

**IN THE HIGH COURT OF TANZANIA**

**AT MOSHI**

**MATRIMONIAL APPEAL NO. 2 OF 2005**

**[C/F DC MOSHI MATR.CAUSE NO. 4/2003]**

**ELIARINGA DAVID MOSHI ----- APPELLANT**

**VERSUS**

**FRANCISCA NGALO ----- RESPONDENT**

**JUDGMENT**

**HON. JUNDU, J.**

The Respondent, in the lower court had filed a matrimonial cause against the Appellant in which she had prayed for Judgment and Decree for divorce, division of matrimonial assets jointly acquired, and cost of the petition. Having heard the evidence of both parties, the said court in its Judgment delivered on 26/1/2005 held that the marriage between the Appellant and the Respondent had broken down beyond repair hence it granted divorce.

As regards the division of the matrimonial assets, the said court based on the evidence of the Respondent held allegedly that the following properties had been acquired during the subsistence of the marriage:-

- (1) 1 house at Old Moshi
- (2) A farm measured 1 acre at Old Moshi
- (3) A sewing machine
- (4) A Radio
- (5) Four drums for storing cereals
- (6) Two beds with mattresses
- (7) Household properties.

The said court further held that the Respondent had contributed her efforts in acquiring the above named properties. So it made the following division of the said properties:-

- (1) One house at Old Moshi – Respondent
- (2) A farm measured 1 acre at Old Moshi – Appellant
- (3) Sewing Machine – Respondent
- (4) A Radio – Appellant
- (5) Four drums for storing cereals – 2 for Appellant and 2 for Respondent.
- (6) Two beds with mattresses – one to the Appellant and one to the Respondent
- (7) House properties – Respondent.

Having been aggrieved by the decision of the lower court, the Appellant has appealed to this court listing five (5) grounds of appeal in his Memorandum of Appeal filed in this court namely:-

- (1) That the Judgment of the trial court is not supported by the evidence on record.
- (2) That the honourable trial magistrate misdirected herself on the admissibility of evidence and hence wrongly rejected respondents witnesses evidence.
- (3) That the trial court wrongly relied on its own speculated evidence that the marriage between the parties had broken down irreparable.
- (4) That the trial court erred in law in finding that the Respondent contributed towards acquiring the properties during the subsistence of her marriage without proof at all.

Based on the aforesaid grounds of appeal, the Appellant in his Petition of Appeal has prayed to this court to allow the appeal with costs, set aside the trial court's findings and orders and dismiss the petition thereto.

On 23/5/2007, this court, by consent, had ordered the parties to argue the appeal by way of written submissions. The parties have so complied. The

Respondent is advocated by Mrs. Minde, learned counsel while the Appellant prosecuted the appeal on his own.

First, before going into the grounds of appeal, I wish to dispose off a preliminary objection that was canvassed by the Respondent in her submission to the effect that the appeal is not properly before this court as it was not accompanied with a copy of the decree as mandatorily required under Order XXXIX Rule (1) (1) of the Civil Procedure Code, 1916. She cited the case of H.J. Stanley & Sons Limited V. Ally Ramadhan Kunyamale [1988] TLR 250 to support her submission. She prayed to this court to dismiss the appeal worth costs, based on the said defect. The Appellant, in his submission replied that previously the Respondent had raised a preliminary objection that the appeal was time barred which this court overruled but the Respondent in the said preliminary objection did not point out that the present objection that no decree had a companied the Memorandum of Appeal. He contends that he had attached copy of the decree to the Memorandum of Appeal having collected the same in the District Court.

I have carefully perused the Memorandum of Appeal filed by the Appellants on 11/4/2005 vide the lower court and thereafter transmitted to this court. The same is accompanied by a copy of the Decree of the lower court as well as copies of the Judgment and Proceedings thereon. Therefore, I overrule the preliminary objection raised by the Respondent. I hold that the Memorandum of Appeal having been annexed with a copy of the Decree of the lower court then the appellant is properly before this court. In any case, in my considered view, had the Respondent been serious on her preliminary objection, she would have raised it at the same time when she revised her earlier preliminary objection that the appeal was time barred, which was also overruled by this court.

Secondly, was the petition filed by the Respondent in the lower court properly before the said court? The Appellant pursued this matter in his

submission while canvassing the 3<sup>rd</sup> Ground of appeal. He contended that the Petition filed by the Respondent in the lower court was not accompanied by any certificate of a marriage conciliation Board as mandatorily required under Section 106(2) of the Law of the Marriage Act, 1971 (now Cap. 29 R.E. 2002). He argued that the absence of the said certificate rendered the Petition filed by the Respondent in the lower court incompetent. He further contended that the Respondent and her witnesses in the trial court contended that the matter had been referred to the Village Council and to the Ward Executive Officer where he, the Appellant was alleged to have been summoned but refused to attend. He contends that this is not the kind of reconciliation boards (probably he meant “Conciliation Board”) recognized by law. In her submission, in the 3<sup>rd</sup> Ground of Appeal, the Respondent contended that the matrimonial dispute was referred to the Matrimonial Reconciliation Board at Old Moshi on 20/12/2000 to no avail.

Section 101 of the Law of Marriage Act, 1971 (now Cap.29 R.E. 2002) states 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 had failed to reconcile the parties”.

In addition, Section 106(2) of the said Act provides as follows –

“106(2) 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 in accordance with subsection (5) of Section 104:

Provided that such certificate shall not be required in cases to which the proviso to Section 101 applies”

Now, did the Respondent comply with the aforesaid provisions of law in respect of her Petition for Divorce she had filed in the lower court?

