

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
PC CIVIL APPEAL NUMBER 36 of 2010

ISAYA SWAI..... APPELLANT

VS

GREVEN NGOMUO..... RESPONDENT

(Originating from Kinondoni District Court, Civil Appeal No. 54/2007)

JUDGMENT

Date of last Order: 23-06-2010

Date of Ruling: 31-08-2010

JUMA, J.:

This is a second appeal against the Judgment and Decree of the Kinondoni District Court (Rugemalira-RM) dated 28th January 2010 whereby the appellate District Court dismissed an appeal which the appellant (Isaya Swai) had filed against respondent Greven A. Ngomuo.

Appellant and respondent celebrated their Christian marriage on 30th January 1988 and had two children out of that marriage. Later in 2007 respondent petitioned for divorce at the Primary Court of Kawe (Civil Case No. 54 of 2007). The trial court dissolved the marriage and ordered the division of matrimonial property. Because the children of the marriage were already

teenagers, the trial court ordered both parties to maintain the children of marriage. Aggrieved by the decision of the Primary Court, appellant preferred an appeal to the District Court, Kinondoni. Following the dismissal of his appeal by the District Court, appellant has preferred three grounds of appeal to this Court.

In his first ground, appellant contends that his matrimonial dispute with the respondent was never referred to the marriage conciliation board as required by section 101 of the **Law of Marriage Act, 1971**. Therefore both the trial primary court and the district court on appeal, should not have accepted a letter from the District Social Welfare to be a certification that matrimonial dispute between the appellant and respondent had been referred to lawful marriage conciliation board for its certification. In his second ground, appellant reiterated his contention that properties situated on a piece of land in Kilimanjaro should not have been divided as a matrimonial asset because the land did not belong to the parties. Through his third ground of appeal, appellant questioned the rationale of the courts below excluding the properties respondent acquired as retirement benefits from matrimonial properties subject of division.

Both the appellant and the respondent filed written submissions and cited authorities to support their respective arguments. Submitting on his first ground of appeal, appellant reiterated that the District Social Welfare Office is not a Marriage Conciliation Board. That had it been a conciliation board there would have been proceedings before that board chaired by a Chairman and at least two other members in attendance. According to the appellant the petition of divorce was prematurely filed in the primary court.

In the replying submissions filed through Kariwa & Co. Advocates, respondent is in no doubt that the marriage disputes between appellant and respondent were referred to the District Welfare Offices for conciliation but these efforts failed to reconcile the disputing parties. The learned Advocate referred this court to the record of proceedings at the primary court where the respondent herein informed the trial court that in 2006 she went to the Social Welfare Offices to complain,

"...Mnamo mwaka 2006 nilienda Ustawi wa jamii kulalamika na mdaiwa alifika. Uamuzi ulitolewa kuwa tukakae kikao cha ndugu tusuluhishwe na ndugu, mdaiwa alikataa. Ndipo nilipopewa barua ya kuja mahakamani."

Further, the respondent referred this court to appellant's own testimony in the Primary Court confirming attempts to reconcile the couple proved futile,

"...Tumeongelea ofisi ya Jimbo kanisani imeshindikana." **[page 4 of the record of proceedings at the Primary Court].**

The main question to guide my determination of this first ground of appeal is whether the matrimonial dispute between the appellant and respondent was first referred to the conciliation board before the filing of the petition for divorce. According to section 101 of the **Law of Marriage Act, 1971** no petition for divorce can be filed unless the matrimonial dispute has first been referred a Board and the Board has certified that it has failed to reconcile the parties. This requirement for prior reference to the Board before petitioning for divorce is waived in matters falling under paragraphs (a) to (f) of section 101.

I have fully considered rival submissions made on this ground together with records of the trial and district courts. I have taken cognisance of the prior attempt by the couple's church to reconcile as indicated on page 4 of the record of proceedings at the Primary Court. I am satisfied that the letter dated 09-08-2006 from the Social Welfare Department office of Kinondoni

was an outcome of an on-going attempt by the social welfare department to reconcile the disputing couples. This letter makes specific finding on the futile attempt to reconcile the disputing couple. It is clear from this letter both the appellant and respondent attended the conciliation session where attempts were made to reconcile. After failing to reconcile the respondent and appellant, the social welfare department referred the matter to the primary court. In my opinion the letter from the social welfare department to the primary court constitutes a certificate from a conciliatory board for the purposes of section 101 of the **Law of Marriage Act, 1971**. The first ground of appeal is hereby dismissed.

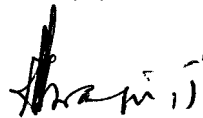
Submitting in support of his second ground of appeal, appellant contends that he alone had constructed house in Kilimanjaro for his ageing parents and this house should not have been divided as matrimonial because it had not as yet been formally transferred to the appellant in accordance with Chagga customs because his parents are still living. To the respondent, property at Moshi was acquired during the subsistence of the marriage of appellant to respondent. Respondent submitted that record of proceedings show that the couple built a family house on a piece of land which appellant's parents had granted the couple. Respondent wondered why appellant raised this explanation during this appeal but not during the trial.

From the rival submissions on this second ground of appeal the issue that I discern for determination is whether there is evidence on record showing that the house at Moshi had not been transferred to the appellant to become part of matrimonial assets of the appellant and respondent. Appellant cannot be allowed at his second appeal to this Court to try to give an explanation on the property at Moshi which he failed to raise during the trial. I will with respect find no reason to differ with the

conclusion reached by the appellate District Court that the house at Moshi is matrimonial asset which the parties agreed to transfer to their children.

In the third ground, appellant contended that since the couple had shared out appellant's retirement benefits, appellant should likewise have a share of respondent's retirement benefits. On this ground, the appellate District Court noted that appellant did not raise this matter during the trial to enable the trial Primary Court to determine the role of the retirement benefits in the acquisition of matrimonial property. Respondent agrees as much with the observation of the District Court. With respect, I am also of the opinion that appellant cannot be allowed to raise the issue of distribution of retirement benefit at the level of appeal. He should have raised it during the hearing of the petition at the primary court.

For the foregoing reasons, the appeal is dismissed with costs to the respondent.



I.H. Juma

JUDGE

31-08-2010

Delivered in presence of:

Isaya Swai (Appellant) and

Greven Ngomuo (For respondent).



I.H. Juma

JUDGE

31-08-2010