

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

MATRIMONIAL APPEAL NO. 07 OF 2022

(Arising from Muleba District Court at Muleba In Civil Appeal No. 53 of 2022 and original Matrimonial Case No. 04 of 2021 at Kashasha Primary Court)

ADELINA KENGALO..... APPELLANT

VERSUS

DERRICK MWESIGE.....RESPONDENT

JUDGMENT

Date of last Order: 14.06.2023

Date of Judgment: 23.06.2023

A.Y. Mwenda, J.

Before Kashasha Primary Court Mr. Derrick Mwesige petitioned for a decree of divorce in Matrimonial Case No. 04 of 2021. At the end of the trial the court held that the marriage between the parties has been broken down irreparably hence the decree of divorce was issued. Aggrieved by the said decision the appellant Ms. Adelina Kengalo appealed to the District Court of Muleba at Muleba in Civil Appeal No. 53 of 2022. The District Court upheld the decision of the trial court hence the present appeal with three (3) grounds which read as follows;

- 1) That, the appellate court erred in law and facts for failure to identify that Buganguzi Ward Conciliation Board failed to perform its statutory task of*

conciliating parties before issuing a certificate of failure to reconcile them.

2) That, the appellant court erred in law and facts for failure to identify that the certificate issued by the board was invalid as per the requirements of the law.

3) That, the appellate court erred in law and facts for failure to identify that the trial courts proceedings are tainted with irregularities especially on the admissibility of evidence which were relied upon by the court in forming a base of its decision.

During the hearing of the present appeal the Appellant was represented by Mr. Gildon Mambo the learned counsel while the respondent hired the legal services from Mr. Mathias Rweyemamu the learned counsel.

When this appeal was scheduled for hearing, Mr. Mathias Rweyemamu prayed this appeal to be disposed by the way of written submissions, the prayer which was granted and the parties complied with the scheduling order.

In his written submissions Mr. Gildon Mambo started with the 3rd ground of appeal. In his submissions he submitted that, the 1st appellate court erred in law and facts for failure to identify that the trial court proceedings are tainted with irregularities. He submitted that the said irregularities are the

failure to tender and admit a certificate from marriage conciliation board which is a serious irregularity which vitiates the proceedings. According to him the records show that the said certificate from marriage conciliation board was merely attached to the document which initiated the said matrimonial case. He was of the view that in law annexures are not evidence for the court to act and rely upon without being, firstly cleared for admission. To support this point, he cited the case of PATRIC WILLIAM MAGUBO VS LILIAN PETER KITALI, CIVIL APPEAL NO. 41 OF 2019 CAT (Unreported).

With regard to the 1st ground of appeal challenging the Buganguzi Ward Conciliation Board failure to perform its statutory task of hearing and reconciling the parties before issuing a certificate, the learned counsel submitted that the records reveal that when parties were summoned for hearing at the Board it was only the respondent who was heard. He submitted that the appellant did not make a reply to the claim tabled before the board on the ground that their dispute was still pending before the church leaders. He submitted that despite the appellant's excuse the board proceeded by issuing a certificate. According to Mr. Mambo, the board was not supposed to issue a certificate without the appellant being heard because it did not reconcile the parties. To cement on this point, he cited the case of ABDALLAH HAMIS KIBA VS ASHURA MASATU, CIVIL APPEAL NO. 465 of 2020 CAT (unreported).

With regard to the 2nd ground of appeal Mr. Gildon submitted that the certificate by conciliation board was invalid for failure to set out its findings following the failure to reconcile the parties as provided for under section 104 (5) of Act. The learned counsel was of the view that the trial court determined a divorce matter instituted without being accompanied by a valid certificate in terms of section 101 of the Act. To cement on this the learned counsel referred the case of ABDALLAH HAMIS KIBA vs ASHURA MASATU (SUPRA). He thus concluded his submissions praying this appeal to be allowed by quashing and setting aside the lower court's proceedings and its subsequent judgments.

Responding to the submissions by the learned counsel for the appellant, Mr. Mathias Rweyemamu merged the 3rd and 1st ground of appeal. He commenced submitting that, the trial court complied with the procedure laid down by the law. He submitted that under section 101 of the law of Marriage Act, 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 to certify that it has failed to reconcile the parties. The learned counsel submitted that the said provision has a proviso which is exception to the above requirement. He quoted it in verbatim as follows, (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 has been required to appear before the board and willfully failed to attend or (c) where the court is satisfied that there

are extra ordinary circumstances which makes reference to the board impracticable.”

The learned counsel submitted further to the effect that the proceedings of Buganguzi Ward Tribunal in Civil Case No. 2 of 2021 shows that the appellant was summoned to appear and reply on the complaint against her but she declined to say anything on the ground that their marriage dispute was pending before the church leaders.

He further submitted that since the appellant appeared before the tribunal but refused to reply the complaints against her then it was as if she failed to appear. According to him, since the appellant refused to reply on the claim against her then Buganguzi ward Tribunal was right to issue a certificate that it has failed to reconcile the parties and this is in accordance with section 101 (c) of the Marriage Act. He further submitted that a certificate from marriage conciliation board is not *sine qua none* to be lodged with a suit of a petition for divorce and that the appellant is estopped from alleging that the respondent ought to have tendered the certificate from conciliation board as a piece of evidence to the trial court.

