IN THE HIGH COURT OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. NO 39 OF 2022

(Originating from Matrimonial Appeal Cause No.37 of 2021 at Temeke District Court before Hon. Mwankenja RM)

JANETH GONDE RUBIRYA.....APPELLANT

VERSUS

PASTORY PETER MASSAWE .....RESPONDENT

JUDGMENT

Date of last Order: 03/11/2022
Date of Judgement:29/11/2022

OMARI, J.:

In August 2021, the Appellant herein petitioned for divorce from the Respondent herein at the Temeke District Court in Matrimonial Cause No. 37 of 2021. From the record, the facts of the case are that the Appellant and Respondent contracted a Christian marriage on 27 October, 2018 at Buza Catholic Church. The said marriage was not blessed with any issues. In the course of the marriage the Respondent's behaviour began to change and he had extra marital affairs; when he was questioned by his wife; he began beating her. This state of affairs was reported to church elders and parents for reconciliation. However, it did not yield any fruits as the Respondent refused to take part in the reconciliation efforts. Later the

matter was referred to the Marriage Conciliation Board (hereinafter the Board) for reconciliation, which also proved futile.

The Appellant then lodged a Petition for divorce claiming that the marriage had irreparably broken down thus, seeking several reliefs including a decree for dissolution of the marriage. In the answer to the Petition, the Respondent alleged that the marriage had in fact not broken down irreparably and there was still room for it to be repaired. He disputed the allegations of having changed and or having extra marital affairs. Therefore, he prayed for the dismissal of all prayers made in the Petition. Nevertheless, during the hearing the Respondent testified that he had no problem with the decree of divorce as prayed by the petitioner. As regards matrimonial property; during the subsistence of the marriage the couple had acquired two motor vehicles a Toyota Verosa with Registration No. T 639 DQC, a Mercedes Benz with Registration No. T 327 DZQ and one retail shop. The record depicts that the couple agreed to the distribution of the two motor vehicles as pleaded.

This, it would seem is a very straight forward matter, since during the hearing the Respondent back paddled on his answer to the Petition and had no objection to the decree for dissolution of marriage and there does

not seem to be any contention on the issue of division of the matrimonial assets. The saying goes; all's well that ends well, this did not end well. On page 7 of the typed Judgment the honourable trial magistrate points out that before fixing the date of judgment his attention was caught by the fact that; I quote:

> *'.... there was an important issue which the Petitioner did not address the Court during the hearing on the Certificate of Marriage from Reconciliation Board. Now the additional issue which I framed was whether or not the Petition for divorce brought by the Petitioner is tenable on the eyes of the law in absence of Certificate of Marriage from reconciliation Board.' (sic)*

Upon this discovery, the trail magistrate gave the parties audience to address the court on the additional issue so framed. In summary; the parties agreed that the certificate from the Board was not tendered during the hearing though the same was pleaded in Paragraph 12 of the Petition. Both parties through their counsels were in agreement that the "oversight" could be corrected by recalling the witness so that she can tender the said certificate as provided under section 147 of the Tanzania Evidence Act Cap 6.

In his Judgment, the trail magistrate termed the prayer to cure the said anomaly by way of recalling the witness to facilitate the tendering of the certificate as a twisted school of thought. He then went on to deal with

the issue raised and observed that the certificate of the Board was pleaded and annexed in the Petition as Annexure Janeth 2. However, the same was not tendered, admitted and received by the court as an exhibit. He further observed that the Petition offended the provisions of section 101 and 106(2) of the Law of Marriage Act, CAP 29 R.E 2019 (hereinafter the LMA), and was therefore an incompetent Petition for divorce. As for curing the said anomaly as suggested by the learned advocates the trial magistrate was of the view that it was not a legally tenable cure since in his view, tendering of documents as exhibits during hearing is a legal requirement that cannot be cured by invoking section 147 of the Tanzania Evidence Act. Consequently, the trial magistrate choose not to labour on the actual Petition and or the other issues framed, concluding that the Petition is not properly before the court and is liable to be struck out.

It is against this background that the aggrieved Appellant came to this court preferring three grounds of appeal which for clarity, I reproduce as follows:

1. That having held the Petitioner complied with the provisions of section 101 and 106 (2) of the Law of Marriage Act, the trial magistrate erred in law and in fact in holding the petition was incompetent before him.
2. The trial magistrate erred in law and in fact in denying the parties to settle the dispute amicably.

3. That the trial magistrate erred in law in failure to exercise his judicial discretion properly in rejection uncontested application to recall PW 1 and hence reaching to a (sic) decision.

