IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA

PC CIVIL APPEAL NO. 61 OF 2022

(C/f the District Court of Arumeru, Civil Appeal No. 13 of 2022, Originating from Enaboishu Primary Court, Matrimonial cause No. 13 of 2021)

MAGRETH LONGIN HHAYUMA _____ **APPELLANT**

Versus

FANUEL ISRAEL GIDORI _____ **RESPONDENT**

JUDGMENT

26th May & 28th July, 2023

BADE, J.

The appellant herein has preferred this appeal challenging the decision of the District Court of Arumeru (henceforth "the first appellate court") exercising its appellate jurisdiction, which was handed down on 29/09/2022. The first appellate court confirmed the decision of Enaboishu Primary Court (henceforth "the trial court"), which issued a decree of divorce and ordered the distribution of matrimonial assets between the parties herein vide Matrimonial Cause No. 13 of 2021.

In its decision, which was delivered on 08/04/2022, the trial court was sufficiently convinced that the marriage between the parties had broken down irreparably and proceeded to issue the decree of divorce. It also ordered division of the matrimonial assets on a 50% by 50% basis. Custody of their children was vested on the appellant.

The material background facts of the dispute leading to this appeal as gathered from the record are easy to comprehend. They go as follows: The appellant and respondent contracted Christian marriage on 11/04/1998. They were blessed with two issues of marriage, Gidion Fanuel Israel (1999) and Glory Fanuel (2003). They lived a happy marriage life, until 2006, when the marriage life turned sour. Attempts to salvage the marriage proved futile. The dispute has been subject of reference to various institutions for resolution without success. In the courts of law, numerous suits were instituted ranging from Maji ya Chai PC, the trial court and the first appellate court, attempting to dissolve the marriage but the efforts were barren. Eventually, the matrimonial cause subject of this appeal was referred in the trial court on 06/05/2021, after several other cases had failed on technical grounds.

At the trial court, the respondent successfully petitioned for a decree of divorce, distribution of matrimonial assets and custody of the children. After hearing evidence from both sides, the trial court was convinced that the marriage between the two had broken down beyond repair. A decree of divorce was issued and an order of distribution of matrimonial assets. The appellant was aggrieved by the decision of the trial court. She appealed to the first appellate court, which as above pointed, dismissed the appeal by upholding the decision of the trial court. Still undaunted,

the appellant has preferred this appeal based on the following grounds of appeal, *verbatim*:

a) *That, both the trial and the appellate courts erred in law and fact by upholding the decision of the trial court granting the decree of divorce while the Appellant was not given an opportunity to appear before the Marriage Conciliation Board which denied the Appellant the right to be heard contrary to the principal (sic) of natural justice;*

b) *That, both the trial and the Appellant (sic) Courts erred in law and facts to held (sic) the Appellant was summoned several times to appear before the marriage Conciliation Board without evidence proving that the Appellant was summoned;*

c) *That, both the trial and the Appellate Courts (sic) erred in law and fact by failed (sic) to re-evaluate fabricated evidence tendered before the trial court by the one alleged to be chairman of the marriage Conciliation Board and the same were used to identify and prove that the marriage between the parties herein broken (sic) down beyond repair;*

d) *That, both the trial and Appellate Court erred in law and facts by upholding the decision of the trial court that marriage between parties herein broken (sic) down beyond repair based on unproven allegation;*

e) *That the first appellate Court erred in law and facts by failure to consider the record of the trial court that the petition for divorce and division of matrimonial property was prematurely filed in the trial Court without observing the prerequisite requirement of*

properly being held by Marriage Conciliation Board for reconciliation as per requirement of the law; and

f) *That the Appellate Court erred in law and in facts by not considering facts that the trial Court did not clearly evaluate the evidence before it concerning matrimonial properties to be divided between the parties herein.*

Based on the foregoing grounds of appeal, the appellant prayed for the following reliefs:

a) *The judgment, decree and proceedings of both the trial and the first appellate court be quashed and set aside;*
b) *That the matter be remitted back to the trial court to be re-heard by marriage conciliation board so that parties will be afforded the right to be heard;*
c) *Matrimonial properties owned and acquired by the parties be properly identified and distributed to both parties equally; and*
d) *Any other relief(s) this Honourable Court deems fit and just to grant.*

At the hearing of the appeal, both the appellant and respondent appeared in Court in person unrepresented. The appeal was disposed of through filing of written submissions.

Submitting in respect of the first ground of appeal, the appellant contended that before filing petition for divorce, the dispute must be referred before Marriage Conciliation Board for the board to certify that it

has failed to reconcile the parties. Her reliance in this respect is section 101 of the Law of Marriage Act, Cap. 29 [R.E 2019] (henceforth "the LMA"). In her view, this mandatory requirement of the law was bypassed because she was not summoned in any board, she was just summoned to appear in the trial court where petition for divorce was granted.

