

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

MATRIMONIAL APPEAL NO. 4 OF 2023

(Originating from Matrimonial Cause No. 1 of 2022 in the District Court of Momba)

STELLA N. MWAIJUMBA APPELLANT

VERSUS

SAMWEL J. SEMADALARESPONDENT

JUDGMENT

17th & 26th October 2023.

NONGWA, J.

This is an appeal against the order for division of matrimonial properties an order from the District Court of Momba at Chapwa in Matrimonial Cause No. 1 of 2022. The appellant had petitioned for the decree of divorce and division of matrimonial properties against the respondent.

Briefly the appellant and respondent were wife and husband after contracting a Christian marriage on 4th October 2020 Anglican Church at St.

Michael Parish. It was apparent that before the marriage parties had been living together and were blessed with four issues though with normal marriage disputes. This precipitated the appellant to get married to the respondent hoping things would change. That the respondent was brutal to the appellant by assaulting her and has extra marital relations with other women. These made intolerable to the appellant hence referred the dispute to social welfare officer where the respondent did not appear, and was issued with certificate of marriage reconciliation board which was attached to the petition. Then the appellant petitioned for the divorce and division of matrimonial properties which he alleged was acquired jointly.

The respondent disputed all the allegation of the respondent save that their marriage had broken irreparably. He added that before contract marriage in 2020 they lived under concubinage relationship. On division of the properties, the respondent stated that it was solely acquired by him and the appellant had no contribution on them.

After full trial the magistrate was satisfied that the marriage was irreparably broken and thus granted decree of divorce. The magistrate was also satisfied that the respondent had big hand in acquiring the properties, out of the

mentioned properties the appellant was awarded one motor vehicle, house and plot of land located at Chapwa. This aggrieved the appellant hence filed the present appeal consisting of seven grounds but for the reason to be apparent shortly will not be reproduced here.

When the appeal was scheduled for hearing parties were represented by Mr. Lusajo Mwakasege and Moses Mwampashe, both learned advocates for the appellant and respondent respectively. Their submissions will not be paraphrased here because this judgment is not based on grounds raised.

When the court set to compose the judgment, it noted some of the issues pertinent to the competence of the petition in the trial court. Thus, suo motto reopened the proceedings for parties to address the court on;

1. Whether the petition sought leave to petition for divorce before expire of two years of marriage; and
2. Whether parties passed through marriage reconciliation board and there was a valid certificate.

Submitting on the first issue it was Mr. Mwakasege's contention that they applied for leave to the district court in Application No. 8 of 2022 which was

not contested by the respondent but forgot to attach the order, the said order was received by the court.

Regarding the second issue it was submitted that the parties passed through the marriage reconciliation board which forwarded the appellant to social welfare officer who issued "rufaa ya uwaki" which was attached to the petition. He stated that the matter did not pass at the marriage reconciliation board however the court was satisfied that there was no need, for it was impracticable to refer the matter there because parties themselves are not objecting divorce to be granted. He stated further that the magistrate was satisfied under section 101(f) of the Law of Marriage Act as in "Rufaa ya uwaki" is clear that the respondent refused to attend. He added that as parties were not disputing to be divorced then the matter cannot be referred to it. He cited the case of **Halima Athumani vs Maulidi Hamisi** [1991] TLR 179 and **Zainati Khan vs Abdullah Khan** (1973) LRT No. 57 to support the argument. He said that it was not possible to reconcile the parties and were therefore served by section 101(f) of the LMA.

On part of the respondent, on the first issue he submitted that leave was applied and granted by the court for the appellant to file the petition.

In respect of the second issue, he conceded that the appellant did not refer and pass before the marriage reconciliation board as required by section 101 read together with 106(2) of the LMA which requires a petition to be accompanied by a certificate from the marriage reconciliation board. He stated the "uwaki" form was not tendered by the appellant and was cross examined at the trial court and admitted that she did not produce evidence showing that it passed for mediation at the board. He referred to the case of **Patrick William Magubo vs Lilian Peter Kitali**, Civil Appeal 41 of 2019 (Unreported) in which it was held that, failure to comply with section 101 and 106(2) of the LMA make a petition for divorce incompetent before the court.

It was further submitted that submission of the appellant's counsel that the magistrate was satisfied that the matter was served by section 101(f) of the LMA was not reflected in the record and the counsel was feeding those words in the magistrate's mouth. Mr. Mwampashe submitted that skipping to pass at the marriage reconciliation board makes the proceeding a nullity and prayed the same to be nullified and parties be ordered to restart afresh.

Rejoining Mr. Mwakasege insisted that this case fall under exception to section 101 of the LMA as there was no possibility of reconciling them. On failure to tender a certificate, he said it was attached to the petition and was not objected by the respondent.

I have considered the argument in respect of the issues raised by the court. In the first issue section 100(1) of the LMA prohibits the party and a court to grant decree of divorce before the expiry of two years. It reads;

'No person shall, without the prior leave of the court, petition for divorce before the expiry of two years from the date of the marriage which it is sought to dissolve.'