The learned counsel went further in submitting that, the complaint of appellant cannot be entertained at this appellate stage because at the trial court she did not raise the issue of failure to tender certificate from conciliation board to be admitted as part of evidence. He further submitted

that the certificate could have been tendered by the appellant if she thinks it was of evidential essence to disapprove the claims of divorce against her. He submitted that since the appellant at the trial court did not cross examine the respondent on admissibility of the certificate from the marriage conciliation board that means it was of no evidential value.

The learned counsel further submitted that the question of admissibility or non-admissibility of the certificate from conciliation board was not raised as a ground of appeal in the district court and therefore the appellant and her counsel are estopped to raise it at this stage.

Regarding the decisions of the Court of Appeal cited by the learned counsel for the appellant, Mr. Rweyemamu was of the view that the said cases are distinguishable in that they are so illustrative on the procedure to be adopted by spouses when they are looking for justice to protect their marriage.

He further submitted that in the present case the respondent referred the matter to the ward conciliation board before instituting the matter at Kashasha Primary Court as per the requirement of the law. To support this point, he cited the case of SWITBERT THOMAS BARUMUZI VS JULIANA SWITBERT, MATRIMONIAL APPEAL NO. 01 OF 2022. He thus concluded his submissions by stating that this appeal should be dismissed for lack of merits.

Having gone through submissions by the learned counsels the issue for determination is whether or not this appeal is meritorious.

At the outset I find it prudent to point out that before filing a petition for decree of divorce, a party is obliged to exhaust the conciliation process through the Marriage Conciliation Board to the satisfaction and certification of such Board that it has failed to conciliate the parties. This is what is reflected in section 101 of the Law of Marriage Act [CAP 29 R.E 2019] which also state as follows;

*"S. 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;"*

In the present appeal, it is clear that the parties attended before the Marriage Conciliation Board and the certificate from Marriage Conciliation Board stating that it has failed to reconcile them was issued. The same was accompanied in a petition for divorce.

Although the respondent accompanied a certificate from the marriage conciliation board, he had another pending task ahead. In other words, attaching a certificate in the petition is one thing and admissibility is another. This is so because tendering of such certificate is of utmost importance in ensuring that conciliation process was conducted properly. If the certificate is not tendered, it is impossible for the adverse party to challenge it as to its

correctness. Likewise, courts may adjudicate on matrimonial cases of which they do not have jurisdiction on the account of defective certificates.

In that regard since the respondent failed to tender the certificate as exhibit, I agree with the learned counsel for the appellant that such failure is fatal and therefore the trial Court did not have jurisdiction to entertain the petition for divorce. This position was taken recently by the Court of Appeal in the case of PATRICK WILLIAM MAGUBO V. LILIAN PETER KITALI, CIVIL APPEAL NO. 41 OF 2019 where it was stated:

*"The issue of parties referring their matrimonial dispute to the marriage conciliation Board before filing a petition for divorce in the court, is a mandatory requirement of the law. **Therefore, that document was required to be tendered and admitted in evidence.**"*

On his part, the learned counsel for the respondent, while relying in section 101 of the Act was of the view that a refusal by the appellant to state her case before the Marriage Conciliation board, is as if she did not attend, circumstances which exempts the tendering of the certificate from the Board. I have considered this argument but with due respect, what he alleges is not supported by the records. The records are clear that both parties attended at the board but the appellant advanced reasons as to why

she was not ready to proceed. Based on her excuse, the board went on preparing the certificate. Since the said certificate was issued, exceptions to the requirement set under the proviso to section 101 of the Act cannot apply. That would have been different if the board did not prepare the certificate at all. Again Mr. Rweyemamu submitted that the issue of failure to tender the certificate was not raised at the first appellate court and the appellant did not cross examine on that regard. I have put his argument under scrutiny but it suffices to say that a point of law/jurisdiction can be raised at any time. In the case of PETER NG'HOMANGO VS. ATTORNEY GENERAL, CIVIL APPEAL, NO. 114 OF 2011 where the Court of Appeal of Tanzania held:

"We are alive to the fact that the issue of jurisdiction can be raised at any time. However, with respect, we think there was a need for the parties to be given the opportunity to address the court on that point of law."

From the foregoing observations, it is my conclusion that the trial Court did not have jurisdiction to entertain the petition, therefore, this appeal has merits and it is hereby allowed by nullifying the proceedings of the trial Court and setting aside its judgment and orders emanating therefrom. Consequently, the proceedings of the first appellate court are quashed and judgment and orders are set aside. The Respondent, if he still wishes, is at liberty to file a fresh petition subject to compliance with the Law of Marriage

Act, [Cap.29 R.E 2019]. Given the nature of this appeal, I issue no order as to costs.

It is so ordered.

Right to Appeal Explained.




A.Y. Mwenda

Judge

23.06.2023

Judgment delivered in chamber under the seal of this court in the presence of Mr. Mathias Rweyemamu learned counsel for the appellant and in the presence of Mr. Gildon Mambo learned counsel for the respondent.




A.Y. Mwenda

Judge

23.06.2023