

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 19 OF 2020

**(Arising from the Judgment of Ilala District Court in Civil Appeal
No. 120 of 2018 dated 20th December, 2019 before Hon. D.P.
NYAMKERYA, RM, Original Matrimonial Cause No.164 of 2018 in
Ukonga Primary Court)**

HUSNA HAMADI APPELLANT

VERSUS

SAID BAKARI CHIYUMBO RESPONDENT

JUDGMENT

04th May & 22nd May, 2020.

E. E. KAKOLAKI J

This is a second appeal in respect of the decision of Ilala District Court in Civil Appeal No. 120 of 2018 which was entered in favour of the respondent. Discontented the appellant by way of appeal is before this court canvassed with three grounds of appeal as registered hereunder:

1. That, the Honourable trial and first appellate court grossly erred in law and facts for failure to consider the history of the matrimonial case filed before Primary Court and evidence of the parties proved that the matter was determined first by the Marriage Reconciliation Board (BAKWATA).

2. That, the first appellate court grossly erred in law and facts to hold that(sic) for quashing and set aside the decision of the trial Court based on section 101 and 105(2) of the Law of Marriage Act, 1971 that the appellant had no valid certificate of Marriage Reconciliation Board.

Way back 2017 the appellant filed a petition at Mbagala Primary Court in Matrimonial Cause No. 157 of 2017 against the respondent for divorce decree and division of matrimonial properties after obtaining a certificate of Marriage Reconciliation Board from BAKWATA Temeke District within Dar es salaam Region issued on 30/12/2017. The petition was decided in her favour as a result the respondent preferred an appeal to the District Court of Temeke on the ground that the matter was filed in a wrong jurisdiction as the cause of action arose at Mvuti ward within Ilala District. Basing on that ground the District Court quashed the trial court's proceedings and set aside the decision thereof. Following that decision the appellant on the 02/07/2018 decided to file a fresh petition in the Ukonga Primary Court within Ilala District vide Matrimonial Cause No. 164 of 2018 using the same certificate of Marriage Reconciliation Board from BAKWATA Temeke District. On the 29/08/2018 the Ukonga Primary Court entered judgment in favour of the appellant the decision which aggrieved the respondent who appealed to the District Court of Ilala through Civil Appeal No. 120 of 2018. One of his grounds of appeal was that the trial court had dissolved their marriage without any valid opinion or certificate from reconciliation board. Appellate court found that the said certificate was out of time and contravened the law. It therefore proceeded to quash the entire trial court proceedings and set

aside the decision arrived from. It is from that decision the appellant is before this court challenging the same with two grounds above stated.

On 26/03/2020 when this matter came for hearing of the appeal both parties appeared unrepresented. By consent moved the court to have the appeal disposed by way of written submissions and the filing schedule was issued and dully complied with.

Submitting on the first ground the appellant is of the contention that the first appellate court erred in law and facts for failure to consider the history of the matrimonial case before filing the petition in the trial court and the evidence that the dispute passed first to the Marriage Reconciliation Board (BAKWATA). That the history of the case is that their marriage dispute passed before the Marriage Reconciliation Board and a certificate issued before filing the first petition in Mbagala Primary Court whose proceedings were quashed. That it is the said certificate which was used to file a fresh petition at Ukonga Primary Court and went uncontested during the trial only to be raised as incompetent during the appeal. She is of the view that the first appellate court ought to have considered the fact that the trial court was right to determine the petition basing on that certificate that passed to the Marriage Reconciliation Board instead of being bound by procedures which do not go to the merits the case. That it is a legal principle that courts are not bound by rule of procedures. She backed her views with the decision in **National Housing Corporation Versus Etienes Hotel**, Civil Application No. 10 of 2005 (CAT-Unreported) and **D.T Dobie (Tanzania) Ltd Versus Phantom Modern Transport (1985) Ltd**, Civil Application No. 141 of 2001 (CAT-Unreported).

On the second ground she faulted the appellate court to base its decision on section 101 and 105(2) of the Law of Marriage Act, 1971 concluding that the appellant had no valid certificate of Marriage Reconciliation Board. That section 105(2) of the Law of Marriage Act, 1971 cannot be applied to invalidate the said certificate as that provision does not deal with the matter of validity of certificate. She therefore urged this court to allow the appeal by quashing and setting aside the first appellate court proceedings and judgment and restore the trial court's one.

