

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

PC. CIVIL APPEAL NO. 75 OF 2022

*(Originating from DC. Magu Matrimonial Appeal No. 24 of 2021, original from
PC Kisesa in Matrimonial Cause No. 24 of 2021)*

SALOME MICHAEL APPELLANT

VERSUS

IDDY GASPER RESPONDENT

JUDGMENT

Sept. 19th & 27th, 2022

Morris, J

Around June 2021, Iddy Gasper filed against Salome Michael - the appellant herein; matrimonial cause No. 24 of 2021 at Kisesa Primary Court claiming for divorce and division of matrimonial property. Upon entering appearance, the appellant conceded to the grant of the decree of divorce. The trial court, pursuant to **Joseph Warioba Butiku v Perucy Muganda Butiku** [1987] TLR 1 and section 110(1) of the **Law of Marriage Act**, Cap 29, R.E.2019 (elsewhere **LMA**) issued the subject decree forthwith. As for the other relief, division of matrimonial property, the Primary Court was invited to determine

how the parties to the petition were to share the only matrimonial house situate Wita 'B', Bujora Ward - Kisesa.

Although the trial court's proceedings do not indicate how parties proved their respective contribution to the acquisition of the foregoing property, the court proceeded to order that the property should not be divided among parties. Instead, the court ordered further that the house should be leased from which rent was to be used to cater for maintenance of their children until such children attain the age of majority. That is, the property would only be sold and proceeds therefrom shared by parties upon the children becoming adults. However, the court did not state the proportion of each party when such time comes. Household items were given to the appellant. Dissatisfied with the order regarding the house, the appellant appealed to the District Court of Magu. The appellate District Court confirmed the trial court's decision and dismissed the appeal. The resolute appellant did not despair. She has now knocked the doors of this court, still lusty for justice.

Through services of Mr. Adam Robert, learned advocate, the appellant raised two grounds of appeal. One of them is challenging the District Court's confirmation of the trial court's decision while the other is challenging the

jurisdiction of the marriage conciliation board of Kisesa. However, during the hearing, the appellant's counsel abandoned the latter ground. Submitting in support of the only remaining ground, Mr. Adam argued that the first appellate court erred in law and fact to confirm the Primary Court's decision that the matrimonial house should be leased and rent therefrom be used to cater for children's school fees and other upkeep charges. To him, this was wrong because the respondent had presented himself as a person with financial ability to take care of the children under his custody.

The learned advocate cited section 114 (1) of **LMA**. He argued that after issuing the decree of divorce, the trial court was supposed to order distribution of the matrimonial house on 50% by 50% basis. Further, he faulted the appellate court's confirmation of the trial court's decision regarding sale of the house being subject to children becoming of the majority age. According to him, that order is unjust because the appellant is rendered homeless while the house is a product of joint efforts in her marriage. He thus prayed for this court to quash the decision of the District Court and instead thereof to order sale of the house forthwith for both parties share equally. As for children, he prayed that parties should be ordered to be responsible for the children jointly.

On his part, the unrepresented respondent supported the decisions of both subordinate courts herein. He submitted that the appellant is not homeless because she is now married to another man and rent from the house is benefiting their children. He further denied being financially stable enough to keep proper maintenance of the children in the absence of rent from the subject house. It was his additional submissions that custody of children was given to him because the respondent had abandoned them which abandonment necessitated him to take the children to a boarding school. Further, the respondent argued that the appellant was concessionary about the rent to be used for the children but on appeal she is working on afterthoughts. Finally, he objected to the sale of the house on the argument that the appellant, being a house wife, did not contribute anyhow towards acquisition of the matrimonial house. He prayed for dismissal of the appeal.

The main question which I am moved to answer is in regard to legality of the two subordinate courts' concurrent order that the matrimonial house should not be sold pending the issues of the dissolved marriage turning adults. However, though the appellant's counsel abandoned the second ground of appeal, this court finds it just to consider its parameters in this appeal. Hence, parties were invited to address the court in this regard. Upon

hearing the parties of this issue, the appellant submitted that it is true that the certificate is not valid because she never attended any conciliation proceedings at Kisesa. However, the respondent insisted that the duo appeared before the board for conciliation and the appellant was not interested in the process. That is why the board issued the subject certificate.

I am inclined to deliberate of the role of marriage conciliation board because therefrom crops a very fundamental point of law which is integral to the matter before this court. I am alive to the position of the law that a pure point of law can be raised at any time even at appeal. See the case of **Adelina Koku Anifa & Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported). Of significance from the cited case, is the holding that even in the absence of the grounds of appeal; courts may justly address the point of law, particularly on jurisdiction.

Going through the records of the appellate District Court the appellant's counsel seems to have submitted on the aspect of irregularities inherent in the certificate issued by the Kisesa marriage conciliation board. He was emphatic that the board lacked jurisdiction to entertain marriage disputes.

