

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO.19 OF 2020

(Arising from the District Court of Liwale in Matrimonial Appeal No.1 of 2020)

ALPHONCE SIONG'O..... APPELLANT

VERSUS

REHEMA HASHIMU MANYINJA.....RESPONDENT

JUDGMENT

23 March & 3 June, 2021

DYANSOBERA, J.:

This is an ex parte judgment in which the appellant Alphonce Siong'o is challenging the decision of the District Court of Liwale delivered on 30.3.2020 in Matrimonial Appeal No. 1 of 2020.

A brief background of this matter is as follows. The parties are husband and wife. On 13th October, 2017 the respondent, armed with a letter from Nangando Ward Tribunal, petitioned only for decree of divorce before the Liwale Primary Court in Matrimonial Cause No.75 of 2017. The three grounds advanced by the respondent in support of her petition for dissolution of the marriage were desertion by the appellant, lack of shelter provision and denial of conjugal rights by the appellant.

The matter was heard ex parte whereby one witness Hashimu Chande Manyinja supported the respondent's evidence.

After a full trial, the trial Primary Court was satisfied that the marriage of the parties was broken down irreparably on the assumption that the preconditions laid down under section 107(3) of the Law of Marriage Act, Cap 29 R.E.2002 were met. The marriage was dissolved and a decree of divorce subsequently issued on 30.1.2018.

On 23.05.2019 the appellant wrote a letter to the Primary Court Magistrate in charge of Liwale Primary Court seeking to have the ex parte judgment set aside. The trial court heard the parties but at the end of the day dismissed the application on 31st day of December, 2019 and proceeded to order the division of their matrimonial assets by 50%. A certificate was also ordered to be handed over to the appellant.

The appellant was dissatisfied. He appealed to the District Court after time within which to lodge his appeal was extended. In its judgment, the first appellate court came to the concurrent finding that the appellant had failed to adduce sufficient reasons for setting aside the ex parte judgment that had been delivered against him. The learned Resident Magistrate was, however, of the view that the trial court introduced a new fact of ordering the division of matrimonial assets. He was of the view that the matter before the trial tribunal was an application for setting aside the ex parte judgment and not on division of matrimonial properties.

Still aggrieved, the appellant has come to this court on a second appeal. He is armed with a total of six grounds of appeal as follows:-

1. That, the District Court erred grossly for entertaining Matrimonial matter which was not accompanied with certificate of failure to reconcile from Islamic reconciliation board.
2. The District Court erred in Law and in fact for failure to notice that the Primary Court order equal distribution of Matrimonial properties without considering Contribution by each spouse.
3. That, the District Court erred in law and fact for awarding prayers which were not prayed for in the petition of divorce.
4. The District Court erred in fact and in law for not considering and record all the relevant evidence adduced by the appellant while submitting orally.
5. The District Court shows obviously biasness in adjudicate the matter.
6. That the District Court erred in fact and in law for not summoned even a single witness from the appellant side.

When the appeal was called for hearing on 23.3.2021 only the appellant appeared, the respondent defaulted appearance. This court, after it was satisfied that the respondent was duly served but made no appearance without notice, proceeded to hear the appeal ex parte.

In supporting the appeal, the appellant argued that the respondent is his legal wife but the trial magistrate dissolved their marriage in his absence and contended that there are efforts by the respondent to marry another man. He prayed this court to intervene.

I have gone through records of the lower courts, the grounds of appeal of the appellant and the submission of the appellant

In determining this appeal, I undertake to consider the 1st ground of appeal which, I think, may dispose of this appeal. As indicated hereinabove, the appellant in his 1st ground of appeal is complaining thus:

“That, the District Court erred grossly for entertaining Matrimonial matter which was not accompanied with certificate of failure to reconcile from Islamic reconciliation board.

Having perused the lower courts’ records, I am in no doubt that the appellant’s complaint in this ground has merit. The issues for determination in this appeal are whether the appellant was duly served, whether the matrimonial difficulty between the parties had been referred to a properly constituted Marriage Conciliatory Board and whether a valid certificate was issued. If the answers are in the negative, whether the trial Primary Court had jurisdiction to entertain the matrimonial dispute between the parties.

