

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE-STOP JUDICIAL CENTRE)
AT TEMEKE**

MATRIMONIAL CAUSE NO. 15 OF 2021

FATUMA DAVID PONERA..... PETITIONER

VERSUS

FARAJI ABASI CHIWILA.....1st RESPONDENT/

JANE JACOB ANDOLILE.....2nd RESPONDENT

EX-PARTE JUDGMENT

08th November & 20th November, 2023

BARTHY, J:

The petitioner herein prays for judgment and decree as follows;

- 1. A declaration that the marriage between the petitioner and the respondent has irreparably broken down.*
- 2. An order for dissolution of marriage between the petitioner and the respondent and divorce decree be granted.*
- 3. Division of matrimonial properties acquired in the course of marriage between the petitioner and the respondent as per paragraph 10 (a-q inclusive)*

- 4. Custody of the issues be granted to the petitioner. Pre-arranged visitation of the issues to be made between the petitioner and the respondent.*
- 5. An order for maintenance of children who are minors.*
- 6. An order for payment of damages to the tune of 50,000,000/= against the defendants jointly or severally under paragraph 6 (e) and 9(b)*
- 7. Each party to bear its cost.*
- 8. Any other relief that this honourable court may deem fit to grant and equitable to grant.*

The respondents were duly served to appear before the court. Only the first respondent filed his reply to the petition and contested it. When the matter was set for a hearing before this court, both respondents failed to show any cause.

On the 7th of November, 2023, the court issued an *ex-parte* order for hearing, and the respondents were duly served; however, they did not appear. Therefore, the hearing of the matter proceeded in their absence.

At the hearing, the petitioner enjoyed the services of Mr. Armandus Swenya, esquire, and she was the only witness for the petitioner's side.

The petitioner in her affirmed testimony as PW1, she stated she was the military woman since 2005 and 2007 with the Tanzania People's Defence Force (TPDF). Also, the first respondent was working with the TPDF. On 26/10/2012, they contracted an Islamic marriage. PW1 tendered a marriage certificate, which was admitted and marked as Exh. P1.

PW1 further stated that, in their marriage, they were blessed with three issues, but the first respondent had another issue. The issues from their marriage are Faraja Faraji (2012), Fadhili Faraji (2016), and Fahim Faraji (2021); she tendered their birth certificates, which were admitted as Exh. P2 collectively.

PW1 narrated that after the birth of their first son, the marriage started to sour as the respondent was not faithful. PW1 bitterly stated that she got her second pregnancy, she then came to learn that the respondent had impregnated another woman.

PW1 stood in her marriage believing it will work out but to no avail. As the infidelity with the first respondent was not a secret anymore and it became open an account. In the same year of 2016 when they sired their second born, the first respondent also sired the child known as Farhat with another woman.

When the respondent was confronted, he denied the allegation. It was also pointed out that the respondent had other multiple affairs, and now he is with Jane Jacob herein styled as the second respondent. After PW1 came to know her through the first respondent's mobile phone, and then the first respondent started to forward their conversation to her. Much worse, as on 2020, PW1 caught the duo red-handed in one of the guest-houses at Chamanzi-Mbagala.

She confronted the first respondent and reported to the office, but the behavior of the first respondent escalated as he started to take their issues of marriage to the second respondent. He also started sleeping out of the matrimonial house, and his family supported his behavior, as it reached the stage PW1 was insulted with his parents and siblings in front of him, and he took no action against them.

The insults continued to PW1 even with the second respondent who used text messages, and the first respondent did nothing. After a series of events, the duo stopped having a conjugal relationship.

After PW1 gave birth to their third issue, the first respondent left their matrimonial house. Traumatized with these ordeals, PW1 had facial stroke caused by depression, and the second respondent took over her responsibilities like supervising the construction of their house. PW1 tendered medical reports which were admitted and marked as Exh. P3.

She also tendered message printouts and photographic prints, which were also admitted as Exh. P4.

PW1 stated further, according to Exh. P1, their marriage was intended to be monogamous, and she even asked the first respondent if he intended to marry another woman, but he denied. She added that reconciliation at the family level had failed.

