

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBIA DISTRICT REGISTRY

AT BUKOBIA

PC. CIVIL APPEAL NO. 31 OF 2022

(Originating from Matrimonial Cause No. 14 of 2021 at Primary Court of Muleba District at Muleba Urban and arising from Civil Appeal No. 04 of 2022 at District Court of Muleba at Muleba)

RASHIDI SHABANI----- APPELLANT

VERSUS

CHRISTINA MORIS-----RESPONDENT

JUDGMENT

Date of Last Order: 15/08/2022

Date of Judgment: 26/08/2022

A. E. Mwipopo, J.

Rashidi Shabani, the appellant herein, and Christina Moris, the respondent herein, were husband and wife since 1999 and they were blessed with 4 children. From 2009 their marriage entered into turmoil and on 2021 the dispute was referred to Reconciliation Board. The Board failed to reconcile them and on 23.11.2021 it issued a certificate that it has failed to reconcile the parties. The respondent petitioned for divorce in Matrimonial Cause No. 14 of 2022 in the Primary Court for Muleba District at Mubunda. The trial Primary Court dissolved the marriage and issued a decree for divorce. It also distributed the matrimonial

assets where the appellant was granted house at Mkolani Mwanza, house at Kiholeli Mwanza, three guest houses, the hall at Kimoyomoyo area, a plot at Kilumba Mwanza, a hall at Murumo and 1 water pump. The respondent was given a house at Usagara Mwanza, a house at Kilimahewa Mwanza, a plot at Kimoyomoyo, one guest house, the plot for drying anchovies (dagaa), rented phone shop, and one water pump. The appellant was aggrieved with the decision of the trial Primary Court and filed in Muleba District Court a Civil Appeal Case No. 04 of 2022 which was dismissed for want of merits. The appellant was not satisfied with the decision of the appellate District Court and filed the present appeal.

The appeal was instituted by Petition of Appeal containing four grounds of appeal as follows hereunder:-

- 1. That, the Honourable District Magistrate grossly erred in law to entertain an appeal emanating from nullity proceedings of the Primary Court which proceeded without proper certificate of marriage from the Conciliation Board from a Ward Tribunal with jurisdiction.*
- 2. That, Honourable District Magistrate grossly misdirected himself in law and on facts to make presumption of existence of certificate of the Marriage conciliation Board which was neither tendered or made part of the Court record.*
- 3. That, the Honourable District Magistrate grossly erred in law to uphold the decision of the trial Court which illegally issued a decree of divorce and division of matrimonial assets without any proof that the marriage of spouses had irreparably broken down.*

4. That, Honourable District Magistrate erred in law and on facts to make unfair distribution of matrimonial properties without consideration of the contribution of each party, consideration of other two wives who contributed to acquisition of the same and that the respondent had no personal property.

On the hearing date, both parties were present in Court. The appellant appeared in person and was represented by Mr. Frank John, advocate, whereas, the respondent was present in person. The Court invited both parties to submit on the appeal.

The counsel for the appellant submitted on the 1st and 2nd grounds of appeal together, he abandoned the 3rd ground of appeal and he submitted on the 4th ground of appeal independently. On the 1st and 2nd ground of appeal, he said that section 101 of the Law of Marriage Act, Cap. R.E 2019 provides that no person shall petition for divorce unless that 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. Further, section 106 (2) of the same Act provides that the petition for a decree of divorce shall be accompanied by certificate by a Board issued not more than six months before filing petition in accordance with subsection (5) of section 104. The Matrimonial Case No. 14 of 2021 was instituted in the Primary Court for Muleba District at Muleba Urban without valid certificate from reconciliation Board. When the Matrimonial Case was instituted at trial

Primary Court, the said certificate of the Board was not accompanied with the petition. The certificate does not show that the Board failed to reconcile the parties as it is requirement under section 101 of the Law of Marriage Act. The certificate states that *"Baada ya kuwa tulivyowashauri hayakufanyiwa kazi kwa Mdawa kutokubali kushirikisha Mdai kwenye biashara kwa mujibu wa malalamiko na maelezo ya mgogoro huu ni mzito. Hivyo baraza limewatuma kwako ili sheria ichukue mkondo wake"*. The said wording of the certificate indicates that the Board has never reconciled the parties as it failed to shows the efforts to reconcile them and if they had failed to reconcile them.

