IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A. KWARIKO, J.A., And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 246 of 2019

HASSANI ALLY SANDALI.....APPELLANT

VERSUS

ASHA ALLY.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 25th day of May, 2018

in

Matrimonial Appeal No. 2 of 2016

JUDGMENT OF THE COURT

17th & 24th February, 2020

MWANDAMBO, J.A.:

This is a third appeal by Hassani Ally Sandali (appellant) against Asha Ally (respondent) arising from a matrimonial dispute which culminated into a decree of divorce before Chikundi Primary Court, Masasi District. The appellant all along challenged the dissolution of his marriage contending that it was premature but has been a loser to the respondent before the Primary court all the way to the High Court. He is now before the Court on a sole question of law determined by the High Court revolving around the

competence of the petition and the resultant proceedings before the Primary court.

The facts giving rise to the instant appeal are not in dispute. Hassani Ally Sandali and Asha Ally were husband and wife having celebrated their marriage under Islamic rites sometime in 2001. On 24th June 2016 Chikundi Primary Court, Masasi District dissolved their marriage following a successful petition for divorce by the respondent. That court did so presumably upon being satisfied that the marriage celebrated under Islamic law had been irreparably broken down and that the Marriage Conciliation Board, BAKWATA Chigugu Ward had failed to reconcile the parties. In other words, the trial Primary Court granted the divorce because it believed that the preconditions for doing so under section 107(3) of the Law of Marriage Act, Cap. 29 [R.E 2002] (the Act) had been met. However, the appellant has all along contended that the decree of divorce was made prematurely because the conditions precedent for a proper divorce involving a marriage celebrated under Islamic law were not met. His appeal before the District Court did not succeed and likewise before the High Court on a second appeal.

One of the grounds of appeal before the High Court which is relevant to this appeal contended that the Primary court issued a decree of divorce contrary to the law because there was no evidence that there was a valid certificate from BAKWATA that it had failed to reconcile the parties on a matrimonial dispute referred to it. The challenge of the decree of divorce on account of lack of a certificate of the marriage conciliation board of its failure to reconcile the parties on their matrimonial dispute surfaced for the first time before the High Court on a second appeal. That meant in effect that the appellant was questioning the competence of the proceedings of the Primary court and the orders it made which had a bearing on the proceedings before the District Court on appeal. Although the High Court acknowledged that the letter issued by BAKWATA, Chigugu ward not in conformity with the certificate in the prescribed form, it treated the letter as sufficient to institute a petition for divorce and in consequence, it dismissed the appellant's appeal. That reasoning did not find purchase with the appellant who has preferred a third appeal after obtaining leave and a certificate on a point of law from the High Court.

In the exercise of its power under section 5(2) (c) of the Appellate Jurisdiction Act, Cap.141 R.E 2002, the High Court certified the following point;

> *"Whether the High Court was right in holding that the letter from BAKWATA Conciliation Board, which does not resemble the form prescribed by law as certificate of such Board that it has failed to reconcile the parties, as sufficient for use as such certificate in matrimonial proceedings."*

Arising from the foregoing, the appellant preferred three grounds of appeal running as follows:

1. *That the trial judge(sic!) erred in law by granting a decree of divorce while there was not(sic!) certificate from the Marriage Conciliation Board as required by law certifying that it has failed to reconcile the parties.*
2. *That the trial Judge (sic!) erred in law by holding that the letter from BAKWATA Chigugu amounted to a Certificate of Marriage Conciliation Board.*
3. *That the trial judge(sic!) erred in law by failure to hold that such letter did(sic!) amount to (sic!) as prescribed in form 3 of the relevant law and the same*

did not meet the requirements of a certificate under the law.

We wish to point out that the reference to a trial judge in the grounds of appeal is erroneous because the decree of divorce was made by the Primary court and not the High Court. At any rate, the issue touching on the validity of the impugned certificate never surfaced before the Primary court and so that court cannot be blamed for something which it did not itself deal with.

In arguing the appeal, the appellant who is unrepresented filed written submissions so did the respondent resisting the appeal. Considering that the issue in the appeal revolves around the point certified by the High Court, the appellant focused submissions on that point. The appellant argued that the petition for divorce was conditional upon a matrimonial dispute being referred to a Marriage Conciliation Board and such Board certifying that it had failed to reconcile the parties. The appellant pegged his argument on sections 101 and 104 (4) of the Act and contended that despite the High Court making a finding that the Board which attempted a reconciliation did not issue a certificate in Form 3 prescribed under GN 240

of 1971, it went ahead and held that the letter issued by that Board was sufficient to institute matrimonial proceedings.

