

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**PC CIVIL APPEAL NO. 23 OF 2022**

**ADAM MAZILE JUMANNE ..... APPELLANT**

**VERSUS**

**MULEBA MGEZWA LUSATO ..... RESPONDENT**

**(Appeal from the decision of the District Court of Kibaha at Kibaha in  
Matrimonial Appeal No. 1 of 2022)**

**JUDGMENT**

26<sup>th</sup> May & 21<sup>st</sup> July, 2023

**KISANYA, J.:**

Before this Court is an appeal filed by the appellant, Adam Mazile Jumanne. It originates from the decision of the District Court of Kibaha at Kibasa (the first appellate court) dated 17<sup>th</sup> August 2022 in PC Civil Appeal No. 1 of 2022. Pursuant to that decision, the respondent's appeal against the decision of the Primary Court of Mkuza (the trial court) in Matrimonial Appeal No. 61 of 2021 was allowed.

In order to facilitate easy appreciation of the appeal, I find it of importance to preface the judgment with a brief background. The appellant and the respondent, Muleba Mgezwa Lusato, were husband and wife who celebrated a civil marriage on 27<sup>th</sup> December, 2013. They lived peaceful until sometimes later when their marriage turned sour. According to the

respondent, the misunderstandings started when the appellant begun to mistreat and abuse her (the respondent) because she could not conceive.

The respondent decided to petition to the trial court for orders of divorce and division of matrimonial assets. After hearing both parties, the trial court held that there was no evidence to prove that the marriage between the appellant and respondent had broken down irreparably. The trial court went on to issue an order of separation for one year. The appellant was further ordered to maintain the respondent during that period.

That decision aggrieved the respondent. She successfully appealed to the first appellate court. Having heard the appeal, the first appellate court was satisfied that the marriage had been broken down irreparably based on the ground of cruelty. Consequently, the trial court's decision was quashed and the decree of divorce was granted. The first appellate court further ordered that the matrimonial properties to wit, two houses, vehicle and flour milling machine be sold and the proceeds be distributed at the rate of 60% to the appellant and 40% to the respondent.

Not amused, the appellant lodged the present appeal in which he raised five grounds of appeal. On account of what is to be depicted or noticed in this judgment, I have found it not necessary to reproduce the said grounds.

During the hearing of this appeal, the appellant was represented by Mr. Emmanuel Hyera, learned advocate, while the respondent was represented by Ms. Rita Ntagazwa, learned advocate. The appeal was argued by way of written submissions.

Before the hearing commenced, this Court wanted to satisfy itself on the propriety or otherwise of the proceedings before the trial court. This was done by probing the learned counsel for the parties to address this Court on whether the certificate from the Marriage Conciliation Board (hereinafter referred to as "the Board") was tendered before the trial Court, and if the answer to that issue is not in the affirmative, what is the effect on the matter at hand.

In his submission, Mr. Hyera submitted that the matter was entertained without following the matrimonial proceedings and the laws governing the institution of matrimonial cases in Tanzania. He fortified his argument by referring this Court to sections 101, 104(5) and 106(2) of the law of Marriage Act, Cap. 20, R. E. 2019 (the LMA).

The learned counsel went on to contend that the respondent (the then petitioner) did not adduce evidence to prove that parties had referred their dispute to the Board. His contention was based on the ground that neither did the respondent testify on that fact nor tender the certificate issued by the Board under section 105(2) of the LMA, leave alone the competence of

the said Board. On that account, the learned counsel was of the firm view that the whole proceedings were a nullity as the trial court had no jurisdiction to try the matter. To expound his argument, Mr. Hyera cited the cases of **Shillo Mzee vs Fatuma Ahmed**, [1984] TLR 112, **Ratifa Rafael Kipande vs Ramadhan Yusuph Mkoba**, PC Civil Appeal No. 195 of 2020 (unreported) and **Abdallah Hamis Kiba vs Ashura Masatu** Civil Appeal No. 465 of 2020 CAT (unreported).

In reply, Ms. Ntagazwa was alive to the position that, a matrimonial cause arises where the Board certifies that it has failed to reconcile the parties, as mandatorily required under section 101 of the LMA. She contended that the Board's certificate was received during the trial and placed in the case file. The learned counsel further claimed that the certificate was seen when the record was before the first appellate court. She was of the view that the certificate might have been misplaced at the time of transferring the record to this Court. The learned counsel maintained her position that both parties appeared before Pangani Ward for conciliation. She prayed that a certificate appended to her written reply submission to form part of her submission.

