IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 41 OF 2019

PATRICK WILLIAM MAGUBO.....APPELLANT

VERSUS

LILIAN PETER KITALI.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Matupa, J.)

dated the 5th day December, 2018
in
Matrimonial Civil Appeal No. 2 of 2018

JUDGMENT OF THE COURT

15th & 18th July, 2022

KEREFU, J.A.:

This matter originates from the District Court of Nyamagana at Mwanza in Matrimonial Cause No. 04 of 2015 (the trial court). In that case, the respondent herein, petitioned to the trial court claiming for reliefs of divorce, division of matrimonial properties, custody and maintenance of the three issues of the marriage who were born during the subsistence of the marriage, before it went on the rocks.

The material background and essential facts of the matter as obtained from the record of appeal giving rise to the present appeal

indicate that, the appellant and the respondent celebrated their marriage under Christian rites on 18th May, 2002. During the subsistence of their marriage, they were blessed with three issues of marriage and they jointly acquired various properties. The respondent stated that, they lived a happy marriage life with no difficulties until 2011 when the appellant started to assault and harass her sexually. The respondent stated further that, sometimes in 2011, while pregnant of her third child, the appellant assaulted and chased her from the matrimonial home. That, after chasing her, the appellant totally abdicated his matrimonial obligations including maintaining the issues of the marriage. The respondent also complained about infidelity on the part of the appellant, as she alleged that he had an extra-marital affair with another woman whom they had a child. She added that, they have stayed in separation for more than five years. Following the said unresolved misunderstandings, the respondent decided to petition for divorce as indicated above.

On his part, the appellant admitted that he was duly married to the respondent but disputed to have chased her from the matrimonial home. He contended that, it was the respondent's habit to move away from the matrimonial home without any justifiable cause and come back later at her own pleasure. He alleged that, the respondent left the matrimonial home in

2008 together with the two children and went to live in Kigoma and Dar es Salaam and came back in 2009 but, she left again in 2011. The appellant disputed the allegation that he abdicated his matrimonial obligation as he stated that, he has been always maintaining his children. That, sometimes in 2012, he was dragged to the Regional Social Welfare Offices where the respondent submitted her claims for maintenance and he started providing the said maintenance through that office. The appellant also disputed the allegation of having an adulterous relationship. He equally disputed that he was never summoned to any reconciliation Board to solve the misunderstanding between them.

At the trial, the controlling issues were: **One,** whether the respondent was chased out of the matrimonial home by the appellant; **two,** whether the appellant maintained the respondent and the issues of marriage after separation; **three,** whether there was cruelty and sexual harassment; **four,** whether the listed properties under paragraph 8 of the petition were jointly acquired during the subsistence of the marriage; and **five,** whether the marriage between the parties has broken down irreparably and what reliefs are the parties entitled to.

Having heard the evidence of witnesses for both sides, the trial court was convinced that the marriage between the parties had broken down

beyond repair hence the decree of divorce was granted. The trial court further proceeded to order division of matrimonial assets, whereby the household utensils were divided equally between the parties and the respondent was also awarded 20% of the value of the matrimonial home. Then, the custody and maintenance of children was granted to the appellant.

Aggrieved, the respondent appealed to the High Court armed with five grounds of complaints mainly challenging the division of matrimonial assets and the custody of the children. The High Court (Matupa, J.), upon hearing the parties, he confirmed the decree of divorce issued by the trial court together with the order of custody and maintenance of the children. It however varied the order of division of matrimonial properties to the extent that, the 20% of the Buswelu farm and building at the school was awarded to the respondent. The High Court further ordered for the land to be valued and distributed proportionately between the parties.

The decision of the High Court prompted the appellant to lodge the current appeal to express his dissatisfaction. In the memorandum of appeal, the appellant has preferred three grounds of complaints which can be conveniently paraphrased as follows: -

1. *That, the first appellate court erred in law and facts by holding that the school buildings are part of the matrimonial property subject for division;*
2. *That, the first appellate court erred in law and facts by issuing a contradictory judgment and decree; and*
3. *That, the first appellate court erred in law and facts by determining the appeal without considering that the trial court did not have the requisite jurisdiction to entertain the matrimonial dispute for failure by the respondent to comply with the mandatory requirement of the law as the certificate from the reconciliation board was not tendered before the trial court as an exhibit.*

At the hearing of the appeal, the appellant was represented by Mr. Fidelis Cassian Mtewele, learned counsel whereas the respondent had the services of Mr. Denis Kahangwa, also learned counsel. The appellant and the respondent were also present in Court. It is noteworthy that, pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, the learned counsel for the parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

Upon taking the floor, Mr. Mtewele prayed to abandon the first and second grounds of appeal and intimated that he would argue only the first ground. On that ground, Mr. Mtewele faulted the first appellate court for failure to observe that the trial court was not vested with the requisite jurisdiction to entertain the matrimonial dispute between the parties. He argued that, the issue of jurisdiction being a point of law can be raised at any stage. To bolster his proposition, he cited the case of **Richard Julius Rukambura v. Isaack Ntwa Mwakajila and Another,** Civil Appeal No. 2 of 1998.

