

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

PC: MATRIMONIAL APPEAL NO. 03 OF 2020

(Arising from Matrimonial Appeal No. 13 of 2019 of the District Court of Geita at Geita, originating from Katoro Primary Court Matrimonial Cause No.51 of 2019)

FIDELIS FRANCIS APPELLANT

VERSUS

PASCHALIA MALIMA RESPONDENT

JUDGMENT

Last order: 30.03.2020

Judgment date: 21.04.2020

A.Z.MGEYEKWA, J

This is an appeal arising from the Matrimonial Appeal No.13 of 2019 of the District Court of Geita at Geita. The appellant being aggrieved by the Judgment delivered on the 23rd January, 2020, filed this appeal before this court on 12th February, 2020.

For purposes of understanding the gist of this appeal, it is necessary to give the following background. The appellant and respondent had a customary marriage in 1989 and blessed with five children. They have also jointly acquired several matrimonial assets, which include three houses, one plot, two Bajaji, and one shop.

It is on record that, the appellant and the respondent lived peacefully and harmoniously life till 2017 when misunderstandings between them started; the appellant (original plaintiff) complained that they are not cooking together, the respondent denies the appellant conjugal rights and other marital differences. The respondent (original defendant) complained that the main dispute between them was concerning money whereas the respondent's son took a loan from his father Tshs. 33,000,000/= and his son claimed to have lost the said money then the appellant advised the respondent to sell one house to recover the said money, the appellant disagreed and decided to sleep in another room.

The Primary Court decided in favour of the appellant and declared that the marriage was irreparably broken down. Dissatisfied the respondent filed an appeal before the District Court of Geita at Geita and the first appellate court quashed the decision of the trial court for the

reason that the certificate from the Marriage Conciliation Board did not comply with the provisions of section 104 (5) of the Law of Marriage Act, Cap. 29 [R.E 2019].

Being aggrieved by that decision of the District Court of Geita, the appellant preferred two grounds of appeal running as follows:-

1. *That, the learned appellate magistrate grossly erred in law to quash the judgment of the trial court on the reason that the certificate of marriage conciliation board did not comply with section 104 (5) of the Law of Marriage without assigning reasons for his decisions.*
2. *That the learned appellate magistrate grossly erred in law and fact for her failure to give a proper interpretation of section 104 (5) of the Law of Marriage and proceeded to hold that there was no certificate of the conciliation board at the trial court, the fact which vitiates the whole proceedings.*

When the appeal was called for hearing, the appellant enjoyed the service of Mr. Steven Kaijage, learned Advocate and the respondent appeared in their personal capacities, unrepresented.

Mr. Kaijage opted to consolidate the two grounds of appeal and argue them together, he submitted that before lodging the case before Primary Court in Matrimonial Case No.5 of 2019 parties appeared before the conciliation board. He lamented that the first appellate court

quashed the decision of the trial court for the reason that the certificate of conciliation board did not comply with section 104 of the Law of Marriage Act Cap.29 [R.E 2019]. Mr. Kajigae argued that the Marriage Conciliation Board of Geita Ward issued a statement stating that the board tried to solve the matter he went on arguing that it is not a legal requirement to state reason since the law does not require the Board to give reasons for their decision. Therefore it was his view that the first appellate court had no valid reason to set aside the whole decision basing on the said ground.

It was his further submission that the certificate of the Marriage Conciliation Board was in place and the trial court directed itself well because it was moved by the certificate of the Marriage Conciliation Board. He went on claiming that parties had already divided the matrimonial properties as per the order of the trial court and now the respondent is claiming the appellant's house while she was given the house which is situated in Musoma and she has rented it.

In conclusion, Mr. Kaijage argued that all children are defending their mother thus the appellant thinks the best solution is to remain separated.

The respondent had not much to say; she denied to have appeared before the Marriage Conciliation Board and went on submitting that she informed the trial magistrate that they did not appear before the Marriage Conciliation Board even their parents have never called them to try to solve their problems. She concluded by stating that the appellant is in dispute with their son in relation to financial issues.

