

TANZANIA / JUDGMENT

KUSEKWA KINYABUDAGI VS MUUNGULU NZIGE Final

COURT
TANZLII

DECIDED
17 September 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA PC. CIVIL APPEAL NO. 2024062810000015342 (Arising from Civil Appeal No.37 of 2023 before Bariadi District Court, the same arises from Matrimonial Cause No.51 of 2023 before Nkololo Primary Court) KUSEKWA KINYABUDAGIAPPELLANT VERSUS MUUNGULU NZIGERESPONDENT

JUDGMENT

10th & 17th September, 2024. F.H. MAHIMBALI, J The respondent herein petitioned for a decree of divorce and division of matrimonial properties before the trial court (The Primary Court of Bariadi District sitting at Nkololo). According to the facts of the case as gathered from the evidence of both parties they married each other in 1990 in customary rites and paid 5 cows as bride price. Their marriage was blessed with 6 issues. 1 At the beginning as usual, parties had lived each other joyfully and peacefully enjoying their marriage. However, it turned sour. Their house changed to a battle field, whereby the appellant instead of being lover and sexy, he became an amateur boxer against his lovely spouse thus, torturing and threatening the respondent's life telling her that he would kill. These repeated episodic events, terrified the respondent thus referred the matter through various authorities including family level, street council and later to the marriage conciliation board. All these did not bring back peace and love to the spouses. Eventually, the matter went to the trial court, which after a full consideration ruled out that the marriage was irreparably broken and thus issued a decree for divorce and division of matrimonial properties. Not amused, the appellant unsuccessfully appealed to the first appellate court. Aggrieved by the said decision, the appellant had once again approached this court, armed with two grounds of appeal to wit;

1. That, both trial court and the first appellate court erred in law and in facts by entertaining the matter, that has not passed through Marriage Conciliation Board. 2
2. That, both trial Court and the first appellate court erred in law and in facts by terming the clan land as matrimonial assets of the parties. During the hearing of this appeal, both parties appeared in person and unrepresented. Arguing for the appeal, the appellant submitted that, he is not satisfied with the decision of the first appellate court which upheld

the decision of the trial court. He prayed that his grounds of appeal dully filed be adopted by the court to form part of his appeal submission. He however, emphasized that it was a great error to confirm the clan land as matrimonial property. On this error, thus, he prayed for the appeal be allowed. The respondent on the other hand submitted that, opposed the both grounds of appeal, stating that none is genuine and thus devoid of any merit. On the first ground of appeal, she emphasized that the trial court record is clear that they passed to the Marriage Conciliation Board which was dully constituted but failed to reconcile them. She wonders to hear the respondent saying that they had not passed through it. As regards to the second ground of appeal, the respondent prayed before this Court that the same be dismissed as the said land is not a clan 3 land as alleged. The first appellate court rightly dismissed this ground by upholding the trial court's decision on this, she argued. She also prayed for this Court to rely on exhibits B, C, D and E and that the appeal be dismissed in its entirety for want of merit. In rejoinder, the appellant maintained his submission in chief, insisting that on his grounds of appeal, let this court allow it and reverse the concurrent findings of the lower courts. I have keenly followed the proceedings of the case at the trial Court, and what is complained by the appellant that there was unjust and error on distribution of matrimonial assets on allegation that the divided land property is not a matrimonial property rather a clan property. I wish to preface my decision by stating from the outset that this is a second appeal. It is a settled law that where there are concurrent findings of facts of the two courts below, the second appellate court should not under normal circumstances interfere with such concurrent findings of facts. However, if it is established that there was misapprehension in the substance, nature and quality of such evidence adduced which result into unfair decision in the interest of justice, the Court may interfere. This position has been re-emphasized now and then 4 by the Apex Court in our jurisdiction held in Abdallahman Athuman v. Republic, Criminal Appeal No. 149 of 2014; Omari Mussa Juma v. Republic, Criminal Appeal No. 73 of 2005; 8 Josephat Shango v. Republic, Criminal Appeal No. 62 of 2012; and Yohana Dioniz and Another v. Republic, Criminal Appeals No. 114 and 115 of 2009(all unreported) to mention but a few. The appellant had complained that the matter was not first referred to the Marriage Conciliation Board before it was adjudicated by the trial court, thus the trial Court erred to try the matter. This fact has been resisted by the respondent arguing that it did As per law, section 101 of the Law of Marriage Act, Cap. 29 R.E. 2019 (hereafter "the Act") provides 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 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; 5
- (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." Also relevant is section 106 (2) of the Act, which reinforces the above requirement by providing 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 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" As rightly acknowledged by the appellant, the above provisions bar institution of a petition for divorce unless the matrimonial dispute or matter concerned has been referred to the Board and such Board certifying that it has failed to reconcile the parties. Compliance with the certificate requirement is mandatory except where a situation falls within any of the enumerated circumstances in paragraphs (a) to (f) of the proviso to the aforesaid section 101 - see, for example, *Hassani Ally Sandali v. Asha Ally*, Civil Appeal No. 246 of 2019 (unreported). Regulation 9(2) of the Marriage Conciliation (Procedure) Regulations, 1971, Government Notice No. 240 of 1971 (hereafter "the Regulations") 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 form is prescribed in the Schedule to the Regulations as Form No. 3 in English language. 7 As was held in *Hassani Ally Sandali* (supra); and *Yohana Balole v. Anna Benjamin Malongo*, Civil Appeal No. 18 of 2020 (unreported), it is settled that a petition for divorce instituted without being accompanied by a valid certificate in terms of section 101 of the Act is incomplete, premature and incompetent - see *Shillo Mzee vs. Fatuma Ahmed* [1984] TLR 112. In the instant case, the records reveal that the respondent accompanied her petition for divorce with a certificate of marriage conciliation board dated 28/7/2023 from " Baraza la Kusuluhisha Mashauri ya Ndoa la Kata ya Nkololo " (hereafter "the Board"). In that certificate the recommendation by the board were that since the matter was dealt by it on several times but failed to reconcile them, the recommendation by the Board that has failed to reconcile the parties anymore; Upon that submission of the certificate from the marriage conciliation board, the trial court was therefore correct to proceed with the matter since the Marriage Conciliation Board had failed to reconcile the matter. Thus, the argument by the appellant is devoid of any merit. The appellant's argument would have been valid, had he denounced the validity of the said certificate by the reconciliation board during trial. Even in his defense testimony, he never opposed the fact of being reconciliation at the Nkololo

