

IN THE HIGH COURT OF TANZANIA
(IN THE SUBREGISTRY OF MWANZA)

AT MWANZA

PC CIVIL APPEAL NO. 109 OF 2022

*(Arising from Matrimonial Appeal No.16 of 2022 at Nyamagana District Court and
and Matrimonial Cause No. 23 of 2022 at Mwanza Urban Primary Court)*

MARIAM ATHUMAN.....APPELLANT

VERSUS

SALIUS DIDACE..... RESPONDENT

JUDGMENT

Date of Last Order: 07/02/2023

Date of Judgment: 27/02/2023

Kamana, J:

Mariam Athuman, the Appellant, and Salius Didace, the Respondent tied the knot in 2016 under Islamic rites. During the subsistence of their marriage, the couple was blessed with two issues. Besides, they acquired various properties.

Their happy marriage life did not last longer as things turned sour sometimes in the year 2020. The Appellant evidenced during the trial at Mwanza Urban Primary Court that she was recipient of beatings inflicted by the then lovely husband of hers. She testified to have been deprived of the properties acquired during the subsistence of their union.

On the other hand, it was the case of the Respondent, that his once lovely wife was no longer faithful in their marriage. The Respondent evidenced to have eavesdropped the Appellant's phone calls to the extent of discovering her unfaithfulness. The Appellant mentioned two guys bearing amusing names of Bugando Biggy Daddy and White Star as flirting with his wife.

In a bid to resolve endless conflicts in their marriage, in the year 2021 the Respondent approached Mahina Ward Tribunal for conciliation where he accused the Appellant of adultery. However, the conciliation process did not come to an end as the Respondent abandoned his reference to the Tribunal.

In the year 2022, the Appellant approached the trial Court petitioning for divorce, division of matrimonial properties and maintenance of children. Upon hearing both parties, the trial Court satisfied that their marriage was broken beyond repair. In that case, it proceeded to grant a divorce and order division of matrimonial properties and maintenance of children.

The decision of the trial Court did not amuse the Appellant. She consequently filed an appeal against such decision in the Nyamagana District Court. She advanced four grounds of appeal as follows:

1. That the trial Magistrate erred in law and facts for failure to categorize matrimonial and non matrimonial assets in the entire decision.
2. That the trial Magistrate erred in law and facts for failure to suitably distribute the matrimonial assets between the parties.
3. That the trial Magistrate erred in law and facts for shifting maintenance of children to the school and indeed declare unsuitable maintenance of the children.
4. That the trial Magistrate erred in law and facts for shifting the burden of proof to the Appellant.

When the appeal was heard, it was determination of the first appellate Court that the decision of the trial Court was right. In that case, the said appeal was dismissed.

Aggrieved by such decision, the Appellant approached this Court by way of an appeal armed with six grounds as follows:

1. That the first appellate Court erred in law and fact in entertaining the matter without considering that the trial Court did not have requisite jurisdiction for want of Certificate from Marriage Conciliation Board.

2. That the trial Court erred in fact and law to ascertain and categorize matrimonial assets before division.
3. That the trial Court erred in law and fact by using evidence and exhibits which were not part of the evidence by the parties.
4. That the trial Court erred in law and fact for failure to recognize and appreciate the Appellant's contribution in acquisition of matrimonial assets.
5. That the trial Court erred in fact and law for failure to read over to the parties the documentary evidence after admission.
6. That the trial Court erred in fact and law for failure to consider and evaluate the testimony adduced by the Appellant.

Save for the first ground which touches issues of jurisdiction, the remaining grounds challenges the decision of the trial Court and not the 1st appellate Court. In that case, I will not delve to determine them.

When the appeal was called on for hearing, the Appellant was represented by Mr. Raphael Lukindi, Advocate. The Respondent appeared in person. At the instance of both parties, the appeal was argued by way of written submission.

Arguing in support of the first ground of appeal, the learned Counsel for the Appellant contended that jurisdiction is a creature of

statute. In that case, he was of the position that every court is under the duty before venturing into determining any matter before it to satisfy itself as to whether it has jurisdiction over the matter. Deducing from that position, Mr. Lukindi contended that for a matrimonial dispute to be adjudicated by any court, the same must have been referred to the Marriage Conciliation Board and the same must certify that it has failed to conciliate the parties as per sections 101 and 106(2) of the Law of Marriage Act, Cap. 29 [RE.2019].

Mr. Lukindi, learned Counsel contended that from the records of the trial Court there was no Certificate of Marriage Conciliation Board. In that case, he prayed this Court to nullify the proceedings and judgments of the lower courts. In buttressing his position, the learned Counsel made a reference to the cases of **Seif Omary Nguge v. Husna Ally Mikengesi**, Civil Appeal No.397 of 2021 and **Patrick William Magubo v. Lilian Peter Kitali**, Civil Appeal No. 41 of 2019.

