THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY AT MUSOMA)

CIVIL REVISION No. 20231123000086814

(Arising from the Resident Magistrates' Court of Musoma at Musoma in Matrimonial Cause No. 2 of 2023)

NOELA MEDARD WAMBURA ..... **APPLICANT**

Versus

JUMA MASAGATI MABERE ..... **RESPONDENT**

RULING

27.03.2024 & 08.04.2024

Mtulya, J.:

On 7th September 2023, **Noela Medard Wambura** (the applicant) had approached the **Resident Magistrates' Court of Musoma at Musoma** (the court) and petitioned for divorce in **Matrimonial Cause No. 2 of 2023** (the Cause) without attaching a certificate from **Makoko Ward Marriage Conciliation Board** (the board) as per requirement of section 101 of the **Law of Marriage Act [Cap. 29 R.E. 2019]** (the Act). The absence of the certificate was spotted by **Mr. Emmanuel Gervas**, learned counsel for **Mr. Juma Masagati Mabere** (the respondent) hence protested the application in three (3) points of law for want of the application of sections 101 (f) & 106 (2) of the Act and Rules 18 & 19 of the **Law of Marriage Act (Matrimonial Proceedings) Rules, GN. No. 246 of 2017** (the Rules).

The court on 31st October 2023 had resolved the contests on the points in favour of the respondent and at page 7 held that that: *this petition for divorce is defective for contravening section 101 (f) of the Law of Marriage Act for being filed without obtaining first court order.* The reason of the decision is found at page 6 of the Ruling that:

> *I believe all orders are obtained by application. It is not automatic and suo moto given as it infringes the right to be heard...and that section 106 (2) of the Law of Marriage Act is very clear that if the court is satisfied then there must be an application to move the court to that angle of satisfaction.*

It is both the decision and reasoning of the court which were brought in this court for revision. The revision was called for hearing on 27th March 2024 and the applicant had hired legal services of **Mr. Barack Dishon** and **Mr. Dotto Bija** to argue the revision, whereas the respondent had invited **Mr. Emmanuel Gervas**, learned counsel to respond to the arguments of the applicant.

In order to move the court to appreciate the complaint of the applicant, the applicant's learned counsels have produced three (3) reasons, *viz*: first, the court failed to exercise its jurisdiction vested to it as there was no any law which requires the petitioner to have a leave of the court on his hand in order to lodge a petition for divorce without

a certificate from the board under extra ordinary circumstances; second, the trial court did not consider the applicant's pleadings; and finally, Rule 18 and 19 of the Rules do not contravene right to be heard.

According to the dual, reading the provisions of sections 99, 100, 101 and 106 (2) of the Act, it is vivid that a petitioner for divorce is not required to file any separate application for leave to substantiate application of the proviso in section 101 (f) of the Act. In the opinion of the dual counsels, the question to be replied by this court is: at what time the certificate of the board becomes useful in the petition for divorce proceedings or else, what time the court can satisfy itself on the extra ordinary circumstances as exception to the general rule in section 101 of the Act.

In the opinion of the dual counsels, the reply is found at Rule 19 read together with Rule 18 of the Rules that: if the petition for divorce complies with section 101 (f) of the Act via pleadings, it will be admitted *suo moto* by the court and if does not comply, it will be rejected. To the dual counsels, if the court does not scrutinize pleadings at admission stage, it has not done its duty hence it cannot go further and entertain preliminary objection on points of law. According to them, the petitioner had stated in the eighteenth

paragraph and attached proof of the same in her affidavit, but the court had declined to consider them.

In order to support their move, the twin learned counsels registered a decision of this court in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe**, Civil Appeal No. 163 of 2020, arguing that the court must satisfy itself at the time admission of the petition for divorce and if there is no certificate, it has to search for extra ordinary circumstances. The dual contended further that Rule 18 and 19 of the Rules do not deny the respondent the right to be heard. In giving reasons on the subject, the dual counsels produce two (2) reasons, namely: first, the case was not at hearing stage; and second, the extra ordinary circumstances cited in the applicant's affidavit were in the court's mandate during admission of the case. According to them, if the matter could have been left to proceed to the hearing stage, the parties would have well enjoyed the right to be heard via the contents in the pleadings.

