

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

PC MATRIMONIAL APPEAL NO.1 OF 2023

(Arising from Consolidated Matrimonial Appeals No. 1 and 2 of 2022 District Court of Bukoba Originating from Matrimonial Cause No. 21 of 2021 Bukoba Urban Primary Court)

JESCA BALONGO..... APPELLANT

VERSUS

FELIX FRANCE..... RESPONDENT

JUDGMENT

5th July and 4th August, 2023

BANZI, J.:

The respondent, Felix France and the appellant, Jesca Balongo were husband and wife since 1st June, 2013 when they contracted their marriage under Christian rites. Their marriage lasted until 2021 when it was officially dissolved by Bukoba Urban Primary Court (the trial court) after the respondent successfully petitioned for divorce. Consequently, among other things, the trial court divided matrimonial assets acquired during subsistence of marriage and the appellant was given custody of the two issues of marriage with an order of their maintenance while the respondent was ordered to pay for their school fees.

On 1st February, 2022, the trial court following the application by the respondent, made a ruling in respect of execution of decree. The appellant being dissatisfied with both decisions, she filed two separate appeals before the District Court of Bukoba (the District Court) where they were consolidated and after being heard, the same were dismissed for want of merit. Still aggrieved, the appellant filed petition of appeal before this Court containing five grounds. At the hearing, the appellant was represented by Mr. Nathan Alex, learned Advocate whereas, the respondent had the services of Mr. Fahad Rwamayanga, learned Advocate. Although the petition of appeal contained five grounds, Mr. Alex, learned counsel prayed to abandon ground number two to five and remained with the first ground which challenges the propriety of proceedings before the trial court for determining the matter without the certificate by the Marriage Conciliation Board that it had failed to reconcile the parties.

Submitting in support of that ground, Mr. Alex stated that, jurisdiction of the Primary Court in matrimonial matter is subject to compliance with section 101 of the Law of Marriage Act [Cap. 29 R.E. 2019] ("the LMA") which requires the parties to refer matrimonial dispute to the Marriage Conciliation Board ("the Board") for reconciliation before filing petition for divorce. Also, section 106 (2) of the LMA requires every petition for divorce

to be accompanied by the certificate issued by the Board stating that, it had failed to reconcile the parties. Mr. Alex challenged the certificate in the matter at hand, claiming that, on 20th October, 2021, the respondent went to the trial court with a letter of request to open the divorce case but the attached certificate is dated 4th November, 2021.

He further challenged the validity of certificate in question on the reasons that; one, the evidence of parties does not reveal that if the duo passed before the Board prior to institution of the matter; two, the alleged certificate was not tendered as exhibit as required by law through the case of **Patrick William Magubo v. Lilian Peter Kitali** (Civil Appeal No. 41 of 2019) [2022] TZCA 441 TanzLII; three, the certificate in question was not attached with his letter of request for filing divorce as it was issued on 04/11/2021 while the said letter was written and received by trial court on 20/10/2021 and four, while both parties live at Kibeta Ward but the certificate was issued by the Board of Kitendaguro Ward which is contrary to section 103 (2) (a) of the LMA. With such anomalies, Mr. Alex urged this Court to allow this appeal by nullifying, quashing and setting aside the proceedings, judgment and orders of the trial court. Likewise, the proceedings and judgment before the District Court be nullified and quashed for being a product of nullity.

On his part, Mr. Rwamayanga submitted that, the fact that parties were living at Kibeta Ward and the Board which reconciled them is located at Kitendaguro Ward cannot invalidate the proceedings of the Board because such irregularity is curable under section 104 (7) of the LMA. He added that, sections 101 and 106 of the LMA do not require tendering of certificate of the Board. He distinguished the case of **Patrick William Magumbo** (*supra*) claiming that, the circumstances of that case are different from the matter at hand because that case originated from District Court where proceedings are initiated by petition. Also, the certificate was nowhere to be seen and it was neither attached with petition nor it formed part of the evidence. He further contended that, in the instant matter, the issue of certificate was not among the facts in issue before the trial court for parties to testify. He cited the case of **Switbert Thomas Baramuzi v. Juliana Switbert** (Matrimonial Appeal No. 1 of 2022) [2022] TZHC 12103 TanzLII to support his assertion about dispensation of requirement to tender certificate. He added that, taking the parties back to the Board will not save any purpose to them rather than causing more costs while their marriage had already broken down irreparably. He finally concluded his submission by praying for appeal to be dismissed as parties went to the Board and the certificate of failure is in the record.