It was her submission that although the petition was filed along form No. 3 signifying that the Board has failed to reconcile the parties, the respondent was heard ex-parte in the Board which contravenes section 101 of LMA. The appellant maintained that failure to comply with section 101 of the LMA, nullifies the proceedings and judgment of the trial court. To reinforce her argument, the appellant referred the case of **Athanas Makungwa vs Darini Hassani** [1993] TLR 132.

According to the appellant, she was denied the right to be heard because she raised the complaint that she was not summoned in the Conciliation Board but still the trial magistrate did not consider her complaint. She insisted that the right to be heard as guaranteed under Article 13(6)(a) of the URT Constitution is basic right whose contravention goes to the root of the matter. To buttress her contention, she relied on the decision in

the case of **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported).

Elaborating the 2nd ground, the appellant averred that she was not summoned in the Marriage Conciliation Board, because even the chairman who testified in the trial court had no proof that the appellant was summoned but she wilfully defaulted to appear. In her view, the trial court was biased because it took into account the respondent's evidence without considering her evidence.

Submitting in support of the 3rd and 4th grounds conjointly, the appellant faulted the trial court for relying on uncorroborated evidence of the Chairperson of the Marriage Conciliation Board who stated that the marriage was broken down beyond repair while the Board did not hear the appellant herein. The appellant cited section 107(2) of the LMA which outlines salient grounds upon which marriage can be said to have broken down irreparably.

Regarding the 5th ground, the appellant complained that the trial court did not consider her evidence regarding the properties she mentioned as assets acquired during subsistence of their marriage. For example, 1 acre

plot in Morogoro, which has a house was not among the properties distributed. She maintained that the trial court miserably failed to evaluate the evidence before it regarding matrimonial properties jointly acquired. She concluded her submission by urging the Court to quash and set aside the judgments, decree, and proceedings of both lower courts.

Resisting the appeal, the Respondent combined the 1st, 2nd, and 3rd grounds of appeal submitting that the appellant was summoned to appear in the Conciliation Board but she wilfully defaulted to appear. He added that, even the Chairperson of the Board testified in that accord.

In response to the 4th ground, the Respondent amplified that he is no longer interested to live with the Appellant, bearing the tortures he suffered for more than 16 years. He confirmed that he is now happily married to another woman.

Arguing the 5th and 6th grounds simultaneously, the Respondent fortified that he tendered in the trial court all documents in respect of the matrimonial properties jointly acquired and he implored the court to make an equal distribution of such properties. The Respondent further argued that the Appellant had ample opportunity to testify on the properties

jointly acquired in the trial court and not in this Court, insisting that they have no property situated at Morogoro as the Appellant contended.

In rejoinder submission, the Appellant reiterated her submission in chief adding that she still loves her husband and she is not prepared to lose him. She insisted that since she made an equal contribution towards the acquisition of the matrimonial properties, she is entitled to an equal share including the plot and house in Morogoro.

I have considered the grounds of appeal, the record of the lower courts, and the submissions by both parties. The main issue for determination which in essence covers the complaints in the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal is whether the trial court had jurisdiction to hear and determine the matter.

The appellant's complaint is that she was not afforded the right to be heard as she was not summoned to the Marriage Conciliation Board. It is common ground that the jurisdiction of courts is a creature of statute and is conferred and prescribed by the law and not otherwise. Primary Court, the District Court, and the High Court all have original jurisdiction to entertain a matrimonial proceeding.

However, for a petition for divorce to be entertained by any court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such Board shall certify that it has failed to reconcile the parties. The certification is made in a prescribed form known as Form No. 3 found in the schedule to G.N No. 240 of 1971. This is in terms of section 101 of the LMA which 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:***
>
> *Provided that this requirement shall not apply in any case:*
>
> *(a) N/A;*
>
> *(b) N/A;*
>
> *(c) where the respondent has been required to appear before the Board and has wilfully failed to attend;*
>
> *(d) N/A;*
>
> *(e) N/A*
>
> *(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board Impracticable."*

By the use of the word 'shall', the above provision implies that compliance with section 101 of the LMA is mandatory except where there is evidence of the existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board. This requirement is

further reinforced by section 106(2) of the same Act, which states in clear terms that:

> *"2. Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition..."*

According to the evidence on record, the matter was referred to the Ambureni Ward Tribunal for reconciling the parties. According to Gabriel Joseph (SM2) who identified himself as the Chairman of Ambureni Conciliation Board, the Appellant was summoned three times but she wilfully refused to attend. When cross-examined by the Appellant, SM2 stated that the summonses were served to the Appellant through the ten-cell leader. He further accounted that once summonses were issued, the Appellant did sign them but she wilfully defaulted appearance.

