

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 235 OF 2021

(Arising from Matrimonial Cause no. 9 of 2018 in the Resident Magistrate Court of Dar es salaam at Kisutu, issued by Hon. T. Simba, PRM)

PLACIDIA GRACE BARONGO APPELLANT

VERSUS

WILLIAM BARONGO RESPONDENT

JUDGMENT

13th December 2021 & 3^d February, 2022

ITEMBA, J;

The appellant and respondent were wife and husband respectively, they celebrated a Civil Marriage in 1988 in Temeke Dar es Salaam and they were blessed with three issues. The parties had peaceful life in Mbezi Beach Dar es Salaam until sometimes in 2011 where things turned sour. The respondent claims that misunderstanding started when the appellant started to misbehave and even tried to kill him. He decided to move out of the matrimonial house in 2016 for his safety. That their communication during that time of separation has been rude, harsh, abusive with threats to the respondent's life.

In 2018 the Respondent petitioned for divorce in Matrimonial Cause No. 9 of 2018 in the Resident Magistrate Court of Dar es Salaam at Kisutu on 17/3/2021 praying for:-

- (a) A declaration that the marriage between the petitioner and the respondent has broken down irreparably.
- (b) An order to dissolve the marriage and a decree of divorce be issued.
- (c) Division of matrimonial properties. The petitioner proposes that for the issue of landed properties each party should take the landed properties which are in their respective names.
- (d) Costs of the petition be provided for by the respondent.
- (e) Any other relief that the court shall deem fit and just to grant.

A judgement was issued whereas it was ordered that the marriage between the parties has irreparably broken down, decree of divorce was issued and properties were divided to the effect that each party will remain

with properties registered in their respective names and the petitioner to maintain the child **A.B** pursuant to section 129 (1) of the Law of Marriage Act No. 5 of 1971 (hereafter the LMA) by providing accommodation, clothing, food and education.

The appellant being aggrieved by the said decision has filed the present appeal with the following grounds:

- 1. That the learned magistrate erred in law and in fact by failing to order equal division of matrimonial acquired by the joint efforts of the parties acquired during their marriage of thirty two years.*
- 2. That the learned magistrate erred in law and practice by ordering to the effect that each party shall remain with the properties registered in their own names without evaluating the value of the assets or evaluating the evidence adduced by the parties with regard to contributions.*
- 3. That the learned magistrate erred in law and in fact by failing to identify which of the matrimonial assets were registered in the names of each spouse resulting in inequitable division of matrimonial assets to the disadvantage of the Appellant who married the Respondent*

when he was living in a rented single room with no asset at Mtoni Aziz Ally at Mama Hussein's house, with no asset to his name.

- 4. That the learned magistrate erred in law and in fact by impugning that the Appellant did not show how she contributed in the acquisition of the matrimonial assets while by the parties' own pleadings and evidence the couple was happily married and functional for 30 years.*
- 5. That the learned magistrate erred in law and in practice by failing or neglecting to properly record the evidence of the Appellant.*
- 6. The learned magistrate erred in law and in practice by failure to address the prayer of the Appellant for equal division of matrimonial assets while blanketly endorsing the prayer of the Respondent.*
- 7. That the learned magistrate erred in law and practice by failing to address the issues drawn duly by the court as a result of which gross injustice was committed against the appellant.*
- 8. That the learned magistrate himself when he admitted the respondent's salary slip and letter from his employer which neither had been attached to the pleadings nor notice given of their production*

given to the appellant in advance in accordance to law and practice thus taking the letter unfairly by surprise.

When the appeal was scheduled for hearing the appellant was represented by Mr. Antipas Lakamu who was holding brief for Ms. Magdalena Rwebangira while the respondent was represented by Mr. Nehemia Nkoko. It was agreed by both parties that it is convenient to proceed by way of written submission.

Prior to arguing the grounds of appeal the appellant's counsel raised a legal issue that the trial court proceeded with hearing of a matrimonial cause, in the absence of certificate of Marriage Reconciliation Board, an omission which contravenes section 101 of the Law of Marriage Act. He added that he took over the matter at appeal stage and could not notice the same until the time he was supplied with proceedings. To support his argument, the counsel for the appellant stressed that the said omission is incurable and he referred the court to the case of **Yohana Balole vs. Anna B. Malongo**, Civil Appeal No. 18 of 2020 which stated that the requirement to obtain and present a Marriage Reconciliation Board Certificate was mandatory and failure to do so renders the proceedings null and void. The appellant also cited the case of

Hassan Ally Sandema v Asha Ally (CA) Civil Appeal No.249 of 2019 (unreported).

In response to this issue of absence of Certificate of Reconciliation Board, the respondent's counsel strongly objected the said argument. The learned counsel argued that the respondent had deserted the appellant. He referred the court to paragraph 9 of the petition which stated "... *the respondent behavior within their matrimonial home amounted to desertion of the petitioner forces him to go out of their matrimonial home...*" and paragraph 5 and 6 of the written statement of defence which summarily states that "...*the petitioner deserted from the house for his own interest.*" He added that the appellant even managed to report that the respondent is missing and has deserted him. That the said report was made at Kawe Police station and the "RB" annexure "B" was issued to that effect.

Based on this argument he submitted that exceptions under section 101 (a) of the LMA were met as both the appellant and respondent pleaded desertion.

The respondent further distinguished all the cases referred by the appellant on the sole ground that in those cases, circumstances under

section 101 (a to f) of the LMA were not pleaded by parties but in this case, both parties have pleaded desertion which is an exception mentioned under section 101 (a) of the LMA. He also invited the court to apply the overriding objective principle so as to uphold substantive justice.

Before I proceed with the merits or otherwise of the rival arguments by both learned counsels, I find it appropriate to first determine the issue of reference of the dispute to the Marriage Reconciliatory Board.

After keen consideration of the parties' arguments and records of appeal I must say that first, the appellant did not include the grievance pertaining non reference of the dispute to the marriage Conciliation board as a ground in his Memorandum of Appeal, however, due to the fact that the ground touches the key issue of jurisdiction, and both parties have argued on it, this court has a duty to determine this issue before proceedings with other grounds.

To start with, the law is settled under Section 101 of the LMA as follows:

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.

I have gone through the pleadings and indeed paragraph 9 of the divorce petition reads:

"9. That, the Respondent behavior within their matrimonial home amounted to desertion of the Petitioner forcing him to go out of their matrimonial home thus forcing the petitioner to rent a house as herein above mentioned, and in the event the Petitioner is currently staying at Sinza, Mapambano, Ubungo District in Dar es salaam so that the Petitioner could have a safe place to reside."

And paragraphs 5 and 6 of the written statement of defence respectively, states that as follows;

"5. That the contents of paragraph 6 to 9 of the Petition are strictly denied and the petitioner shall be put to strictest proof thereof. In further reply to paragraph 6 to 9 of the Petition, the Respondent shall state that the Petitioner is attempting to deceive the court by providing to the court false particulars or statements sicne there is no anyone who attempted to kill him. The Petitioner deserted from the house for his own interest.

6. "That, the Petitioner left the matrimonial home on the Sunday 21st August, 2016 and on 22nd August, 2016 the Respondent reported the matter to Kawe Police Station vide RB No. KW/RB/9346/2016. A copy of RB is attached herein marked "B""

Looking at these paragraphs, the petitioner who is the respondent herein, alleged that he deserted the respondent for his own safety and the appellant supports the same. Therefore, it was actually the petitioner who deserted the respondent and not otherwise.

Section 101 (a) of the LMA provides that:

"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;***
[Emphasis supplied]

(b) N/A

As elaborated earlier, I have revisited the appeal records and both the pleadings and proceedings are silent on the fact that before filing the divorce petition parties were referred to the Reconciliation Board. The respondent's counsel in his submission, in essence, admits that there was no Certificate of Reconciliation Board forming part of proceedings and adds that the said omission is due to the fact that the petitioner has alleged desertion which is an exemption as per S. 101 (a) of the LMA.

The way I see it, the provision of section 101 (a) is very clear that for the exemption to suffice, **one**, the respondent should have been the one deserted the petitioner, and **two**, the petitioner does not know the whereabouts of the respondent. It appears in our case at hand, that the petitioner who is herein the respondent, was the one who deserted the respondent who is the appellant in this appeal. Again, there is no proof that the petitioner at the time of lodging the petition of divorce, he didn't know the whereabouts of his spouse. From this viewpoint, I believe the parties were not exempted at all from compliance with the requirement of section 101 of the LMA.

In **Hassan Ally Sandali vs. Asha Ally** Civil Appeal No. Civil Appeal No. 246 of 2019 (Unreported), the Supreme Court had lucidly observed thus:

*"...the granting of the divorce...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 Borad certifying that it has failed to reconcile the parties...**"*[Emphasis added].

Basing on the above, it prudent to state that the trial Court erred in law to entertain a matrimonial dispute which was not yet referred to the marriage reconciliation board as required by the law.

In the far side, in the records of appeal, I have come across form No. 3 which shows that on 20/2/2018 parties went to "Baraza la Kata Mikocheni" which translates as Mikocheni Ward Tribunal, for reconciliation. The said form is titled "BARAZA LA KUSULUHISHA MASHAURI YA NDOA YA KATA YA MIKOCHEMI." The same has been signed by the Chairman and bears the stamp of "Baraza la Kata Mikocheni". The form implies that the parties attempted to reconcile. Nevertheless, the said form did not form part of the proceedings as it was not tendered as exhibit during trial. Further, neither of the parties have referred to it in this appeal. Therefore, at this stage, I do not wish to rely on the said certificate as it is not proper before the court.

The supreme Court in the case of **Yohana Balole** (supra) cited by the appellant, when confronted with similar circumstances it stated among others that;

'...the use of the words "shall" in section 101 implies that compliance with section 101 is mandatory except where there

is evidence of existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board.'

In the same case, the Court of appeal while citing **Hassan Ally Sandali vs. Asha Ally** (supra) stated clearly that;

"...the trial Court was wrong to rely on a letter from A.I.C church as a sufficient document to institute matrimonial proceedings because the said letter was wrong both in form and content and it was not part of the records as neither of the parties tendered the same as exhibit." [Emphasis is added]

From the above position, it shows that even if this Court wants to consider the said letter from Baraza la Kata Mikocheni, the same needed first to have been properly admitted before the court a procedure which was not complied with in the case at hand.

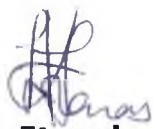
Based on the above, I conclude that, the trial court had no jurisdiction to proceed with matrimonial proceedings without proof of parties' reference to reconciliation board. The respondent's petitioner for divorce was incompetent for contravening section 101 and 106 of the LMA.

Consequently, I invoke the powers under section 44 (1) (b) of the Magistrate's Court's Act [Cap. 11 R.E 2019] and nullify the entire proceedings of Kisutu Resident Magistrate Court, quash the judgment and set aside the orders thereof.

The Respondent (petitioner) is at liberty to refile a fresh petition, if he so wishes in accordance with the law.

Therefore, the appeal is allowed to the extent explained hereinabove. Considering that this matter is matrimonial, each party bears its own costs. It is so ordered.




L. J. Itemba
JUDGE
3/2/2022