IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 07 OF 2023

(Appeal from the Judgment of the District Court of Temeke at One stop Judicial Centre, Matrimonial Cause No.90 of 2021, Before Hon. J.C MSAFIRI-PRM dated 31/10/2022)

COSMAS THADEY MUSHI ..... APPELLANT

VERSUS

CONSOLATHA JOSEPH CHUWA..... RESPONDENT

JUDGMENT

Date of Last Order:08/05/2023

Date of Judgment: 26/05/2023

Z.M. Goronya, J

This appeal emanates from a judgment issued by the District Court of Temeke(One Stop Judicial Centre) in Matrimonial Cause No.90/2021 on 31/10/2022, where the respondent Consolatha Joseph Chuwa, petitioned for dissolution of her marriage with the appellant Cosmas Thadey Mushi the appellant. It is on record that, the two celebrated a Christian marriage in 2004 after they have lived together since 1995. They were blessed with three issues namely; Tumaini Cosmas Mushi, Joseph Cosmas

Mushi and Isack Cosmas Mushi. On 13th December, 2021, the respondent petitioned for divorce and distribution of their matrimonial properties having found that appellant had extra marital affairs that lead to children born out of wedlock. She was also being beaten by the appellant and abused before their children. In response to petition the appellant denied all the allegations arguing that their marriage was not irreparably broken down, insisting that he was still in love with his wife. Having heard the parties' evidence, the trial magistrate found that, the marriage between the parties is irreparably broken down. Court then distributed the matrimonial assets on percentage basis that the appellant got 60% of the properties, whereas the respondent got 40% of the properties and custody of their son Isack. Being resentful with the decision, appellant appealed against the said Judgment on the grounds that:

1. *That the trial Magistrate erred in iaw and fact by granting the decree for divorce on the Petitioner's alleged ground of Adultery while the same trial magistrate in the Judgment admitted that no evidence shown in the petitioner's account to support the claim for adultery and owing of children outside of marriage.*

2. *That, the trial Magistrate erred in law and fact in determining the issue of matrimonial properties without considering the vital evidences and testimonies adduced by the Appellant herein during the hearing of the matter before the trial court, thus arrived into unfair decision.*

3. *That, the trial Magistrate erred in iaw and fact by entertaining the petition for divorce registered as Matrimonial Cause No. 90 of 2021 without considering that the same was pre maturely instituted as the Appellant herein was not summoned before any marriage conciliatory board.*

4. *That, the trial Magistrate erred in law and fact by distributing 60% shares to the Appellant and 40% shares to the Respondent herein, without considering the evidence adduced by the Appellant on the Loan acquired by the Respondent alone which led to the sale of the Matrimonial property located on Plot No. 2126, Block "D", Karakata Mji Mpya that were used by the Respondent as security for personal loan.*

5. *That the trial Magistrate erred in law and fact by not considering other matrimonial properties registered in the Respondent's name while the same were the proceeds of Matrimonial Properties described as Kariakoo Shop and the House located on Plot No. 2126, Block "D", Karakata Mji Mpya which was Sold by Letshego Bank (T) limited on the Respondent's Personal Loan.*

With consent, hearing of the appeal was conducted by way of written submission. The appellant's submission were prepared by Advocate Victoria Paulo where as the respondent's submissions were prepared by Advocate Iddi Mwinyi.

In support of the appeal, on the first ground Ms. Paulo for the appellant submitted that, it is settled principle of law as stated by this honourable court in the case of **DADI SAID KWANGWA vs. NURDIN AKACHAPA** (1999) TLR 398, that adultery is a matter of fact and so can be only established by direct or circumstantial evidence. In the impugned judgment, there is no any direct or circumstantial evidence

adduced by the petitioner in Matrimonial Cause No.90 of 2021 to establish the claim for adultery against the Appellant. The trial magistrate at page 5 of the Judgement particularly the 2nd paragraph stated that: ***"Even though there is no proof of adultery, there is no doubt their marriage cannot be replaced".*** She insisted, from that wording of the trial magistrate, it is undisputable that Matrimonial Cause No. 90 of 2021 was not with cogent evidence and thus the trial magistrate dissolved the marriage between the parties without any legal ground.