The counsel said that even the decision of the Board accompanying the certificate shows that the Board has never heard the matrimonial dispute between the appellant and the respondent. What was before the Board was the complaint by the Respondent that she was not given the key to the house and she was not allowed to participate in the business. The first decision of the Board was for the appellant to give the key of the house to the respondent, to take care of the respondent and to allow the respondent to participate in the business. For that reason the Primary Court had no jurisdiction to entertain and determine the matrimonial dispute.

The counsel cited the case of **Yohana Balole vs. Anna Benjamin Malango**, Civil Appeal No. 18 of 2020, CAT at Bukoba, (unreported), at page 13

and said that it was held by CAT that the certificate of the Board has to be tendered as evidence by either party. He said in this case it is not known how the certificate was found in the record of the trial court. As the certificate was not tendered as exhibit, this Court has to hold that there was no certificate from the Board proving that it has failed to reconcile the parties.

The Counsel turned to the last ground of the appeal on the distribution of matrimonial properties where he submitted that the trial Primary Court distributed the matrimonial assets without considering principles of distribution of matrimonial properties to the parties. The Court is supposed to consider the contribution of each couple in acquisition of the matrimonial properties and obligations of each of the couple during their marriage. The evidence available shows that the parties listed the properties which they acquired during their marriage. The appellant testified that he has two wives and the respondent was the second wife. In page No. 8 of the judgment of the trial Primary Court, the appellant was given extra duty to pay for education of their children. Even the extent of distribution was supposed to consider that the appellant has another wife who was supposed to be considered. For that reason, the distribution was not supposed to be equal between the appellant and the respondent. The contribution to the acquired properties was not equal as all three of them contributed to the properties and the

appellant has duty to take care of education of his children's education. The Court has to re-distribute the properties.

In her reply, the respondent said that she is opposing the appeal as what was stated by the counsel for the respondent is not the truth. The respondent raised preliminary objection during her submission that the appeal was filed in this Court out of time. That, the decision of the District Court in Civil Appeal No. 4 of 2020 was delivered on 21/04/2022 and the appellant filed his appeal on 12/07/2022, hence the appeal in this court was filed well out of time.

Thereafter, the respondent continued to submit on the 1st and 2nd grounds of appeal and said that what transpired is completely different from what the appellant is asserting. The dispute started long ago and she took several efforts for reconciliation. It was in September 2020 when she instituted the dispute at the Board. They attended at the Board 4 times and the appellant agreed to give her key of the house at Mwanza and bus fare. The Board also asked parties to solve their dispute but the appellant did not want any reconciliation. On the date of hearing the appellant told the Board that he do not want any reconciliation and the Board issued certificate. The said certificate was submitted to the Primary Court when the Matrimonial Case was instituted. The Chairperson of the Board himself took the certificate to the Primary Court and handled it to the court in respondent's presence. It was the Primary Court which drafted the petition after

listening to her. Thus, the matrimonial case was properly before the trial Primary Court.

On the issue of distribution, she said that appellant never testified that he have two wives. For that reason the distribution was proper. The evidence on record shows that she was the one who was doing business and she was the one who invited the appellant to do business with her. All the properties acquired came from the business which she was doing and he assisted her to develop the business. After the business grew, he decided to take everything and throw her away from everything she have worked hard to acquire. For that reason, the trial Primary Court properly distributed the matrimonial assets as her contribution to the said property is larger than that of the appellant. The properties mentioned before the trial Primary Court are those they acquired together with the appellant. If there are other properties the appellant acquired with another wife whom he did not mention in his evidence, the same was not listed among the matrimonial properties in this case. When the appellant proposed to her, he said he was single and that he divorced his wife. That is the reason she accepted him and he came to live in her house.