Finally, the applicant's learned counsels submitted that the trial court was wrong in entertaining points of objection without abiding with the laws regulating matrimonial causes filed in courts hence this court is empowered under section 79 (1) of the Code to revise the proceedings in order to put the record right.

Replying the submissions of the dual learned minds, Mr. Gervas for the respondent, submitted that it was vivid from the proceedings of the court and submission of the applicant's learned counsels that the Cause at the court was preferred without the certificate from the board contrary to the law and established practice of courts. In order to substantiate his submission, Mr. Gervas cited the enactments in article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution), sections 101 (f) & 106 of the Act and Rules 18 & 19 of the Rule. In precedent he moved this court to read a bunch of decisions in: **Hadija Seif v. Ahmed Nassoro**, Misc. Civil Application No. 51 of 2022; **Athanas Makungwa v. Darin** (1983) TLR 132; **Mariam Tumbo v. Harold Tumbo** (1983) TLR 293; **Janeth Gonde Rubirya v. Pastory Peter Massawe**, Civil Appeal No. 39 of 2022; **Martha Mayenze v. Emmanuel Mongo**, (PC) Matrimonial Appeal No. 15 of 2019; and **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020,

In the opinion of Mr. Gervas, the indicated enactments and precedents show that the certificate of the board is necessary and must be registered during lodging of the petition for divorce. According to him, if applicant is so wish to practice the exception enacted in section 101 (f) of the Act, he must satisfy the court of the same by registering necessary materials in a separate application, where the

respondent will cherish the right to be heard. Mr. Gervas thinks that for the court to resolve the issue of certificate *suo moto* leads to automatic denial of the right to be heard on part of the defendant. In his interpretation, court's satisfaction would only be arrived after a contest of both parties in a dispute. Mr. Gervas went further in citing the current sciences in electronic case management system (e-CMS) where Deputy Registrars or magistrates in-charge are mandated to admit cases and not to resolve or scrutinize issues of exceptions in section 101 of the Act. According to him, issues are resolved before the assigned judges or magistrates when parties appear for hearing or necessary orders.

Regarding the cited precedent in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe** (supra), Mr. Gervas stated that the case concerns presence of exhibit certificate of the board, and not registration or admission of a petition for divorce in a matrimonial cause. Finally, Mr. Gervas contended that the case of **Hadija Seif v. Ahmed Nassoro** (supra) regulates the circumstances like the present one, and this court may be inclined to follow in resolving the current dispute.

In a brief rejoinder, the applicant's learned counsels have submitted that section 101 (f) of the Act reading together with section 106 and Rules 18 & 19 of the Rules were coached in a way that the

court may resolve the exception *suo moto* in pleadings of the parties. In their opinion, section 106 (2) of the Act gives mandate to the court to satisfy itself *suo moto* on want of the relevant materials to decline the requirement of a certificate. According to them, Mr. Gervas insisted on separate, but was silent on the applicable law to be cited in chamber summons supported by an affidavit.

The instant revision will not detain much this court. The parties are contesting on appropriate procedure to be followed in resolving extra ordinary circumstances indicated in section 101 (f) of the Act. The applicant's learned counsels think that the appropriate procedure is to state in an affidavit and produce relevant materials in favor of the exception enacted in section 101 (f) of the Act. According to them, courts of law may wish to resolve the issue *suo moto* during admission of the dispute without inviting the defendant to enjoy the right to be heard. To them that is the law in section 101 (f) read together with section 106 (2) of the Act and Rule 18 & 19 of the Rules. I have perused the indicated sections and Rules together with the precedent in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe** (supra).

Section 101 of the Act provides in brief that: *no person shall petition for divorce unless he has first referred the matrimonial dispute to a Board and the Board has certified that it has failed to reconcile the parties*. However, the Act moved further to recognize *extra ordinary*

circumstances which make reference to the board is impracticable to be an exception to the general rule of the enactment (see: section 101 (f) of the Act).

