

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
CIVIL APPEAL NO.36 OF 2022

(Originating from Matrimonial Cause No.04 of 2021 at Kigamboni District Court)

AMINA HUSSEIN MASHIMBA.....APPELANT

VERSUS

WILBARD ROMAN MUSHI.....RESPONDENT

JUDGMENT

Date of last order: - 15/02/2023

Date of Judgment: -15/05/2023

OMARI, J.

The Appellant herein instituted Matrimonial Cause No. 4 of 2021 at the District Court of Kigamboni seeking for among other orders a decree of divorce. In the course of the hearing, the trial court sought to be addressed on the propriety of Form No. 3- Exhibit S1, that is, a Certificate from the Marriage Conciliation Board (the MCB) that was appended to the Petition. Subsequently, guided by section 101 of the Law of Marriage Act Cap 29 RE 2019 (the LMA) and the Court of Appeal decisions of **Hassan Ally Sandani v. Asha Ally**, Civil Appeal 249 of 2019 (*sic*) and **Shird v. Fatuma Mohammed** (1984) TLR (*sic*) it concluded that the Petition is not

accompanied by a Certificate from the MCB thus incompetent before it. The trial court went ahead to state that the marriage between the parties has not broken down beyond repair thus, denied to issue an order for divorce.

Aggrieved, the Appellant knocked the doors of this court, preferred an Appeal on two grounds that:

- i. The District Court erred in deciding that the marriage between the parties has not broken down while it has declared that there was no proper reconciliation in the Board thus the Court failed to decide that the matter was invalid by law for being immaturity brought before the Court.
- ii. The Court erred in law and evidence to decide that the marriage was not irreparably broken down when the evidence to a large extent proved the same.

On the date set for hearing the Appellant had the services of Ms. Angelista Nashon and the Respondent had the services of Bernad Masimba both learned advocates.

Ms. Nashon begun her brief submission on the Appeal by averring that the Appeal has two grounds that is; the District Court erred in law and in fact

when it held that the marriage had not irreparably broken down while it already held that there was no reconciliation before the MCB for reason of a defective Form No.3. She went on to state the second ground as being that the honorable court erred in law and in fact when it held that the marriage had not broken down irreparably while there was enough evidence to prove that the marriage had in fact broken down irreparably. Ms. Nashon further submitted that it was on the basis of the said grounds that her client is seeking for this appeal to be allowed and the District Court's decision to be quashed in addition to any other reliefs that the court will deem befitting to grant. Thereafter the learned advocate informed the court that she and the counsel for the Respondent had agreed that she will forgo the rest of her submission in chief on the grounds, allowing her learned brother to state his position and that will in effect save time for all parties since in essence the parties are in agreement. The court granted this wish.

When it was his turn to submit, Mr. Masimba averred that his client was served with the Memorandum of Appeal seeking to challenge the decision of the District Court of Kigamboni. He went on to submit that after going through the said memorandum and seeing the reliefs that the Appellant was seeking, he advised his client that it was in their best interests to concede to the Appeal so that they are able to initiate divorce proceedings properly.

He therefore concluded by conceding to the two grounds of appeal, prayed that there be no costs.

Having considered the very brief but odd submissions by both counsels I reckon there is only one issue for me to determine; whether it was proper for the District Court to decide that the marriage has not broken-down basing on the defective certificate from the MCB, that is if this Appeal is meritorious.

I will start with the first ground. Since both counsels opted not to go into the grounds of Appeal, I had to rely on the lower court's record. The crux of the District Court's decision which led to this Appeal is very simple, the propriety of Form No. 3 which was submitted by the Appellant with her Petition. The record shows after hearing had commenced and progressed; on 04 August, 2021 the presiding Magistrate asked the parties to address him on the propriety of the said Form. And, on 24 September, 2021 the court sought to ascertain the propriety of the said Form from the MCB; that is whether the Respondent was properly summoned to appear before the MCB for Vijibweni Ward in Kigamboni. The chairlady (sic) and two members appeared and testified before the trial court. After this, the proceedings seem to veer off to the parties seeking a consent Judgment. However, the

court pronounced its Judgment on 27 June, 2022 where it made an order that the marriage between the Appellant and the Respondent had not broken down. Thus, this Appeal and perhaps the way counsels choose to go about it.

The MCBs are created by Section 102 of the LMA. In essence the MCBs are supposed to act as a mesh, allowing people to channel their disputes through them in the hope for reconciliation. In effect, it is only those marriages that have failed to be reconciled that are supposed to end up in court. The requirement of prior reference to a MCB is provided for under section 101 of the LMA with very specific instances as exceptions where the courts may entertain Petitions without the parties having been to the MCB. For avoidance of doubt the said section provides:

'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.'