However, there is exception if the person seeking divorces seek leave of the court under sub section 2 of the 100 of the LMA. In this appeal parties are at once that leave was sought and granted, the appellant purported even to tender the order in this appeal.

I have given thorough thought the issue and come to the conclusion that leave was not sought and granted. It is so because in the petition the appellant did not plead that his marriage has lasted for less than two years and that she was granted leave to file the petition though. In absence of the same being pleaded then I cannot accede to the party's submissions that

appellant complied with the law. This is because the petition is the foundation of the claim in absence of such facts in the petition then their submissions that leave was granted is from the bar which cannot be allowed to prevail over the records of the court. Likewise, the copy which was tendered cannot be acted upon because it was not pleaded. Therefore, the first issue is answered in negative.

Coming to the second issue it is the mandatory requirement of section 101 that any petition for divorce must first pass through mediation before the marriage reconciliation board. It 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.'

The matter which has not passed through the board, the court will not have jurisdiction over the matter. This was stated in the case of **Patrick William Magubo** (supra) the court stated;

'Similarly, in this case, since we have found that the respondent's petition for divorce before the trial court was incompetent for failure to comply with the requirement of section 101 and 106 (2) of the Marriage Act, we agree with Mr. Mteweale that the trial court did not have the requisite jurisdiction to entertain the matter.'

In the present case parties are at once that the matter did not pass through reconciliation at the Marriage reconciliation board. According to the Mr. Mwakasege the magistrate was satisfied that it was impracticable for the parties to go there. In response Mr. Mwampashi has submitted that it is not reflected in the court record and the counsel is feeding words into the magistrate. On my part I indorse the submission of Mr. Mwampashi on this point. The record is silence that the magistrate admitted the petition under the circumstances falling under section 100(f) of the LMA. This is a court of law which does not work on assumptions and matters not in record. The appellant has not even explained what extra ordinary circumstances obtained at the material time warranting the dispensing with reference to the Board under section 101(f) of the LMA. The mere fact that parties are not disputing to be divorces in my view are not extra ordinary circumstances for dispensing with the requirement of the law. At any rate decree of divorce is not granted based on agreement of the parties that they want to be divorced but based on proof that the marriage is irreparably broken beyond repair as per section 107(2) of the LMA.

The appellant sought reliance on a document titled “rufaa ya uwaki” which according to him is where the matter was referred for reconciliation but the respondent refused attendance. It is true that the said document was attached to the petition but not tendered in evidence. The appellant was intensively cross examined on this aspect by the respondent's counsel in the trial court. In absence of the said document being tendered in evidence it cannot be relied upon by the appellant as it did not form part of court record. In the case of **Patrick William Magubo** (supra) the court has this 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**'. Emphasise supplied.*

Even assuming the purported document from the Welfare office is a certificate of reconciliation, it does not conform to the contents required by section 104(5) of the LMA which are set in form 3 to the schedule of the Marriage Conciliation Board (Procedure) Regulation G. N. No. 240 of 1971. The importance of showing that parties have been reconciled without

success was discussed in the case of **Hassani Ally Sandali vs Asha Ally**, Civil Appeal 246 of 2019 [2020] TZCA 14 (www.tanzlii.org.tz; 24 February 2020) and the court held that;

'Be it as it may, if one compares Form 3 with the contents of the letter from BAKWATA, it will be clear that there is no indication in the letter that BAKWATA made any attempt to reconcile the parties on the dispute referred to it by Asha Ally (respondent).... In the absence of any express statement that BAKWATA made an attempt to reconcile the parties but failed, can only lead to an inference that BAKWATA could not have certified that it failed to reconcile the dispute by involving the respondent alone.'

[See also: **Abdallah Hamisi Kiba vs Ashura Masatu**, Civil Appeal 465 of 2020 [2022] TZCA 335 (www.tanzlii.org.tz; 14 June 2022)].

In this appeal, it is clear to me that parties did not pass the mandatory requirement of reconciliation at the Marriage Conciliation Board. Even then purported “rufaa ya uwaki” is invalid for not being in conformity with the section 104 (5) of the LMA and form 3. The second issue is also answered in negative.

In the end, I find that the matter was premature filed in the trial court, in absence of certificate from the Marriage Conciliation Board the trial court had no jurisdiction over the matter. Consequently, I nullify the entire

proceedings of the trial court and quash the judgment and set aside the subsequent orders thereto. Should parties still be willing to pursue the matter then should adhere to the dictates of the law.

In the event, I allow the appeal. Being matrimonial matter, I order no costs.


V.M. NONGWA
JUDGE
26/10/2023

DATED and DELIVERED at MBEYA this 26th October, 2023 in presence of the appellant in person and Mr. Evance Rwekaza Advocate holding brief of Mr. Moses Mwampashi Advocate for the respondent.




V.M. NONGWA
JUDGE