Therefore, PW1 reported the matter to the ward conciliation board, yet the respondent refused to attend. The matter when was referred to BAKWATA, the first respondent issued talaq to PW1, the same was tendered and admitted as Exh. P5, and Form No. 3 from the Conciliation Board from BAKWATA was admitted as Exh. P6, respectively.

It was stated by PW1 that there were properties acquired during the subsistence of marriage which are; 3 houses (1 at Chamazi, 1 at Abiola - Buza, which is unfinished and Buza kwa Mpalange a two-storey building), 2 plots at Buza kwa Mpalange and Chamazi Saku. There are also 5 cars (3 Mitsubishi-Rosa), but 1 was told, 1 Toyota Prado (used by the first respondent) and Toyota Raum (used by PW1). Other properties are household items like five beds (5x6) plus their mattresses, 2 mattresses (6x6), washing machine, sofa set, TV with its decoder, and kitchen utensils.

PW1 stated most of the sale agreements of those plots bear the name of the first respondent, but she was a witness to the same. The sale agreements were tendered and admitted as Exh. P7 collectively, and in respect of the cars, PW1 stated she only had the original card of Raum car as others were in possession of the first respondent, thus 1 original card and 3 copies of motor vehicle cards were tendered and admitted as Exh. P8 collectively.

PW1 informed the court that her contribution towards the acquisition of those properties was through her employment income, which facilitated her to take loans from NMB, BARODA, and PBZ to support in acquiring joint properties. She further stated that loans were used to construct the houses and to start the passenger carrier business in 2013. As for two houses, she stated were not finished, but they intended the two-storey house to be used as a lodge.

She tendered her salary slips, which were admitted and marked as Exh. P9 with a basic salary of Tsh. 910,000/= plus other fringe benefits apart from the salary. She also tendered letters involving loans from BARODA dated 30/10/2019 admitted as Exh. P10, NMB and PBZ Bank statements were admitted as Exh. P11 collectively.

PW1 stated all those loans used to acquire their properties were issued during the subsistence of marriage save for one plot which was

bought during their courtship period. However, PW1 and the first respondent constructed their house which PW1 lives now. In addition to that, PW1 she stated she made a contribution with her domestic chores.

She, therefore, prayed to this court to grant a decree of divorce, give orders for maintenance and custody to her children, but the first respondent be granted the right to access his children. She also prayed for an order for the distribution of assets in accordance with the prayer in the petition. Also, for an order of compensation due to the mistreatment and anguish from the second respondent.

With respect to the instant matter, the issues formulated for determination were as follows;

- 1. Whether the marriage between the parties is irreparably broken down.*
- 2. Whether the petitioner and the first respondent acquired matrimonial properties subject to division.*
- 3. Whether the petitioner has to be given custody of children.*
- 4. Whether the respondents committed adultery.*
- 5. Whether the petitioner is entitled with compensation for adultery.*
- 6. To what reliefs are the parties entitled.*

To begin with the first issue, which tasks this court with determining if the marriage between the petitioner and the first respondent was broken down beyond repair. Before the party petitions for a decree of divorce or separation, the provision of section 101 of the Law of Marriage Act, Cap 29, R.E 2019 (referred to as the LMA) requires the party to go to the conciliation board first and obtain a certificate that it has failed to reconcile the parties.

The requirement to observe this procedure was also stated in the case of **Fidelis Francis v. Paschalia Malima**, PC Matrimonial Appeal No. 3 of 2020, High Court of Tanzania, at Mwanza (unreported). See also the case of **Shillo Mzee v. Fatuma Ahmed** [1984] TLR 112.

In this matter Exh. P6 which is form No. 3 from the reconciliation board of BAKWATA was tendered certifying that the board has failed to reconcile the parties, thus the requirement of the law has been complied with.

With respect to the issue at hand, PW1 stated that she contracted an Islamic marriage with the first respondent, supported by Exh. P1, which is a marriage certificate to prove the same. The first respondent, in his reply to the petition, also did not dispute the fact that the parties were duly married.

As a matter of fact, divorce is not an automatic right; this was emphatically stated in the case of **R. v. R.** [2004] T.L.R 121. Rather, in deciding whether or not the marriage has broken down, the court shall have regard to all relevant evidence concerning the conduct and circumstances of the parties.

