IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 79 OF 2020

SAID MBARAKA..... APPELLANT

VERSUS

ASHA NASSORO KASSIM .....RESPONDENT

(Appeal from the decision of the Court of District Court of Ilala)

(Haule- Esq, RM.)

dated 13th March, 2020

in

Matrimonial Cause No. 45 of 2018

JUDGEMENT

10th October & 14th December 2020

AK. Rwizile, J

This appeal originates from a conflict between husband and wife. The appellant was married to the respondent in an Islamic marriage contracted in 2012. Their otherwise happy marriage did not last longer and was not blessed with children. It was in 2013, when their conflict got gain. The appellant is alleged to have stopped providing for the respondent, he also denied her matrimonial rights and pushed her out of their matrimonial home. These misdeeds led to separation, which ultimately led to a matrimonial proceeding at Ilala District Court. The respondent therefore petitioned for divorce, equal division of their matrimonial assets, and maintenance to the respondent at the tune of

1,000,000/= per month from November 2013 to the date of the judgement. The District Court, granted a decree of divorce upon ruling that their marriage was broken down irreparably, the respondent was as well, ordered to pay 20,000,000/= as contribution towards acquisition of the matrimonial house and payment of arrears of maintenance at the tune of 1,000,000/= per month from November 2013 to the judgement date. The appellant was indeed aggrieved, hence this appeal. He has advanced 7 grounds of appeal.;

1. *That the trial magistrate erred both in law and in fact by failing to state to which marriage conciliation board was involved in reconciliation of the parties as between BAKWATA and Kadhi court*
2. *That the trial Magistrate having held that the respondent has failed to prove that she was offered one flat at Congo Kariakoo for lack of proof of transfer of ownership she erred both in law and fact by passing judgement in favour of the respondent based on assumptions and insufficient evidence.*
3. *The petitioner having tendered no registration card or any sale agreement of her motor vehicles the court grossly erred in law and fact for holding that the respondent had sold her motor vehicles and the money amounting to 20,000,000/= was used in the construction of the appellant's house*
4. *That the trial magistrate erred in law and fact by holding that the respondent contributed 20,000,000/= in developing the appellant's house without any proof to that effect*
5. *That the trial court erred both in law and fact in arriving at her decision by not properly evaluating the evidence adduced through the testimony of Dw1 who testified that the respondent lied to TRA that she was doing business at the appellant's house on the plot No. 72 Narung'ombe Street*
6. *That the trial magistrate erred both in law and fact by holding that the parties agreed that the appellant will pay the respondent 1,000,000/= per month as a means of stopping her business without any tangible evidence*

7. *That the trial magistrate erred both in law and in fact by giving an order of maintenance at the tune of 1,000,000/= per month to the respondent without considering the means of income of the respondent.*

On request of the respondent, this appeal was argued by written submissions. The order for written submission directed the appellant to file his submissions on 29th June 2020, while the respondent was to file on 9th July. It is clearly shown on record that the appellant complied with the order and filed his submission on the same date as directed. This did not happen to the respondent who filed her counter-submission on 13th July. She did so out of time and this court was never asked to extend time to that effect.

As submitted by the appellant on his rejoinder, any submission filed out of time assigned by the court cannot be considered unless leave is sought and granted. On perusal of the record, it shows, the respondent is getting services from the Women's legal Aid Centre. This assures me of one fact that, it is because of her failure to pay for services of the lawyers that is why she has failed to file her submissions in time. But still, she had to observe the court directive. I therefore agree with the appellant and disregard her submission.

Getting back to the grounds of appeal, having gone through the submission of the appellant, I propose to start with the first ground of appeal which I think will dispose of this appeal.

It was the argument of the appellant on the first ground that the petition did not comply with section 101 of Law of Marriage Act [Cap 29 R.E 2019] (LMA). It is the law, he opined, that matrimonial disputes have to be referred first to the reconciliation board before filing a case in court. It was submitted that the respondent did not go through the board within the meaning of the law because she went to Kadhi Court instead of Bakwata. According to the appellant it is Bakwata that is empowered in law to reconcile marriages under Islamic rites and issue certificate upon failure as stated under section 103(b) of the LMA. Apart from the law, this court was referred to two cases of **Jonadhani**

Mhagama vs Joyce Mangweru, Matrimonial Appeal No. 2 of 2013 and **Clemence Ngonyani vs Roswita Komba** [2017] TLS LR 176. It was in dispute according to the appellant whether Bakwata that issued a certificate, reconciled the parties.

It was therefore submitted that since it is the Kadhi Court that reconciliated the parties and a certificate issued by Bakwata which did not act on their dispute, then the certificate is invalid. It was his argument that upon issuing the certificate, the petition was filed out of 6 months' time prescribed under section 106(2) of LMA.

Tackling this ground of appeal, I have to state clearly that there is no dispute that it is Bakwata which issued the certificate. It does not matter, whether the matter first went to the Kadhi Court as the appellant puts it. That might be an internal business with Bakwata. I believe there is no law and the appellant has not cited any that prevents a religious institution like Bakwata to make its arrangement on how marriages can be reconciled. After all that ought to be a matter of evidence before the trial court which is not in record. What is important and as the law directs, upon failure to reconcile a marriage, the board duly constituted issues a certificate. The appellant had to prove that the board did not attend the matter. In absence of such evidence it is held that it is Bakwata which issued the certificate and so the same was duly issued. It was therefore validly issued.

From the certificate which is in record, it is clear from it that the same was issued on 19th February 2018. This petition was instituted on 21st August 2018. Time to file a matrimonial dispute, upon failure of reconciliation, begins to run when the certificate is issued. By normal counting therefore, the petition was filed after six months. It ought to have been filed before 19th August.

Section 106 of the LMA provides, apart from the contents of the petition under subsection 1, time limit within which to file a petition after a certificate has been issued under subsection 2. In clear wording of the law, it provides;

> *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.

It is my considered view that since the proviso to this section does not apply to this matter. That means, the respondent was not excluded from the dictates of section 101. Therefore section 104(5) applied to her case. Then, it should be held that the petition was filed out of time before the District court. I am also aware that the trial court ruled that the certificate was valid, which in fact it is true, but it did not address itself on the dictates of section 106(2) of the LMA. For the foregoing reasons, this appeal is therefore allowed. The respondent filed her petition out of prescribed time under the law. This means there was no petition before the court, since it was filed without a valid certificate of reconciliation. Therefore, the judgement, proceedings, and all orders are nullified. Based on section 90 of LMA, I decline to make an order for costs.

AK Rwizile
JUDGE
14.12.2020

Delivered in the presence of the parties this 14th day of December 2020

AK Rwizile
JUDGE
14.12.2020

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY