

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

(PC) MATRIMONIAL APPEAL NO. 3 OF 2020

(Arising from Matrimonial Appeal No. 1/2019, Ndungu Primary Court,
Original Matrimonial Case No. 5/2019, Ndungu Primary Court)

AMOSI SHABANI ----- APPELLANT

VERSUS

NAMSIFU GODFREY ----- RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant has through the Amended Petition of appeal raised six grounds of appeal. The same are as here under: -

- (1) That, the trial and first appellate court erred in law and fact to grant the order of divorce whilst the appellant failed to prove the adulterous act alleging to have been committed by the appellant.
- (2) That, the trial court erred in law and facts to entertain the matrimonial dispute vide Matrimonial Cause No.

5/2019 without proper and valid certificate from Marriage Conciliatory Board.

- (3) That, the trial and the first appellate court erred in law and fact to order the division of matrimonial property and grant custody to the respondent whilst respondent never pleaded in her evidence adduced during trial.
- (4) That, the trial and first appellate court erred in law and fact to decide in the respondent's favour whilst her evidence not backed up any credible witnesses.
- (5) That, the trial and first appellate court erred in law and fact to decide in the respondent's favour whilst the appellant's defence during trial not considered.
- (6) That, the trial court judgment is bad in law for lack of court assessor's opinion.

Wherefore: - The appellant prays before this honourable court the appeal be allowed with costs by quashing and setting aside the trial and first appellate court's judgment and orders made thereto.

When the appeal was called up for hearing, Mr. Omari Burhani learned advocate, representing the appellant had

the following to say.

As far as the first and fourth grounds are concerned, he submitted the trial court granted divorce without proof that the marriage had irreparably broken down. The respondent had alleged the appellant had been committing adultery but did not marshal even a single witness to prove the same. There were allegations that they had even gone to the church for reconciliation but, the respondent did not call such vital witnesses. To support his stance the learned advocate invited the court to the case of **Hemed Saidi vs. Mohamed Mbiru [1984] TLR 113.**

Submitting on the second ground of appeal, the learned advocate stated, the parties were issued with what he termed a mere letter and not a Board Certificate as provided for by **Section 101** of the **Law of Marriage Act Cap 29 R.E. 2019.**

Further the Board was not properly constituted as there was no indication that a member or secretary of the Board had been involved. To buttress his argument the learned advocate cited the case of **Athanas Makumbwa vs. Doreen Hassan [1983] TLR 132.**

In view thereof; without a proper certificate, the trial court's decision was a nullity.

Reacting to the third ground of appeal, the learned counsel submitted, the trial court had no mandate to grant the division of the matrimonial assets nor custody. These had not been pleaded for. These had simply been mentioned in the petition form, but the respondent had only concentrated on the divorce.

Lastly on the fifth ground, the learned advocate faltered the way the trial Magistrate had not considered the appellant's case. It is very vivid that the appellant did demonstrate how he had acquired the properties in issue and was even ready to live with the issues of marriage yet the trial Magistrate did not grant him custody of the children.

Before concluding the learned advocate notified the court that he had abandoned the sixth ground of appeal and prayed the appeal be allowed.

On the other hand, the respondent who was unrepresented, submitted that, the truth of the matter is that, she had been

issued with a letter by the Conciliation Board and had provided its findings.

Further, that she had listed the matrimonial assets and this is why a division by the court was made. She submitted further, that she had concrete evidence supporting the adulterous acts of the appellant. She was the only eye witness who found the appellant on their bed with another woman.

I have visited the lower court's records and the following are my observations. The respondent had filed for petition, seeking for divorce, division of matrimonial assets and custody. She had alleged that they had celebrated their married in 2012 and were blessed with two issues. They had lived happily but later on, she started noticing some changes. The appellant stopped providing his family with essential needs. He started involving himself in love affairs with their house girl. At one incidence, she found the appellant sleeping with the said house girl. She further told the trial court that, they had managed to acquire three cars, a house and a shop, through joint efforts.

When given an opportunity, the appellant averred before the trial court that all that the respondent had testified was

correct, save that she had left their matrimonial home with the children. As a result he had to get a house girl to help in the shop and the appellant's mother. Further, it is not true that they had acquired jointly some matrimonial assets. The appellant had his own money of which he bought two vehicles, a motorcycle, a shop and built one house. He managed to get money through loans (NMB Bank) and hiring of his vehicles.

