

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOBA DISTRICT REGISTRY)  
AT BUKOBA**

**MATRIMONIAL CAUSE No. 1 OF 2018**

**MODESTA KAGAMBO ----- PETITIONER**

**Versus**

**YAHYA KAGAMBO ----- RESPONDENT**

**RULING**

**14/05/2020 & 15/05/2020**

**Mtulya, J.:**

This is a petition for decree of divorce registered in this court by Mrs. Modesta Kagambo (the Petitioner) claiming that his husband of fifty three (53) years stay in the same wedlock, Mr. Yahaya Kagambo (the Respondent) is aggressive, cruel and deserted her since 2004.

However, the petition was registered in this court without a certificate issued by the Marriage Reconciliation Board (the Board) to show that the Board has failed to reconcile the parties as is required by the provision of section 106 (2) of the Law of Marriage Act [Cap. 29 R.E. 2019] (the Act). Reference to prior consultation to the Board is secured by the authority in section 101 of the Act.

It is this requirement of the provisions of the Act which invited the Respondent to raise a notice of preliminary objection (the

objection) stating that the petition offends section 101 of the Act and therefore it was wrongly placed in this court.

When the objection was scheduled for hearing, the Respondent hired the legal services of learned counsel Mr. Eliphazi Bengesi to argue the objection on his behalf whereas learned counsel Anesius Stewart appeared for the Petitioner. I have to thank both learned counsels. They were very brief to the matter and narrowed down the issue in the objection to whether a petition for decree of divorce can be registered and entertained in this court without certificate issued by the Board.

Mr. Bengesi submitted briefly that the Respondent married and lived together with the Petitioner for more than fifty three (53) years and were blessed with eight (8) children and therefore is not ready to divorce his beloved wife.

It was Mr. Bengesi submission that the current petition contravened provisions in section 101, 106 (2) of the Act and Regulation 9 of the Government Notice 240 of 1971. He went on to cite the precedents in **Zinat Khan v. Abdulla Khan [1973] LRT 57** and **Hasani Ally Sandali v. Asha Ally, Civil Appeal No. 246 of**

**2019** arguing that this petition is incompetent for want of valid certificate from the Board.

To bolster his arguments, Mr. Bengesi stated that the Petitioner instead of seeking the certificate issued by the Board and file the proper petition, she was busy moving and registering applications in various courts of law, including Bukoba Urban Primary Court (the Primary Court) and District Court of Bukoba at Bukoba (the District Court). However, apart from the decision of the Primary Court registered in Appeal No. 12 of 2018, Mr. Bengesi failed to mention specific cases filed in the District Court, save for names of learned magistrates who entertained the applications, namely: Hon. Mwakyaba and Hon. Kapokoro.

Replying the objection, Mr. Stewart defended the petition contending that it is correct and meets all requirements of the Act. To substantiate his arguments, he submitted that the present petition is saved by the provision of section 101 (f) of the Act which allows *extraordinary circumstances* which make reference to the Board impracticable.

Mr. Stewart pronounced the extraordinary circumstances in the present petition as, the Respondent: failure to provide necessary

social services like water and electricity, intimidation, aggressive behavior, harassment, change of religion, and contracting of another marriage.

When rejoining the submission of the Respondent, Mr. Bengesi submitted briefly that Mr. Stewart argued on petition itself rather than the objection. According to Mr. Bengesi, the petitioner has failed to show how it was impracticable to access the Board in search of the certificate. Finally, Mr. Bengesi stated that the petition is incompetent and against the law in section 101 and decisions in **Zinath Khan** (supra) and **Hassani Ally Sandali** (supra) and therefore must be withdrawn to follow the prerequisite procedure of the law.

I have visited and glanced the provisions of the law in the Act and precedents pronounced during the hearing of this objection. I also have had an opportunity to peruse the record of this petition. It is correct, the petition is not accompanied with the certificate issued by the Board to depict that they have failed to reconcile the parties. The provision in section 106 (2) of the Act provides that:

*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...*

However, this enactment is qualified by the provisions in section 101 of the Act. This enactment is given the following text:

*No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter 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) where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse;*

*(b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;*

*(c) where the respondent has been required to appear before the Board and has wilfully failed to attend;*

*(d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the*

*Preventive Detention Act and has been so detained for a period exceeding six months;*

*(e) where the petitioner alleges that the respondent is suffering from an incurable mental illness;*

*(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.*

The importance of the route is depicted in the decision of **Zinath Khan** (supra) more than forty (40) years ago in the following words:

*It becomes very clear that the Board is very important institution in the scheme of things under the Marriage Act and that nothing should be done to undermine its importance...**court should not by-pass the Board in dealing with matrimonial processes of divorce except in extreme cases*** (emphasis supplied).

The views of the Nigeria Judge, Hon. Onyiuke, J., with regard to the route, when deciding a Tanzanian precedent in **Zinath Khan** (supra), are quietly correct and for purposes of this petition, I will quote inhere:

*A person is not normally the best judge in his own cause and least of all, parties to marriage when confronted with stress and strains of married life, they may be carried away by passions and emotions of the moment and may rashly conclude that the marriage has broken down. Unless some restriction was imposed the courts are likely to be inundated by ill-conceived petitions alleging the breakdown of marriage and praying for divorce. There is therefore need for a cooling off period and for some attempt to mediation and reconciliation by an impartial body which can engender confidence in the warring parties and is in the position to make an objective assessment of the circumstances followed by an attempt at reconciliation.*

The facts in **Zinath Khan** (supra) briefly were that: The petitioner petitioned to the court for divorce without referring the matrimonial dispute to the Board and her petition was unaccompanied by the certificate issued by the Board. In paragraph 8 of the petition, the petitioner stated that she has not referred the dispute to the Board because of the extraordinary circumstances

which make reference impracticable and mentioned threats of the Respondent to kill her and their children. During the hearing of the petition, the petitioner claimed to live in threat and constant fear of death and therefore reference to the Board will put her life at great peril.

