

Q&A^{with}

FB ATTORNEYS

Fayaz A. Bhojani
Gaudiosus Ishengoma
Vol. 1



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To my wife Shemina, and my daughters Alisa and Riana.
Fayaz A. Bhojani

To my family.
Gaudiosus Ishengoma

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Preface

Welcome to the first volume of 'Q&A with FB Attorneys'.

Q&A with FB Attorneys column was first published in the Daily News in 2009, making it one of the first interactive legal question and answer columns in East Africa. After having written the columns for more than eight years, and realising the thirst for legal knowledge out there, the authors embarked on this journey of compiling all columns since inception into a book.

This book, which covers questions and answers from 2009 to 2011 on Tanzanian and International Law, is a useful guide to readers, students, teachers, legal practitioners and the public. There are six chapters in the book and topics include relationships, Wills, employment disputes, consumer rights, commercial disputes, Court matters and crime.

The book aims to reach out to readers from all walks of life in an attempt to make the public aware of the law and the repercussions of not following the law. The law can confuse, frustrate and might sometimes not even work for you, but the general norm is that it must be followed. What the book does is to educate you on the law, your rights and the do's and don'ts.

As well as answering some serious questions on the law, this book has a sense of humour and the weekly columns published make for a good Monday morning read with a cup of coffee.

We thank the Daily News, the leading English newspaper in Tanzania that publishes the Q&A columns every Monday (www.dailynews.co.tz). It has been an excellent partnership between the Daily News and FB Attorneys.

We hope you enjoy reading the book.

FB Attorneys

FB Attorneys is a full service law firm based out of Dar es Salaam and brings with it a cumulative experience of over seventy years and a thorough knowledge of colloquial practices within the East African region. We cover all aspects of the law and specialise in Corporate and Commercial matters including Mining, Oil and Gas, Tax, Litigation, Banking, Competition, Real Estate, Intellectual Property Law and Land Law, amongst others.

We are held in high esteem throughout the region and internationally. Our stellar reputation has been built on successfully handling complex business transactions that consistently require a high level of sophistication. Frequently relied upon by clients as the preferred law firm for demanding legal cases, FB Attorneys offers unprecedented legal advice on a variety of corporate and commercial matters.

FB Attorneys has established long-standing relationships with some of the leading financial institutions, government entities, not-for-profit organisations, and other prominent public and private sectors in East Africa.

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FAYAZ BHOJANI has seventeen years of experience in corporate affairs and heads the firm's Corporate Law department. He is a graduate of the world-renowned Berkeley Law School at the University of California. Having consulted for some of the leading banks, mining, oil and gas, and insurance companies, FAYAZ brings a strong commercial sense to any legal transaction. Key specialisations include Corporate and Commercial Law with a focus on Mining Law, Oil and Gas, Tax Law, Banking and Mergers and Acquisitions. As an undergraduate, FAYAZ studied actuarial science under the Society of Actuaries (SOA), bringing with him some sharp mathematical skills.

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HAVING worked as a state attorney for eight years, ISHENGOMA has broad experience in high value litigation cases. In his legal career spanning twenty two years, he focuses on Land Law, Mining Law, and Contract Law. He has been involved in major cases before the High Court of Tanzania (Land Division), Commercial Court and the Court of Appeal. ISHENGOMA brings with him an excellent track record in bank recovery cases; he was trained by the British Council under a team from the House of Lords on prosecution skills.

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Family, Relationships, Wills & Probate



The more time you spend away from your home and enjoy it, the higher the chances you will need a lawyer one day.

...for richer, for poorer in sickness and in health, till death do us part is the promise we make to our loved one when we marry. We promise to love and be faithful, we are not forced into this – we choose to do so. Making the promise is easy! Keeping it is another story. This chapter tackles some interesting questions on family relationships and examples of various case law used in answering these questions. The chapter also covers questions on Wills, probate and inheritance. To many of us, writing a Will is a reminder of the one guarantee life has to offer – death, which is inevitable so why not prepare for it!

