

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

(PC) CIVIL APPEAL NO. 56 OF 2022

(Arising from Matrimonial Appeal No. 2 of 2022 of Bunda District Court at Bunda)

SHIDA JOHNAPPELLANT

VERSUS

MAPELA JUSTINE RESPONDENT

JUDGMENT

05th & 07th June, 2023

M. L. KOMBA, J.:

'...marriage is a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient in marriage is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him.' **John David Mayengo vs. Catherina Malembeka**, (PC) Civil Appeal No. 32 of 2003.'

Appellant herein filed a divorce in Kabasa Primary Court (the trial court) where she complained of the habit of her husband (respondent) and prayed

the trial court to pronounce divorce. The respondent when was informed of the application before the trial court he replied;

'Ni sawa kwa Mahakama kumpa huyu mwanamke talaka kwakuwa hajui kunihudumia kama mume.'

A brief back ground is that the appellant and the respondent married in 2003 and were blessed with one issue though not explained in which year, the child passed away. The couple leaved in happy life till 2009 when the marriage becomes bitter. Relatives tried to reconcile the parties in vain and the appellant decided to petition for divorce.

Upon hearing both parties, trial court was convinced that the marriage has irreparably broken down and pronounced divorce and dealt with distribution of matrimonial properties which were jointly acquired during subsistence of the marriage of the parties.

Respondent was dissatisfied by the decision of the trial court on both dissolution of the marriage and distribution of the Matrimonial properties claiming among other issues that there was no certificate from the Marriage Conciliation Board and that apart from the fact that distribution was unfair, properties which were distributed were found prior to the marriage. From

that he lodge his appeal to District Court, Matrimonial Appeal No. 02 of 2022. (the 1st appellate court).

The first appellate court ruled out that the trial court erred on granting the divorce decree for not adhering to the mandatory conditions set by the law that parties have to apply to court for a waiver before the petition. On the second issue of division of matrimonial assets, the 1st appellate court ruled that because the divorce decree was wrongly pronounced then there supposed to be no distribution matrimonial properties as the whole judgment and proceedings are void from the beginning and went on to nullify the judgment and proceedings of the trial court. This decision too was not in the satisfaction of the appellant hence this appeal. Appellant herein filed three grounds of appeal which all together is targeting on correctness or otherwise of the nullification of the judgment and proceedings of the trial court done by the 1st appellate court.

When the case was scheduled for hearing, parties appeared in person unrepresented. It was the appellant who address this court first claiming that there was no peace in her marriage to the extent when the respondent is sick relatives think she is the one bewitching him. She further informed the court that they had a letter from the Ward Executive officer who introduced

them to the trial court. About distribution of the matrimonial properties, she submitted that it was the respondent who show all the farms to the trial Magistrate and Hon Magistrate distribute them fairly there was no privilege. She further explained that all properties subject to their marriage were listed and they did not deal with respondent's father properties. She pray this court to pronounce that the marriage is irreparably broken down and she has to remain with properties which were jointly acquired as distributed by the trial court.

In contesting the appeal, contrary to what he informed the trial court, respondent submitted that she recognize the appellant as his wife and that she has never disturb her since the trial court judgement and he said that's why he was satisfied by the decision of the 1st appellate court that the marriage between the parties still exists. He further submitted that he was the one who show the properties to the trial Magistrate when listing them for distribution but at the end he was aggrieved by the said distribution that why he appealed. In a different note he submitted that he is comfortable with the decision of the 1st appellate court that the marriage is still subsisting. During rejoinder, appellant informed the court that when the 1st appellate court pronounced that the marriage is still subsisting, he never went back to

the appellant instead he remained to the second homestead. She insisted this court to pronounce the marriage is irreparable broken down.

From submission I find the duty of this court is to determine whether the appeal has merit while targeting the decision of the 1st appellate court. The first appellate Magistrate was aware of the exception provided under section 101 (f) of the Law of Marriage Act, Cap 29 R. E. 2019 which provides that;

'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:-

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

Hon. Magistrate analysed this provision at page 3 of the judgment while considering the position in **Hellen Gen Lucas vs. Cleophas Lucas**, Matrimonial Cause No. 1 of 2021, HC Mwanza Registry (Unreported) that the court should be moved prior to the filing of the petition of divorce and concluded that this condition was not met.

Going through the proceedings of the trial court, I happened to find a letter which was filled by the Ward Executive Officer (WEO) from Kabasa ward which partly stated;

'...kutokana na Kata ya kabasa kutokuwa na baraza la wazee linalohusiana na mambo ya usuluishi naomba nimlete kwako kwa ajili ya msaada zaidi.'

This information from the WEO to my considered view falls under extraordinary circumstances which make reference to the Board impracticable. The WEO is a Government officer whom I do not see the reason as to why he should not be trusted. If there is no Conciliation Board, the implication is that the parties cannot do anything.

The case cited by the 1st appellate court is distinguishable from the case at hand on the sense that the cited case was instituted at the High court while this case is originated from the Primary Court whose procedures are different from the procedure used in other courts. See Section 93 of the Law of Marriage Act which governs the proceedings of matrimonial cases in Primary Courts. Thus, so long as the WEO notified the Magistrate that in his ward where the parties come from there was no Conciliation Board is enough and the Primary Court after being satisfied instituted the case by

waiving the requirement for the parties to go to the Board. See **Paskalina Joseph Bayyo vs. Solja Semali Mashauri** (PC Civil Appeal No. 3 of 2022) [2022] TZHC 9552 (17 May 2022).

I find the trial court was right to waive this requirement as it deed and proceed to pronounce divorce decree. Why am I saying this, it is because; first, the parties are in a better placed to know the true position of their marriage life; second, the respondent was ready to distribute matrimonial property they acquired through their joint effort during their marriage time as depicted from the record while parties appeared to Bitaraguru village executive officer ; third, the appellant has sworn to all gods that he will never live with the appellant as his wife; fourth, marriage is a voluntary union of a man and a woman intended to last for their joint lives and that it is the parties themselves who are the best judges on what is going on in their joint lives; and fifth, provisions of section 107 of the Law of Marriage Act is in satisfactory. It is dangerous to compel couple to live together when love disappear among them and result of it is chaos. See **Boniphace Abel Mwachipindi vs. Winney Martiney Obwobwe**, Matrimonial Appeal Case No. 7 of 2021.

Respondent complaint over the distribution of matrimonial property as appeared in his petition of appeal filed to the 1st appellate court I can say is afterthought as he was the one who volunteered separation and distribution of matrimonial assets when appeared to Bitaranguru village executive officer and the fact that he informed this court that he is the one who show the properties to the trial Magistrate, then I find his appeal was afterthought and the reality remain the same.

It is upon the overall circumstances surrounding this case that I agree with the trial Primary Court that the marriage between the appellant and the respondent has broken down beyond repair. The order of the first appellate court declaring the marriage to be subsisting is hereby quashed and the order of the trial court dissolving the marriage is restored together with its orders.

It is so ordered.

Right of appeal explained.





M. L. Komba

Judge

07 June, 2023

Judgement delivered in chamber in the presence of both parties who appeared in person.




M. L. Komba
Judge
07 June, 2023