In his rejoinder, Mr. Alex insisted that, the issue of passing through the Board, to attach certificate and tender the same is not the matter of technicality but rather a jurisdiction issue and thus, the case of **Switbert Thomas Baramuzi** was decided in per curium. He added that, requirement to tender certificate is applicable even in cases which originate from Primary Courts as it was stated in the case of **Yohana Balole v. Anna Benjamin Malongo** (Civil Appeal No. 18 of 2020) [2021] TZCA 388 TanzLII. He further submitted that, in this case, the appellant claimed to have never attended at the Board and the evidence of parties as well as the judgment of the trial court do not disclose that fact. Hence, he reiterated his prayers in chief submission.

Having carefully perused the record of the trial court and the submissions made by learned Advocates, it is pertinent to determine the legality or otherwise of the proceeding of the trial court.

It is worthwhile noting here that, section 101 of the LMA bars institution of petition for divorce unless the matrimonial dispute in question is referred to the Board and the said Board certifies that it has failed to reconcile the parties. This compliance is underscored in section 106 (2) which

requires the petition for divorce to be accompanied by certificate of the Board. The section provides that:

"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 in accordance with subsection (5) of section 104:

Provided that, such certificate shall not be required in cases to which the proviso to section 101 applies."

It is also prudent to underscore that, section 104 (1) of the LMA requires the Board to which a matrimonial dispute or matter has been referred, to require the attendance of the parties and give each of them an opportunity of being heard and make such inquiries as it may think fit and if it considers it necessary, may adjourn the proceeding from time to time. Equally subsection (5) requires the Board to issue certificate stating its findings when it failed to reconcile the parties.

In the matter at hand, there is rival argument on whether the parties referred their matrimonial dispute to the Board before instituting the matter at the trial court. It is on record that, on 20/10/2021 the respondent wrote a letter addressing the Magistrate in-charge with a request to file the petition for divorce. The letter was received by the trial court on the same date. It is

undisputed that, on that date, the certificate in question was yet to be issued because the record reveals that, the same was issued on 04/11/2021 which is two weeks after the respondent submitted his request for filing petition of divorce. This in itself is a clear indication that, at the time the respondent made the decision of filing for divorce, nothing was referred to the Borad as required by law. In other words, the issue of referring their dispute to the Board nothing but after the fact thing. Apart from that, as rightly submitted by Mr. Alex, the fact that neither the appellant nor the respondent testified about passing to the Board cast strong doubt if at all the duo referred their matrimonial dispute to the Board before instituting the petition for divorce at the trial court. Likewise, it is doubtful if the reconciliation effort took its full course in those two weeks between 20/10/2021 and 04/11/2021 when the certificate in question was alleged to be issued.

Besides, a thorough scrutiny of the content of the impugned certificate reveals another controversy which leaves a lot to be desired if the same is genuine or a mere sham. For ease of reference, the relevant part is reproduced as hereunder:

***"HII NI KUTHIBITISHA kuwa Baraza hili
limeshindwa kusuluhisha wadaawa kwa maoni ya***

Baraza: Mwanaume anashikilia msimamo wa kutaka talaka kwa kuwa mwanamke: (kutaja baadhi)

- (i) Anafanya mapenzi nje ya ndoa na wanaume wengine.*
- (ii) Si mkweli juu ya umri wake, elimu yake na historia yake.*
- (iii) Anazua visa na kesi za jinai dhidi ya mume wake ili apate adhabu asizostahili ikiwemo kufungwa.*
- (iv) Anasafiri safari nyingi za kulala nje ya familia bila sababu na ruhusa ya mume.*
- (v) Mwanaume alibaini mkewe aliolewa na kuzaa mtoto kabla ya kuolewa na yeye, jambo ambalo halikujulikana kabla ya ndoa yao.*

(Maoni yoyote ambayo Baraza linataka kueleza:)

Ndoa hii haina amani hata kidogo tunashauri mahakama ione namna ya kumsaidia mwanaume."