On the other hand, section 106 of the Act shows in brief that: every petition for a decree of divorce shall be accompanied by a certificate issued by the Board before the filing of the petition. Similarly, the section has a proviso which recognizes the proviso in section 101 of the Act in the following words: *such certificate shall not be required in cases to which the proviso to section 101 applies*.

It is unfortunate, the two cited sections, which are the center of the instant contest, did not move further to display procedure in a circumstance where a petitioner alleges that he had faced the so called: *extra ordinary circumstances*, which make access to the certificate impracticable. Similarly, the indicated sections are silent on whether a petitioner is required to seek leave of the court in a separate application filed by a chamber summons supported by an affidavit or direct approach to the matrimonial court. According to the parties' learned counsels, the cited Rules and precedents may be of aid on the interpretation of the subject. Rule 19 of the Rules provides that:

> *(1) Where a petition for divorce or separation is presented, the court shall, **if it is satisfied** that the petition does not*

comply with the provisions of section 106 of the Act or of the provisions of rule 18, reject the petition.

(2) Where the court is satisfied that the petition complies with the provisions of section 106 of the Act and of rule 18, the court shall admit the petition and direct that a notice of the petition together with a copy of the petition be served upon the respondent and the co-respondent, if any.

Whereas, Rule 18 of the Rules, on the other hand provides that:

(1) Every petition shall state in addition to the facts required to be stated therein by section 106 of the Act:

(a) the full names of the petitioner and his address for service;

(b) the full names and address of the respondent and of every co-respondent.

(2) Every petition shall be signed by the petitioner and shall contain a statement by the petitioner verifying the facts of which he has personal cognizance and of the facts which he believes to be true by reason of any information in his possession or otherwise.

The two enacted rules, as from the plain meaning interpretation of the law, are silent on appropriate procedures to be followed if the applicant who petitions for divorce and alleges *extra ordinary circumstances* which make access to the certificate impracticable. The rules are made from enactment of section 162 (1) of the Act to regulate matrimonial proceedings. However, they are silent on the subject.

I am aware Mr. Gervas had disputed all materials brought by the applicant's learned counsels in the present case, including the enactment of sections 101 & 106 of the Act and Rules 18 & 19 of the Rules contending that they are all in favor of the respondent's protest. In substantiating his argument, he produced several precedents on want of certificate, and regarding the present dispute he produced the precedent in **Hadija Seif v. Ahmed Nassoro** (supra). In his opinion, this precedent resolves the present dispute. On the other hand, applicant's learned counsels think that the precedent in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe** (supra) settles down the matter.

I have had an opportunity to peruse the indicated decisions of this court which are alleged to have solved contests like the instant one. The precedent in **Hadija Seif v. Ahmed Nassoro** (supra), at page 3 of the Ruling shows, in brief, the species of dispute:

> *...from the court record, it is apparent that this application was brought in court without attempting to resolve the matrimonial dispute before the Marriage Conciliation Board as provided under section 101 (f) of the Law of Marriage Act [Cap. 29 R.E. 2019]. No wonder that, even the present application was brought in court without being*

accompanied with certificate issued by the Board to depict the Board has failed to reconcile the parties.

The court then thought at page 4 of the decision that:

*...reference of a matrimonial dispute to the Board prior to petitioning for divorce is mandatory requirement. The law has used the word **shall** to emphasis that it is mandatory, unless there are extraordinary circumstances that prevents to fulfil the requirement of the law...*

This court finally invited the indicated exception enacted in section 101 (f) of the Act and resolved that:

...the respondent is currently living in Geita Region, working with the capital drilling [that] cannot be an extra ordinary circumstance, and the applicant failed to show how it was impracticable for the respondent to access the Board in search of a certificate that could pave the way to the next step...

In the precedent, there is nothing resolving the species of procedures to be followed when a petitioner is intending to persuade the court in application of section 101 (f) of the Act read together with section 106 (2) of the Act and Rules 18 & 19 of the Rules in accessing courts to explain reasons of extra ordinary circumstances.

Pages 3 & 4 of the Ruling display all that. Similarly, the precedent went to the merit of the matter and resolved that the respondent being working at Geita Region is not relevant material for inviting section 101 (f) of the Act. In the present case, the applicant claims to have registered relevant materials in the Cause at paragraph 18 of the affidavit, but the court had declined to peruse and resolve the same.

