IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 44 OF 2023

(*Arising from the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 127/2021 before Hon. Sanga - SRM)*

GETRUDE MUSHI .....APPELLANT

VERSUS

DR. AVIT THADEI MUSHI.....RESPONDENT

JUDGMENT

13/12/2023 & 15/02/2024

S.S. SARWATT, J.

This matter originates from the District Court of Temeke at One Stop Centre in Matrimonial Cause no 127 of 2021. While at the trial Court, the respondent herein petitioned for a decree of divorce, division of matrimonial properties, and custody of children.

The case's material facts obtained from the trial court record indicate that the appellant and the respondent contracted a christian marriage in 2007 and were blessed with two issues. Later on, the marriage between them

started to face challenges. As a result, the respondent petitioned for divorce before the trial Court.

The trial Court was satisfied that their marriage had broken down beyond repair. Therefore, it issued the decree of divorce, divided matrimonial house, and placed their children in the custody of the respondent.

Aggrieved by the decision of the trial Court, the appellant challenges it with three (3) grounds as hereunder;

1. *That the trial Magistrate erred in Law and, in fact, by dissolving the marriage between the two in absentia of a letter from the conciliation Board, contrary to the procedure of the Law.*
2. *That the trial Magistrate erred in Law and fact to find out and order that the house at Madale was a Matrimonial property, disregarding the plenty and justified evidence of DW1 and DW2.*
3. *That the trial Magistrate erred in Law and fact by ordering the custodian of the two children, aged 13 and 16 years, to the respondent while the Court erroneously failed to ask both children where they wanted to stay for living, whether to the appellant or respondent, contrary to the procedure of Law.*

Mussa Ramadhani, the Learned advocate, represented the appellant, while the respondent appeared in person. The appeal was argued by way of written submissions. In his submission supporting the appeal on the first ground, the appellant's counsel submitted that it is the requirement of the Law under section 101 of The Law of Marriage Act, Cap 29 (the Law), that before a person petitions for the decree of divorce, must refer the matrimonial dispute to the conciliation Board (the Board).

He further submitted that no evidence was produced before the trial Court proving that the respondent had referred their dispute to the Board. Therefore, lacking such evidence was an error for the trial magistrate to decide a case without considering that the parties had not referred their dispute to the Board.

On the second ground of appeal, the counsel for the appellant submitted that the Law, under section 114, gives power to the Court to order the division of property that was acquired jointly by the parties during their marriage through their joint efforts. The counsel added that the respondent, apart from testifying that he constructed the matrimonial house, did not provide any evidence to prove that he fully participated in the construction of the said house. Thus, the counsel prayed for the trial Court's decision to be quashed.

It is the appellant counsel's submission on the third ground of appeal that the Court has the power to place a child in the custody of a mother or a father by taking into account the child's best interest. However, as stipulated under section 125(2) of the Law, the Court should also consider the child's wishes when he or she is of an age to express an independent opinion with whom they want to stay. In the present case, the record shows that the trial Court did not call the children of the appellant and the respondent, who at that time were 13 and 16 years old, so that they could give their opinion on whose parent they wanted to stay with between the appellant and the respondent, this, according to the appellant's counsel, is against the Law under section 125(2).

In response, the respondent stated on the first ground of appeal that the marriage dispute between him and the appellant was referred to the Board. However, the appellant did not attend for no apparent reason. Following that, the Board issued a certificate stating that it had failed to reconcile the parties. He said the certificate was annexed to the petition as annexure AM3. The respondent further argued that before filing the petition, they were already separated with the appellant for more than four years. Since there is no love and affection, no magic could make them love one another. To support his assertion, he cited the case of **John David Mayengo V**

Catherine Malembeka, Pc Civil Appeal No. 32 of 2003 (Court of Appeal.)

Regarding the second ground of appeal, the respondent submitted that the Law under Section 114(1) allows the Court to order the division of assets the couple has jointly acquired during their marriage. In dividing the said matrimonial assets, the Law directs the Court to consider the extent of the contribution made by each party in terms of money, property, or work towards the acquisition of the assets. To emphasize this ground of appeal, the respondent submitted that, being a public servant, he managed to build a house at Madale and buy a Motor vehicle, which he left with the appellant. He added the appellant, despite arguing that the house is not a matrimonial property, did not produce any evidence to show that she alone was the one who bought the plot. Thus, the house should be regarded as matrimonial property. To support his argument, he cited the case of **Yesse Mrisho V Sania Abdu,** Civil Appeal No. 147 of 2016 (Court of Appeal).

