

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
PC CIVIL APPEAL NO. 58 OF 2022**

*(Arising from Matrimonial Appeal No. 48 of 2021 at Ilala District Court originating from
Matrimonial Cause No. 83/2021 of Ukonga Primary Court)*

HAMAD SWALEHEAPPELLANT

VERSUS

SIAELI ELIA MKENDARESPONDENT

JUDGMENT

*Date of last order: - 10/02/2023
Date of judgment: - 13/02/2023*

OMARI, J.

Having lived together on and off for several years, the parties herein contracted a marriage in 2020. Disputes arose in 2021 and the Respondent herein petitioned for divorce, distribution of matrimonial property and maintenance of the children of the marriage at the Ukonga Primary Court. The trial court upon finding that the marriage had irreparably broken down per section 99 and 107 of the Law of Marriage Act, CAP 29 R.E 2019 (the LMA) granted the divorce as per section 110 of the LMA, ordered the

Appellant herein to pay TZS 100,000/= monthly as the maintenance for the two children. The court further found that the assets were not matrimonial properties and ordered that they not be distributed for they were acquired before the marriage was contracted in 2020. Moreover, the court ordered the Appellant to pay to the Respondent TZS 3,000,000/= as a parting gift.

Aggrieved by the decision of the trial court the Respondent herein appealed through Matrimonial Appeal Case No. 48 of 2021 at the District Court of Ilala at Kinyerezi. There were two grounds of appeal which for ease of reference I reproduce hereunder:

1. That the trial court erred in law and in facts for failure to consider contribution of the Appellant in the distribution of properties jointly acquired by the parties.
2. That the trial court erred in law and fact for failure to give consideration for amount stated for maintenance and how much should be paid to the Appellant for maintenance of the children.

When determining the first ground the court consulted the provisions of section 114 (1) and (2) (b) of the LMA and sought to determine whether the house in dispute was acquired during the subsistence of the marriage. After a lengthy analysis the first appellate court found the first ground to

be meritorious and allowed it. It ordered the matrimonial house to be sold and the proceeds of the sale to be divided between the parties. The Respondent (being the Appellant therein) to receive 40% and the Appellant (being the Respondent therein) to receive 60% as per section 114 (1) and (2) (b) of the LMA. The second ground of appeal was dismissed for lacking merit. The Appellant herein is aggrieved by the decision of the first appellate court and has come to this court to prefer an appeal on the following grounds:

1. That, the Appellate Court grossly erred in law and fact by deciding that the division of Matrimonial property was not proper.
2. That the Appellate Court erred in law and fact by ordering the division of matrimonial properties by 40% to 60% between Appellant and Respondent without taking into consideration of the contribution of the Appellant in acquiring the same.
3. That the Appellate Court erred in law and fact by misdirecting itself to order division of the house in dispute as a matrimonial property, without taking into consideration that the parties were concubines and not married during the acquisition of the same.

4. That the Appellate Court erred in law and fact in deciding and alleges that exhibits No. 1,2 and 3 are not received while it was not pleaded in the respondent's appeal at the trial court. (sic)

The Appellant had the services of Ms. Kashindye Thibit learned advocate while the Respondent sought legal assistance from the Tanzania Women Lawyers Association.

Heeding to the Respondent's request; the court ordered hearing to proceed by way of written submission. Having duly considered the grounds of appeal and gone through the submissions of both parties; I made up my mind that there were only three questions to guide the determination of this appeal that is; whether the acquisition of the matrimonial assets was well ascertained, whether the said assets were fairly distributed and lastly whether the first appellate court was correct in raising the issue of exhibits No. 1, 2 and 3 then deciding on the same.

As I set out to delve into the above questions, I became conscious of the fact that if the parties were indeed married on 03 April, 2020 and the divorce was filed on 31 March, 2021 there was an issue that needed to be addressed before going into the questions raised above. This is whether the divorce was appropriately filed in the Primary Court; that is after the expiration of

two years after the date of the marriage as required by section 100 of the LMA and whether the said court had jurisdiction to entertain the said petition. I accordingly raised the issue and called the parties to come and address me on the same, to which they obliged.

As for the divorce being appropriately filed and the trial court having jurisdiction to entertain the same the learned counsel for the Appellant fleetingly submitted that it was true that the marriage had not lasted for two years before the petition for divorce.

When it was the Respondent's turn, she also briefly submitted that two years had not expired after the said marriage and before petitioning for divorce. She, however mentioned that the two lived together as husband and wife for more than two years. She admitted that she had not sought leave of the court for she did not know what that was and insisted that the two lived together since 2013 and they were therefore married.

Having heard submissions of both parties on the issue, I find it prudent to determine whether indeed the divorce was appropriately filed and whether the trial court had jurisdiction to entertain it before delving into the grounds of appeal.