On the second ground Counsel submitted that, the trial Magistrate erred in law and fact, in determining the issue of matrimonial properties without considering the evidence adduced by the appellant at the trial thus, arrived to unfair decision. That, during the trial the aappellant adduced vital evidence to prove his personal properties which were wrongly included in the petition for divorce, and source of income giving rise to the said properties, mentioning Mitsubishi Pajero with Registration number T958AXF, Toyota Harrier with Registration number T667 CWG, Toyota Surf with Registration number T751 DME, House situated in Plot No. 2126, Block D at Karakata Mji Mpya with Certificate of Title Number 192661. Ms. Paulo further submitted that, before any court makes its decision, evidence of both parties must be considered, evaluated and reasoned in the judgment and omission to do so is fatal, referring the Court of Appeal decision in the case **HUSSEIN IDDI AND ANOTHER vs. REPUBLIC** [1986] TLR 166, where the Court of Appeal of Tanzania held that; ***it was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own***

and arrive at the conclusion that it was true and credible without considering the defence evidence.

In addition, Appellant's Counsel insisted that even matrimonial properties including the house described as IL/KPW/KRT2329 situated at Karakata area, Ukonga Dar es Salaam were distributed by the trial magistrate without considering the extent of contribution made by each spouse. It is elementary principle of law that when determining distribution of matrimonial properties a court must also scrutinize the contribution of each party in acquisition of matrimonial assets, citing the case of **GABRIEL NIMROD KURWIIILA vs. THERESIA HASSANI MALONGO**, CIVIL APPEAL NO. 102 OF 2018, CAT (unreported) where is was stated that;

> ***"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution".***

As regard to the third ground Ms. Paulo submitted that, Matrimonial Cause No. 90 of 2021 which resulted to the impugned decision, was instituted in trial court without referring the dispute to the Marriage Conciliatory Board, and no any certificate of marriage conciliation board that was tendered in trial court contrary to Section 101 of THE LAW OF MARRIAGE ACT, [CAP. 29 R.E 2019] which provides that, no petition for marriage divorce shall be instituted in court unless, the dispute has first been referred to the Marriage Conciliatory Board and the certification is made to the effect that, the Board has failed to reconcile the parties as

per Section 104 (5), [CAP. 29 R.E 2019]. Non compliance with the requirement of the law on referring the matrimonial dispute to the Marriage Conciliatory Board was explained by the Court of Appeal in the case of **HASSANI ALLY SAN DALI vs. ASHA ALLY,** Civil Appeal No. 246 of 2019,(unreported) where it was held that;

> ***"It follows thus that in the absence of a valid certificate to institute a petition as required by section 101 of the Act, the petition before the Primary court was premature. The appellant referred us to the decision of the High Court in Shillo Mzee v. Fatuma Ahmed (supra) which held that a petition instituted without the accompanying certificate is incomplete and incompetent. We subscribe to that holding as reflecting a correct legal position".***

Appellant's Counsel also cited the case of **SADIKI RASHID vs. MARIAM MOHAMED**, PC Civil Appeal No. 03 OF 2021, (unreported) where it was held that:

> ***"In absence of certificate from a reconciliation board, a petition for divorce is premature and incompetent "***

Ms. Paulo prayed this honourable court to find out that the petition for divorce in Matrimonial Cause No.90 of 2021, before the trial court was incompetent for want of a valid certificate from the Marriage Conciliation Board, thus even the proceedings, decision and orders are nullity that need to be quashed.

On the forth ground Ms. Paulo argued that, trial magistrate unfairly awarded the appellant 60% of shares because, the existence of the said debt accrued from a loan acquired by the respondent in person

and used a matrimonial property located at Plot No. 2126, Block "D" as security that was sold on her default. The trial magistrate disregarded the fact that, the respondent used the matrimonial property as security the fact that was raised by the appellant in his reply to the petition of divorce and admitted by both parties during the trial.

As regard to the fifth ground, Ms. Paulo contended that at page 6 of the judgment trial magistrate acknowledged the existence of personal properties of the appellant. However, he went on stating that, the properties acquired during subsistence of the marriage are matrimonial properties, subject to division upon dissolution of marriage in terms of Section 114 of [CAP.29 RE 2019]. She emphasized that, the properties registered in the names of the appellant were not acquired by their joint efforts, rather from personal income of the appellant. Lastly, counsel prayed the judgment be quashed and appeal be allowed with costs.

