

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 80 OF 2019

(Arising from Civil Appeal No. 142 of 2018, Ilala District Court. Original case Matrimonial cause No. 19 of 2017 at Ilala Primary Court)

BERNADETA MUKAYIRANGA.....APPELLANT
VERSUS
HERBERT KABYEMELA.....RESPONDENT

JUDGEMENT

MASABO J.L.:-

Herbert Kabyemela, the Respondent herein successfully petitioned for divorce against the Appellant before Ilala Primary Court. The Appellant was disgruntled. Her attempt to have the divorce decree and subsequent orders annulled turned futile as her appeal before Ilala district court was dismissed for lack of merit. Disgruntled further she appealed to this Court contending that:

1. The appellate court erred in law and fact in confirming that the marriage dispute between her and the Respondent was referred to the Marriage Conciliatory Board while the petition for divorce was not accompanied with the certificate from the Conciliatory Board
2. That the appeal court erred in law and fact in confirming that the marriage between the parties has broken down irreparably while the petition of divorce was founded on the petitioner's wrongdoing.



3. That the appellate court erred in law and in fact in confirming the decision of the trial court that the marriage has broken down irreparably while it failed to inquire the facts alleged to warrant that the marriage has broken down irreparably.

At the hearing, both parties were represented. Mr. Cleoplace James and Mr. Allen Mollel learned Advocates appeared for the Appellant whereas Mr. Wilson Mukebezi, learned counsel appeared for the Respondent.

In support of the Appeal Mr. James submitted that the appeal magistrate erred in confirming that the dispute was referred to the Marriage Conciliatory Board whereas the petition for divorce was not accompanied by a valid certificate from the Marriage Conciliatory Board contrary to section 104(5) and 106(2) of the Law of Marriage Act, 1971 which impose a mandatory requirement that a petition for divorce be accompanied with a certificate of the Marriage Conciliatory Board certifying that it has failed to reconcile the parties. He reasoned that pursuant to Regulation 9 of the Marriage Conciliatory Board (Procedures) Regulations, 1971, the certificate has to comply to the format provided in Form 3 of these regulations.

In support of his submission, Mr. James cited the case of **Clemence Ngonyani v Baswita Komba** (2017) TLS Law Report 176 where it was held that the petition for divorce and division of matrimonial assets is predicated upon a certificate from a competent Marriage Conciliatory Board indicating that the marriage could not be reconciled by the Board. He also

cited the Case of **Shillo Mzee v. Fatuma Ahmed [1984] TLR 112** and **Athanas Makungwa v Darling Hassan [1983] TLR 132** and proceeded to argue that in the absence of the certificate, the decree of divorce can not be granted. Mr, James argued further that reference of the dispute to the court is not enough. For purpose of compliance with the requirement of the law, the Board must issue a certificate that it has failed to reconcile the parties. Based on this he argued that, the letter from the Board does not suffice the requirement of the law and can not be acted upon.

On the 2nd ground, Mr. James submitted that the court erred in law and fact in confirming that the marriage between the parties has broken down irreparably while the grounds upon which the divorce was granted was exclusively based on the Respondent's wrong doing contrary to the provision of section 15(1) of the Law of Marriage Act. He argued that since it was the Respondent who deserted his wife and went to live with another woman it was wrong for the appellate court to confirm that the marriage had broken down irreparably as that was tantamount to rewarding the Respondent for his wrongdoing. Further, he argued that section 107(1)(e) of the Law of Marriage prohibits a spouse to cohabit with another man or woman during the subsistence of marriage. He cited the case of **John Kahamila v Paschal Jonathan and Hilda Hosia [1986] TLR 104** and proceeded to submit that a party to a monogamous marriage is prohibited by law to contract another marriage during subsistence of marriage hence the Respondent violated the law and should not be allowed to use the court as a shield for his wrong deeds.



On the 3rd ground of appeal Mr. James submitted that the court erred in dissolving the marriage as there was no sufficient proof that the marriage had broken down irreparably. He argued that the only reason advanced by the Respondent in support of his petition for divorce was that the two has quarrels but the trial court and the first appeal court made no attempt to inquire on the nature of the quarrels to see whether they sufficiently warranted issuance of a divorce decree.

Responding to the submission, Mr. Mukebezi submitted that the submission that the petition was not accompanied by a certificate of the Board is misconceived as the petition was accompanied by a certificate which was dully filed in court on 30/5/2015 and it contains all the particulars provided under Form 3 in that it has the names of the parties, and certified that the Board has looked into the matter but failed to reconcile the parties. He further argued that, the Board was legally constituted as its membership complied with the requirement of section 103(1) and (2) of the Law of Marriage Act. He reasoned that, although the certificate submitted is not in the format provided under Form 3, it cannot be vitiated as it encompasses all the prerequisite contents of Form 3. Based on this he reasoned that the trial court and the 1st appeal court correctly held that the petition was accompanied by a certification. Mr. Mukebezi distinguished the case of **Athanas Makungwa v Darling Hassan (supra)** from the instant one. He argued that unlike in the instant case where the parties went to the Marriage Conciliatorily Board, in **Athanas Makungwa** the parties never

referred their dispute to the Conciliatory Board hence it is distinguishable from the instant case.

On the 2nd and 3rd ground of appeal, he argued that section 15(1) of the Law of Marriage is irrelevant as it only applies where a party to marriage intends to contract another marriage during the subsistence of the marriage which was not the case in the instant appeal. He argued further that in the instant case the petition was based on the long separation between the parties pursuant to section 107(2)(e) which under the law constituted a ground for divorce. He submitted further that the parties were under separation for more than ten years hence there is no reason to fault the findings of the two lower courts. Lastly, he argued that under section 105 and 108 of the Law of Marriage Act entitles each of the spouses to petition for divorce. The Appellant and the Respondent had a parallel right to petition for divorce hence the argument that the court erred in entertaining the matter for reasons that it was the Respondent who petitioned is misconceived and should be disregarded.

In rejoinder Mr. James briefly submitted that the minutes of the Marriage Conciliatory Board accompanying the petition do not suffice as Certificate because Regulation 9(1) uses the word shall which entails that the petition for divorce must be accompanied by Form 3. On the 2nd ground of appeal he rejoined that the trial court found that the Respondent was living with another woman in a hotel hence he violated section 15 of the Law of Marriage Act and should not be allowed to benefit from his wrongs.



I have carefully considered all the submission by both counsels. As it could vividly appear from the submissions this court is basically invited to determine two main issues: (i) whether the lower courts erred in their findings that the petition for divorce was accompanied by a certificate from the Marriage Conciliatory Board; and (ii) whether the lower courts were correct in their finding that there was proof that the marriage between the parties had broken down irreparably.

Regarding the first ground, section 101 of the Law of Marriage Act imposes a mandatory requirement for petitions of divorce to be referred to the Marriage Conciliatory Board prior to being filed in court. The section states in unequivocal terms that:

"No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a Board and the Board has certified that it has failed to reconcile the parties"

Further, Section 106 (2) provides 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 filing of the petition...."

The form and content of the certificate are further exemplified under The Marriage Conciliatory Board (Procedures) Regulations, 1971, GN No. 240 of 1971 whose Regulation 9(2) provides that:

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."

The requirement for reference of disputes to Marriage Conciliatory Boards has been a constant subject in matrimonial proceedings. In a recent judgement by the Court of Appeal, His Lordships had this to say:

"..... the granting of the 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 there is evidence of existence of extra ordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101(f) of the Act." [emphasis added] (**Hassan Ally Mwandali v Asha Ally**, Civil Appeal No. 246 of 2019, Court of Tanzania at Mtwara (unreported)).

