

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

PC. CIVIL APPEAL NO. 14 OF 2023

(Appeal from the decision of the District Court of Singida in Civil Appeal No. 15 of 2022 original Matrimonial Cause No. 12 of 2022 Sepuka Primary Court)

SAFINA JUMA SAMWIAPPELLANT

VERSUS

ATHUMANI JUMANNE MDIDA.....RESPONDENT

JUDGMENT

Date of last order: 5/10/2023

Date of Judgment: 12/12/2023

KHALFAN, J.

Before Sepuka Primary Court (hereinafter referred to as the trial court), the respondent successfully petitioned for divorce against the appellant. According to the record, the appellant and the respondent herein celebrated a marriage and under Islamic rites in 2008. It is on record that the marriage was blessed with five issues. Generally, it was a happy marriage, but later on, it was marred by frequent conflicts. The respondent alleged the appellant to disrespect him to the extent that the former could even stay outside of their matrimonial home for two days without seeking the respondent's permission.



The respondent further alleged that the appellant was misusing the family properties. After hearing the parties, the trial court was satisfied that the marriage between the parties was irreparably broken down subsequently it granted the divorce. The issues of marriage were placed under the custody of the appellant and the respondent was ordered to pay monthly maintenance at TZS 100,000/=.

The trial court ordered further that the matrimonial assets be divided as follows: maize and sunflower be harvested and the appellant take 40% whereas the respondent take 60% while the matrimonial house be sold and the proceeds be divided at the ratio of 40% and 60% to the appellant and the respondent respectively. The trial court further ordered the 6 acres farm be divided, the appellant get 2 acres and the respondent 4 acres. The trial court further ordered that the appellant and the respondent take 9 cows each. It also ordered that 5 goats be given to the appellant and 4 goats for the respondent.

It is on record that the appellant was dissatisfied with the trial court's decision, thus, she filed an appeal before the District Court of Singida (hereinafter referred to as the first appellate court) in civil Appeal No. 15 of 2022. After hearing the parties, the first appellate court dismissed the



appellant's appeal for lack of merits. The appellant was further aggrieved with the decision of the first appellate court hence she preferred the instant appeal with four grounds of appeal which can conveniently be reduced to two grounds of appeal as follows:

- 1. That, the first appellate court erred in law in upholding the decision of the trial court in division of the matrimonial assets.*
- 2. That the first appellate court erred in law in upholding the trial court's decision on the amount of maintenance.*

By the parties' consensus, the appeal was disposed of by way of written submissions in which the appellant was represented by Mr. Issaya Edward Nchimbi learned advocate while the respondent was represented by Ms. Magreth Mbasha, the learned advocate.

In the course of his submission, Mr. Nchimbi raised a concern that the trial court had no jurisdiction to entertain the matter as there was no certificate by a marriage conciliatory board that was tendered and admitted as an exhibit. He argued that it is a settled position of law that in terms of section 101 of the Law of Marriage Act [CAP 29 RE 2019], (hereinafter referred to as the LMA), the petition for divorce cannot be filed without



referring the matter before the marriage conciliatory board. The said provision reads thus:

"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"

Mr. Nchimbi argued that there was no certificate from the marriage conciliation board tendered and admitted as exhibit but the first appellate court held that section 101 of LMA was complied with. He submitted that the first appellate court relied on the certificate which was neither part of the records nor of the parties tendered it as an exhibit hence the trial court lacked jurisdiction. To buttress his arguments, Mr. Nchimbi referred to the decision in **Yohana Balole v. Anna Benjamin Malongo** Civil Appeal No. 18 of 2020 Court of Appeal of Tanzania (unreported).

Mr. Nchimbi therefore urged the court to allow the appeal, quash and set aside the proceedings, judgment and subsequent orders of both the lower courts.

Responding to the above concern, Ms. Mbasha argued that while agreeing with mandatory reference to the marriage conciliatory board, in the



instant matter, such requirement was complied with as pointed out by the first appellate court. Ms. Mbasha admitted that reading through the record of the trial court, there is nowhere where it is shown how such certificate found its way to the court's record. She however pointed out that the said certificate was attached to the pleadings before the trial court. She referred to the case of **Isack Jonathan v. Esther Charles** PC Matrimonial Appeal No. 5 of 2021 (unreported).

Having gone through the parties' arguments regarding the concern raised by the appellant, although it was not specifically made as one of grounds of appeal, I am satisfied that since both parties had a chance to respond to and since it raises the question of jurisdiction, it can be raised at any stage.

The above position of the law was emphasised in the case of **R. S. A. Limited v. Hanspaul Automechs Limited Govinderajan Senthil Kumal** Civil Appeal No. 179 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported) in which the court held that:

"It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gainsaid that it has to be



determined first before proceeding to determine the substantive matter."

See also **Shahida Abdul Hassanali Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported).

It is on record that this complaint was raised on the first appeal, but the learned Resident Magistrate overruled it in the following words:

"Katika kuamua sababu hii ya rufaa, kumbukumbu za mahakama ya mwanzo zinaonesha mjibu rufaa alitekeleza takwa la kisheria kwa mujibu wa kifungu 101 cha sheria ya ndoa."

Admittedly, in the trial court's record, there appeared to be form No. 3 which is commonly issued by the marriage conciliatory board. But as argued by the appellant and readily conceded by Ms. Mbasha, there is nowhere on the record of the trial court where it is indicated how the said form found its way to the record. There is no any party that tendered the same as an exhibit.

I have considered the argument by Ms. Mbasha that the said form was filed with the pleadings. With respect, I disagree with her since I have keenly gone through form No. 2 which instituted the matter before the trial court.



The said form was neither pleaded nor attached to it. Even if I were to agree with Ms. Mbasha that the said form was filed with the pleadings, still, it is settled law that documents attached to the pleadings are not automatically admitted as exhibits unless and until they are cleared for admission and in fact, they are admitted and read before the court after being admitted.

Henceforth, in the absence of such clear transaction, it can be said that the purported certificate from marriage conciliatory board never formed part of the record of the trial court and therefore the trial court had no jurisdiction to entertain the matter as provided for under section 101 of the LMA.

In the case of **Jumanne Leonard Nagana @ Azori Leonard Nagana and Another v. The Republic**, Criminal Appeal No. 515 of 2019 Court of Appeal of Tanzania at Musoma (unreported), it was observed thus:

"The fate which befalls the proceedings and a decision made without jurisdiction is a nullity. Even where a court decides to exercise a jurisdiction which it does not possess, its decision amounts to nothing."


Consequently, I proceed to quash and set aside the proceedings and decision of the trial court for it acted without jurisdiction. Equally, the proceedings and decision of the first appellate court are quashed and set




aside for having emanated from a nullity. Each party is at liberty to file a fresh matter after having complied with the law. I further order each party to bear its own costs.

It is so ordered.

Dated at **Dodoma** this 12th day of December 2023.




F. R. KHALFAN
JUDGE