

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MATRIMONIAL APPEAL NO. 2 & NO. 10 OF 2021 (CONSOLIDATED)

(Arising from Matrimonial Appeal No.2 of 2020 of Karagwe District Court, (F.M. Kishenyi- RM) Original Matrimonial Cause No. 2 of 2019 at Bugene Primary Court)

AURELIA FAUSTINE.....APPELLANT

VERSUS

FAUSTINE KYARUZI.....RESPONDENT

JUDGMENT

05/07/2022 & 22/07/2022
E. L. NGIGWANA, J.

This matter traces its origin from Matrimonial Cause No. 2 of 2019 of Bugene Primary Court in Karagwe District. In that case, the appellant petitioned for divorce alleging adultery, cruelty, and desertion. She also prayed for division of matrimonial properties.

The brief facts giving rise to this appeal as per available records can be summarized as follows; on 23rd day of November, 1980, the parties got married at Nyaruntutu Roman Catholic Church. Their marriage was blessed with ten (10) issues who are currently above 18 years old. The appellant claimed that, in their marriage life time, they managed to acquire various properties including motor vehicles, houses, plots, and farms.

The respondent admitted to have married the appellant in 1980; however, he disputed the petition for divorce and division of matrimonial properties. At the end of the trial, the trial court was convinced that the marriage between the parties had broken down irreparably, hence, the decree of divorce was granted.

As regards the issue of matrimonial property, the respondent was awarded the following properties; five (5) Motor vehicles with Reg. **Nos. T.770 BFJ Minibus, T. 841 DCZ make Nissan Vanet, T.692 BDY make Nissan Vanet, TZG 2850 make Jiafong, and T.726 AER make Land cruiser. She was also awarded three (3) houses.** As regards the issue of livestock, the respondent was awarded 50 heads of cattle, 10 goats and one sheep.

On his side, the appellant was awarded three (3) motor vehicles, three (3) houses, 95 heads of cattle, 27 goats and one plot.

The trial court further ordered that, two farms located at Nyakagondo and one located at Kyanyangabwa area to be equally divided between the parties. As regard the shop, the respondent was awarded 1/3 of the value of the properties found therein.

There were other properties including motor vehicles, houses and farms which were excluded from being divided between the parties on the ground that they were not among the matrimonial assets.

Aggrieved by the decision of the trial court, the respondent **Aurelia Faustine** appealed to the District Court of Karagwe at Kayanga vide Matrimonial Appeal No. 2 of 2020, and she raised three (3) grounds of appeal which were coached as follows;

- 1. That, the trial Magistrate erred in law and fact for dividing non-existing properties to the appellant now respondent.*
- 2. That, the trial Magistrate erred in law and fact for dividing non-existing properties to the stranger*
- 3. That, the trial Magistrate erred in law and fact for dividing non-existing Assets without considering evidence adduced before the court.*

4. *That the trial Magistrate erred in law and fact for excluding matrimonial assets when dividing the same to the parties*
5. *That the trial Magistrate erred in law and fact for dividing properties which are neither matrimonial assets nor subject to distribution*
6. *That the trial Magistrate erred in law and fact by distributing matrimonial assets without considering efforts and contribution of the appellant now respondent.*

Wherefore, Aurelia Faustine prayed for the reliefs that; the trial court decision be quashed and set aside, the correct division of the matrimonial property be made, and that, Faustine Kyaruzi be condemned to pay costs of the appeal.

After hearing the appeal, the 1st appellate court confirmed the decision of the trial court. In other words, on 28/05/2020, Appeal No. 02 of 2020 was dismissed for want of merit.

Aggrieved by the decision of the 1st appellate court, Aurelia Faustine preferred this appeal on two points as reproduced here under;

1. *That the 1st appellate court erred in law when it never rectified the manner in which the matrimonial assets were divided to the parties by the primary court.*
2. *That the 1st appellate court erred in law to embrace division of some of the properties to the respondent's child as well as his concubine wife.*

Wherefore, Appellant is praying two orders; **one**, that this appeal be allowed with costs. **Two**, that the matrimonial properties be re-divided.

On the other hand, the respondent Faustine Kyaruzi filed Civil Appeal No.10/2021 against the decision of the 1st appellate court on the following grounds;

1. *That the first appellate court immensely erred in law and fact by upholding the trial court's decision without the jurisdiction even after having*

perused the tendered Exhibit SM1 from Nkwenda Marriage Conciliation Board.

- 2. That the 1st appellate court further erred in law by its failure of reversing the order for dissolving the invalid Christian Marriage that had been contracted while the Civil one was still subsisting.*
- 3. That the lower courts immensely erred in law and facts in respect of the distribution of the purported jointly earned assets despite of the adduced testimonies of the fate and ownership of some properties.*

Wherefore, the respondent Faustine Kyaruzi is praying for two orders; **one**, an order quashing and setting aside the Marriage dissolution order. And **two**, an order quashing and setting aside the order for distribution of properties.

On 5/5/2022, when the matter came for hearing, Mr. Samwel Angelo, learned counsel appeared for the appellant while Mr. Lameck Erasto, learned counsel appeared the respondent. Mr. Lameck Erasto, informed the court that considering the circumstances of this appeal, the 1st ground of appeal raised by the respondent in Appeal No.10 of 2021, if argued will suffice to dispose of this appeal. The ground read;

“That the first appellate court immensely erred in law and fact by upholding the trial court’s decision without the jurisdiction even after having perused the tendered Exhibit SM1 from Nkwenda Marriage Conciliation Board”

Mr. Lameck urged the court to adjourn the matter to come for hearing on 05/07/2022. The prayer was not objected by Mr. Samwel Angelo, learned counsel for the respondent. Upon perusal of the lower court records, the law of Marriage Act Cap. 29 R: E 2019 and case law, I was also convinced that the herein above stated ground will suffice to dispose of the appeal, thus I granted the prayer and adjourned the hearing as requested.

