IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 39 OF 2023

(Appeal from the decision of District Court of Temeke, One Stop Judicial Centre at Temeke in Matrimonial Case No. 82 of 2022)

IGNAS BENEDICT DIU.....APPELLANT

VERSUS

AZA ALLY RASHID.....RESPONDENT

JUDGMENT

18th October & 11th December, 2023

BARTHY, J.:

The appellant, being aggrieved by the decision of the District Court of Temeke One Stop Judicial Centre at Temeke, vide Matrimonial Case No. 82 of 2022 (referred to as the trial court), appealed to this court. Initially, nine grounds of appeal were advanced, and later, two more grounds were added, making a total of eleven grounds of appeal, as follows;

1. *That, the honourable magistrate erred in law and facts by failure to evaluate the evidence adduced by parties which proved that there were no valid reasons to grant the divorce.*

2. *That, the honourable magistrate erred in law and facts by failure to take note that the respondent in this matter is a wrongdoer was not entitled to relief she prayed for on her petition.*
3. *That, the honourable magistrate erred in law and facts by proceeding to hear and determine the matter without jurisdiction.*
4. *That, the honourable magistrate erred in law and facts by failure to analyse properly the evidence before him including the fact that the respondent admitted clearly that her only ground for divorce was the issue of religion, the ground which was rejected and the court proceeded to use the ground not raised by parties as the basis to grant the divorce.*
5. *That, the honourable magistrate erred in law in determining issues of properties in the USA without Jurisdiction.*
6. *That, the honourable magistrate erred in law and facts in ordering the division of matrimonial properties specifically the house located at Mbezi kwa Msuguri equally without considering the contribution of parties as per evidence presented and issued an order on the properties not within the Tanzania jurisdiction.*

7. *That, the honourable magistrate erred in law and facts in determining children custody for the children in the USA without jurisdiction*
8. *That, the honourable magistrate erred in law and facts in determining the custody of the children over 18 years in the USA without jurisdiction*
9. *That, the honourable magistrate erred in law and facts in concluding that there was separation by consent contrary to evidence adduced.*
10. *That, the honourable magistrate erred in law and facts by failing to note that the Marriage Conciliation Board did not conciliate the parties as per law.*
11. *That, the Marriage Conciliation Board had no jurisdiction as parties were not residents of Tanzania.*

Wherefore, the appellant prays for the appeal to be allowed, the judgment and decree of the District Court to be quashed and set aside, the cost for the appeal to be provided for and any other relief(s) deemed fit to be awarded by this court.

The factual background leading to this appeal is as follows: The parties in this matter initially celebrated their civil marriage and

subsequently underwent a Christian marriage ceremony in Tanzania. Following this, the respondent secured a job in the United States of America (referred to as the U.S) and relocated there.

The appellant later moved to the U.S to join the respondent, along with their two children. While living in the U.S, the couple welcomed another child, resulting in three children from their union.

During their time in the U.S, the couple acquired matrimonial assets with various titles in both the U.S and Tanzania. However, despite their initial commitment to the vows of 'for richer or for poorer,' the parties eventually decided to part ways.

Subsequently, the respondent filed a petition for a decree of divorce against the appellant before the trial court. The petition sought the division of matrimonial assets and custody of their children. After a hearing, the trial court determined that the marriage had irretrievably broken down and issued a decree of divorce. Additionally, the court issued orders for the division of matrimonial assets and custody of the children.

Aggrieved by this decision, the appellant appealed to this court, presenting eleven grounds of appeal as shown above.

During the hearing, both parties were represented by learned advocates, with Mr. Evold Mushi appearing for the appellant and Mr. Emmanuel Marwa appearing for the respondent. The appeal was disposed

of through written submissions, and I appreciate the adherence of both parties to the court's scheduling order.

Supporting the grounds of this appeal, Mr. Mushi argued the first ground, contending that there was no valid reason for the court to grant a divorce under section 107(2)(a) to (i) of the Laws of Marriage Act, Cap 29, R.E 2019 (hereinafter referred to as the LMA).

The trial court had relied on section 107(2)(f), which provides for voluntary separation for more than three years as the ground for issuing the decree of divorce. Mr. Mushi emphasized that this ground was not raised by the parties, but introduced by the court in its judgment. The only ground raised by the parties, a difference in religion, was found lacking merit, leading to the dismissal of the entire petition.

On the second ground, Mr. Mushi submitted that the trial magistrate erred in law and fact by not recognizing the respondent as the wrongdoer, for denying the appellant the enjoyment of the marriage based on unfounded religious grounds. Reference was made to section 107(1)(a) of the LMA, which prohibits the court from granting the decree of divorce based on the wrongdoing of the petitioner.

Submitting on the third ground which was centred on the jurisdiction of the trial court, Mr. Mushi firmly stated that the parties had been living in the USA since 2007, and the dispute originated there. He argued that

the court in Tanzania lacked jurisdiction to try the matter, and the proper court with jurisdiction would be in Virginia, U.S, where the court had already determined matters related to the custody of children, including the one born in the U.S with the U.S citizenship.

On the fourth ground, Mr. Mushi strongly argued that the Marriage Conciliation Board (to be referred to as the board) had failed to comply with the provisions of section 104(1), (5) of the LMA. It was stated that the respondent came to Tanzania without notifying the appellant to appear before the board, thus denying the appellant the right to be heard.

On an additional ground raised, Mr. Mushi submitted that the Marriage Conciliation Board of Dodoma had no jurisdiction over the matter, given that the cause of action arose in the U.S.

Vehemently opposing the grounds of this appeal, Mr. Marwa, on the first ground, argued that the trial magistrate correctly analysed the evidence and applied section 107(2)(f) of the LMA to grant a divorce based on voluntary separation. He referenced the case of **John David Mayengo v. Catherina Malembeka,** PC Civil Appeal No. 32 of 2023, High Court of Dodoma (unreported) at page 4.

Regarding the second ground, Mr. Marwa contended that the reliefs granted by the trial court were entitled to the respondent as prayed. He further argued that in matrimonial disputes, the focus is not on identifying

the wrongdoer, as stated in section 107(1)(a) of the LMA, but rather on considering the evidence brought before the court. He added that the provision of section 107(2) of the LMA allows the court to accept any other matter.

Rebutting the third ground, Mr. Marwa pointed out that the issue of lacking jurisdiction was resolved by the trial court through a preliminary objection raised by the appellant, which was dismissed for being devoid of merit.

On the fourth ground, Marwa insisted that based on the evidence adduced by both parties, it was clear that they were under separation for more than three years, justifying the granting of the decree of divorce on this ground.

Responding to grounds five and six, which fault the board's failure to reconcile the parties, Mr. Marwa contended that the board in Dodoma is the headquarters, and the appellant was notified of preliminary procedures through Zoom meetings, but he was not ready to mediate, as indicated in exhibit P4.

Additionally, Mr. Marwa stated that the parties are not residing in Tanzania, but are domiciled there. Therefore, he contended that the provision of section 103(2)(a) of the LMA was not applicable, and the appeal should be dismissed.

Having heard the contending submissions of both sides with respect to the grounds of appeal at hand, I will start by addressing the issue of jurisdiction of this court, which was raised explicitly on the third ground and touched on other grounds followed.

It is best to resolve the issue of jurisdiction first as it forms bedrock of the court's mandate.

On this ground Mr. Mushi argued that since the parties were residing in the U.S since 2007, then the trial court lacked jurisdiction to try the matter. He contended that the court in Virginia, which had already dealt with the issue of the custody of their children, ought to have heard the matter.

Contending to this ground Mr. Marwa was of the view that the issue of jurisdiction was already resolved by the trial court through the preliminary objection raised, and there was no appeal against that decision.

To address Mr. Marwa's argument that the issue of jurisdiction was already resolved and there was no appeal against that ruling of the court, it is clear that the decision of that court was only an interim or interlocutory order, which is not appealable as it did not dispose of the matter. See the case of **Yusuf Hamisi Mushi & another v. Abubakari Khalid Hajj & Others** (Civil Application 55 of 2020) [2021] TZCA 589.

He added, the issue of jurisdiction being raised before the trial court and dismissed does not bar the appellant to raise it again on appeal stage as it was held in the case of **Yusuf Khamis Hamza v. Juma Ali Abdalla** (Civil Appeal 25 of 2020) [2021] TZCA 734, where the court held that the issue of jurisdiction can be raised at any stage even on appeal.