The appellant has criticized the High Court for arriving at that conclusion contending that the letter was deficient in both form and content and thus did not amount to a certificate for the purposes of sections 101 and 104 (5) of the Act. He submitted further that whilst section 101(f) of the Act dispenses with referring of matrimonial disputes to a Marriage Conciliation Board where there are extra ordinary circumstances, there is no indication that the condition for doing so was met and so the trial Primary court had no legal basis for dissolving a marriage on which there was no proof that a dispute had been referred to the Board and such Board issued a valid certificate that it had failed to reconcile the parties. He invited us to be persuaded by a decision of the High Court in **Shillo Mzee v. Fatuma Ahmed** [1984] TLR 112 to buttress his contention. In conclusion, the appellant invited the Court to hold that since the petition for divorce before the Primary court was incompetent for want of a valid certificate from the Marriage Conciliation Board, the proceedings before the Primary court and the resultant decree for divorce

as well as the proceedings and orders of the District Court and the High Court were a nullity and liable to be quashed followed by an order allowing the appeal with costs.

In addition to the written submissions, the appellant made oral submissions a large part of which raising factual matters including evidence not borne by the record and outside the point certified by the High Court for our determination. For instance, the contention that the conciliation board never met to reconcile the parties. All in all, he reiterated his contention that the BAKWATA issued a letter which the respondent took to the Primary Court but that letter was not a proper certificate known under the law.

The thrust of the respondent's written submission was to support the decision of the High Court. Her starting point was that the validity of the certificate of the Marriage Conciliation Board never featured before the Primary court. We understood her to be suggesting that it was too late to raise that point before the High Court. It is her further submission that all the same, the appellant has failed to persuade the Court on what amounts to a valid certificate. Referring to GN. 240 of 1971, the respondent argued

that the High Court rightly held that the letter written by BAKWATA carried the spirit of a certificate of the Marriage Conciliation Board. In the alternative, the respondent argued that if the Court was to rule otherwise, it should, nevertheless, do away with the requirement for a certificate of the Marriage Conciliation Board under Section 101(f) of the Act.

We have examined the submissions of the parties in the light of the point certified by the High Court. We are called upon to determine whether the letter from the Marriage Conciliation Board not in conformity with the certificate in the prescribed form could still be used as a certificate for instituting a petition for divorce. The High Court had no difficult in sustaining the appellant's argument that the letter did not resemble the certificate prescribed in Form 3 in the schedule to GN 240 of 1971. However, it took the view that the letter reflected the spirit of a certificate of the failure to reconcile the estranged couple and so it was a good certificate sufficient to institute the petition for divorce under section 101 of the Act. In arriving at that conclusion, the High Court took into account what it believed to be peculiar circumstances obtaining in the rural areas with the attendant geographical limitations to access proper certificates

specified in Form 3. The nagging issue is whether the learned Judge was correct in treating that letter as a valid certificate notwithstanding its inconformity with a certificate prescribed in Form 3. Before we address that aspect we wish to clear a few issues featured in the submissions of the parties both written and oral.

The first relates to the criticism by the respondent against the appellant for not raising the issue on the validity of the certificate before the Primary court. It is true that the issue featured as a ground of appeal for the first time on a second appeal before the High Court. However, whilst it is desirable that all issues must have been dealt with at the earliest possible opportunity, the High Court was not precluded from dealing with it as it did. That ground involved a point of law touching on the competence of the proceedings before the Primary court which could be raised at any time. In **Marwa Mahende v. Republic** [1998] TLR 249, this Court underscored the duty of the appellate courts to apply and interpret the law of the land and ensuring proper application of the laws by the courts below. See also: **B 9532 Cpl. Edward Malima v. Republic**, Criminal Appeal No. 15 of 1989 referred recently in **Adelina Koku Anifa &**

Another v. Byarugaba Alex, Civil Appeal No. 46 of 2019 (both unreported).

The other aspect relates to the appellant's claim in his oral submissions contending that there was no reconciliation of any dispute before BAKWATA. We need only say that this complaint falls outside the point certified by the High Court for our determination. In any event, the determination of that complaint will entail revisiting evidence and possibly calling for additional evidence which is not what we are supposed to do at this level. We shall now revert to the issue in this appeal.

We shall begin with the obvious. As seen above, the Primary court dissolved the marriage between the appellant and the respondent on the basis of section 107(3) of the Act. However, the granting of the divorce under section 107(3) of the Act was not an end in itself. It was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of the Act is mandatory except where there is evidence of existence of extra

ordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101(f) of the Act. However, there is no indication of any extra ordinary circumstances in this appeal which could have attracted dispensing with reference of the matrimonial dispute to the Board.

There is no dispute that there was indeed a matrimonial dispute between the parties which resulted into the appellant issuing a *talak* to the respondent on 26th February 2016 (page 78 of the record). In terms of section 107(3) of the Act, the Primary Court had power to dissolve the irreparably broken down marriage between the parties upon being satisfied that all conditions under the sub-section had been met. It is important to note that the Board's certificate is one of such conditions which the Primary court was bound to be satisfied of its existence. Section 101 of the Act does not prescribe how a certificate accompanying a petition for divorce should look like. However, rule 9(2) of GN 240 of 1971 provides:

> *"9(2) Where the dispute is between a husband and his wife, and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, and the Board*

fails to reconcile the parties, the Board shall issue a certificate in the prescribed form."

