

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.397 OF 2021

(Originating from Matrimonial Cause No. 41 of 2019 in the District Court of Temeke at Temeke)

SEIF OMARY NGUNGE..... APPELLANT

VERSUS

HUSNA ALLY MIKENGESI.....RESPONDENT

RULING

Date of Last Order: 23/09/2022

Date of Judgment: 30/09/2022

Kamana, J:

The year 2001 witnessed a union between **Seif Omary Ngunge**, the Appellant and **Husna Ally Mikengesi**, the Respondent as they contracted an Islamic marriage. In the subsistence of their happy life in marriage, the duo was blessed with three issues which for the purpose of this Ruling I will not mention them. Besides that, the couple managed to acquire a number of properties. Again, I will not mention those properties as they are not form part of this Ruling.

In 2013 things started to turn sour as the couple found themselves in endless conflicts involving abusive language, violence and desertion. That state of affairs led the Respondent to petition for divorce at the District Court of Temeke. In that petition, the Respondent prayed for:

1. Declaration that the marriage has broken down irreparably.
2. A divorce decree.
3. Equal division of matrimonial properties.

4. Custody of children.
5. Maintenance of the children.
6. Any other reliefs as the Court may deem fit and just to grant.

In a nutshell, the trial Court declared that marriage has broken down irreparably and consequently issued a divorce decree. With regard to the division of matrimonial properties, it was decided by the trial Court that the properties be divided at the ratio of 35 percent for the current Respondent and 65 percent for the current Appellant. In this regard, the properties listed by the Petitioner were confirmed by the Court to be the matrimonial properties despite the Appellant's objections.

Further, the trial Court held that the first and second born of the parties be under the custody of their father. This decision was reached after seeking their opinion. The third issue was put under his mother's custodianship. It was ordered by the trial Court that both parents should be responsible for taking care of the lad.

However, the Appellant was not satisfied with the decision of the trial Court hence he preferred this appeal. In the course of seeking justice from this Court, the Appellant filed a Memorandum of Appeal which contains eleven grounds of appeal. For the purpose of this Ruling, I will not discuss or reproduce those reasons herein.

When the appeal was called on for hearing, the Appellant had the services of Mr. Alex Enock, learned Counsel. The Petitioner appeared in person without legal representation.

Before submission of the grounds of appeal, the Court invited the parties to address it on whether there was a compliance with the provisions of section 101 of the Law

of Marriage Act, Cap.29 [RE.2019]. Section 101 requires certification of the Marriage Conciliation Board as to its failure to reconcile the parties. Principally, that section imposes mandatory requirement for the parties to ensure that their disputes are referred to the Board before engaging courts of law. In view of this position, the Court wanted to hear the parties with a view to satisfying itself as to the compliance with section 101.

The Counsel for the Appellant was the first to submit. In his submission, he was of the view that the provisions of section 101 of the Law of Marriage Act were not complied with by the parties. He argued that in the Petition for Divorce as filed by the Respondent there is an attached document from BAKWATA bearing Number 00428/2018 dated 26th June, 2019 which is purported to approve a *talak*. That document, according to the learned Counsel is not a certificate within the purview of section 101 of the Law of Marriage Act.

It was further submitted by the learned Counsel that in the assumption that the said attachment is a certificate for the purpose of section 101, that certificate can not be considered as such since it was issued by the incompetent authority for lack of a quorum. In this respect, the learned Counsel referred this Court to the provisions of section 103(1) of the Law of Marriage Act.

According to that section as contended by the learned Counsel, the Marriage Conciliation Board is consisted of not less than three members and not more than five members. It was his submission that the attached document was signed by two persons that are Chairman and Secretary hence being in contravention of section 103(1) of the Law of Marriage Act.

In concluding his submission, the learned Counsel was of the view that the trial Court did not have jurisdiction to hear the Petition in the absence of the certificate issued by the Marriage Conciliation Board. To him, the Petition was premature for want of the certificate as per section 101 of the Law of Marriage Act. He prayed for the Court to nullify the proceedings of the trial Court on that ground.