The trial court after considering the appellant's adulterous acts and the failure of reconciling the parties through various places, found in the circumstances the marriage had broken down irreparably. The court further despite finding that the appellant had acquired assets through his own efforts, the respondent had contributed in the improvement of the same by carrying out the domestic chores.

In so far as the custody of the children was concerned, the trial court granted custody of the children to the respondent but proceeded to direct that if all the appellant wishes the children to go to a boarding school, this was best for the welfare of the children. They will in the event go for holidays to their mother's home (respondent) but he be allowed to

visit the children during the weekends. All that the appellant was to do is to provide maintenance of the children. In the end the trial court made an order that the respondent be given 5% of the matrimonial house and she be given 50% of the market value of the vehicle that the appellant did not substantiate for (T 707 CST make silver) and 50% should go to the appellant. The custody of the children was granted to the respondent and the children allowed to visit their father on weekends. When the children are still waiting to go to a boarding school, the appellant to provide Tshs. 50,000/= one tin (debe) of maize and 10 kilograms of rice per month. In the event the children succumb to sickness, both parents should bear the health expenses.

The appellant was aggrieved by the trial court's judgment and appealed to the first appellate court where the appellate court found and was satisfied that the marriage had irreparably broken down and the trial court had properly granted the divorce. Secondly, relying on the testimony of the appellant and the contribution made by the respondent in the upkeep of the family, the first appellate court raised the value of the house to be divided from 5% to 15% but was still

to give the respondent 50% of the market value of the vehicle to be divided.

Thirdly, considering the age of the issues of the marriage, the first appellate court found in the best interest of the children, they be taken to a good day school within the area where the respondent resides and they were to remain in her custody. The appellant shall have visitation rights over the weekends. As for the maintenance costs, the appellant to provide Tshs. 50,000/= one tin of maize and 10 kilograms of rice monthly. These are to be handed/deposited with the Ward social worker of Ndungu Ward, and lastly both parents are to cater for the medical expenses.

The appellant is now before this court on appeal on the grounds already stated earlier in the judgment.

Turning back to the grounds of appeal, I will first and foremost deal with the second ground of appeal touching on the requirement of a certificate from the Conciliation Board. I must confess out rightly that this issue has been raised the first time before this court. The same was never raised before the trial court nor the first appellate court. I will nevertheless deal with the same as this ground involves a point of law touching

on the competence of the proceedings before the primary court. The court is alive with the noble duty that an appellate court has in applying and interpreting the law in the legal fraternity and ensuring proper application of the laws by the court. The same was underscored in the case of **Marwa Mahende vs. Republic [1998] TLR 249.**

It is trite law and procedure that for any court before entertaining a matrimonial dispute must comply with the requirements found in **Section 101 of the Marriage Act (Supra)**. This section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties, except where there is evidence of existence of extra ordinary circumstances making it impracticable to refer the dispute to the Board as provided for under **Section 101 (f) of the Act.**

The appellant's counsel has contended that what is on record is a mere letter written by a single person which is deficient in form and content and does not qualify to be a certificate carrying the spirit of Form 3 prescribed in the schedule and **Rule 9 (2) of G.N 240 of 1971.**

For the sake of clarity the purported letter is reproduced as hereunder: -

Mwenyekiti Baraza la Kata,
S.L.P 01,
NDUNGU.

14.05.2019

Hakimu Mahakama ya Mwanzo Ndugu.

Yah: **SHAURI LA NAMSIFU GODFREY DHIDI YA AMOS SHABAN**

Husika na kichwa tajwa hapo juu;

Baraza la Kata Ndungu limesikiliza shauri la ndugu Namsifu Godfrey dhidi ya Ndugu Amos Shaban, Baraza limesuluhisha ndoa ya Namsifu Godfrey na Amos Shaban na hakuna suluhu yeyote, hivyo Baraza la Kata Ndungu limeamua kulifikisha Mahakamani kwa hatua zaidi za kisheria.

Wako

Sahihi: (Muhuri wa Mwenyekiti wa Baraza – Kata Ndungu)

Stanley .C. Kimeri

Mwenyekiti Baraza Kata Ndungu

14.5.2019

Glancing through the contents, the Chairman of the Board did sign on behalf of the Board. Further it is clear there is an indication in that letter addressed to the Primary Court that it had made efforts to reconcile the parties on the dispute referred to them by both parties and a reconciliation had failed. The catch words being "**hakuna suluhu yeyote.**" It follows the purported letter did qualify as a certificate from the Conciliation Board more so considering the remoteness or the geographical impediment to get a proper form 3. This ground fails.

