IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 465 OF 2020

ABDALLAH HAMIS KIBA ..... APPELLANT

VERSUS

ASHURA MASATU ..... RESPONDENT

(Appeal from the Judgment and Decree of the Resident Magistrate's Court of Musoma at Musoma)

(Ngaile, RM – Ext. Juris.)

dated the 19th day of December, 2019
in
PC. Matrimonial Appeal No. 02 of 2019

.....

JUDGMENT OF THE COURT

6th & 14th June, 2022

NDIKA, J.A.:

Abdallah Hamis Kiba and Ashura Masatu, the appellant and respondent respectively, were husband and wife from 1998 when they contracted an Islamic marriage. Their marriage ended on 13th November, 2018 upon the Urban Primary Court of Musoma dissolving it and dividing all matrimonial assets following a petition for divorce lodged by the respondent. Resentful of the outcome, the appellant successfully challenged the said dissolution on appeal to the District Court of Musoma

on the ground that the trial court heard and determined the matter without there being a valid certificate by the Marriage Conciliation Board that it had failed to reconcile the parties.

There was yet another twist and turn in the dispute: the Resident Magistrate's Court of Musoma with extended powers, which heard and determined the respondent's appeal following a transfer in terms of section 45 (2) of the Magistrates' Courts Act, Cap. 11 R.E. 2019, restored the trial court's decision. The appellant remains aggrieved and has posited in this appeal the same contention he raised on the first appeal; that the trial court wrongly assumed jurisdiction in the matter without there being a valid certificate by the Marriage Conciliation Board that it had failed to reconcile the parties.

At the hearing of the appeal, Messrs. Cosmas Tuthuru and Thomas Manyama Makongo, learned advocates, appeared for the appellant and respondent respectively.

To be sure, section 101 of the Law of Marriage Act, Cap. 29 R.E. 2019 (hereafter "the Act") provides as follows:

> *"**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 wilfully 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."

Also relevant is section 106 (2) of the Act, which reinforces the above requirement by providing that:

> *"Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104:*
>
> *Provided that, such certificate shall not be required in cases to which the proviso to section 101 applies."*

As rightly acknowledged by the learned counsel, the above provisions bar institution of a petition for divorce unless the matrimonial dispute or matter concerned has been referred to the Board and such Board certifying that it has failed to reconcile the parties. Compliance with the certificate requirement is mandatory except where a situation falls within any of the enumerated circumstances in paragraphs (a) to (f) of the proviso to the aforesaid section 101 – see, for example, **Hassani Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 (unreported).

Regulation 9(2) of the Marriage Conciliation (Procedure) Regulations, 1971, Government Notice No. 240 of 1971 (hereafter "the

Regulations") provides that, 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 in the Schedule to the Regulations as Form No. 3 in English language. In the instant case, the respondent accompanied her petition for divorce with a certificate dated 24th September, 2018 from the National Muslims Council (known by its acronym in Swahili as BAKWATA), Musoma Urban District (hereafter "the Board").

Submitting in support of the appeal, Mr. Tuthuru attacked the aforesaid certificate, contending that it was not only invalid but also it did not meet the mandatory requirement under section 101 of the Act. Referring to the respondent's evidence, shown at page 7 of the record of appeal, as well as that of the appellant, revealed at pages 16 and 17 of the record, he claimed that the Board did not finalize its effort to hear and reconcile the parties by the time it issued the impugned certificate on 24th September, 2018. He added that the content of the impugned certificate does not suggest that the reconciliation effort took its full course and thus, the respondent lodged her petition for divorce prematurely. To bolster his submission, the learned counsel cited **Hassani Ally Sandali** (*supra*),

which concerned a comparable setting. Accordingly, he urged us to nullify the lower courts' proceedings and vacate the decree for divorce issued by the trial court and affirmed by the second appellate court.

On the other hand, Mr. Makongo countered that the evidence on record was clear that the parties fully participated in the reconciliation hearing before the Board held on 15th September, 2018 after which, at the direction of the Board, they vainly attempted an effort to reach a settlement in a clan meeting held on 20th September, 2018 following an adjournment of the hearing by the Board. He said the adjournment was rightly allowed in consonance with section 104 (1) of the Act, which stipulates that:

> *"**104**.-(1) A Board to which a matrimonial dispute or matter has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary,* ***adjourn the proceeding from time to time.***"
> [Emphasis added].

