IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) MATRIMONIAL APPEAL NO. 8 OF 2020
(ARISING FROM MATRIMONIAL CAUSE NO. 1 OF 2018 OF SINGIDA DISTRICT COURT)

MAX HASSAN OMARY..... APPELLANT

VERSUS

ZAINABU KALENGA.....RESPONDENT

JUDGEMENT

Date of JUDGEMENT- 9TH FEBRUARY 2021

Mansoor, J:

The parties to this appeal were married and celebrated Islamic marriage on 5th November 2010 at Buguruni, Dar es Salaam. They were blessed with two children, Sada Hassan Omary and Hassan Hassan Omary. The children are above seven years old and are at boarding school.

In 2017, the parties started quarrelling, the respondent claimed cruelty and adultery. She referred the matter to the Marriage Conciliatory Board "BAKWATA". On 12 December 2017, BAKWATA issued a certificate that the marriage is irreparably broken down and parties cannot be reconciled. The Certificate, which was annexed to the plaint as Annexure P3, reads and I quote:

> *"ni kwamba mdai/mke baada ya kuleta lalamiko lake mahakamani hapa, alieleza kwamba yeye mwenyewe kwa khiyari yake bila kulazimishwa na mtu yeyote ameamua kubadili dini waliyofunga ndoa ambayo ni ya uislam na kuwa mkristo. Hivyo kwa kuwa sheria ya kiislam haitambui ndoa ya dini tofauti yaani mkristo na muislam, kwa mujibu wa sheria ya dini ya kiislam, ndoa yao imevunjika yenyewe. Hivyo nawaleta kwenu kwa msaada Zaidi."*

BAKWATA declared the marriage null and void since the wife had converted her religion from Islam to Christianity. BAKWATA did not issue the certificate for reasons of cruelty or adultery, but it simply declared the marriage null and void for religious reasons. This shows that parties were not mediated by any Conciliatory Board.

Perhaps, this issue needs to be considered first before the appeal is decided on merits. Whether it was proper for the Court sitting as a Matrimonial Court to issue divorce before the parties were reconciled by the Marriage Conciliatory Board.

Under the Law of Marriage Act, the party seeking divorce must first apply to Marriage Conciliatory Board (MCB) which must certify failure to reconcile parties before divorce suit can be initiated; The Law of Marriage Act prohibits any person to file a Divorce Petition in Court unless he or she has first referred the matrimonial dispute or matter to a Board (Marriage Conciliation Board) and the Board has certified in

writing that it has failed to reconcile the parties. Only after the certificate is issued by the Marriage Conciliation Board, then parties may petition to Court for the grant of divorce. Upon grant of a divorce by the court, the parties to the application then proceed to register the divorce with the Registration Insolvency and Trusteeship Agency (RITA) which will then issue a certificate of divorce.

Whether the Certificate issued by BAKWATA in this matter qualifies to be treated as a proper Certificate under the Law of Marriage Act, and whether BAKWATA had tried to reconcile the parties at all, or it simply rejected the reconciliation simply because the wife/petitioner had changed to Christianity.

The issue of a valid Certificate of the Marriage Reconciliation Board was thoroughly discussed by the Court of Appeal in its recent decision in the case of **Hassan Ally**

Sandali vs Asha Ally, Civil Appeal No 246 of 2019, Court of Appeal sitting at Mtwara. In this case the Court of Appeal rejected the certificate of conciliation issued by BAKWATA as the Certificate did not conform with the Form and Contents of a Valid Certificate and ruled that since the matter was filed in court without a proper certificate, the petition for divorce was premature before the Court. The Court of Appeal had this to say:

> *"In the absence of any express statement that BAKWATA made an attempt to reconcile the parties but failed, can only lead to an inference that BAKWATA could not have certified that it failed to reconcile the dispute by involving the respondent alone."*

The Court of Appeal continued to hold the matter as premature as the petition was not accompanied with a valid certificate, it held:

"In our view, it would have been different had the contents reflected the fact that the Board had failed to reconcile the parties with findings as close as possible to Form 3. Since that is not the case, we are unable to go along with the learned High Court Judge that the letter from BAKWATA was a valid certificate capable of accompanying a petition for divorce under section 101 of the Act. The upshot of all this is that the letter which the High Court found to be sufficient for use as such certificate in matrimonial proceedings was not a valid certificate in accordance with the law. It follows thus that in the absence of a valid certificate to institute a petition as required by section 101 of the Act, the petition before the Primary court was premature."

