

**IN THE HIGH COURT OF TANZANIA**  
**(DAR -ES- SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 191 OF 2019**

**AUGUSTINO LEONARD CHIBWANA..... APPELLANT**

**VERSUS**

**UPENDO MKUMBO MAMBILI..... RESPONDENT**

(From the decision of the District Court of Temeke)

**(Batulaine- Esq, RM)**

dated 11<sup>th</sup> December 2018

in

Matrimonial No. 47 of 2018

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**JUDGEMENT**

24<sup>th</sup> February & 21<sup>th</sup> May 2021

**Rwizile, J**

Parties to this appeal once lived together as husband and wife. They contracted a Christian marriage in 2001. They were blessed with two children. Their marriage became sour in 2006, when the appellant started assaulting the respondent and had extra-marital relationships. He spent nights out of their matrimonial home. In 2008 the appellant deserted the respondent and refused to maintain his children. Consequently, a matrimonial case was filed at Temeke District Court petitioning for divorce, division of matrimonial properties, custody and maintenance of their two children.

The case was heard, the decree of divorce was granted, the trial court ordered equal distribution of the matrimonial property (house). Custody and maintenance of the two children was placed to the appellant, while respondent was granted right to visitation. The appellant was aggrieved by the decision on distribution of matrimonial property, he has therefore appealed to this court on three grounds that;

- 1. The trial magistrate erred in law and fact by ordering equal division of matrimonial house that does not exist.*
- 2. The trial magistrate erred in law and in facts by granting a prayer which was not prayed by the respondent in her petition for divorce*
- 3. The trial magistrate erred in law and fact by not properly evaluating evidence adduced by the appellant in respect of the purported a matrimonial house.*

He therefore prayed for this appeal to be allowed with costs and the decision of the trial court, be set aside.

At the hearing, the appellant was represented by Mr Leslie learned advocate while respondent appeared in person. This appeal was argued orally.

In support of the appeal, Mr Leslie argued ground one that, a house which the trial court ordered to be distributed never existed. He said, there was no house pleaded in the petition of divorced. He added that, the only prayer found in the petition was for distribution of the house items/utensils. According to him, the house in issue belongs to the appellant's deceased brother. He stated further that, the respondent did not prove existence of the said house. He referred to section 110 of the Evidence Act.

It was his submission on ground two that, the respondent never prayed for distribution of the house in her petition of divorce. He said, it was wrong for the trial magistrate to order distribution of the same which was not pleaded in the pleadings. He said the court has to decide on what was pleaded. His argument was supported by the cases of **Tanzania Electric Supply Co. Ltd vs Muhimbili Medical Centre** [2003] TLR 277, **Pasinetti Adriano vs Giro Gest Ltd and Another** [2001] TLR 9 and **Shinyanga Region Trading Co. Ltd and Another vs NBC** [1997] TLR 68.

On the last ground, the learned advocate argued that, the trial court failed to properly analyse the evidence adduced before it. He stated, despite failure by the respondent to plead the existence of a house in her petition, she only mentioned the same at the hearing. According to him, she failed to mention the size of a plot on which the house was built. He asserted that in the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 133 the court has to consider the weight of evidence adduced by the parties to the case. He added that, if a party to the case failed to call an important witness, the

court may draw an inference that if a witness was called, he would have testified contrary to party's interest. He therefore prayed for the appeal to be allowed and decision of the trial court be quashed and set aside.

Disputing the appeal, the respondent argued that, at the trial, she mentioned all of their matrimonial properties for distribution, including the house. She added that, she presented all the evidence proving existence of the same. She said, documents showing the purchase of the plot, sketch map and costs incurred were tendered in court.

She asserted more that, they built their house at Kingugi, when the said place was not densely populated. She added that, it was hard to know her neighbours since their houses were far apart and from neighbours. She also said, her witnesses testified at the trial court. The respondent submitted further that; the said plot was bought when the appellant's brother was already dead. She said, it is not true that the house is owned by the late brother of the appellant. According to her, they started building the same in 2006. She said, the appellant designed her suffering since she has no place to live.