In the first place, the proceedings before the trial Primary Court indicate that the appellant made no appearance when the petition of divorce was heard. It is, therefore, clear that the case before the trial court proceeded ex parte. There is no evidence showing that the trial court was satisfied that the summons was duly served to the appellant before it embarked on trying the matrimonial difficulty of the parties. The trial court and the first appellate court were enjoined to be satisfied that the appellant was duly served as provided for by the law and without sufficient cause defaulted appearance.

As the record of the trial court depicts, no such service was ever issued by the court to the appellant. The appellant was, therefore, condemned unheard.

Second, the Law of Marriage Act, [Cap 29 R.E. 2019] particularly under section 101 clearly bars a party to petition for divorce until he or she has referred the matter to the Marriage Conciliatory Board and the Board has certified that it has failed to reconcile the parties. For clarity and ease of reference, Section 101 of the Act enacts that:-

“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 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.

The proceedings of the trial court do not indicate that the respondent had referred to a properly constituted Board. Besides, it is

clear that no certificate was issued to indicate that the Board had summoned the parties, tried to reconcile them but had failed. What is on record is a mere letter which for ease of reference, is reproduced as hereunder:-

Halmashauri ya Wilaya Liwale

Baraza la kata ya Namgando

S.L.P 23

Liwale

13-10-2017

Kumb. Na. LW/NG/BV/16

Muheshimiwa Hakimu

Mahakama ya Mwanzo Liwale

YAH: KUMLETA NDUGU REHEMA HASHIMU NAMYINJA

Ndg. Mtajwa hapo juu, ametelekezwa na mumewe ndg. Alfouse Siong'o tangu mwaka 2015 hadi loe hii. Hana msaada wowote juu yake. Pamoja na mtoto wao ambao amemuachia Sulemani Siong'o mwenye umri wa miaka 19. Kwa hiyo Bi. Rehema Hashimu Manyinja anaomba msaada wa serikali apewe taraka.

Namleta kwako kwa hatua za kisheria zaidi.

.....

katibu

Clearly, this was not a Certificate from a proper Marriage Conciliatory Board envisaged under section 101 of the Law of Marriage Act [Cap. 29 R.E.2002] and the Regulations made under section 162(2) of the said Act. These Regulations are called the Marriage Conciliation Boards (Procedure), Regulations, Government Notice No. 240 of 1971, sections 103 and 104, in particular. The following are sections pertinent to the matter on hand and for clarity and ease of reference are reproduced as hereunder.

103.

(1) Every Board shall consist of a Chairman and not less than two and not more than five other members.

(2) The Board having jurisdiction for the purposes of this Act shall be—

(a) the Board or any one of the Boards established for the ward within which the husband or intended husband resides, or, where the husband or intended husband is not resident in Tanzania, the Board established for the ward within which the wife or the intended wife resides;

(b) where both parties belong to the same community, the Board, if any, designated to be the Board for that community.

104. Proceedings of Boards

(1) A Board to which a matrimonial dispute or matter has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard

and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn the proceeding from time to time.

(2) Where a Board is of the opinion that it is necessary for it to require the attendance of any person before it, it may by notice in writing require such person to attend before the Board on the date and at the time and place specified in such notice.

(5) If the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings.

(6) A Board may append to its certificate such recommendations relevant to the matter or dispute referred to it as it may think fit.

As the record depicts, the trial Primary Court did not abide by the law. Since the respondent petitioned before the Primary Court before she had first referred her matrimonial dispute before a properly constituted Marriage Conciliatory Board and the Board had not issued a certificate that it had failed to reconcile the parties, the trial court had no power to hear and decide the matter. Unfortunately, the District Court failed to notice this serious legal irregularity.

Courts are enjoined to accord particular regard to the sanctity of marriage so that its dissolution is not easily granted as was the case here.

In the present case, the trial court entertained the matrimonial cause which was premature and this vitiated the whole proceedings and judgment.

The appeal succeeds and is allowed. The decisions of the District and Primary Courts are quashed and set aside. The respondent is at liberty to pursue her legal rights in accordance with the law.

No order as to costs is made.



A handwritten signature in blue ink, appearing to read "W.P. Dyansobera".

W.P. Dyansobera

Judge

3.6.2021

This judgment is delivered under my hand and the seal of this Court on this 3rd day of June, 2021 in the absence of the appellant and respondent.



A handwritten signature in blue ink, appearing to read "W.P. Dyansobera".

W.P. Dyansobera

Judge