

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

**IN THE DISTRICT REGISTRY OF TABORA**

**AT TABORA**

**PC CIVIL APPEAL NO. 13 OF 2022**

*(Arising from the decision of Nzega District Court in Civil Appeal No.09 of 2022 and Originating from Puge Primary Court in Matrimonial case No. 20/2021)*

**JANTIL ERNEST .....APPELLANT**

**VERSUS**

**ANNA PROSPER BAHHA .....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 05/09/2023*

*Date of Judgment: 05/09/2023*

**MATUMA, J.**

The Respondent sued the appellant for divorce in the Primary Court at Puge. The Primary Court having heard the parties granted the divorce decree, made an order for division of matrimonial assets at 50% for each of the parties and custody of children to the Respondent.

The appellant having been aggrieved with both orders appealed to the District Court of Nzega which having heard the appeal found that the suit at the trial court was incompetent for having been filed without having first

referred to the Marriage Conciliation Board and the board has certified that it has failed to reconcile the parties.

The District Court thus nullified the proceedings and judgment in its own words; **"... the dispute has never been referred to any relevant board and such proceedings and the judgment thereof are a nullity."**

Despite of such findings, the learned appellate Magistrate maintained the order for custody of children to the respondent and added that;

*"Since the trial court ordered the children namely Godwin Jayantil and Godlisten Jayantil to be placed under the custody of the respondent as a mother for she has the pains to the infant children over any one and there is no way this court can come into fault with such findings taking into account that it is the respondent who has been living with the issue all along and this court cannot allow the said children to stay with their step mother while their mother is still alive."*

It is upon this finding that the appellant was further aggrieved hence this appeal with four grounds whose core complaint was that ***the first appellate court erred in law to maintain the order for custody of children having nullified the proceedings and judgment of the trial court.***

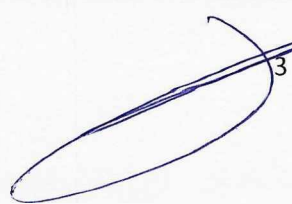
At the hearing of this appeal Mr. Amos Gahise learned advocate appeared for the appellant on behalf of advocate Yusuph Ally Maganga who sent him to hold his brief.

The respondent despite of having been served defaulted appearance hence the appeal proceeded ex-parte. Mr. Amos Gahise learned advocate arguing for the appeal condemned the first appellate court to have maintained the order for custody of children despite the fact that it had nullified the proceedings and judgment of the trial court.

He further argued that the 1<sup>st</sup> appellate court acted on bias by depriving the appellant the right to custody of his children. He finally prayed for the appeal to be allowed.

Having heard this appeal and gone through the records of the trial court and that of the 1<sup>st</sup> appellate court, I am inclined to agree with Mr. Amos Gahise learned advocate in his argument that the first appellate court having nullified the proceedings and the judgment of the trial court was not justified to maintain subsequent orders resulting from the nullified proceedings. Once the proceedings and judgment of the lower court are nullified, the superior court lacks jurisdiction to issue subsequent orders on the matter for having no records before it upon which such orders could be issued.

In the case of ***Semeni Issa versus the Republic, criminal Appeal no. 156 of 2019***, the Court of Appeal at Tabora citing the cases of ***Richard Julius Rukambura versus Issack Ntwa Mwakajila and another, Civil Application no. 3 of 2004*** and that of ***Fanuel Mantiri Ng'unda versus Herman Mantiri & 20 others, Civil Appeal no. 8 of 1995*** held that once the appellate court nullifies the records of the trial court, it remains with no records before it which could be subject to scrutiny for subsequent orders. At that time the appellate court remains with no jurisdiction on the matter

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as the same is not before it. Whatever assumption of powers will be a nullity. In the same way, in the instant appeal, once the learned appellate magistrate nullified the proceedings and judgment which resulted into a nullity trial, had no records before it which could be acted upon to issue appropriate orders including that of custody of children.

It was as well unwarranted for the learned magistrate to rule out that only the respondent had pain of the children over any one else and that the court cannot allow the children to stay with their step mother while their mother is still alive. Such findings no doubts connote biasness against the appellant as rightly complained by the appellant through his advocate Mr. Amos Gahise. The findings were made out of records which is bad in law. Both parents have equal rights to their children and thus no one should be treated biasedly against the other. Also issues of "**step mother**" were extraneous to the proceedings at hand. They were wrongly applied in reaching to the decision. The alleged "**step mother**" was not party to the suit nor was summoned to be heard before she is condemned unfit to care for the children. Most important it was the appellant before the court litigating for custody of the children and not the "step mother". The first appellate court should have therefore adjudged the parties and not a stranger to the suit who is not a party thereof.

I therefore allow this appeal and quash the decision of the 1<sup>st</sup> appellate court relating to the orders for custody of children. I maintain the order nullifying the proceedings and judgment of the trial court because truly the proceedings at the trial court commenced in contravention of the law section 101 of the Law of Marriage Act, Cap. 29 R.E. 2019 which provides that;



*"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."*

That position was as well stated in the case of ***Shilo Mzee Versus Fatuma Ahmed (1984) TLR 112*** in which the court held;

*"In the absence of a certificate from the conciliation board, a petition for divorce becomes premature and incomplete."*

I therefore in the clear light of the position of the law supra declare that the parties' status quo prior to the institution of the proceedings at the trial Primary Court is restored.

Whoever wishes to petition for divorce and subsequent orders thereto, should do so in accordance to the law. If the parties are no longer interested to further litigate on their marriage but their grievances are on the custody of children, then, whoever aggrieved with the current status quo may refer the matter to the Juvenile Court for orders pertaining to custody and or maintenance.

Having said all these, this appeal is allowed to the extent herein above stated and no orders as to costs. It is so ordered.

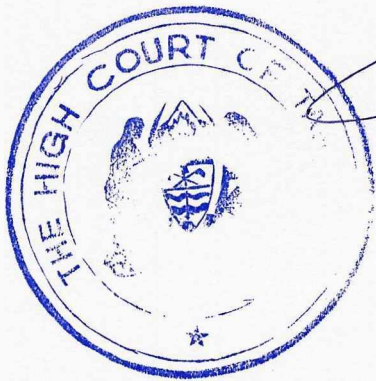


**MATUMA**

**JUDGE**

**05/09/2023**

**Court:** Judgment delivered in the presence of advocate Amos Gahise learned advocate for the appellant and in the absence of the Respondent. Right of further appeal explained.



**MATUMA**

**JUDGE**

**05/09/2023**