On the basis of these three grounds the Appellant prays that; the appeal be allowed, an order that the Petition was competent before the trial court; the decree of divorce alongside division of matrimonial properties be granted as prayed in the Petition and elaborated in evidence; and any other relief this honourable court may deem fit to grant.

During the hearing of this Appeal both parties were represented; the Appellant by Hosea Chamba learned advocate while Peter Nyangi, learned advocate represented the Respondent.

In his submission the Appellant's advocate averred that the Appeal emanates from the decision of the Temeke District Court striking out Matrimonial Cause No. 37 of 2021 for reasons that the Petition offends section 101 and 106 (2) of the LMA.

After praying to consolidate and argue concurrently; the first and third grounds of appeal the learned advocate submitted that, after hearing the evidence of both parties in Matrimonial Cause No. 37 of 2021 and before composing his Judgment the learned trial magistrate raised the issue of

the certificate of the Board not being tendered. The learned advocate continued to submit that when they were called in so that the anomaly could be addressed; despite having consensus from both parties that the it was an oversight and one that was not fatal so as to affect the Petition and even if it were it could be cured; the trial magistrate reserved his Ruling and the same was given in the Judgment. The learned advocate went on to submit that the trail magistrate faulted the Petition for offending section S. 101 and 106 (2) of the LMA which requires a certificate Board to be annexed to the Petition. In the advocate's view, the said provisions do not state that the said certificate must be tendered as evidence. He contended that in his Judgment, the trial magistrate accedes to the fact that the dispute was referred to the Board and the ensuing certificate was annexed to form part of the Petition. The learned advocate asserted that it was therefore wrong to struck out the Petition on the basis of being incompetent. To buttress his contention, he relied on the case of **Hassan Mohammed Timbulo v. Rehema Clemens Kilawe,** Civil Appeal No. 163 of 2020 High Court Dar es Salaam where the court held that the certificate of the Board is there for the purpose of admission of a Petition not as part of evidence. He further argued that in this particular Petition the existence of the certificate of the Board was not in dispute amongst the litigants, it was enough that it was pleaded and formed part

of the Petition and had it been necessary for it to be tendered the witness could have been recalled. In the learned advocate's opinion, by denying the recall of the witness, the trial magistrate denied the parties justice. He concluded his submission on this ground that the trial magistrate was wrong to rule the Petition was incompetent and as a result striking it out.

On the second ground of appeal the learned advocate briefly submitted that the during the proceedings the parties addressed the court that they had settled the dispute amicably and they had a Deed of Settlement. Moreover, they prayed that the same be recorded by the court and the court issue a decree. The trial magistrate denied the said request. In the learned advocate's view, this was tantamount to compelling the parties to live together while they consider their marriage irreparably broken down which is against the spirit of the matrimonial court. To buttress his argument, he relied on the case of **Joseph Warioba Butiku v. Perucy Muganda Butiku**, 1987 TLR 1. He informed this court that in the said case it was decided that where the parties are at a consensus the court should not compel them otherwise. While concluding, he stated that the court should consider the fact that even before going to the Board there were efforts of reconciling the couple by the family and the church all of which failed; this goes to show that the marriage has irreparably broken down. He prayed that this court grants the divorce decree that the lower

court had failed to grant. In addition, it should order the distribution of matrimonial property that is the two vehicles and all the other orders submitted and prayed for in the Memorandum of Appeal.

When it was the learned advocate for the Respondent's turn to submit, he unequivocally stated that they do not contest the grounds of appeal as itemized in the Memorandum of Appeal and the prayers and reliefs sought by the Appellant through her counsel.

The issue for determination before this court is whether the trial court was correct in striking out the Petition and consequently not granting a decree of divorce or ordering the distribution of matrimonial properties as per the Petition and or as reasoned by the parties during the hearing. The issue can be determined by considering the grounds of appeal as they appear in the Memorandum of Appeal.

As regards the first ground which was consolidated and argued concurrently with the third ground; the issue is whether the trail magistrate was right in striking out the Petition due to failure to tender as an exhibit the certificate from the Board.

Marriage Conciliatory Boards are created by Section 102 of the LMA. In essence the Boards are supposed to act as a mesh, allowing people to channel their disputes through them in the hope for reconciliation. In

effect, it is only those marriages that have failed to be reconciled that are supposed to end up in court. This is the gist of the Board certifying to the court that they have failed to reconcile the parties as provided for in Section 104 (5) and (6) of the LMA.