Indisputably, the parties herein are well acquainted with this requirement as it is common ground between them that prior to being instituted in trial court the dispute was referred to the Marriage Conciliatory Board as per the requirement of the Law. It is also a common ground between them that the petition for divorce was accompanied by a document from the Marriage Conciliatory Board. Their point of departure is the status of said document.

On the one hand, the Appellant holds that the document filed in court lacks seriously in form and content hence contravenes the mandatory requirement of the law. On the other hand, the Respondents counsel does not dispute that the said document is not similar to Form 3. He however contends that its content encompasses all the information prescribed under Form 3 hence it suffices as a certificate for purposes of Section 106 (2).

I have carefully scrutinized the impugned document which was filed in court on 30th May 2017. The 5-page document contains the proceedings of "BARAZA LA USULUHISHI KATA YA KINYEREZI." Its contents encompass a list of members of baraza (5 members) and information provided by the parties in the course of hearing (including questions posed and answers thereto). The questions and answers are followed by the following paragraphs:

"Hayo ni baadhi ya maelezoo ya mlalamikiwa kwa ufupi zaidi yapo ndani ya mwenendo shauri.

Baaada ya uchambuzi huo baraza la usuluhishi tulitoa mapendekezo ya hitimisho la shauri hili la mwenendo.

Hitimisho la Mapendekezo

1. Kuanzia leo 05/05/2015 tunataka ndugu Herbert Kabyemela unaamriwa kuendelea kutoa matunzo na huduma zote za familia yako pamoja na mkeo
2. Kuanzia leo 05/05/2015 shauri hili tunalileta katika mahakama ya mwanzo Ilala Wilaya ya Ilala kwa utekelezaji wa kila mwanandoa kupata haki yake

3. Pia tunataka amani na utulivu katika kipindi hiki ambacho sheria inafanya kazi

Signed

Ambakisye Mwakisisile

Katibu wa Baraza

Kata ya kinyerezi

Signed

Bakari K. Mnikande

Katibu wa Baraza

Kata ya kinyerezi

In all fairness, when the contents of this document are paired with the content of Form No. 3 provided for under GN No. 240 of 1971 they exhibit serious flaw. As it could be vividly seen under the provisions above cited the certificate is meant to certify that the Board failed to reconcile the parties. There is entirely no glimpse in the excerpt above and in the whole document that the Board attempted to reconcile the parties let alone the fact that it failed to reconcile them. In fact if one is to assume that reconciliation ever took place, which I seriously doubt, the content of the first item under "Hitimisho la mapendekezo" may as well be deemed to entail that reconciliation ended with fruition and the Respondent was ordered to provide maintenance to his family, the wife inclusive.

All having been said, the deficiency in the document purported to be a certificate is serious and goes to the heart of this appeal as there can be no valid certificate if the same does not certify that the Board failed to reconcile the parties. Faced with a similar issue in **Hassan Ally Mwandali v Asha Ally** (supra) and having found as in the instant case that the document so filed did not meet the standards of a valid certificate, the Court of Appeal made the following conclusion:



"It follows thus that in the absence of a valid certificate to institute a petition as required by section 101 of the Act, the petition before the Primary court was premature."

Having made this finding and upon citing with approval its previous decision in **Shillo Mzee v. Fatuma Ahmed** (supra), the court held that *"a petition instituted without the accompanying certificate is incomplete and incompetent."*

On the strength of the authorities above which constituted the position of the law in our country and based on what I have endeavored to demonstrate above with regard to the document filed in court, I concur with Mr. James's submission that the petition for divorce was filed prematurely without being accompanied by a valid certificate from the Conciliatory Board hence the proceedings in the trial court was a nullity.

Based on the above finding, I will not labour on the two grounds as they will add no value to the appeal. Accordingly allow the appeal. This being a matrimonial appeal I will make no orders as to costs.

DATED at DAR ES SALAAM this 27th day of April 2020.



J.L. MASABO

JUDGE