in a year from cultivating and selling Page 9 of 19 maize and beans. He claimed to have no other business or means to earn additional income. When probed by the Court as to what he can contribute to his children, he stated that he is capable of contributing TZS. 700,000/- for each child in the annual school fees. However, it is mind stretching considering that both parties testified to the respondent taking several loans from SACCOS, CRDB, NMB and Mwangi Hakika banks. The respondent even took personal loans, one of such is evidenced by the Judgement

in Civil Case No. 09/2022 before Uru Primary Cout dated 20.06.2024. He, in fact, did not deny this fact. Apparently, as testified by himself, he is still re-paying the said loans. This fact however, creates doubts as to the income of TZS. 7,000,000/- allegedly gained by the respondent yearly. As matters stand at this point, I find there being no ample proof on the respondent's financial status or means. Considering that he indicated that he earns around TZS. 7,000,000/- yearly, though doubtful, I shall make my orders basing on the claimed value. I therefore order the respondent to contribute TZS. 300,000/= monthly to the petitioner as maintenance allowance for their issues. Considering the fact that he agreed to contribute TZS. 700,000/- yearly for each child's school fees, I as well order for his contribution to such amount on each child's school fees yearly. As to spouse maintenance, there were no details offered by the petitioner in relation to this aspect. Section 116 of the LMA provides instructions as to assessment of maintenance. The provision states: Page 10 of 19 "In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties but shall have regard also—

- (a) to the degree of responsibility which the court apportions to each party for the breakdown of the marriage; and
 - (b) to the customs of the community to which the parties belong." The evidence of the parties demonstrates that they were voluntarily separated. However, it appears that to some extent the respondent was more responsible for the breakdown of their marriage due to mental cruelty and wilful neglect by not contributing in raising their issues thereby imposing a huge burden to the petitioner. As already observed, the respondent's means have not been accurately disclosed by him or the petitioner. It also appears that he has several debts which even led to attachment of their matrimonial house to pay off an individual loan. He averred that he can only earn about TZS. 7,000,000/- annually. On the other hand, as she clearly stated, the petitioner is an employee of the Judiciary of Tanzania with a stable income. She has also demonstrated to have the capacity to care for their issues even without the respondent's help. It is thus evident that the petitioner has failed to demonstrate the respondent's capability to pay spouse maintenance. The Page 11 of 19 petitioner as well did not show how she needed to be maintained by the respondent. In the premises, I do not find it prudent to compel the respondent to pay her maintenance allowance. This relief shall therefore not be awarded. The 4th and last issue is on whether there are any matrimonial assets and how they should be divided between the parties. The Law of Marriage Act does not only provide for the powers of the Court to divide matrimonial assets. It also provides for matters to be considered in exercising such powers. Section 114 (1) and (2) of the LMA state: "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 Page 12 of 19 considerations, shall incline towards equality of division.” In her pleadings, the petitioner mentioned two properties she alleged to have acquired jointly with the respondent during subsistence of their marriage. The first is a modern residential house situated at COSATA Longuo area registered under Certificate of Title No. 65628 Plot No. 486, Block A in the name of the respondent. The second property is a 4.5 acres piece of land located at Kawawa area in Moshi district, allegedly acquired between 2014 and 2015. She also mentioned a posho mills business situated at KCMC Madukani near Las Vegas area valued at TZS. 37,000,000/=. There however, appears to be no details nor arguments in regard to the alleged posho mills business. This is in further consideration that when the respondent denied the alleged business, the petitioner noted the same, hence agreed to his denial. In the premises, I shall not probe further into this matter. Lastly, household appliances were also mentioned and referred to a list which was never annexed to her pleadings nor tendered in evidence. This Court therefore lacks the bases or enough information to deliberate on this relief. Among all the properties mentioned, I find the house at COSATA a bit clearly explained. It was explained that the same is a matrimonial home. It is trite law that contribution in acquisition of matrimonial Page 13 of 19 properties is a question of evidence. See, Gabriel Nimrod Kurwijila
- v. Theresia Hassani Mallongo (Civil Appeal No. 102 of 2018) [2020] TZCA 31 (20 February 2020); Yesse Mrisho v. Sania Abdu (Civil Appeal No. 147 of 2016) [2019] TZCA 763 (6 November 2019). In the matter at hand, the petitioner alleged to have contributed to the purchase of that land in 2006 whereby she alleged she contributed TZS. 5,000,000/= being money she obtained from her transfer to Rombo district. On the other hand, the respondent alleged to have purchased the land alone at a price of TZS. 3,200,000/= and prior to their marriage. However, later, during cross examination, he changed stating that they were not yet legally married during that time, but resided together under one roof when he made the purchase. The petitioner also contended to have contributed to construction of the house in question whereby they moved into upon being habitable. On his part, the respondent again alleged to have constructed the house on his own vide funds he raised from a garment and electronic shop. Contradicting himself however, in his evidence, the respondent alleged to have taken loans from CRDB, NMB and Mwanga Hakika Bank and to have also borrowed construction materials from a retail hardware for construction of the house. He claimed that it is the same loans that he continues to repay to date. He insisted that the petitioner made no contribution in construction of the house. However, when questioned by the Court he stated that the petitioner only contributed by putting tiles and sinks in the house. Page 14 of 19 Upon close scrutiny of the respondent’s evidence, I find the same clearly showing that he

