IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA
PC CIVIL APPEAL NO. 58 OF 2022

(Appeal from the District Court of Magu District in Matrimonial Appeal No. 3 of 2022, Original Matrimonial Cause No. 41 of 2021 of Kisesa Primary Court)

CHRISANTUS OSCAR ..... APPELLANT

VERSUS

AGNES MGALA ..... RESPONDENT

JUDGMENT

13th December 2022 & 17th March 2023

ITEMBA, J

The appellant and respondent were husband and wife respectively. The two celebrated their Christian marriage in the year of the Lord 1970 at Mwanza. They were blessed with 10 issues; they also acquired several properties including a house located at Kisesa and a shamba in Bujora ¾ of an acre. The parties lived amicably in Kisesa Mwanza until 2005 when the appellant left his matrimonial home following the ongoing disputes with the respondent.

In November, 2021, the appellant petitioned for divorce in the Primary Court of Kisesa at Magu. On 11th of January 2022, a judgement was issued and it was declared that the marriage between the appellant and respondent is irreparably broken. A decree of divorce was issued and the court made orders for division of matrimonial properties thereof. At

the hearing before the trial court, there was an objection raised by the parties' ten children to the effect that the properties which the appellant moves the court to divide, are not solely matrimonial as there was high contribution of the parties' children in developing them. In consideration of such objection, the trial court ordered that; the shamba be valued and because it was the children who bought the shamba, they will have 60% of the share and the appellant and respondent will have 20% each. It was ordered further that, as the matrimonial house is the main asset of the family, 75% is allocated to the children. That, the said house should not be sold, but it should be valued and the children should compensate their parents; in the ratio of the 15% to appellant and 10% to respondent.

The appellant was aggrieved with such decision specifically on division of matrimonial properties and appealed to the District Court of Magu which maintained the Primary Court's decision. The appellant still determined to pursue his rights, filed the present second appeal armed with the following grounds:-

1. *That the first appellate court erred in law and in fact in upholding the decision of the lower trial court which infact was irregular and against the law governing division of matrimonial properties.*

2. *That the first appellate court was in error of law when it proceeded ahead to order for division of matrimonial assets to also include children of the couple who at the time were of majority ages and strangers to the said relationship.*
3. *That the lower appellate court erred in law in upholding the decision of the trial court which recognized contributions of children in acquisition of the said matrimonial properties and applied for the said division without evidence to prove the same.*
4. *That the lower appellate court erred in law in ordering for an equal distribution of the shamba as a matrimonial property without regard to the extent of contribution of each party in the procurement of the same.*
5. *That in general the judgment of the lower court was against the law and evidence in records.*

When the appeal was called for hearing, both parties were present in person and they were represented by learned counsels, Mr. James Njelwa for the appellant while Mr. Thomas Isaya was for the respondent. Prior to arguing the appeal, the court *suo motto* raised a legal issued in respect of trial court's jurisdiction. Parties were moved to address the court on what appears in the proceedings as the trial court proceeded to

entertain a matrimonial cause, in the absence of certificate of Marriage Reconciliation Board, an omission which contravenes Section 101 of the Law of Marriage Act, Cap. 29 R.E (2019) herein (LMA).

The counsel for appellant addressed the court that the dispute reached the Ward Reconciliation Board and a certificate was issued on 26.11.2021 and the same was submitted before the court. The learned counsel also mentioned that he had a copy of the said certificate. Therefore, in his opinion the procedure under Section 101 of the LMA was complied with.

Replying on this aspect, Mr. Ilanga was of the view that the document dated 26.11.2021 is form No. 3 GN 239 OF 1971 and that he challenges that document because of its form and content. He added that even the GN itself is incorrect because the correct GN is No. 240/1971. He cited the case of **Hassan Ali Sandali v Asha Ali** Civil Appeal No. 246 of 2019 which provided that under Section 101 LMA, it is mandatory for marriage dispute to be preceded by reconciliation and if reconciliation fails, the Board should issue a certificate thereof. He argued that the Board did not have power to state that a divorce should be issued and that the certificate is supposed to be signed by three people but the referred certificate is signed by one person. He also stated that the

appellant went before the board on his own which was not proper. Under these circumstances he stated that the lower court's proceedings are a nullity.

In rejoinder, Mr. Njelwa insisted that Section 101 of LMA was complied with. However, he agreed that the lower court's proceedings are nullity because everything was based on illegality including division of matrimonial properties.

Upon being probed by the court, the appellant explained that they went to the Reconciliation Board at Bujora. The respondent also agreed to have attended the reconciliation Board for about three times then she was sick and asked for permission to go to Dar es Salaam for treatment when she came back, she was given a letter, (supposedly the certificate).

Before, I proceed to the merits or otherwise of this appeal, I find it appropriate to first determine the issue of compliance with Section 101 of the LMA because it has the effect of touching the court's jurisdiction.

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:*

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 ensuring after the date of the petition;

c) Where the respondent has been required to appeal before the Board and has willfully 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;

As expounded earlier, I have revisited the appeal records and the proceedings are silent on the fact that before filing the divorce petition, parties were referred to the Reconciliation Board. On the first day of hearing, at page 2 of the proceedings, the trial court made an outright order that, as the respondent has not objected the divorce the issue is on

division of matrimonial properties. Therefore, even the evidence at the trial court presented in respect of properties.

It should be noted that, the provision of section 101 LMA is very clear that reference of the matrimonial dispute to the Board and issuance of certificate that reconciliation has failed, is mandatory, unless the parties fall under the exceptions (a) to (e) of the section. At the trial, there was no evidence whatsoever to establish any of the exceptions under section 101(a) to (e).

In **Hassan Ally Sandali v Asha Ally** Civil Appeal No. Civil Appeal No. 246 of 2019 (Unreported), the Supreme Court had cogently 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].

See also: **Yohana Balole vs. Anna B. Malongo**, Civil Appeal No. 18 of 2020 (CAT) Bukoba. Basing on the above, it prudent to state that he 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 consideration of the submission by the appellant's counsel, I have noted that as part of the records of appeal, there is a form No. 3 which shows that on 16/11/2021, parties went to "*Baraza la Usuluhishi Kata ya Bujora"* which translates as Bujora Ward Tribunal, for reconciliation. The said form is titled '*Baraza La Kusuluhisha Mashauri ya Ndoa ya Kata ya Bujora Magu-Mwanza.'* The same has been signed by the secretary and bears the stamp of "*Baraza la Kata ya Bujora".* The form implies that the parties attempted to reconcile. Nevertheless, the said form did not form part of the proceedings and it was neither mentioned by the parties nor produced as exhibit during trial. 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), 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 added]

From the above position, it shows that even if this court wishes to consider the said form from Baraza la Kata Bujora, the same needed first to have been properly admitted before the court, a procedure which was not complied with in the present case.

In the premises, I find that, the proceedings before the trial court and first appellate court were vitiated. The trial court had no jurisdiction to proceed with matrimonial proceedings without proof of parties' reference to reconciliation board. The appellant's petition for divorce was incompetent for contravening section 101 and 106 (2) of the Law of Marriage Act. As a result, I hereby nullify the entire proceedings of the trial court, quash the judgment and set aside subsequent orders. Likewise, I nullify the entire proceedings and judgments of the first appellate court

and set aside the orders thereof as they all stemmed from null proceedings.

It goes therefore, this court cannot entertain the grounds of appeal as they are not supported with any valid records.

The appellant (petitioner) may 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.

Right to appeal explained.

L. J. ITEMBA
JUDGE
17.3.2023

DATED at **MWANZA** this 17th Day of March, 2023.

L. J. ITEMBA
JUDGE