Further, Regulation 9(2) of the Marriage Conciliatory Boards (Procedure) Regulations G.N. No. 240 of 1971 (the Regulations) provides: -

*'Where the dispute is between a husband and his wife and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, **and the Board fails to reconcile the parties, the board shall issue a certificate in the prescribed form.***

When conducting the hearing, the learned Magistrate sought to ascertain the propriety of the MCB Certificate that was submitted with the Petition. In this case, the MCB had certified the marriage as broken down without hearing both sides and as is depicted in the record and there was no legal reason for the same to issue such Certificate since the particular case did not fit in the exceptions in the *proviso* of section 101 of the LMA. The *proviso*, has only six instances where the requirement of prior reference to the MCB may be dispensed with; that is where the spouse's whereabouts are unknown, where the spouse is residing outside Tanzania and is unlikely to return within six months ensuing after the Petition, where the respondent has been required to appear before an MCB but has failed to do so, where the respondent is imprisoned for a period specified in the law, where they are suffering from an incurable mental illness and lastly where the court is satisfied that there are extraordinary circumstances which make reference to the MCB impracticable. In essence other than the six exceptions all other Petitions should be accompanied with a certificate from the MCB.

The proceedings of the of the MCBs are regulated by section 104 of the LMA, which for convenience I reproduce in part here under.

*'(1) A Board to which a matrimonial dispute or matter has been referred **shall require the attendance of the parties and shall give each of them an opportunity of being heard** and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn the proceeding from time to time.'* (Emphasis supplied)

From the above provision, both parties need to attend the MCB which shall in turn accord them an opportunity to be heard. This means other than a situation that falls within the six exceptions elucidated hereinabove, the parties have to attend the MCB for it to come to a conclusion and if need be, issue a certificate.

In terms of section 104(5) of the LMA, the certificate has to reflect the MCB's findings and the same have to be in prescribed form as provided for in the Regulations. A perusal through the lower courts record brings me to Form No. 3 from the MCB for Vijibweni Ward which *inter alia* states that the Respondent was required to appear before it but failed to do so. However,

during the trial court's hearing the Respondent conceded to not appearing before the MCB for he was never served and as a result never heard.

As already pointed out, the MCB has the mandate to require the parties attendance and has to give them an opportunity to be heard. Section 104 has procedural safe guards for ensuring the parties or any other person the MCB so requires attendance of, attends the said MCB. There was no evidence that the Respondent was served and he failed to appear and this is very clear from the various functionaries of the MCB for Vijibweni Ward as well as the parties themselves. It was thus, wrong for the MCB to issue a certificate stating that the Respondent had failed to appear, which by necessary implication meant it had failed to reconcile the parties. This, in my view contravenes section 101 of the LMA which in essence made the available Certificate invalid. In retrospect, by the Petition having a Certificate that is defective the learned Magistrate should have struck out the said Petition and not deny to issue a divorce decree on the basis of the marriage not being irreparably broken down. The Court of Appeal of Tanzania in the case of **Hassan Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 nullified the proceedings and orders made by the Primary Court and District Court because there was no valid certificate of the MCB capable of instituting the Petition. In **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal

No. 18 of 2020 the Court of Appeal of Tanzania while referring to its earlier decision in **Hassan Ally Sandali v. Asha Ally** (*supra*) also nullified the proceedings as a result of the trial court lacking jurisdiction to entertain the Petition due to failure to comply with section 101 of the LMA. Furthermore, in Abdallah **Hamis Kiba v. Ashura Masatu**, Civil Appeal No. 465 of 2020 the Court of Appeal also held a Petition that was instituted without being accompanied by a valid certificate is incomplete, premature and incompetent.

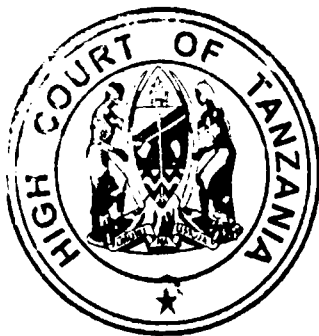
With regards to the second ground of Appeal, I see no reason to embark on the same since the examination and findings on the first ground suffices to dispose this Appeal. I am guided by the Court of Appeal's decision in **Magambazi Mines Company Limited and 4 Others v. Kidee Mining (T) Limited**, Criminal Appeal 238 of 2018 where it held:


Further, because no appeal can legally stem and proceed from a nullity, these appeals are in the same vein, incompetent. The same are therefore struck out.

In the circumstances, this Appeal is therefore incompetent before this court as there is no sound decision for this court to consider.


I invoke the revisionary powers bestowed to this court to nullify the entire proceedings of the District Court of Kigamboni, quash the judgment and set

aside the subsequent orders thereto as they stemmed from nullity proceedings. Either of the parties are at liberty to file a fresh Petition if they so wish subject to compliance with the law. This being a matrimonial matter each party to bear their own costs of this Appeal. It is so Ordered.




A.A. OMARI
JUDGE
15/05/2023

Judgment delivered and dated 15th day of May, 2023 in the presence of Ms. Catherine Mponda learned advocate holding brief of Ms. Angelista Nashon and Mr. Bernad Mashimba both learned advocates for the Appellant and Respondent respectively.


A.A. OMARI
JUDGE
15/05/2023