

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB REGISTRY**

**AT MBEYA**

**MATRIMONIAL APPEAL NO. 20 OF 2022**

*(Originating from Matrimonial Appeal No. 03 of 2022 in the District Court Mbeya at Mbeya  
in Original Matrimonial Cause No. 66 of 2021 of primary court of Mbeya at Uyole)*

**JAMES BENEZETH .....APPELLANT**

**VERSUS**

**MAGRETH MOSES ..... RESPONDENT**

**JUDGMENT**

Date of hearing: 21/12/2023

Date of judgment: 25/1/2024

**NONGWA, J.**

James Benezeth and Magreth Moses, the appellant and respondent respectively, were husband and wife from 2003 when they contracted Christian marriage. It came to an end in 2021 when Magreth Moses successfully vide Matrimonial Cause No. 66 of 2021 of the primary court of Mbeya district at Uyole, petitioned for decree of divorce, division of matrimonial properties and custody of issues of marriage.

Disgruntled of the outcome, the appellant vides Matrimonial Appeal No. 3 of 2022 of the Resident Magistrate of Mbeya at Mbeya, unsuccessfully challenged the trial court judgment on division of matrimonial properties alleging that some of the properties were acquired

by him prior contracting marriage with the respondent. Further that that custody of some children aged above seven years were wrongly placed under the custody of the respondent.

Still resentful of the outcome, the appellant filed the petition of appeal consisting of two grounds, **one**; that the appellate court erred in law and facts for its failure to analyse properly the evidence of both parties so as to reach the proper decision, **two**; that the appellate court erred in law and facts by ordering the custody of the two children being under the custody of the respondent without analysing the said interest of the children.

When the matter came on for hearing both parties appeared unrepresented, the appeal was disposed through written submission, dutifully parties filed their submissions as scheduled.

Arguing the first ground of appeal the appellant submitted that the house at Uyole was wrongly included in the matrimonial properties because it was owned by their son Francisco Fippa and they lived therein in temporarily. He attached sale agreement to the submission.

The appellant went further to argue that the lower court divided cattle while was not in existence after the parties sold all to solve their

problems like illness. According to the appellant there was no cattle worth to be included as matrimonial property and divided among them.

In respect of the second ground on custody of children, the appellant submitted that the respondent deserted them and remained with him. That according to the law particularly section 125 of the Law of Marriage Act (the LMA), the children's age allowed them to live with the father so as to be able to fulfil their needs and welfare.

Responding to appellant's submission, on the issue of division of matrimonial property, the respondent recounted that the house at Uyole did not belong to their son as there was no any evidence to substantiate it.

Reply to the second ground on custody of children being placed under her, it was submitted that the courts below considered the welfare of the children as required by section 125(4) of the LMA in placing custody of the children under her.

In rejoinder the appellant maintained that the house at Uyole belonged to their son and sought indulgence of the court to allow him to produce proof in accordance with order XI rule 12 of the Civil Procedure Code. On custody of children the appellant restated his submission in chief.

Having considered the rival submission of the parties, the determination of the appeal would be on the two grounds of appeal, however, for the reason to come later, the appeal will be resolved on different issues discovered by the court *suo motto* in the course of composing judgment. Hearing was re-opened and parties given opportunities to address on the following issues;

1. Whether parties passed their dispute at the marriage conciliation board and were given certificate of the marriage conciliation board; and
2. Whether the appeal is within time.

In his response to the issue posed by the court, the appellant submitted that the record did not contain certificate from marriage conciliation board and it was not attached to the petition in the trial court. The appellant stated that parties did not pass before the board to reconcile them, making the matter improperly conducted by the trial court.

On his party the respondent contended that parties passed through the Uyole ward Conciliation board in 2020 and the certificate was issue signifying that they failed to reconcile them. Further that the certificate

was tendered in the court and decree of divorce issue in 2021. According to the respondent, parties went to the marriage conciliation board.

I have considered the argument in respect of the issues raised by the court. In the first issue section 101 of the LMA prohibits a spouse to petition for divorce before referring the matter to the marriage conciliation board to reconcile them. It reads;

*'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.'*

However, there is exceptions as provided to proviso of the above section 101 of the LMA;

*'(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;*

*(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.'*

Existence of certificate from the marriage conciliation board is a jurisdictional issue which every court empowered to issue and grant decree of divorce must satisfy first before proceeding with the matter. See **Yohana Balole vs Anna Benjamin Malongo**, Civil Appeal 18 of 2020 [2021] TZCA 388 (TANZLII).

The requirement of the marriage conciliation board issuing certificate of failure to reconcile spouse has been subject of discussion in the court of appeal. In the case of **Hassani Ally Sandali vs Asha Ally**, Civil Appeal 246 of 2019 [2020] TZCA 14 (TANZLII) the court stated that 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.

In the present appeal, I noted that the trial magistrate at page 3 of the judgment raised the issue whether parties passed through the conciliation board and failed to reconcile them. Resolution of the issue features at page 4 of the judgment, the magistrate was satisfied that

parties were reconciled by the board in vain and that there was a letter from the ward to that effect.

From the party's submission on the issue of certificate from the marriage conciliation board there is parity of view, the appellant is content that there is no certificate from the board and they did not pass for reconciliation while the respondent has submitted that they passed to the board and the certificate was tendered in court.

After going through the record of appeal, the appellant rightly submitted that the record does not reflect presence of the certificate from the marriage conciliation board. I have anxiously perused the record and not been able to retrieve the certificate of the Uyole ward conciliation board as argued by the respondent. The raising of the issue and its resolution by the trial magistrate is not supported by the record, the certificate was neither attached to petition of divorce nor tendered during hearing. The record is clear that the respondent testified as SM1 and tendered no document, making her argument that it was tendered misplaced and not supported by the record of the court.

Assuming the respondent is right in his submission though not that they referred the dispute of marriage reconciliation board in 2021 and was issued with certificate, the same could not have force of law because,

taking 2020 alleged by the respondent to 18th October 2021 when divorce petition was filed in the trial court six months for which the certificate would be valid has long expired in terms of section 106(2) of the LMA.

Even oral evidence of SM1, the respondent here is silent if they passed through marriage reconciliation board, all what is clear is that their dispute was solved at family level by including their parents and at the local government which in terms of section 102 of the LMA is not the marriage conciliation board. Submission of the appellant that they did not refer the dispute to the marriage conciliation board to reconcile is more trustful in absence of the certificate from the board being introduced in evidence. See the case of **Patrick William Magubo vs Lilian Peter Kitali**, Civil Appeal No. 41 of 2019 [2022] TZCA 441 (TANZLII). The first issue is answered in affirmative.

In regard to the issue of time barred, parties rightly so are in agreement that it was filed beyond forty-five (45) days prescribed by section 80(2) of the LMA and no leave was sought by the appellant. Following the resolution of the first issue I will not delve in discussing the second issue in extenso because it will save no purpose and will be for academic purpose. In the end I find the first issue raised by the court *suo motto* sufficiently disposes off the appeal.



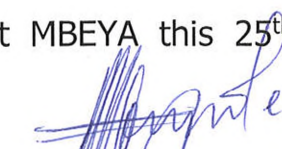
In the premises, I find that the petition for divorce before the trial court was incompetent for failure to comply with the requirement of section 101 and 106 (2) of the LMA because the trial court did not have the requisite jurisdiction to entertain the matter. The district court did not detect the said irregularity when it went ahead to determine the appeal and uphold the judgment of the trial court. As a result, I nullify the entire proceedings of the trial court in Matrimonial Cause No 66 of 2021 and quash the proceedings, judgment and set aside the subsequent orders thereto.

Similarly, I nullify the proceedings of the district Court and quash its respective judgment and subsequent orders as they stemmed from null proceedings. The respondent is at liberty to process her petition afresh in accordance with the law, if she so wishes. Being matrimonial appeal, I order no costs.



  
**V.M. NONGWA**  
**JUDGE**  
**25/1/2024**

DATED and DELIVERED at MBEYA this 25<sup>th</sup> day of January 2024 in presence of both parties.

  
**V.M. NONGWA**  
**JUDGE**