

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

(PC) CIVIL APPEAL NO. 61 OF 2020

(Originating from Civil Appeal No. 21/2020 at Babati District Court, Matrimonial

Cause No. 08 of 2020 at Babati Primary Court)

SHAMSA JOSEPH.....APPELLANT

VERSUS

AHMED ZBERI..... RESPONDENT

EX-PARTE JUDGMENT

1/11/2021 & 18/2/2022

ROBERT, J

This appeal arises from Civil Appeal No. 21 of 2020 at the District Court of Babati where the Respondent, Ahmed Zuberi, challenged dissolution of his marriage with the appellant, Shamsa Joseph, arising from Matrimonial Cause No. 8 of 2020 at Babati Primary Court which culminated into a decree of divorce between parties. The District Court quashed the proceedings and decision of the trial Court for lack of certificate of Marriage Conciliation Board and proceeded to allow

the appeal. Further to that, the Court ordered that the appellant herein is at liberty to file her petition afresh if she so desires. Aggrieved, the appellant preferred this appeal.

Briefly stated, the background of this matter reveals that, on 4th day of October 2018, the appellant herein filed Matrimonial Cause No. 20 of 2018 against the respondent herein at Babati Primary Court seeking dissolution of marriage, maintenance of children and distribution of matrimonial assets. After a full trial, the Primary Court made a finding that, marriage between couples was broken down beyond repair and granted reliefs sought in its decision delivered on 12/7/2019.

Aggrieved, the respondent herein registered Civil Revision No. 4/2019 at the District Court of Babati which, after the hearing, quashed and set aside the proceedings and judgment of the trial Court in Matrimonial Cause No. 20/2018 for lack of participation of assessors in the proceedings of the trial court. In its judgment delivered on 17/3/2020, the District Court ordered that parties are at liberty to file a fresh suit if they wish to do so.

On 22/10/2019 the appellant herein filed another petition for divorce at the Primary Court of Babati vide Matrimonial Cause No. 08 of 2020 which was decided in her favour on 3/6/2020. Aggrieved, the

respondent herein appealed to the District Court of Babati which quashed the decision of the trial court on the grounds that the proceedings at the trial court proceeded without the certificate from the Marriage Conciliation Board as required under section 107(3) of the Law of Marriage Act. Again, the District Court ordered that the appellant herein is at liberty to file her petition afresh if she so desires. Aggrieved, the appellant preferred the present appeal based on the following grounds:

- 1. That, the trial magistrate erred in law and fact by arriving into a contradictory judgment without considers the proper evidence adduced by the Respondent.*
- 2. That, the trial magistrate erred in law and fact in misconstrued the decision of the both primary court despite the wrongly allegation that the appellant id not tendered the certificate form No. 3 while there is proved evidence that a board has certified that it ha failed to reconcile the parties and the Appellant tendered the alleged form.*
- 3. That, the trial Magistrate misdirected himself in delivering judgment without consider that the marriage of the parties was conducted under Islamic rites and the same the dissolution was dully warranted by the said law that marriage has irrepealably broken down beyond repair.*
- 4. That, the trial Magistrate erred in law and fact for failure to properly to evaluate the evidence by the parties and as a result arrived at erroneous decision not maintainable at law.*
- 5. That the decision of the trial court is bad in law for lacks the legal reasoning.*

At the hearing of this appeal, the appellant herein appeared in person without representation. The respondent did not enter appearance in spite of being served repeatedly through the Ward Executive Officer. The matter proceeded ex- parte by way of written submissions as ordered by the Court.

Amplifying on the first ground of appeal, the appellant submitted that the trial court erred in law by arriving at a contradictory judgment which ordered the matrimonial home to be divided between the appellant and the respondent without considering her evidence at the trial court.

On the second ground, the appellant maintained that, in her first petition for divorce she tendered the Form No. 3 from the Marriage Conciliation Board together with a letter from Baraza Kuu la Waislam dated 21/9/2018 where the Board had declared that it failed to reconcile the parties. Thus, the arguments raised by the first appellate court that there was no certificate from the conciliation board is immaterial and has no merit at all. It was her submissions that this ground has merit.

Coming to the third ground of appeal, the appellant argued that, marriage between the parties was successfully dissolved in 2020. Thus,

the act of the trial court ordering reliefs which were not sought for raised doubt regarding the legality of the whole judgment. For that reason, she maintained that this ground of appeal is meritorious.

As for the fourth and fifth grounds of appeal, the appellant submitted jointly that, the trial Magistrate failed to evaluate the evidence brought before him for determination of the matter. Further to that, she maintained that, the 1st appellate court's judgment lacks legal reasoning. In the end, she prayed for the appeal to be allowed and the court to quash and set aside the judgement of the trial court.

Having heard submissions of the appellant and examined records in support of this appeal, I will now pose here and determine the merit of this appeal.

This court noted that, at the District Court the appellant raised four grounds of appeal. However, in determining the appeal the District Court raised one issue suo moto and determined the appeal on the basis of that issue. The issue raised was not covered in the grounds of appeal and parties were not invited to address the Court on the said issue at the District Court. The said issue is, whether the Marriage Conciliation Board issued a certificate of its finding.

It is a trite law that, a decision likely to affect the rights of parties shall not be made without affording the parties a right to be heard. In the case of **EX-B.8356 S/SGT Sylvester S. Nyanda vs The Inspector General of Police & the Attorney General**, Civil Appeal No. 64 of 2014 (unreported) the court held inter alia that:-

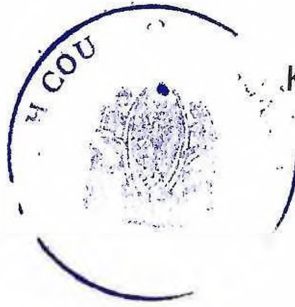
"The way the first appellate court raised two jurisdictional matter Suo motto and determine them without affording the parties opportunity to be heard has made the entire proceedings and judgment of the high court a nullity and we hereby declared so".

In the present appeal as stated earlier, there is no dispute that the appeal was decided on the issue raised suo moto by the 1st appellate court and the record reveals that parties were not accorded the right to be heard which, as guided by the cited case, renders the decision of the 1st appellate court a nullity.

On the basis of the foregoing, I proceed to quash and set aside the proceedings and judgment of the District Court in Civil Appeal No. 21 of 2020. As a consequence, I order for immediate rehearing of the appeal before another competent magistrate.

Appeal is allowed with no order as to costs.

It is so ordered.



K.N. ROBERT
JUDGE
18/2/2022