Now on the first ground which relates to the criticism by the appellant on the failure by the court to satisfy itself whether the marriage had broken down irreparably. The evidence adduced by the respondent largely centered on the adulterous acts of the appellant. He had involved himself with their house girl/maid which relationship bore results by the birth of a child. There was ample evidence that, the two had appeared before various unfruitful mediations and reconciliation sessions and to cap it all the respondent left the matrimonial house since 1/1/2019. With such unshaken testimony the trial Magistrate was proper to hold that the marriage had irreparably broken down.

Coming to the third and fourth grounds of appeal, the appellant is clearly disturbed by the division of the matrimonial assets and the grant of the custody to the respondent. As properly found, the respondent had simply in her prayers stated the reliefs she was seeking for but did not at all give evidence to this effect. It was hence surprising how on record the trial Magistrate had recorded that the respondent had jointly acquired with the appellant a house, 3 vehicles, and a shop. To the contrary the record is in black and white that the respondent admitted she had not acquired any properties with the appellant. She found him with a shop, a house, a motorcycle and two vehicles which were bought from a loan the appellant had taken from the NMB Bank. On the other side the appellant had adduced extensive and elaborative testimony of how he had acquired the assets he possessed. Relying on the authority of the most celebrated case of **Bi Hawa Mohamed vs. Ally Seif, Civil Appeal No. 9 of [1983] TLR**, the trial court proceeded to divide the properties which the first appellate court upheld with a slight variance on the house from 5% to 15% of the value of the house in consideration of the "efforts" done by the respondent.

Let me say, this court is likewise guided by the authority in the case of **Bi. Hawa Mohamed (Supra)** "that the words "joint efforts" and "work" towards the acquiring of the assets, have to be continued as embracing the domestic "efforts" or "work" of husband and wife."

On the same footing the respondent was justified to receive some share based on the contribution she had as a house wife and selling in the shop. There was no justification of the first appellate court raising the percentage of the share on the house listed. The trial court had assessed the shares in the vehicles and this court is satisfied of how the same was reached. In view therefore the court quashes the variation granted by the first appellate court (15%) and proceeds to uphold the division done by the trial court.

Trickling done to the issue of the custody of the children, the trial court had granted the same to the respondent. The consideration was the tender age of the children. At the time these were below the age of seven. **Section 26 (1) (b) of the law of the Child Act** provides: -

"26 (1) subject to the provisions of the law of the Marriage Act, where parents of a child are separated or divorced, a child shall have a right to;

(a)

(b) "Live with a parent who in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child."

and Section 39 (1) of the same Act provides: -

"39 (1) the court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access and shall also consider 2 (b) the age and sex of the child."

In view thereof as did both the lower courts, it is proper that the respondent is granted custody of the children. If the appellant loves his children so much as is trying to impress the court, he should provide maintenance as was ordered by the lower courts and maintain the visitation rights he was availed. There is a fact worth noting in relation to the kind of school the children should attend. What is paramount is the best

interest of the child as provided for by the **Law of the Child Act under Section 8 (1)** that: -

"It shall be the duty of a parent, guardian or any other person having custody of the child to maintain that child in particular that duty gives the child the right to."

- (a) Food
- (b) Shelter
- (c) Clothing
- (d) Medical care including immunization
- (e) Education and guidance
- (f) Liberty and
- (g) Right to play and leisure (emphasis mine)

The trial court left the appellant with the liberty to take his children to a boarding school if he so wished and in conformity to what is best for the children. This court finds it was wrong for the first appellate court to deny the appellant the opportunity to take his children to a boarding school if he was of the feeling that, it was in the best interest of the children. On this ground, this court finds in favour of what the trial court had ordered.

In the final analysis and in consideration of what has been elaborated in this judgment, the court finds that the appeal is partly allowed to the extent explained in the judgment.




B. R. MUTUNGI

JUDGE

20/11/2020

Judgment read this day of 20/11/2020 in presence of both parties.


B. R. MUTUNGI

JUDGE

20/11/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI

JUDGE

20/11/2020