

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

MATRIMONIAL APPEAL No. 32 OF 2020

**(Arising from Matrimonial Cause No. 02 of 2019 at Bukombe
District Court)**

ANDREW S/O MHOLA @ BARABARA.....APPELLANT

VERSUS

SARAH D/O MASIBUKA @ KASHINDYE.....RESPONDENT

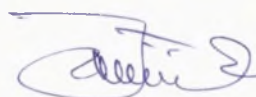
JUDGMENT

05th July & 28th July, 2021.

TIGANGA, J.

Before Bukombe District Court, the respondent herein, petitioned for divorce, division of matrimonial assets according to the contributed efforts, costs of the suit and any other relief the honourable court would deem fit and just to grant.

During the hearing of the petition, the respondent told the trial court that the appellant was her husband, the two having contracted a Christian marriage in 1977. That the two lived together until 1998 when they started having misunderstandings which were caused by adultery, neglect of family, cruelty, inhumane treatment, destruction of domestic tools and wilful neglect, all these committed by the appellant herein,



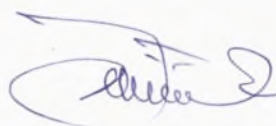
something which prompted the respondent to initiate divorce proceedings subject of this appeal.

The then respondent did not object an order for divorce and division of matrimonial assets acquired during their marriage, as he prayed their marriage to be so declared to have been broken down irreparably and that it should be dissolved and the assets be distributed. However, he substantially disputed the existence of some of the assets listed by the petitioner and the ownership of the same.

Having heard the parties, the District Court granted divorce and ordered the division of matrimonial assets.

Dissatisfied by the said decision of the District Court, in respect of the division of matrimonial properties, the appellant filed this instant appeal armed with five grounds of appeal as follows;

1. That the first appellate court erred in law and fact for failure to comply with section 114 of the Law of Marriage Act, Cap 29 of 1971, thus the principles applied in division of matrimonial assets jointly acquired was misapplied as the trial court failed to take into consideration the extent of contribution and its acquisition before making an order for distribution of matrimonial assets.



2. That the first appellate court erred in law and fact for failure to properly analysing the evidence on record testified before the before trial court thus resulted in improper identification of matrimonial properties and miscarriage of justice to order distribution of some non-existing assets and for not ordering distribution of some assets.
3. That the trial court erred in law after ordering the division of the houses and other matrimonial assets without considering their physical strength and current market value.
4. That the trial court erred in law and fact in entertaining and deciding the matter without proper and genuine certificate from marriage reconciliation board indicating its failure to reconcile spouses.
5. That the trial court erred in law and facts to deliver punitive and non-executable judgment.

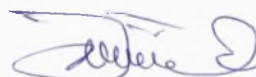
The appellant's prayers before this court is to have the appeal allowed with costs by quashing the order for distribution of the assets and redistribution of the same according to the extent of contribution and evidence on records. In alternative the judgment and orders of the trial court be quashed and set aside thus retrial be ordered and any other order that this court deems fit and just to grant.

In this court, the appellant was represented by the learned counsel Mr. Constantine Ramadhani whereas the respondent was represented by Mr. Yuda Kavugushi, learned counsel.

In his submission in support of the appeal, Mr. Constantine Ramadhani combined and argued together, the first, second, third and fifth grounds of appeal and argued the fourth ground of appeal separately.

In his arguments he started with the fourth ground in which he faulted the trial court for entertaining the matter without a proper and genuine certificate from the Marriage Reconciliation Board indicating its failure to reconcile the parties. He submitted that under section 101 of the Law of Marriage Act it is prohibited to petition for divorce unless a matrimonial dispute has been referred to the Marriage Reconciliation Board and that board has certified that it has failed to reconcile the parties. The only exception to the requirement, according to him, is where there is evidence of existence of extra ordinary circumstances making it impracticable to refer the matter to the board.