Mindful with the arguments of both sides, on the issue of jurisdiction I will agree with Mr. Marwa that it can be raised at any stage even at appeal stage.

This principle was lucidly stated in the case of **Gem & Rock Ventures Co.Ltd v. Yona Hamis Mvutah** (Civil Reference 1 of 2010) [2011] TZCA 200, quoting with approval the case of **Charles Julius Rukambura v. Isaac Ntwa Mwakajila and Tanzania Railways Corporation**, Civil Appeal No. 2 of 1998 (unreported) where the court among other things held that;

> *"The question of jurisdiction is paramount on any court proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any stage of the proceedings in order to ensure that the Court is properly*

vested with jurisdiction to adjudicate the matter before it"

Now, the important question to be determined by this court is whether the trial court had jurisdiction to try the matter involving spouse who contracted their marriage in Tanzania, but living abroad. As intimated by the respondent and not disputed by the appellant that they were living in the U.S since 2007. However, the facts reveal that the parties also were domiciled in Tanzania where they would come occasionally.

The provision of section 77(3) of the LMA provides for circumstances in which the court may invoke jurisdiction to determine petition for divorce, if the party has been domiciled in Tanzania or has been the resident of Tanzania for at least one-year prior presentation of the petition; for easy reference the said provision reads;

Any person may petition the court for a decree of annulment or a decree of divorce if he or she—

(a) is domiciled in Tanzania;

(b) has been resident in Tanzania for at least one year immediately preceding the presentation of the petition:

Provided that, in the case of a petition for annulment under subsection (2) of section 96 such petition may be lodged by a party who is resident in Tanzania at the time when

such petition is lodged, for whatever duration such party may have been resident in Tanzania.

Since the parties had the place of domicile in Tanzania, despite them having residence in the U.S then the court in Tanzania may invoke jurisdiction in terms of section 76 of the LMA. See also the case **Adelaide Boniface Simon Temu v. Appollo Boniface Simon Temu** (Civil Appeal No. 265 of 2021) [2023] TZHC 17572. Therefore, the trial court had the jurisdiction to try the matter. Thus, the third ground of appeal is devoid of merit and dismissed.

Having determined that the trial court had the jurisdiction to try the matter, I will proceed to address the tenth and eleventh grounds of appeal jointly, which faulted the trial court to have determined the matter where the board failed to reconcile the parties in accordance to the law and without having the jurisdiction.

For easy reference the provision of Section 101 of the LMA provides as follows;

"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"

However, gathered from the record and Exh. P4, there was no sufficient proof that the respondent was issued with notice or summons to appear as the law directs under section 104(2) and (3) of LMA.

The record further reveal that the appellant was in U.S when the respondent had intended to petition for decree of divorce. Therefore, the respondent ought to have obtained leave of the court to petition for divorce without referring the matter to the board under special circumstances as provided in the proviso to section 101(b) of the LMA which reads;

> *Provided that, this requirement shall not apply in any case—*
>
> *(b) where the respondent is residing outside Tanzania and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition;*

The requirement to petition without referring the matter to the board under extra-ordinary circumstances was well stated in the case of **Hassani Ally Sandali v. Asha Ally,** Civil Appeal No. 246 of 2019, Court of Appeal of Tanzania, at Dar es Salaam, the court held that;

> *"...compliance with section 101 of the Act is mandatory except where there is evidence of the existence of*

extraordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101(f) of the Act"

The respondent therefore, had the duty to move the court properly to indicate there were extra-ordinary circumstances to have her petitioning for decree of divorce without referring the matter to the board as it was cogently stated in the case of **Hellen Gen Lucas v. Cleophace Lucas**, Matrimonial Cause No. 1 of 2021, High Court of Tanzania at Mwanza.

I therefore find grounds ten and eleven dispose this appeal and I find no reason to determine the rest of the grounds as they are bound to die naturally.

In the upshot, I proceed to quash and set aside the judgment, decree, and proceedings of the trial court as the petition was determined prematurely without leave of the court as stated above. I give no order as to costs.

It is so ordered.

Dated at **Dar es Salaam** this 11th December, 2023.

G.N. BARTHY

JUDGE