IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.275 OF 2020

(Original Matrimonial cause no.21/2020 of the Resident Magistrates' Court of Dar es Salaam at Kisutu before Hon. C.Matembele, PRM)

PHILOMENA KASANGA.....APPELLANT

VERSUS

SAMWELI ABADO.....RESPONDENT

JUDGMENT

23/9/2021 & 21/10/2021

I.C MUGETA, J.

The Parties to this appeal celebrated their Christian marriage in 2015. After they married, they cohabited for not more than three months. Then they lived in separation till now due to the fact that the appellant lives and worked for gain in Bagamoyo, Kibaha and now Dar es Salaam while the respondent lives and works in Kilimanjaro. For reasons best known to them no one wanted to relocate so that they could live under one roof. Consequently, the appellant petitional for divorce. In the petition at para 7.0 she alleges that since they have barely lived under one roof, they have never enjoyed conjugal right or acquired any property or had children. She alleges further that their marriage has broken down beyond

repair. In reply to the petition (which was titled 'written statement of defence') the respondent was in agreement with the petitioner and supported divorce decree to be issued. The 27th July, 2020 was a hearing date. The case was heard ex parte against the respondent who was absent and the petitioner's counsel prayed for judgment under order XV rule 1 of the Civil Procedure Code (Cap. 33 R.E 2019) (the CPC) because the petition was uncontested. The case was fixed for judgment on 7/8/2020 which was not pronounced. In lieu thereof, the learned trial Principal Resident Magistrate interviewed the petitioner with some questions and fixed the case for judgment on 26/8/2020. No evidence was recorded. On the appointed date the trial court dismissed the case for a reason that the parties never referred their dispute to the Marriage Conciliation Board (the Board) as mandatorily requirement under section 101 of the Law of Marriage Act (Cap.29 R.E 2019) the (LMA). Appellant was aggrieved by this decision and she preferred this appeal. In the memorandum of appeal, she has advanced three grounds that:-

1. *The trial court proceedings are a shambles and in no way reflect how judicial proceedings in a matrimonial case ought to be.*
2. *The trial court erred in law in issuing a judgement without conducting a proper hearing per the law from which a lawful judgement could be composed.*

3. *The trial court erred in law and in fact in holding that the marriage has not been broken down irreparably when the respondent conceded in his written answer to the petition that divorce be issued, inter alia due to a lengthy separation of 5 years.*

At the hearing Mr. Alphonce Nachipyangu, learned counsel, represented the appellant and also held brief for Ms Suzan Kavishe for respondent with instructions to proceed on account that the Respondent does not oppose the appeal.

Mr. Nachipyangu argued all three grounds jointly. He submitted that in his reply to the petition of divorce, the respondent conceded to the petition of divorce. He submitted that according to Order XV rule 1 of Civil Procedure Code [Cap. 33 R.E 2019] the trial court ought to have pronounced the judgement since there was no fact in issue. He argued further that the trial court erred in summoning the appellant and interview her in the absence of the respondent and, thereafter, dismissed her petition which is procedurally irregular. To buttress his argument that since the petition was uncontested the trial court ought to have pronounced a judgment, he cited the case of **Joseph Warioba Butiku vs Perucy Muganda Butiku** [1987] TLR 1 where it was held that when

parties agree in sufficient issues of facts and law raised in their pleadings the court may pronounce judgment.

While I agree with the complaints in the first and second grounds of appeal, namely, that the manner the trial court conducted the proceedings is unusual and that there is no evidence upon which judgment could have been written, I do not agree with the complaint in the third ground of appeal which I shall deal with first.

Indeed, under Order XV rule 1 of CPC the Court may pronounce judgement at the first day of the hearing where it appears from the pleadings that the parties are not at issue on any question of law or fact. Under rule 29(2) of the **Law of Marriage (Matrimonial Proceedings) Rules, 1971,** rules of procedure under the CPC as to hearing of cases applies to matrimonial proceedings too. In this Case the parties pleaded in unison that their marriage has been broken down irreparably, therefore, the trial Court could have instantly pronounced a judgment as far as divorce is concerned. However, the manner of trial under Order XV rule 1 of the CPC applies to Matrimonial Proceedings subject to complying with mandatory procedures like the requirement under section 101 of the LMA which states: -

'No person shall petition for divorce unless he or she has first referred the Matrimonial dispute to the Board and the Board has certified that it has failed to reconcile the parties'.

The word Board refers to the Marriage Conciliation Board established under section 102(1) of the LMA. The appellant petitioned for divorce without referring the dispute to the Board for reason stated in paragraph 11 of the petition. These are: -

'that, when it became apparent that the marriage between the parties has basically broken down due to both prolonged separation, the parties have found it virtually impossible to successfully and effectively refer the matter to a marriage concilliation Board'.

This fact is admitted in the answer to the petition under paragraph 3. Logically, therefore, the Board had not failed to reconcile the parties but the parties wilfully neglected to refer the dispute to the Board. It is for this reason the trial Court refused to grant the petition for divorce and held that "applying order XV rule 1 of the CPC to the circumstances of this case will defeat the whole concept of judicial care.

I agree with the learned Principal Resident Magistrate. As I have already stated herein, Order XV rule of the CPC 1 would apply if the petition was

properly before the Court. Lack of the certificate of the Board that it had failed to reconcile the parties rendered the petition incompetent.

Sections 101(a) – (f) of the LMA provides for conditions under which reference of the matrimonial dispute to the Board is exempted. Living under separation which is the ground advanced by the parties to the case is not one of them. I understand one of the prayer in the petition was the court to make a finding that there exists exceptional circumstances that make it impossible to refer the matter to the Board. Those circumstances are listed in paragraph 12 of the petition thus: -

i) The parties have never lived together as husband and wife either in Dar es salaam or Kilimanjaro.

ii) The parties have been at odds (sic) and loggerheads regarding where exactly such reference should be done.

iii) The prolonged separation between May, 2015 – June, 2020 has completely deformed any meaningful practicality, import, meaning and chances of liconciliation.

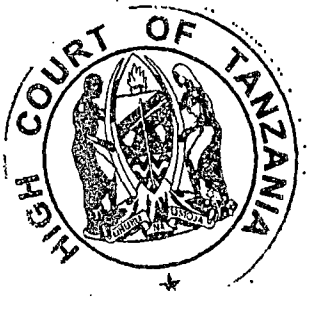
The trial Magistrate did not address his mind to these grounds. As first appellate Court I am entitle to step into the shoes of the trial Court and consider them as I hereby do. After such consideration, I hold a firm view that none of them constitute an extraordinary circumstance that could have made reference of the dispute to the

Board impossible. Firstly, living under separation does not bar reference of the dispute to the Board where a party seeking divorce knows the where about of the other spouse. On their disagreement on where to refer the dispute, it is my view that a party wishing to petition for divorce must refer the dispute to the Board that is within the area of the Court having jurisdiction over the dispute. Parties need not to agree on which Board should preside over their dispute as the Board has powers to summon the other spouse under rule 7(4) of the Marriage Conciliation Board (Procedure) Regulation, G.N.240/1971 (the Rules). Further, such a Board under rule 12 of the Rules may transfer the dispute from it to another Board when it is of the opinion that, in the interest of justice, another Board having jurisdiction in the matter should determine the dispute. The third ground of appeal, in view of the foregoing discussion, has no merits. The trial court rightly dismissed the petition except for the procedure it adopted in determining the matter as I shall hereunder demonstrate when dealing with the first and second grounds of appeal.

The first and second grounds of appeal, shall be dealt with jointly. As explained earlier, no evidence was tendered before the trial

court. The trial Court also refused to apply order XV rule 1 of the CPC to enter a judgment. In such circumstances the trial court erred to call its decision a judgment. A judgment presupposes conclusive determination of the matter after hearing the parties on merits. This petition was not determined on merits but on a technical issue that the dispute had not been referred to the board. Therefore, the door is open to the parties to file a fresh petition after reference of the dispute to the Board. Calling the decision thereof as a judgement brings the principle of "res judicata" into play, hence, barring further litigation between the parties. Having found that the petition was filed without the certificate, the trial court ought to have rejected the petition instead of passing orders that it declined to dissolve the marriage as if the case was heard on merits. The trial court also ought to have, at the outset, determined whether there were extraordinary circumstances which prevented reference of the dispute to the Board. However, since I have stepped into the shoes of the trial court and I have determined that there was no extraordinary condition, this finding validates the decision of the trial Court.

In the final analysis, I hold that, indeed, the petition was incompent for want of the Board's certificate of failure to reconcile the parties. However, since the proceedings were irregular for composing a judgment without evidence where the powers under Order XV rule 1 of the CPC were not invoked, I set them aside and quash the judgment emanating therefrom. I strike out the petition for incompetence. The appeal is allowed to the extent that the proceedings were irregular. The parties can refer the dispute to the court again after obtaining the certificate of the Board that it has failed to reconcile them. No orders as to costs.



I.C MUGETA

JUDGE

21/10/2021

COURT: Judgement delivered in chamber in the presence of Killey Mwitasi holding brief for Alphonce Nachipyangu for the appellant and in the absence of the respondent.

Sgd: I.C MUGETA

JUDGE

21/10/2021