IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 573 OF 2023

(Arising from Matrimonial Appeal No. 35 of 2023 of the District Court of Sengerema and Originating from Matrimonial Cause No. 33 of 2023 of Sengerema Urban Primary court)

FATUMA SAID ..... APPELLANT

VERSUS

YONA K. MABELA ..... RESPONDENT

JUDGEMENT

18th March & 16 April, 2024.

CHUMA, J.

This is a second appeal in which the appellant herein **FATUMA SAID** was aggrieved by the decision of the District Court of Sengerema in Matrimonial Appeal No. 35 of 2023 as she unsuccessfully appealed therein. Originally, the matter originated from Sengerema Primary Court in Matrimonial Cause No. 33 of 2023 dated on the 30th day of August,2023 in which the respondent successfully petitioned for divorce.

The brief facts of this case are that **YONA K. MABELA** and **FATUMA SAID** were husband and wife having celebrated their marriage on 19th June, 2010. During the subsistence of their marriage, they were blessed with four (4) issues. According to the respondent, in 2020 misunderstandings in their marriage life started when the appellant denied conjugal rights for three years, abused the children, and also unfaithful. Following the alleged

problems, the respondent decided to lodge a petition for divorce in the Primary Court of Sengerema. At the trial court, the trial court was satisfied and declared the marriage between parties irreparably broken down hence granted a decree of divorce. The trial court also proceeded to order for division of matrimonial properties. Regarding the custody of the children, each party was granted custody of their children for maintenance. Following the said decision of the trial court, the appellant was dissatisfied and hence preferred to appeal to the District Court of Sengerema challenging the division of matrimonial properties and custody of the children. However, the District Court (the first appellate court) decided in favor of the respondent and proceeded to dismiss the appeal for want of merits.

At this juncture, the appellant is still dissatisfied with the division of matrimonial properties and custody of the children, hence she has lodged the second appeal herein hence this appeal. The appellant has raised four (4) grounds of appeal in her petition of appeal. The grounds can be reproduced as follows;

1. *That the 1st appellant court erred both in law and fact once upheld the decision of the trial court while the trial court failed to consider the heavier evidence tendered by the appellant leading to a composition of an erroneous judgment.*

2. *That the 1st appellant court erred both in law and fact by holding the decision of the trial court without warning itself that the trial court divided matrimonial assets unfairly contrary to the evidence adduced on the contribution towards acquisition of matrimonial assets.*
3. *That the 1st appellant court erred in law and fact once upheld the decision of the trial court while the trial court was biased as it failed to include and divide thereupon some matrimonial assets despite the fact that the said properties were advanced at the time of adducing evidence.*
4. *That the 1st appellant court erred in law and fact once upheld the decision of the trial court on the reason that the trial court was right not to order who will be responsible for the control over the custody of the children since no party who claims at the trial the custody of children while this was legal duty imposed by the law to the trial to determine who will have the control over the custody of children*.

When the matter at hand was scheduled for hearing, the matter was ordered to be heard by way of written submissions, and the same was filed by Messers. Chiwalo Nchai Samweli, Learned Counsel representing the appellant, and Samweli S. Lugundiga, Learned Counsel, representing the respondent.

Submitting on the first ground of appeal, the Learned Counsel for the appellant argued that, it is a cardinal rule that in a civil suit, cases must be proved on balance of probability through section 110 of the Tanzania Law of Evidence

Act Cap.6 R. E 2019. The court is bound to rule in favor of one who has heavier evidence. He added that, in the trial court the appellant stated that she constructed and maintained the psychology of her husband and advised him to buy Shamba and open a shop to establish timber (for the business purpose). They jointly kept the money for their development. To him, the evidence of the appellant was heavier than that of the respondent because the respondent did not object to those facts during the trial.

Mr. Chiwalo Nchai Samweli went on by submitting that, the appellant listed the assets acquired jointly such as, two motor vehicles make Nadia and Carina, two farms located at Sima and Sotta-Ngoma, and a shop. However, the respondent stated that all properties were sold for purposes of treatment, to him, the respondent admitted that the said properties existed and the respondent did not bring any evidence to prove that the properties were sold.