In response, Counsel for the respondent on the first ground submitted that, he does not object the principles enshrined in the case of **DADI SAID KWANGWA vs. NURDIN AKACHAPA** as cited by the appellant (supra), respondent complied in toto with one of the two principles mentioned in the referred case as reflected at paragraph 3 of the pleadings specifically rejoinder to the reply of petition for divorce.

Respondent mentioned by name one among the Appellant's children born out of wedlock named Prince Mushi, and the same was not objected by the appellant at the trial.

Concerning the second ground, Counsel for the respondent strongly disputed the appellant's allegation that, his evidence was not considered by a trial magistrate as both parties were heard, and trial court scrutinized the parties' evidence hence arived into a fair and just decision. That, at the trial the Appellant tendered one loan agreement worth Tshs. 40,000,000/= which he personally took and used the same to build one house at Kipawa, no any other evidence was presented to prove as to how other properties were personally acquired. While the Respondent on her part testified that they have acquired all properties together but were all registered in her husband's name, save for the Kariakoo shop which bears the Respondent's TIN number. When cross-examined, the Appellant told the court that before he started to live with the Respondent, he was only owning a petty shop located at Yombo suburb and music appliances. He insisted that, trial magistrate considered the evidence of both parties hence arrived to a fair decision.

As regard to the third ground Counsel submitted that, the Appellant was summoned to appear before the said Marriage Conciliation Board but, on his own whims he decided not to attend such board sessions. The respondent complied with the requirement of the law under Section 101 of Cap. 29 RE 2019, as the petition was accompanied with a certificate from Kipawa Ward Marriage Conciliation Board. Counsel added that, to ensure that the parties maintains their marriage the trial court referred them to the office of the Social Welfare office at the

court's premise for reconciliation but the same parties were not reconciled hence, the matter proceeded with a trial. He therefore prayed for the court to disregard this ground.

Regarding the fourth ground it was submitted that, despite the fact that the Appellant already has majority share of 60% still does not have even concern that, the Respondent, a mother of his three children who deserves a sort of sympathy even if their marital relationship is no more. Counsel submitted further that; it is on records that the parties have lived together since 1994 working jointly for the welfare of the family. As testified by PW2, the referred loan was deducted to repay the previous loan which was used to build the Hotel at Moshi. All the properties were acquired by joint efforts referring Section 114 of Cap.29 RE 2019 and the case of **Bi Hawa Mohamed vs Ally Seif,** (1983) TLR No.32.

On the fifth ground it was submitted that, all properties acquired during the subsistence of marital relationship forms part of matrimonial assets as per Section 114 (3) of Cap 29 RE 2019. He emphasized that, neither the Appellant nor Respondent's properties should be spared when it comes to division of matrimonial assets as they both contributed to its acquisition. In winding up Counsel prayed for the appeal to be dismissed with costs for want of merit.

In rejoinder Ms. Paulo Counsel for the appellant, reiterated her submission in chief and further submitted that, Respondent is misleading the court, as the allegation for adultery and the child born out of wedlock was strongly disputed by the Appellant, and even the name of Prince Mushi was not pleaded by the Respondent in the said

Petition for Divorce, thus, it comes as a new fact which was not determined by the trial court.

Having considered the rival submission of the parties herein, I prefer to commence with the third ground of appeal, regarding the competence of the impugned petition before the District Court. It was alleged by Ms. Paulo that, the trial magistrate erred in law and fact in entertaining the petition without considering that, the same was pre maturely instituted. The Appellant herein was not summoned before marriage conciliatory board. In rebuttal, the respondent's counsel argued that the appellant was served with a notice to appear before the Kipawa Ward Marriage Conciliation board but on his own whims decided not to appear, hence, the conciliation board issued a certificate for the respondent to file petition. It is apparent on record that the appellant in his response to the petition at paragraph 6 expressed that he was not summoned to appear at the conciliation board, even in his testimony at the trial as reflected at page 32 of the typed proceedings, but the trial magistrate did not take the same into account.

