

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
CIVIL APPEAL NO. 21 OF 2021

*(Originating from Matrimonial Appeal Case No. 5/2021 of District Court of Kilwa at
Kilwa)*

HAMISI ABDALLAH MKWEKEAAPPELLANT
VERSUS
DARINI SELEMAN MROPERESPONDENT

JUDGMENT

Muruke, J.

Darini Selemani Mrope, filed Matrimonial dispute at Kilwa Masoko Primary Court petitioning for divorce, custody for the children and distribution of matrimonial properties. Trial court awarded respondent one house located at Masoko, guest house at Nangurukulu, house located at Nangurukuru, one plot at Nangurukuru, five goats, one house at Dar es salaam and half share of tree farm. While the appellant awarded one house located at Nangurukuru, guest house located at bondeni Nangurukuru, milling machine, one plot at Nangurukuru, house at Lindi, farm of sogam, five goats, and equal share of trees farm.

Dissatisfied with that decision, appellant filed Matrimonial Appeal No. 5 of 2021 at, Kilwa District Court, in which the first appellate court decided in



favour of the respondent. Appellant was awarded, guest near the road at Nangurukuru, house at Lindi, new house at Nangurukuru, milling machine at Nangurukuru, plot at Liwale road Nangurukuru, old house and bar at Nangurukuru, half farm of trees, farm of sorgum, five goats, half total number of chickens and house utensils.

On the other hand the respondent was awarded, house at Dar es salaam, semi- finishing house at Masoko, guest at the valley(bondeni) Nangurukuru, plot at Nangurukuru, farm at sengeru, half ½ of farm trees, five goats and half of all chickens. Appellant was dissatisfied, thus filed present appeal raising four grounds as articulated in the memorandum of appeal.

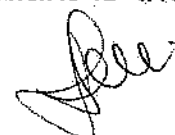
On the date set for hearing appellant was represented by Issa Chiputula Advocate. While the respondent appeared in person. On ground four counsel for the appellant argued that, district court erred in law in agreeing with the primary court decision, in which the dispute was not taken to the reconciliation board as per section 99 of the Law of Marriage Act. Before the hearing matrimonial disputes, court must satisfy that the dispute has passed through reconciliation board. Section 107 of LMA bars parties to file dispute in court without passing through reconciliation, unless there are sufficient reasons not to do so. After hearing of the parties then, reconciliation board issue reference in case they failed to reconcile. The letter is the one used to file dispute at the court. Case filed without passing through reconciliation, proceedings and judgment is null and void. In the case at hand, proceedings of primary court at page 5,6, and 7 respondents did not say that the dispute was taken for reconciliation. There is no form No.3 in the trial court proceedings.



On ground 2 is about contribution of each party to the acquisition of matrimonial properties. Section 114(1) of the Law of Marriage Act, court has power to divide the matrimonial properties. In the present case respondent had little contribution. Respondent did not mention properties that was acquired. Respondent did not justify on how she contributed to acquisition. Trial court took on board evidence that were not in court, that is wrong. For contribution of ideas only is not sufficient for 50% of properties to be taken by respondent. Appellant contributed more than respondent on the acquisition of the properties. He argued further that, court did not order valuation report. Each property was supposed to be evaluated then division. The house at Dar- es- salaam cannot be equally with that of Nangurukuru. Valuation report would have helped the court to divide the asserts properly.

Ground 3 respondent failed to prove in court contribution. Her evidence was not enough to warrant such division. Appellant evidence carried more weight and appellant evidence was not cross examined by respondent. So, his evidence was strong and more credible, insisted appellant counsel.

In reply, respondent submitted that, they went to Bawaku, for reconciliation four times. Then she was given letter to take to court. On ground one she submitted that, she found appellant with one Kiosk. She made several contributions manually, she was also managing the kids and family. She constructed two houses at Nangurukuru. It is on record at trial court that she worked hard to acquire those properties. On ground 2 she argued that, valuation was done. House at Dar es salaam is not valuable than the one at Nangurukuru. Trial court visited the areas where properties were found and divided fairly. On ground three she argued that, appellant is the one who



contributed to the breaking up of their marriage. Respondent contributed to the acquisition of the properties in question however respondent (appellant) was the one who took major share of properties. So, trial court was fair bearing in mind, it is the respondent who has been taking care of the issues of the marriage since 2020 when problem started.