However, this is a case that falls under the exceptions of section 101 of the Law of Marriage Act, and the conciliation certificate may be dispensed with. In this case BAKWATA had

declared the marriage to be null and void. It had declared itself incompetent to reconcile the marriage between a Muslim and a non-Muslim. The Petitioner/wife ought to have referred the matter for reconciliation in any other body such as the Social Welfare Offices in which the marriage which does not fall under Islamic marriage could be reconciled. However, since there is no marriage at all under the Islamic rituals, the case falls under the exceptions of section 101 of the Law of Marriage Act, and the Petitioner was correct to refer the matter directly to the Court without having a valid Certificate from any Conciliatory Board.

The Apellant challenges the issuance of divorce. He says there was no reasons at all to grant the divorce, as he was not cruel towards his wife and he never committed adultery. Presently to the factual matrix in entirety and the subsequent events, I am conscious that the relief of dissolution of marriage was sought on the ground of cruelty and adultery. The submission of the learned counsel for the appellant is that

neither subsequent events nor the plea of cruelty could have been considered. These grounds of cruelty and adultery was never considered by the Conciliatory Board as the Board declined to entertain the dispute since under the Islamic laws, once the woman or any party to the marriage changes the religion, the marriage becomes void. To BAKWATA, the marriage no longer existed and thus there was nothing to reconcile.

On a perusal of the petition, it transpires that the wife who was the petitioner was asserting ill-treatment, mental agony, and torture. The ill treatment or torture she has suffered was that her husband was forcing her to pray five times a day as required in Islam. The petitioner, willingly and without being forced agreed to convert to Islam, and she was required to pray five times a day, as required under the Islamic commandments. The husband, who is the appellant herein wanted his wife to adhere to Islamic rules and thus he used to wake his wife up early in the morning for prayers. He

was pouring water on her, and he was also forcing her to wear hijab. Perhaps the mode of waking her up in the morning annoyed the wife, and so the question to be decided by this Court is whether the act of the appellant who is the husband insisting his wife to live by Islamic rituals could be termed as cruelty.

At this juncture it has become imperative to understand and comprehend the concept of cruelty. The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

> *"Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."*

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of

fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty, but it is an important element where it exits."

In the instant case, the main concern is to see whether there was any mental or physical cruelty towards the appellant's wife inflicted by her husband. The only allegation of cruelty advanced by the wife before the Trial Court was the husband's constant reminders to his wife to observe the Islamic rituals. It be noted that the wife was a Christian, she

then voluntarily converted to be a Muslim, and she married a Muslim man who is a staunch believer of Islam. To the man practicing Islam in his family is a must, and he was using all means possible to convince his wife to live and behave in an Islamic way, and this was unacceptable to the wife. This was only unacceptable to the wife but to the man and as commanded in Islam, the man was permitted to use all possible means to make sure that the wife prays five times a day or he suffers punishments on the day of judgement. The reminders to pray by the husband, in my view, cannot amount to mental cruelty adequate to grant a decree of divorce.

Another ground for issuing the decree of divorce is adultery. Adultery must be proved. The only proof adduced by the wife during trial of adultery is that immediately after she left the matrimonial home, her husband married a house maid. This, with due respect is not proof of adultery. The Trial Magistrate only assumed that the husband might have had a relationship with the maid, and that is why he married her

after the wife left the house. This is a Court of law, and no decision can be given by assumptions. The wife was duty bound to give proof that her husband was committing adultery during the subsistence of their marriage. The decree of divorce therefore could not be issued on the ground of adultery.

As said in the certificate issued by BAKWATA, the marriage had become invalid since the woman had changed her religion, and thus under the Islamic law, there was no valid marriage, and this is the valid ground for the issuance of talak. Thus, as declared by BAKWATA, parties to this appeal are no longer husband and wife and this marriage has broken down irretrievably. In case the marriage has ceased to exist in substance and, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfillment which they seek.

Once the parties have separated and the separation has continued for a sufficient length of time as in the present case and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavor to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and

emotions of the parties. Since there is no acceptable way in which a spouse can be compelled to resume life with his spouse, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Section 140 of the Law of Marriage Act prohibits courts to issue an order to compel parties to cohabit as husband and wife. I therefore confirm the decision of the Trial Court that the marriage between the parties herein had broken down irretrievably and the divorce issued is therefore confirmed.

Now having confirmed the divorce, the next question is the division of assets. As submitted by the counsel for the Appellant, and having perused the Petition, the Petitioner only asserted in paragraph 10 of the Petition that during the subsistence of the marriage some assets listed in that paragraph were jointly acquired. She listed the house located at Plot No. 369 Block A, Unyakumi Area in Singida Municipality. A house located at Plot No. 22 Bloc C, Kisasa B, in Dodoma, a plot in Buswelu Area Mwanza, and a plot located

at Mbezi Mpighi Magohe, Dar es Salaam. She also mentioned the existence of seven cars and one tractor. She said there was a business center called Himag General Supplies, but she did not give proper description of the Business Centre. She also mentioned the existence of home assets such as televisions, beds mattresses sofa sets, cooker refrigerators, blender, grinding machines, microwaves, decoders, laundry machines, carpet, picture frames, curtains, pots for flowers and kitchen utensils. The Petitioner did not attach any document as proof of the existence of the assets mentioned in paragraph 10 of the Petition.