Regarding the second and third grounds of appeal, he submitted that the trial court records show that the appellant managed to give more convincing evidence as proof of efforts of the acquisition of the properties. The parties were both government employees, the appellant was employed as a Postal Clerk and the respondent was employed as a doctor. Both contributed to the acquisition of matrimonial assets. He cited the case of

Regnad Ndanda Vs. Felichina Wekisi, Civil Appeal No. 256 of 2018 (unreported) pages 14 to 16 to support his point. To him, the appellant is entitled to a 50 percent share of matrimonial assets.

As to the fourth ground of appeal, he argued that according to section 125 (1) (2) of the Law of Marriage Act Cap.29 R.E 2022, it is a mandatory requirement that the court is entrusted to give the order to custody of the child or children after the dissolution of the marriage. The court must consider the best interest of the child and welfare but the trial court did not determine the issue regarding the custody of children. The trial court issued only a maintenance order that each party to maintain for 50 percent leaving behind who will be responsible for custody. He therefore prayed this appeal be allowed.

In reply, Mr. Samweli S. Ludundiga, Learned Counsel for the respondent argued on the first ground of appeal that, the appellant failed to prove the real matrimonial assets which were acquired jointly efforts and which belong to the respondent alone. The appellant also failed to prove which assets were available at the time and which assets were already sold. The appellant failed to prove her contribution to the acquisition of matrimonial property before the trial court, what she said was the responsibility of taking

care of the family and advising the respondent how to run the business. He further submitted that; the evidence of the respondent was heavier than the evidence of the appellant at the trial court. There was only one house, one plot, and one farm which was acquired jointly. But other properties were acquired by the respondent alone and others were sold to meet home and treatment expenses. To him, the appellant participated very little in developing the project of the farm, shop, and timber business because she was a government employee and she participated only on Saturday and Sunday.

Submitting on the second and third grounds of appeal he stated that, the appellant failed to prove her contribution to the acquisition of any matrimonial assets. Section 60 of the Law of Marriage Act provides that a spouse can own property in exclusion of the other spouse. The respondent managed to prove that he owned some properties alone. To him, the appellant is not entitled to a 50 percent share of matrimonial assets. He cited the case of **Yeses Mrisho Vs. Sania Abdul,** Civil Appeal No. 147 of 2016 (unreported) to cement his point.

Regarding the fourth ground of appeal, he argued that, according to Section 37(1), (2), (3), and (4) of the Law of the Child Act, Cap. 13 R.E 2019,

the parents are at liberty to apply for custody of children therefore no right had been infringed. He therefore prayed this appeal be dismissed with costs.

In rejoinder, the Learned Counsel for the appellant reiterated his submission in chief and added that there was no evidence at a trial court in which the respondent proved that there were some properties acquired for himself as alleged. He therefore concluded that the case of **Yeses** (supra) cited by the respondent is distinguishable from this case.

Before determining this appeal, let me state the legal position that, a second appellate court cannot interfere with concurrent findings of the lower courts (the trial court and the first appellate court). It can however do so only if there is misapprehension of the evidence, miscarriage of justice, or violation of principles of law. This principle or legal position was stated in the case of **Amratlal D. M. Zanzibar Silk Stores Vs. A.H. Jariwale Zanzibar Hotel,** [1980] TLR 31.

In the instant appeal, I have thoroughly scanned the entire court records of the first appellate court and the trial court together with the grounds of appeal and submissions from both sides concerning this appeal and I find the following issue which needs to be determined first by this court before disposing the matter on merits. The issue is *whether there was a*

certificate issued by the reconciliation board indicating that, the marriage conciliation board had failed to reconcile the marriage between the parties and whether the same was dully tendered and admitted in court during the trial.