Arrested for enticing a woman

For quite some time my neighbour has been accusing me of having an affair with his wife. In January 2010 there was a baptismal ceremony at another neighbour's house in which my family and that of my suspicious neighbour were invited. My neighbour found me standing outside the house with his wife, got very upset, and took her home after yelling at me in front of others. Shortly after they had left, some policemen arrived and arrested me. At the police station I was interrogated about the incident and released a day later. It is untrue that I am having an affair with the wife of my neighbour. Can I be arrested?

18th April 2011

The legendary James Bond would be in big trouble if enticing someone's wife was a criminal offence. But it is not, and hence you cannot be arrested for this. By answering in this manner, we are not giving relationship advice – there are other newspaper columns for that – we are merely advising you from a legal point of view. It is morally wrong to entice another man's wife – it is a tort, which is a civil wrong, not a criminal offence. The police have no right to arrest a man who is accused of such actions. In your case, you can sue both the policemen who arrested you and the neighbour for damages for false imprisonment. On the other hand, since such enticement is a tort, the husband can sue you for damages if he can prove a good cause of action against you.

Sexual relations with a pupil

I am a businessman and I have been sexually involved with a student of a certain secondary school. Last December, the father found out about our relationship and the girl confessed that we have been going out for two years and that she loves me. Surpris-

ingly, I was arrested by the police and have been charged with rape. I have never raped the girl – in fact the girl confesses that she consented to the sexual relations. I have a feeling that the police and magistrate have been compromised. What should I do?

28th March 2011

Due to the increased number of female students who drop out of school due to pregnancy and older men taking advantage of young girls, the law is plain and clear in that it is illegal to have sexual relations with a girl who is in primary or secondary school, or any girl who is below the age of 18. Any man having sexual relations with a pupil below 18 years of age will be guilty of rape regardless of whether she consented to it or not. The presumption of the law is that such a girl is incapable of understanding the situation and is thus incapable of consenting to sexual relations. We hence agree with the police and the Magistrate. Should you be convicted, be prepared to spend about thirty years in jail.

Prime property, no insurance

My father has had bad experiences with insurance companies. He believes they are the biggest crooks on earth. Because of his belief, we have major risk exposure on all assets our father owns. We are a family of eight with five brothers and three sisters. My father has a Will and has left a prime property for me to inherit. That property is currently leased to a company that is involved in mixing and supply of chemicals. This tenant poses a huge risk to the property – nonetheless my father is unwilling to insure the property. Since I am ultimately going to be the owner, can I insure the property to safeguard my interest?

21st March 2011

You must remember that this is not your property just yet. You merely have an

expectation to inherit the property. You might have a moral certainty but you do not have full assurance, as the Will is changeable and you might die before your father. Unfortunately, since you do not own the property you cannot claim to have an insurable interest in the property, and hence cannot insure it in your name. If such an illusory insurance was available, it would be difficult to ascertain the limits on who could insure – for instance, your wife and children could also start insuring it, assuming the property will pass to them upon your demise.

Halving of rights, doubling of responsibilities

I was a very happy single man until I was forced into getting married five years ago. With my wife in the picture, my rights have been halved and responsibilities doubled. There is no peace of mind at home. My wife complains about me whenever she sees me. I just cannot seem to find the right formula to keep my family happy. What should I do?

14th March 2011

There are many aspects to your question that are beyond our scope of advice. There is no magic formula that we can think of that will please your wife. Problems between man and wife have existed since the time of Adam and Eve, and will likely continue to exist. If the marriage is so hopeless, you do have the option of separating and allowing time to reconcile, or proceed to file a petition for divorce. Life does go on even after a divorce, so you should keep that option on the drawing table. However, you might want to meet with a marriage counsellor before taking further action.

Fallen out of love

I got engaged to a man I loved. A few months after the engagement I changed my mind

and now wish to call off the wedding. Can I do that? My friends tell me that I cannot, as legally I am bound to marry this man. What should I do?

21st February 2011

To begin with, you or your friends seem to think you are married. You are not. Engagement under the law is defined as a promise to marry, which is usually by way of an engagement ring. The law does not force you to get married and the engagement can be cancelled, contrary to what your friends tell you. It would be interesting to note what your so-called friends would say about divorce. The strict view they have on engagement means they may counsel others that divorce is illegal!