Submitting on the first ground raised by the respondent as herein above stated, Mr. Lameck stated that the appellant had successfully petitioned for divorce and division of matrimonial property in the Primary Court of Bugene vide Matrimonial Cause No. 2 of 2019. He added that, the appellant was aggrieved by the distribution order therefore, she unsuccessfully appealed to the District Court of Karagwe vide Matrimonial Appeal No.2 of 2020, hence this appeal.

Mr. Lameck further argued that, the petition in the Primary Court of Bugene was not accompanied by certificate from the Marriage Conciliation Board certifying that it has failed to reconcile the parties, and that matter, the Primary court of Bugene had no jurisdiction to admit, entertain and determine the petition. The learned counsel added that the petition filed in the primary court offended G.N No.240 of 1971, section 101 of the Law of Marriage Act, Cap 29 R: E 2019.

To support his argument, the learned counsel referred me to the decision of the Court of Appeal of Tanzania in **Hassani Ally Sandali versus Asha Ally**, Civil Appeal No.246 of 2019 where the Court held that;

"That the Primary Court had no legal basis for dissolving a marriage on which there was no proof that a dispute had been referred to the Board and such Board issued a valid certificate that it had failed to reconcile the parties"

He ended his submission saying, in the case at hand the only remedy is to nullify the proceedings of the lower courts, quash and set aside the judgments and orders thereof.

On his side, the learned counsel for the appellant argued the issue of valid certificate ought to have been raised in the primary court as preliminary objection on point of law, thus, it was improperly raised at this stage. He added that, the issue of certificate has nothing to do with jurisdiction of the court. However, the learned

counsel conceded that the non-compliance of section 101 of the Law of Marriage Act, Cap 29 R: E 2019 is fatal.

In his rejoinder, Mr. Lameck submitted that in the primary court, the parties were not represented, and that, the one who appealed to the 1st appellate court was the appellant Aurelia Faustine, while his client has appealed to this court therefore, he was right to raise the issue certificate at this stage considering that a point of law which goes to the jurisdiction of the matter like in this case, can be raised at any stage including appeal.

Having heard submissions by the parties, it is now pertinent to determine whether the petition filed in the Primary Court of Bugene was accompanied with a valid certificate from the Marriage Conciliation Board.

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 the board 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".

From the herein above decision, it goes without saying that the argument by Mr. Angelo that the issue of certificate has nothing to do with jurisdiction of the court is baseless and unfounded.

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 typed letter dated 19/09/2019 bearing the title;

**"JAMHURI YA MUUNGANO WA TANZANIA
HALMASHAURI YA WILAYA YA KYERWA
BARAZA LA KATA NKWENDA**

**"HATI YA MAPENDEKEZO YA BARAZA KWA MUJIBU WA SHERIA YA NDOA
YA MWAKA 1971 KUHHUSU HALI HALISI YA WANANDOA AURELIA
FAUSTINE NA FAUSTIN KYARUZI"**

HALIYA NDOA NA MAISHA HALISI YAO

Kwa mujibu wa maelezo yao yanayopatikana katika faili No7/2020 yaliyoelezwa mbele ya Baraza la Kata Nkwenda. Baraza limeridhika kuwa ndoa hii inaweza kurekebika kwa sababu kuu tatu:

1. Kwa kuwa mdai (Mke) ameelaza kuwa Mdaiwa (Mume) ameo wake zaidi ya wane, hivyo mdai anaishi kwenye ndoa ya wake wengi.
2. Kwa kuwa Mke wa pili aliolewa na mdaiwa mwaka 1985 na walizaa watoto 2 (wawili) na mke wa tatu (3) aliolewa na mdaiwa mwaka 1998 na walizaa

mtoto mmoja (1) na mke wan nne (4) Mdaiwa alimuoa mwaka 2013 na kuzaa naye watoto wawili (2).

3. Kwa kuwa Mdai (Mke) anaishi na mdaiwa (mme), anaishi katika ndoa ya wake wengi, hivyo kila mke anayo haki kwa mume wake.

Maamuzi/Mapendekezo ya Baraza ya jumla

Kwa kuzingatia sababu 1, 2 na 3 pamoja na sababu nyingine na kwa kuzingatia **hali halisi ya ndoa yao ilikofikia baraza la Kata Nkwenda limeamua na kutamka kuwa ndoa ya wahusika inaweza kurekebishwa na siyo kutengana**".

The Court of Tanzania **in Abdale Hamisi Kiba versus Ashura Masatu**, Civil Appeal No. 465 of 2020, **Hassani ally Sandali versus Asha Ally** (Supra) 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 as correctly argued by Mr. Lameck Erasto, learned counsel.

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 any party desire to pursue petition for divorce, he/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 22nd day of July 2022.




E. L. NGIGWANA

JUDGE

22/07/2022

Judgment delivered this 22nd day of July, 2022 in the presence of the respondent and his advocate Mr. Lameck Erasto, Hon. E .M. Kamaleki, Judges' Law Assistant and Ms.Tumaini Hamidu, BC, but in the absence of the respondent.




E. L. NGIGWANA

JUDGE

22/07/2022