

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(PC) CIVIL APPEAL NO. 11 OF 2021

(Arising from Matrimonial Appeal No. 3 of 2020, Rombo District Court, Originating from Matrimonial Cause No. 1/2020, Usseri Primary Court)

JUDITH SIMON TARIMO ----- APPELLANT

VERSUS

NOVATI BONIFACE KIMARIO ----- RESPONDENT

JUDGEMENT

MUTUNGI .J.

The matrimonial dispute originates from Usseri Urban Primary court (the trial court) in Matrimonial Cause No. 1 of 2020. In the said court the respondent successfully petitioned for divorce and division of matrimonial assets. Prior to the judgment of the trial court, the court through an Application made by the Appellant placed the custody of the five issues namely Marigareth Novath, 14 years, Aisack Novarth, 12 years, Antonia Novath, 8 years, Grace Novath 5 years and Ezekiel Novath 2 years under the custody of the Appellant.

Briefly, Judith Simon Tarimo and Novati Boniface Kimario celebrated a Christian Marriage on 13th of November, 2007

and were blessed with five issues. Before the trial court, the respondent herein petitioned for divorce on the grounds of adultery and witchcraft. He also prayed for division of matrimonial properties which were, a four roomed commercial house situate at Tarakea Urban and a vehicle make Fuso. The house in which they reside therein was the respondent's property acquired before the marriage and farms located at forest area.

In the end the trial Magistrate granted the divorce and awarded the respondent the said motor vehicle and the 4 roomed commercial house at Tarakea allocated to the Appellant. Further, the Respondent was ordered to provide the Appellant the start-up capital at the tune of Tshs. 1,000,000/=, the children were to remain in the custody of the appellant.

The appellant was aggrieved by the decision of the trial court, she appealed to the District Court of Rombo. Her appeal was partly allowed where the order of custody was reversed and this time around Marigoreth Novart, Aisack Novart and Anthonia Novarth were placed under the custody of the Respondent while Grace Novart and Ezekiel Novart were placed under the custody of the Appellant. The respondent was further ordered to provide Tsh 100,000/- per month for maintenance of the children placed in the Appellant's custody.

Still dissatisfied, the Appellant appealed to this court on the following grounds: -

1. That the first Appellate Court erred in law and fact in finding that Section 101 Law of Marriage Act Cap. 29 R.E. 2002 was complied with.
2. That the first Appellate Court erred in law and fact in finding that FORM 3 purportedly annexed with submissions on appeal was properly admitted or at all issued by a competent Board.
3. That the 1st Appellate court erred in finding that failure by the Appellant to indicate the number of the Ward Act rendered the said Form 3 as a valid form.
4. That the 1st Appellate Court erred in finding that an analysis of what constitutes Matrimonial assets was done and that a fair division was made.
5. That the first Appellate Court erred in finding that Tshs. 1,000,000/= as start-up capital was enough and suffices to cover maintenance for the wife.
6. That the 1st Appellate Court erred in finding that maintenance for the divorced wife is dependent on disability and or difficult condition.
7. That the First Appellate Court erred in granting custody of three children to the Respondent without making orders for access by their mother and without taking into account ability to care for them during holidays.

8. That the first Appellate court erred in confirming divorce on mere speculation of adultery.
9. That the first Appellate Court erred in dismissing the Appeal with costs and displaying bias against the Appellant contrary to the spirit of law and justice.

The appellant was represented by Mr. Baraka Mussa, learned advocate while Mussa Mziray advocated for the respondent. The matter proceeded orally.

The Appellant's counsel started by narrating the history of the dispute then continued to submit on the grounds of appeal. Submitting on the first ground of appeal Mr. Baraka stated, the first appellate court failed to note that in the proceedings before the petition was filed, Form 3 was not filed or attached to show there was reconciliation but miraculously was seen in the District Court record (in submissions). Mr. Baraka was of the view the purported Form 3 should be treated as though it never existed. Even though the appellant has never been summoned/invited for reconciliation at any given time. Be as it may, Form No. 3 was never referred to in the trial court.

He further challenged the alleged Form on the reason it was illegally procured because the authority issuing the Form is questionable and the Board itself was not existing in law. He stated the form is titled "*Baraza la Usuluhishi wa Ndoa la Kijiji cha Msangeni*" while section 101 of the Law of Marriage Act,

Cap 29 R.E 2002 (LMA) provides that it should be issued by the Marriage Conciliation Board. Mr Baraka further argued section 102(1) of the Act vests powers with the minister to establish a Board in the Ward. The one mentioned in this matter refers to "Kijiji" and not Ward. He further contended, such form was signed by the V.E.O who is not legally a member or secretary to the Board laid down by the law. The village council is not a competent body where matrimonial disputes are to be adjudicated. In that respect, it was argued there was no reconciliation concluded in this matter.

Submitting on the third ground of appeal on failure to indicate the number of the Ward Tribunal Act, the counsel stated the **Ward Tribunal Act) Act No. 7 of 1985 R.E. 2002** establishes Boards and the structures of the people forming the Ward. In the present case non citation of the Act is not fatal and it doesn't occasion injustice because the Board had already been established.

On the fourth ground the counsel is challenging the division of matrimonial properties. He stated section 114 of the Law of Marriage Act provides for division of matrimonial assets acquired through joint efforts after an order of divorce or separation is granted. He added the court should consider customs, extent of contribution or personal efforts or debts jointly acquired and the maintenance of issues of marriage.

He argued before the trial court there were properties found to have been jointly acquired like the farms at Forest area, a house at Tarakea, a vehicle (Fusso) and a matrimonial home but only one house (commercial house at Tarakea) given to the Appellant and the respondent was given a Fusso. He further stated though at page 8 of the judgment it was admitted the matrimonial home and farms were matrimonial assets the same were not analyzed and assigned to anyone. The same picture is reflected, at the District Court, where the commercial house and vehicle were to be divided but the court was silent as regards the matrimonial home and farms.

Mr. baraka added the two had been married for the past 16 years, for that he was of the view, it does not get in one's mind that the appellant had no share in the home (house) and the farms which they used to cultivate and grow potatoes and timber trees together. The fact that she could not remember the purchase price was no ground to curtail her rights on the same.

On the fifth ground the counsel challenged the one million startup capital on the ground that, the amount does not suffice for one to start a new life and at the same time maintain the children. He referred to Section 108 of Law of Marriage Act which provides for the basis of the grant of such money which in his view, this was not done. The learned advocate contended further the respondent is a rich man, the wealth

which was the result of the appellant's handwork. In such respect he prayed for the figure to be looked into.

Addressing the sixth ground on maintenance of the appellant the learned advocate stated, though the District Court at page 7 - 8 of the judgment interpreted section 105(1)(e) and 120(1) of the LMA but it did not justify the reason of denying the appellant maintenance. The counsel contended the law is very clear when granting divorce or separation, the court has also powers to grant maintenance. The legislature has used the word "may", in his settled view it can be interpreted to include a wife (spouse) who is not disabled. He further contended that **Section 63(a) of Law of Marriage Act** provides mandatorily for the husband to provide maintenance to his estranged wife.

In so far as the seventh ground of appeal on the issue of custody of three children is concerned, Mr. Baraka expounded, custody granted to a spouse does not do away with visitation rights. He argued the parents should be availed the right to access the children. He faulted the trial court for not discussing these rights or order for the provision of health and education care to the children who were placed under the Appellant's custody.

Submitting on the eighth ground on the issue of grounds of divorce, it was the counsel's argument, the law requires the court to assess whether the marriage has broken down

irreparable. He stated there were no facts presented in court to support the divorce, even the alleged adultery was never proved, since the respondent admitted that he had never seen the appellant with any man. He added the DNA had proved that the disputed child one Ezekiel was the respondent's child. In such respect and evidence, he condemned the court for discussing adultery issues which were not pleaded for. He called upon this court to look into this aspect.

Lastly as to the ninth ground regarding the dismissal with costs it was Mr. Baraka's argument that in matrimonial proceedings costs are governed by section 90(1) of Law of Marriage Act and it is within the discretion of the court. It was his settled opinion that a woman should not be condemned for costs unless there is proof of means to pay the same. He argued there was no such proof since at page 15 of the judgment it was noted the appellant has no income. In that respect, the counsel submitted the order as to costs was unlawful compared to the facts of the case.

He concluded by praying the appeal be allowed with costs.

In response thereto, Mr. Mussa Mziray reacted to the submission by Appellant's counsel on the 9th ground of appeal. He argued, the District Court's judgment dated 19/4/2021 at page 9 para 5 did not grant any costs against the appellant.

Mr. Mziray quickly conceded Form No. 3 which was issued by the village council does not comply to section 101 of the Law of Marriage Act. In such respect therefore, he was of the view that all that transpired in the lower courts was Null *abinitio* and the disputing parties ought to have gone for reconciliation before filing the petition.

In concluding, the learned counsel had two prayers, **one**, the court to advise parties to follow the law and procedures pertaining to matrimonial cases and **two**, the court should not condemn the respondent to costs because the two will still be a married couple.

I have dispassionately passed through the rival submissions by the advocates representing the parties as well as lower courts records, and found as did the Appellant's counsel an issue on jurisdiction. The same is that the matter did not pass through the Marriage Conciliation Board for the reason that a certificate was never filed in the trial court. Even if the one available on the record existed, still it was illegally procured and the issuing Board was none existing in law. The issue which was conceded to by the Respondent's counsel.

Under section 101 of the Law of Marriage Act it provides: -

*"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..."

The importance of complying with the mandatory requirement of the above provision was emphasized by the Court of Appeal in the case of **Hassan Ally Sandali VS Asha Ally, Civil Appeal No. 246 of 2019 (CAT-unreported)**.

The contents of a certificate from the Marriage Conciliation Board (Form No. 3) is provided for under the schedule of G.N No. 240 of 1971. For ease of reference, I reproduce the same hereunder: -

FORM 3

MARRIAGE CONCILIATION BOARD

(Give full designation of the Board)

WHEREAS a dispute exists between
..... *(State name of husband)* and
..... *(state name of wife)* who are lawfully
married and such dispute was referred to this
Board by (Name of the person
who referred the dispute).

THIS IS TO CERTIFY that this Board has failed to
reconcile the parties and that in the opinion of
the Board *(any recommendation which the Board may wish
to make)*

Signed.....

Chairman/Vice-Chairman/Member

Dated this..... day of.....

20.....

I have painstakingly passed through the available Form No.3 in the trial court, I find the same was in violation of the set down format. For the sake of record it is quoted as follows: -

**BARAZA LA USULUHISHI WA NDOA LA
KIJIJI CHA MSANGANI**

*Kwa kuwa Usuluhishi wa mgogoro wa ndoa kati
ya*

NOVATH BONIFAS KIMARIO

na

JUDITH SIMON TARIMO

*Ambao wameoana kisheria na mgogoro wao
umeletwa mbele ya Baraza hili na JUDITH SIMON
(Taja jina la aliyepeleka Shauri kwenye Bodi)*

*HII NI KUTHIBITISHA KWAMBA Baraza limeshindwa
kusuluhisha mgogoro huo na linapendekeza
yafuatayo;-*

- 1. WASIKILIZWE MAHAMANI KWA USHAURI
ZAIDI KWANI BARAZA LIMESHINDWA
KUTATUA MGOGORO HUO. (sic)**

SAHIHI:

MWENYEKITI

MHURI:

AFISA MTENDAJI

KIJIJI CHA MSANGANI

Mwenyekiti/Wajumbe; PHILBERT J. K.
IRAMBATA..."

Though the contents are the same as those in the prescribed form the issue is whether the issuing Board was legally existing.

The Marriage Conciliatory Boards are provided for by the law. There are those established under LMA where under **section 102 (2) of LMA** it is the Minister who establishes the said Boards in every ward 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. The provisions is as hereunder: -

"102.- (1) The Minister shall establish in every ward a Board to be known as a Marriage Conciliation Board and may, if he considers it desirable so to do, establish two or more such Boards in any ward.

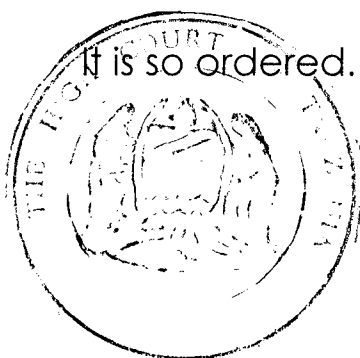
(2) Where the Minister is satisfied that any community in Tanzania has established for itself a committee or a body of persons to perform the functions of a Marriage Conciliation Board and that

it is desirable that such committee or body of persons be designated to be the Board having jurisdiction over the members of that community, the Minister may so designate such committee or body of persons

Turning back to Form No. 3 which was reproduced earlier, titled **“BARAZA LA USULUHISHI WA NDOA LA KIJILI CHA MSANGAI”** is not a certificate issued by a Board established as per section 102 of Law of Marriage Act. The same vitiates the proceedings and judgements of the two lower courts. The same being the position it suffices to dispose of the entire appeal.


I thus allow the appeal, the judgments of the District and Primary Courts are quashed and set aside. The parties are at liberty to pursue their rights in accordance with the law.

Considering the nature of dispute, I make no order as to costs.

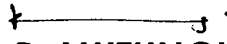


B. R. MUTUNGI
JUDGE
31/8/2021

Judgment read this day of 31/8/2021 in presence of both parties, Miss Minde for the Appellant and Mr. Emmanuel Karia holding brief for Mr. Mussa Mziray.


B. R. MUTUNGI
JUDGE
31/8/2021

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
31/8/2021