To clarify further on his point, he referred us to section 101 of the Law of Marriage Act, [Cap. 29 RE 2019] (the Marriage Act) and contended that, pursuant to that section, for a petition for divorce to be entertained by a court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such Board certify that it has failed to reconcile the parties. It was the argument of Mr. Mtewele that, during the trial, there was no certificate from the Marriage Conciliation Board tendered by the respondent to prove that the said requirement was complied with.

He further referred us to paragraph 10 of the petition for divorce where the appellant alleged that the matrimonial dispute has been referred to the Marriage Conciliation Board and purported to attach the said

certificate as annexure LPK/2. He argued that the said annexure was never tendered in evidence as an exhibit. He added that, even in their testimonies, PW1 and PW2 did not adduce any evidence on that aspect.

He further referred us to pages 1 and 2 of the record of appeal where a certificate from the Nyakato Conciliation Board dated 3rd March, 2015 together with a letter from the Winners' Chapel International-Mwanza dated 22nd March, 2015 have been included in the record of appeal. He argued that, the two documents were not part of the petition for divorce and were never tendered in evidence as exhibits. He contended that, at any rate, and in terms of section 103 (2) of the Marriage Act, the parties could not have been reconciled by the Nyakato Conciliation Board because they were both residents of Mhina Ward. He further argued that, in his testimony found at page 41 of the record of appeal, the appellant categorically disputed to have been summoned to any reconciliation Board to solve the dispute between him and the respondent and he was not cross-examined on that aspect. He thus emphasized that, since the trial court did not have the requisite jurisdiction to entertain the matrimonial dispute, then, the entire proceedings and the resultant judgment are nullity. On that account, Mr. Mtewele urged us to nullify the aforesaid proceedings and its decision together with the subsequent proceedings

before the first appellate court. On the strength of his submission, Mr. Mtewele urged us to allow the appeal.

In response, Mr. Kahangwa resisted the appeal by arguing that the trial court had the requisite jurisdiction to entertain the dispute between the parties as it was satisfied that reconciliation was conducted but could not yield positive results. He however admitted that during the trial there was no certificate from any Marriage Conciliatory Board which was tendered and admitted in evidence. He further admitted that, both PW1 and PW2 have not adduced evidence in that regard. He however strongly argued that, even if those documents were not admitted in evidence, since a certificate from a Marriage Conciliation Board is a public document, the trial court was expected to take judicial notice of the same under section 59 of the Evidence Act, [Cap. 6 R.E 2022]. He further contended that, the jurisdiction of courts to entertain matrimonial disputes is conferred by section 76 of the Marriage Act and not section 101 of the same Act cited to us by Mr. Mtewele. To buttress his proposition, he referred us to **Halima Athumani v. Maulidi Hamisi** (1991) T.L.R. 179 and **Yohana Balole v. Anna Benjamin Malongo,** Civil Appeal No. 18 of 2020 and he finally urged us to dismiss the appeal.

In a brief rejoinder, Mr. Mtewele reiterated what he submitted earlier and insisted for the appeal to be allowed.

Having carefully considered the arguments by the learned counsel for the parties, there is no doubt that the third ground of appeal raise an issue of jurisdiction of the trial court to entertain the matter.

It is common ground that jurisdiction of courts is a creature of statute and is conferred and prescribed by the law and not otherwise. The term "Jurisdiction" is defined in Halsbury's Laws of England, Vol. 10, paragraph 314 to mean: -

> *"...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision.* ***The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.*** *A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended or it may partake of both these characteristics." [Emphasis added].*

From the above extract and considering the fact that jurisdiction of courts is conferred and prescribed by law, it is therefore a primary duty of

every court, before venturing into a determination of any matter before it, to first satisfy itself that it is vested with the requisite jurisdiction to do so.

In the matter at hand, it is on record that the dispute which was submitted before the trial court was a matrimonial dispute. We wish to state that, jurisdiction of the District Court in matrimonial proceedings is provided by two pieces of legislation, namely the Magistrates' Courts Act, [Cap. 11 RE 2019] (the MCA) and the Marriage Act. Specifically, section 76 of the Marriage Act, vests concurrent jurisdiction in matrimonial proceedings to the Primary, District and High Courts. The said section states that:

> *"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court."*

In terms of the above provision, there is no doubt that the Primary Court, the District Court and the High Court all have original jurisdiction to entertain a matrimonial proceeding. However, and as correctly submitted by Mr. Mtewele, for a petition for divorce to be entertained by any court, a matrimonial dispute should first be referred to a Marriage Conciliation Board and such Board shall certify that it has failed to reconcile the parties.

