

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

PC. MATRIMONIAL APPEAL NO. 05 OF 2021

ISACK JONATHAN.....APPELLANT

VERSUS

ESTHER CHARLESRESPONDENT

(Arising from the Judgment of Singida District Court -E. E Kisoka, RM.)

Dated 26th day of May, 2021

In

Matrimonial Appeal No. 02 of 2021

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JUDGMENT

11th May&5thAugust, 2022

MDEMU, J:.

This is a second matrimonial appeal. In the Primary Court of Utemini, the Respondent one Esther Charles filed a matrimonial suit for divorce, custody and maintenance of children and division of matrimonial assets against her husband one Isack Jonathan. It was registered as matrimonial cause No. 20 of 2020. On 12th of February 2021, the Primary Court of Utemini ordered divorce of the two couples, divided the matrimonial properties equally and ordered the two issues to be in the custody of the Respondent. The Appellant was ordered to pay Tshs.60,000/= per month for maintenance of children and was also given right to visit them. The trial Court's decision did not please the Appellant.

He appealed to the District Court of Singida vide Matrimonial Appeal No. 02 of 2021 where the decision of trial Court was upheld. Aggrieved again, the Appellant appealed to this Court on the following grounds: -

- 1. That, both the first Appellate Court and trial Court erred both in law and facts by holding the marriage between the parties herein was broken down beyond repair while there was no enough proof of the same.*
- 2. That, the Appellate and trial Court erred in law and fact by determining the matrimonial cause without certificate from the Marriage Conciliation Board as a mandatory legal requirement.*
- 3. That, the Appellate and trial Court erred in law and fact by ordering an equal distribution of matrimonial properties as they have acquired during subsistence of the parties marriage.*

On 12th May 2022, the appeal was heard. The Appellant was represented by Mr. Erick Christopher, learned Advocate whereas the Respondent appeared in person.

In support of the appeal, it was Mr. Erick's submissions in the second ground that, there was no certificate from marriage conciliation board as nowhere in the trial Court proceedings the said certificate features. He said, this contravened Section 101 of the Law of Marriage Act, Cap.29 and therefore the suit was incompetent. He cited the case of **Shilo Mzee vs. Fatuma Ahmed [1984] T.L.R. 112** to support his argument.

On the first ground, it was his submissions that, the Respondent didn't prove that the marriage was broken down irreparably due to adultery and failure to maintain the family as required by section 107(1) of the Law of Marriage Act, Cap. 29.

In respect to the third ground of appeal on the division of matrimonial properties, he argued that, the Respondent didn't prove on the contribution she made as to be entitled for distribution of 50%. The Respondent was duty bound to prove the extent of contribution on acquisition of one house and home appliances. He lastly urged this Court to allow this appeal.

In reply, the Respondent adopted his reply to the petition of appeal to form part of her submissions and added that, to date, the Appellant has failed to maintain the family. Regarding distribution of 50% each on matrimonial assets, she said, the Court was justified to do that. As to Marriage Conciliation Board, he argued that, they went all way through



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their church, "wadhamini" and Marriage Conciliation Board and it was until it proved futile is when they referred the matter to Court. In rejoinder, Mr. Erick reiterated his submission in chief.

I have considered the grounds of appeal, the entire record and submissions of both parties. The issue for determination is whether the appeal has merits. I will deal with the first and second grounds of appeal as one. They are on evidence that the two Courts below had no evidence to rely on that the marriage was broken beyond repair. One of the evidence, in my view, is certificate from the Marriage Conciliation Board. The Appellant said do not form part of the evidence.

Beginning with this latter and as submitted by Mr. Erick, for a petition of divorce to be entertained by any Court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such a Board must certify its failure to reconcile the parties. This is in terms of Section 101 of the Law of Marriage Act which provides categorically that:

"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 wilfully 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.*

In the foregoing, save for exceptions in the proviso, the mandatory requirement to refer first the dispute to Marriage Conciliation Board is

further reinforced under Section 106(2) of the same Act which states in mandatory terms that:

"Every petition for divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition."

In the case of **Hassan Ally Sandan v. Asha Ally, Civil Appeal No. 249 of 2019** (unreported), the Court when faced with a situation where a trial Court entertained a petition for divorce in violation of the requirement of section 101 of Marriage Act, it held that:

".....the granting of the divorce was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of the Act is mandatory except where there is evidence of existence of extra ordinary circumstances making it impracticable to refer a dispute to the Board as provided under section 101(f) of the Act".

This position has been recently reiterated by the Court of Appeal on 18th day of July 2022 in the case of **Patrick William Magubo vs. Lilian Peter Kitali, Civil Appeal No. 41 of 2019** (unreported).

Back to the case at hand, the complaint from the Appellant is that, the matter was determined without a certificate from the Marriage Conciliation Board. This matter was resolved by the District Court of Singida when entertaining the first appeal. At page 3 of the judgment, the learned Resident Magistrate observed the following:

On the 4 ground of appeal, is a new matter but it is a matter of jurisdiction, so even though it is a new matter, I will address it because it is a matter of jurisdiction and it can be raised at any time. I have gone through the trial court proceedings and did find form No.3, a conciliation from "Baraza la kusuluhisha mashauri ya ndoa la Kata ya Kindai." The presence of that form in the trial court proceedings shows that parties referred their matters there and they were reconciled and the outcome was, the Board failed to reconcile the parties. And the parties in that form were the Appellant and the Respondent. Therefore, the parties referred their disputes to the Conciliation Board. Ground No. 4 dismissed.