This court cannot scrutinize and deliver decisions which its relevant materials where not digested and decided at that level. It is a settled position of the law that, a matter not decided by the lower court cannot be decided by this court (see: **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018; **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006; **Celestine Maagi v. Tanzania Elimu Supplies (TES) & Another**, Civil Revision No. 2 of 2014; and **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya**, Civil Appeal No. 40 of 2021).

Assuming all is well from the submission of Mr. Gervas and that the indicated precedent of **Hadija Seif v. Ahmed Nassoro** (supra) regulates the procedure regulating application of the exception enacted in section 101 (f) of the Act. That would be entertaining two (2) separate applications in the same court with distinct time

schedules. The practice is currently discouraged by a bunch of enactments in article 107A (2) (b) & (e) of the **Constitution** and sections 3(A) & (B) of the **Civil Procedure Code [Cap. 33 R.E. 2022]** (the Code), which are in favor of speed justice without technicalities in hearing of disputes brought in courts.

The indicated enactments have received a bunch of precedents and currently is a settled position (see: **Yakobo Magoiga Gichele v. Peninah Yusuph**, Civil Appeal No. 55 of 2017; **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017; and **Chenge Magwega Chenge v. Specioza Mochubi**, Land Appeal No. 13 of 2022). Similarly, the current trend in enactments and precedents show a move to do away with unnecessary complaints and applications in resolving disputes (see: section 45 of the **Land Disputes Court Act [Cap. 216 R.E. 2019]** (the Land Disputes Act); section 5 of the **Appellate Jurisdiction Act [Cap 141 R.E 2019]** (the Appellate Act) and section 10 of the **Legal Sector (Misc. Amendment) Act, No. 11 of 2023.**

As of today, even leave of this court to access the Court of Appeal (the Court) has been deleted from a statute book to easy legal procedures of accessing the Court (see: Section 5 of the Appellate Act). Any person or institution, which adds one more procedural requirement in law or practice, will not be tolerated by

this court. The current protest of Mr. Gervas wants to add more procedural requirement in matrimonial disputes brought in this court on ground of extra ordinary circumstances. The move must be discouraged and will receive the obvious consequences in this court.

I am conversant that the applicant's learned counsels have cited the precedent in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe** (supra) contending that it settles down the instant contest. I have read the ruling and found page 9 of the same to depict the following words:

> *I think what is needed for purpose of giving jurisdiction to the court is the existence of the certificate before the court at the registration stage. It is something which is required at the admission stage. It must exist before the case is registered and given number...what is important is that it must be existence as part of the pleadings before the magistrate at the time of making the decision to register the case.*

However, the case did not resolve the application of section 101 (f) of the Act and nowhere in the Ruling where section 101 (f) of the Act was cited. The case was trying to resolve an issue: *whether Islamic Talak issued by Baraza la Usuluhishi Mashauri ya Ndoa la Bakwata Chita approved by Bakwata Kilombero District was a legal*

document for purposes of the Law of Marriage Act. The issue was resolved in favor of the document talak, and nothing more on procedures to access courts under exceptions enacted in section 101 of the Act was resolved.

I understand during the proceedings, Mr. Baraka contended that the key words are that the matter must be considered at registration or admission stage. Mr. Gervas on the other hand had protested for want of the respondent's right to be heard. Mr. Gervas moved further to state that the current sciences in e-CMS has introduced electronic filing system which shows that it is difficult to resolve the materials at admission stage. In his opinion, it is Deputy Registrars or Resident Magistrates In-charge who admit cases and are not empowered to resolve each and every dispute at admission.

It seems there is a point on the protest of Mr. Gervas. First, the law does not provide for such procedure; second, proceeding on such *suo moto* move, in such circumstances may violate the constitutional right to be heard enacted under article 13 (6) (a) of the Constitution, which is now elevated to the level of human rights (see: **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018; **Judge In-Charge, High Court at Arusha and the Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; and **Masumbuko Rashidi v. Republic** [1986]

TLR 212). In short, the right to be heard cannot be curtailed by statutes or rules of enactment subordinate to the Constitution. In that case, any enactments or interpretations of enactments must cherish the right to be heard to both parties in contests.