In reply to the submissions by the appellant, the respondent on the first ground is not disputing that the dispute was referred to the Marriage Reconciliation Board (BAKWATA) Temeke District. He submits that the certificate was issued on 30/12/2017 and used to file the petition in the present matter on 02/07/2018 seven months later contrary to sections 101 and 105(2) and (5) of the Law of Marriage Act. That the provisions makes it mandatory that a petition for decree of divorce shall be accompanied by a certificate of Marriage Reconciliation Board issued not more than six months before filing the petition. That since the same was filed seven months passed regardless the fact that it was first used at Mbagala Primary court it invalidated the proceedings. With regard to the second ground he had nothing to reply. In the end he prayed the court to dismiss the appeal for want of merits. In rejoinder submission the appellant almost reiterated what she had submitted earlier and prayed the court to allow the appeal.

I appreciate for the arguments advanced by both parties in support of and against this appeal. The main issue for determination is whether the first appellate court was justified to quash the proceedings and set aside

the judgment of the trial court? The appellant is of the contention that it was not justified and it ought not to be bound by rules of procedures in order to reach ends of justice. And that it erred to base on section 105(2) of the Law of Marriage Act to find that the certificate of Marriage Reconciliation Board was invalid while in fact the said provision is not referring to validity of the certificate. The respondent is of different view that the issue here is that the certificate of reconciliation board was used seven months passed contrary to the law that requires its use not to be more than six months since the date of issue. I am in agreement with the respondent's view. As the law stands now under sections 101 and 106(2) of the Law of Marriage Act, it is a mandatory requirement that goes to the jurisdiction of the court that a petition when filed must be accompanied by a valid certificate from marriage reconciliation board. It does not end there but goes further to put limitation of time of the certificate issued, that once issued it should not exceed six months before is filed in court to support the petition. To appreciate the gist of the provisions it is incumbent that I reproduce it as I do hereunder.

"S. 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:

Provided that this requirement shall not apply in any case-

(a) ...N/A.

(b) ...N/A.

(c) ...N/A.

And section 106 of the Act provides:

*"S. 106 (2) 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."*

The trial court having proceeded to determine the petition on merits in ignorance of the expired certificate of marriage conciliation board in my opinion contravened the provisions of sections 101 and 106(2) of the Act, as it was not clothed with jurisdiction to hear and determine it. It follows therefore that the whole proceedings in the trial court was null and void. The first appellate court having noted that the decision was premised on null proceedings was justified to quash the proceedings and set aside the decision thereof. I find no reason therefore to fault the decision of the District Court of Ilala. This ground has no merit and is dismissed.

Coming to the second ground I agree with the respondent in that the first appellate court wrongly cited the provisions of section 105(2) of the Law of Marriage Act, to stress on the requirement of valid Certificate from Marriage Reconciliation Board issued not more than six months prior to institution of any petition for divorce. The applicable provision was section 106(2) of the Act as cited above.

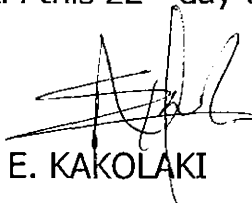
Having so stated I think that point should not detain me much as it does not vitiate the decision complained of. The appellant submitted further that the issue of certificate should be dispensed with as considering it will amount to court be bound by rules of practice which defeats the end of justice. With due respect to the appellant, the requirement of

accompanying not only a certificate of Marriage Reconciliation Board but also a valid one to the petition for divorce goes to the jurisdiction of the court. It cannot therefore be considered as rule of practice which in appellant's view should be dispensed with. The issue of jurisdiction of the court is so paramount hence the requirement to establish it first to the court's satisfaction before commencement of any proceedings failure of which might render the entire proceedings a nullity at a later stage of appeal or revision. See the case of **Justina James Lukumay Vs. National Bank of Commerce and Another**, Civil Case No. 3 of 2019 (HC-Unreported). What the appellant ought to have done after expiry of six months was to go back to the reconciliatory board for reconciliation and if unsuccessful secure a fresh certificate before a fresh petition at Ukonga Primary Court is preferred. The second ground also fails.

In the circumstances and for the foregoing reasons, I find that this appeal is devoid of merit and is hereby dismissed in its entirety. Each party has to bear his/her own costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of May, 2020.


E. E. KAKOLAKI

JUDGE

22/5/2020

Delivered at Dar es Salaam this 22nd day of May, 2020 in the presence of both appellant and respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

22/05/2020