**IN THE COURT OF APPEAL OF TANZANIA**
**AT BUKOBA**

**(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)**

**CIVIL APPEAL NO. 18 OF 2020**

**YOHANA BALOLE.....APPELLANT**

**VERSUS**

**ANNA BENJAMIN MALONGO.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Bukoba)**

**(Bongole, J.)**

**dated the 29th day June, 2018**
**in**
**Matrimonial Appeal No. 1 of 2017**

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# JUDGMENT OF THE COURT

13th & 19th August, 2021

## KEREFU, J.A.:

This matter originated from Bukoba Urban Primary Court in Matrimonial Cause No. 88 of 2013. In that case, the respondent herein, petitioned to the trial court claiming for reliefs of divorce, division of matrimonial properties, custody and maintenance of the two issues of the marriage.

The material facts of the matter obtained from the record of appeal giving rise to the present appeal indicate that, the respondent alleged

that they celebrated their marriage under Christian rites sometimes in July, 2005. That, thereafter, they started living in a rented room at Hamgembe area and later they shifted to another rented house situated at Nyakanyasi. The respondent went on to state that they lived a happy marriage life with no difficulties for sometimes where they managed to jointly acquire some properties situated in Mwanza and Kagera Regions and other properties were acquired before the said marriage. The respondent stated further that they were also blessed with two issues, namely Paulo Yohana and Magoke Yohana. She said that misunderstandings in their marriage life started when the appellant brought the children he had before their marriage and started living with them in their houses. That, due to the said misunderstandings, frequent quarrels and fight became the order of the day to a point that the appellant, on different occasions, took the respondent to a police station where she was locked up in custody. The respondent also complained about infidelity and witchcraft beliefs practiced by the appellant. Following such long and unresolved misunderstandings, the respondent decided to petition for divorce as indicated above.

On his part, the appellant admitted that they contracted the said marriage, acquired properties and were blessed with two issues. However, according to him the said misunderstandings started when he convinced the respondent to quit her previous job and start her own business. That, he gave her TZS. 350,000.00 for the said business and she started a retail shop but later she wanted to go back to her original job. The appellant added that sometimes the respondent would disappear from her matrimonial home and go to unknown places for months and his efforts to make her stay at their matrimonial home had failed.

At the end of the trial, the trial court was convinced that the marriage between the parties had broken down beyond repair hence the decree of divorce was granted. The trial court further proceeded to order for division of matrimonial assets whereby the house situated at Buswelu in Mwanza Region together with the 18 cows, one motor vehicle Mark II with Registration No. T. 549 ADU and other households were distributed between the parties equally. The house situated at Kibeta within Bukoba Municipality and a fish boat were awarded to the appellant while the house situated at Kashai Matopeni and a TV set were awarded to the

respondent. The house situated at Igoma in Mwanza Region was awarded to the appellant's first wife.

As regards the custody of children, each party was granted custody of one child and the appellant was ordered to pay TZS 100,000.00 monthly to the respondent as maintenance.

Aggrieved with the decision of the trial court, the respondent appealed to the District Court of Bukoba armed with four grounds mainly challenging the division of matrimonial assets and specifically the inclusion of the house situated at Kashai Matopeni in that division, which she alleged was acquired before the said marriage. The respondent also challenged the trial court's decision by awarding the house situated at Igoma Mwanza to the appellant's alleged first wife. The respondent's appeal before the District Court partly succeeded as the said court made a finding that the house situated at Kashai Matopeni having been acquired before the existence of the marriage should not have been included in the list of matrimonial assets to be divided between the parties. As such, the District Court awarded that house to the respondent and proceeded to dismiss other grounds of appeal.

Still dissatisfied with the division of matrimonial assets, the respondent preferred Matrimonial Appeal No. 1 of 2017 in the High Court of Tanzania at Bukoba. Having heard the appeal, the High Court (Bongole, J), on 29th June, 2015 confirmed the decree of divorce and the order of custody and maintenance of the two children born in the wedlock. It however varied the order of division of matrimonial properties to the extent that the house situated at Kibeta within Bukoba Municipality was awarded to the appellant while the house situated at Buswelu in Mwanza Region was awarded to the respondent. Furthermore, the appellant was awarded the motor vehicle make Forester Subaru with Registration No. T. 829 BNK and the respondent was awarded the motor vehicle make Mark II with Registration No. T. 549 ADU and the division of other properties remained undisturbed.