Since the issue at hand has been raised during the composition of the judgment considering the fact that, the same was even raised at the first appellate court and determined therein, I find it more appropriate to invite the parties to address me on it before I decide the matter on whether the matter was firstly referred to the marriage conciliation board and if so, whether the marriage reconciliation board dully issued a certificate to indicate that, reconciliation had failed and the same was subsequent tendered and admitted in court during the trial. On 12 April 2024 I opted to give room the parties to address this issue raised ***suo mottu*** herein because I have been guided by the decision of the Court of Appeal in the case of **Juma Said Vs. Republic,** Criminal Appeal No. 29 Of 2018 (Cat-Mwz) (Unreported) at page 8, the Court of Appeal of Tanzania cited with approval the case of **Abbas Sherally & Another Vs. Abdul S.H.M Fazalboy, Civil Application No. 33 Of 2002 (Unreported)** the Court had this to say and I quote;

"The right to be heard before adverse action is taken against such party has been stated and emphasized by the

courts in numerous decisions. ***That right is so basic that decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."*** [Emphasis is mine]

The Counsel for the appellant upon being invited to address the court argued starting to admit that the very point was raised at the first appellate court and was determined. And that as a matter of procedure an attachment has to be tendered in court but the lower courts record is silent on whether the respondent tendered that certificate in evidence. Failure of the record to reflect it, this court will remain with questions on where the first appellate court relied upon the document which does not exist on record. It is unknown how the document came into that file a fault which concludes that parties never passed through the Marriage Reconciliation Board as required by the law. This point suffices to vitiate proceedings for being incompetent. He then urged the court to quash the lower court's decision and direct any interested party to file the petition afresh.

In response, the respondent unrepresented argued that, they did undergo the reconciliation process to the Board as required by the law and that he cannot comment much on omission done by the court. To him, the

trial court would have not determined the case in the absence of the Certificate from the Marriage Reconciliation Board hence what was submitted by the appellant's advocate is baseless. He went on to submit that it is unjustifiable to go back to the Board while the certificate is in the court file. And that parties were asked nothing on that aspect.

In his brief rejoinder Mr.Chiwalo contended that the respondent should not seek refugee on technicalities. This is a position of law. The law and procedure are quite clear that annextures attached to pleadings has to be tendered and admitted in court. In absence of it the proceedings become nullity. He then insisted that the trial by the lower courts was then void ab initial.

Having considered the submissions from both parties, the court is aware of the mandatory requirement of the Conciliation Board Certificate before part instituting or petitioning for divorce. According to Marriage Conciliation Board (Procedure) Regulations, GN No. 240 of 1971, Regulation 9 provides for Form No. 3 in the schedule. The said regulation reads as hereunder;

> *"Where the dispute is between a husband and his wife and relates to the breakdown of the marriage or an anticipated breakdown of the marriage, and the Board fails to reconcile the*

parties, the Board shall issue a certificate in the prescribed form."

However, Section 101 of the Law of Marriage Act Cap.29 reads as follows;

*"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 will enter the jurisdiction within the six months next ensuing after the date of the petition;
(c) where the respondent has been required to appear before the Board and has wilfully failed to attend; Cap. 361
(d) where the respondent is imprisoned for life or for a term of at least five years or is detained under the Preventive Detention Act and has been so detained for a period exceeding six months;
(e) where the petitioner alleges that the 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." [Emphasis is mine]

According to the provisions above, it is clear that no person shall petition for divorce unless he or she has first referred the matter or matrimonial dispute to a board and the board has certified that it has failed to reconcile the parties.

Furthermore, section 104 (5) of the LMA provides that;

*"104 (5). Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it **shall** issue a certificate setting out its findings."*

In addition, section 104(6) of the Act states that;

"A Board may append to its certificate such recommendations relevant to the matter or dispute referred to it as it may think fit.

Section 106(2) also emphasized 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 filling of the petition.