Regrettably, no documentary proof was tendered in the trial court proving that the Appellant was served but declined to appear. According to SM2, the Appellant signed all the summonses but still did not appear. Such evidence appears to be mere words without documentary proof. In as much as SM2 testified that the summonses were signed by the Appellant, he ought to have tendered such summonses as proof that the Appellant

was summoned but wilfully refused. It would have made better sense particularly because it is alleged that she signed those summonses.

Similarly, an affidavit of the person serving the summonses would have also acted as proof if the Appellant simply refused to sign after being found for service. Above all, the said ten-cell leader who served the summonses was not called to testify in court so that he could be cross-examined on the service that he had made on the Appellant. Since the Appellant persistently kept on insisting that she was never served with summonses to appear in the Marriage Conciliation Board, it was the Respondent's duty to prove that she was in fact served but refused to appear. In the absence of proof that the Appellant was so served but wilfully refused to appear, there is no gainsaying that section 101 of the LMA was not flouted.

It is on record that the petition was accompanied by a certificate from Ambureni Ward Land Tribunal, certifying that it had failed to reconcile the parties. However, noteworthy is that the said certificate is deficient in legal requirements due to the following: **First**, the dispute was heard ex-parte. That means the Appellant was not heard in the Marriage Conciliation Board.

Second, the dispute was heard by a non-existence board. The certificate purported to be form No. 3, was signed and sealed with a seal showing that it was Ambureni Ward Land Tribunal that heard the dispute. Similarly, the proceedings purporting to be the proceedings of the Board, show that the dispute was heard by Baraza la Ardhi na Usuluhishi Kata ya Ambureni. That Tribunal is not mandated to resolve matrimonial disputes. It deals exclusively with land matters as designed by law. Therefore, even assuming that the said certificate was genuine, in the sense that, there was proof that the Appellant was served but wilfully refused to appear, still the certificate would not be assailed due to the fact that the dispute was reconciled by a non-existent Marriage Conciliation Board.

Third, the said certificate only features in the court record but it was not admitted in evidence. Since the said Form No. 3 was not tendered and admitted in evidence, it did not form part of the court record. While faced with an akin scenario, the Court of Appeal in the case of **Patrick William Magubo vs Lilian Peter Kitali,** Civil Appeal No. 41 of 2019 (unreported), had the following to say:

> *"With profound respect, we are unable to agree with Mr. Kahangwa on this point, because 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.*** *It is trite law that annexures are not evidence for the court of law to act and rely upon."* (Emphasis added).

Deducing from the above, I am of the settled view that the Appellant was not heard in the Marriage Conciliation Board in the absence of proof of service. The Appellant was denied the right to be heard in the Board, as a matter of fact, the Board had nothing to reconcile. As the record bears, the Appellant raised such complaint in both the trial court and the first appellate court, but both lower courts desisted from addressing it. That was highly irregular because without valid certificate from the Board, petition for divorce cannot be entertained. Non-compliance with section 101 of the LMA was also held fatal in the case of **Hassani Ally Sandali vs Asha Ally**, Civil Appeal No. 246 of 2019 (unreported). In that case the Court succinctly observed:

> *" ...* ***the granting of the divorce...was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of***

the Act is mandatory except where there is evidence of existence of extraordinary circumstances making it impracticable to refer a dispute to the Board *as provided for under section 101 (f) of the Act. However, there is no indication of any extra ordinary circumstances in this appeal which could have attracted dispensing with reference of the matrimonial dispute to the Board.* "Emphasis added.

See also: **Yohana Balole vs Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020 (unreported).

Having found that the dispute was determined by Marriage Conciliation Board which does not exist, the decision therefrom cannot be left to stand. Similarly, the fact that the Appellant was not heard in the said Board, militates one to conclude that there was no reconciliation conducted. Further, owing to the fact that the certificate of the said Board has been found defective, I entirely agree with the Appellant that the trial court had no jurisdiction to entertain the dispute since there was no valid certificate from the Marriage Conciliation Board certifying that it has failed to reconcile the parties. In the circumstances, I find merits in the 1st, 2nd, 3rd, 4th and 5th grounds of appeal, and in consequence, I allow them.

Having resolved that the trial court had no jurisdiction to entertain the matter in terms of section 101 of the LMA, I find no pressing reason to

delve into determining the remaining grounds of appeal as it will be an exercise in futility.

In the premises, this appeal is merited. I find that the proceedings before the trial court and the first appellate court were vitiated, and I hereby proceed to nullify the entire proceedings of the trial court, quash the judgment, and set aside the subsequent orders thereto. I also nullify the proceedings of the first appellate court and quash the judgment and subsequent orders as they stemmed from nullity proceedings. The Respondent is at liberty to process his petition afresh in accordance with the law, if he so wishes. This being a matrimonial dispute, I make no order as to costs.

Order accordingly.

DATED at **ARUSHA** this **28th** day of **July**, 2023

A. Z. Bade
Judge
28/07/2023

Judgment delivered in the presence of parties / their representatives on **28th** day of **July 2023**

A. Z. Bade
Judge
03/03/2023