Apart from the bolded part which is the standard proclamation found in the form provided under the Schedule to The Marriage Conciliation Boards (Procedure) Regulations, GN No. 240 of 1971, what was stated therein was neither the efforts made at the reconciliation nor findings made by the Board following failure to reconcile the parties as required under section 104 (5) of the LMA. Conversely, the certificate in question contains allegations made by the respondent towards the appellant. Facing similar situation, the Court of

Appeal in the case of **Abdallah Hamisi Kiba v. Ashura Masatu** (Civil Appeal No. 465 of 2020) [2022] TZCA 335 had this to say:

"...the certificate in the instant case gives no details of the alleged effort made at reconciliation. In terms of section 104 (5) of the Act, the certificate ought to have set out the findings made by the Board following failure to reconcile the parties."

The Court went on and stated that:

"In the instant case, instead of the impugned certificate giving findings of the Board, it enumerates the respondent's allegations against the appellant as if they had been heard and proven to be true. There is no gainsaying that none of these allegations constituted the Board's findings of fact."

The Court concluded by stating that:

"Given the evidence on record as we have reviewed it earlier, we hold without demur that the impugned certificate is invalid for stating falsely that the Board had attempted to reconcile the parties but failed to settle the dispute when the reconciliation effort clearly did not take its full course."


From the extracts above, it is settled that, for certificate to be valid, it must give details of the efforts made at reconciliation, and, as required under

section 104 (5) of the LMA, it must set out the findings of the Board after failing to reconcile the parties. As stated herein above, in our instant matter, the purported certificate contains allegations made by the respondent against the appellant as if they were proved to be true. In addition, looking closely at the alleged certificate, it gives the impression of a one-sided hearing. In that regard, it is the finding of this Court that, it is doubtful if the parties went to Board for reconciliation before the respondent instituted the matter at the trial court. Assuming that, they referred their dispute to the Board, yet the alleged certificate would still be invalid following the flaws mentioned above. With due respect to learned counsel for the respondent, his argument about no purpose would be saved if the parties are taken back to the Board is misplaced because that is not among the exception warranting dispensing with reference to the Board under section 101 (a) to (f) of the LMA.

Before I pen off, I would like to comment on the argument raise by learned counsel about the choice of Board preferred by parties. It is undisputed that, parties were residing at Kibeta Ward while the Board which reconciled them is located at Kitendaguro Ward. Admittedly, this in itself would not have invalidated the proceedings of the Board as such irregularity is curable under section 104 (7) of the LMA. However, such argument could

be valid if there was evidence of reconciliation conducted at the Board of Kitendaguro Ward. Besides, in the absence of evidence from parties explaining why they chose the Board of another ward other than theirs, cast another doubt if the parties actually attended the alleged reconciliation.

Since it is doubtful if the parties actually attended reconciliation process as required by law and since the petition for divorce was instituted without being accompanied by a valid certificate in terms of section 101 of the LMA, the said petition is incomplete, premature and incompetent. On that basis, the entire proceedings, the decision and orders of the trial court are nullified for want of jurisdiction. The resultant, the decree of divorce issued by the trial court is hereby quashed for being nullity. Equally, the decision of the District court is also nullified as it is a product of nullity. Should the respondent desire to pursue his quest for divorce, he is at liberty to do so afresh according to the law. Consequently, this appeal is allowed and since it is a family matter, I make no orders as to costs.



I. K. BANZI
JUDGE

04/08/2023

Delivered this 4th day of August, 2023 in the presence of Ms. Pilli Hussein, learned counsel for the appellant, Mr. Fahad Rwamayanga, learned counsel for the respondent as well as the appellant and the respondent both in person. Right of appeal duly explained.



A handwritten signature in blue ink, appearing to read "I. K. Banzi", written in a cursive style.

**I. K. BANZI
JUDGE
04/08/2023**