

IN THE HIGH COURT OF TANZANIA
AT MOSHI
DC. MATRIMONIAL APPEAL NO. 3 OF 2007
[RM'S COURT MOSHI MATR. CAUSE NO. 3/2003]
MR. SERVI NDELEMO KESSY ----- APPELLANT
VERSUS
MRS ROAMANA MIDLASTER KESSY – RESPONDENT

JUDGMENT

HON. JUNDU, J.

In the lower court, the present Respondent had instituted matrimonial dispute against the Appellant as well Ms. Yasinta Patrick Assey. The Respondent and the Appellant were a wife and husband. They had married in 1965, a Christian marriage. They were blessed with eight children, three of whom passed away. They had lived happily until 1983 when they started to quarrel after the Appellant cohabited with Ms. Nolevera Lembezi as well as Ms. Yasinta Patrick Assey each of them got a child with the Appellant.

The Respondent, in the lower court, has petitioned for decree of divorce, division of matrimonial properties, maintenance for herself, and custody of children, exemplary damages and costs of the petition. The said court granted the decree of divorce. As regards the division of the matrimonial properties, it ordered the land at Miembeni to be given to the Respondent; the house at Majengo to be a family house; the Appellant to maintain the Respondent at T.shs.30,000/= per month. There was no order as to custody of children. The Appellant was ordered to pay costs of the petition.

Having been aggrieved by the Judgment and Decree of the lower court, the Appellant has appealed to this court listing six (6) grounds of appeal in his Petition of Appeal namely:

- (1) That the trial magistrate erred in law and fact to entertain Matrimonial Cause No. 3 of 2003 without the matter being referred to Marriage Conciliation Board as required by law.
- (2) That the trial magistrate erred in law and fact for admitting Annexure '13' as a letter from Marriage Conciliatory Board, while Annexure "C" is about the complaints of the Respondent against the Appellant concerning the land situated at Miembeni.
- (3) That the learned trial magistrate in his evaluation of the evidence of the Respondent's witness failed to give material factors adequate weight and wrongly found that PW.2 and PW.4 were an essentially believable witnesses.
- (4) That the trial magistrate erred in law and fact for holding that the land at Miembeni belongs to the Respondent without taking into account that there was no enough evidence to prove the same as there was contradiction in evidence given by Respondent's witnesses.
- (5) That the trial magistrate erred in law and fact for admitting uncertified photocopy of a letter produced in court and marked as identification D1 which shows that the land at Miembeni was given to the Respondent by one Mzee Malekia Kessy without the original document being produced.
- (6) That the learned trial magistrate erred in law and fact in deciding against the Appellant on the weight of the evidence and without the case having been proved beyond reasonable doubt.

Based on the aforesaid grounds of appeal, the Appellant, in his Petition of Appeal has prayed to this court to allow the appeal, set aside the Judgment and Decree of the lower court.

On 20/8/2007, by consent, this court ordered the parties to argue the appeal by way of written submissions. The parties have so complied.

In grounds 1 and 2 of the appeal, the Appellant complains on non-compliance of the mandatory provisions of law pertinent to the filing of a petition for divorce. He contends that the Respondent had filed her petition in the lower court without being accompanied by a Certificate of a Marriage Conciliation Board. He contends that the said shortfall violated Sections 101 and 106 (2) of the Law of Marriage Act No. 5 of 1971. He contends that the letter dated 28/2/1981 from Rev. Father Arbogast Sekundo to the Social Welfare Officer was not a certificate in terms of the above cited provision of law. Likewise, he further contends that the letter dated 22/7/2002 from the Ward Executive Officer to the Primary Court was not a certificate in terms of the said provisions of law as it was filed many years before filing the petition. He argues that this court and the Court of Appeal have in several cases held that non-compliance with the provisions of the law relating to Certificate of a Marriage Conciliatory Board renders the proceedings for divorce incompetent. He cites the case of Salim Lukindo Vrs Monica Lukindo, Civil Appeal No. 23 of 1997, in which this court (Rutakangwa, J. as he then was) held that a petition for divorce not accompanied by a proper certificate is incompetent and the same ought to be rejected or struck out. He contends that since the petition for divorce filed by the Respondent in the lower court was not accompanied by a certificate in terms of the above mentioned provisions of law, the same was incompetent and rendered the court proceedings of the lower court incompetent and ought to have been struck out with costs.

