

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 163 OF 2020

(Originating from District Court of Kilombero at Kilombero in Civil Case No. 8 of 2020)

HASSAN MOHAMED TIMBULO ----- APPELLANT

VERSUS

REHEMA CLEMENS KILawe ----- RESPONDENT

Date of Last Order: 10/5/2021

Date of Judgment: 16/7/2021

JUDGMENT

L. M. MLACHA J.

The appellant Hassan Mohamed Timbulo was the respondent in Matrimonial Cause No. 20 of 2020 at the Primary Court of Ifakara District at Mngeta. The respondent, Rehema Clemence Kilawe was the petitioner. It was a case for divorce and division of matrimonial assets. The Primary Court heard the parties and found that the marriage was irreparably broken down. It granted the decree of divorce and division of matrimonial assets. Nothing was spoken of the children most probably because they are not minors or the respondent simply thought that she can just take care of them herself.

The appellant had no problem with divorce because love appear to have disappeared at this stage. His problem was on the division of matrimonial assets. He appealed to the District Court of Kilombero at Ifakara in Civil Appeal No. 8 of 2020. His appeal was dismissed hence the present appeal.

The grounds of appeal upon which this appeal is based can be put thus;

- 1. That, the District Court erred in finding that there was a certificate issued by a Marriage Conciliation Board authoring the case to come to court.*
- 2. That, the District Court erred in confirming the order for division of Matrimonial assets.*
- 3. That, the appellant was denied a right of legal representation by fixing a very near hearing date.*

Before going to examine the grounds of appeal, I find it proper to give the background as reflected in the records of the lower courts, albeit briefly. The records of the primary court show that the respondent filled a petition which had two documents attached to it; form No. 3 from BAKWATA CHITA dated 27/5/2020 certifying that they had failed to reconcile the parties and a letter from BAKWATA KILOMBERO district addressed to the magistrate informing him that divorce had already been granted according to Islamic Law and requesting him to proceed with division of matrimonial assets. It added that the appellant had failed to respect religious leaders on this aspect.

In the course of hearing the case, the court received evidence from the respondent about the difficulties she was getting from the appellant who did not provide maintenance to the family and who was cruel to her. She gave evidence as PW1 and called 2 other witnesses namely; Rajab Mohamed (40) and Mohamed Hassan Timbulo (19). They all gave evidence on the difficulties of the marriage and on the list of assets which were to be divided. The court could also receive evidence from BAKWATA which was marked exhibit "R1", dated 25/4/2020, signed by the parties before three people who also signed. This was an Islamic 'Talak' which is marked TALAKA YA KUJIVUA (KHUL-U). Under it was the list of children namely; Hawa Hassan Timbulo (22), Mohamed Hassan Timbulo (19), Abdul Hassan Timbulo (14) and Samirnassri Hassan Timbulo (8). The respondent managed to convince the court that indeed, marriage had broken down beyond repair.

The appellant gave his defence arguing that it was not just to grant divorce. He accused the respondent for conflicting him with his children. He said that there was nothing to be distributed as the respondent met him with the properties.

The primary court evaluated the evidence, granted divorce as pointed out and made a division of matrimonial assets. The division is reflected in page 5 and 6 of the judgment as under: -

"Mume (SU.1) amegawiwa nyumba yenye vyumba sita and frem nne, mashamba ekari (10) yaliyoko chita ukumbi wa kuonyesha mpira, kiwanja kimoja kilichoko chita, laini za simu alizosajili kwa jina lake, duka la sim una pikipiki pia.

"Mke (SM1) mashine ya kukoboa nyumba za vyumba viwili viwili iliyopo (sic) chita na imepangishwa, shamba ekari kumi (10) ambalo tunaambiwa lina ekari 20, kiwanja kimoja kilichoko chita, laimi alizosajili kwa jina lake".

The court added,

"vitu vya ndani wagawane nusu kwa nusu pia".

This arrangement was confirmed by the district court.

It is against this background that an appeal was lodged in this court. With leave of court, the appeal was heard by written submissions. The appellant had the services of Mr. Elibarik Zakaria Nkandi while the respondent appeared in person, fending for herself.

It was the submission of the appellant that the district court erred in recognizing exhibit R1 as a certificate and evidence that the parties had passed through the Conciliation Board. He had the view that the case did not pass through the Conciliation Board as required by the Law and therefore illegally received by the primary court. Further to that, the court made the division of matrimonial assets contrary to section 114(1) and (2) of the Law

of Marriage Act, Cap 29 R.E. 2019 for failure on the part of the respondent to prove contribution.

It was submitted in reply that the appeal is merely a delay trick to prevent the execution of the decree. On the requirement of passing through the Conciliation Board, the respondent informed the court that the case passed at BAKWATA which is legally recognized as a Conciliation Board. Both parties were heard. A decision was reached showing that they had failed to reconcile the parties. The respondent was given form No. 3 which was attached to the petition. They were also given another document, exhibit R1, which was dully signed by the parties signifying that the Islamic Talak have already been issued. It was further submitted that the respondent took part in the acquisition of the assets which were obtained in the length period of the marriage (from 1996 to 25/4/2020).

I had time to examine the records and the submissions made. Indeed, as said by the respondent, this appeal is nothing but a delay trick. I will try to show.

The evidence is plain that the parties went through the BAKWATA processes of reconciliation from Chita up to Ifakara (District level) and that they got the assets under distribution through their joint efforts. The parties were given certificates from BAKWATA showing that the Board had failed to

reconcile them. There is also a letter from BAKWATA Ifakara district supporting the Board. It described the appellant with the words, "*Mlengwa ameshindwa kuheshimu viongozi wa dini*" meaning that the appellant had failed to respect religious leaders. The matter went to court after going through this process. It was then heard and decided as aforesaid.