Having in mind the above legal position, I took trouble to peruse the Primary Court records and found the certificate from the Marriage

Reconciliation Board in issue but the trial court records do not show if the same was tendered and admitted in court. More so parties said nothing to that aspect in their testimony. For clarity, page 3 of the trial court proceedings when the respondent testified stated that;

> *"Baada ya kujari]bu kila njia kutafuta suluhu, niliamua kumwacha, hadi sasa hakuna kinachoendelea kati yetu sasa ni takribani miaka mitatu na miezi minane hatufanyi tendo la ndoa."*

In cross-examination, the respondent also stated that;

> *"-Sijakupeleka kwenye dawati la jinsia.*
> *-Kuhusu mgogoro wa ndoa sijawahi kushirikisha wazazi."*

As per the quoted proceedings, no doubt parties said nothing regarding the conciliation process. However, this issue was raised by the appellant at the first appellate court but the learned Magistrate in dismissing the point relied on the decision of **Switbert Thomas Barumuzi Vs. Juliana Switbert,** Matrimonial Appeal No. 01 of 2022, TZHC at Bukoba. In this case, the High Court was of the view that, since the said certificate was in the case file, hence the same suggested the dispute between the parties was at first referred to the reconciliation board.

On my side, I differ with the first appellate court. The reason is that, one the certificate was never tendered in court and hence not admitted to form part of court records. Two even in their evidence neither of them testified or said anything in that aspect. Thus, the certificate is not reflected in the court record which suggests that the appellate court assumed the parties went through the Board. I have tried to ask myself what if one removes the certificate from the file or it gets lost for whatever reason and the record does not reflect its existence, how can one believe that the same was brought in court? As submitted by Mr. Chiwalo advocate for the appellant it raises several questions as to how the same came into that file. It is my view that being found on a court file and being not raised by the parties in dispute does not justify non-complies with the mandatory requirement of the law. My position is based on the wise decision of the Court of Appeal of Tanzania in the case of **Patrick William Magubo Vs. Lilian Peter Kitali,** Civil Appeal No. 41 Of 2019 (Cat-Mwz) (Unreported) the court faced a similar scenario as in the instant matter. On page 13 the Court had this to state and I quote;

> *"…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, annextures are not evidence for the court of law to act and rely upon."*** [Emphasis is mine]

Again, in the case of **Yohana Balole Vs. Anna Benjamini Malongo,** Civil Appeal No. 18/2020 on page 13, it was held that;

> ***"A certificate of the Board has to be tendered as evidence by either party".*** *[Emphasis is mine]*

From the above arguments backed up by the cited authorities since the Certificate from Marriage Reconciliation Board does not feature on the trial Primary courts record for being not tendered and admitted on record and or not even testified by the parties, it is as good as there was no such certificate. Therefore, in such circumstance the Primary Court of Sengerema had no requisite jurisdiction to entertain the matter. The absence of a certificate from the Board renders the petition incompetent for failure to comply with sections 101 and 106 (2) of the Law of Marriage Act, Cap.29 of 19171 as it was held in a number of cases including that of **Abdallah Hamis Kiba Vs. Ashura Masatu,** Civil Appeal No. 465 of 2020 (unreported) and **Hassan Ally Sandali Vs. Asha Ally,** Civil Appeal No.246 of 2019.....

The first appellate court then entered into an error of assuming the existence of the certificate as the same does not feature in anyhow in the trial court proceedings and hence tried nullity.

In the event, I hereby allow this appeal to the extent above stated. Consequently, I proceed to quash and set aside the proceedings, judgments, decree, and orders emanated from the District Court of Sengerema in PC Civil Appeal No. 573 of 2023 (the first appellate court) as well as Matrimonial Cause No. 37 of 2023 (the trial court) for being a nullity. Any party who is still interested with this matter is at liberty to commence the process for petition afresh according to the law. No order as to costs considering that this appeal emanates from the matrimonial dispute.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 16th day of April, 2024.

W. M. CHUMA

JUDGE

The Judgment entered in the presence of Mr. Chiwalo Nchai, the appellant's advocate and the appellant herself and of the respondent who appeared unrepresented, this 16th day of April, 2024.

W. M. CHUMA

JUDGE