The respondent said further on the issue of distribution of the matrimonial properties that in reality the distribution was not equal. The appellant was given 3 guest houses and she was given only one guest house, he was given two halls /

clubs and she was given none. As the appellant prayed for this Court to re-distribute the matrimonial assets, the Court has to re-distribute the matrimonial assets equally.

In his rejoinder, the counsel for the appellant said that the distribution of the matrimonial properties did consider the contribution of each of the parties in acquiring the said properties. If the trial Primary Court considered the evidence on the contribution for each of the party, it would have arrived at a proper distribution according to the law.

On the issue of that appeal was filed out of time, the counsel said the decision of the appellate District Court was delivered on 21/04/2022 and it was ready for collection on 22/04/2022. He filed the appeal on 28/04/2022 and the fees was paid on the same date which is on 28/04/2022. For that reason the appeal was filed just 6 days after the judgment was delivered hence within time.

As the respondent in his submission raised the issue of jurisdiction of this Court to entertain the appeal which was filed out of time and the counsel for the appellant responded on the issue, I find it appropriate to determine it first since the issue is crucial and it raises a point of law.

The respondent said in her submission that the decision of the District Court in Civil Appeal No. 4 of 2020 was delivered on 21/04/2022 and the appellant filed his appeal on 12/07/2022, hence the appeal in this court was filed well out of time.

In his response, the counsel for the appellant said the decision of the appellate District Court was delivered on 21/04/2022 and the judgment was ready to be issued to parties on 22/04/2022. The appellant filed the appeal on 28/04/2022 and the fees was paid on the same date which is on 28/04/2022. For that reason the appeal was filed just 6 days after the judgment was delivered, hence it was within time.

From the submission of the parties on the issue there is no dispute that the judgment of the appellate District Court was delivered on 21/04/2022. The available copy of the judgment was certified on 22/04/2022 which means that it was ready to be dispensed to parties on 22/04/2022. The record shows that the appellant filed the petition of appeal on 28/04/2022 and paid for the filing fees on the same day according to the attached exchequer receipt. This prove that the appeal was filed just within 6 days from the date of issuance of the judgment as it was stated by the counsel for the appellant. It is not known source of the respondent assertion that the appeal was filed in July 2022. For that reason, the appeal was filed within time according to the law.

After resolving the issue of the jurisdiction of the Court to determine this appeal, what is next is to see whether the appeal has merit or not. In determination of the merits of the appeal, I will consider each ground of the appeal as submitted by the parties.

The appellant submitted on ground No. 1 and 2 of the appeal jointly where he said the trial Primary Court for Muleba District at Muleba Urban determined the matrimonial cause without valid certificate from the Reconciliation Board. The Matrimonial Case was instituted at trial Primary Court without certificate from the Reconciliation Board, the certificate does not show that the Board failed to reconcile the parties as it is required by the law, the Board never heard the matrimonial dispute between the parties and the certificate of the Board was not tendered as evidence by either party as it is requirement of the law. The respondent in her response said that the Reconciliation Board heard both parties more than 4 times and even gave them chance to solve the dispute by themselves and they failed. The certificate was filed in Court by the Chairman of the Board and it was the Primary Court which drafted the petition after receiving the certificate, hence the ground has no merits.