After all is said and done, if you intend to cancel the engagement and subsequently the marriage, you may be sued for damages for whatever loss that the other party has incurred in connection with the preparation of the marriage. Furthermore, the victim of such an act may sue for the return of the gifts given in expectation that marriage will take place. Be prepared for this.

Compulsion by husband

My husband is a controlling and strict man. He rules us with a heavy hand and a small mistake can lead to a severe beating to anyone, including me. I have no formal education and am entirely dependent on my husband for my livelihood, and hence cannot contemplate divorce. In a recent incident, our house girl left meat on the stove and forgot about it. The meat burnt, ruining the stove and causing a mess in the kitchen. When my husband got home and found out, he was furious. He ordered me to hit the house girl. I would not and he started hitting me and told me he would only stop if I hit the house girl. I hit her with a broom on the head a couple times and have now been charged with assault

with intention to cause Grievous Bodily Harm (GBH). After the arrest my husband decided to dump me and I was bailed out by my neighbour. What should I do?

7th February 2011

Such cruelty is not uncommon, and the law does come to your rescue. In the Penal Code, there is a provision which states that if a woman commits an offence (other than murder or treason), under the direct presence and compulsion of her husband, a sufficient defence is to prove beyond reasonable doubt that she only committed the offence because her husband forced her to do so. You should direct your defence in that direction. Assuming all that you have told us is the truth and can prove so in Court, it is likely that you will be acquitted.

We must, however, caution you that assault with intention to cause GBH, as opposed to common assault, is a very serious offence. GBH means serious bodily harm. In your case, it would depend on the size and weight of the broom, on what part of the body you struck the person, how sharp the assault weapon was, and why you decided to hit the maid on the head as opposed to any other part of the body. GBH also includes psychiatric injury but excludes mere emotions such as distress or fear.

Prenuptial agreement in Tanzania

I am a South African national and have lived in Tanzania for the last ten years. Over the years I have been dating a beautiful Tanzanian girl, whom I trust very much. Recently some lawyers from overseas were visiting our offices in Tanzania, and after I told them about my planned marriage, they suggested I enter into a prenuptial agreement with my girlfriend in case of divorce. Is this possible under Tanzanian law and are such contracts enforceable? What should I focus on in

such an agreement? What are post nuptial agreements?

31st January 2011

A prenuptial agreement, also called ante-nuptial agreement or premarital agreement, is a contract entered into by the two parties prior to marriage. The contents of prenuptial agreements vary widely, but commonly include provisions for division of property and spousal support in the event of divorce or breakup of marriage. The agreement may also include terms for the forfeiture of assets as a result of divorce on the grounds of adultery.

Further conditions of guardianship may be included as well. When high net worth individuals enter into this agreement, frequently one of the more important provisions is that of assets owned before marriage would remain, in the event of divorce, with the party who owned them before the marriage. This provides an 'asset safety zone' for the party that could otherwise potentially end up paying billions in divorce settlement claims over property.

In some countries, particularly in Europe, people prefer these contracts, as they are regarded as (ahem) the ultimate test of love – the only way of knowing that one is truly loved, and not merely wanted because of his or her wealth. However, the contracts are not without opposition; many religious leaders consider them to be damaging to marriages because they are inconsistent with the principle of 'till death do us part'. In Tanzania, the Law of Marriage Act is silent on the issue. The Courts have also not been tested on this. Hence, our answer is based on our reading of the subject, in addition to the general legal framework in Tanzania.

The legality of these types of agreements in Tanzania will very likely depend on the way the prenuptial agreement is drafted. If it undermines morality or if it is against public

policy, the agreement will likely be held to be void. The next question is what types of provisions would undermine morality or render the agreement antithetical to public policy. This will likely be a subjective test, and the background of the parties, their religion, and their culture will likely play a key role in determining this.

The law looks at marriage as a lifetime bond. This might have been a strong notion when the law came into effect in the early 1970s, but with the combination of decreasing tolerance levels amongst couples, increased level of openness, and increased awareness of the law has resulted in record high divorce rates. This is not only true in Tanzania, but all over the world. If the Courts were to look at a public policy from a broader angle, and consider the changing times (we are not sure if they would), we do not see why these agreements should be held illegal. However, as previously stated, this has not been tested in the Courts, and much as you would like us to, we cannot give you a firm answer.