The problem before me is on the status of the certificate and the legality of the division which was made by the primary court and supported by the district court. I will start with issues around the certificate.

Marriage Conciliation Boards are a creature of the statute and are regulated by the law. The relevant law is sections 102, 103 and 104 of the Law of Marriage Act and rules made there under. Section 102 (1) gives the minister responsible for legal matters power to establish in each ward a Board to be known as the Marriage Conciliatory Board. This was designated to be the *Ward Tribunal* established under the Ward Tribunal Act (see Part III (ii) of the Schedule to the Act). So, when we talk of the Board, we mean the ward tribunal but there are other institutions as well which were designated as Boards. Subsection (2) gives the minister power to designate *community committees* (mostly coming from religious institutions) as Boards with the same power and functions. Now in the exercise of his powers under subsection (2) through GNs 96 of 1971, 211 of 1971 and 245 of 1971 a

number of religious committees were designated as Marriage Conciliatory Boards through this law. BAKWATA is covered under item 345. This is the second category of Boards. The third category comprise of committees of the Social Welfare Department. If formed, they may also exercise the functions as Boards. See the decision of this court in **Isaya Swai V. Greven Ngomuo**, High Court Dar es Salaam, PC Civil Appeal No. 36 of 2010. The challenge here is that, there must be a committee with members as specified under the law not the social welfare officer alone. If the social welfare will act alone, his certificate may suffer the risk of being rejected as it was done by this court in **Happiness Masisi v. Maximillian Buhatwa**, PC Civil Appeal No.12 of 2019 (H/C Dar es Salaam).

The law requires all people to route their marriage problems to court after passing through the Board which should attempt a reconciliation and in case of failure certify to the court that it has failed to reconcile them. Jurisdiction of the court is given by this certificate

Items 345 reads;

"345. Any Marriage Conciliatory Boards established by Baraza Kuu la Waislamu wa Tanzania (BAKWATA) in any area of Mainland Tanzania provided that;

- a) *The Board shall consist of a **chairman and not more than five and not less than three members** appointed by the **proper organ of BAKWATA**;*
- b) *BAKWATA shall give **notice of the Registrar of the number of Boards established by it** and shall also give the Registrar the Postal address of each of such Boards;*
- c) ***Each such Board shall exercise jurisdiction as a Marriage Conciliatory Board in matter where both parties are muslims***.
(Emphasis added)

What I can gather from the above is that, the law has given BAKWATA mandate to establish Marriage Conciliatory Boards in mainland Tanzania, to work in their respective areas, where both parties are Muslims. The Law have also established the composition; that the members shall not exceed five and shall not be less than three. Now if such a Board is established and notice of its existence is given to the Registrar of Marriages, the Boards will have legal mandate and can exercise jurisdiction in their respective areas.

In our case we have form No. 3 issued by BARAZA LA USULUHISHI MASHAURI YA NDOA LA BAKWATA CHITA. It is the certificate which is ordinarily issued by Conciliatory Boards. BAKWATA Wilaya Kilombero recognized the Board through its letter sent to court. There is no doubt that BAKWATA at district level is the proper organ of BAKWATA within the meaning of item 345(a) which can recognize the existence and legality of a

Board. It follows that the certificate which came from Chita was a legal document for the purposes of the Law of Marriage Act.

Counsel for the appellant challenged its weight saying that it was not tendered as an exhibit. That it was merely attached to the petition. And that the Islamic Talak Exhibit R1 was wrongly recognized as the certificate. He requested the court to discard it and dismiss the whole thing. This is opposed by the respondent. I have tried to reason out carefully.

Section 104 (5) and (6) of the Law of Marriage Act require does not require the existence of the certificate as an exhibit. It only says that if the Board is unable to resolve the matrimonial dispute or matter referred to it, it shall issue a certificate setting out its findings. And that it may also append to the certificate its recommendations as it may deem fit. Admittedly, it is this certificate which gives the court jurisdiction to hear the case but there is no indication that it should be tendered as an exhibit. I think what is needed for the purpose of giving jurisdiction to the court is the existence of the certificate before the court at the registration stage. It is something which is required at the admission stage. It must exist before the case is registered and given the number. It is a registration condition which may not necessarily be needed later. What is important is that it must be existence as part of the pleadings before the magistrate at the time of making the

decision to register the case. He must see it or else his jurisdiction is premature. It is like a death certificate in a probate case. It must be attached in the petition and must be seen before any step is taken. It may not necessarily be tendered as an exhibit but must be present as one of the attachments to prove death and give the court mandate to sit to determine the matter. Whether it will be tendered as an exhibit will depend on whether there is an issue calling proof using the document. In this reasoning, in my considered view, the failure to tender the document did not affect the case.

What about division of matrimonial assets? Like the district court, I don't see any problem with the division made by the primary court. The record is clear that the parties have lived together from 1996 up to 25.4.2020 when the Islamic Talak was issued (24 years). They have 4 children. They were simple farmers who had nothing. They engaged themselves in agricultural activities and petty businesses. They managed to acquire the assets in the course. The contribution of the respondent as a wife is notable. She took part in the agricultural activities and the businesses. She took care of the children properly no wonder she is accused of conflicting them with the appellant. I find no problem with the division made by the trial court. I dismiss the complaint based on second ground is dismissed.

I could see no tangible evidence that the appellant was denied a right to engage a lawyer. I think the third ground was put without legal base. It is stands dismissed as well.

That said, the appeal is found to have no merits and dismissed with costs. The primary court magistrate is directed to proceed with execution without further delay.



A handwritten signature in blue ink, consisting of a stylized, elongated loop followed by a series of vertical strokes and a long horizontal line extending to the right.

L. M. MLACHA

JUDGE

16/07/2021