It is the requirement of the law under section 101 of the law of Marriage Act, Cap. 29 R.E. 2019 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. The Law emphasized in section 106 (2) of the Act 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 accordance with subsection (5) of section 104. The form and content

of the certificate by a Board is provided in section 104 (5) of the Law of Marriage Act. The section 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 issue a certificate setting out its findings. The law also gives discretion to the Board to append to its certificate such recommendations relevant to the matter or dispute referred to it as it may think fit in section 104 (6) of the Act. Thus, the valid certificate of the Board must accompany the petition for divorce. The Court of Appeal sitting at Mtwara was of the same position in the case of **Hassani Ally Sandali vs. Asha Ally**, Civil Appeal No. 246 of 2019, where it held at page 15 that, I quote:-

"It follows thus that in the absence of a valid certificate to institute a petition as required by section 101 of the Act, the petition before the Primary court was premature."

I perused the available record and as it was submitted by the respondent, I find the certificate of the Reconciliation Board for Muleba (Form No. 3) in the trial Primary Court file. The said certificate is appended with the decision of the Reconciliation Board. This prove that the petition for divorce filed in the trial Primary Court was accompanied with the certificate of the Board.

The counsel for the appellant said in his submission that the certificate of the Board was not valid as its content does not show that the Board failed to

reconcile the parties, the Board never heard the matrimonial dispute between the parties and the certificate of the Board was not tendered as evidence by either party as it was the position stated by the Court of Appeal in the case of **Yohana Balole vs. Anna Benjamin Malango**, (supra). I read the said judgment of the Court of Appeal extensively including page 13 which was referred by the counsel for the appellant and there was nowhere in the said judgment where the Court of Appeal held that the certificate of the Board has to be tendered as evidence by either party. At page 15 of the judgment the Court of Appeal held that there was no certificate from Marriage Conciliation Board which accompanied the petition of divorce lodged before the trial Court. The only time when the Court of Appeal referred to the tendering of evidence by either party is in page 16 when it was discussing the letter from A.I.C Church which was relied by the trial Magistrate in the respective case as a sufficient document to institute matrimonial proceedings. The Court held that the said letter is deficient in both form and content and it does not amount to certificate envisaged under section 101 and 106 of the Law of Marriage Act. The Court of Appeal went on to say that worse still the said letter was not part of the record as neither of the parties tendered the same in evidence as an exhibit. Thus, it is clear that the Court of Appeal did not hold that the certificate of the Board was supposed to be tendered as evidence by either party.

On the issue of the validity of the certificate of the Marriage Reconciliation Board, the counsel for the appellant said the content of the certificate does not show whether the Board failed to reconcile the parties and the Board never heard the matrimonial dispute between the parties. The said certificate of the Board was recorded as follows in its opinion I quote:-

"Baada ya kuona tuliyowashauri hayakufanyiwa kazi kwa mdaiwa kutokubali kumshirikisha mdai kwenye biashara kwa mujibu wa malalamiko na maelezo yao mgogoro huu ni mzito. Hivyo Baraza linawaleta kwako ili sheria ichukue mkondo."

The informal interpretation of the said paragraph is that after seeing that the respondent did not agree to comply with the Board advice for him to include the complainant in the businesses, according to their statements this dispute is massive. The Board is referring them to you so that the law shall take its cause. The said opinion of the Board reveals that it advised the appellant to allow the respondent to participate in the business but the appellant did not agree and according to their statement the dispute between them is big. The said opinion means that the Board failed to reconcile the parties. This is seen clearly in the decision of the Board which was appended with the certificate. The said decision shows that the Board tried to reconcile them and the Board did speak to the parties and advised the appellant to provide necessities to the respondent, to allow the respondent to participate in the business, they should take care of their children

and the appellant to give one house for the respondent to stay with her children. The Board give them time to implement the advice and after sometime the appellant gave keys to the house to the respondent and money for buying necessities. The Board believed the dispute was over.

However, after sometime the respondent returned to the Board and said that the appellant is not fulfilling his promises, he is threatening her and he is not allowing her to participate in the business because she has caused loss to him. The Board then decided that the dispute is big as the appellant did not adhere to advice. It is clear that the Board fulfilled its duty of reconciling parties in this dispute, but there was no progress. For that reason, I find that the certificate is valid and was issued according to the law. Thus, I find the 1st and 2nd grounds of appeal have no merits.