There is, however, no harm in drafting this kind of agreement, and we highly recommend that you do so. It would not only save a lot of time, money and energy to litigants but also lessen the burden on Courts.

If the agreement is held not to be tenable or executable in a Court of Law, it can at best be an indication of the intent of the parties. A clause to exclude any provisions of the agreement that are held to be illegal should be included so that the other provisions of the agreement may be held to be enforceable.

To answer the last part of the question, post-nuptial agreements are similar to prenuptial agreements, except that they are entered into after a couple is married. Bargaining power after marriage is obviously much more limited, and we do not recommend you wait until after marriage to sign any such agreement.

Maintenance order against father

I have been in a relationship with a man for the past two years and have just delivered a baby boy. As is typical of males he has deserted me and I am left to look after the child alone. I am finding it hard to make ends meet. Should the father not also contribute to the well-being of the child? What options do I have?

17th January 2011

Under the Law of Child Act 2009, an application for maintenance order may be made against the alleged biological father to the Court in respect of the child by the expectant mother, at any time before the birth of the child; at any time within twenty four months from the birth of the child; at any time after the birth of the child upon proof that the man alleged to be the biological father of the child has within twenty four months after the birth of the child paid money for its maintenance; at any time within the twenty four months after the return to Mainland Tanzania of the man alleged to be a biological father of the child, upon proof that he ceased to reside in Tanzania before or after the birth of the child.

The Act further states that the Court shall refuse to grant a maintenance order unless it is satisfied that there is a reasonable cause to believe that the man alleged to be the father of the child is in truth the real father and that the application for a maintenance order is made in good faith and not for any purpose of intimidation and extortion; and the man alleged to be the father of the child has been requested by or on behalf of the applicant, to make provisions for maintenance of the child and has refused or neglected to provide maintenance, or has made inadequate provisions.

Based on the above, you have a good case and should proceed to make this application.

Same sex marriage

Does the law in Tanzania allow same sex marriage, and if so, can the partners adopt a child? I am informed that the marriage laws have been amended and such relationships are now recognised. If so, what is the procedure? What about temporary marriages? Can a man in Tanzania have more than one wife?

3rd January 2011

The Law of Marriage Act has not been amended, and same sex marriages, as is the case in most jurisdictions, is illegal. The law in Tanzania has defined marriage as a voluntary union of a man and a woman intended to last for the rest of their joint lives. With this definition, temporary marriages, whatever you mean by that, are not allowed.

A monogamous marriage is a union between one man and one woman to the exclusion of all others.

A polygamous marriage is a union in which the husband may be married to or marry another woman or women.

According to the law, there are two kinds of marriages: those that are monogamous or are intended to be monogamous, and those that are polygamous or potentially polygamous. As per the law, marriages contracted in Islamic form or according to rites recognised by customary law in Tanganyika, are presumed, unless the contrary is proved, to be polygamous or potentially polygamous. In any other case, the marriage is presumed to be monogamous, unless the contrary is proved. We thus answer the last part of your question in the affirmative, a man in Tanzania can have more than one wife.

My Will is in a safe overseas

I made a Will in Tanzania three years ago and deposited it in a bank vault in London

for safekeeping. I am nearly 80 and do not expect to live very long. I wish to change my Will and sent a letter to the bank in London. But the bank wants me to be physically present to receive the envelope with the copy of the Will. I am very weak and cannot travel such distances any longer. The bank does not seem to be able to understand this. What should I do, as I desperately need to change my Will? What happens if there are two Wills?

13th December 2010

Before we answer your question we wonder why the bank in the UK is not releasing the Will. Perhaps they are unaware that the envelope contains a Will. We wonder what would have happened to the envelope in case you had passed away. Should the bank have acted like that when you were gone, it would have been pointless for you to have made a Will, as no one would have been able to access it. We suggest that you deposit the Will in a Will bank and inform the executor of the deposit being made there.