There must be proof that there are some factors necessary to grant a decree of divorce, as stipulated in section 107(1) and (2) of the Law of Marriage Act, Cap 29, R.E 2019.

In the petition lodged, under paragraphs 6 (a) to (e), it states the reasons for divorce to be desertion, adultery, lack of conjugal right, disrespect, and abusive language to the petitioner by respondents.

To prove this, PW1 stated in her testimony under oath that, when she had their third issue, the respondent deserted her, the act which led to mental depression and she had to suffer facial stroke which was proved with Exh. P3.

There was also evidence of adultery between the respondents, which was proved with Exh. P4. Moreover, to prove that the once sweeter love came to an end, the talaq was issued to PW1 by the first respondent as per Exh. P5 dated 28/05/2022, indicating that their marriage came to an end under Islamic rites.

The marriage between the petitioner and the first respondent was contracted in accordance with Islamic rites, as provided under section 10(2)(a) of the Law of Marriage Act. Under Islamic law, the marriage is considered to have broken down beyond repair after the *talaq* is issued, as provided under section 107(3)(c) of the Law of Marriage Act. The emphasis on this point was stated by the Court of Appeal in the case of **Ali v. Sewji & others** (Civil Appeal 63 of 2005) [2006] TZCA 21. Therefore, I grant the decree of divorce to the petitioner and the first respondent.

Turning to the second issue, the court has to determine whether the petitioner and the respondent acquired matrimonial properties jointly subject to division. Making reference to the oral account of PW1, she stated that herself and the first respondent had acquired properties during the subsistence of marriage which are 3 houses (1 at Chamanzi, 2 unfinished houses at Abiola - Buza and Buza kwa Mpalange, a two-storey building), also they acquired 2 plots at Buza kwa Mpalange and Chamazi Saku.

She further mentioned they have together 5 cars (3 Mitsubishi-Rosa) but was told one is sold, 1 Toyota Prado (used by the first respondent) and Toyota Raum (used by PW1). Other properties are household items

like five beds (5x6) plus their mattresses, 2 mattresses (6x6), washing machine, sofa set, TV and decoder, and utensils.

Going through the evidence adduced by PW and the exhibit tendered, it shows the sale agreement dated 2nd October 2017 when PW1 bought a plot at Mabagala for 10,000,000/-. There was also the sale agreement dated 30th March 2016; the first respondent bought a plot for Tsh. 5,000,000/= . Again, on 30th September 2015, the first respondent bought a house at Temeke for Tsh. 10,000,000/= and PW1 was a witness thereof, same as for sale agreement dated 08th July 2015 and the sale agreement of 27th August 2015; the respondent brought a plot for Tsh. 5,000,000/. All these were captured on see Exh. P7.

On the other side, where PW1 stated they had jointly acquired 5 cars with the first respondent. According to registration cards, it shows the cars were registered during the subsistence of marriage as seen on Exh. P8.

PW1 had also testified to the effect that she made her contribution with direct income and doing domestic chores. Under section 114(2)(b) of the Law of Marriage Act, it considers the monetary contribution and through domestic work. PW1 as employed as a military woman earning the salary as seen on Exh. P9. She also took loans from BARODA (Exh. P10), PBZ, and NMB (Exh. P11) where it was also used in acquiring matrimonial assets.

With such evidence, I have considered the law under section 60 of the Law of Marriage Act, which provides for presumptions as to property acquired during marriage it states;

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.

In a gist of this provision of the law above, I will draw an inference from the decision of this court, in the case of **Yulita Matera v. Onasisi Ibrahim** (Matrimonial Appeal 1 of 2020) [2021] TZHC 2225. The court in determination of assets acquired jointly in the subsistence of marriage it court held that;

It is clear that a property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property registered in the name of one spouse acquired during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse. ... In the division of such properties, each party has to prove his/her level of contribution, whether monetary or

non-monetary. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution.

In the instant case there are some of the properties which are in the name of the first respondent; however, PW1 rebuts it with the claim that the properties were acquired during subsistence marriage and she contributed towards their acquisition.

This is proved with loans PW1 took and being the witness to sale agreement the first respondent entered implying they were buying the plots of land together. This court has not received any evidence to counter it.