I have labored to go through the trial Court's records and found the certificate from Marriage Conciliation Board certifying that it has failed to reconcile parties. There is however no endorsement in the certificate. In the proceedings dated 5th of May, 2020, the Respondent stated the following:

Ameapa anasema, tulifunga ndoa ya kikristo na mdaiwa 2004, tulikuwa tunaishi Iramba, tukawa na mgogoro mdaiwa akawa anataka tuachane, tulikaa vikao vya suluhu ikashindikana. Mdaiwa akawa ametoroka. Mdaiwa baada ya kutoroka ndipo niliamua kuja hapa. Tulisuluhishwa kanisani na Baraza la Kata ambako nilipewa barua ya kuja hapa. Tuna watoto wawili na mdaiwa;

These proceedings were before Shila, PPCM. They commenced on 14th of April, 2020 and ended on 5th of May, 2020. The trial Magistrate made an order to pronounce judgment the following day on 6th of May, 2020 and it was pronounced. The Appellant then applied to set aside ex-parte judgment whose decision was delivered on 4th of September, 2020. One of the grounds, beside showing cause for nonappearance, was that there was no certificate from the Marriage Conciliation Board. The application was accordingly dismissed. The Appellant was successful in

the District Court in Matrimonial Appeal No. 16 of 2020 which ordered retrial to have both parties heard, now the subject of this appeal.

In those set of facts, the certificate from the Marriage Conciliation Board was there as what Ms. Tarimo, Senior Resident Magistrate did was to quash and set aside proceedings, judgment and the resultant order when ordering a fresh trial. That means, pleadings remained intact. The said judgment at page 3 & 4 reads partly as hereunder:

Taking into account the whole circumstances, and in particular the Appellant's right to be heard, I find it just and proper to quash and set aside the whole proceedings, judgement and order entered by the trial court. I further order for the trial to be heard in fully (trial de novo) before another Magistrate and different set of assessors.

Having that in mind, and given the Appellant's complaint in setting aside the ex-parte judgment, the Appellant and the Court had full knowledge over presence of a certificate of Marriage Conciliation Board. This, in my view, this is the reason why in the second trial, the Appellant was silent all through regarding availability of the certificate and in fact, it was attached during the filing of the petition. The Appellants Counsel faulted the Appellate Magistrate on availability of the certificate in the proceedings. It is correct that reading the proceedings before Shaidi, RM,

there is nowhere the record shows availability of the said certificate. The question to ask is this, in the primary court, under the circumstances where the document was annexed in the pleadings, at what point in time will that document feature in the proceeding?

I have two scenarios, one is in the course of recording the evidence, the presiding Magistrate may guide the complainant/petitioner and two, when the Defendant/Respondent objects formally or even through cross examining the complainant/petitioner. If these have not been done, then the said document, in this case, a certificate of the Marriage Conciliation Board, will not feature in the proceedings but that is not evidence that it was not attached in the course of filing of the divorce petition.

I have also examined closely the nature of complaint in the ground of appeal and also as submitted by Mr. Erick Christopher. The dispute is on acknowledgement of the certificate in the proceedings. If this is the case, then there is no dispute that, the Appellant and the Respondent appeared before the Marriage Conciliation Board to have their marriage reconciled. They are in court forums because the Board certified irreparability of their marriage.

As correctly observed by the two courts below, evidence as adultery; the Appellant's version to have another woman; denial of conjugal rights among the couples plus the certificate that the marriage

is irreparably broken are overwhelming to justify divorce. The Appellant himself is a witness to this as testified at pages 8 and 9 of the proceedings:

SM1 ni mke wangu tumefunga ndoa toka mwaka 2004. Huyu mwanamke hanitaki kwenye tendo la ndoa. Nimevumilia nikidhani atabadilika lakini hajabadilika. Tunakaa hata miezi sita bila kufanya tendo la ndoa wakati tunalala kitanda kimoja. Miaka niliyofurahia ndoa na SM1 toka tuoane ni miaka mitatu. SM1 hajawahi kunifulia hata nguo zangu.....

In the third ground, the complaint is on division of matrimonial assets. In this, the two courts below observed that both the Appellant and the Respondent each contributed toward acquisition of a matrimonial house. The Appellant testified at the trial Court that the Respondent was employed as a shop keeper. This was also the evidence of the Respondent. When the Appellant was cross examined by the Respondent at page 10 of the trial Court proceedings had the following testimony:

Nyumba peke yake ndio tumechuma pamoja ipo Kindai ila pia hapohapo kwenye hiyo nyumba, kulikuwa na nyumba nyingine ndogo ambayo ilikuwa na vyumba viwili na sebule ailikuwa na bati ishirini. Nimerudi kutoka safari nimekuta bati hazipo.

With this evidence, basing on the decision in **Bi. Hawa Mohamed vs. Ally Seif [1983] T.L.R. 32** and the provisions of section 114 (2) (b) of the Law of Marriage Act, Cap.29, the District Court on appeal ordered equal distribution of matrimonial property (the house). This was also the decision of the trial court.

This being a concurrent findings and for want of misapprehension of facts and the evidence in arriving at that concurrent decision, I have no reason what so ever to interfere. See **Ismail Seleman Nole vs. R. [2014] T.L.R 335**

That said, the appeal therefore fails and is accordingly dismissed. Under the circumstances, I do not think to be appropriate to make an order as to costs. It is so ordered.



Gerson J. Mdemu

JUDGE

05/08/2022

DATED at DODOMA this 05th day of August 2022



Gerson J. Mdemu

JUDGE

05/08/2022