In Paragraph 9 of her Petition filed in the said court, the Respondent stated as follows

“9. That the Matrimonial difficulty was referred to parents and later to marriage Conciliation Board for Reconciliation to no avail. Copy of certificate of marriage Conciliatory Board is annexed and marked P2 which the Petitioner shall crave leave to refer to.”

Now, it is a principle of pleading that each party is bound by the pleadings he or she has filed in court. In para 9 of the Petition, the Respondent had clearly stated that the matrimonial dispute had been referred to a marriage Conciliation Board and that a Certificate to that effect had been issued. In other words, the Respondent in her Petition was giving an impression that in filing her Petition in the lower court she had complied with the mandatory provisions of Sections 101 and 106(2) of the Law of Marriage Act, 1971 (now Cap. 29 R.E. 2002). Was this the case?

In para. 8 of his Written Statement of Defence filed in the trial court, the Appellant had denied what the Respondent had stated in para. 9 of her Petition filed in the lower court. In the said para 8, the Respondent stated as follows –

“8. That in respect of the contents in para. 9 of the Petition, the Respondent state that the matter was not referred to the parents or to the Marriage Conciliatory Board but was sent to Ward Executive Officer, Old Moshi Mashariki who summoned the Respondent to appear on 8/12/2000 while served him on 7/12/2000 while knowing that could have to get permission from his employer. The Respondent was required to appear

before the Board on 14/12/2000 but received the summons on 15/12/2000. The Respondent denied to have inclined to appear before the Conciliatory Board as that was not a Marriage Conciliatory Board. There was no other summons as the alleged certificate wanted the court to believe. The Petitioner is put into strict proof.” (underlining mine).

It is clear from the above quoted para. 8 of the Appellant’s WSD in the trial court that he was denying the contention of the Respondent in her Petition that the matrimonial dispute had been referred to the Marriage Conciliatory Board.

Therefore, in my considered view, the competency of the Petition filed by the Respondent was in issue and that the lower court should have resolved the said matter first before proceeding to hear the Petition on merits.

Though the Respondent in Para. 9 of her Petition filed in the lower court had stated that the matrimonial dispute had been referred to a Marriage Conciliation Board and that copy of certificate of the Marriage Conciliatory Board had been annexed to the said Petition and marked as annex “P.2”, the latter was not annexed to the said petition nor did the Respondent tender the same by way of evidence during trial in the said court. It is not anywhere in the proceedings of the lower court. What the Respondent (PW.1) and her witnesses (PW.2, PW.3, PW.4 and PW.5) did in their evidence was to show that the Appellant had been summoned to a reconciliatory meeting before the Ward Executive Officer but had refused to attend. In my considered view, this was a deviation from what the Respondent had stated in Para. 9 of her Petition she had filed in the lower court. As each party is bound by his/her pleadings filed in court, the Respondent was required to abide by what she had stated in Para. 9 of her Petition.

As the certificate by a Marriage Conciliatory Board was not there, it followed that the Petition filed by the Respondent in the lower court was not properly before the trial court for non-compliance of Sections 101 and 106(2) of the Law of Marriage Act, 1971 (now Cap. 29 R.E. 2002). The trial court in the premise should have struck out the Petition filed by the Respondent with costs.

However, if the Respondent and her witnesses stood by their position that the Appellant had been summoned by the Marriage Conciliation Board and refused to attend or appear as contended in their evidence, then there was a need for the Respondent to have applied to the trial court to amend Para 9 of her Petition filed in the lower court so as to let the matter fall under the exception (c) under the proviso to Section 101 of the Law of Marriage Act, 1971 which dispenses away with the reference of a matrimonial dispute to a Conciliatory Board “where the Respondent has been required to appear before the Board and has willfully failed to attend.” This would have further dispensed away with the requirement of the certificate of the Board as clearly stated under the proviso to Section 106(2) of the said Act which states “Provided that such certificate shall not be required in cases to which the proviso to Section 101 applies.”

As long as the Respondent had left Para. 9 of her Petition filed in the lower court intact, the absence of the said certificate from the Marriage Conciliation Board alleged to have been annexed as annex “P2” thereto, meant that the Petition was not properly before the said court. As Section 106 (2) of the Law of Marriage Act, 471 (now Cap. 29 R.E. 2002) mandatorily requires that every petition for a decree of divorce to be accompanied by a certificate by a Marriage Conciliatory Board, its absence in the Petition filed by the Respondent in the lower court renders the decree of divorce granted to the Respondent issued by the said court as null and void and of no effect. Further, as the division of the matrimonial assets done by the trial court between the Appellant and the Respondent was a result of

the granting of the decree of divorce, the said division of matrimonial assets done by the trial court is also null and void.

In the upshot, what has been stated in the above paragraphs suffice to dispose the appeal before this court. I need not labour on the remaining grounds of appeal. I nullify the proceedings of the trial court. I substitute the Judgment and Decree of the lower court with an order striking out with costs the Matrimonial cause or petition filed by the Respondent in the said court. I make no order as to costs. Appeal allowed as herein described. It is so ordered.

**F.A.R. JUNDU**

**JUDGE**

**27/8/2007**

Right of Appeal Explained.

**F.A.R. JUNDU**

**JUDGE**

**27/8/2007**

27/8/2007

Coram: F.A.R. Jundu, J.

For the Appellant: present

For the Respondent: present

C/C: Muyungi

**Court:** Judgment delivered in the presence of the Appellant and in the presence of the Respondent.

**F.A.R. JUNDU**

**JUDGE**

**27/8/2007**

**AT MOSHI**