On the other hand, the Respondent in her submission strongly resists the contentions of the Appellant in the said grounds of appeal. She contends that the Appellant did not raise the issue of non-compliance with the mentioned provisions of law in the lower court as there was no preliminary objection raised and argued to the said effect hence he is estopped to raise the same at this appeal stage. She contends that the issue could only be valid if the same is raised by the court on review under Section 44(1) of the Magistrates' Courts Act, 1984 or under Section 79(1) of the Civil Procedure Code, 1966. She has prayed to this court to dismiss the appeal.

I have carefully considered the submissions of the parties on the issue of non-compliance with the provisions of the law relating to filing petition of divorce as alleged in grounds 1 and 2 of the appeal. In short, the Appellant contends that the Respondent in filing her petition for divorce in the lower court the same was not accompanied by a certificate from a Marriage Conciliatory Board hence the said petition was incompetent before the said court for violating Sections 101 and 106(2) of the Law of Marriage Act, 1971. He contends that the annexures that have been mentioned above which were annexed to the said petition that the Respondent had been filed in the lower court were not the certificate contemplated under the said provisions of law. He has prayed to this court to struck out with costs the proceedings of the lower court for incompetency. On the other hand, the Respondent in her reply submission contends that the Appellant is estopped to raise the said issue in this appeal as he did not raise and argue the same by way of preliminary objection in the lower court.

First, my careful perusal of the record of the lower court shows me that the Appellant had raised the issue of incompetency of the petition of divorce filed by the Respondent in the lower court in his Written Statement of Defence as well as at the time of hearing of the said petition in the said court. In his Amended Written

Statement of Defence filed on 17th October, 2003, the Appellant, who was the 1st Respondent in the lower court stated as follows in Para 1 thereof –

“The above named 1st Respondent states as hereunder:

1. That on the first available opportunity the 1st Respondent shall raise the preliminary point of objection namely

(a) That the Petition is improperly instituted for non compliance with the mandatory provisions of S. 101 of the Marriage Act No. 5 of 1971

(b) That it is time barred under the provisions of Limitation Act, 1939 and subsequent enactments relating to the limitation to actions as well as the Land Act, 1999: in the case of the claim of a piece of land at Miembeni”

It is clear that in Para 1(a) of his Amended Written Statement of Defence, the Appellant (then 1st Respondent) had raised preliminary objection that the petition for divorce filed by the Respondent was improperly before the said court for non-compliance with Section of 101 of the Law of Marriage Act No. 5 of 1971.

Therefore, the contention of the Respondent that the Appellant did not raise the issue in the lower court is untrue.

Further, pages 3 to 4 of the typed proceedings of the lower court clearly shows that the Appellant who was the 1st Respondent in the lower court had pursued his preliminary objection during trial. At page 3, the said record shows that on 18/12/2003, the Appellant stated as follows

“**1st Respondent:** I pray to explain my objection as per the amended WSD in writing”

Then Mr. Shayo, who was appearing for the Respondent replied –

“Mr. Shayo: I pray the 1st Respondent to file his objection on or before 30.12.2003 and I will reply on 13.01.04 and rejoinder if any on 20.01.04 and the matter to come on mention on the same date.”

Then the Appellant responded

“1st Respondent: I had no objection”

The trial magistrate thereafter made the following order –

- “Order:** 1. Mention on 20.01.04
2. 1st Respondent to file his objection
3. Reply on 13.01.04 and rejoinder it any on 20.01.04”.

However, it is clear to me that the trial magistrate had mishandled the matter before him. The Appellant had wanted to explain his objection in writing. That is he wanted to argue the same by way of written submission. But the order that the trial magistrate made shows that he had ordered the Appellant “to file his objection”. This was incorrect because the Appellant had already stated his preliminary objections in his Amended Written Statement of Defence he had filed on 17th October, 2003. So the trial magistrate had ordered the Appellant to file his objection instead of ordering him to file his written submission to explain his objection as the Appellant had prayed.