To substantiate his position, the learned Counsel cited the case of **Marwa Mahende v. R** [1998] T.L.R. 249. In the cited case, the Court of Appeal observed that:

*'The duty of the courts is to apply and interpret the laws of the country. **The superior courts have the additional duty of ensuring proper application of the laws by the Courts below.**'*(Emphasis added).

In view of the position of the Court of Appeal, the learned Counsel prayed this Court to discharge its duty of ensuring proper application of the laws by the courts subordinate to it by nullifying the decision of the trial Court which entertained the Petition in the absence of the certificate of the Marriage Conciliation Board. In buttressing his position, the learned Counsel also cited the persuasive case of **Sadiki Rashid v. Mariam Mohamed**, PC Civil Appeal No. 3 of 2021 in which the High Court (Kakolaki, J) nullified the proceedings and judgments of the trial and appellate courts on the ground that the petition for divorce was incompetent for contravening mandatory provisions of section 101 of the Law of Marriage Act.

On the part of the Respondent, being a lay person, she could not have useful arguments as the matter was premised on the point of law. She submitted that in

the course of resolving their disputes she referred the matter to BAKWATA. However, it was her submission that the Appellant despite being summoned he did not enter appearance. According to her, that was the reason which precipitated BAKWATA to approve *talak* as the Appellant was not performing his family duties. She contended that after the issuance of that approval of the *talak* the Appellant submitted himself to BAKWATA and he took his copy of the said approval. In summing up, she was in disagreement with what was submitted by the learned Counsel for the Appellant and requested the Court to proceed with the hearing of the appeal in merit.

After hearing both parties, the issue for determination is whether section 101 of the Law of Marriage Act was complied with before the institution of the Petition for Divorce in the trial Court. It is worthy at this point to reproduce the contents of section 101 of the Act. It reads:

'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 wilfully 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.'*

This position of the law was echoed by the Court of appeal in the case of **Hassan Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 (Unreported) in which the Court stated:

'However, the granting of the divorce under section 107(3) of the Act was not an end in itself. It was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of the Act is mandatory

except where there is evidence of existence of extra ordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101(f) of the Act.'

Upon the careful perusal of the records of the trial Court, it has come to my attention that the Respondent in filing the Petition for the Divorce did attach a letter from BAKWATA District Office of Temeke dated 26th June, 2019. The said letter was addressed to the Magistrate In charge of the Mbagala Primary Court. The thrust of that letter was to inform the Magistrate In Charge of the findings of BAKWATA that it has failed to reconcile the parties. The said letter attached Form No. 3 with No. 00428/2018 dated 26th June, 2019. Form No.3 is a certificate issued by the Marriage Conciliation Board to certify that it has failed to reconcile the parties. Such Form is provided for under the Marriage Conciliation Boards (Procedure) Regulations, 1971 (Government Notice No.240 of 1971).

The Court had the opportunity of examining the said letter and its attachment (Form No.3). Starting with the letter, it is the view of the Court that the legal document to satisfy the requirements of section 101 of the Law of Marriage Act is a certificate issued by the Marriage Conciliation Board and not a mere letter. According to regulation 9(2) of the Marriage Conciliation Board (Procedure) Regulations, 1971 it is mandatory for the Board to issue a certificate in the prescribed form as to its failure to reconcile the parties. The said regulations states:

'(2) Where the dispute is between a husband and his wife, and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, and the Board fails to

reconcile the parties, the Board shall issue a certificate in the prescribed form.'

In view of this, I am inclined to hold that the letter attached to the Petition for Divorce is not a certificate contemplated by the Law of Marriage Act and its Regulations. Further, that letter does not contain the contents which are supposed to be in Form No. 3 such as the findings of the Board.

With regard to Form No, 3, I am in agreement with the learned Counsel for the Appellant that the same is not a certificate within the purview of the Law of Marriage Act and specifically the Marriage Conciliation Board (Procedure) Regulations, 1971. While, I am subscribing to the reasons advanced by the learned Counsel, I am further of the view that the matter was not handled by the Marriage Conciliation Board. The purported Form No. 3 states amongst other things that it has been proved by the *Kadhi* that the wife (now the Respondent) has been divorced and that the husband (now the Appellant) is responsible for giving her *mutaa* so that she can manage life after being divorced. The purported Form No. 3 states:

'Kwanza imethibiti kuwa mke ameachika kama ilivyothibitishwa na Kadhi. Mtaliki anawajibika kumpa mtalikiwa wake mutaa ili aweze kumudu hali ya maisha baada ya kuachika.'