From the submissions of the learned counsel for both parties, it is a common ground that, a petition for divorce cannot be instituted unless the matrimonial matter has been referred to the Board and the said Board has

certified that it has failed to reconcile the parties. This is pursuant to sections 101 of the LMA. The said requirement is reinforced by section 106(2) of the LMA which requires the petition for divorce to be accompanied with a certificate issued by the Board not more than six months before the filing of the petition. In the case of **Abdallah Hamis Kiba** (*supra*), the Court of Appeal cited the above provisions and went on to hold that:

*"...the above provisions bar institution of a petition for divorce unless the matrimonial dispute or matter concerned has been referred to the Board and such Board certifying that it has failed to reconcile the parties. Compliance with the certificate requirement is mandatory except where a situation falls within any of the enumerated circumstances in paragraphs (a) to (f) of the proviso to the aforesaid section 101 - see, for example, **Hassani Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 (unreported)."*

In view of the above position first for consideration is whether the parties referred their matrimonial dispute to the Board for conciliation. As rightly observed by Mr. Hyera, the respondent did not testify to have referred the dispute to the Board and whether the said Board certified to have failed to reconcile the parties herein. Further to this, nothing to suggest that the appellant prayed to tender the certificate issued by the Board let alone mentioning the certificate or the Board. That being the case, Ms. Ntagazwa's

submission that the certificate was tendered during the trial is not supported by the record.

I have also gone through the copy of the certificate appended to the respondent's submission and noticed its original was attached to the petition (*hati ya mada'i*) for divorce filed in the trial court. However, as stated afore, the respondent did not pray to tender it. The law is settled in our jurisdiction, that, annexures to the pleadings are not evidence. Therefore, the respondent was required to tender the certificate in evidence. I am fortified by the case of **Patrick William Magubo vs Lillian Peter Kitali** (Civil Appeal No. 41 of 2019) [2022] TZCA (18 July 2022) in which the Court of Appeal stated:

*"Therefore, that document was required to be tendered and admitted in evidence. It is trite law that annexures are not evidence for the court of law to act and rely upon".*

It is also settled position that, the requirement to tender the document in evidence applies to the cases before the primary court. This stance was taken by this Court in the case of **George Mbushi vs Mniko Magesa**, PC Civil Appeal No. 62 of 2019, HCT at Musoma (unreported) where it was held that:

*"Further, regulation 8(1) (b) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 provides that facts can be proved by evidence which may be the production of documents by witnesses*

*(documentary evidence). In case where documentary evidence is produced, it can be relied upon if oral evidence to link it with the case is given. This is pursuant to regulation 11(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1964 which provides that:*

*"Where documentary evidence is produced, oral evidence must be given to connect it with the case."*

In view of that position, this Court went on to hold as follows after noting that the report was not tendered in evidence:

*"...the valuation report alleged to have been prepared by the agricultural officer was not tendered by any witness. Although the same was appended to the claim at the time of instituting the case, it was not produced in evidence. Thus, oral evidence was not given to link the said document with the appellant's claim."*

I subscribe to the position stated in the above cited case. Since the certificate alleged to have been issued by the Board was not tendered in evidence, it cannot be relied upon by this Court. This is so when it is considered that the appellant was not given time to comment on the contents thereto.

Even if the respondent had tendered the certificate appended to her petition, it is doubtful whether the same was issued by the Board established

by the Minister responsible for legal affair under section 102 of the LMA. This is because the letter head is titled Marriage Conciliation Board of Msagani Ward (Baraza la Usuluhishi la Kata, Kata ya Msagani), the stamp thereon is in the name of "*Mwenyekiti wa Baraza la Ardhi na Nyumba-Kata*" (Chairman of Land and Housing Tribunal). Such contradiction give rise the doubt whether the certificate was issued by the Board or the Land and Housing Tribunal.

For the foresaid reasons, I entirely agree with the appellant's counsel that it was not proved that the Board certified to have reconciled the parties herein. Given the fact that it was not established that the dispute fits under the exemption set forth by section 101 of the LMA, the proceedings and the decisions of the trial court and the first appellate court are a nullity. The matrimonial dispute was instituted prematurely and thus, incompetent before the trial court for want of the Board's certificate. See also the case of **Abdallah Hamis Kiba** (*supra*) in which the Court of Appeal held as follows on the issue under consideration:

*"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. Needless to say, the trial court's decree of divorce is quashed for being a nullity."*



Being guided by the foregoing position, the decisions of the trial court and first appellate court including, the decree of divorce and the order for division of matrimonial properties are hereby quashed for being nothing but a nullity. For that reason, I find no need of reproducing and discussing the grounds of appeal because they are founded on the merit of the decisions of the two lower courts.

In consequence, this appeal is hereby struck out for originating from the proceedings and decisions which are a nullity. As for the way forward, a party who is interested to pursue the matter is at liberty to institute a fresh petition in accordance with the law. This being a matrimonial matter, each party is ordered to bears its own costs.

It is so ordered.

**DATED at DAR ES SALAAM** this 21<sup>st</sup> day of July 2023.



S.E. KISANYA  
**JUDGE**  
21/07/2023