The pursuit for answers leads me back to section 100 (1) of the LMA; which sets out one of the pre-conditions to be complied with before one can file for a divorce. The section provides:

*'No person shall, without the **prior leave of the court,** petition for divorce **before the expiry of two years from the date of the marriage which it is sought to dissolve.**' [emphasis supplied]*

This means a person whose marriage has not lasted for a period of two years is precluded from petitioning for divorce unless they have sought leave of the court to do so. Section 100(2) of the LMA further provides that the court can only grant the said leave in instances where it is shown that exceptional hardship is being suffered by the person applying for such leave. Importing that, the Petitioner needs to satisfy the court that they are living in circumstances that befit the descriptor 'exceptional hardship' either before or after reference to the Marriage Conciliation Board as provided for in section 100(3) of the LMA.

In the Appeal at hand, both parties did not dispute that they got married on 03 April, 2020 and the record depicts that the petition for divorce was filed on 31 March, 2021 which is short of one year since the marriage was contracted. This is in contravention of section 100 (1) of the LMA.

The Respondent in her submission mentioned that they lived together prior to the marriage and seemed to suggest that the law recognizes this as marriage making inference, albeit a very lay one, to the provisions of section 160 of the LMA.

To do away with the said inference, I will immediately state that the law on the presumption of marriage as provided for in section 160 of the LMA was meant to act as a shield and not as a sword as observed by the court in **Jenny Mhando v. Aloyce Kisengo** Matrimonial Appeal No. 4 of 2021 High Court of Tanzania at Tanga. Moreover, the court in **Zaina Ismail v. Said Mkondo** [1985] TLR 239 had this to say:

'Section 160(1) of the Law of Marriage Act only creates a rebuttable presumption of marriage. It does not create another method of contracting a lawful marriage under the Act'

This, is perhaps the reason the couple found it necessary to contract a marriage despite having lived together for several years. In any case, the Respondent cannot seek this court to deem the period prior to her marriage to the Appellant a marriage (albeit presumptively) at this stage. Therefore, the fact that the two have lived together on and off for several years before

contracting the marriage in 2020 does not exempt the Petitioner from the requirement of obtaining leave from the court as per section 100 of the LMA.

The fact that the Petitioner did not seek and obtain leave of the court to petition for divorce before the lapse of two years from the date the marriage was celebrated, renders the Petition prematurely filed. In effect, the Petition for divorce and all other reliefs sought, the ensuing decree of the trial court, the judgement of the first appellate court are all a nullity. This is in line with section 100(1) of the LMA and the judgment of the court in **Sabato Yohana Zakari v. Anastazia Zephania Washa**, PC Civil Appeal No.11 of 2022, High Court of Tanzania at Mwanza and **Sangali Athumani v. Bahati Abdu**, PC Civil Appeal No. 46 of 2001, High Court of Tanzania at Dar es Salaam where in both cases the court found that the petition for divorce that had been instituted without obtaining the leave of the court as prescribed in section 100(1) of the LMA was premature and incompetent. This rendered the said proceedings and judgments a nullity.

The Court of Appeal in **Marwa Mahende v. Republic** [1998] TLR 249 clearly stated that it, as superior court has the duty to ensure that the lower courts properly interpret and apply the law. By necessary implication this same duty also applies to this court.

Section 100 of the LMA provides for a mandatory requirement that ought to have been addressed by the trial court or the first appellate court; neither of which did so, an oversight which is in my opinion grave. In a later case of **Adelina Koku Anifa & Another v. Byarugaba Alex**, Civil Appeal No. 46 of 2019, Court of Appeal of Tanzania at Bukoba which also made reference to **Marwa Mahende v. Republic (supra)** and was also referred to by this court in **Sabato Yohana Zakari v. Anastazia Zephania Washa (supra)** the Court of Appeal was of the view that where a lower court may not have observed the demands of any particular provision of law then it cannot justifiably close its eyes on such a glaring illegality because it has a duty to ensure proper application of the laws by lower courts and tribunals. This duty, as already insinuated, also vests with this court.


Therefore, I find that the petition for divorce having been filed without due regard to the provisions of section 100 of the LMA was incompetent; the proceedings and judgement that resulted therefrom are a nullity making it futile to address the grounds of appeal and or the parties' submissions on appeal.

Accordingly, the proceedings of the Ukonga Primary Court in Matrimonial Cause No. 83 of 2021 and that of the District Court of Ilala at Kinyerezi in


Matrimonial Appeal Case No. 48 of 2021 are quashed and the resultant decisions are set aside for being predicated on an incompetent petition. The parties are at liberty to petition for divorce as per the provisions of the LMA. This matter being a matrimonial dispute, I make no orders as to costs.

It is so ordered.




A.A. OMARI
JUDGE
13/02/2023

Judgment pronounced and dated 13th day of February, 2023 in the presence of the Appellant and the Respondent. Right of appeal explained.


A.A. OMARI
JUDGE
13/02/2023