Deducing from that wording, it is crystal clear that the dispute was referred to and determined by the *Kadhi* and not the Marriage Conciliation Board. In other words, the purported certificate does contain the findings of the *Kadhi* rather than the findings of the Marriage Conciliation Board. This is a clear contravention of the

provisions of section 104(5) of the Law of Marriage Act which stipulates that the certificate should provide findings of the Board in resolving the matrimonial dispute.

The subsection reads:

'(5) 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.'

Regarding the issue of quorum as raised by the learned Counsel for the Appellant, under regulation 4 of the Marriage Conciliation Board (Procedure) Regulations, 1971, the constitution of the Board when discharging its duties is the quorum of not less than three members. The regulation reads:

'4. The quorum necessary for the transaction of the business of a Board shall be three members.'

The exception, according to regulation 7(6), is when the adjourned meeting is attended by only two members after the adjourning meeting fails to perform its business for absence of the required quorum. Another exception which allows the Board to transact its business even by the presence of one member is provided in regulation 8.

Assuming that the purported Form No.3 was issued by the Marriage Conciliation Board and its findings are in line with section 104(5), such Form would not pass the test of validity. This is due to the fact that the purported Form No. 3 as rightly argued by the learned Counsel for the Applicant was signed by two persons and there is no evidence that in deliberating its decision the quorum was present. It is

further not in evidence that the meeting of the Board was adjourned to warrant such exceptions.

In view of the foregoing, I am of the settled mind that the purported Form No. 3 was not Form No. 3 in the spirit of the Law of Marriage Act and its Regulations. That being the position, I hold that the trial Court entertained the Petition for Divorce prematurely for want of the certificate issued by the Marriage Conciliation Board as per section 101 of the Law of Marriage Act. In other words, the proceedings, judgment and decree of the trial Court were a nullity.

Mindful of the Respondent's submission that the Appellant failed to appear before BAKWATA and in view of that it was decided that the approval of *talak* be issued, I am of the considered view that could be a reason to submit her Petition for Divorce without attaching Form No. 3. This could be in line with paragraph (c) of section 101 of the Law of Marriage Act. The said paragraph allows a Petitioner to submit the petition for divorce if the Respondent wilfully fails to appear before the Board despite being required to appear.

I had taken time to peruse the records with a view to ascertaining whether there is any evidence that proves failure on the part of the Appellant to attend meetings of the Board. I found none. Otherwise, what I managed to find in the records is the minutes of the meeting organised by BAKWATA on 27th July, 2018 in which the Appellant was present. In view of that, the Petition for Divorce can not be saved by paragraph (c) of section 101 of the Law of Marriage Act.

Since it is the position of this Court that the Petition for Divorce as filed by the Respondent was prematurely before the trial Court for want of the certificate issued

by the Marriage Conciliation Board and hence renders proceedings, judgment and decree therefrom a nullity, the next question for determination is the status of this appeal before this Court.

On account of the proceedings, judgment and decree of the trial Court be a nullity, the appeal before this Court is incompetent as there is no a valid decision for consideration. Hence, I invoke revisional powers of this Court to quash the proceedings of the trial Court and set aside the judgement and the decree thereon. The Respondent, if she wishes, is at liberty to file a fresh petition subject to her compliance with the Law of Marriage Act.

Each party to bear its own costs of this appeal.

It is so ordered.

Right to appeal explained.

DATED at **DAR ES SALAAM** this 30th day of September,2022.



KS KAMANA

JUDGE

30/02/2022



Delivered at Dar es Salaam in Chambers this 30th day of September, 2022 in the presence of Mr. Alex Enock, Counsel for the Appellant and Ms. Husna Ally Mikengesi, the Respondent.