I also went through the Reply to the Petition filed by the Appellant in the Trial Court. The Appellant acknowledge that the house in Singida exists and it is a matrimonial house, otherwise the appellant demand for strict proof of not only the existence of the other houses and plots mentioned in the Petition but also proof of the contribution of the respondent

towards the acquisition of the houses and plots to include those assets or houses or plots as the matrimonial properties.

As for the vehicles, the appellant acknowledged the existence of only two cars, that is a Range Rover and Mitsubishi. He denied owning the rest of the cars mentioned in the Petition. The Petitioner was required to provide strict proof of the existence of the vehicles, and proof that the vehicles she mentioned, if at all, they exist, have been acquired by them during the existence of the marriage, and proof of her contribution towards their acquisition.

As for home assets, the appellant also demanded strict poof of their existence.

I understand that Section 114 of the Law of Marriage Act empowers the Court, when granting or after the grant of divorce to order the division of the assets acquired during the

marriage by their joint efforts. The Court however is required to consider the extent of contributions made by each party in money, property, or work towards the acquiring of the assets. The Court also is required to consider the needs of the infant children. Considering the above proposition of law, and upon perusing the proceedings of the Trial Court, the only evidence received by the Court was a pay in slip for the purchase of a plot. There is no proof whatsoever proving the existence of the houses mentioned in the petition. There was no proof whatsoever of the existence of the vehicles mentioned in the petition, and the existence of a tractor. There was no proof of the existence of the business center or home assets. (See page 13 to 16 of the proceedings).

Apart from failure to prove the existence of the properties and the date of the acquisition of the properties, there was no proof whatsoever of whether the assets were acquired during the subsistence of the marriage, and there was no proof that the assets mentioned, if at all they exist,

they were acquired by joint efforts of the spouses. In the case of Gabriel Nimrod **Kurwijila vs Theresia Hassan Mallongo, Civil Appeal No. 102 of 2018**, it was held that the extent of contribution by a party in a matrimonial proceeding is a question of evidence, thus evidence to that effect must be provided. Also, the case of **Cleophas M Matibaro vs Sophia Washusha, Civil Application No. 13 of 2011,** Court of Appeal held that there must be a link between the accumulation of wealth and the responsibility of a couple during such accumulation.

Aside of the authorities given above, section 60(a) of the Law of Marriage Act provides that when the property is acquired by one of the spouses during the subsistence of the marriage, there is a rebuttable presumption that the property belongs absolutely to that person to the exclusion of his or her spouse. If at all the properties mentioned by the petitioner existed and they were acquired during the subsistence of the marriage by the husband, the appellant herein, alone, there is

a rebuttable presumption under the Law of Marriage Act that the properties belong to the husband in the exclusion of the wife. The Petitioner was duty bound to comply with the provisions of section 114 of the Act to give proof of her contributions towards the acquisition of the properties, and if at all the properties existed. I found no such proof in this matter. Therefore, as held in the case of **Emmanuel Burton Mwakisambwe vs Asa Salifu Kibale, Matrimonial Appeal No. 05 of 2019 (HC),** the court hereby remits the records of this case to the Trial Court to take the additional evidence as to the proof of the existence of the assets mentioned in the Petition, and proof of contribution of each party towards the acquisition of the assets, and thereby make a proper distribution of the assets which shall be proved to be the matrimonial properties, between the spouses.

With regards to the custody of the children, the Law of Marriage Act is clear. Under section 125 (2) of the Act, the wishes of the children must be taken into consideration more

specific now that the children are over the age of seven years and are able to express independent opinions. I order the District Court in liaise with the Social Welfare Officer to interview the Children, to know their wishes, to decide the custody of children, taking into strict consideration the welfare of the children, including the religion and customs.

In conclusion, the appeal is partly allowed, and I shall pass the following orders:

1. The order of divorce issued by the Matrimonial Court is hereby confirmed.

2. The file is remitted back to Trial Matrimonial Court for considerations of the issue of division of matrimonial assets as directed hereinabove.

3. The file is remitted back to the Trial Matrimonial Court for determination of the issue of the custody of the children, after a thorough report of the Social Welfare

Office and after interviewing the children who can express their independent opinions. The interest and welfare of the children must be known and clearly stated when making the decision of custody of the two children.

It is so ordered.

DATED and DELIVERED at DODOMA this 9TH day of FEBRUARY,2021.

L. MANSOOR

JUDGE

9TH FEBRUARY 2021