

IN THE HIGH COURT OF TANZANIA

AT MTWARA

PC. MATR. CIVIL APPEAL CASE NO. 8 OF 2012

From Ruangwa District Court Criminal Case No. 3 Of 2012

Original Civil Case No. 10 of 2012 from Ruangwa Primary Court

MWANAHAWA SELEMANI ----- APPELLANT

VERSUS

VITUS KILIAN MKANE ----- RESPONDENT

JUDGMENT

1st August, 2013 and 13th September, 2013

M. G. MZUNA, J.:

Mwanahawa Selemani successfully sued Vitusi Killian Mkane in a Matrimonial proceeding before Ruangwa Primary Court where she was granted divorce and Tshs. 5,000,000/= as a compensation for her disfigurement as well as for the division of matrimonial properties being a house and farm.

Vitusi Killian Mkane appealed to the District Court of Ruangwa where Hon. B. R. Nyaki RM allowed the appeal and ordered for a retrial of the suit in Primary court and quashed all orders and proceedings of Ruangwa Primary court for the reasons that the trial magistrate relied on the admission of the appellant that the marriage had broken down which was wrong. Secondly, that the matter was one of a normal civil suit not a matrimonial suit and therefore was adjudicated upon wrongly. Thirdly that the matter did not pass through the legally constituted Marriage Conciliation Board.

The suit is founded on matrimonial proceedings to which their marriage had subsisted for 16 years and had no issue of the marriage. The Appellant has filed three grounds of appeal. Both appellant and respondent appeared in person to argue the appeal.

The first issue is whether the matter was referred to the Conciliation Board prior to the filing of the petition for divorce in the Primary Court?

I am aware and case law have held that "in the absence of a certificate from a Conciliatory Board a petition for divorce becomes premature and incompetent" See; **Athanas Makungwa vs Darini Hassani** 1983 TLR 132 (HC) and **Shillo Mzee vs Fatuma Ahmed** 1984 TLR 112 (HC).

Reading the provisions of Section 101 of the Law of Marriage Act, CAP 29 R.E 2002, it is plainly clear that petition for divorce can not be entertained unless there is a certificate from the Conciliation Board that it has failed to reconcile the parties. Exception to this rule includes among others "where the respondent has been required to appear before the Board and has willfully failed to attend" (See; S.101 (c) of the said Act.

The evidence clearly shows, and the respondent did admit that he was summoned to appear before what he called "Mahakama ya Kata" but never attended. Again, there is a letter from the Katibu Mahakama ya Kata Narungombe showing that the respondent never attended though summoned. Of course, looking at the contents of that letter, one gets the impression that the complaint was on the properties which were jointly acquired during the subsistence of their marriage. Had the respondent appeared, one could have come to the conclusion that possibly the issue of reconciliation was not resolved. However, in the absence of such evidence, to say there was no reconciliation is a

matter of mere conjecture. Suffice to say that there was an effort taken to have the matter resolved at the Conciliation Board but the respondent frustrated that move. The learned Resident Magistrate went astray to hold otherwise.

I should say, sometimes, the court may dispense with reference to the Marriage Conciliatory Board where it is satisfied that there are extraordinary circumstances which make reference impracticable as well spelt out under Section 101 (f) of the Law of Marriage Act Cap 29 R.E 2002 (See; **Halima Athumani vs. Maulidi Hamisi** 1991 TLR 179 (HC) by Mwalusanya, J (as he then was) and **Mariam Tumbo vs. Harold Tumbo** 1983 TLR 293 (HC) by Rugakingira, J (as he then was)). This case does not fall under that category and was so referred. The first issue is therefore answered in the affirmative that the matter was referred to the Conciliation Board prior to the filing of the petition for divorce in the Primary Court.

The second issue is whether the marriage had broken down irreparably?

SM1 stated that she started to stay with the respondent under one roof in 1997. The respondent paid the bride price in 2003. The matrimonial misunderstanding cropped up in 2011 after she was beaten by the respondent leading to her being admitted. This culminated to their separation after being chased away. Even during hearing of this appeal, it was the argument of the appellant that the respondent dissolved the marriage and promised to build a house for her. However, the appellant's witnesses said that even their religious differences contributed to the separation and then divorce.

In reply thereto, the respondent said that that the marriage had not been broken down irreparably. That, though the appellant stays to her parents, she left from her matrimonial home willingly. He denied to have beaten her.

In rejoinder the appellant stated that the marriage has broken down irreparably. That some of the house hold items have been divided those which are not yet to be divided are a house and farm.

In determining the issue as to whether the marriage had broken down irreparably the district court faulted the Primary court to base its decision on the fact it changed the suit from normal civil suit to matrimonial proceedings.

This court finds that based on the evidence of the appellant who said in 2011 she was beaten severely by the respondent leading to her being admitted. She tendered medical chits to add weight for what she contended. Both SM 2 and SM 3 said that the respondent used to beat the appellant. Such evidence shows that the respondent used to beat the appellant and caused her injury to the extent of permanent disfigurement. This is one of the indicators that the marriage has broken down irreparably as per section 107 (2) (c) as there was physical cruelty inflicted by the respondent on the petitioner.

Even assuming that there was no such evidence, parties had gone to the extent of dividing between themselves some of the properties which were acquired during the subsistence of their marriage and the fact that the appellant had stayed away from the matrimonial home for two years, all these factors point to the conclusion that the marriage had broken down irreparably. I disagree entirely with the respondent that she decided to stay away from their home willingly (kwa mauzauza) as alleged. The second issue is therefore answered in the affirmative. If I can add, the matter took a matrimonial outlook from its inception not a normal civil suit. If there was any fault it was on the court officials who labeled it civil case.

The third issue is what should be awarded to the parties upon dissolution of the marriage?

The record show, that amount Tsh. 5 million was based on compensation for properties like a house, farm and incapacitation. The District court found, and I think rightly so, that it was quite improper to order compensation for body injuries in the matrimonial proceedings. If I can go further, that amount did not itemize in particular a farm or house or injury was awarded what exact amount of money? It was an omnibus order which had no basis of the decision. It is accordingly set aside.

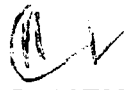
In deciding on the division of the matrimonial properties contribution by the parties to its acquisition must be taken into account along with the matrimonial misconduct which may affect the contribution of the party to the welfare and acquisition of matrimonial and family assets (See; **Bi Hawa Mohamed vs. Ali Sefu** (1983) TLR 32). Even performing domestic duties (as the appellant did in this case as opposed to the respondent a teacher by profession) amounts to such contribution to its acquisition.

The properties which were mentioned for division were a house worth Tshs. 3,000,000/- a farm with cashew nuts worth Tshs. 3,300,000/-. To have fair distribution the respondent is ordered to give the appellant Tshs. 3,300,000/- to the appellant so that he can remain with both properties.

That said this appeal is allowed to the extent of Tsh. 3,300,000 with no order as to costs.

**M. G. MZUNA,
JUDGE.
13/9/2013**

Court: Judgment delivered this 13th day of September 2013 in the presence of the parties.



**M. G. MZUNA,
JUDGE.
13/9/2013**