The court in a well-reasoned judgment stated that the stated incidences are suitable for reference to the Board so that it can inquire into the allegations, make inquiries and try to reconcile the parties. Finally, the court concluded that all that remained is for the petitioner to refer the mentioned difficulties to the Board for it to find out why the Respondent is doing all the terrible things to a person who wished to remain his wife.

Our superior court, the Court of Appeal with full court of learned three justices of appeal, at the end of February this year, in **Hassani Ally Sandali** (supra) confirmed the precedent in **Zinath Khan** (supra) and went further to cite the authority in **Shillo Mzee v. Fatuma Ahmed [1984] TLR 112**, and stated that:

*...the Primary Court dissolved the marriage between the appellant and the respondent on the basis of section 107 (3) of the Act. However, the granting of the divorce*



*under section 107 (3) of the Act was not an end in itself.*

*It was subject to compliance with section 101 of the Act.*

***That 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*** (emphasis supplied).

The Court of Appeal also noted the exception existing in the Act. At page 10 to 11 of the decision it touched on the subject in the following text:

*That means compliance with section 101 of the Act is mandatory except where **there is evidence of existence of extra ordinary circumstances making it impracticable to refer a dispute to the Board as provided under section 101 (f) of the Act*** (emphasis supplied).

In that decision, the Court of Appeal found merit of the appeal and advised the respondent Asha Ally, if she so wished, to process her petition afresh according to the law.

In the present petition, the petitioner preferred the petition without first referring the matrimonial dispute to the Board to assess the complained threats, aggressive behavior and physical abuse as they are depicted in paragraphs 8 to 12 of her petition. In the same understanding, Mr. Stewart during the hearing of this petition, mentioned the same difficulties involved in the marriage and argued that the present petition is saved with the provision of section 101 (f) of the Act.

However, the interpretations of the section received from the stated precedents in **Zinath Khan** (supra) and **Hassani Ally Sandali** (supra) show that courts of law should not by-pass the Board in dealing with matrimonial processes of divorce ***except in extreme cases*** or when there are evidence of ***existence of extra ordinary circumstances making it impracticable*** to refer a dispute to the Board. I have gone through submissions of Mr. Stewart and paragraph 8 to 12 of the petitioner's petition, but I did not learn any indication that this petition belong to ***extreme case*** or falls within the ambit of interpretation of ***extra ordinary circumstances making it impracticable***. There are reasons why I state so.

First, record shows that the petitioner initially attempted to access the Board in Dispute No. 12 of 2018 and was required to wait ninety (90) days to see if she can be reconciled with her husband and probably to settle their differences. However, instead of waiting the decision of the Board after ninety (90) days, the petitioner rushed to the Primary Court seeking an appeal of the directives of the Board.

Secondly, the petitioner was directed by the Primary Court to go back and follow the prerequisite procedures of seeking the certificate, but did not comply with the directives.

Again, during the hearing of the objection, Mr. Bengesi stated that the petitioner did not go back to the Board, instead she took time to access the District Court in two different occasions before learned magistrates Hon. Mwakyaba and Hon. Kapokoro. This submission was not protested by Mr. Stewart. In law if facts are not disputed, court may assume them to be true.

I understand the complaints registered by the Petitioner in her affidavit and during the submission of this petition, but those incidences are suitable for reference to the Board so that it can inquire into the allegations, make inquiries and try to reconcile the

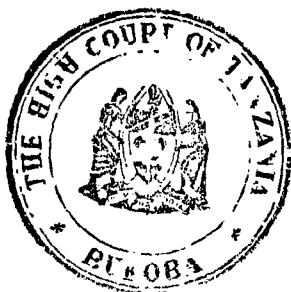
parties. The Board is there to receive and work on matrimonial difficulties and terrible things to parties in one wedlock.

If I proceed into merit and determine this petition, there would be two faults: First, the importance of the Board as shock-absorber in reconciling petitioners will be undermined and second, the determination will contravene the requirements of the Act and precedents already discussed in this Ruling.

I therefore hold that the petition is incompetent for want of the certificate issued by the Board. This petition was registered in this court prematurely and must be marked withdrawn as I am going to do so. This petition is accordingly struck out for want of competence. The petitioner is at liberty, if she so wish, to initiate fresh petition according to the provisions in the Act and stated precedents.

Having said so and considering the parties are still in the same roof, I do not think it will be appropriate to order for costs. Each party to bear his costs.

It is accordingly ordered.

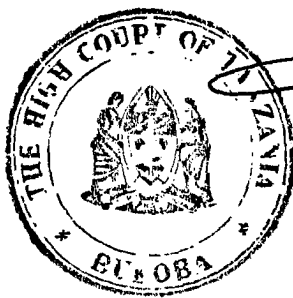


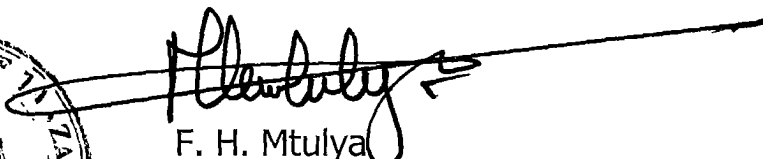
F. H. Mtulya

**Judge**

15/05/2020

This Ruling was delivered in Chambers under the seal of this court in the presence of the Appellant, Mrs. Modesta Kagambo and in the presence of the Respondent Mr. Yahya Kagambo, with their respective learned counsels, Mr. Anesius Stewart and Mr. Eliphazi Bengesi.



  
F. H. Mtulya

**Judge**

15/05/2020