In a brief rejoinder, the appellant's Advocate reiterated her submission in chief and insisted that in the trial court record the certificate from the Marriage Conciliation Board is in place, it is dated 6th September, 2019 titled " Baraza la Usuluhishi wa Ndoa, Kaloro, Geita and both parties appeared before the Board. Mr. Kaijage refuted that the appellant is in dispute with his son and it is not among the grounds of appeal.

In conclusion, the learned counsel for the appellant argued that the certificate is in place the same was the foundation of the case which enabled the trial court to determine the case. He prays this court to and set aside the first appellate court decision, uphold the trial court decision and allow the appeal.

I have gone through the evidence which was adduced in the trial court thoroughly concerning the first and second grounds of appeal that the appellant did not furnish a certificate of Marriage Conciliation Board. I will determine whether the document from the Marriage Conciliation Board is not in conformity with section 104 (5) of the Law of Marriage Act, Cap. 29 [R.E 2019]. The law under section 101 of the Law of Marriage Act, Cap. 29 [R.E 2019] prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Marriage Conciliation Board and the Board certifying that it has failed to reconcile the parties. That means compliance with section 101 of the Act is mandatory.

I had to go through the trial court records and found a Form that is prescribed under the Schedule to GN. 240 of 1971 as Form 3 in Kiswahili language. Due to its certainty to the appeal, I reproduce it as hereunder:-

"BARAZA LA USULUHISHI WA NDOA LA

.....

(Taja jina na anuani ya kwanza)

(chini ya kifungu cha 101 cha sharia ya ndoa Cap 21 R1 2002
pamoja na kanuni ya 9(7) ya GN 2401/1571)

KWAKUWA usuluhishi wa mgogoro wa ndoa kati ya

.....

na

.....

(taja majina ya wanandoa)

ambao wameoana kisheria na mgogoro wao wa ndoa
umelelewa mbele ya Baraza hili na
(taja jina la aliyepeleka shauri kwenye bodi)

HII NI KUTHIBITISHA KWAMBA Baraza limeshindwa kusuluhisha
mgogoro huo na linapendekeza yafuatayo

.....
.....
.....
.....

(toa maoni ya Baraza)

SAHIHI.....

MUHURI.....

Mwenyekiti/ wajumbe.....

imesomwa leo..... siku ya.....20.....

Based on the above Form, it is a plain FORM 3 that the Board is
enjoined to certify that it has failed to reconcile the parties on a dispute
referred to it by either the husband or wife. In addition, in terms of

section 104 (5) of the Act, the certificate has to reflect the Board's findings. The contents of the impugned certificate are reproduced hereunder as:-

" ... Mgogoro wa Ndoa hii umetushinda Baraza la Kata limezamilia kuwatuma mahakamani."

The Form was signed by the Chairman, dated 6th September, 2019. Section 104 (5) of the Law of Marriage Act Cap. 29 [R.E 2019] provides that:-

" 104 (5) If the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings."

Based on the above provision of law, in my view, the same reflects the spirit of a certificate of the failure to reconcile the estranged couple as stated above the Marriage Conciliation Board made its finding thus it was a good certificate sufficient to institute the petition for divorce as stipulated under section 101 of the Law of Marriage Act Cap. 29 [R.E 2019].

I have laboured to go through the trial court records and found that the respondent did not testify that they appeared before the

Marriage Conciliation Board, therefore, failure to object to during trial court her submission is regarded as an afterthought.

For the aforesaid reasons, I quash the decision and order of the trial court and allow the appeal. I do not think it will be appropriate to make an order for costs.

Order accordingly.

DATED at Mwanza this 21st April, 2020.


A.Z.MGEYEKWA

JUDGE

21.04.2020

Judgment delivered on 21st April, 2020 via audio teleconference, and both parties were remotely present.




A.Z.MGEYEKWA

JUDGE

21.04.2020

Right to appeal explained.