Aggrieved, the appellant lodged the current appeal. In the memorandum of appeal, the appellant has preferred three grounds which can be conveniently paraphrased as follows: -

1. *That, the second appellate court erred in law and fact by including the motor vehicle make Mark II in the division of matrimonial properties without there being proof of its*

*existence as its Registration Card was not tendered in evidence;*

2. *The second appellate court erred in law and fact for determining the appeal without considering that a Certificate issued by a Marriage Conciliation Board was not availed and tendered as an exhibit during the trial to ensure that the court was vested with jurisdiction to adjudicate the matter before it; and*

3. *That, the second appellate court erred in law and fact for determining the appeal without considering that the lower courts had no jurisdiction to entertain the matter in terms of section 101 of the Law of Marriage Act, [Cap. 29 R.E 2019].*

At the hearing of the appeal, the appellant was represented by Mr. Sifael Muguli, learned counsel while the respondent had the services of Mr. Aaron Kabunga, also learned counsel. The appellant and the respondent were also present in Court. It is noteworthy that the counsel for the appellant had earlier on filed his written submissions as required by Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which he sought to adopt to form part of his oral submission. On his part, the counsel for the respondent did not file a reply written

submission and he thus addressed us in terms of Rule 106 (10) (b) of the Rules.

Upon taking the floor, Mr. Muguli intimated that he would argue the first ground separately and the second and third grounds jointly. Arguing on the first ground, Mr. Muguli faulted the second appellate court for including the motor vehicle make Mark II in the division of matrimonial properties and proceeded to award it to the respondent without there being any proof of its existence and ownership. He contended that during the trial the respondent, though listed the said motor vehicle among the matrimonial assets jointly acquired by the parties, she failed to prove its existence and ownership as she did not tender any Registration Card to that effect. He further argued that the respondent did not even adduce evidence on how she contributed towards acquisition of the said property. To buttress his proposition, Mr. Muguli referred us to the case of **Bi Hawa Mohamed v. Ally Seif** [1983] T.L.R 32.

In respect of the second and third grounds, Mr. Muguli faulted the second appellate court for failure to observe that the trial court was not

vested with the requisite jurisdiction to entertain the matrimonial dispute between the parties. He argued that, the issue of jurisdiction being a point of law can be raised at any stage. To bolster his proposition, Mr. Muguli cited the case of **Richard Julius Rukambura v. Isaack Ntwa Mwakajila and Another,** Civil Appeal No.2 of 1998.

To clarify on his point, the learned counsel referred us to section 101 of the Law of Marriage Act, [Cap. 29 RE 2019] (the Marriage Act) and contended that, pursuant to that section, for a petition for divorce to be entertained by a court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such Board certify that it had failed to reconcile the parties. It was the argument of Mr. Muguli that, during the trial, there was no any certificate from the Marriage Conciliation Board tendered by the parties to prove that the said requirement was complied with. He thus faulted the learned trial Magistrate by erroneously indicating in his judgment that the matrimonial dispute between the parties was subjected to the Marriage Conciliation Board and extensively made reference to a letter from the A.I.C Church in Geita which was not tendered and admitted in evidence as an exhibit. He thus emphasized that, since the trial court did not have the requisite

jurisdiction to entertain the matrimonial dispute which was before it, then, the entire proceedings of the trial court and the resultant judgment are nullity. On that account, Mr. Muguli urged us to nullify the aforesaid proceedings and its decision together with the subsequent proceedings before the first and second appellate courts. On the strength of his submission, Mr. Muguli urged us to allow the appeal with costs.

