IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC MATRIMONIAL APPEAL No. 09 OF 2021

(Arising from Matrimonial Appeal No. 3 of 2021 of the Shinyanga District originating from Matrimonial Case No. 5 of 2021 of Kizumbi Primary Court)

NYAMBELE SAMASI BUSOLO.....APPELLANT

VERSUS

ANAMARY SOSTENES KAIZILEGE .....RESPONDENT

JUDGMENT

21st May & 15th July 2022

MKWIZU, J.:

This is a second appeal by the appellant, **NYAMBELE SAMASI BUSOLO** originating from the decision in Matrimonial case No. 5 of 2021 by Kizumbi Primary court partly upheld by the District Court Shinyanga in Matrimonial Appeal No. 3 of 2021, in its decision dated 29th July 2021. The appellant's appeal is pegged on four grounds of appeal asserting; (i) *forgery of the reconciliation Board's certificate (ii)Failure by the Court to analyze the evidence in relation to the acquisition of matrimonial assets resulting in the unjust decision (iii) failure to seek the children's opinion before issuing an order of custody.*

It is from the records that the two parties, the appellant and the respondent began their cohabitation as a husband and wife in 2007

without contracting any formal marriage. Their union was blessed with four children. And according to the respondent, they two had acquired various properties namely a house in Kitangiri area, five plots at Kitangiri, one vehicle, two beds and two mattresses, a cupboard, one TV, one bicycle, and other home appliances.

The party's relationship, however, became unbearable followed by a petition of divorce by the respondent, Annamary Sostenes Kaizilege alleging disintegration of the marriage beyond repair due to the appellant's cruelty and family desertion among others. Both parties were heard, marriage was dissolved, matrimonial assets acquired during the party's cohabitation were divided among themselves and the respondent was given 9,000,000/= as her share. Respondent was given custody of the children and appellant was subsequent thereof ordered to pay 200,000 per month as maintenance for the well-being of the children of their union.

The Appellant was aggrieved, he filed an appeal to the District Court where the trial court's decision was upheld save for the dissolution of marriage and an order for payment of Tsh. 200,000/= for maintenance per month. On dissolution of marriage order, the 1st appellate was of the view that the trial court's duty under section 160 of the LMA is to see whether the presumption is rebuttable and proceed to issue resultant orders specified under sub-section 2 of the same section. And that there is no evidence justifying the payment of 200,000/= monthly maintenance. Parties were thus, directed to institute a separate application to determine the issue of maintenance.

When the appeal was called for hearing, both parties appeared in person/unrepresented. Supporting his grounds of appeal, the appellant submitted, that the matter was not referred to the marriage Reconciliation Board. The order for the distribution of matrimonial assets did involve properties that are not his namely, the vehicle and the house. He also challenged the two court's decision for failure to record their opinion on issues of their custody.

In reply, the respondent argued that she reported the matter to the marriage Reconciliation board, but the appellant refused to attend.

Responding to the issue of matrimonial assets, the respondent was of the view that all the assets belonged to them. She added that, at the beginning of their relationship, the appellant had only a bed, but they thereafter constructed a house on one of the plots they bought from one of his friends and the rest of the plots were his. Stressing on this point, the respondent argued that at their separation, the appellant had five plots and one house as testified before the trial court, but the district court distributed only three plots.

In rejoinder, the appellant urged the court to verify the title number from the copies they filed before the trial court.

Having considered the grounds of appeal, parties' submissions and the two lower court's records, the issue for determination is only whether this appeal has merit.

The first ground of appeal by the appellant is the legality of the certificate by the Marriage Reconciliation Board. Irrefutably, the petitioning for divorce and other matrimonial reliefs is in our law regulated. And to

successfully approach the court on such remedies one must first obtain a certificate from the Marriage Conciliation Board specified under section 101 of the Law of Marriage Act Cap.29 [R.E 2019] except for circumstances stipulated in subsections (a) to (f) of the same. section as quoted hereunder:

> *"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."(emphasis added)*

This section is couched in a compulsory way, attracting mandatory compliance. Emphasizing this position the Court of Appeal in **Yohana Balole vs. Anna B. Malongo**, Civil Appeal No. 18 of 2020 held:

"...the use of the words "shall" in section 101 implies that compliance with section 101 is mandatory except where there ii is evidence of the existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board."

