

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB – REGISTRY)
(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 05 OF 2022

*(Arising from the judgement and decree of the Resident Magistrate Court of Dar es salaam
at Kisutu in Matrimonial Cause No. 31/2016 before Hon. R.W. Chaungu – PRM)*

ANISA KAPUFI MBEGA APPELLANT

VERSUS

ALLY MOHAMED MBEGA RESPONDENT

RULING

20/7/2023 & 24/7/2023

M. MNYUKWA, J.

Parties in this appeal were wife and husband respectively. They contracted their marriage according to Islamic rites in 12th December 2008. They were blessed with three issues in their marital relationship. They lived a happy marriage until 2016 when their marriage became acidic. It was the petitioner's allegation that the respondent was cruel, hostile and unfaithful as he had adulterous relationship with other women. Above all, the petitioner alleged that respondent failed to maintain her and the issues of marriage. Therefore, she initiated the processes of dissolving the marriage with the respondent.



In her paragraph 11 of the Petition, she asserted that, in resolving the matrimonial dispute with the respondent, she referred the matter to the marriage conciliation board which failed to reconcile the parties. To substantiate so, she said that she attached the marriage certificate board as Annexure D of the petition. The petitioner added that, since their marriage was contracted according to Islamic rites, she also referred the matter to the *Sheikh* so as to reconcile them but all in vain.

The petitioner thus sought for a declaration that the marriage between her and the respondent be dissolved, an order for a division of matrimonial assets acquired by the parties during the subsistence of the marriage, custody of the issues of marriage, costs of the suit to be borne by the respondent and any other relief(s) the court may deem fit and just to grant.

When he was served with the petition, the respondent denied the petitioner's allegation and alleged that, it was the petitioner who deserted from the matrimonial home in the year 2016. He also noted paragraph 11 of the petition which alleged that the matter was referred to the conciliation board and to the Sheikh to reconcile their marriage. The respondent also filed a cross petition alleged the appellant to live in adulterous relationship with two different man. He thus prayed for a declaration of a decree of divorce to be granted on the assertion that the



marriage between the parties is irreparably broken down, equal division of the matrimonial assets, the respondent be granted custody of children, dismissal of the petitioner's claim and costs of the suit. However, it is on record that on 18th November 2018, the respondent filed the preliminary objection to the effect that:

" the petition for divorce is not proper before the court for want of proper and valid certificate from the Marriage Conciliation Board, and therefore contravenes mandatory provisions of sections 101 and 103(a) of the Law of Marriage Act, Cap 29 R,E 2002."

As a matter of practice, after receiving the notice of preliminary objection, the trial court set the date for hearing of the preliminary objection which was done by way of written submissions. On 21/6/2017, the trial court overruled the preliminary objection for a reason that there was an extra ordinary circumstances which makes reference of the matter to the board impracticable and hence falling under the exception of section 101(f) of the Law of Marriage Act, Cap 29 R.E 2002 (the Act) for a reason that petitioner was constructively deserted by the respondent and that each party alleged his/her counterpart on the accusation of adultery which proved that the marriage between the parties cannot be repaired. And to that end, reconciliation is impracticable.



To elaborate more on the extra ordinary circumstances which makes reference of the matter on the marriage conciliation board to be impracticable, the trial court stated that, petitioner complied with Islamic rules of dissolving marriage as the matter was referred to Sheikh for reconciliation. Also, pleadings of the parties shows that there was no chances that the board will be able to achieve any useful results and that reference of the matter to the board will be wastage of time and effort. Again, in overruling the preliminary objection, the trial court referred to the pleadings of the parties and adjudged that, since the respondent filed cross petition, he join issues on the grant of the decree of divorce.

After the preliminary objection being overruled, the full trial was conducted where parties adduced their respective evidence. After hearing both parties, the trial court satisfied that a marriage between the parties was irreparably broken down and issued a decree of divorce, made an order on the division of matrimonial assets and custody of children.

The appellant is not amused by the decision of the trial court and appealed to this court by advancing eleven grounds of appeal and mainly asked this court to allow the appeal. She challenged the order of the division of matrimonial assets and custody of children. The appeal was scheduled for hearing, and through the prayer made by the appellant's counsel, the matter was heard by way of written submissions. However,



at a time when the trial court was about to compose the Judgement, the predecessor Judge summoned the counsel for both parties to address the court on whether before filling a petition, parties referred their matrimonial dispute to the marriage conciliation board.

Based on the above issues addressed by the court, parties were ready to address the court on 20/07/2023. It was the appellant's counsel who kicked the ball rolling to address the court on the issue raised suo-moto. The appellant was represented by Mr. Gerald Nangi while the respondent enjoyed the legal representation of Mr. Ezekiel Joel.

The appellant's counsel started by averring that, pleadings of the parties shows that the matter was passed in the marriage conciliation board. He submitted that, this issue was raised by the respondent in the trial court which overruled the preliminary objection and proceeded to hear the petition on merit. The counsel of the appellant averred that, this court raised the issue on whether the matter was referred to the marriage conciliation board as it need to see the certificate from the marriage conciliation board which is misplaced.

The counsel was of the view that, since the lower court made a decision on that issue and it was not among the issue that was disputed in the trial court based on their pleadings to which they are bound with, this court may proceed to give decision based on the submissions of the parties on



the grounds of appeal. In the alternative, he prayed the court to give any other direction for the sake of ensuring justice is done to the parties by directing what should be done to the parties.

Responding, the counsel for respondent submitted that, the petition was filed without attaching a certificate from a marriage conciliation board as it is provided for under section 101 of the Act, and that the respondent raised such anomaly in the trial court but the same was overruled. He further submitted that, the trial court overruled the objection for a reason that, parties had a misunderstanding for a long time and there was no chances for them to be reconciled. The counsel for respondent went on that, he tried to show at the trial court that the matter was incompetent for not being reconciled by a marriage conciliation board but his argument was ignored.

To support his contention that the petition was incompetent since the dispute was not referred to a marriage conciliation board, he cited a case of **Athanas Makungwa v Darini Hassan** [1983] TLR 113 and the case of **Shillo Mzee v Fatuma Ahmed** [1984] TLR 112. He remarked that, in the above cases, the court held that if there is no certificate from the marriage conciliation board the petition for divorce is incomplete.

The respondent's counsel asked this Court to order the parties to refer their matrimonial dispute to the marriage conciliation board as the law

requires since the appellant's counsel also asked the court to give direction on what should be done. He retires by stated that, it will be unjust for a court to proceed with the determination of the appeal on merit while the petition was incompetent.

Re-joining, the appellant's counsel mainly reiterate what he had submitted in chief. He also insisted that the matter was referred to the marriage conciliation board but the certificate is missing in the court record. He maintained that, the circumstances prevailing in our case at hand dictates the appeal to be heard on merit as the case cited by the respondent's counsel is distinguishable with our case at hand. He retires praying the court to take into consideration that the matter stayed in court for a long time.

As earlier on indicated, after this Court have gone through court's record, it asked the parties to address it on the issue of referring the matter to the marriage conciliation board as it is required by section 101 of the Act.

To begin with, I wish to state that, the question of referring the matter to the marriage conciliation board touched the jurisdiction of the trial court. I say so because it is a settled position of law that no person shall petition for a decree of divorce unless the matter has first been referred to the marriage conciliation board. In other words, if the matter is not



referred to the marriage conciliation board, the court to which the petition is filed, is not clothed with the requisite jurisdiction to hear and determine the matter unless, there is extra ordinary circumstances which makes reference of the matter to the marriage conciliation board impracticable.

In other words, as a general rule if the petition for divorce was filed in court before it passed into the marriage conciliation board, the decision rendered is null and void in the eyes of the law. To substantiate that reference of the matter to the marriage conciliation board is mandatory, I find it wise to reproduce section 101 of the Act. The section provides that:

"S. 101. – 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.

Provided that this requirement shall not apply in any case:

- (a) Where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse*
- (b) Where the respondent is residing outside Tanzania and it is unlikely that he or she is likely to enter jurisdiction within the six months next ensuing after the date of petition*



- (c) *Where the respondent has been required to appear before the board and has wilfully failed to attend*
- (d) *Where the respondent is imprisoned for life or for a term of at least five years or is detained in preventive detention Act and has so detained under the Preventive Detention Act and has so detained for a period exceeding six months.*
- (e) *Where the petitioner alleges that respondent is suffering from an incurable mental illness.*
- (f) *Where the court is satisfied that there are extraordinary circumstances which make reference to the board impracticable."*

Thus, as a general rule, it is a pre-requisite that before a petition for divorce is filed, the matter has to be referred to the marriage conciliation board for it to certify that it has failed to reconcile the parties. (See the case of **Hassani Ally Sandali v Asha Ally**, Civil Appeal No 246 of 2019. Reference to the board is mandatory as the word used in that section is "shall" which shows it is not an option for the parties to comply with it. The board certified to have failed to reconcile the parties by issuing certificate which is commonly known as Form No 3.



The requirement to refer the dispute to the marriage conciliation board is also reinforced by the provision of section 106 of the Act which provides that:

"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 for divorce."

Again, it is the requirement of the law for every petition for divorce to be accompanied with a certificate from the marriage conciliation board. The logic behind is to ensure that parties got an opportunity to be reconciled by an appropriate body established by the law before filling petition for divorce. When the petition is accompanied by a certificate from the board, the court is satisfied that parties went to the board for their marriage to be reconciled and got an opportunity to exercise their right to be heard before the board as it was provided for under section 104 of the Act, and that the reconciliation did not yield a fruitful results.

Coming now to our case at hand, paragraph 11 of the petition for divorce shows that the matter was referred to the marriage conciliation board. However, no certificate accompanied the petition even though the petitioner purported to attach it as Annexure D. I form the view that the certificate was not attached due to the following reasons:



First, when the respondent raised the preliminary objection before the trial court that the petition was incompetent for want of proper and valid certificate from the board, the Ruling of the trial court did not made any observation whether it has come across with that certificate or not. The Ruling is very silent on the petition to be accompanied with a certificate.

Second, the trial court issues the Ruling which dispense the appellant from referring the matter to the marriage conciliation board for what is termed as an ex-ordinary circumstances which makes reference of the matter to the board to be impracticable. The extraordinary circumstances envisaged by the trial court is the accusation for adultery, constructive desertion of the appellant by the respondent, long misunderstanding between them and accusation for adultery from each other. To which I believe that, it is the duty of the marriage conciliation board to try at their level best to reconcile the parties as it is entrusted by the law to perform that duty.

Third, the appellant's submissions in the trial court to refute the preliminary objection raised by the respondent that the petition is incompetent for want of certificate, he firstly submitted that the matter was referred to the board and the certificate was attached. In the same submissions, he reversed his submissions by stating that there was extra



ordinary circumstances which makes reference of the matter to the board impracticable. One is wondering if the matter was referred to the board how come then the same person stated that there was extra ordinary circumstances which makes reference to the board impracticable.

Fourth, the appellant submissions to this court tried to make this court to believe that, the certificate from the conciliation board was perhaps misplaced in the court file. However, upon going through the entire file, I find other documents attached by the appellant, what so special for a certificate to be misplaced. I find this argument unfounded.

From the above reasoning, it is quite clear that the certificate from the marriage conciliation board did not accompany the petition as it is required by the law. It is therefore doubtful if the parties referred their dispute to the marriage conciliation board as it is required by the law.

The appellant's counsel tried to make this court to believe that the parties' pleadings suggested that the matter passed through the marriage conciliation board and therefore it has to proceed to hear the appeal on merit. With due respect to him, I find this argument is unfounded due to the fact that his submissions is full of contradiction as it is not clear whether the parties referred the matter to the board or he side-line with the Ruling of the trial court which states that there was extra ordinary circumstances which makes reference to the board impracticable.



Moreover, even if the pleadings of the parties shows that their matrimonial dispute referred to the marriage conciliation board, the said pleadings needs to be supported by the certificate from the board attached in the petition. I hold that view since it is the mandatory requirement of the law for a petition to be accompanied with a certificate from the board which certified that it has failed to reconcile the parties. As I have earlier on noted, the issue of referring the matter to the marriage conciliation board touched the jurisdiction of the court, As it is settled, parties cannot give the court jurisdiction which it does not possess since the issue of jurisdiction is fundamental and goes to the root of the matter.

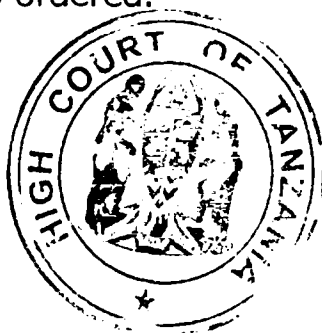
Additionally, even the parties' evidence in the trial court does not show that the board in which the appellant purported to have referred the matrimonial dispute gave them certificate. This makes me to believe that the matter was not officially referred to the board that's why there is no even the certificate from the board to show that it has failed to reconcile the parties. Thus, the petition for divorce was filed in contravention to section 101 and 106(2) of the Act which make the petition to be incompetent and incomplete as it was stated in the case of **Patric William Magubo v Lillian Patrick Kitali**, Civil Appeal No 41 of 2019.




In the premises, I find the Proceedings in the trial court were vitiated. I therefore nullify the entire Proceedings of the trial court and quash the decision and orders emanated therefrom. Consequently, if any party desire to initiate the processes of dissolving the marriage, he/she is at liberty to petition for divorce afresh in accordance with the law.


No order as to costs as the parties are spouses.

It is so ordered.




M.MNYUKWA
JUDGE
24/7/2023

Court: Ruling delivered on 24th July 2023 in the presence of Mr. Ezekiel Joel on behalf of the parties' counsel.


M.MNYUKWA
JUDGE
24/7/2023