In response, Mr. Kabunga resisted the appeal. Starting with the first ground, Mr. Kabunga challenged the claim by his learned friend that the respondent had failed to prove the existence and ownership of the said motor vehicle. He argued that ownership of a motor vehicle is not proved only by a registration card because people purchase vehicles and use them without changing ownership in the said cards. It was his argument that since during the trial the appellant did not dispute owning the said vehicle, he cannot dispute it at this stage.

As regards the second and third grounds, Mr. Kabunga also challenged Mr. Muguli for raising the said issue at this level as he argued that the same was not raised before the lower courts. It was his

argument that the trial court had the requisite jurisdiction as it was satisfied that the parties were reconciled but failed.

However, upon further reflection, Mr. Kabunga submitted that, since the point raised by Mr. Muguli is a point of law which touches on the jurisdiction of the trial court to entertain the matter, the appellant is justified to raise it at this level. He however, prayed for the appeal to be dismissed.

In a brief rejoinder, Mr. Muguli challenged the submission of his learned friend on how the ownership of a motor vehicle is supposed to be proved. He referred us to page 81 of the record of appeal and argued that the High Court properly advised on how the ownership of a motor vehicle is supposed to be established. He then reiterated what he submitted earlier and insisted for the appeal to be allowed.

Having carefully considered the arguments by the counsel for the parties, there is no doubt that the second and third grounds of appeal raise an issue of jurisdiction of the trial court to entertain the matter. Since this is a crucial issue and a point of law, we find it appropriate to start with it.

It is common ground that jurisdiction of courts is a creature of statute and is conferred and prescribed by the law and not otherwise. The term "Jurisdiction" is defined in Halsbury's Laws of England, Vol. 10, paragraph 314 to mean: -

> *"...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision.* ***The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.*** *A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended or it may partake of both these characteristics." [Emphasis added].*

From the above extract and considering the fact that jurisdiction of courts is conferred and prescribed by law, it is therefore a primary duty of every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so.

In the matter at hand, it is on record that the dispute which was submitted before the trial court was a matrimonial dispute. Jurisdiction of

the Primary Court in matrimonial proceedings derives from two pieces of legislation, namely the Magistrates' Courts Act, [Cap. 11 RE 2019] (the MCA) and the Marriage Act. Section 18(1) of the MCA gives power to the Primary Court to determine matrimonial proceedings. The said section provides that: -

> *"18 (1) A primary court shall have and exercise jurisdiction -*
>
> *(a) In all proceedings of a civil nature -*
>
> *(i) where the law applicable is customary law or Islamic law: Provided that no primary court shall have jurisdiction in any proceedings of a civil nature relating to land;*
>
> *(ii) NA*
>
> *(iii) NA*
>
> *(b) In all matrimonial proceedings in the manner prescribed under the Law of Marriage Act."*

In addition, section 76 of the same law vest concurrent jurisdiction in matrimonial proceedings to the Primary, District and High Courts. The said section states that: -

> *"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court."*

In terms of the above provisions, there is no doubt that the Primary Court, the District Court and the High Court all have original jurisdiction to entertain a matrimonial proceeding. However, and as correctly submitted by Mr. Muguli, for a petition for divorce to be entertained by any court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such Board certify that it had failed to reconcile the parties. This is in terms of section 101 of the Marriage Act which provides categorically that: -

> *"101. No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties:*
> *Provided that this requirement shall not apply in any case–*
>
> *(a) where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse;*
>
> *(b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;*

*(c) where the respondent has been required to appear before the Board and has willfully failed to attend;*

*(d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the Preventive Detention Act and has been so detained for a period exceeding six months;*

*(e) where the petitioner alleges that the respondent is suffering from an incurable mental illness;*

*(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.*

By the use of the word 'shall', the above provision implies that, compliance with section 101 above is mandatory except where there is evidence of existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board. This requirement is further reinforced by section 106 (2) of the same Act, which states in mandatory terms that: -

> *"Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more that six months before the filing of the petition..."*

In the case at hand, it is on record that there was no certificate from the Marriage Conciliation Board which accompanied the petition for divorce lodged by the respondent before the trial court. This can be evidenced from the decision of the trial court found at page 27 of the record of appeal, where the learned trial Magistrate in his own words, observed that:

