

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

MATRIMONIAL APPEAL NO. 13 OF 2022

(Originating from Miscellaneous Matrimonial Application No. 24 of 2021 in the District Court of Mbeya at Mbeya, originated from Matrimonial Cause No. 41 of 2020 in the Primary Court of Mbeya District at Iyunga.)

VUMILIA AIZECK APPLICANT

VERSUS

OSIA MWAMBANDE RESPONDENT

JUDGMENT

Date of Last Order: 09/01/2024

Date of Judgment: 06/02/2024

NDUNGURU, J: -

This appeal traces its genesis from the *ex parte* judgment of the Primary Court of Mbeya District at Iyunga ("the trial court") dated 10th September, 2020 awarding the respondent herein a custodian of two issues while a matrimonial house to be left to the children with restriction of selling or to be used as a collateral in mortgage. Also, their marriage was ended on the same date upon the trial court dissolving it following a petition for divorce lodged by the respondent.

The appellant lodged a complaint over the said *ex-parte* decision through a letter dated 14/09/2020 where she asked the trial court to set aside *ex-parte* decision. On 14/12/2020 the appellant lodged an application before the trial court to withdraw her application of setting aside *ex-parte* decision. The trial court proceedings are silent on those applications. Unfortunately, when the trial court was determining the application for execution then, the appellant prayed for division of the matrimonial properties without prior application to set aside *ex parte* decision.

The trial court refrained determined the matter on merit on the ground that it has already decided by the trial court. The appellant being aggrieved with the decision then, she lodged the application for revision before the District Court of the ground that the trial court has denied her the right to be heard. The matter was dismissed still she was aggrieved with the said decision then, she approached this court armed with a total of three grounds of appeal contained in the petition of appeal. The matter was argued orally while the respondent has nothing to add while insisting the petition of appeal be dismissed.

The appellant has a service of Ms. Silomba, learned counsel while the respondent appeared in person unrepresented. When this court was preparing the judgment it conducted a keen perusal of the trial court records it reveal that the matter was lodged in the trial court without accompanying a certificate issued by the Marriage Conciliation Board. This court asks itself as to whether it was proper for the trial court to entertain and determine the matter without a certificate issued by the Marriage Conciliation Board. The parties were invited to address the court on the irregularity depicted by the court.

Ms. Silomba learned counsel for the appellant told the court to the effect that the Certificate from Ward Conciliation Board was not filed. Which means the dispute was not referred to the Board that is contrary to section 101 of Law of Marriage Act Cap 29. The counsel told the court that the effect of such irregularity is the nullification of the whole proceedings. The respondent being a layperson had nothing substantial to address the court. He opted to leave it for the court to decide.

I have scrutinized the lower courts record and found that the matter was instituted without being accompanied with the certificate of Marriage Conciliation Board. This implies that the dispute was not referred to the Board which is contrary to the law governing matrimonial dispute resolution.

The law is clear when it comes to hearing the matrimonial cause, a foundation of hearing such cases is laid down on the certificate of the Matrimonial Conciliation Board. Section 101 of the Law of Marriage Act, [Cap.29 R.E 2019] provides that:-

"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..."

No court can proceed with hearing without satisfying itself that the petitioner has filed a valid certificate of the Marriage Conciliation Board. This position was discussed in the case of **Abdallah Hamis Kiba vs. Ashura Masatu**, Civil Appeal No. 465 of 2020, CAT at Musoma (unreported) where it was observed that;

*"As we held in **Hassani Ally Sandali** (supra); and **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal No. 18 of 2020 (unreported), it is settled 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 also the High Court's decision in **Shillo Mzee v. Fatuma Ahmed** [1984] TLR 112. On that basis, we hold that the entire proceedings and the decisions of the courts below are a nullity as they stemmed from the illegal assumption of jurisdiction by the trial court despite the absence of a valid certificate. Needless to say, the trial court's decree of divorce is quashed for being a nullity. Should the respondent desire to pursue her quest for divorce, she is at liberty to do so afresh according to the law."*

This court subscribe the position held above to the matter at hand where the trial Magistrate was not required to proceed with hearing of the case without a valid certificate issued within six (6) months as provided under section 106(2) of the **Law of Marriage Act**, Cap. 29. The law is clear that in order to petition for divorce or separation then, the petitioner

has to comply with the conditions set out under sections 77, 100 and 101 of the Act as provided under section 99 of the same Act, Cap. 29.

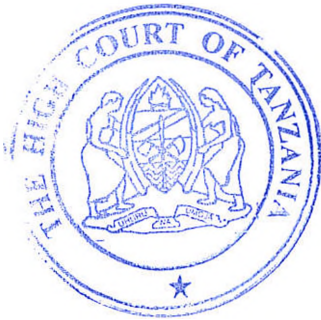
This matter at hand was lodged before the trial court without a valid certificate issued by the Marriage Conciliation Board. In my considered view, the trial Magistrate entered into an error, I am saying so because the certificate is a requirement in instituting a matrimonial cause, unless there is an exception which is to be stated and found in the court record. The trial Magistrate was required to satisfy himself whether the case before him was properly filed.

Hearing could not proceed without first referring the parties to Marriage Conciliation Board. The Marriage Conciliation Board has a role to reconcile the parties and any outcome should be expected; parties can agree to reconcile and end their differences or institute a petition. Therefore, the trial Magistrate was supposed to know that petitioner could have petitioned for divorce after prior marriage conciliation conducted by the Marriage Conciliation Board to solve their difference.

In the upshot, I find the petition was prematurely file and registered before the trial Court. All what was done was a nullity. Therefore, I

proceed to nullify the proceedings, judgment and consequential orders of trial court and that of the Appellate District court. No order to costs.

It is so ordered.




D. B. NDUNGURU
JUDGE

06/02/2024