

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

(MATRIMONIAL CAUSE NO.1 OF 2021)

HELLEN GEN LUCAS PETITIONER

VERSUS

CLEOPHACE LUCAS RESPONDENT

RULING

Date of last Order: 16.06.2021

Date of Ruling date: 24.06.2021

A.Z.MGEYEKWA, J

This is a matrimonial cause brought before this court by the petitioner seeking an order that the marriage between the petitioner and the respondent has been broken down irreparably deserving a decree of divorce. The petition for divorce was opposed by the respondent who filed a reply to the petition of divorce and raised five points of preliminary objection as follows:-

1. *That, this petition is premature for want of prior reference to the marriage conciliation board and certificate us contrary to section 101 and section 106 (2) of the Law of Marriage Act, Cap.29 [R.E 2019].*
2. *That this petition is improper for want of particulars of facts giving the court jurisdiction contrary to section 106 (1) (b) of the Law of Marriage Act, Cap.29 [R.E 2019].*
3. *That the petition is legally improper for want of names, ages, and sex of the children contrary to section 106 (1) (a) of Law of Marriage Act, Cap.29 [R.E 2019].*
4. *That the petition is legally improper for want of facts established that the marriage has broken down irreparably contrary to section 107 (2) of Law of Marriage Act, Cap.29 [R.E 2019].*
5. *That the petition is improper for containing a defective verification clause that does not contain the name of a verifier contrary to Rule 18 (2) of the Law of Marriage (Matrimonial Proceedings) Rules GN. No. 136 of 197 and Order VI Rule 15 (1) of the Civil Procedure Code, Cap.33 [R.E 2019].*

When the objection was scheduled for hearing on 17th June, 2021, Mr. Martin Geoffrey, the learned counsel appeared for the Petitioner whereas the respondent had the legal service of Mr. Sakila, learned counsel. By the court

order and consent by the parties, the appeal was argued by way of written submission whereas, the appellant filed his submission in chief on 28th May, 2021 and the respondent filed his reply on 10th June, 2021, the respondent wave the option to file a rejoinder.

In his submission, Mr. Sakila raised five preliminary objections. On the first limb, he argued that the petitioners' petition is not accompanied by the certificate of the Marriage Conciliation Board in order to prove that they have failed to reconcile the parties. He added that for that reason the petition is prematurely filed and incompetent. Mr. Sakila fortified his submission by referring to section 101 of the Law of Marriage Act, Cap. 29 [R.E 2019] and cited the cases of **Athanas Makungwa v Dorin Hassani** [1983] TLR 132 and **Mwanahawa Hemed v Rashid Kulomba** [1999] TLR 21.

On the second limb, Mr. Sakila contended that a statement of particular is missing. He lamented that it is a mandatory requirement for every petition to contain a statement of particular. To support his position he referred this court to section 106 (1) (b) of the Law of Marriage Act, Cap.29 [R.E 2019]. He added that the petitioner has to prove that this court has geographical, original, and pecuniary jurisdiction. Insisting, he contended that in the absence of such particulars makes the petition improper and

incomplete. He claimed that the plaint contravened Order VII 1 (f) of the Civil Procedure Code Cap. 33 [R.E 2002]. Now [R.E 2019] which is the same as section 106 (1) (b) of the Law of Marriage Act, Cap. 29 [R.E 2019]. Mr. Sakila fortified his position by referring this court to the case of **Mussa Abel Mange v Ethiopian Airlines**, Civil Case No.111 of 2018, HC.

On the third limb, Mr. Sakila claimed that the petition does not contain the names, ages, and sex of the children. He argued that section 106 (1) (a) of the Law of Marriage Act, Cap. 29 [R.E 2019] made it compulsory for every petition to state the names, ages, and sex of the children if any. He claimed that the petition under paragraph 6 of the petition has stated that she has 8 children, the same has prejudiced the respondents because he is not aware, who those eight children are and if they deserve custody and maintenance.

As to the fourth limb, the learned counsel for the respondent contended that the applicant has not stated the facts which establish that the marriage has broken down irreparably. Mr. Sakila stated that section He argued that section 106 (1) (a) of the Law of Marriage Act, Cap. 29 [R.E 2019] requires the petitioner to contain particulars that marriage has broken down

irreparably. He went on to state that the circumstances in which the marriage is presumed to have broken down irreparably are adultery, sexual prevention, cruelty, and desertion. To bolster his position he cited section 107 (2) of the Law of Marriage Act, Cap. 29 [R.E 2019]. Mr. Sakila claimed that the petitioner main reason for divorce is stated under paragraphs 8 and 9 of the petition that she was chased by the Police officer after the issuing of the decree of divorce while at that time the parties were not spouses since the court had already granted a decree of divorce.

Submitting on the fifth limb, Mr. Sakila stated that the verification clause is defective for missing the name of the petitioner. Mr. Sakila fortified his submission by referring this court to section 108 (2) of the Law of Marriage Act, Cap. 29 [R.E 2019] and Order VI Rule 15 (1) of the Civil Procedure Code Cap.33 [R.E 2019].

On the strength of the above submission, Mr. Sakila beckoned upon this court to strike out the petition with costs.

Responding to the submission in chief, on the first limb of the objection, he stated that section 101 (f) of the Law of Marriage Act, Cap. 29 requires the where the court is satisfied that extraordinary circumstances. Mr.

Godfrey went on to state that the law is silent on how the Court will be notified of the extraordinary circumstances leading to the impracticability of reference of matrimonial disputes to the Marriage Conciliation Board. He added that the legislature intends that the wife or husband who wants to petition for divorce to file a formal application to the Court by way of chamber summons and affidavit showing the extraordinary circumstances.

The learned counsel for the petitioner continued to submit that the petitioner has stated the facts leading to extraordinary circumstances. To bolster his submission he referred this court to paragraph 14 of the Petition and affidavit wherein she adduced the evidence of the extraordinary circumstances which rendered the reference of their dispute to the Board impracticable. Mr. Godfrey further submitted that basing on the said circumstances is quite clear that reference to the Marriage Conciliation Board was impracticable. Fortifying his position he cited the case of **Khan v Khan 1973 LRT 57.**

On the second limb of the objection, Mr. Godfrey admitted that the Petition did not contain the paragraph containing the particulars which give jurisdiction to this Court, thus the same is contrary to the provision of section

106 (1, (b) of the Law of Marriage Act, Cap.29 [R.E 2019]. However, he was on his view that the jurisdiction in matrimonial proceedings is vested concurrently in all the trial courts of the land, starting from the Primary Court to the High Court. To support his submission he referred this court to section 76 of the Law of Marriage Act, Cap.29 [R.E 2019].

With respect to the third objection, Mr. Godfrey stated that the import of section 106 (1) (a) of the Law of Marriage Act, was to facilitate the custody and maintenance order of the infant children of the married couples. He added that as long as the children are all adults the omission to mention their names, ages, and sex is not fatal to the extent of rendering the whole Petition incompetent.

He went on to state that if the Respondent feels prejudiced for not knowing the age and names of children, then he should seek refugee from the petition and its annexures.

Concerning the fourth limb of the objection, the learned counsel for the petitioner argued that paragraphs 8 and 9 of the Amended Petition for divorce show that there are facts establishing that the marriage between the Petitioner and the Respondent has broken down beyond repair.

On the last objection, Mr. Godfrey contended that the Petition was verified by the petitioner as required by law. He further argued that the need to insert the names of the verifier in the clause itself is only mandatory when the Petition or Complaint has more than one petitioner or plaintiffs. He claimed that since the verification clause was signed by none other than the petitioner, and her names are displayed in the body of the Petition as being Hellen Gen Lucas, the same suffices. Taking into account that the provision does not state that the verification clause shall contain the names of the verifier.

On the strength of the above submission, he beckoned upon this court to dismiss the Preliminary Objections and the petitioner be allowed to rectify minor errors which do not go to the root of affecting the Petition itself.

Having heard the submission for and against the preliminary objection, I have come to realize that both parties agree that this matter was brought to this Court without an attempt to resolve it by the Marriage Conciliation Board as provided for under section 101 of the Marriage Act, Cap. 29 [R.E 2019]. This is evidenced by the fact that the petition is not accompanied by a certificate issued by the Marriage Conciliation Board signifying failure to reconcile the parties.

The learned counsel for the respondent is of the view that it was improper to bring the matter to this court without referring it to the Marriage Conciliation Board. On his side, Mr. Godfrey, learned counsel for the petitioner contended that the matter is properly before this Court, it falls under the exceptional circumstance provided for under section 101 (f) of the Law of Marriage Act Cap.29 [R.E 2019]. I have read the provision section 101 of the Law of Marriage Act Cap. 29 [R.E 2019] and found it providing thus:-

"101. Requirement of prior reference to Board. 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."

Applying the above provision, reference of a matrimonial dispute to the Board prior to petitioning for divorce is a mandatory requirement. The Court of Appeal of Tanzania in the case of **Hassan Ally Sandali v Aaha Ally**, Civil Appeal No. 246 of 2019 nullified the proceedings and orders made by the Primary Court and District Court because there was no valid certificate of the Board capable of instituting a petition before the trial court. I am aware of the exceptions provided in subsections (a) up to (f) of section 101

of the Law of Marriage Act cap. 29 [R.E 2019]. The said exceptions are as follows:-

- "... (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 willfully 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 that make reference to the Board impracticable.*

Mr. Godfrey claimed that the petitioner has stated the facts leading to extra ordinary circumstances under paragraph 14 of the Petition and affidavit. The question that arises is whether the section 101 subsection (f)

(f) applies in the circumstance of the instant petition. The said provision reads;

"...where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable".

From the provision, the words, *"...where the court is satisfied..."* the question to ask is how can this court be satisfied without being moved? This words *"...where the court is satisfied..."* presupposes that the Court has to be moved to determine the 'extraordinary circumstances' for petitioning for divorce without the certificate of the Board. I am in accord with Mr. Godfrey contentious that 'how to move the court' has not expressly provided in the law. But I understand that the petitioner must move the court prior to filing the petition or determination of the petition.

In the present case, the petitioner in her petition did not move this court to waive the requirement of a certificate of the Marriage Conciliation Board based on extraordinary circumstances. I am holding so because the provision implies that it is the Court, which has to satisfy itself before proceeding to exercise its discretionary power to waive the requirement of the certificate. The Court cannot compose itself to determine the 'circumstances' unless

moved by the parties showing the said extraordinary circumstances. This implies that parties have to apply to the Court for a waiver before lodging the petition. However, in the present case, the petitioner is trying to show the said circumstance in her petition for divorce instead of applying for a waiver first.

When I was perusing the applicant's petition specifically on paragraphs 8, 9, 10, 11, 12, 13, and 14, the petitioner explained the matrimonial hardship between the petitioner and respondent and claimed that referring the matter to the Marriage Conciliation Board as envisaged by the law of marriage is impracticable. The petitioner was required to raise these grounds in her application for waiver of parties to appear before the Marriage Conciliation Board.

In my view, as long as the petitioner filed an application to set aside the *ex parte* hearing in Matrimonial Cause No. 4 of 2017, means that she disputed the divorce and other orders made thereto. Therefore, as long as there was a dispute then the petitioner and respondent were required to appear before the Matrimonial Conciliation Board. It is a normal procedure that before filing a petition for divorce, parties appear before the Marriage Conciliation Board for reconciliation or the petitioner could have requested the court to waive

the requirement of passing through the Marriage Conciliation Board in according to section 101 (f) of the Law of Marriage Act, Cap.29 [R.E 2019] which provides that the power of waiver is vested to the Court and a party is required to apply for it. Therefore, I find this point has merit.

In the upshot, I find the petition was registered before this Court prematurely. Since the determination of the point of objection suffices to dispose of the matter, therefore, I shall not consider the remaining four points of objections. Thus, I sustain the preliminary objection and proceed to strike the petition with no orders as to costs.

Order accordingly.

DATED at Mwanza this 24th June, 2021.


A.Z.MGEYEKWA

JUDGE

24.06.2021

Ruling delivered on this 24th June, 2021 via audio teleconference whereby Mr. Godfrey Martin, learned counsel for the petitioner and Mr. Sakila, learned counsel for the respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

24.06.2021

Right to appeal is fully explained.