I am aware this court is not bound by its previous decisions, and when it sees right to depart, it may wish to do so. I have indicated in this Ruling how difficult to follow and abide with the two indicated precedents of this court in **Hassan Mohamed Timbulo v. Rehema Clemens Kilawe** (supra) and **Hadija Seif v. Ahmed Nassoro** (supra). In between the two decisions, there is in place a Court of Appeal decision in **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020, which have resolved that: *compliance with section 101 of the Act is mandatory except where there is evidence of extra ordinary circumstances making it impracticable to refer a dispute to the Board.* In the precedent, there was no any indication of extra ordinary circumstances which could have escaped the Board hence the Court had nullified the proceedings and quashed the judgment of the trial court.

In the present case, there is paragraph eighteen in the applicant's affidavit which the applicant alleges that it displays extra ordinary circumstances. The trial court had declined to resolve the materials on merit in favor of the points of objection raised by Mr.

Gervas. The question is whether that was proper. What then appropriate steps to have been employed by the trial court.

In my considered opinion, and after noting there is no specific enactment on the subject and being aware that the current trend of this court in reducing procedures in favor of substantive justice, and noting the necessary materials are in the applicant's affidavit, and the respondent had disputed them in the twelfth paragraph of the counter affidavit, the proper procedure would be to contest the materials during the hearing of the matter. In that case, both parties will cherish the indicated enactments in articles 13 (6) (a) & 107A (2) (b) & (e) of the **Constitution** and sections 3(A) & (B) of the Code. If the trial court sees no merit on the materials, it may decline the application of section 101 (f) of the Act for want of the application of section 106 (2) of the Act. To end the matter at preliminary stages, it is not an inviting story in our courts.

I am conscious that Mr. Gervas had correctly submitted and agree with him that points of law may be raised at any point of time. That is precise position of the law and cherished in a number of precedents (see: **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai,** Civil Appeal No. 179 of 2016; **Meet Singh Bhachu v. Gurmit Singh Bhachu,** Civil Application No. 144/2 of 2018; **Shahida Abdul Hassanal Kassam v. Mahedi Mohamed**

Gulamali Kanji, Civil Application No. 42 of 1999; **Tanzania Spring Industries & Autoparts Ltd v. The Attorney General & 2 Others**, Civil Appeal No. 89 of 1998; and **Method Kimomogoro v. Registered Trustees of TANAPA**, Civil Application No. 1 of 2005.

However, the circumstance of the present dispute is a bit distinct. In the present case, there are enactments and practice which are silent on the subject complained of. Neither the applicant's learned counsels nor the respondent's learned counsel who had cited any enactments or precedents which regulates the present contest.

In my considered opinion, I think any interpretation of the law, as of current, must consider provisions of articles 13 (6) (a) & 107A (2) (b) & (e) of the **Constitution** and sections 3(A) & (B) of the Code. I have already indicated how the enactments of section 101 (f) and 106 (2) of the Act may be interpreted to comply with the enactment of articles 13 (6) (a) & 107A (2) (b) & (e) of the **Constitution** and sections 3(A) & (B) of the Code. I have also showed in this Ruling that a matter which has not been resolved in the lower court, cannot be resolved at this stage.

In the final analysis, and having said so, I set aside the proceedings of the **Resident Magistrates' Court of Musoma at Musoma** in the **Matrimonial Cause No. 2 of 2023** from 29th

September 2023 to 31st October 2023, and quash the ruling of the court issued on 31st October 2023. I order the parties to appear before the court in the Cause in two (2) weeks' time period from today, 8th April 2024, in order to proceed in accordance to the law. I declined to issue an order to costs as this is a matrimonial contest and it is back on the course at the Resident Magistrates' Court of Musoma at Musoma.

Ordered accordingly.

F.H. Mtulya

Judge

08.04.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of the applicant, **Noela Medard Wambura** and her learned counsel, **Mr. Doto Bija** and in the presence of the respondent, **Juma Masagati Mabere** and his learned counsel, **Mr. Emmanuel Gervas.**

F.H. Mtulya

Judge

08.04.2024