IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 76 OF 2017

(Originating from the decision of the Temeke District Court in Matrimonial Cause No. 41 of 2016)

MOHAMED SINDE.....APPELLANT

Versus

ZAITUNI KHALFANI SAID.....RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

The genesis of the dispute is such that, ZAITUNI KHALFANI SAID (The Respondent herein) successfully petitioned for a divorce against MOHAMED SINDE (The appellant herein) at the Temeke District Court in Matrimonial Cause No. 41of 2016. The trial court granted them a divorce and ordered further the child born of the marriage be in the custody of the appellant save for the holidays; the

matrimonial assets be divided equally and the appellant to pay costs for the suit.

The appellant was dissatisfied by the division of the matrimonial properties hence this appeal. The appellant through the legal services of R. MRINDOKO Advocate from Mrindoko Law Chamber has raised three grounds of appeal. These are as hereunder:

1. *The trial magistrate erred in division of matrimonial property between the appellant and the respondent in equal share without regard to the customs of the community to which the parties belong and the need of infant children.*
2. *That the District Magistrate erred in law and in law by including some properties/ assets which are not matrimonial assets as part of matrimonial assets subject to division.*
3. *That the trial magistrate erred in law and in fact by granting divorce without certificate from conciliatory board certifying that they have failed to reconcile the petties. (sic)*

On 28/2/2018 when the appeal was called for hearing, Mr. Mrindoko the learned Advocate, appeared for the appellant, whereas the respondent appeared in person and defended for herself. However before venturing into the merits of the instant appeal, let me summarize the facts which have led to the appeal.

According to the testimony of the respondent who at the trial court was PW, narrated she was legally married to the appellant way back in 2003. The respondent alleged the core of the misunderstanding was the belief the appellant had that she was a witch. Further he blamed her for not conceiving. The biggest problem was that the respondent alleged the appellant had disserted their house and left her with the children. The respondent complained to BAKWATA where It was ordered the appellant should go

back to his home after six months but he did not do so. The decision from BAKWATA was admitted for identification as 'ID1'. The respondent went further by alleging during the subsistence of marriage, they had been blessed with two issues, one is dead and another studying in Standard V in a the private school;. During their stay they managed to acquire joint houses in 2011 and 2013; three plots where two are located at Kisarawe and the other at Tuangoma. The respondent tendered documents to prove ownership of the said assets as per Exhibit P.2 and P3.

The respondent managed to bring other witnesses (FAUZIA MOHAMED-PW2 and MWANAHARUSI DAUD-PW3) to prove the contribution of the respondent in construction of the alleged matrimonial houses.

On the other side of the coin, the appellant did concede that there was a dispute between them. He

testified the respondent was not comfortable with the appellant's child born out of wedlock. He further admitted to have been referred to Bakwata and made it very clear that he could no longer live with the respondent. Regarding the alleged matrimonial assets, he clarified that the respondent had no contribution at all in acquisition of the same. Upon the evidence adduced, the trial court entered judgment in the respondent's favour, hence this appeal.

The issue is whether the appeal has merit or otherwise. In determining the instant appeal, I shall determine each ground of appeal one after another but I find it more appropriate to start with the third ground of appeal, and if it found necessary I shall proceed to deliberate upon the remaining grounds of appeal.

Regarding the third ground of appeal which is whether the dispute between the parties herein had originally been referred to the Conciliation Board. The appellant's Counsel

(Mr. Mrindoko) submitted, the trial court had found the said dispute was pre – mature since there was no certificate from the Reconciliation Board. The counsel wondered then how could the court proceed to grant the divorce on the ground that the appellant could no longer reconcile with the respondent (the wife). In view thereof the entire trial court's proceedings becomes a nullity in terms of section 107 (3) (c) of the Law of Marriage Act [Cap. 29 R.E 2002]. He further referred this court to the case of **Shilo Mzee Versus Fatuma Ahmed [1984] T.L.R 132** and **Athumani Makungwa Versus Doreen Hassan [1983] T.L.R 132** in order to support his position.

In reply, the respondent submitted the appellant had refused to attend to Bakwata for Reconciliation hence she was given Form No. 3 which she had filed with the trial court.

In her settled view the said form indicated BAKWATA had failed to reconcile the parties.

After a serious scrutiny of the entire court record and the submissions from the conflicting parties, I find there is no dispute that the parties herein were husband and wife. However, I find the document which the respondent is referring to from Bakwata (Reconciliation Board) was merely admitted at the trial court for identification purposes (ID1) and not as an exhibit. In other words, it was merely marked as ID, whereas other documents were admitted as exhibits (Exhibits P1, 2 and 3). This is found at pages 15-16 of the typed proceedings of the trial court when the respondent was testifying therein. The same is reproduced as follows;

> ***"I pray to tender Bakwata decision as an exhibit.***
>
> ***Advocate Ndalu: I object the document is a copy.***

Advocate Leah: The document is original because it has original stamp from Bakwata.

Advocate Ndalu: I pray to withdraw my objection.

Court: The document from Bakwata is admitted as ID1.

Considering the above extract, it goes without saying the said document was admitted as "ID1" while other respondent's documents were admitted as exhibits. Be it that Advocate Ndalu subsequently had withdrawn his objection, it is still on record and remains so that, the document was admitted for identification purposes. The court finds this is the reason why the trial magistrate in her judgment simply noted it as a mere document evidencing that the parties attended reconciliation sessions but it did not amount to a certificate in law. To cap it all, the trial magistrate had admitted that the document was in fact

giving light that the parties were reconciled and was in no way a certificate required from Bakwata in law.

This court has also noted the documents (proceedings and alleged certificate from Bakwata) are not original documents. This observations in my settled view contravened **sections 66** and **67 (1) (a)-(g) and section 67 (2) of the Evidence Act [Cap. 6 R.E 2002]** which requires documents must be proved by primary evidence except as otherwise provided in section 67 (2) of the Act.

Having analyzed as above, the legal position in the absence of a certificate from the Reconciliation Board is well settled. **Section 104 (5) of the Law of Marriage Act** requires the Reconciliation Board to issue a certificate once the dispute between the spouses is irresolvable. That means any petition filed in the Court must first be referred to the Reconciliation Board. This position was amplified in the case

of **Shilo Mzee Versus Fatuma Ahmed [1984] T.L.R 112** where it was held;

> *'In the absence of a certificate from a conciliation board a petition for divorce becomes premature and incomplete.'*

In the matter at hand, since there is no valid admitted certificate from Bakwata, obviously I join hands with Mr. Mrindiko that, the filed petition (Matrimonial Cause No. 41 of 2016 at Temeke District Court) was premature in the given circumstances. This renders the entire trial court proceedings and Judgment a nullity.

From the above reason, I hereby quash and set aside the proceedings and judgment of the trial court and if any party so wishes to revive the matrimonial dispute, the procedure must be complied with accordingly before filing the petition in court. In the upshot, I find the third ground of appeal has merits.

In the event, I find it inappropriate to determine the remaining grounds of appeal for the reason that it will mainly be an academic exercise. I hereby allow the appeal with no order to costs considering the relationship of the parties herein.

It is so ordered.

B.R. MUTUNGI

JUDGE

13/04/2018

Right of Appeal Explained.

B.R. MUTUNGI

JUDGE

13/04/2018

Read this day of 13/4/2018 in the presence of Jalous Mpoki for Mr. Marindoko for the appellant and the respondent in person.

B.R. MUTUNGI

JUDGE

13/04/2018