In rejoinder, appellant reiterated what he submitted in his submission in chief. He insisted that there must be form number in the records. Respondent said, she was given letter to take to court, but that is not right. It is form number which is valid not letter. More, so, letter was not tendered, submitted appellant, counsel.

Having heard both parties' submission, on grounds of appeal, rejoinder submission from the appellant, and gone through records of two court below, the issues for determination are: -

- (i) Whether the District Court was correct to uphold the decision of the trial court which determine matrimonial dispute which does not referred to the Marriage Conciliation Board.
- (ii) Whether division of matrimonial properties was properly divided in accordance to the law.

It is the procedural requirement of law that, before instituting matrimonial dispute. Parties must first refer the dispute to the Marriage Conciliation Board for Reconciliation. If the reconciliation fails, the board will issue the parties with formal certificate to certify that it had failed to reconcile the parties. This position of the law was provided under section 101 and 104(5) of the Law of Marriage Act, that: -



*"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."*

*"104. 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."*

By the use of the word shall, the above provision implies that, compliance with section 101 above is mandatory except where there is evidence of existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the board. This requirement is further reinforced by section 106(2) of the same Act, which states in mandatory terms that: -

"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 this appeal the appellant complained that, the trial court entertained the matrimonial dispute without reference to Marriage Conciliation Board. He insisted that, the petitioner filed dispute at the trial court without attaching form No. 3 (certificate from Marriage Conciliation Board) to prove that the dispute referred to marriage conciliation board before instituted at the trial court.

I have keenly reviewed the records of the trial court; it is true that there was no certificate from the Marriage Conciliation Board which accompanied the



petition for divorce lodged by the respondent before the trial court. This was also supported by the evidence of PW1 who testified at 7 of the trial court typed proceedings that: -

Tumerudi nyumbani akaenda tena BAKWATA kule BAKWATA akasema anakuja kumpa kichapo na mwanangu.

PW1 evidence was also corroborated by the testimony of appellant DW1 and DW2. At page 13, 14 and 15 of the trial court typed proceeding as follows: -

“Nilipomuuliza alikataa lile swala, mimi nilienda BAKWATA kuulizia sheria ya ndoa na mwenendo was sheria. BAKWATA ikamuomba aje na kadi ya piki piki alisema hana ela, mimi nikakopa laki moja nikawapa BAKWATA. Mdai aliomba talaka mwenyewe tukiwa BAKWATA na nilimpa.”

DW2(Hamisi Omary Ligweje) testified that: -

“Baada ya hapo miezi mitatu iliyopita nilipigiwa simu na mdaiwa akanieleza kwamba shauri lao lilipelekwa BAKWATA, hatimaye maamuzi yalitoka kwamba ndoa yao imekwisha.”

Evidence proved above that, the trial magistrate relied on the evidence of PW1, DW1 and DW2 as sufficient proof to institute matrimonial dispute. In the case of **Yohana Balole Vs. Anna Benjamin Balongo, Civil Appeal No. 18 of 2020(unreported)** at Bukoba CAT held:



"With profound respect, and as correctly argued by Mr. Muguli, the said letter is deficient in both form and content and the same does not amount to a certificate envisaged under sections 101 and 106 of the Marriage Act."

Court went further stating that: -

"Worse still, the said letter, though it was extensively referred to by the learned trial Magistrate in his judgment, it was not part of the record as neither of the parties tendered the same in evidence as an exhibit... similarly, 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 of jurisdiction to entertain the matter."

The trial court and the first appellate court overlooked this irregularity. It is my view that, this ground has merits. Since the second issue depends on the findings of the first issue and the first issue is enough to dispose this appeal.

In the premises, I find that the proceedings before the trial court and first appellate court is vitiated. Thus, I have no option other than nullifying the proceedings of the trial court in matrimonial case No. 09 of 2021 and quash the judgment and set aside the subsequent orders. I also nullify the proceedings of the first appellate court in matrimonial Appeal No. 5 of 2021 and quash its judgment and subsequent orders as they originated from nullity proceedings. However, respondent to continue occupying house at Mbagala



where she is currently leaving and Guest house at Nangurukuru, for upkeeping of the issues of marriage. Any of the parties may file petition upon completion of necessary procedures. This appeal has merits, it is allowed. Each party will bear his/her own costs. It is so ordered.




Z.G. Muruke
Judge
31/08/2022

Judgment delivered in the presence of Issa Chiputula Advocate for appellant and respondent Darini Selemani in person.




Z.G. Muruke
Judge
31/08/2022