Since it is clear that all these assets were acquired during the subsistence of their marriage, therefore with the evidence tendered before this court, I find that the petitioner had an equal contribution to their acquisition. Hence, the second issue is answered in the affirmative. I, therefore, order the distribution of matrimonial assets as indicated on the sixth issue.

Turning to the third issue, which is for determination of the custody of issues of marriage. I have taken great consideration on the age of issues involved in this matter as per Exh. P2. Their first issue Faraja Faraji Chiwila is about 11yrs, Fadhili Faraji Chiwila who is 4 years and last issue

Fahim Faraji Chiwila is aged 11 months. In consideration of the same, section 125 (2) (b) of the Law of Marriage Act provides that;

*(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)N/A

*(b) the wishes of the child, where he or she is **of an age** to
express an independent opinion. [Emphasis is supplied].*

Also, Section 39 (2) of the Law of the Child, Cap 13, R.E 2019 requires the court to consider the best interest of the child and the importance of a child when determining to whose custody to place the children of marriage.

In this case, PW1 is the mother to all three issues with the first respondent. In her petition she sought to be granted custody of all three issue and the respondent be granted right to access them. However, it is clear that the eldest issue who is 11yrs, but the court did not inquire to his opinion whom he wishes to be with. This is due to the fact the petition is not contested on the relief of the custody of all three issues. Thus, there

was also no need to have social inquiry reports made in terms of section 136(1) of the Law of Marriage Act

Considering the fact that the petitioner was the one who was staying with all three issues all along up to the time she lodged her petition. Also, the two issues are below the age of 7yrs that for their best interest should be placed in the custody of their mother. In those circumstances, therefore, I grant the custody of all three issues to the petitioner as prayed. The first respondent is granted the right to access their issues on weekends, public holidays, and school holidays.

This now brings to the determination of the fourth issue as to whether the petitioner is entitled to adultery compensation. As stated by PW1, the respondents have sexual affairs and therefore sought damages to the tune of Tsh. 50,000,000/=.

PW1, to prove the same, tendered Exh. P4, which included photographs and WhatsApp messages. Analysing Exh. P4, I find no proof of adultery from those extracts. Moreover, PW1 claimed she had caught the respondents red-handed at the guest house. However, PW1 failed to adduce any proof or call a witness to support the same. Guided by Section 110(1) of the Law of Evidence, Cap 6, R.E 2022, it provides that;

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

Basing on the analysis above, I find that there was not enough proof of adultery proved by the petitioner. Despite the medical proof of facial palsy PW1, which she claimed to have been due to mental torture from the behaviors of the first respondent and even the second respondent, there was no clear connection with the allegation of adultery. In those premises, the fourth and fifth issues are not answered in the affirmative.

Thus, the last sixth issue calls this court to its attention, what reliefs are the parties entitled to? This court, basing on the ex-parte evidence tendered and analysis being made, grants the following reliefs:

- I. The marriage between the petitioner and the first respondent has been irreparably broken down, and therefore, the decree of divorce is granted.
- II. The petitioner shall have custody of the issues of marriage, and the respondent shall have the access right of their three issues.
- III. The respondent is to provide maintenance on the issues of marriage including paying school fees, clothing and providing them with

health insurance. The petitioner will also provide food maintenance to those issues when they are in her custody.

- IV. Three houses (1 at Saku-Temeke District, a semi-finished house at Buza Abiola, and Semi finished Storey building at Buza Kwa Mpalange (mji Mpya) are to be divided equally between the parties, together with the households and utensils at the ratio of 50% each.
- V. Three surveyed plots located at (1 plot at -Saku Mkondogwa, 1 plot at-Buza Mji Mpya kwa Mpalage, and 1 plot at Saku Ilulu Temeke) are to be divided equally at a ratio of 50% between the parties.
- VI. Mitsubishi Rosa T852 DPZ, T581DTF, and T868DUU are to be divided equally between the parties, and Toyota Prado T235DJJ is to be owned by the respondent, and Toyota Raum T845DLE is to be owned by the petitioner.

Each party to bear its own cost.

It is so ordered.

Dated at Dar es Salaam this 20th November, 2023.



A handwritten signature in blue ink, appearing to read "G.N. Barthy".

**G.N. BARTHY
JUDGE**