

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO. 74 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Misc. Civil Application No. 3 of 2022)

BETWEEN

ELIZA CHRISTOPHER APPELLANT

VERSUS

CHRISTOPHER DIBOGO RESPONDENT

JUDGMENT

13th & 27th March, 2023

M. L. KOMBA, J.:

Marriage means the voluntary union of a man and woman, **intended to last for their joint lives**. That is the definition of marriage in accordance with section 9 (1) of the Law of Marriage Act [CAP 29 R.E 2019] (the Act). One of the essences of marriage as provided by the law is the union that intended to last. But is it really what happen in the field? The answer is both 'YES' and 'NO'. That means some of marriage do last but others do not.

Now days we get used to came across terrible incidents happened between married couples and sometimes included their families. Married couple are

brutally killing each other, injured each other and sometimes their beloved surrounding them (children) are also get affected in the course. And all of this happened due to the loss of love in marriage and filled with hatred and regrets. Thus, it is my views that if the marriage reached to that point and there is no any other amicable solution thrived to make the situation calm, it is better every couple to walk aside and take his/her own path so that to avoid the great tragedies that may happen in the future if they force to stay together. At this point it came '**separation**' or '**divorce**'.

In Tanzania power to grant decree of separation or divorce is vested to the court. And this may be done so after the court satisfied that the marriage has broken down, and if the petition is for divorce, that the break down is beyond repair. See section 110 (1) (a) of the Act. But before anyone can reach the court seeking for divorce decree, the law require him/her to refer his matter to the Marriage Conciliation Board (the Board) first and that the Board has certified that it has failed to reconcile the parties. That provided under section 101 of the Act.

In this appeal at hand, the respondent was first instituted matrimonial proceedings before Primary Court of Tarime at Nyaburongo (Matrimonial Cause No. 15 of 2020) seeking the decree of divorce. The matter was heard

and decided in favour of the respondent. She was granted the decree. The appellant was not satisfied, he appealed to the District Court of Tarime in Matrimonial Appeal No. 12 of 2020 but the case was withdrawn for non-appearance of the parties on 12th July, 2021.

Later on, 9th February, 2022 the appellant filed Misc. Application No. 3 of 2022 before the District Court of Tarime praying to restore the Matrimonial Appeal No. 12 of 2020 to be heard in merit. His application failed and dismissed for want of merit.

Now the appellant has knocked the door of this court, armed with four grounds of appeal intended to challenge the decision of the District Court of Tarime in Misc. Application No. 74 of 2022. Overall grounds advanced by the appellant; I will only deal with ground number four as the ground is suffice to dispose of this appeal. The ground read;

"THAT, the Resident Magistrate of Tarime District Court erred in law and facts by not restoring matrimonial appeal no. 12 of 2020 and determine the grounds of appeal that show fundamental illegality committed by Nyaburongo Primary Court Magistrate for not directing the parties to refer their dispute at conciliation board".

During the hearing of the appeal, both parties fended for themselves and both they agree that their matter was never passed to the Board. The appellant explained further that the reason their matter was not referred to the Board was due to the corona virus crisis. He explained that the Ward Tribunal ceased to lender services at that time.

Having heard the submissions of both parties and pass through the record of appeal, the issue here I am called to determine is whether the appeal is meritorious.

Section 101 of the Act which provide for the requirement of referring to the Board prior to application of divorce decree is using the word '**shall**' which means the section is coached in mandatory term. The section read;

"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 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; and where the court is satisfied that there are extraordinary circumstances which make reference to the Board Impracticable.*

This requirement is further reinforced by section 106 (2) of the same Act, which states in mandatory terms that: -

"Every petition for a decree o f divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing o f the petition..."

Therefore, by the use of the word '**shall**', the above provision implies that, compliance with section 101 above 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. See the cases of **Patrick**

William Magubo vs Lilian Peter Kitali, Civil Appeal No. 41 of 2019 CAT at Mwanza, **Yohana Balole vs Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020 CAT at Bukoba and **Abdallah Hamis Kiba vs Ashura Masatu**, Civil Appeal No. 465 CAT at Musoma.

In this appeal, the appellant explained that the reason they failed to reach the Board was due to the corona virus outbreak, that the Ward Tribunal was not provide services during that time. In my views, that was not a genuine reason. The parties may have an opportunity to wait until the situation stayed calm and proceed with the Board. I did not see any reason for any of them to rush in court and skip that important step. However, I am also asking myself if their case was succeeded to be heard on court during that time of corona outbreak why they failed to attend the Board?

It is unfortunate that the District Court of Tarime did not detect the said irregularity as it proceeded to decide the matter without there being any valid decree for divorce. It is my considered view that had the District Court of Tarime considered the crucial legal issue on the jurisdiction of the trial court as discussed above, it would not have dismissed the appellant's application and leave the decision of the trial court which is erroneous on

account of the reasons stated above. In the circumstances, I find the fourth ground of appeal to have merit.

In the events, I find that the proceedings before the trial court and the District Court were vitiated. As a result, I have no option other than to nullify the entire proceedings of the trial court and quash the judgment and set aside the subsequent orders thereto. I also nullify the proceedings of the District Court of Tarime and quash its respective ruling and subsequent orders as they stemmed from null proceedings. The respondent is at liberty to process her petition afresh in accordance with the law, if she so wishes.

The appeal is hereby allowed. No order as to costs.

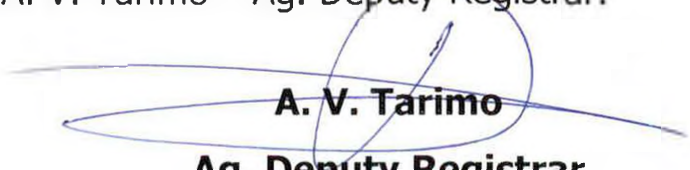
Right of appeal is explained.

DATED at **MUSOMA** this 24 March 2023.



M. L. KOMBA
JUDGE

Judgement delivered on this 27th day of March, 2022 in presence of both parties before A. V. Tarimo – Ag. Deputy Registrar.


A. V. Tarimo
Ag. Deputy Registrar
27/03/2022