The form is prescribed under the schedule as Form No. 3 in English language. Due to its centrality to the appeal, we take the liberty to reproduce it as hereunder:

"MARRIAGE CONCILIATION BOARD OF

.....

(state full designation of Board)

WHEREAS a dispute exists between..... (state name of husband) and ..... (state name of wife) who are lawfully married and such dispute was referred to this Board by ..... (name of the person who referred the dispute).

THIS IS TO CERTIFY that this Board has failed to reconcile the parties and that in the opinion of the Board–

.....

.....

.....

(any recommendation which the Board may wish to make)

Signed .....

Chairman/Vice-Chairman/Member .....

Dated this ..... day of ..... 20...."

It is plain from Form 3 that the Board is enjoined to certify that it has failed to reconcile the parties on a dispute referred to it by either the husband or wife. In addition, in terms of section 104(5) of the Act, the certificate has to reflect the Board's findings. The contents of the impugned certificate are reproduced at page 92 and 93 of the record thus:

> *"... Bi Asha Ally alikuja katika Baraza la BAKWATA Kata Kulalamika aliyekuwa mumewe Bw. Hassani Sandali ..... hivyo sisi tumeshindwa. Hivyo huyo mama tumemruhusu kuja huko kwa ufafanuzi zaidi wa kisheria ..."*

That letter was addressed to Chikundi Primary court and signed by BAKWATA secretary. Ordinarily, a certificate, as seen above would be signed by the Chairman, vice chairman or member. It is not clear to us if the secretary was also a member of the Board with authority to sign the certificate. Be it as it may, if one compares Form 3 with the contents of the letter from BAKWATA, it will be clear that there is no indication in the letter that BAKWATA made any attempt to reconcile the parties on the dispute referred to it by Asha Ally (respondent). It is equally unclear what

the letter meant by the phrase *hivyo tumeshindwa* (we have failed). To us that phrase may have meant to say that the Board had failed to reconcile the dispute referred to it or that it failed to reconcile the parties on account of the appellant's failure to appear before the Board. But the fact that it says that the respondent approached BAKWATA appears to suggest that it is the respondent alone who went to BAKWATA complaining against the appellant. In the absence of any express statement that BAKWATA made an attempt to reconcile the parties but failed, can only lead to an inference that BAKWATA could not have certified that it failed to reconcile the dispute by involving the respondent alone.

The appellant has contended that the letter from BAKWATA is deficient both in form and content and so it could not qualify to be a certificate carrying the spirit of Form 3 as held by the High Court. We are constrained to agree with him. In our view, it would have been different had the contents reflected the fact that the Board had failed to reconcile the parties with findings as close as possible to Form 3. Since that is not the case, we are unable to go along with the learned High Court Judge that the letter from BAKWATA was a valid certificate capable of accompanying a

petition for divorce under section 101 of the Act. The upshot of all this is that the letter which the High Court found to be sufficient for use as such certificate in matrimonial proceedings was not a valid certificate in accordance with the law. It follows thus that in the absence of a valid certificate to institute a petition as required by section 101 of the Act, the petition before the Primary court was premature. The appellant referred us to the decision of the High Court in **Shillo Mzee v. Fatuma Ahmed** (supra) which held that a petition instituted without the accompanying certificate is incomplete and incompetent. We subscribe to that holding as reflecting a correct legal position.

The respondent invited us to dispense with the requirement under section 101(f) of the Act if we uphold the appellant's submission that the certificate was invalid. However, she did not explain what extra ordinary circumstances obtained at the material time warranting the dispensing with reference to the Board under section 101(f) of the Act. In any event, that would only be within the competence of the trial court had the respondent placed material to attract the invocation of section 101(f) of the Act.

In consequence, we are left with no option but to determine the point certified by the High Court in the negative which disposes of the appeal in favour of the appellant. The appellant invited us to nullify the proceedings of the lower courts if we uphold the appeal and we see no difficult in accepting the invitation. Having held that the petition for divorce was incomplete for lack of a valid certificate, the proceedings before that court were a nullity. Accordingly, there could not have been any valid decree of divorce from which one could have challenged on appeal to the District Court and ultimately to the High Court. The High Court should therefore have sustained the appeal on the ground that there was no valid certificate capable of instituting a petition before the Primary Court. Since that Court strayed into an error, its proceedings and the decision are quashed and substituted with an order allowing the appeal. The net effect is that the proceedings before the Primary Court as well as the decree of divorce are hereby quashed for being a nullity so are proceedings and orders made by the District Court on appeal. The respondent is at liberty to process her petition afresh according to law if she so desires.

The above said, we find merit in the appeal and allow it. Considering that the proceedings emanate from matrimonial dispute, we do not think it will be appropriate to make an order for costs.

DATED at **MTWARA** this 21st day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2020 in the presence of the appellant in person and respondent in person, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL