

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 238 OF 2021

(Originating from the judgment and decree of the Resident Magistrates Court of Dar es salaam at Kisutu in Matrimonial Cause No.20 of 2018 before Hon. H.S. Ally, **SRM**, dated 17th of December, 2019)

HOSEA PATERSON KAJANGE.....APPELLANT

VERSUS

JUSTINA MMARY MMBANDO..... RESPONDENT

RULING

Date of last order: 24/02/2022

Date of ruling: 06/05/2022

E.E. KAKOLAKI, J.

This is an appeal by Hosea Peterson Kajange who is dissatisfied with the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Matrimonial Cause No. 20 of 2019. A brief historical background to this appeal is noteworthy. Parties herein on the 20/12/1997 contracted holy union under Christianity rites in Dar es salaam. Prior to their nuptial vows, the two were blessed with two male issues whom for the purposes of preserving their identity will be referred by their initials as R.H.K and S.H.K. Marriage life between the parties was led smoothly for two years before the ups and downs ensued following several misunderstandings.

As the matrimonial squabbles intensified, the two parted ways and consequently the appellant who was the petitioner before the trial court filed the petition vide Matrimonial Cause No. 20 of 2019, seeking for among other reliefs divorce decree on grounds of denial of his conjugal rights, adultery, cruelty and irresponsibility on the part of the respondent, order for custody of the children and division of matrimonial properties jointly acquired. On her part the Respondent strenuously challenged appellant's grounds for dissolution of their marriage as she was still in true love with him. She attributed their misunderstanding to labour complications which she underwent in the course searching for children that included two still births (two times) which put her life in danger, high blood pressure and rupture of the placenta. That, she was medically advised by her doctor not to conceive for three years consecutively though she breached the conditions because of love to her husband. She totally denied appellant's accusations on her over adulterous acts, denial of conjugal rights, cruelty and irresponsibility. The trial court upon evaluation of the evidence from both sides was convinced that, there was no sound grounds for dissolving parties' marriage as the appellant had failed to prove his assertions against the respondent. The appellant's petition was thus dismissed while ordered by the court to return to his matrimonial home and join his family with immediate effect. The appellant is unhappy

with the said decision and has formed a decision to lodge the present appeal with two grounds going thus:

1. That the trial magistrate erred in law and in fact in holding that the marriage between the appellant and the Respondent has not been broken down irreparably.
2. That the trial magistrate erred in law and in fact by ordering the appellant to return to the matrimonial home to join his family with immediate effect.

With leave of the court both parties who appeared represented argued the appeal by way of written submissions. Mr. Faraja Kajuni, learned counsel appeared for the appellant whereas the respondent was fended by Mr. Martin Sangila, learned Advocate. While preparing to compose the judgment and in the course of perusing the trial court judgement this court came across the legal issue which was raised by the respondent, argued by the parties and decided on, though not forming part of the grounds of appeal but affected jurisdiction of the trial court. For the reason to be apparent soon this court found it so relevant to address it first before going in to merit or otherwise of the appeal.

It was raised by the respondent during the trial court, whether the Ward Land Tribunal for Wazo or Kawe which allegedly issued the parties with

Certificate for failure to reconcile them in compliance with section 101 of the Law of Marriage Act, [Cap. 29 R.E 2019] in real sense constituted the Ward Marriage Reconciliatory Board, capable of issuing the said certificate. In its decision the trial court adjudged that, though the alleged Board sat as Ward Land Tribunal was competent enough to entertain matrimonial issues. It is from that decision this court invited parties to address it first on that legal issue as to whether the Ward Land Tribunal for Wazo that certified to have failed to reconcile parties' dispute was properly constituted as Marriage Conciliatory Board and whether the present appeal is competent before the court, hence this ruling. Responding to that call parties appeared in court on 06/04/2022, ready to address the court on the issue at hand represented by their respective advocates in which Mr. Deusdedith Luteja joined efforts with Mr. Martine Sangija, counsel for the Respondent.

Addressing the court on the raised issue, it was Mr. Kajuni for the appellant who took floor first. He started by informing the court of the constitution of the Ward Tribunal which is dully established under section 3 of the Ward Tribunal Act, [Cap. 206 R.E 2002] and its jurisdiction as provided under section 8,9 and 10 of the same Act. He argued section 9 of the Ward Tribunal Act empowers the Tribunal among other functions,

the function to inquire and determinate criminal offences and civil disputes including all functions of the Marriage Reconciliation Board as specifically stated in item 2 of part III of the schedule to the Act. While acknowledging establishment of the Marriage Reconciliation Board under section 102(2) of the Law of Marriage Act, [Cap. 29 R.E 2019], Mr. Kajuni submitted that, since the Ward Land Tribunal is also established under the Ward Tribunal Act, then it has all powers to perform other functions and duties of the Ward Tribunals including reconciliation of marriage disputes. On that basis he opined that, the Ward Land Tribunal for Wazo was properly seated when entertaining the parties' marriage dispute as the stamps for Wazo Ward Land Tribunal affixed on the Certificate issued to the parties did not affect in any way functions of the Tribunal as the certificate is titled the 'Marriage Conciliatory Board'. He therefore urged the court to find the certificate was valid and properly issued to the parties by the properly constituted Board, the trial court proceedings properly conducted hence the appeal is properly before the court.

On the respondent's side Mr. Luteja resisted the submissions by Mr. Kajuni that, the Ward Land Tribunal for Wazo ward was properly constituted when issued the certificate to the parties certifying that it had failed to reconcile them. He was in agreement with Mr. Kajuni's submission on

establishment of the Ward Tribunals in every ward in the country under section 3 of the Ward Tribunal Act, and their functions as rightly provided under the Act and the fact that, the same constitutes a Marriage Conciliatory Board for each ward, particularly when seating to reconcile matrimonial disputes as empowered under item (ii) Part III of the schedule to the Ward Tribunal Act, read together with section 102 of the Law of Marriage Act, [Cap. 29 R.E 2019]. As to the powers and functions of Ward Land Tribunal while conceding to the submission by Mr. Kajuni that, the same is also established under the Ward Tribunal Act, he said its powers and functions are limited to determination of land matters only. And that, it becomes the 'Court' when exercising those powers and functions as provided under section 10 of the Land Disputes Courts Act, [Cap. 216 R.E 2019] in which its composition and jurisdiction is provided under the said Act. It was his submission therefore that since the Ward Land Tribunal becomes the Court when exercising its powers of adjudicating land matters only, the certificate issued by Ward Land Tribunal for Wazo ward was invalid as the stamps affixed to it manifested the titles, functions and capacities of the people who sat and signed the document which was the basis for institution of the petition in court. He added the language used in the stamps leads to an inference that, when certifying that had failed to reconcile the parties' marriage dispute the said

officers were sitting as members of the Land Court established under Land Disputes Court's Act and not as Marriage Reconciliation Board. Thus the issued certificate I hold was invalid and since it is the document that initiated the matrimonial proceedings the entire trial court proceedings and the decision thereof were a nullity. With that submission the learned counsel urged this court to find the trial court wrongly entertained the parties' matter for want of valid certificate as required under section 101 of LMA, hence the present appeal is incompetent.

I have considered the rival submissions by the learned counsels on the issue raised suo motu by the court. It pleases this court to quote the excerpt from the impugned decision for better understanding of the matter under consideration. The learned Senior Resident Magistrate in his judgment at page 6 when deciding whether the Ward Land Tribunal for Wazo properly constituted the Marriage Reconciliation Board as provided under section 102 of LMA ruled thus:

"The question is whether the Ward Land Tribunal for Wazo is a Marriage Reconciliation Board under section 102 of the Law of Marriage Act. The counsel for Respondent has submitted that a Ward Land Tribunal is not a Marriage Reconciliation Board under section 102 of the Law of Marriage Act. With due respect, that view cannot be correct. Part III item (i) of the schedule to the Ward Tribunal Act

No. 1985 is very categorical that Ward Tribunals are empowered to do all functions of Marriage Reconciliation Board vested in the existing arbitration Tribunal in terms of Government Notice No. 108 of 1971 under the Law of Marriage Act, 1971. This being the position the contention by the learned counsel for the Respondent that the Ward Land Tribunal for Wazo is not Marriage Reconciliation Board is, with all respect, untenable."