Mr. Makongo supported the course taken by the Board to issue the impugned certificate on 24th September, 2018, which was four days after

the clan meeting ended in a deadlock. He contended that **Hassani Ally Sandali** (*supra*) was inapplicable because the Board in that case purportedly issued a certificate without having conducted any hearing as only one spouse appeared before it but that in the instant case both parties were in attendance and that they subsequently participated in the clan meeting at the Board's direction, which was barren of fruit. He thus implored us to find that the Board rightly issued the certificate.

In a brief rejoinder, Mr. Tuthuru argued that what matters in any certificate under section 101 of the Act is the content, which must indicate that the Board has attempted and failed to reconcile the parties. He insisted that when the matter came up again before the Board on 24th September, 2018, the appellant was absent as he was not summoned and that no hearing was conducted. Instead, the Board proceeded to issue the impugned certificate without having attempted to reconcile the parties.

We have examined the record of appeal and considered the contending submissions of the learned counsel. The focal point of the appeal is whether the certificate issued by the Board met the requirement of section 101 of the Act.

It is on record, at pages 7 and 8, that the respondent told the trial court in her testimony that when she and her estranged husband appeared before the Board on 15th September, 2018, the Board, at the appellant's request, remitted the matter to the clan for discussion and settlement. The clan met on 20th September, 2018 but the meeting ended in vain. The respondent then went back to the Board on 24th September, 2018 whereupon she was issued with the impugned certificate upon which she instituted the proceedings in the trial court for dissolution of the marriage and division of matrimonial property. For clarity, we let the record speak for itself in Swahili:

> *"Tulikaa kikao cha ukoo ikashindikana. Wakashauri tugawane mali zetu lakini ikashindikana, ndipo nikarudi BAKWATA,* ***nikaenda ndipo wakanipa barua ya kuja huku Mahakamani.*** *Mimi nimefika Mahakamani kuomba ndoa yetu ivunjwe nipewe talaka .... Pia naomba mgawanyo wa mali tulizochuma pamoja ...."* [Emphasis added].

The appellant's testimony, as shown at pages 16 and 17, dovetailed with that of his estranged wife. That after the Board had referred their disagreement to the clan meeting, the clan met on 20th September, 2018 but the matter remained unresolved. The clan issued to the parties copies

of the minutes of the meeting and that another copy was forwarded to the Board and that four days after the botched meeting, the Board issued the certificate to his separated wife. The relevant part of his testimony, at page 17 of the record of appeal, reads in Swahili thus:

> *"Tarehe 20/09/2018 tulikaa kikao cha pande zote mbili ili kusuluhisha ndoa iendelee kuwepo, mimi na mdai tukahojiwa na kujieleza na ikaonekana mdai aliondoka kwa dhamira yake tukashauriwa tuendelee kuishi pamoja. Mimi nikasema mdai arudi maana ni kosa la kuamua kwenye ukoo. Mdai alipoulizwa akasema harudi anachotaka ni chake. Tukamaliza kikao na ukoo ukaona hali halisi. M/kiti akatengeneza muhtasari na kutoa nakala kwangu, kwa mdai na Baraza Kuu (BAKWATA). Ndipo BAKWATA wakampatia barua mdai ya kuja Mahakamani. Mimi bado ninampenda mke wangu, naomba arudi nyumbani tuendelee kuishi ...."*

Having reflected on the aforesaid evidence, we agree with Mr. Tuthuru that it is without doubt that the Board did not let the reconciliation effort take its full course. For a start, it is clear that when both parties appeared before the Board, at the first and only time, on 15th September, 2018, it did not hear them but that it remitted the matter to the clan

meeting for discussion with the view to reaching a compromise. Secondly, after the botched clan meeting, the Board went ahead and issued to the respondent the impugned certificate on 24th September, 2018 in the absence of the appellant who was not summoned. Ideally, after the clan meeting had failed to reach a compromise, one would have expected the Board to have summoned both parties and proceeded to hear them both and determine the matter accordingly. The fact that an attempt at reconciliation had been done by the clan meeting without success at the Board's direction did not dispense with the requirement under section 101 of the Act for the Board itself to perform its statutory mandate to hear and reconcile the parties.