Your question is very simple – in order to make a new Will, you do not need to have the current Will. The new Will will automatically revoke any older Will. Hence, unless there are other reasons that you have not disclosed to us, there is no point in requesting the bank to send you the current Will. Proceed and draft a new Will, and make sure that it is kept in a place where the executor has access to it.

In the event there are two Wills, and both are genuine, the Will that was the latest prevails, as it revokes the older Will.

Compulsion to cohabitation

I was married in 1990 and our marriage is blessed with three children. In the last few months my wife and I have had frequent issues in our marriage, as my wife does not approve some of my habits. She has now gone back to her parents, and refuses

to come back to our matrimonial home. Can the Court support me by issuing an order for her to return?

6th December 2010

Marriage is a voluntary union between a man and woman and contracted with the consent of both parties. The Law of Marriage Act 1971 is also clear that no proceedings may be brought to compel a wife to live with her husband or a husband with his wife. Therefore, the Court cannot compel the two of you to live together. The only remedy for you is to refer the matter to Marriage Conciliation Board. Alternatively, to save your marriage, you may want to change your habits, whatever they are.

Mother dead, father rich

My mother was a rich and famous business-woman in Mwanza who recently died. My father, with whom she did not get along very well, has produced a Will whereby to our utmost surprise she has given him more than we would have expected – he is now a rich man. How do we go about challenging the Will? At the bottom of the Will, my mother has signed as a testator of the Will. Is that not a fatal mistake?

15th November 2010

You have not mentioned whether you have any other Will that your mother made; your question is based on mere speculation. To verify that a Will is genuine, you can check with the witnesses who signed the Will. You can also get a forensic expert to look at the signature on the Will and confirm that it matches the signature of your mother. Your observation that your mother signed as a testator as opposed to a testatrix is interesting. However, in modern English, testator has become gender-neutral, like actor, juror, prosecutor and executor. We are not convinced that a Court will be perverse enough to

rule a Will invalid on the grounds that a female deceased had executed her Will as testator, especially in the face of the common statutory provision that in all documents the masculine includes the feminine and vice versa. You may need legal advice and we recommend you see your attorney.

Who can witness my Will?

I have prepared a Will and need a witness to sign it. Who can be a witness? Does it have to be a judge or lawyer or can it be anyone? I do not want my Will to be challenged.

1st November 2010

First and foremost, you require two witnesses and not one. It is not necessary that a judge or lawyer witness your Will. It is generally advised that a Will be witnessed by persons you know and are trustworthy, and if called upon, will be able to testify that the Will was signed by you in their presence.

A spouse, beneficiary, spouse of a beneficiary, blind person, minor and a person of unsound mind may not witness a Will. The witnesses should understand the nature and effect of what they are doing.

You must take note that both witnesses must be in the same room at the same time as you when they sign. Should one of your witnesses predeceases you, we would recommend that you immediately draw a new Will and get another witness. The law requires witnesses' verification at the time of applying for a probate and a dead witness may complicate and delay the process.

Claiming inheritance from my father

My father is a very rich man – one of the richest in the country. I am well taken care of and have access to pocket money, a car and all the works. My father, however, does not want to give me funds to start a business that I could manage on my own. He claims

that upon his demise I shall get 50% of his wealth. I am turning 30 and would like to pre-claim this inheritance from my father and live my own life. I am also scared that he might change his mind in the Will as it is rumoured he has a mistress and children with her. I would like to confront him about this extramarital relationship. Please advise.

4th October 2010

We assume that you want us to advise you on whether you can claim under the Will and not whether you should confront your father about having a mistress. Unfortunately, if it is the latter, we are not qualified to answer.

To begin with, you are of a mature age and not a child by any definition. We know of no law in any jurisdiction that allows the beneficiary of a Will to pre-claim their portion of the testator's estate. A Will is an instrument that gets invoked upon the death of the testator. Fortunately (or unfortunately), your father is still alive and you cannot claim under the Will. It makes absolutely no difference if your father is the richest man in Tanzania or the richest man in Africa – amount of wealth does not change the law.

Also be informed that a Will is a changeable instrument and is not cast in stone. It can be changed at any time by the testator. Upsetting your father in any way can make him change his mind about you – do keep that in mind when you confront him about the mistress.