The Appellant's contention is that they have never attended such a reconciliation Board and therefore the certificate filed by the respondent is fictitious. This complaint was botched by the 1st appellate court for failure by the appellant to prove the forgery allegations.

I have curiously assessed the trial court's records. There is a Form No 3 filed by the respondent to initiate the proceedings. In her submissions, the respondent both before the 1st appellate court and this Court, the respondent said, the appellant was summoned to the Board, but he refused to attend. Her submissions at the 1st appellate court were as follows:

"The appellant was called, summoned by the ward conciliation Board, but he refused to attend that is why the Board issued a certificate"

She repeated the same statement, in this court. I think there is a misconception here. The obligation of the board to issue a certificate is only where it has failed to resolve the party's dispute as provided for under section 104 (5) of the same Act that:

" 104 (5) If the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings."

This section presupposes procurement of the party's attendance before the Board, hearing of the parties but failed to meet a harmonious end. The issuance of the certificate doesn't extend to where parties are not heard by the failure of one to attend before the Board under subsection (c) of section 101 of the Law of Marriage Act.

The respondent's submissions are clear that there was no attempt to reconcile the matter by the board due to the appellant's refusal to attend the Board. If this is the case, then the Board's certificate of non-settlement issued is a false statement worth ignoring.

I have as well traversed through the said certificate. Indeed, it would have remained invalid even if parties were heard before its issuance. The said certificate reads as follows:

> *"FORM Na. 3*
> ***BALAZA LA KUSULUHISHA MASHAURI YA NDOA LA NYAMBELE SAMASI BUJOLO***
> *(Taja jina la mme)*
>
> *Na* ***ANNAMARY SOSTENESI***
> *(Taja jina la mke)*
>
> *Ambalo ni mume na mke, ambalo liliwasilishwa Baraza na* ***ANNAMARY SOSTENESI***
> ***INATHIBITISHWA*** *kwamba Baraza hili limeshindwa kabisa kuwapatanisha watu hao wawili yaani mume na mke, kwa hiyo maoni ya Baraza hili ni kuwa:-*
> *BARAZA LIMESHINDWA KUWASULUHISHA MDAI NA MDAIWA HIVYO TUNALETA SHAURI HILI MAHAKAMANI KWA HATUA ZAIDI*
> *(Taja mapendekezo yoyote ya Baraza kuhusu shauri hili)*
>
> *.....Sign.....Amazeru.....*
> *(Sahihi) Mwenyekiti/Makamu Mwenyekiti/Mjumbe wa Baraza*
> *Tarehe:.....″*

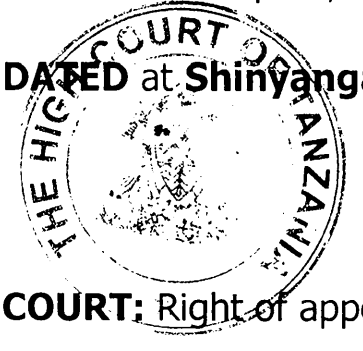
A careful reading of the contents of the certificate has failed to detect the place of sitting of the Board, the designation of the person who signed it, and the date of issue, thus uncertain whether this board had jurisdiction over the matter under the provisions of 103 of the Marriage Act. By any standard, the Marriage conciliation certificate is scarce of the qualities of the certificate envisaged by the law and hence invalid. The appellant's

The absence of a valid certificate and an explanation justifying exceptions explained under section 101 of the Law of Marriage Act, makes the petition before the trial court incompetent complaint is therefore justified. See for instance **Shillo Mzee vs Fatma Ahmed,** [1984] TLR 112.

The entire proceedings before the primary Court and the resultant decree are quashed for being a nullity. This also extends to the proceedings and orders by the District Court on appeal for being pegged on a nullity. Parties are at liberty to file a fresh petition in accordance with the law.

Since the first grounds disposes of the matter, I find no need to determine the rest of the grounds. The appeal is for that reason allowed. Being a matrimonial dispute, each party is ordered to bear its own costs.

DATED at **Shinyanga** this **15th** day of **July** 2022.



E.Y MKWIZU
JUDGE
15/07/2022

COURT: Right of appeal explained.

E.Y. MKWIZU
JUDGE
15/07/2022