lied regarding the petitioner's contribution in purchasing the land and construction of the house. I as well find that he also lied in relation to the loans taken when he claimed the same being spent to facilitate the construction of the house. This is because he initially rejected the loans and alleged to have paid some of them. However, during cross examination, it became apparent that he took a loan from CRDB bank in 2022 and not in his wife's knowledge. The matrimonial house in question was mortgaged as security for the said loan. It is further clear on record that there was also another private loan from one Anicet Msoka, which led to the matrimonial home being attached. To rescue the house, the petitioner filed objection proceedings, a fact attested by a Judgement in Civil Case No. 09/2022 before Uru Primary Court, dated 20.06.2024. Evidently, the respondent lied in relation to the loans being taken for the purpose of construction of their matrimonial home. These loans are vividly recent, while the record shows that the construction took place between 2006 and 2009, at least to the extent of rendering the house habitable. There is hardly any proof showing otherwise that the raw construction carried on after 2009. Even though I find no clear evidence on the petitioner's contribution to the purchase of the land, I find clearly proven that she contributed in construction of the matrimonial home. It is undisputed that at such time the two were married and resided Page 15 of 19 together. It is also not contested that she had a stable income compared to the respondent. Apart from monetary contribution, it is also not disputed that the petitioner took care of the family, including paying for the children school fees, something she continues to do to-date. The respondent himself admitted paying only TZS. 500,000/- in his children school fees from when they started schooling to-date. In the premises, even if the petitioner had not contributed in any way in the purchase of land and construction of the house thereto, her contribution into caring for the family morally and financially cannot go ignored. In my view, it should be equated as contribution in acquisition of the matrimonial property/home, as the respondent used his money, if at all that is true, to construct the house while the petitioner used her money to care for the family, including paying for the children's education. In my view, this is more than monetary contribution. Further, questions as to the respondent's financial capacity at the time of purchasing the land on which the matrimonial home was built make it apparent that he could not have alone easily pulled off the construction in three years' time. His conflicting statements on the source of income also suggests that the petitioner made a great contribution in construction of their matrimonial home. On the other hand, it is notable that since 2013 the respondent has maintained the matrimonial home in the absence of the petitioner. As per the evidence of both parties, their issues have been under Page 16 of 19 physical care of the petitioner. They have also not stayed in the matrimonial home for a long time. It is only the appellant and the daughter he had prior to the parties' marriage who lived there. In the foregoing observations, and in consideration of the fact that both parties somehow proved to have contributed in the acquisition of the matrimonial home, but neither of them proved his/her exact monetary/material contribution, I find it just to hold that the parties equally contributed to the acquisition of the matrimonial home, thus entitled to 50% each. The other listed property is the 4.5 acres of land at Kawawa road in Moshi rural. The petitioner alleged it was purchased sometime in 2014 at TZS. 25,000,000/=

and she contributed TZS. 10,000,000/-. It was also alleged that this land was divided into four plots. At first, in both, his pleadings and witness statement, the respondent denied existence of this property. He however later admitted its existence, but alleged that he had not purchased the land but rather given the same by a defaulting borrower in 2013. He claimed to have donated the land to a church, thus no longer in his possession. Critically examining the evidence on record, I find there being no proof offered showing existence of the said property as of now. There is no proof demonstrating that the petitioner contributed the alleged TZS. 10,000,000/= in its purchase. Even if it is being mentioned, there is also no proof that the said property or plots therein are still in the respondent's possession. In the circumstances, Page 17 of 19 I find it prudent to refrain from making any orders as to division of this property. Conclusively, considering the observations I have made hereinabove, I make the following declarations and orders:

1. The marriage between the petitioner, and the respondent has broken down irreparably. A divorce decree is therefore hereby granted to such effect. A certificate attesting the same shall be issued after 45 days.
2. The petitioner is granted full custody over their two issues (whose names are intentionally reserved) in consideration of the agreement between the parties. The respondent shall have the right to see his children upon consultation and arrangement with the petitioner.
3. The respondent shall contribute TZS. 300,000/= monthly to the petitioner as maintenance allowance for their issues and TZS. 700,000/- per each child as annual contribution to the children's school fees.
4. The house at Uru Kati- COSATA at Plot No. 486 Block A Registered under CT No. 65628 shall be divided equally between the parties, that is, 50% each, after valuation. Either of the parties shall be at liberty to pay the other party half of the valuated price if he/she wishes to maintain possession of the house. Page 18 of 19
5. Considering the relationship between the parties, I make no orders as to costs. It is so ordered. Dated and delivered at Moshi on this 26th day of March, 2025. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 19 of 19

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Prepared on 13 October 2026 · Esheria