

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
CIVIL APPEAL NO. 05 OF 2021**

(Appeal from the decision of the District Court of Ilala at Kinyerezi in Matrimonial Cause No. 20 of 2018 dated 8<sup>th</sup> December, 2020 before Hon. H.M. Marando, **RM**).

**MARIAM MAUFI JOHN.....APPELLANT**

**VERSUS**

**FARIDA MOHAMED ARFI** (Legal Representative of

**MOHAMED AMOUR ARFI).....RESPONDENT**

**RULING**

Date of last order: 22/03/2022

Date of Ruling: 01/04/2022

**E.E.KAKOLAKI, J.**

Dissatisfied with the decision of the District Court of Ilala at Kinyerezi in Matrimonial Cause No.20 of 2018, dated 8<sup>th</sup> December,2020, the appellant has appealed to this Court. She is equipped with the memorandum of appeal containing two grounds of appeal going thus:

1. That the trial Magistrate erred in Law and facts for ordering the distribution of matrimonial assets 30% to Appellant to 70% to Respondent without justification and consideration of each contribution.

2. That the trial Magistrate erred in Law and fact for not observing rules of procedure and making proper analysis on the evidence produced by the appellant.

Before commencement of the hearing of the appeal the court found it necessary to invite the parties to address the court on the competency of the appeal for want of compliance of section 101 of the Law of Marriage Act, [Cap 29 R.E 2019] before the trial court. Both parties who appeared in person indicated to the court that were ready to address it on raised issue.

It is the Appellant who took the floor first and address the court that, their marriage was dissolved by the Regional Kadhi of BAKWATA. Discontented with Kadhi's decision she decided to seek assistance of Marriage Conciliatory Board which issued her with the certificate basing on what was decided by the said Regional Kadhi. She said, it is the said certificate which was relied on by the trial court to proceed with hearing of her petition.

On the other side Farida Mohamed Arfi legal representative of the respondent under the Power of Attorney, countered the appellant's submission by informing the court that, parties in this matter never underwent reconciliation before issuance of the alleged certificate by the

purported marriage conciliatory board. She contended, the respondent came to know about existence of the said certificate when summoned in court.

The Law of Marriage Act, [Cap 29 R.E 2019] , herein referred to as LMA, under section 101 imposes a mandatory requirement for the party who intends to petition for divorce to refer their matrimonial dispute to the Marriage Conciliatory Board before filing it in court of law. In other words the provision bars the court of law to entertain any divorce petition which its parties have not been reconciled first by the Marriage Reconciliatory Board and duly issued with the certificate certifying that it has failed to reconcile them. The words in the said provision are unambiguous as section 101 of LMA provides thus:

*"S.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 use of the word shall in the above provision implies that, parties are strictly prohibited to petition for divorce as well as the court to entertain it without compliance of section 101 of the Act. Therefore compliance with the provision of section 101 of the Act is binding to both parties and the court

except for certain circumstances as provided under section 101 (a)- (f) of the Act. The court of Appeal in the case of **Hassan Ally Sandali Vs. Asha Ally**, Civil Appeal No.246 of 2019 (unreported) insisted on compliance of section 101 of the Act except where there is evidence to prove existence of extraordinary circumstances making it impracticable to refer the dispute to the Board.

In my considered view a certificate granted by a Marriage Reconciliation Board works as a key to open the court's door for any marriage party who seeks to petition for divorce. This view is embraced in the word of section 106(2) of the LMA which states that;

*(2) Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104: Provided that, such certificate shall not be required in cases to which the proviso to section 101 applies.*

Now back to issue at hand, I find the circumstances surrounding this matter is of its own, as it appears that the petition filed by the appellant was accompanied by a certificate (Form No.3) from BAKWATA. However, upon consideration of parties' submissions on the matter, this court is satisfied

that, their dispute was never reconciled by the BAKWATA Marriage Reconciliation Board which purportedly issued the said certificate. The certificate was just issued to the appellant to create her access to the court without availing parties with a forum to be reconciled by the board, contrary to the mandatory requirement and spirit of section 101 of LMA. From the Appellant account this court entertains no doubt that, prior to the filing of the suit parties dispute was heard by Dar es salaam Region Kadhi (Mahakama ya Qadhi Mkoa wa Dar es salaam), whereby the said Kadhi court adjudicated the matter instead of reconciling the parties as it finally wrote a judgment (Hukumu). It's from that "hukumu" the appellant on her own time went back to BAKWATA where she illegally obtained the certificate purporting to prove that her reconciliation with the respondent became futile. I conclude it was illegally obtained as from the Respondent's uncontroverted submission he became aware of existence of the alleged certificate after being summoned by the court. From the parties' submission it is obvious and this court is satisfied that, parties in this matter were not reconciled at all. The Court of Appeal in the case of **Yohana Balole Vs. Anna Benjamini Malongo** (Civil Appeal 18 of 2020)[2021]TZCA 388 (19

August 2021) [www.tanzlii.org](http://www.tanzlii.org), when confronted by the scenario akin to the present one had the following observation;

*"...in this case, since we have found that the respondent's petition for divorce before the trial court was incompetent for failure to comply with the requirement of section 101 and 106 of the Marriage Act, we agree with Mr. Muguli that the trial court did not have the requisite jurisdiction to entertain the matter."*

Like in the above cited case in this matter the appellant when filing the petition violated the provision of section 101 of LMA. Unfortunately the trial court did not detect such fatal irregularity. This court having detected has no other option to go for than to invoke its revisional powers under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019], and proceed to nullify the entire proceedings of the trial court, set aside the judgment and subsequent orders thereto as they emanated from nullity proceedings. The appeal is therefore incompetent before this court for being predicated on null proceedings and the same is hereby struck out. The appellant if so wishes, is at liberty to file a fresh petition with an alert to strictly adherence of the legal procedures.

No order as to costs.

It is so ordered.

DATED at Dar es salaam this 01<sup>th</sup> day of April, 2022.



E. E. KAKOLAKI

**JUDGE**

01/04/2022.

The Ruling has been delivered at Dar es Salaam today on 01<sup>th</sup> day of April, 2022 in the presence of Mr. Robert Jagad, advocate for the appellant, the appellant in person and Farida Mohamed Arfi legal Representative of Mohamed Amour Arfi the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

01/04/2022