Marriage 8 Conciliation Board. So, it is merely an afterthought ground which cannot form valid basis of appeal. With the complaint on division of matrimonial assets alleged to be clan land that is not subject for division. Upon scanning the trial Court's records, the same provides that the respondent testified on how they acquired the alleged properties. She said they were involving in agricultural activities and managed to acquire all the mentioned properties. Nevertheless, she also testified that the argument that the land alleged to be clan land as argued by the appellant is not correct. In ascertaining the same Exhibits; B,C,D,E signify that the land in question was bought by the appellant during the existence of their marriage in corroboration with the respondent. Thus with respect to definition as to what is matrimonial property as defined in *Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo*, Civil Appeal No. 102 of 2018 and *National Bank of Commerce Limited v. Nurbano Abdallah Mulla*, Civil Appeal No. 283 of 2017 (both unreported), the Court of Appeal defined matrimonial properties as those properties acquired by one or the other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives. 9 Likewise, the Court of Appeal emphasized in *Yesse Mrisho vs Sania Abdul*, Civil Appeal No. 147 of 2016 (unreported) that matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts. Section 114 of the LMA has been a subject of interpretation by this Court as well the Court of Appeal in a number of cases, such as, *Bi Hawa Mohamed*

- v. *Ally Sefu* (1983) TLR 32. In essence, Section 114(1) of the LMA, vests powers to the trial court to order division of assets between the parties (upon dissolution of their marriage) which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts. See *Bi Hawa Mohamed v. Ally Sefu* (supra) and *Samwel Moyo v. Mary Cassian Kayombo* [1999] T.L.R. 197. The Court has underscored the principle envisaged in section 114 of the LMA as compensation for the contribution towards acquisition of matrimonial property regardless whether the contribution is direct or 10 otherwise see: *Mohamed Abdallah v. Halima Lisangwe* [1988] T.L.R. 197. Further, the Court emphasized that services of a house wife entitle her to division of matrimonial properties regardless of her direct contribution or otherwise. In the case of *Reginald Danda v. Felichina Wikesi*, Civil Appel No. 265 of 2018 (unreported), it was held that a wife is entitled to a division of matrimonial properties even if she had not made any direct contribution to their acquisition for; she has that entitlement so long as she was a wife who made indirect contribution through domestic chores. In the instant appeal, the appellant had denied the existence of land in question, but he does not dispute the contribution made by the respondent towards acquisition of the said properties. In my view the argument by the appellant is evasive denial which holds no water. By the way, there has not been proof of the purchased land (exhibits B, C,D,E) were bought on behalf of the appellant's clan as alleged. Perhaps, the appellant wants us believe that the respondent was ignorant of the fact what is

a family property and what is a clan property. That is a ridicule. 11 Here I must associate myself with the findings of both lower courts and in the same vein I do not see good and sound reasons to fault the decision thereof, and consequently I uphold it as correctly decreed. That said, the appeal is devoid of any merit and is hereby dismissed. This being a matrimonial matter involving spouses, I order no costs. It so ordered. DATED at SHINYANGA this 17th September, 2024. F.H. Mahimbali Judge 12

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