

**IN THE HIGH COURT OF TANZANIA
(TEMEKE HIGH COURT SUB- REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
PC CIVIL APPEAL NO. 1123 OF 2024**

*(Arising from Matrimonial Appeal No. 41 of 2023 of District Court of Temeke at One Stop Judicial Centre
originating from Matrimonial Cause No. 283 of the Temeke Primary Court at One Stop Judicial Centre)*

JOSEPH TARIMO.....APPELLANT

VERSUS

ANNA TEODOR MLELWA.....RESPONDENT

JUDGMENT

Date of last order: 06/05/2024
Date of Ruling: 17/05/2024

OMARI, J.

The background of this matter is that the Appellant, Joseph Tarimo through Shauri la Talaka Na. 283 of 2022 sought a divorce decree and division of matrimonial properties acquired during the marriage between him and the Respondent, Anna Teodar Mlelwa. His grounds for seeking the divorce were that the Respondent was misappropriating matrimonial properties, she is buying land and taking out loans without his involvement. The Respondent contested the divorce.



The trial court ordered that the marriage between the two had not irreparably broken down and refrained from dividing the matrimonial properties as a result. Dissatisfied with the decision of the Temeke Primary Court at One Stop Judicial Centre the Appellant filed Appeal No. 41 of 2023 posing a total of six grounds which all hinge on the court's failure to consider the marriage broken down irreparably. The district court dismissed the appeal in its entirety for being devoid of merit. This is what brought the Appellant to this court, he filed a second appeal armed with four grounds to wit:

1. That the learned trial magistrate erred in law by ignoring the fact that the long matrimonial conflict between the Appellant and the Respondent leads (*sic*) to a bad marriage relationship.
2. That the learned trial magistrate erred in law and fact by ignoring the Appellant's testimony and biased (*sic*) relied on the Respondent's of which the Respondent agreed to have left the matrimonial home leaving the Appellant without spousal care for quite a long time.
3. That the learned magistrate erred in both law and fact by failing to consider the danger for the Appellant and Respondent being in the marriage.

4. In the alternative but without prejudice to the grounds mentioned above the learned trial judge (*sic*) erred in law and facts by not considering the initial failed efforts of the parties to reconcile before the marriage conciliation board.

It is based on those four grounds that the Appellant is praying for this court to quash and set aside the decision of the District Court of Temeke and judgment and decree of the Primary Court of and dissolve the marriage between him and the Respondent.

When the appeal was called for hearing both parties appeared in person and opted to submit on the grounds of appeal orally.

Submitting on the first ground of appeal Mr. Tarimo argued that the trial court erred as the Respondent was a drunk who returned home at odd hours. He complained that she travelled without informing him which in effect denied him his conjugal rights for a long time and led to a bad relationship between the two although they live in the same house and share a bedroom.

The Appellant submitted on the second ground contending that the magistrate ignored his testimony and only considered the Respondent's testimony who in any case had admitted to leaving the matrimonial home.



He further stated that the documents that she brought as evidence of ownership of the properties are false and incorrect and some are forged including the one for Kivule. Mr. Tarimo further explained that all the exhibits were wrong except for the marriage certificate. He concluded on this ground by emphatically submitting that the Respondent left home and lives in Tunduma without consultation or agreement and that the primary court proceedings have errors including that his objection was marked that he had agreed.

On the third ground of appeal the Appellant submitted that their marriage had failed because the Respondent ignored the church's call for reconciliation as well as the advice of their marriage intermediary. He complained that his efforts at reconciliation did not yield positive results.

Submitting on the last ground of appeal which is in the alternative the Appellant argued that the magistrate did not consider that the Marriage Conciliation Board failed to reconcile the parties. He then prayed for this appeal to be granted.

When it was her turn, the Respondent replied generally that, there were no errors in the decisions of the lower courts, the trial court heard both sides

before reaching a conclusion and making a decision as did the Marriage Conciliation Board. She refuted the allegations that she left the matrimonial home stating it is he who left and is currently living with other women. As regards her evidence, Ms. Mbelwa stated that her witnesses included his siblings and relatives thus, he is making up lies and there are no errors.

In his brief rejoinder, the Appellant complained that the Respondent is selling properties underhandly. He prayed for this court to grant a divorce as the two are no longer compatible and have lived apart for more than 10 years.

Having considered the submission of both parties and the record of the case I am also aware of the fact this is a second appeal and there is a principle that a second appellate court should not go into issues of the first court as those were the business of the first appellate court and that, this being a second appellate court is not expected to disturb the lower courts' concurrent findings unless there is a misapplication of the law or misdirection of the evidence as was held in **DPP v. Jafari Mfaume** [1981] TLR 149. See also **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31. That said, I am still obligated to answer the question as to whether the appeal is meritorious.



The first ground of appeal is not based on the Appellant's evidence or testimony in the trial court and the same was not decided by the trial court or the first appellate court making it an afterthought. The Court of Appeal in Additionally in the case of Safari **Mwazembe v. Juma Fundisha**, Civil Application No. 503/06 of 2021 observed as follows:

"Time without number, and we need not cite any authority, this court has clearly stated that usually, the Court will look into matters which came in the lower court and where it will not look into issues which were neither raised nor decided either by the trial court or the high court."

Although the cited authority is of the practice and procedure in the Court of Appeal the same would still apply to this court as it cannot look at matters that were not raised or decided by the trial court or the first appellate court. As regards the second ground of appeal, having gone through the record and the judgment of the trial court I am of the view that both of the parties' testimonies were considered. Furthermore, there is nowhere in the Respondent's testimony that she admitted having left the matrimonial home, making this ground misconceived.

The third ground of appeal also brings an issue that was neither testified by the Appellant nor decided by the two lower courts and thus, cannot be brought at this time.

- The last ground of appeal is anchored on the court's failure to consider that the MCB has failed to reconcile the parties. The law is very clear on this one, every Petition for divorce needs to be accompanied by a certificate of the MCB with its findings that it has failed to reconcile the parties. This is provided for under section 101 of the LMA. However, upon the MCB certifying that it has failed to reconcile the parties, the court is by law still required to have due regard to all the relevant evidence in deciding whether the marriage has broken down irreparably. This is provided for under section 107 of the LMA. The Appellant did not provide sufficient evidence that the marriage had broken down irreparably. I agree with the observation made by the district court on page 6 of its judgment which states:

"...the court in determining the matrimonial case is duty bound to make sure the circumstances under section 107(2) of the Law of Marriage Act exist. Unfortunately, the Petitioner has not established any of the circumstances as required under the said law. That being the case, I find that this ground of appeal has no merit"

This goes to show that the trial court does not just rubberstamp the decision or certification of the MCB, it has to satisfy itself that the marriage has broken down irreparably as per the evidence of the parties. In this case, the Appellant failed to establish this through evidence in the trial court.

Therefore, I cannot find that the trial court erred by not considering that the MCB failed to reconcile the two.

Having found that all four grounds of appeal are without merit, this appeal is dismissed in its entirety. This being an appeal that emanates from a matrimonial matter, each party is to bear its own costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

17/05/2024

Judgment delivered and dated 17th day of May, 2024.

A handwritten signature in blue ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

17/05/2024