His main concern was geographical jurisdiction. The District Court, in my view, rightly ruled against such argument.

This court has decided to take this pertinent legal aspect further but from a different approach. The role of the marriage conciliation board, as the name runs, is to conciliate the disputes between spouses not just issuance of certificates. Indeed, the certificate is the product of actual process of conciliation. In my considered view, this is the import of section 104 (5) of **LMA**. Hence, before certifying that it has failed to conciliate the disputants before it; the board must engage in the real activity of having them resolve their marital differences.

The above legal requirement is so fundamental. First, it goes to the objective of why the marriage conciliation boards were established in the first place. Secondly, it is intrinsically a jurisdictional issue because the court, as the general rule, cannot adjudicate on a matrimonial dispute unless such certificate is attached to the petition. Read section 106 (2) of **LMA**. Thirdly, it signifies that parties have gone to court as a last resort. Fourth, during the trial, the certificate should be tendered in evidence so that it forms the basis

for the subsequent court decision [**Patrick William Magubo v Lilian Peter Kitali**, CAT (Mwanza) Civ. Appeal No. 41 of 2019 (unreported)]

Looking at the certificate from Kisesa Ward, the board is seemingly reducing the material facts of the dispute instead of conciliating the parties. It reads:

'Ugonvi wa mara kwa mara kati ya mume na mke kwenye maisha yao ya ndoa kwa muda mrefu na pia wameshindwa kabisa kuendelea kuishi pamoja pia mke amepata ujauzito nje ya ndoa. Maoni yetu watenganishwe ili kila mmoja wao aishi kwa amani. [TAJA MAPENDEKEZO YOYOTE YA BARAZA KUHUSU SHAURI HILI] Watenganishwe ili kila mmoja wa wanandoa hawa aishi kwa amani na usalama'.

From the foregoing excerpt, there is no glimmer of doubt that all what the board is conveying, is that it appreciated that there were serious matrimonial misunderstandings between the parties. That the couple were having constant squabbles and disagreements. Consequently, the Board is of the view that for peace to prevail, their marriage should be dissolved. No mention of what exact conciliation efforts were made use of by the board with the view to reconcile the couple. This omission, to me, is seriously irregular.

The law is clear in matrimonial matters which are initiated without attaching or using defective or irregular certificates from the marriage conciliation boards. The proceedings, decisions and orders rendered therefrom are a total nullity. They do not stand the wrath of the law. In the absence of the valid certificate, the trial is integrally incomplete, premature or incompetent. For instance, cases in this regard include **Shillo Mzee v Fatuma Ahmed** [1984] TLR 112; and **Abdallah Hamis Kiba v Ashura Masatu**, CAT (Musoma) Civ. Appeal No. 465 of 2020 (unreported). From the latter case, I would quote the following relevant pronouncement:

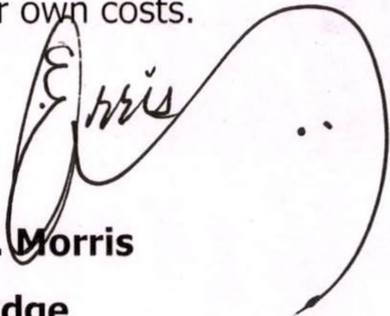
'Given the evidence on record as we have reviewed it earlier, we hold without demur that the impugned certificate is invalid for stating falsely that the Board had attempted to reconcile the parties but failed to settle the dispute when the reconciliation effort clearly did not take its full course. Moreover, we are satisfied that the current dispute does not fall within any of the exceptions (a) to (f) enumerated under the proviso to section 101 of the Act for the certificate requirement to be dispensed with.'

On the basis of what is elucidated above, this appeal succeeds but on a different ground. Thus, proceedings, judgements, decrees and orders of

both Magu District Court and Kisesa Primary Court should, and are hereby quashed and set aside. Accordingly, any party who is still interested in the pursuit of this matter, is at liberty to commence the process afresh and in the appropriate mode. Parties to bear own costs.

It is so ordered.

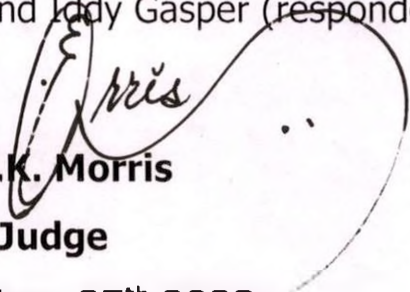



C.K.K. Morris

Judge

September, 27th 2022

Court: Judgement delivered this 27th day of September 2022 in the presence of Salome Michael, the appellant and Iddy Gasper (respondent).


C.K.K. Morris

Judge

September, 27th 2022