The learned senior Resident Magistrate concluded by saying and I quote:

"..., I hold that the Ward Land Tribunal for Wazo acted intra viresly as a Marriage Reconciliatory Board under the Ward Tribunal Act No. 7 of 1985 and it properly exercised its powers conferred to it under item (1) part III of the schedule to the same law. The Ward Tribunal Act to reconcile the parties and to issue the certificate of failure (exhibit P.1). Therefore exhibit P1 is proper and the petition is properly before the court."

Now the issue for determination before this court is whether the Ward Land Tribunal for Wazo, properly constituted and discharged its functions as a Marriage Reconciliation Board. I am in agreement with both counsels submissions as rightly submitted that, all Ward Tribunals in every ward in the country are established under section 3 of the Ward Tribunal Act, [Cap. 206 R.E 2002] with its composition, powers and functions provided under section 8,9 and 10 of the Act. It is also uncontroverted fact that the

said Ward Tribunals Act under section 9(1) provides the said Tribunal with jurisdiction to inquire and determine Criminal offences and civil matters as specified in the schedule of the Act one of which is to perform all functions of the Marriage Reconciliation Board. (See item 2 Part III of the schedule to the Act). Marriage Reconciliation Board is therefore established under item (ii) Part III of the schedule to the Ward Tribunal Act read together with section 102(1) of the LMA. Further to that I am not in quarrel with the contention from Mr. Kajuni that the Ward Land Tribunal Act traces its origin from the Ward Tribunal Act. In order to appreciate our agreement to the establishment of the Ward Tribunals in every ward in the country and the Marriage reconciliation Board, I find it imperative to quote the provisions of section 3 of the Ward Tribunal Act, item (ii) Part III of the schedule to the Act and section 102(1) of the LMA. Section 3 of Ward Tribunal Act reads:

3. There is hereby established a tribunal for every ward in Mainland Tanzania to be known as the Ward Tribunal for the Ward for which it is established.

Item (ii) Part III of the schedule to the Ward Tribunal Act provides thus:

(ii) All functions of Marriage Reconciliation Board vested in the Arbitration Tribunal in terms of Government Notice No. 108 of 1971 under the Law of Marriage Act, 1971.

And section 102(1) of the Law of Marriage Act, (LMA) reads:

102.-(1) The Minister shall establish in every ward a Board to be known as a Marriage Conciliation Board and may, if he considers it desirable so to do, establish two or more such Boards in any ward.

This Court in the case of **Hassan Mohamed Timbulo Vs. Rehema Clemens Kilawe**, Civil Appeal No. 163 of 2020 (HC-unreported) also had an opportunity to discuss and determine on the establishment of Marriage Reconciliation Board and its categories being the one, ones designated under Ward Tribunals, second, those designated under community committees (religious institutions) and committees of the Social Welfare Department. On the ones designated under ward tribunals the Court had this to say the finding which I fully subscribe to:

*"Marriage Conciliation Boards are creature of the statute and are regulated by the law. The relevant law is sections 102, 103 and 104 of the Law of Marriage Act and rules made thereunder. Section 102(1) gives the minister responsible for legal affairs power to establish in each ward a Board to be known as the Marriage Reconciliation Board. This was designated to be the **Ward Tribunal** established under the Ward Tribunal Act, (See Part III (ii) of the schedule to the*

Act). So, when we talk of the Board we mean the ward tribunal ...”