Divorcing a mentally challenged wife

I celebrated a Christian marriage with a girl five years ago. Our marriage is blessed with one boy who is nearly three. In January 2008 my wife fell sick with malaria and was mis-diagnosed and treated with the wrong medication. She then fell into a coma and was hospitalised for three months before being discharged. Ever since her discharge she is mentally challenged and cannot eat,

take a bath or walk on her own. I have tried very hard to adjust, but have failed to keep up with this. I wish to support her for life, but wish to divorce her. Is this a sufficient grounds for divorce? What grounds for divorce can I come up with to be successful? Please note that two of my wife's brothers are lawyers.

27th September 2010

We are sorry to hear about your wife. We will take you down memory lane and remind you of the vows you made during your wedding ceremony when you undertook to live with your wife in any situation be it during happiness or sadness, sickness or good health. The same applies in law in that sickness is not ground for divorce, separation or annulment of a marriage. The case would have been different if your wife had this problem before you contracted your marriage and this was concealed from you. Had this been the case, your marriage would have been voidable and we could have advised you to go to Court for an annulment.

Since you have revealed the truth, we as officers of the Court are duty bound not to mislead any Court and do not see the need of discussing other grounds that you want to cook up. We have also taken note that two of your wife's brothers are lawyers – this fact is relevant to the extent that she will have good guidance on this matter and you should be aware of that.

Grant of letters of administration on urgent basis

My father passed away a few weeks ago without leaving behind a Will. Since I am the first born and our mother predeceased my father, I agreed with my younger brothers and sisters that I should apply for letters of administration for his estate. Before the letters of administration was granted, a

woman appeared from out of the blue, and challenged my application, claiming she was also a wife of my father. I have never seen this woman in my life and the matter is before the Court. We have learned that a number of our father's properties are being misused in his absence. Other assets, including his car, are in the possession of his driver who does not seem to show good intentions. My father's business partners are also behaving weirdly and not disclosing details of certain transactions. The Court case will take a long time. What can we do at this juncture to stop this pilferage?

27th September 2010

The letters of administrations you have applied for will not be granted until the application made by this alleged wife of the deceased is disposed of. You have correctly pointed out that this will take time and time being of essence, you need to stop this pilferage and misuse of assets.

Our law allows the grant of letters of administration with limited powers. Such temporary letters of administration will give the administrator all the rights and powers of the general administrator, except the powers of distributing the estate. In law, this is referred to as grant of letters of administration *pendente lite*. We recommend that you immediately apply for letters of administration to preserve your late father's estates while you are settling matters in Court.

This application should be filed under 'certificate of urgency' for it to get a quick hearing date.

Husband has 'nyumba ndogo'

We have been married under a Christian marriage for the past fifteen years and blessed with five children. I can prove that my husband has another girl and house, *nyumba ndogo*, in his life. Is this not a

criminal offence? What action can I take?

20th September 2010

The *nyumba ndogo* is an adulterous relation that your husband is engaged in. Adultery is defined as sexual intercourse between a married person with a person who is not that person's lawful spouse.

Unfortunately, this is not a criminal offence in Tanzania, meaning one cannot be arrested for being in this kind of a relationship.

If the behaviour does not change or your relation is beyond repair, this is grounds for divorce. You also have a right to sue the *nyumba ndogo* lady for damages, but such claim for damages can be thrown out by the Court if it can be convinced that you have done anything by your conduct or act or omission to induce or force your husband to behave in this manner.

Necessity of bride price

I entered into a Christian marriage with a woman. Strangely, her father came and took her away against her will, claiming that I had not paid bride price for her. I do not disagree with this, but the amount demanded is excessive. Is the father entitled to keep her away from me because of the unpaid bride price? Is bride price a mandatory requirement under the law? Please advise.

16th August 2010

Under the Law of Marriage Act bride price is not a mandatory requirement. In other words, there can be a valid marriage between a man and a woman, whether bride price is paid or not. The act of your father in-law taking your wife away from you is illegal and unjustified.

In the event your wife is unable to return, you can seek for an order of the Court to compel your father in-law to return your wife in your care.



If you would like a copy of the book please email:
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