On 20/01/2004, the said error was further widened by the trial magistrate when he struck out the said preliminary objection of the Appellant on the ground that the Appellant had failed to file his written submission to explain the same as had been ordered by the trial magistrate on 18/12/2003. However, as I have already explained, the trial magistrate on 18/12/2003 had ordered the Appellant to “file his objection” instead of requiring him to file his submission to explain his preliminary objections that he had raised in his Amended Written Statement of Defence filed on 17th October, 2003. Therefore, it was wrong on the part of the

trial magistrate to struck out the preliminary objection raised by the Appellant while there had been no proper order by the trial magistrate requiring the Appellant to argue the same by writing as he had prayed to the trial magistrate. I have demonstrated all this to show that the Appellant had raised the issue of incompetency of the petition for divorce filed by the Respondent in the trial court contrary to the submission of the Respondent that the Appellant did not so raise the matter in the lower court. Therefore, the contention of the Respondent that the Appellant is estopped from raising the issue at appeal stage as he did not raise the same in the lower court has no merit.

Now, what do Section 101 and 106 (2) of the Law of Marriage Act, No. 5 of 1971 provide? Section 101 provides as follows –

“101. No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board and the Board has certified that it has failed to reconcile the parties.”

Section 106 (2) provides as follows –

“106 (2). Every petition for 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 sub-section (5) of Section 104”.

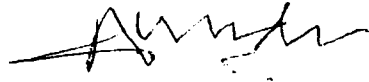
Therefore, according to the above mandatory provision of law cited by the Appellant in his submission, it is mandatory for every petition for divorce to be accompanied by a certificate by a Marriage Conciliation Board to the effect that the matrimonial dispute was first referred to the Board and the Board had failed to reconcile the parties. The said certificate has to be issued not more than six (6) months before filing of the petition.

My perused of the petition that was filed by the Respondent in the lower court shows me that the Respondent in filing her petition in the lower court did not comply with the said provisions of law. I have read Annexure “B” annexed by the Respondent to the petition. It is a letter written by Rev. Father Arbogast Sekundo dated 28/2/1981. Its contents do not show that it is a certificate from a marriage conciliatory board. Further, the Respondent had filed her petition on 3/7/2003 but the said letter was written on 28/2/1981 which was over twenty years before the Respondent had filed her petition in the lower court while the law requires that a certificate that has been issued not more than six months before the filing of the petition. I have also read Annexure “C” annexed to the petition filed by the Respondent in the lower court. It is minutes of the meeting of Ward Marriage Conciliatory Board held on 19/4/2004 alleging that it has reconciled the parties and failed. However this document was issued on 19/4/2004 while the Respondent had filed her petition in the lower court on 3/7/2003. The same is contrary to Section 106 (2) of the Law of Marriage Act No. 5 of 1971 nor does the record show that the same was filed with leave of the court. Therefore, this is not a certificate from a Marriage Conciliatory Board as contemplated by Section 106 (2) of the Law of Marriage Act No. 5 of 1971.

There being no competent certificate from a Marriage Conciliatory Board to show that the matrimonial dispute was referred to a Marriage Conciliatory Board in terms of Sections 101 and 106 (2) of the Law of Marriage Act No. 5 of 1975, I hold that the petition for divorce that was filed by the Respondent in the lower court was incompetent and improperly before the lower court. Had the trial magistrate properly applied his mind on the said matter he would have struck out the petition filed by the Respondent in the lower court with costs.

In the upshot, I hold that grounds 1 and 2 of the appeal are meritorious. They are sufficient to dispose this appeal before this court. I need not labour on grounds

3, 4, 5 and 6. Having held that the petition for divorce filed by the Respondent in the lower court was incompetent, I hereby allow the appeal by striking out the entire proceedings with costs in the lower court. The Appellant to have his costs in this court as well. It is so ordered.

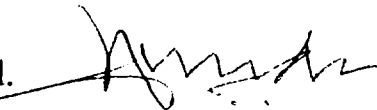


F.A.R. JUNDU

JUDGE

16/11/2007

Right of Appeal Explained.



F.A.R. JUNDU

JUDGE

16/11/2007

16.11.2007

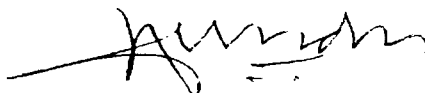
Coram: F.A.R. Jundu, J.

For the Appellant: present

For the Respondent: Mr. Shayo, Advocate

C/C: Muyungi

Court: Judgment delivered in the presence of the Appellant and in the presence of Mr. Shayo, learned counsel for the Respondent.



F.A.R. JUNDU

JUDGE

16/11/2007