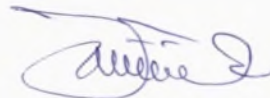
He submitted further that the respondent never brought a valid certificate from the reconciliation board a fault which renders the whole proceedings a nullity and that even though the document titled "hukumu kwa ufupi" was attached to the petition the same was not tendered and



admitted in evidence as exhibit meaning that the court relied on a document that was neither tendered nor admitted which could result in miscarriage of justice.

On the rest of the grounds of appeal, the appellant complains that the matrimonial assets were distributed without first considering the extent of contribution of each spouse. It was his submission that the law requires the courts to establish and ascertain first the assets which were acquired through joint efforts and the extent of such efforts before they make orders for distribution. He contended that the respondent herein only testified as to how she contributed to build the matrimonial home where she resides, but adduced no evidence regarding her contribution on the rest of the assets whereas on his part, the appellant gave evidence on how and when he acquired all the alleged matrimonial assets. He was of the strong view that, the trial court did not consider the current market value of properties when distributing them and ordered the distribution even on assets which are non-existing which facts renders the said decision to be non-executable.

Replying to the submission in chief, the counsel for the respondent argued regarding the fourth ground of appeal that the requirement of referring the dispute to the Marriage Reconciliation Board before taking it to the court of law was adhered to and that is evidenced by the



certificate from the board itself that was presented even before the commencement of the court proceedings and the same is reflected on page 1 of the judgment of the trial court. He also submitted that the cited cases are inapplicable to the matter at hand because they have been wrongly interpreted. The certificate attached was a valid certificate in both form and content. He prayed that the ground of appeal be dismissed for it lacks merits.

Responding to the rest of the grounds of appeal, the counsel submitted that, the respondent managed to prove what she alleged at the trial court to the required standard. Page 4 to 6 of the judgment of the trial court shows summary of what both parties testified regarding their contribution towards the acquisition of the matrimonial assets and also that is on page 7 to 8, the trial court considered the efforts of each party thus the assets were divided according to the law as the trial court adhered to the requirements of section 114(2)(b) of the Law of Marriage Act (supra).

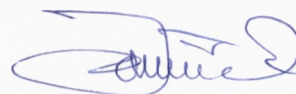
The learned counsel also submitted that there is enough evidence that it was the appellant who mismanaged the matrimonial assets for private gain and at the expense of the respondent herein, thus the division was made after considering all the adduced testimonies. He in

the end prayed that the appeal be dismissed by upholding the decision of the trial court and the costs be provided for.

That being a summary of the submission by the parties to this appeal, one issue that arises is whether this appeal has merit. To get an answer for that, I will go straight to the fourth ground of appeal, which was argued first, in which the appellant is faulting the trial court for entertaining the matter without there being a valid certificate from the Marriage Reconciliation Board.

It was the appellant's contention that the certificate attached was not valid and genuine and that the same was not tendered and admitted as an exhibit before the trial court, therefore the court was not justified to rely on the same to arrive at the decision. The respondent on the other side was of the strong view that the claim is baseless as the certificate from the board was a valid certificate and as a legal requirement the same was presented before the commencement of the proceedings.

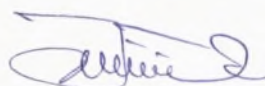
I am in total agreement with the parties that the law requires that a matrimonial dispute must first be referred to the Marriage Conciliation Board before knocking the courts' doors and that the Board has to certify that it has failed to reconcile the parties. See section 101 of the Law of Marriage Act (supra).



It is also provided by the same law under section 102 (2) that it is the Minister who establishes the said Board in every ward and the same shall be known as a Marriage Conciliation Board and under section 103(1) of the same law, the said Board shall consist of a Chairperson and not less than two and not more than five other members.

From the provisions herein above, there are two issues that arises **one**, the Minister has been mandated to establish in every ward, the Board for reconciling marriages before the marriage disputes are filed to courts, that shall be named the "Marriage Conciliation Board." **Two**, the said Board shall as a matter of law, be constituted by a chairperson, and not less than two other members as the minimum requirement, and not more than five other members, as the maximum requirement. These two elements are mandatory for the said Board to be a proper and competent one.

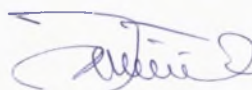
I have passed through the records of the trial court and found attached thereto the complained of certificate from the Board. This means that, parties referred their dispute to the Board as required by the law before their dispute was filed in court. However, the said certificate bears the stamp of the Ward Land Tribunal "Baraza la Ardhi na Nyumba Kata ya Nyakafuru", and, the alleged certificate is titled "Hukumu kwa Ufupi" meaning that, a short form or summary of the



decision of the Board. Its heading is "Baraza la Usuluhishi la Ardhi na Nyumba" which means that the document was from the Ward land Tribunal. Not only the heading but also the contents of the said document (certificate) prove that the purported Board was not a Board but a Ward Land Tribunal, and from the content of the document the dispute between the parties which was entertained was not a matrimonial dispute, it was a dispute over properties and that is what the tribunal resolved as proved by the content of the document from the first sentence to the last sentence of the document.

This means that, the parties' dispute was entertained, not by the Board established by the Minister, which has jurisdiction to reconcile matrimonial disputes under section 102(2) of the Law of Marriage Act (supra) but rather by the Ward Tribunal which has exclusive jurisdiction to hear and determine land matters only.

Moreover, the purported Board when hearing the parties' dispute was composed of the Chairman and six other members contrary to section 103(1) of the Law of Marriage Act (supra) which requires the Board to constitute the chairperson and not more than five other members. That means parties referred their dispute to a wrong forum which lacked jurisdiction to reconcile their dispute.

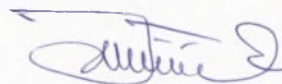


Worse still even after receiving the disputes, the purported Board did not reconcile the marriage disputes and certify to have failed to reconcile the parties, but it adjudicated the complaint over landed property distribution between the parties. In the certificate the said Tribunal ended up directing who should be the supervisor of the properties, as indicated in the said document. I therefore share the same position with the appellant that there was no any valid certificate, which the trial court could rely on to entertain the dispute and arrive at a decision. In the case of **Athanas Makungwa vs Darin Hassan** [1983] TLR 132 where this Court, Bahati, J (as he then was) held *inter alia* that;

"Where there is no certificate within the meaning of s. 101 of the Law of Marriage Act, 1971 from the Conciliation Board indicating its failure to reconcile the spouses a petition for divorce becomes incomplete."

As indicated herein above that what was attached to the petition of appeal is not a certificate of the Conciliation Board within the meaning of section 101 of the Law of Marriage Act, now [Cap. 29 R.E 2019], then the petition for divorce was supposed to have rejected in the first place, it could not have admitted and entertained the said dispute.

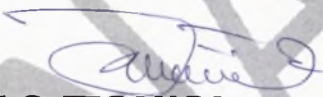
That said, I find the fourth ground of appeal to be meritorious and is therefore upheld thereby quashing the proceedings before the trial



court and setting aside the decision thereof. Parties are advised to start afresh and refer the matter to the proper Board with jurisdiction to reconcile them. As that suffices to dispose of this appeal, I will not consider the remaining grounds of appeal, and considering the nature of the dispute I make no order as to costs.

It is accordingly ordered

DATED at MWANZA this 29th day of July, 2021

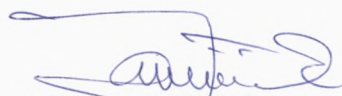


J.C. TIGANGA

JUDGE

29/07/2021

Judgment delivered in open chambers in the presence Mr. Constatine Ramadhani, Advocate, for the applicant and Mr. Renatus Malecha, counsel for the respondent through audio tele-conference.



J. C. TIGANGA

JUDGE

29/07/2021