IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 12 OF 2023

(*Arising from the District Court of Rufiji in Civil Appeal No. 01 of 2022)*

HASSANI RASHIDI NJOGORO..... APPELLANT

VERSUS

MWACHE YUSUFU POGORA.....RESPONDENT

JUDGMENT

20th July & 31st August, 2023

BWEGOGE, J.

This is an appeal against the judgment and order entered by the District Court of Rufiji which dismissed the appeal lodged by the appellant herein who sought to defeat the decree for dissolution of the marriage between the parties herein entered by Ngorongo Primary Court. The appellant advanced four (4) monotonous grounds of appeal in this court which may be reduced to two grounds of appeal as hereunder:

1. *The trial Magistrate erred in law and facts in upholding the decree for divorce entered by the primary court contrary to section 101 of the Law of Marriage Act [Cap. 29 R.E. 2019].*
2. *The trial magistrate erred in law and facts in upholding the decision of the primary court which ordered the division of matrimonial assets between the parties herein contrary to section 114 (1) and (2) of the Law of Marriage Act [Cap. 29 R.E. 2019].*

Primarily, I find it pertinent to recapitulate the facts of this case gleaned from the records of the subordinate courts as follows: The appellant and respondent herein were husband and wife having contracted Islamic marriage in 1998 and begotten one issue. In 1999 the parties herein fell asunder. Both remarried other suitors. However, the subsequent marriages established crumbled. Eventually, the parties reunited and cohabited as husband and wife. Unfortunately, the reunion between the parties herein was short-lived. Marital strife constrained the respondent herein to file matrimonial proceedings in Ngorongo Primary Court. The court of first instance granted a decree for divorce. Likewise, the trial court ordered the division of matrimonial assets between the parties herein. The appellant herein was awarded 60% of the matrimonial properties and the respondent herein was awarded 40% of the same. The appellant was not amused with the decision of the trial court. He lodged his appeal in the first appellate court. The appeal failed. Hence the 2nd appeal herein.

The appellant was represented by Mr. Sosthenes Edson, learned advocate, whereby the respondent fended for herself. The appeal was argued orally. The submissions of the parties herein, albeit briefly, are restated hereunder.

In support of the 1st ground of appeal, Mr. Edson submitted that the first appellate court failed to consider the provision of section 101 of the Law of Marriage Act [Cap. 29 R.E. 2019] in determining this matter. That the above-mentioned provision of the law mandates that the matrimonial dispute should be filed to the Marriage Conciliation Board before the petition is filed in court of law. The counsel asserted that this requirement was not complied with. That the respondent informed the trial court that she was availed with the referal letter from the Ward Tribunal but the said document was not produced in court. The counsel asserted that the omission is fatal to the matrimonial proceedings. The counsel cited the case of **Abdallah Hamis Kiba vs Ashura Masatu (**Civil Appeal 465 of 2020) [2022] TZCA 335 to bring his point home.

In respect of the 2nd ground of appeal, the counsel submitted that the distribution of matrimonial assets was against the provision of section 141(1)(2) of the Law of Marriage Act. That the respondent admitted to have been a housewife and she didn't prove her contribution to the

acquisition of matrimonial assets to be entitled to 40% of the matrimonial assets. The counsel concluded that the subsistence of the marriage was too short to entitle the respondent to have such a share in matrimonial properties.

On the other hand, the respondent submitted that she married the appellant in 2016. They acquired landed property and cohabited peacefully until 2021 when the appellant's behavior changed. She engaged her family to mediate them, but the effort ended in vain. Later, she referred their dispute to BAKWATA which failed to reconcile them. BAKWATA referred the parties herein to the Ward Tribunal on the ground that the parties herein possessed matrimonial assets. The tribunal, likewise, failed to reconcile the parties herein and referred the respondent to the primary court. The respondent enlightened this court that the appellant, when summoned in court, expressly declared to have issued her with divorce.

In respect of the 2nd ground of appeal, the respondent submitted that the appellant admitted that they were married in 2016 and acquired piece of land in 2019 whereas they constructed a house in the same year. The respondent concluded that she satisfied the trial court that she had

contributed in the family business by selling cashew nuts and operating the money transfer business.

In rejoinder, the appellant's counsel submitted that the referral letter issued to the respondent by the Ward Tribunal was not tendered in court. He reiterated that the respondent has not contributed to the acquisition of matrimonial property to entitle her to the distribution of 40% of the property.

The issue for determination is whether the appeal is merited.