On the third ground of appeal, the respondent submitted that the trial Court was proper to order custody of the two issues to him since he is the one who takes care of them by paying school fees and providing them with shelter and clothes. He submitted further that no law requires them to give their opinion on whose parent they wish to stay with. It is the Court's discretion to decide that.

I have considered grounds of appeal, evidence on record, and submissions of both parties. The issue for determination is whether this appeal has merits.

As to the first ground of appeal, my perusal of the trial Court record reveals that although the certificate from the Board was attached to the petition as annexture AM3, it was not tendered as evidence during the trial. The Law under section 101 provides,

> *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 unlike that he or she will enter the jurisdiction within six months ensuing after the date of the petition*
>
> *(c) where the respondent has been required to appear before the Board and has willfully failed to attend.*

(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 has an incurable mental illness and,

(f) where the Court is satisfied that there are extraordinary circumstances which refer the Board impracticable."

From the above-quoted provision, it is pretty clear that before a person petitions for a divorce decree, the matrimonial dispute must first be referred to the Board. Plenty of Court of Appeal authorities have expounded this principle, and one of them is the case of **Hassani Ally Sandali v Asha Ally** in Civil Appeal No. 246 of 2019, in which it was held that;

....The granting of divorce under section 107 (3) of the Act was not an end in itself. It was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of the Act is mandatory except where it is impracticable to refer the dispute to the Board as provided under section 101(f) of the Act."

Moreover, it should be noted that for a document to be relied on in making

a decision, it must be tendered and admitted as evidence during the trial. The Court of Appeal in the case of **Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009, held;

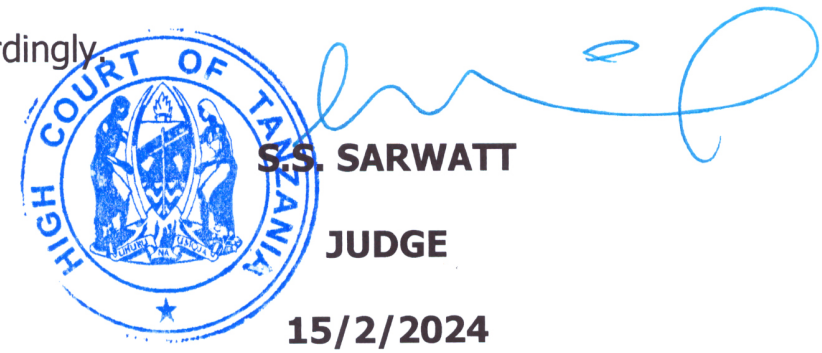
> *we wish to point out that annexures attached along with the plaint or written statement of defence are not evidence. Probably, it is worth mentioning at this juncture to say the purpose of annexing documents either in the plaint or written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind this is to do away with surprises. But annexures are not evidence.*

In the case at hand, according to the Law, it was not enough for the respondent to attach the certificate to his petition. Rather, it is a mandatory requirement for the said certificate to be tendered in Court and form part of evidence. Since the respondent had not tendered the certificate, it can rightly be said that there is no evidence that he had referred their dispute to the Board. Worstly, there is nowhere in evidence given by any witness that either party had attended to the Board and it had failed to reconcile them. The Court of Appeal, In the case **of Patrick William Magubo vs. Lilian Peter Kitali**, Civil Appeal no.41 of 2019, held that if there is a failure to comply with the requirements of sections 101 and 106(2) of the Law, the Court lacks the requisite jurisdiction to entertain the matter.

In the event and for the preceding reasons, I agree with the 1st ground of appeal. Since the findings on this ground suffice to dispose of the appeal, I do not need to consider the other remaining grounds. I thus find this appeal has merit, and I allow it.

Therefore, the whole proceedings, the divorce decree, and the trial Court's orders are hereby quashed for being a nullity. The respondent is at liberty to file his petition afresh according to the Law if he so desires.

Ordered accordingly.



S.S. SARWATT

JUDGE

15/2/2024