At this juncture I would like to agree with the court's reasoning in **Hassan Mohammed Timbulo v. Rehema Clemens Kilawe** (supra) that a certificate of the Board is something that is required at admission stage, it must exist before the case is registered and given a number. It is a registration condition which might not necessarily be needed later. What is important is it must be in existence as part of the pleadings. The court in this case likened a certificate of the Board to a Certificate of Death in a probate case, it must be attached to the Petition and must be seen before any step is taken. The court was of the view that in circumstances where there is an issue calling proof using the document then it should be tendered as evidence, otherwise failure to tender the document should not affect the case.

In the present appeal the Respondent might have had an issue with appearance and or the certificate of the Board at the time of answering to the Petition but in the hearing the same was abandoned and there is nothing in the record to show that it was an issue contested by either of

the parties. It would seem, although the Respondent set out to contest the Petition at some point he had a change of mind and decided to settle the same amicably or perhaps concede to the Petition. It is in my view that while the trail court might have been right to inquire about the non-tendering of the certificate, it should have also gauged as to how the same affects the matter at hand. In my considered opinion, for this particular case the non-tendering of the certificate of the Board did not affect the Petition as it was pleaded and annexed and there was no contention about it during the hearing.

On the second ground of appeal; that the trial magistrate erred in law and in fact in denying the parties to settle the dispute amicably. A glance of the record reveals as submitted by the learned advocate for the Petitioner that the parties informed the court that they had a Deed of Settlement and prayed for the court to pronounce divorce. The Court sought to be addressed as to whether it has powers to grant a decree of divorce pursuant to a Deed of Settlement made under Order XXIII Rule 3 of the Civil Procedure Code Cap 33 RE 2019 (hereinafter the CPC) while the pleadings are at variance. The parties addressed the court, the main points being that the court has the said powers because the CPC applies to matrimonial matters by virtue of Rule 29 of the Law of Marriage (Matrimonial Proceedings) Rules and that section 140 of the LMA bars the

courts from compelling the parties to live together. To cement this argument, the Petitioner's advocate cited **Joseph Warioba Butiku v. Perucy Muganda Butiku** (supra). It was further submitted that the law allows the court to issue a consent judgement by virtue of a Deed of Settlement since the parties had agreed orally that the marriage had irreparably broken down. Being that the parties relied on Order XV Rule 1 of the CPC when the they had not reached the stage that was envisaged by the said Order and Rule the trial magistrate did not grant their prayer and the matter continued to hearing ending in the fate I already described when dealing with the first and third grounds of appeal.

In my considered view, amicable settlement of matrimonial disputes is important and should not end with the certificate issued by the Board. However, it is also a delicate matter because our law does not expressly provide for a consent divorce. While parties can agree to the fact that they no longer want to live together as husband and wife; the court has to ensure that the marriage has irreparably broken down before it can grant a decree of divorce as provided for by section 99 read together with section 107 of the LMA. This is not to say courts should not encourage parties to settle their disputes. Litigation does not change or put an end to the wrongs or problems that led to the divorce. Even with a law that does not allow consent divorce, it is important that when for example, a

court is exercising the duties enumerated in section 108 of the LMA it should try guide and allow the parties to minimize any ensuing conflicts arising from the severance of the marital bond. These are usually in the areas of custody and access of children, maintenance and division of matrimonial property that may arise out of the Petition. The management and minimization of future conflicts is what family courts and family law practitioners in other jurisdictions term as future arrangements. As difficult as it is to minimize conflicts in the adversarial system, courts should at least try to minimize conflicts relating to future arrangements; as the parties continue to be members of the same society and at times have to co-parent their offspring. Where the marriage is irreparably broken down as per the law and the parties are in agreement of this; if they can negotiate and get amicable settlements of the future arrangements out of court and or avoid protracted litigation; the result is usually more mutually appealing.

The above notwithstanding, it is important that procedure(s) be adhered to. The trial magistrate could not allow the parties to settle since in his considerable view the prayer was brought prematurely; that is before the first day of hearing as provided by Order XV Rule 1 of the CPC and before the issues were framed for the parties to agree on since the petition and

the answer were not suggesting an amicable settlement as depicted in **Joseph Warioba Butiku v. Perucy Muganda Butiku** (supra).

That said, there is no sound reason as to why the petition was struck out. Accordingly, I allow the appeal ; find that the Petition was competent before the trial court and invoke my revisional jurisdiction to grant the divorce decree and prayers for distribution of matrimonial property. There is no order as to costs.

A.A. OMARI
JUDGE
29/11/2022

Judgment pronounced and dated 29th day of November, 2022 in the presence of Hosea Chamba learned counsel for the Appellant who was also holding brief of Peter Nyangi the learned counsel for the Respondent.

Sgd. **A.A. OMARI**
JUDGE
29/11/2022