I am now bent to canvass the grounds of appeal mentioned above commencing with the 1st ground. It is the respondent's evidence on record that the appellant having refused to issue her with talak according to Islamic rites, she filed the matrimonial dispute in the National Muslims Council, commonly known as "BAKWATA" at Ikwiriri whereas the said Board, having found that the parties herein had acquired matrimonial properties, referred the matter to the War Tribunal. Thereafter, the Tribunal issued a referral letter allowing the respondent to institute matrimonial proceedings in the Ngorongo Primary Court. I fail to apprehend the procedure taken by BAKWATA in referring the dispute to the Ward Tribunal and, or its failure to certify that it failed to reconcile the parties herein. Unfortunately, the referral

letter issued by the Ward Tribunal was not filed in court. Hence, I am denied an opportunity to scrutinize the same.

As rightly asserted by the appellant's counsel, it is a law that prior to the commencement of matrimonial proceedings in court, the parties are required to refer the dispute to the Marriage Conciliation Board. It is until the Board certifies that it failed to reconcile the parties that the dispute may be filed in court. The provision of sections 101 of the Law of Marriage Act, Cap. 29 R.E. 2019 provides viz:

> *"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 same vein the provision of section 106(2) of the Act provides:

> *"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."*

In tandem to the above, the Apex Court held in numerous cases held that it is settled law that a petition for divorce instituted without being accompanied

by a valid certificate in terms of section 101 of the Act is incomplete, premature and incompetent. See the cases; **Shillo Mzee vs Fatuma Ahmed** [1984] TLR 112; **Hassani Ally Sandali vs. Asha Ally** (Civil Appeal 246 of 2019) [2020] TZCA 14; **Yohana Balole vs. Anna Benjamin Malongo** (Civil Appeal 18 of 2020) (2021) TZCA 388 and **Abdallah Hamis Kiba vs Ashura Masatu** (supra). In **Yohana Balole** case it was opined as thus: -

> *"we agree with the submission of Mr. Muguli that it was improper for the trial Magistrate to rely on that letter as a valid certificate, hence the petition for divorce filed by the respondent before the trial court was incompetent for failure to comply with the requirement of sections 101 and 106 (2) of the Marriage Act"*

Likewise, in the case of **Hassani Ally Sandali** (supra), it was held that:-

> *" 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."

Moreso, the parties herein having married under Islamic rites, I have directed my mind to the provision of section 107 (3) of the Law of Marriage Act [Cap. 29 R: E 2019] which provides viz:

> "(3) *Where it is proved to the satisfaction of the court that;*
> *(a) the parties were* ***married in Islamic form****;*
> *(b) a* ***Board has certified that it has failed to reconcile the parties****; and*
> *(c) subsequent to the granting by the Board of a certificate that it has failed to reconcile the parties,* ***either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law****, the* ***court shall make a finding that the marriage has irreparably broken down*** *and proceed to grant a decree of divorce."*

The provision of section 107 (3) of the Act reproduced above, mention the three conditions precedent for a decree of divorce to issue, namely;

1. Parties should have been married in Islamic form.
2. Board has certified that it has failed to reconcile the parties.
3. Either of them has done any act or thing which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law.

I need not reiterate the fact that in instituting the matrimonial proceedings the respondent was not in possession of the certificate issued by the Board in that their differences were irreconcilable in accordance with the law. And, there is no evidence to arrive to the conclusion that there were valid grounds and, or extra ordinary circumstances which had attracted dispensing with reference of the matrimonial dispute to the Board in terms of the proviso to section 101 of the Law of Marriage Act.

Likewise, the parties herein having married in Islamic form, the certificate from BAKWATA was condition precedent for institution of matrimonial proceedings coupled with any act or thing which would have dissolved the marriage in accordance with the Islamic law in terms of provision of section 107 (3) of Law of Marriage Act. All these precedent conditions were not met by the respondent.

It follows that, based on the above revisited law of this land and decided cases, the matrimonial proceedings instituted in the court of first instance and the subsequent decision of the first appellate court were incompetent and amounted to a nullity. The 1st ground of appeal succeeds.

Having found the 1st ground of appeal meritorious, I need not belabour to delve into the 2nd ground of appeal pertaining to impugned order for distribution of the matrimonial properties entered by the court of first instance and upheld by the first appellate court.

In view of the foregoing reasons, I find this appeal with merit. Consequently, I hereby allow the appeal herein. The decisions and orders entered by the subordinate courts are hereby quashed and set aside. The respondent, if so wishes, may recommence matrimonial proceedings in court having complied with the law. Considering the circumstances of this matter, I find the award of costs to successful party repugnant to justice.

So ordered.

DATED at **DAR ES SALAAM** this 31st day of August, 2023

O. F. BWEGOGE

JUDGE