

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 11 OF 2022

(Arising from Matrimonial Appeal No. 17/2021, Originating from Matrimonial Cause No. 19/ 2021 primary court of Magu district at Kisesa)

SABATO YOHANA ZAKARIAAPPELLANT

VERSUS

ANASTAZIA ZEPHANIA WASHARESPONDENT

JUDGMENT

15th June & 26th July, 2022

Kahyoza, J.:

This is a second appeal filed by **Sabato Yohana Zakaria** against **Anastazia Zephania Washa**, his wife. **Sabato Yohana Zakaria** and **Anastazia Zephania Washa** contracted Christian marriage on 15/12/2019. In period less than two years, **Anastazia Zephania Washa** petitioned for divorce and division of matrimonial asset in the primary court. **Anastazia Zephania Washa** petitioned for divorce on the ground of desertion and cruelty, **Sabato Yohana Zakaria** which opposed vehemently. The trial court found in favour of **Anastazia Zephania Washa**, hence forcing

Sabato Yohana Zakaria to appeal to the district. Unfortunately, **Sabato Yohana Zakaria** lost for a second time.

Unsatisfied, **Sabato Yohana Zakaria** appealed to this Court raising two grounds of appeal which raise two issues as follows-

1. did the primary court had jurisdiction?
2. did the district court err not to consider the grounds of appeal?

Did the primary court had jurisdiction to entertain a petition divorce?

Parties were unrepresented. The appellant argued on support of the first ground of appeal that the trial court had no jurisdiction to trial the disputed as the dispute was not referred to the marriage conciliation board as provided by section 101 of the **Law of Marriage Act**, [Cap. 29 R.E. 2019]. He added that their marriage having subsisted for less than two years, the respondent was required to apply for leave before she petitioned for divorce.

Anastazia Zephania Washa replied that she referred the dispute to the marriage conciliation board however, **Sabato Yohana Zakaria** refused to attend.

It is settled that a petition for divorce instituted without being accompanied by a valid certificate in terms of section 101 of the LMA is incomplete, premature, and incompetent. See **Yohana Balole v. Anna**

Benjamin Malongo, Civil Appeal No. 18/2020. It is mandatory for a party petitioning for divorce to first obtain a certificate from the marriage conciliation board that it has failed to reconcile the parties unless there is evidence of existence of extraordinary circumstances making it impracticable to refer the dispute to the Board. In the present case, **Anastazia Zephania Washa** contended that she referred their matrimonial dispute to the marriage conciliation board where **Sabato Yohana Zakaria** refused to attend. As the record bears testimony, it is true that **Anastazia Zephania Washa** referred the matrimonial dispute to the marriage conciliation board. The marriage conciliation board failed to reconcile them. It is issued a certificate that it failed to reconcile them.

I find the argument that **Anastazia Zephania Washa** instituted the petition for divorce without being accompanied by a valid certificate in terms of section 101 of the LMA, short of merit. However, it is uncontested that **Anastazia Zephania Washa** petitioned for divorce before their marriage had subsisted for a period of two years or more. It is on record that **Sabato Yohana Zakaria** and **Anastazia Zephania Washa** celebrated a Christian marriage on 15/12/2019 and **Anastazia Zephania Washa** petitioned for divorce on 8/6/2021. Thus, **Anastazia Zephania Washa** petitioned for divorce after their marriage had survived only for one year and half. Section

100 of the **LMA** restricts petition of divorce before expiry of two years from the date of marriage without first obtaining leave. It states thus-

100.-(1) No person shall, without the prior leave of the court, petition for divorce before the expiry of two years from the date of the marriage which it is sought to dissolve.

(2) Leave shall not be granted to petition for divorce within two years of the marriage except where it is shown that exceptional hardship is being suffered by the person applying for such leave.

(3) An application may be made to the court under this section either before or after reference to a Board under section 101. (Emphasis supplied)

It is axiomatic that **Anastazia Zephania Washa** did not seek and obtain leave to petition for divorce before expiry of two years from the date they celebrated their marriage. Thus, **Anastazia Zephania Washa** instituted the petition of for divorce pre-maturely filed. Consequently, the petition for divorce, subsequent judgment, decree of divorce of the trial court and the judgment of the first appellate court were all a nullity.

It is a duty of superior courts to make sure lower courts apply the law is clearly and properly. The Court of Appeal emphasized the duty of superior courts in **Adelina Koku Anifa & Another Vs. Byarugaba Alex, Civil Appeal No. 46 OF 2019 (CAT, Unreported)** where it observed that-

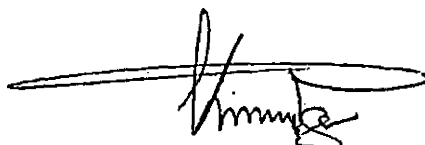
"It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals."

Given the findings to the first issue, I see no compelling reason to answer the second issue unless it was for sheer academic exercise. It is not in any one's interest to determine an issue which has no impact to the parties' dispute.

In fine, that **Anastazia Zephania Washa's** petition for divorce instituted without first obtaining leave in terms of section 100 of the LMA is incomplete, premature, and incompetent. Consequently, the proceedings and judgments were a nullity. I strike out the petition. The parties are at liberty to re-institute the petition subject to the Law of Marriage Act. Each party shall bear its own costs, given their relationship.

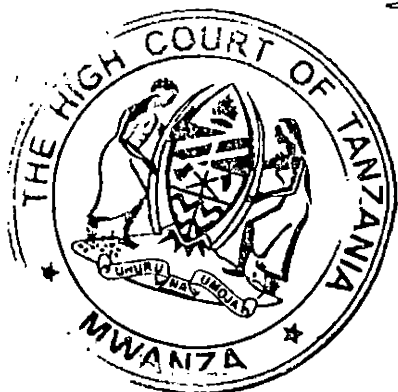
It is ordered accordingly.

Dated at Mwanza this 26th day of July, 2022.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', written over a horizontal line.

J. R. Kahyoza
JUDGE

Court: Judgment delivered in the absence of the parties as they could not connect to the virtual court. B/C Ms. Jackline present.



J. R. Kahyoza
JUDGE
26/7/2022