

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

MATRIMONIAL CIVIL APPEAL NO. 03 OF 2022

(Arising from District Court Bukoba in Matrimonial Appeal No. 5 of 2020, Originating from the Primary Court of Bukoba Urban in Matrimonial Cause No. 32 of 2018).

SALIM KASHOGA.....APPELLANT

VERSUS

SAWIRA BASHIRU.....RESPONDENT

JUDGMENT

26/07/2022 & 29/07/2022
E. L. NGIGWANA, J.

In this Appeal, the record has it that the respondent one Sawira Bashiru was a petitioner in the Urban Primary Court of Bukoba who successfully petitioned for the decree of divorce, custody of children and division of Matrimonial properties through Matrimonial Cause No. 32/2018.

Being not amused with the decision of the trial court, the appellant (herein) one Salim Kashoga who was the respondent at the trial court appealed to the District Court of Bukoba through Appeal No. 5 of 2020, which ultimately was dismissed for want of merit.

Still undaunted, the Appellant knocked the doors of this temple of justice being armed with six grounds of appeal of which are needless to reproduce them here given that the appellant's counsel abandoned the 2nd, 3rd, 4th grounds of appeal in her submission and argued the 1st and 6th grounds of appeal only upon which the duo grounds converge on one complaint that the

honorable District court of Bukoba grossly erred in law and facts for failure to interfere the trial Primary Courts' decision while the trial court's decision was based on the *nullity* proceedings before it.

When the matter came for hearing, Advocate Gisera Maruka for the appellant, submitting to expose the illegalities which were committed in the trial court, She started by informing the court that the petition was registered on 12/10/2018 whereas, it is the express law that before filing any petition for divorce, one has to comply with section 101 of the law of Marriage Act, Cap. 29 R: E 2019 read together with section 106 (2) of the same Act. The contents on the said law provides that;

"No person shall petition for divorce unless the dispute has been first referred to the Conciliation Board and the Board has certified that it has failed to reconcile the parties".

The learned counsel was to the effect that on 12/10/2018 when the petition was filed, there was no valid certificate accompanying the petition in terms of section 101 of the LMA (supra) instead there was a letter from BAKWATA which does not qualify to be so called a certificate. In an attempt to cure such a pitfall, the trial court received and considered a certificate which later came to be filed on 20/05/2020 which, according to the appellant's counsel, the same was wrongly filed as it was filed after the petition for divorce was filed. To amplify her argument, Ms Gizera Maruka referred this court to the Court of Appeal case of **Yustace Balole vrs Ana Banjamini Malago** Court of Appeal No. 18 of 2020 (Unreported) where the court insisted that compliance of section 101 and 106 of the LMA is mandatory. The Advocate went on that page 16 of the said Judgment is very specific that the petition

has to be accompanied by a valid certificate. She finally prayed that the judgment, decision and orders of the lower courts be set aside and the appeal be allowed with costs.

When it was the turn for the respondent's counsel to submit, Mr. Frank Karoli for the respondent uprightly conceded the submitted ground of appeal and thus concurred with the appellant's counsel on the anomaly observed at the trial court save that he disputed the prayer for costs. Mr. Frank substantiated more on the issue of costs that, it has been a practice that in Matrimonial cases, costs are waived and are not normally awarded. He therefore prayed each party to bear its own costs.

I am constrained to start saying that, much as the appeal was not resisted by the respondent's counsel on the ground that the lower proceedings were a nullity for the petition filed in the trial court accompanied with no valid certificate, I will not labour much discussing on such anomaly. Having paid due consideration to the record of the lower courts and as well as the submission of the appellant's counsel which was not disputed by the respondent's counsel, I am in a position to respond that this appeal has merit for the herein below reasons I endeavor to advance.

It is not in dispute that when the petition for divorce was filed at the trial court on 12/10/2018, there was no valid certificate recognized by law in terms of section 101 and 106 of the LMA. Hence the provisions which declares 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*" were not complied with.

Appearing to the Board for reconciliation without coming out with the valid certificate which indicates that the Board has failed to reconcile the parties is not enough to entitle a party to petition for divorce. Failure to comply with such requirement before or at the time of filing the petition has been held from time to time by Superior Courts to be a flaw which renders the petition incompetent and in other words, it is the same certificate which grants jurisdiction to the matrimonial trial court to determine the matter. **See** the Court of Appeal Case in **Abdala Hamis Kiba versus Ashira Masatu**, Civil appeal No. 465 of 2020 and **Yohana Balok versus Anna Benjamin Malango**, Civil Appeal No. 18 of 2020 (unreported).

In this case at hand, the trial court wrongly received the letter from BAKWATA which does not legally qualify to be a certificate neither in form nor in content. Similarly, even the purported certificate which came later to be found in the trial court case file, showing that it was prepared on 27/05/2020 the period of two years after the petition was filed, was as good as a mere document with no legal effect and equally with no purpose to serve in the circumstance as it could not have granted jurisdiction retrospectively. It is even more worse because the trial court record does not show how the purported certificate found its way in the court record.

It goes therefore that what the primary court relied to assume its jurisdiction was the mere letter from BAKWATA conciliatory Board.

In **Yohana Balole versus Anna Benjamin Malongo** (supra), the Court of Appeal of Tanzania held that letters from conciliatory Boards unlike certificates are deficient both in forms and contents hence are not certificates

which can initiate proceedings to the courts with jurisdiction to try or determine divorce.

In the premises, in this matter at hand therefore, there could be no valid orders on division of Matrimonial properties and custody of children if no valid Divorce and equally to, there could be no order of Divorce if there were no valid certificate from the Board indicating that the Board has failed to reconcile the parties hence the primary court lacked jurisdiction to determine the matter.

In the event, I finally find the proceedings before the trial court and the first appellate court a nullity. There is no other order I can give than nullifying the entire proceedings of the trial court and quash the judgment and set aside the subsequent orders thereto and the same applies to the proceedings of the District Court as all what transpired stemmed from a nullity proceeding. Hence the saying once a *nullity* always a *nullity*.

I kindly advise that whoever wishes to process the proper petition, is at liberty to do so to the competent court in accordance with the dictates of law.

The appeal is meritorious and consequently allowed. Given the nature of the matter being matrimonial, I give no order to costs.

It is so ordered.

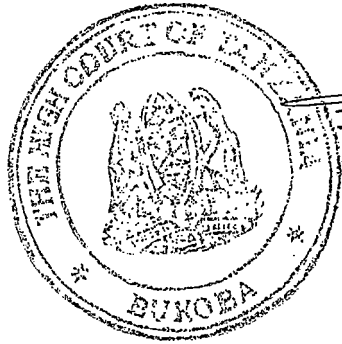


E. L. NGIGWANA

JUDGE

29/07/2022

Judgment delivered this 29th day of July, 2022 in the presence of the Appellant and his advocate Ms. Gisera Maruka, Mr. Frank John Karoli, learned Advocate for the Respondent, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

29/07/2022