When re-joining, Mr Leslie argued that, it was true that respondent called witnesses during the trial. According to him, the respondent did not even testify to have located the said house. He said their testimonies were a hearsay since all of them said, they were told by the respondent. He asserted as well that the respondent failed to prove her ownership on the said plot, even though she alleged to have bought it.

Having heard the submission of the parties and scrutinised the proceeding I have come to the conclusion that the trial court did not properly deal with this matter. There is no clear evidence as to whether parties passed through a reconciliation process. This being a pertinent issue not raised, upon noting it, I asked parties to address this court on the same. The appellant said they did not appear before the board while the respondent said they did. She went further and said, the board issued form number 3 and was in her possession. To be clear with that, she showed the original copy of the same.

Having examined it and compared it with the copy only attached to the petition, it was my interest to see, if the same was apart from being pleaded, tendered in evidence. I did so, having in mind that even though, these are matrimonial proceedings, they have to strictly follow the procedure laid by Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules GN. No. 246 of 1997, where Rules provides;

*"The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code, and the provisions of the Code which relate to examination of parties, production impounding and return of documents, settlement of issues, Summoning and attendance of witnesses, affidavits judgments and decree shall apply mutatis mutandis to a trial of a petition"*

I am also mindful that Rule 38 (b) and (c) of the Rules empowers this Court to decide an appeal on grounds other than those raised in the Memorandum, provided parties are given a right to be heard on those points. It is also clear, the law Marriage Act, under section 101 provides that;

*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.*

Therefore, a certificate as to reconciliation issued by the board is a crucial document in the eyes of the law. I dare to say, it should not simply be attached to the petition. It should be scrutinized by the court to see if it was indeed duly obtained and it was issued by the board named by the law, unless the case falls under exceptions named by the proviso to the same section. In order to be sure of that, the court is enjoined to lead the parties, especially the laymen as the respondent, to produce evidence in that respect. This is important because, a document cannot be referred to or even examined by the court, if it is just annexed to the pleadings. It must form part of it by having it admitted as evidence. It is intrusive not do so as held by the Court of Appeal in the case of **Shemsa and Two Others vs. Seleman Hamed Abdallah**, Civil Appeal No. 82 of 2012 (unreported) where it had the following to say:

*"... at this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We out-rightly are of considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit..."*

The trial court, I have to be certain, did not at least inquiry into the certificate. In record, there is a photocopy attached to the petition. This is contrary to the normal procedure. The importance of having the statement admitted cannot be overemphasized. **First**, it is a requirement of the law of Marriage Act (section 101), **second**, no document that is not tendered can be considered and the trial court ought to make sure it is properly in record, **third**, matrimonial proceedings are serious pleadings that cannot be taken lightly. It is so because they touch a serious institution, the family. **Fourth**, marriage unlike other types of contracts, has its stringent procedure of termination.

Divorce therefore, isn't the first thing that would come into the mind of the court when hearing a petition like this one. It should not, because marriage was not meant for convenience or formality, neither was it done for fun. In order to do that in my view, courts are enjoined to interpret, apply and enforce with strictness laws and rules that govern the whole process of divorce.

If courts do not do so, parties will simply get into marriage and therefore simply apply for divorce. I have to say at last that granting a petition of divorce should not be an easy ride. Courts have to make sure that there was proper reconciliation between the parties as a necessary legal requirement before dealing with any other issue. Therefore, the trial court had to satisfy itself if that process was fully done. In order to know that it had to examine parties, record their evidence as to when, and how reconciliation was conducted and thereby admitted the certificate of reconciliation.

It is clear to me that, the case did not comply with the mandatory requirement of section 101 of LMA. That being the case, this appeal succeeds. The judgement, decree

and proceeding of the trial court are nullified. Since this is a matrimonial dispute. I make no order as to costs.

**AK Rwizile**  
**JUDGE**  
**21.05.2021**

Delivered this 21<sup>st</sup> day of May 2021

 Recoverable Signature

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Signed by: A.K.RWIZILE