> *"...Mahakama ilipokea barua kutoka Kanisa la A.I.C. Geita kuonesha walivyosuluhisha mgogoro wa ndoa ya wadaawa, na kuandika kuwa walikuwa wameshindwa usuluhishi na kuikabidhi Mahakama ichukue hatua za kisheria, hivyo kuridhika kuwa wadaawa walikuwa ni wanandoa."*

Our literal translation of the above paragraph is as follows: -

> *"...The court had received a letter from A.I.C Church in Geita indicating how they have tried to reconcile the conflict between the parties but failed. Hence, they have referred the matter to the court to handle the matter in accordance with the law. On that basis, the court is satisfied that the parties were duly married."*

From the above extract, it is clear that the learned trial Magistrate relied on the letter from the A.I.C. Church as a sufficient document to institute matrimonial proceedings. With profound respect, and as correctly argued by Mr. Muguli, the said letter is deficient in both form and content and the same does not amount to a certificate envisaged under sections 101 and 106 of the Marriage Act. Worse still, the said letter, though it was extensively referred to by the learned trial Magistrate in his judgment, it was not part of the record as neither of the parties tendered the same in evidence as an exhibit. As such, we agree with the submission of Mr. Muguli that it was improper for the trial Magistrate to rely on that letter as a valid certificate, hence the petition for divorce filed by the respondent before the trial court was incompetent for failure to comply with the requirement of sections 101 and 106 (2) of the Marriage Act. In the case of **Hassani Ally Sandali v. Asha Ally,** Civil Appeal No. 246 of 2019 (unreported), the Court, when faced with an akin situation of a trial court entertaining an incompetent petition for divorce which did not comply with the requirement of section 101 of the Marriage Act, stated that: -

> *"...**the granting of the divorce...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 extraordinary 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." Emphasis added.*

Similarly, in this case, since we have found that the respondent's petition for divorce before the trial court was incompetent for failure to comply with the requirement of section 101 and 106 of the Marriage Act, we agree with Mr. Muguli that the trial court did not have the requisite jurisdiction to entertain the matter.

It is unfortunate that the first and second appellate courts did not detect the said irregularity as they all fell into the same trap and

proceeded to divide the alleged matrimonial properties between the parties without there being any valid decree for divorce. It is our considered view that had the first and second appellate courts considered the crucial legal issue discussed above, they would not have upheld the decision of the trial court which is erroneous on account of the reasons stated above. In the circumstances, we find the second and third grounds of appeal to have merit. Since the findings on these grounds suffice to dispose of the appeal, the need for considering the other remaining ground of appeal does not arise.

In the premises, we find that the proceedings before the trial court and the first and second appellate courts were vitiated. As a result, we have no option other than to nullify the entire proceedings of the trial court and quash the judgment and set aside the subsequent orders thereto. We also nullify the proceedings of the District Court and the High Court and quash their respective judgments and subsequent orders as they stemmed from nullity proceedings. The respondent is at liberty to process her petition afresh in accordance with the law, if she so wishes.

In the event and for the foregoing reasons, we find merit in the appeal and allow it. In terms of the proviso to section 90 (1) of the Marriage Act, we make no order as to costs.

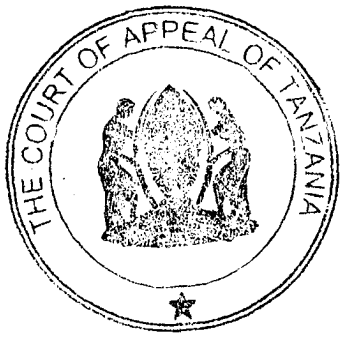
**DATED** at **BUKOBA** this 18th day of August, 2021.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 19th day of August, 2021, in the Presence of appellant and Respondent in persons, Mr. Annesius Stewart, who is holding brief for Mr. Sifaeli Muguli, learned Counsel for the Appellant, and Mr. Aaron Kabunga, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




F. A. MTARANIA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**