

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

PC CIVIL APPEAL NO. 193 OF 2020

(Appeal from the Judgment and Decree of the District Court of Ilala at Kinyerezi in Civil Appeal No. 58 of 2019 before Hon. E. Lukumai, **RM** dated 04/12/2019, Originating from Buguruni Primary Court in Matrimonial Cause No. 07 of 2019)

HAMIS SALUM PENGU..... APPELLANT

VERSUS

ASMA MINTANGA RASHID..... RESPONDENT

RULING

25th Aug, 2021 & 17th Sept, 2021.

E. E. KAKOLAKI J

This is a ruling in respect of the issue raised suo mottu by the court regarding the competence of the appeal before it, preferred by the appellant. The appellant filed the appeal with five grounds which for the purposes of this ruling will not be of assistance hence no need of reproducing them. The appeal is against the judgment and decree of the District Court of Ilala at Kinyerezi in Civil Appeal No. 58 of 2019, handed down on 04/12/2019 in favour of the respondent and against the decision of Buguruni Primary Court

in Matrimonial Cause No. 07 of 2019, particularly on the division of matrimonial properties allegedly jointly acquired. It is worth mentioning that parties' dispute in this appeal emanates from Matrimonial Cause No. 07 of 2019 before Buguruni Primary Court where the respondent had instituted a matrimonial cause seeking for divorce decree and division of matrimonial properties jointly acquired. Upon both parties being heard the trial court decreed their marriage dissolved and proceeded to distribute the matrimonial properties jointly acquired by the parties in exclusion of the house located at Yombo within Temeke District, Dar es salaam Region. The respondent who was aggrieved with the decision of exclusion of the said house from matrimonial properties successfully appealed to the District Court of Ilala through Civil Appeal No. 58 of 2019, whereby the decision of the trial court was varied by declaring the said house a matrimonial property and ordered for its equally distribution among parties. Discontented with such decision of the appellate court the appellant preferred the present appeal which this court is questioning as to whether the same is competent before it as the competence of the said case before the trial court is also questionable for want of valid certificate from the Marriage Conciliatory Board as per the requirement of section 101 of the Law of Marriage Act, [Cap. 29 R.E 2019] herein to referred as LMA.

As alluded to above the issue of competence of the appeal was raised by this court suo motu. The Court did so upon noting that it cannot close eyes to the clear misapplication or misinterpretation of the law as it has the duty of making sure that the law is clearly and properly applied by the lower courts. The duty of the superior courts to so do was overemphasised by the

Court of Appeal in the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249 when the Court stated that:-

*"We think . . . the duty of the Court is to apply and interpret the laws of the country. **The superior courts have the additional duty of ensuring proper application of the laws by the courts below**" [The emphasis is mine]*

Similar observation was also made in the case of **Adelina Koku Anifa & Another Vs. Byarugaba Alex**, Civil Appeal No. 46 of 2019 (CAT-unreported) where it had this to comment:

It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals.

Owing to this court's duty as stipulated in the above case and following the quest raised suo motu parties were called upon to address the court on two issues. **One**, whether the BAKWATA Ilala District was competent to constitute a Board for the purposes of section 102(2) of the Law of Marriage Act, [Cap. 29 R.E 2019]. **Second**, whether parties underwent reconciliation before institution of the divorce petition as per the requirement of section 101 of the LMA. When the matter was set for hearing both parties prayed to address the court by way of written submissions as the appellant was represented by Mr. Maswin Masinga learned advocate whereas the respondent sought legal aid from Tanzania Women Lawyers Association

(TAWLA) for preparation of the submissions only. The said submissions were filed in time hence the present ruling.

I have taken time to go through both parties' submissions, proceedings and judgments of both trial and appellate courts. For the reasons to be disclosed soon I have opted to start with consideration of the second issue. Mr. Maswin on the issue as to whether parties passed through Marriage Conciliatory Board and issued with a valid certificate said there is an indication that parties passed through BAKWATA Marriage Conciliatory Board. He however observed that, as per its findings in the certificate there is no indication that parties were reconciled by the board before the certificate certifying that it has failed to reconcile them was issued. Relying on the case of **Hassani Ally Sandali Vs. Asha Ally**, Civil Appeal No. 246 of 2019 (CAT-unreported) where the Court appeal held parties were not reconciled as there was no indication that BAKWATA made an attempt to reconcile them prayed this court to find the omission was fatal and nullify the proceedings before both preceding courts as the matrimonial cause before Buguruni Primary Court was filed prematurely for want of compliance of section 101 of the LMA, thus the proceedings be quashed and the decision thereof set aside. On the other side the respondent in her submission found meritorious the point of law raised by the court on the competence of this appeal. She joined hands with the appellant and supported his submission that, the contents of the purported issued certificate does not indicate the BAKWATA marriage conciliatory board attempted to reconcile the parties and failed. It was her prayer therefore that this court be pleased to order for retrial of the case

after quashing the proceedings and set aside the decisions of both preceding courts.

It is true and I agree with both parties that the certificate purportedly issued by BAKWATA Ilala District as Marriage Conciliatory Board falls short of legal validity to satisfy the requirement of section 101 of the LMA. The said section 101 of LMA reads:

101. 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 law provides under section 104(5) of the LMA that, the said certificate shall be issued setting out the findings of the board upon its failure to resolve to the satisfaction of the parties the matrimonial dispute or matter referred there by them. The said section 104(5) states thus:

104(5) Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings.

From the above cited sections the board is expected to state in its finding among other things facts stating or indicating that it has attempted to reconcile parties but failed and that is why the matter is referred to court for determination of the parties dispute or matter. In this matter as rightly observed and submitted on by both parties the board's findings do not suggest parties were reconciled and failed to reach consensus before their

matter was referred to court. To bring the matter into picture I reproduce the findings made by the board in the said certificate:

MHESHIMIWA HAKIMU MUME AMETHIBITISHA TALAKA MOJA (1) KWA MKEWE TAREHE 25/04/2016 NA HAKUNA REJEA HADI LEO. NAOMBA MAHAKAMA YAKO ITOWE HATI YA TALAKA (DIVORCE CERTIFICATE).

MME ALIPASWA KUMHUDUMIA EDA MTALIKIWA WAKE ANADAI HAJAGHARAMIWA. HIVYO MUME ANAWAJIBIKA KUFIDIA GHARAMA HIYO.

MUME ANAWAJIBIKA KUMPA MKE MATALIKIWA "MUTAA" KULINGANA NA UWEZO WA MTALIKI.

WANANDOA HAWANA MACHUMO WATAJIELEZA WENYEWE.

From the findings of the board one will unequivocally note that what the board was doing is more of adjudication of the parties' dispute instead of reconciliation. For example a finding that the appellant was to compensate the respondent for the costs incurred during period of "iddat" (waiting period after issue of divorce under Islamic rites) and the payment of "mutaa" by the appellant. To me this brings none other than adverse inference and therefore a conclusion that parties were not reconciled as rightly conceded by themselves, as there is no express statement from the board that it reconciled them and failed before so certifying in the certificate. The court of appeal in a case with more or less similar facts to the present one where

the BAKWATA marriage conciliatory board failed to expressly state that it reconciled the parties had this to say:

"In absence of any express statement that BAKWATA made an attempt to reconcile the parties but failed, can only lead to an inference that BAKWATA could not have certified that it failed to reconcile the dispute by involving the respondent alone."

In this matter since the parties were not reconciled the purported certificate issued by BAKWATA Ilala District, I finding was invalid and therefore could not validly be used to institute matrimonial proceedings before the Buguruni Primary Court in Matrimonial Cause No. 07 of 2019. In that regard as per the requirements of section 101 of the LMA, the petition before the trial court was premature as it was held in the case of **Shilo Mzee Vs. Fatuma Ahmed** (1984) TLR 112 that, absence of such certificate renders the petition for divorce premature and incompetent. In the same bits the whole proceedings before the Buguruni Primary Court and the judgment thereto were nothing but a nullity. As it is the same judgment and proceedings of the trial court which the appellate court relied on to determine the appeal and arrive at the decision which is being challenged here the same also were stained with the nullity. The sum effect therefore is that the proceedings before the Primary Court as well as the divorce decree and other orders are quashed and set aside for being a nullity, so are the proceedings and orders by the District Court of Ilala on appeal.

In the upshot and for the fore going I hold the appeal before this court is incompetent. The same is therefore struck out. The respondent is at liberty to file a fresh petition in accordance with the law if she so wishes.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 17th day of September, 2021.


E. E. KAKOLAKI

JUDGE

17/09/2021

The ruling has been delivered at Dar es Salaam today on 17th day of September, 2021 in the presence of the respondent in person and Ms. **Asha Livanga**, Court clerk and in the absence of the Applicant.


E. E. Kakolaki

JUDGE

17/09/2021