Responding to that ground of appeal, the Respondent was of the view that the trial and the first appellate courts were vested with jurisdiction to entertain the matter. It was his submission that the dispute was referred to the Marriage Conciliation Board whereby the Board failed to conciliate the parties. In view of that, the Respondent

contended that section 101(f) of the Law of Marriage Act, Cap.29 allows the Court to dispense with the requirement of the Certificate from the Board when it is satisfied that there are extra ordinary circumstances which renders issuance of the certificate impracticable. In view of that, he was of the opinion that since he (Respondent) left the matrimonial home for safety reasons, the circumstances were not normal to guarantee conciliation. That being the case, the Respondent prayed this Court to hold that the lower courts were clothed with the jurisdiction.

Rejoining, the Appellant contended that the Respondent has failed to state the extra ordinary circumstances under section 101(f) of the Law of Marriage Act. In view of that, she implored this Court to take the position that the trial Court did not have jurisdiction to entertain the petition for divorce.

At this juncture, I think it is pertinent to have a look at what jurisdiction means. According to **Halsbury's Laws of England, 4th Edition, Re issue Vol 10 para.314**, jurisdiction is defined as follows:

'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the

statute, charter or commission under which is constituted, and may be extended or restricted by similar means.'

Deducing from the cited definition, it is clear that courts derive their jurisdiction from statutes under which they are established or given powers to adjudicate over certain matters. The trial Court in the case at hand was the primary court. Such Court generally derives its jurisdiction to entertain matrimonial disputes from section 18(1)(b) of the Magistrates' Court Act, Cap. 11 [RE.2019] which states:

'18.-(1) A primary court shall have and exercise jurisdiction:

(a).....;

(b) in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act.'

Section 18(1)(b) entails that in dealing with matrimonial proceedings, the primary court ought to abide by the procedures detailed in the Law of Marriage Act, Cap. 29. In view of that, before assuming jurisdiction over the matrimonial dispute, the primary court is under the obligation to satisfy itself as to the compliance with the provisions of the Law of Marriage Act. Amongst those provisions which

the primary Court is required to observe are the provisions of section 101 which stipulates:

'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;

(b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;

(c) where the respondent has been required to appear before the Board and has wilfully failed to attend;

(d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the

Preventive Detention Act and has been so detained for a period exceeding six months;

(e) where the petitioner alleges that the respondent is suffering from an incurable mental illness; and

(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board Impracticable.’

Deducing from section 101 of the Law of Marriage Act, certification of the Marriage Conciliation Board as to its failure to reconcile the parties is a compulsory one save for exceptions stated in that section.

Reverting back to the appeal, the issue for my determination is whether the trial Court in the absence of the Certificate of the Marriage Conciliation Board was vested with jurisdiction to entertain the petition.

Before I embark on determining it, I should put it clear that the records of the trial Court do not suggest that the certificate of Marriage Conciliation Board was tendered and admitted as evidence that the efforts to conciliate the parties proved futile. As a matter of principle, a document attached to the petition is not an evidence worthy consideration of the Court unless the same is tendered and admitted in the proceedings. This position has been reiterated in a number of

cases including the case of **Shemsa Khalifa and Others v. Suleiman Hamed Abdallah**, Civil Appeal No. 82 of 2012 where the Court of Appeal stated:

'At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in the case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice.'

See: Sabry Hafidh Khalfan v. Zanzibar Telecommunications Limited (ZANTEL) Zanzibar,
Civil Appeal No.47 of 2009 and **Zanzibar Telecommunications Limited v. Ali Hamadi Ali and 105 Others**, Civil Appeal No. 295 of 2019.

Having pointed so, I am set to delve into the issue for my determination. Whilst the Appellant admitted that their dispute was

referred to the Marriage Conciliation Board, she was of the firm position that the Board did not issue certificate to the effect that it has failed to reconcile her and the Respondent. On the other hand, the Respondent contends that the Board tried to conciliate them but the same did not materialise. However, the Respondent is silent as to whether the certificate was issued by the Marriage Conciliation Board. In that case, he seeks refuge in section 101(f) of the Law of Marriage Act to the effect that it was impracticable for the certificate to be issued.

From the submissions of both parties, there is no doubt that both parties are in agreement that no certificate was issued by the Marriage Conciliation Board. In that case, it is imperative to analyse whether there were exceptions envisaged in section 101(f) of the Law of Marriage Act as contended by the Respondent.

Succinctly, I have thoroughly gone through the records of the trial Court. Neither the Appellant nor the Respondent who at any time during the trial pleaded that there were extra ordinary circumstances that warranted the Appellant to petition for divorce in the absence of the certificate as to the Board's failure to conciliate the parties. In the absence of that pleadings, the trial Court could not have arrived at the

conclusion that there were extra ordinary circumstances under section 101(f) of the Law of Marriage Act.

Since there was no certificate of the Marriage Conciliation Board issued prior to the filing of the petition in the trial Court and considered that there was no reason justifying application of section 101(f) of the Law of Marriage Act, it is my conviction that the trial Court did not have jurisdiction to entertain the petition. Hence, this appeal is allowed. Consequently, I quash the proceedings, decisions and orders of the trial and first appellate Courts. Either of the parties is at the liberty to file a fresh petition after complying with the provisions of the Law of Marriage Act, Cap. 29 [RE.2019]. I order no costs since this is a matrimonial matter. Order accordingly.

Right to Appeal Explained.

DATED at **MWANZA** this 27th day of February, 2023.



KS KAMANA

JUDGE