It is the procedural requirement of law that, before instituting matrimonial dispute parties must first refer the dispute to the Marriage Conciliation Board for Reconciliation. If the reconciliation fails, then the board will issue the parties with formal certificate to certify that it had failed to reconcile. This position of the law is provided under section 101 of Cap.29 RE 2019. It states:

"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:

Also Section 104 of Cap.29 RE 2019 it provides that;

> *"104. If the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it* ***"shall"*** *issue a certificate setting out its finding".*

Trial court records reveals that on 06/09/2021 the Kipawa Marriage Conciliation ward issued a notice for the appellant to appear before Marriage conciliation board. He didn't enter appearance as a result the Conciliation board conducted exparte hearing and issued the Certificate to the respondent (exhibit A2). The board's finding was to that; I quote;

> *"Bwana Cosmas alipewa wito na alishindwa kufika, baraza llmeshindwa kusuluhisha na kusikiliza upande mmoja. Mahakama ya mwanzo imsikilize lli taratibu za kisheria ziendee."*

This being the court of record, in cause of perusing the same, came across Annexture CJ2 which was attached to the petitioner's rejoinder, being a response from the stem leader one Stella Vicent having been given a notice to serve to the appellant dated 03/11/2021. For ease of reference I find worth to reproduce the same, I quote;

"03/11/2021

Mimi Mjumbe Stella Vicent, nilipata barua ya Cosmas Mushi,nilifanya jitihada za kumtafuta kwenye simu sijampata.Hajapokea simu yangu na pia ikawa amenifungia simu yangu kila nikipiga simu inasema inatumika siku nzima ikawa

hivyo. Na nimefika nyumbani kwake nimekuta milango iko wazi lakini sikupata ushirikiano wa kuitikiwa hodi.
Asante ni mimi mjumbe wa shina, Stella Vicent"

From the wordings in the quotation above, it is crystal clear that, the said notice did not reach the appellant. The record reveals that, it is only one notice that was issued and the same was not delivered to the appellant as it can easily be noted in the quotation above. I am therefore of the firm view that, the appellant was not served with the said notice to appear before the Conciliation board for reconciliation. The respondent in her testimony before the trial court stated that the appellant was called several times to appear before the conciliation board but he did not appear on his own whims. Unfortunately such evidence lacks backup as she only tendered one notice and the same does not prove that the appellant was served.

From the records, I believe the trial Magistrate was aware of the appellant's allegation that he did not attend at the reconciliation board as he was not served with a notice to attend. It is the requirement of the law that parties before dissolution of marriage must appear on the Marriage Conciliation Board. The major role of the Marriage Conciliation Board was to reconcile the parties. It is upon the parties to agree to end their differences or institute a petition. This did not happen in the matter at hand as the parties were not reconciled. From such observation I am of the opinion that, the Conciliation board improperly issued the Certificate of failure of Mediation while the appellant was not served with the notice to appear before it. Thus, the trial magistrate erred on failure to take into consideration of the

appellant's allegation that he was not summoned to appear before the Reconciliation Board, hence the certificate issued by the Reconciliation board was invalid. The court of appeal in the case of **Abdallah Hamis Kiba vs Ashura Masatu**, Civil Appeal No. 465 of 2020 stated that;

> ***"As we held in Hassani Ally Sandali (supra); and Yohana Balole v. Anna Benjamin Malongo, Civii Appeal No. 18 of 2020 (unreported), it is settled that a petition for divorce instituted without being accompanied by a valid certificate in terms of section 101 of the Act is incomplete, premature and incompetent - see also the High Court's decision in Shillo Mzee v. Fatuma Ahmed [1984] TLR 112. On that basis, we hold that the entire proceedings and the decisions of the courts below are a nullity as they stemmed from the illegal assumption of jurisdiction by the trial court despite the absence of a valid certificate."***

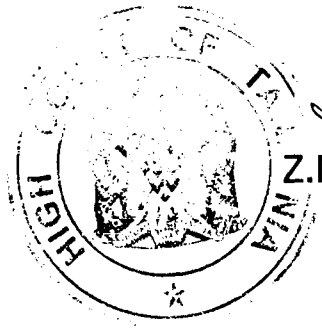
In line with the cited case, I find that the impugned Matrimonial Cause No.90/2021 of the District Court of Temeke One Stop Centre was prematurely filed. I therefore, quash the proceedings, set aside judgment and decree in Matrimonial Cause No. 90 of 2021. The appeal is allowed. Each party to bear own costs. Parties are at liberty to file case upon compliance of procedures of reconciliation board. It is so ordered.

Z.M.Goronya

Judge

26/05/2023

Judgement delivered in the presence of Domina Mdasha, advocate for the appellant and Iddi Mwinyi, Advocate for the respondent



Z.M.Goronya

Judge

26/05/2023