Furthermore, even when the content of the impugned certificate is carefully examined, it leaves no doubt that the said certificate is a sham. To illustrate the point, we extract the operative part of the certificate in Swahili as follows:

> ***"Inathibitishwa kwamba Baraza hili limeshindwa kabisa kuwapatanisha watu hawa wawili, yaani mume na mkewe. Kwa maoni ya Baraza hili ni kuwa:***

Kwa kuwa amekuwa akileta wanawake kwenye guest [house] yao mara kwa mara na kuzini nao na pia mume amekuwa [hatoi] unyumba kwangu kama mkewe kwa kisingizio kwamba anaumwa na hana nguvu za kiume lakini nje anafanya mapenzi na wanawake wengine ambao si wake zake. Mume ana matamshi machafu kwa mkewe kwamba hajazaa hivyo ataondoka kwake bila kitu chochote. Pia aliwahi kumtamkia mkewe kuwa atamuua na yeye atajiua ili mali zibaki za watoto.

(Taja mapendekezo yoyote ya Baraza kuhusu shauri hili)

Baraza la Ndoa linapendekeza kuwa ndoa hiyo ivunjwe na mke apewe sehemu ya mali walizochuma pamoja."

The above text loosely translates as follows:

"This is to certify that the Board has failed to reconcile the parties and that in its opinion the appellant was a philanderer having sex with women frequently in their family guest house; that he has refused to have sexual intercourse with his wife on the pretext that he had erectile dysfunction; that he had subjected his wife to frequent verbal abuse including the claim that she

was infertile; and that he threatened to kill her and then commit suicide so that his properties are inherited by his children. In conclusion, the Board recommends that the parties' marriage be dissolved and the wife given a portion of the matrimonial property."

While taking into account that the opening statement in the certificate that, *"this is to certify that the Board has failed to reconcile the parties and that in the opinion of the Board",* is a standard proclamation in any certificate under section 101 of the Act as prescribed by Regulation 9(2) of the Regulations, the certificate in the instant case gives no details of the alleged effort made at reconciliation. In terms of section 104 (5) of the Act, the certificate ought to have set out the findings made by the Board following failure to reconcile the parties. It stipulates as follows:

"(5) Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings."

In the instant case, instead of the impugned certificate giving findings of the Board, it enumerates the respondent's allegations against the appellant as if they had been heard and proven to be true. There is no

gainsaying that none of these allegations constituted the Board's findings of fact.

Given the evidence on record as we have reviewed it earlier, we hold without demur that the impugned certificate is invalid for stating falsely that the Board had attempted to reconcile the parties but failed to settle the dispute when the reconciliation effort clearly did not take its full course. Moreover, we are satisfied that the current dispute does not fall within any of the exceptions (a) to (f) enumerated under the proviso to section 101 of the Act for the certificate requirement to be dispensed with.

As we held in **Hassani Ally Sandali** (*supra*); and **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020 (unreported), it is settled that a petition for divorce instituted without being accompanied by a valid certificate in terms of section 101 of the Act is incomplete, premature and incompetent – see also the High Court's decision in **Shillo Mzee v. Fatuma Ahmed** [1984] TLR 112. On that basis, we hold that the entire proceedings and the decisions of the courts below are a nullity as they stemmed from the illegal assumption of jurisdiction by the trial court despite the absence of a valid certificate. Needless to say, the trial court's decree of divorce is quashed for being a nullity. Should the

respondent desire to pursue her quest for divorce, she is at liberty to do so afresh according to the law.

For the reasons we have given, we allow the appeal. We make no order as to costs in terms of the proviso to section 90 (1) of the Act.

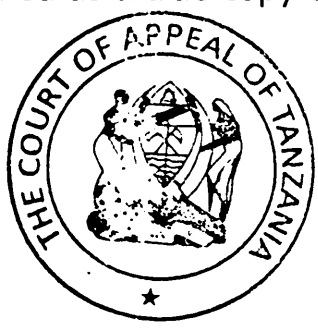
DATED at **MUSOMA** this 13th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of Mr. Cosmas Tuthuru, learned counsel for the Appellant and Mr. Thomas Manyama Makongo, learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL