

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

MATRIMONIAL APPEAL NO. 6 OF 2021

*(Arising from Matrimonial Appeal No. 01 of 2019 at Karagwe District Court before: V. Bigambo, RM,
Original Matrimonial Cause No. 01 of 2018 Case at Kituntu Primary Court before: V. Mushi - PCM)*

ROZARIA CHARLES.....APPELLANT

VERSUS

CHARLES KAHUTU.....RESPONDENT

RULING

01/07/2022 & 15/07/2022

E. L. NGIGWANA, J.

This matter originated from Kituntu Primary Court within Karagwe District in Kagera Region in Matrimonial Cause No. 1 of 2018. In that case, the appellant herein petitioned to the trial court claiming for reliefs of divorce and division of matrimonial properties.

The brief facts giving rise to this appeal as per available records can be summarized as follows; the appellant was customarily married to the respondent in 1963 and both went on living a happy life for 37 years and were blessed with 11 issues of marriage. The appellant also claimed that, in their marriage life time, they managed to acquire the following properties; five houses, sixty (60) cows, ten (10) goats, five (5) farms, and house hold equipment.

The respondent admitted to have married the appellant in 1963, however, he alleged that sometimes later, the appellant deserted her matrimonial home, and in his view, she cannot claim any property.

At the end of the trial, the court was convinced that there was a subsisting marriage but the same had broken down irreparably, hence the decree of divorce was granted.

Upon considering that the petitioner now appellant deserted her matrimonial home for a long time, the trial court found that she was not entitled to an equal share; therefore, she was awarded one plot and one farm.

Aggrieved by the decision of the trial court, the respondent Charles Kahutu appealed to the District Court of Karagwe vide Matrimonial Appeal No. 1 of 2019, armed with three (3) grounds which were coached as follows;

- 1. That, the primary Court Magistrate erred in law and fact to admit the divorce petition from the respondent Rozaria Charles without any proof of subsistence of legally recognized marriage between the parties.*
- 2. That the primary Court Magistrate erred in law and fact to admit, hear and determine the respondent's divorce without Conciliation Board certificate being attached to the petition.*
- 3. That, the trial Primary Court Magistrate erred in law to have admitted and determined an incompetent petition for non-compliance of the provisions of section 101 of the Law of Marriage Act Cap. 29 2002 Nos. R: E 2019.*
- 4. That, the trial Magistrate erred in law and fact when failed to take note that the respondent was first married to one Jonathan Katena, (now deceased) before being married to the appellant, and that in 1982 the respondent went back to his former husband and lived with him, but came back to the appellant in 2018 after the death of the said Jonathan Katena.*

The appeal was heard ex-parte on the ground that the respondent was unsuccessfully traced.

The first appellate court in its judgment dated 09/04/2019 found that no procedure was offended in the institution of Matrimonial Cause No. 01 of 2018. The court further stated that, since the Rozalia Charles is the one who deserted her matrimonial home for 36 years, she is supposed to claim the matrimonial property from one Jonathan Katena, and not from Charles Kahutu. Consequently, it quashed and set aside the decision of the trial court.

Aggrieved by the decision of the 1st appellate court, the appellant who was the petitioner in the trial court has now come to this court armed with three (3) grounds of appeal which were coached as follows;

- 1. That, the 1st appellate court erred in law and fact for denying the appellant the right to be heard.*
- 2. That the 1st appellate court erred in law and fact when ordered that the Appellant herein was to claim property from one Jonathan Kitane instead of the respondent who is her legal husband with whom they acquired matrimonial assets.*
- 3. That, the 1st appellate court erred in law when decided the matter against the weight of evidence.*

When the matter came for hearing, the parties appeared in person and unrepresented. For the interest of justice, it was agreed that this appeal be argued by way of written submissions. The filing of submissions as per scheduling order was duly complied with.

However, in the course of constructing the judgment, I carefully read the trial court records as well as the record of the 1st appellate court. In that exercise, I discovered that there is a crucial legal issue that was raised in the 1st appellate court as a one of the grounds of appeal that;

"The trial Court Magistrate erred in law and fact to admit, hear and determine the petition for divorce which was not accompanied with a certificate of failure to reconcile the marriage from the Marriage Conciliatory Board, thus there was non-compliance of section 101 of the Law of Marriage Act"

In the circumstance, being guided by the Court of Appeal of Tanzania in **Said Sosy Mziba versus Director of Broad Casting, Radio Tanzania DSM and Another**, Civil Appeal No. 4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import & Export C. Ltd**, Civil Reference No. 20 of 2006 (both unreported), I re-opened the proceedings by directing the parties to address me on that issue.

The respondent Charles Kahutu, though a layperson, stated that the certificate of failure to reconcile the marriage was lacking that is why he raised that issue as a ground of appeal in the 1st appellate court but it was not addressed, as the magistrate just said, the law was complied with. He ended his brief submission saying he was not aware there was an opportunity to raise the same point at this stage as a ground of appeal.

The Appellant on her side stated that they were referred to the Board, and the certificate was issued that is why the matter was admitted by the trial court. She added that owing to the reason that she is a laywoman, she cannot distinguish between a valid certificate and invalid certificate.

Having heard submissions by the parties, it is now pertinent to determine whether the issue raised by the court *suo motu* is meritorious.

It is settled law that under the provision of section 101 of the Law of Marriage Act Cap. 29 R: E 2019, no petition for marriage shall be instituted in court unless the dispute has first been referred to the Marriage Conciliatory Board and has failed to reconcile the parties. For easy reference, the section provides thus;

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:

Provided that this requirement shall not apply in any case–

- (a) where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse;*
- (b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;*
- (c) where the respondent has been required to appear before the Board and has willfully failed to attend;*
- (d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the Preventive Detention Act and has been so detained for a period exceeding six months;*
- (e) where the petitioner alleges that the respondent is suffering from an incurable mental illness;*
- (f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable."*

The law provides further under section 104(5) of the Law of Marriage Act, Cap. 29 R: E 2019 provides that, a Certificate of Marriage Conciliation Board **shall** set out findings of the Board.

Indeed, it is that finding of the Board and reference of parties to the court that makes the trial court competent to hear and determine the divorce petition. For easy reference, section 104 (5) of the Law Marriage provides that;

"Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issues a certificate setting out its finding".

Addressing the issue of certificate my senior learned brother, Mlacha, J in the case of **Hassan Mohamed Timbulo versus Rehema Clemence Kilawe**, Civil appeal No. 163 of 2020 HC DSM had this to say;

"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 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 exist as part of the pleadings before the Magistrate at the time of making the decision to register the case. It must be attached in the petition and must be seen before any step is taken".

Regulation 9 (2) of the Marriage Conciliation (Procedure) Regulations, 1971, G.N. No. 240 of 1971 provides that;

"Where the dispute is between a husband and his wife, and relate to the breakdown of the marriage or an anticipated break down, and the Board fails to reconcile the parties, the Board shall issue a certificate in a prescribed form".

The said form is prescribed in the schedule to the Regulations as form 3. In the instant case, the petition of appeal which was presented in the trial court was accompanied by a hand written letter dated 24/07/2018 bearing the title;

"JAMHURI YA MUUNGANO WA TANZANIA BARAZA LA

KATA KITUNTU

24/07/2018

*Hakimu Mahakama ya Mwanzo Kituntu,
KARAGWE.*

YAH: TAARIFA YA MGOGORO WA ROZARIA CHARLES NA CHARLES RULANGA.

Rejea somo tajwa hapo juu. Nilipokea barua kutoka kwenye ofisi yako ya Mahakama yenye Kumb. Na. J.KT/PC/12/25 ya tarehe 14.06.08. ikitaka niwashugulikie wanandoa hawa. Nilifanya jukumu la kumuita mdaiwa Bw. Chalesi Rulango, nilipomtumia hati ya kwanza alikataa kuisaini ilibidi nitume hati ya pili nayo hakuisaini ila aliudhuria baraza na kuelezwa swala la mke wake bi. Rozaria. Yeye alieleza baraza kuwa yeye anamtambua Rozaria kuwa kwake aliishi kama malaya hivyo hamtambuhi kama mke wake. Na kujibu kwa jeuli kubwa kuwa yeye tumusukume kwingine. Pia bi. Rozaria yeye alieleza baraza kuwa alizaa naye watoto 11 lakini Chalesi alikili kuwa alizaa naye watoto kumi na mmoja na kwa sasa wapo sita tu. Hivyo baada ya kupokea majibu hayo namtuma kwako ili atendewe kisheria zaidi.

Nakutakia utekelezaji mwema.

Sgd

Mwenyekiti wa Baraza"

The Court of Tanzania in **Abdale Hamisi Kiba versus Ashura Masatu**, Civil Appeal No. 465 of 2020, **Hassani ally Sandali versus Asha Ally**, Civil Appeal No. 246 of 2019 and **Yohana Balok versus Anna Benjamin Malango**, Civil Appeal No. 18 of 2020 (unreported) held that;

"It is settled that a petition for divorce without being accompanied by a valid certificate in terms of section 101 of the Law of Marriage Act Cap. 29 R: E 2019 is incomplete, pre-mature and incompetent".

In the case at hand, reading the herein above reproduced letter, it is very easy to note that; **one**, the same is not in the prescribed form. **Two**, the Board has not certified that it has failed to reconcile the parties as required by the law.

Therefore, since the matter at hand does not fall within any of the exceptions (a) to (f) enumerated under the proviso to section 101 of the LMA, it is apparent that the petition was prematurely made because it was accompanied by an invalid certificate. In that premise and being guided by the decision of the court of Appeal In the herein above cited cases, the trial court had no jurisdiction to admit, hear and determine the said petition.

In the event, I invoke the revisional powers bestowed to this court and proceed to nullify the entire proceedings of the lower courts, set aside the judgments and subsequent orders thereto as they stemmed from illegal assumption of jurisdiction by the trial court. Should the Appellant desire to pursue her petition for divorce, she is at liberty to do so afresh according to the law. This being a matrimonial matter, I make no order as to costs.

It is so ordered.

Dated at Bukoba this 15th day of July 2022.



E. L. NGIGWANA

JUDGE

15/07/2022

Ruling delivered this 15th July, 2022 in the presence of both parties, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Grace John, B/C.



E. L. NGIGWANA

JUDGE

15/07/2022