This is in terms of section 101 of the Marriage Act which provides categorically that:

> *"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 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 willfully 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; and*

(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable.

By the use of the word 'shall', the above provision implies that, compliance with section 101 above is mandatory except where there is evidence of existence of extraordinary circumstances making it impracticable for the parties to refer their dispute to the Board. This requirement is further reinforced by section 106 (2) of the same Act, which states in mandatory terms 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..."*

In the case at hand, it is on record that there was no certificate from the Marriage Conciliation Board which accompanied the petition for divorce lodged by the respondent before the trial court. This can be evidenced from pages 3 to 6 of the record of appeal that, apart from indicating at paragraph 10 of the said petition that the certificate of the relevant Board is attached and marked as LPK/2/3, that document was not attached to the petition, hence not part of the record. It is also clear that, even the purported certificate from the Nyakato Conciliation Board found at page 1

of the record of appeal was as well not tendered in evidence during the trial. We are mindful of the fact that in his submission, Mr. Kahangwa though, admitted that the certificate from the Board was not tendered in evidence, he argued that the same being a public document, the trial court was expected to take judicial notice of the same under section 59 of the Evidence Act. With profound respect, we are unable to agree with Mr. Kahangwa on this point, because the issue of parties' referring their matrimonial dispute to the Marriage Conciliation Board before filing a petition for divorce in the court, is a mandatory requirement of the law. Therefore, that document was required to be tendered and admitted in evidence. It is trite law that annexures are not evidence for the court of law to act and rely upon. In **Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar,** Civil Appeal No. 47 of 2009 (unreported), the Court stated that:

> *"We wish to point out that* ***annexures attached along with either the plaint or written statement of defence are not evidence.*** *Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or the written statement of defence is to enable the other party to*

the suit to know the case he is going to face. The idea behind is to do away with surprises. ***But annexures are not evidence.*** *" [Emphasis added].*

Likewise, even in this case, what was contained or annexed to the petition could not have been treated as evidence, as Mr. Kahangwa would have like us to believe. We even find his submission on this aspect to be misconceived.

Worse still, and as correctly argued by Mr. Mtewele even in their oral account, PW1 and PW2 did not adduce evidence on that aspect and did not cross-examine DW1 when he disputed that he was never summoned to any reconciliation Board. Again, it is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Nyerere Nyague v Republic,** Criminal Appeal No. 67 of 2010 and **Bomu Mohamedi v. Hamisi Amiri,** Civil Appeal No. 99 of 2018 (both unreported). We therefore agree with Mr. Mtewele that, since the respondent did not utilize that opportunity during the trial, to challenge the evidence of DW1, challenging it at this stage, is nothing but an afterthought.

Furthermore, in the case of **Hassani Ally Sandali v. Asha Ally,** Civil Appeal No. 246 of 2019 (unreported), the Court, when faced with an akin situation of a trial court entertaining an incompetent petition for divorce which did not comply with the requirement of section 101 of the Marriage Act, it stated that:

> *"...the granting of the divorce...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 extraordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101 (f) of the Act. However, there is no indication of any extra ordinary circumstances in this appeal which could have attracted dispensing with reference of the matrimonial dispute to the Board." Emphasis added.*

Similarly, in this case, since we have found that the respondent's petition for divorce before the trial court was incompetent for failure to comply with the requirement of section 101 and 106 (2) of the Marriage

Act, we agree with Mr. Mtewele that the trial court did not have the requisite jurisdiction to entertain the matter.

It is unfortunate that the first appellate court did not detect the said irregularity as it also fell into the same trap and proceeded to divide the alleged matrimonial properties between the parties without there being any valid decree for divorce. It is our considered view that had the first appellate court considered the crucial legal issue on the jurisdiction of the trial court as discussed above, it would not have upheld the decision of the trial court which is erroneous on account of the reasons stated above. In the circumstances, we find the third ground of appeal to have merit.

In the premises, we find that the proceedings before the trial court and the first appellate court were vitiated. As a result, we have no option other than to nullify the entire proceedings of the trial court and quash the judgment and set aside the subsequent orders thereto. We also nullify the proceedings of the High 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.

In the event and for the foregoing reasons, we find merit in the appeal and allow it. In terms of proviso to section 90 (2) of the Marriage Act, we make no order as to costs.

DATED at **MWANZA** this 18th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 18th day of July, 2022 in the presence of Mr. Fidelis Cassian Mtewele, learned counsel for the appellant and the respondent in person, is hereby certified as a true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL