IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

PC. CIVIL APPEAL NO 19 OF 2021

(Originating from Matrimonial Appeal No 2 of District court of Hai and Matrimonlal Cause No 6 of Primary Court of Hai at Bomang'ombe)

HUMPHREY LYIMO.....APPELLANT

VERSUS

MAGRETH STEPHANO.....RESPONDENT

27th September, 2022 & 20thOctober, 2022

JUDGMENT

MWENEMPAZI J:-

In African, specifically in South Africa there is a common saying which is tuned as '*love, like rain, does not choose the grass on which it falls*'. The appellant and respondent fell in love and celebrated a Christian marriage in 2011. The contracted marriage was blessed with three issues. Happiness

between the two love birds, the appellant and respondent, existed for some years and later squabbles arouse to the extent that they were intolerance to the respondent.

The respondent filed a petition for divorce in the Primary court of Hai District at Bomang'ombe whereas the trial court issued a divorce, ordered equal distribution of matrimonial assets and the appellant was also ordered to pay Tshs 50,000/=per month for the maintenance for one issue who was below the age of majority. The appellant was aggrieved by the decision of the trial court and appealed to the first appellate court which is District Court of Hai. The first appellate court dismissed the appeal for want of merits. The appellant has come for second appellate court and there are three grounds of grievances which are against the decision and orders of the first appellate court as follows in verbatim: -

1. That, the trial court did error in law and in fact by confirming the decision of Bomang'ombe Primary court without taking into account that the matter was decided based on the evidence which have never been tendered in court. Hence this appeal.
2. That, the trial court erred in law and fact by confirming the decision of the Bomang'ombe Primary Court without taking into account that

the distribution of matrimonial properties was biased. Thus, this instant appeal.

3. That, the trial court did error in law and in fact by confirming the decision of Bomang'ombe Primary Court without taking into account that, the appellant was curtailed with the right to tender evidences to defend himself in court and the appellant was curtailed with his right to bring his witnesses in court.

The appellant now prays before this honorable court to allow this appeal with costs. On the other hand, the respondent vehemently resisted this appeal. The appellant enjoyed the services of *Miss.Amina Msangi* learned advocate and on the other hand, the respondent was not legally represented. On 11th day of May, 2022, the learned counsel for the appellant proposed the hearing of appeal be by the way of written submission. This court granted the leave to proceed by the way of written submission. I have given due consideration to the parties' dutifully submissions which were filed timely as scheduled by this court and I truly appreciate.

Having carefully considered the submissions by both parties in this matter and also gone through the trial court records; I will start with the first

ground of appeal. According to the first ground of appeal the appellant has complained that the first appellate court did err in law and in fact by confirming the decision of Bomang'ombe Primary court without taking into account that the matter was decided based on the evidence which have never been tendered in court. The appellant cited the case of ***M/S SDV Transami (Tanzania) Ltd Vs. M/S STE DATCO, Civil Appeal No. 16 of 2011, Court of Appeal of Tanzania at Dar es Salaam*** **(unreported)[tanzlii]** where it was emphasized that judgement of any court must be grounded on the evidence properly adduced, tendered and admitted in evidence during the trial.

In the submission, the appellant has submitted that in all proceedings of the trial court, no any document was tendered by either party, the appellant or the respondent. It is surprising that the trial court and the first appellate court have made reference to PF. 3 from Police, as well as Form No. 3 from Ward Office while the same was not tendered in court and indeed the appellant was not even given a chance to cross examine on the same documents.

The respondent has submitted in reply that all the documents were tendered and formed part of the proceedings as indicated in the judgments

of the trial court and the first appellate court. The respondent has, I think in alternative, submitted that the said PF3 and Form from Ward were not necessary since a certificate showing that the Marriage Reconciliation Board issued a letter showing that the board failed to reconcile the marriage.

I had time to revisit the trial court proceeding and examined the same specifically on the point of grievances that some of exhibits were not tendered and properly admitted as the evidences. The exhibits which are disputed to be at fault are the Police Form No.3 which was marked as K1, the Form No.3 from the ward office marked as K2 and a letter of agreement (karatasi ya Makubaliano) marked as K3. The above documents were tendered in the trial court but improperly. The evidence was admitted after the respondent had adduced his evidence and the appellant was not given chance to challenge the admissibility of such evidence.

It is a trite principle of law that the documents which were improperly tendered and admitted in court must be disregarded as it cannot form part of the proceeding and the only remedy is to expunge the same from the record of the court. This position was well enshrined by the court of appeal in the case of **Airtel Tanzania Limited vs. Ose Power Solutions**

Limited, civil Appeal No206 of 2017, CAT at Dar es Salaam Registry (TANZLII).

In the present case, the documentary evidence to wit the Police Form No.3, the Form No.3 from the ward office and letter of agreement (karatasi ya Makubaliano) were improperly tendered and admitted in the trial court and I hereby expunge them in the records of the court. Having expunged them in the records then I found this suit to be incompetent due to the fact that the parties did not make reconciliation in the marriage reconciliation board.

I shall, however, confine myself first to this matter concerning the requirement of a certificate from marriage reconciliation board. Section 101 of the law of marriage Act, Cap 29 (R.E 2019) which states: -

> *"101. No person shall petition for divorce unless she has first referred the matrimonial dispute or matter to a Board and the board had certified that it has failed to reconcile the parties".*

For a petition for divorce to be entertained before any court of law, the matrimonial dispute must first be referred to Marriage Reconciliation Board. In the present case, the parties did not refer the dispute to the Marriage

Reconciliation Board and I have scanned the trial court proceedings and records of the first appellate court, I have not found any certificate from the marriage reconciliation board as prescribed under Regulation 9 (2) of the Marriage Conciliation Boards (procedure) Regulations GN 240 of 1971 which directs that the certificate shall be in a prescribed form {Form 3}.

The expunged exhibits are neither a form nor certificate from the board established under section 103(2) (a) and (b) of the law of marriage Act, Cap 29 (R.E 2019) jurisdiction to reconcile the party's dispute. The parties made efforts for reconciliation of their marriage to incompetent authorities. It does not need a trained eye to see that the parties went to the social welfare officer as exhibited in the expunged evidences to wit letters K-2 and also to the police officer who made a letter agreement exhibited as K-3.

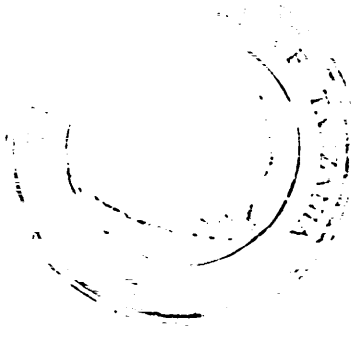
The above letters from the social welfare officer and the police officer, one WP 4323 cannot be treated or acted upon as the Certificate from the Marriage Reconciliation Board in the eyes of the law. In my considered opinion, the same will suffer rejection in the court of law; this court was faced with similar situation in the case of **Happiness Masisi vs. Maximillian Buhatwa, PC civil Appeal No 12 of 2019, (**HCT at Dar-es

Salaam) whereas Honourable Judge Mlacha rejected the letters for not meeting the standard of committee. The social welfare officer and police officer above do not qualify or cannot be treated as the Marriage reconciliation board.

Therefore, it suffices to say that the parties in this case failed to pass in a proper or competent reconciliation board which renders the petition of divorce of the trial court to have been filed prematurely. I will borrow the effect of instituting the petition of divorce prematurely from my fellow learned judge who faced a similar situation and declared the matter prematurely. In the case of **Felix Rugakingira vs Imelda Felix, Matrimonial Cause Appeal No 2 of 2012 (unreported) High Court of Tanzania at Bukoba Registry.**

It is clear the petition for divorce was filed prematurely before first going for reconciliation to the Marriage Reconciliation Board and obtaining a Certificate of failure to reconcile the marriage as per section 101 of the Marriage Act, Cap. 101 R.E. 2002. The above arguments alone suffice to dispose the appeal at hand; I see no need to consider other grounds of grievances raised by the appellant since the first ground alone can dispose the appeal.

For the reasons shown and explained herein above, I find this appeal with merits. It is therefore allowed. I hereby quash the decision of the first appellate court and trial court and set aside the whole proceedings as it was filed prematurely and the trial court had acted without necessary jurisdiction in issuing the decree of divorce. No order is issued as to cost. It is so ordered.



T.M. MWENEMPAZI

JUDGE

20/10/2022