On the fourth which is also the last ground of appeal that the distribution of matrimonial properties was not fair, the counsel for appellant said the distribution was not supposed to be equal between the appellant and the respondent as the appellant testified that he has two wives and the respondent was the second wife. All three of them contributed to the properties and the appellant has duty to take care of education of his children. The Court has to re-distribute the properties. The respondent responded by saying that appellant never testified that he have two wives. The evidence on record shows that all the properties acquired came from

the business which she was doing. The properties mentioned before the trial Primary Court are those they acquired together with the appellant. If there are other properties the appellant acquired with another wife, the same was not listed among the matrimonial properties in this case. She added that in reality the distribution of the matrimonial properties was not equal. The appellant was given 3 guest houses and she was given only one guest house, he was given two halls / clubs and she was given none.

There is no dispute that the parties acquired some properties during their marriage and the appellant is challenging the distribution of the matrimonial properties which was done by the trial Primary Court and approved by the appellate District Court. The appellant claims that the distribution was not supposed to be equal between the appellant and the respondent as there is evidence from the appellant that he has two wives and the respondent was the second wife. Thus, all three of them contributed to the properties and the appellant has duty to take care of education of his children's education. What the appellant implies is that the matrimonial properties were supposed to be divide in 3 portion or pieces where each between the appellant, respondent and appellant first wife has to get equal share amounting to one third of the properties. Admittedly, the evidence available in record prove that the appellant had two wives and this is

found in the testimony of the respondent in page 3 of the typed judgment and in the testimony of the appellant.

Besides, the trial Primary Court distributed the matrimonial properties to the parties herein where the appellant was given a house at Mkolani Mwanza, house at Kiholeli Mwanza, three guest houses, the hall at Kimoyomoyo area, a plot at Kilumba Mwanza, a hall at Murumo and 1 water pump. The respondent was given a house at Usagara Mwanza, a house at Kilimahewa Mwanza, a plot at Kimoyomoyo, one guest house, the plot for drying anchovies (dagaa), rented phone shop, and one water pump. It is clear from the distribution the appellant was allocated with more than twice of matrimonial properties compared to what the respondent was allocated in the distribution. He was allocated 2 houses, 3 guest houses, two halls/clubs, one plot and one water pump. The respondent was allocated 2 houses and one house among them was her house before she married the appellant, one guest house, shops, a plot and water pump. Even though it was not stated in the decision of the trial Primary Court the reason for the appellant to be allocated more of matrimonial properties than the respondent, it is obvious that the trial Court considered the evidence that the appellant had two wives. I agree with the respondent that the contribution of the first wife is not stated, but her testimony proves that first wife was existing at the same time she was married to

the appellant. Thus, there is possibility that the first wife too contributed to the assets.

Regarding the assertion that as the appellant was ordered to pay for maintenance of the children he is supposed to be allocated more properties, the record shows that the trial Court ordered the children to stay with the respondent and appellant to pay for their maintenance. For that reason the order was proper according to the law and the appellant has to pay for their maintenance since it was the respondent who was ordered to stay with the children. After all, the appellant was allocated more matrimonial properties than the respondent. For that reason, the trial Primary Court properly distributed the matrimonial properties according to the law and as result the fourth ground of appeal is found to have no merits.

Therefore, I find the whole appeal is devoid of merits and I dismiss it with cost. It is so ordered accordingly.



A handwritten signature in black ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A.E. Mwipopo

Judge

26/08/2022

Court: The Judgment was delivered today 26.08.2022 in the presence of the appellant, respondent and the counsel for the appellant.



A handwritten signature in black ink, appearing to read "A.E. Mwipopo", is written over a horizontal line.

A.E. Mwipopo

Judge

26/08/2022