As for the Ward Land Tribunal, the law is very clear as to its establishment under section 10(1) of the Land Disputes Courts Act, since it is established a Court to exercise its jurisdiction and powers in each ward for the purposes of the Act, Land Act and Village Land. Section 10(1) of the Land Disputes Courts Act reads:

10.-(1) Each Ward Tribunal established under the Ward Tribunals Act shall be a Court for the purpose of this Act, the Land Act and the Village Land Act and shall have jurisdiction and powers in relation to the area in which it is established.

As to the jurisdiction of the said Court as a 'Ward Land Tribunal', section 13(1) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], provides an answer to the effect that, it possesses exclusive jurisdiction to hear and determine matters concerning land only, in its area and not otherwise. For clarity section 13(1) and of the Land Disputes Courts Act says:

*13.-(1) Subject to the provisions of subsection (1) of section 8 of the Ward Tribunals Act, **the primary function of each Tribunal shall be to secure peace and harmony in the area for which it is established, by mediating between and assisting parties to arrive at a mutually***

acceptable solution on any matter concerning land within its jurisdiction. (Emphasis is supplied)

What is discerned from the above cited provision of the law, is the settled law that, the primary function of each Tribunal established under the Tribunal Act commonly known as Ward Land Tribunal is to *secure peace and harmony, by mediating between and assisting parties to arrive at a mutually acceptable solution on **any matter concerning land within the area for which it is established.*** With that clear position of the law, I distance myself from Mr. Kajuni's proposition and trial court's finding that, since the Ward Land Tribunal is established under the Ward Tribunal Act then it had powers to sit as Marriage Reconciliation Board and therefore the certificate was valid. Had the learned trial magistrate considered the provisions of section 13(1) of the Land Disputes Courts Act on the jurisdiction of the Ward Land Tribunal, I am certainly sure he would not have arrived to the conclusion he reached. On the same beat, I differ with submission of Mr. Kajuni on validity of the certificate and, instead I shoulder up with Mr. Luteja for the respondent on his submission that, the purported certificate issued by the said Ward Land Tribunal for Wazo ward bearing two stamps of the chairman and secretary to the Ward Land Tribunal were invalid in law. I have arrived that conclusion basing on the fact that, the stamps affixed to the purported certificate exhibited the

titles, functions and capacities of the persons who purportedly sat to inquire and reconcile parties as Marriage Reconciliation Board while in fact did not constitute it. It is from those reasons I find the issue is answered in negative that the Ward Land Tribunal for Wazo ward did not legally constitute the Marriage Reconciliation Board. And for that matter the purported certificated issued to the parties and tendered in court to prove compliance of section 101 of the LMA by the parties when instituting the petition was invalid ab initio.

Now the remaining question is whether this appeal is competent before the court for originating from the proceeding arising from an invalid certificate. It is the law under section 101 of the LMA that, no person shall petition for divorce in court unless he/she has first referred the matrimonial matter or dispute to the Marriage Reconciliation Board. In this matter since the appellant lodged the petition accompanying with the invalid certificate issue by the Ward Land Tribunal for Wazo instead of Marriage Reconciliation Board, then the proceedings before the trial court were a nullity as well as its judgment and orders thereto. In the event I invoke the revisional powers bestowed to this Court under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and proceed

to quash the trial court proceedings and set aside the judgment and orders thereto.

As the proceedings and the trial court's decision sought to be impugned are premised on a nullity which have already been quashed and set aside, there is no competent appeal before this court. In the end I struck out the appeal for want of competence. The appellant is advised to file a fresh petition if he so wishes.

As this is a matrimonial matter I make no order as to costs.

It is so ordered.

DATED at Dar es salaam this day of 06th Day of May, 2022.



E. E. KAKOLAKI

JUDGE

29/04/2022.

The Ruling has been delivered at Dar es Salaam today on 06th day of May, 2022 in the presence of Mr. Faraja Kajuni advocate for the Appellant, Mr. Martine Sangila, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE
06/05/2022

