

TANZANIA / JUDGMENT

Mashimo Final

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB REGISTRY AT GEITA
MATRIMONIAL APPEAL NO. 2371 OF 2025 (Arising from Matrimonial Appeal No. 9837 of 2024 of
the District Court of Geita, originating from Matrimonial Cause No. 4 of 2024 of the Nyankumbu
Primary Court) BETWEEN

RMP.....APPELLANT VS
JGY.....RESPONDENT

JUDGEMENT

Date of last order: 11/02/2025 Date of Judgement: 21/02/2025 MWAKAPEJE, J.: This is the second appeal, in which the appellant appeals against the decision of a District Court in a matrimonial dispute resulting in a divorce decree in the Nyankumbu Primary Court in Geita District. The appellant challenges the decision of the first appellate court, which overturned the trial court's decision on the division of matrimonial property and custody of children. The circumstances leading to this appeal are rather straightforward: the appellant and respondent were a married couple who had solemnised their union in 1991 under customary rites. Regrettably, Page 1 of 11 the said enduring relationship, blessed with 8 offspring, came to a conclusion when the respondent successfully petitioned for divorce in the Primary Court, culminating in the dissolution of their marriage on 15 April 2024 for the reasons that she was deserted and the appellant had married another wife. It is customary that upon the granting of a divorce petition, the subsequent steps include the division of matrimonial assets and determination of custody, which the Primary Court carried out. However, the respondent expressed discontent with the distribution of matrimonial properties and the custody arrangement which placed the children under the appellant's care. She successfully appealed against the decision of the primary court in the District Court, which ordered the redistribution of matrimonial assets and transferred the custody of the four children to the respondent herein. Disgruntled with this outcome, the appellant now appears before this Court to challenge the aforementioned decision on five grounds of appeal as follows:

1. The District Court erred both in law and fact by overturning the decision of the Primary Court and declaring that the Ikulwa house belongs to the respondent and is not matrimonial property, even though the respondent himself had listed it as matrimonial property in the original case before the Primary Court.

2. The District Court erred both in law and fact by overturning the Primary Court's decision and declaring that the Ikulwa house and Page 2 of 11 the two-acre farm are located in the same area and should both belong to the respondent.
3. The District Court erred both in law and fact by overturning the Primary Court's decision and directing that the division of matrimonial property be conducted afresh, disregarding the initial division, which had considered the contributions of each spouse in acquiring the said property.
4. The District Court erred both in law and fact by overturning the Primary Court's decision and declaring that the children should remain in the custody of the respondent without considering their best interests, particularly regarding their education.
5. The District Court erred both in law and fact by overturning the Primary Court's decision and stating that the Primary Court had failed to analyse the respondent's evidence, whereas, in reality, the court had thoroughly examined the evidence from both parties. This appeal was argued orally. On the hearing date, the appellant appeared pro se without legal representation, while the respondent was represented by Mr George Alfred, a learned advocate. However, prior to the commencement of the hearing, I probed the parties to make submissions to the Court regarding the jurisdiction of the Primary Court of Nyankumbu to adjudicate on the matter, explicitly addressing compliance with section 101(1) of the Marriage Act. The appellant was the first to submit to this Court, indicating they had attended the reconciliation process before the Marriage Reconciliation Board. Still, no certificate from the board was presented during the Page 3 of 11 hearing. Conversely, the respondent acknowledged possessing all the necessary evidence not tendered in court during the hearing. Mr Alfred, for his part, contended that as per section 101 of the Law of Marriage Act (LMA), it is explicitly stipulated that a divorce cannot be granted unless the parties have undergone the marriage reconciliation board proceedings. He was of the opinion that the language used is unequivocal. Given the absence of proof that the certificate was submitted in court and the unavailability of the primary court's records, it is imperative for the Court to establish whether the certificate was indeed presented. In the event that it is confirmed that the certificate was not submitted, the appropriate course of action would be to invalidate the decision and require the parties to adhere to the statutory prerequisites. Having considered the parties' submissions and considering that a court's jurisdiction pertains to the authority and limits that a court possesses to hear and adjudicate cases of varying natures, I will determine it first. From the onset, I should emphasise that jurisdiction is considered fundamental for any court before determining a case as it delves into the very core of its power. In the case of Fanuel Mantiri Ng'unda ss Herman M. Ng'unda, Civil Appeal No. 8 of 1995 (CAT- unreported), it was explicitly provided that: Page 4 of 11 "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature.it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case." In compliance with section 76 of the Law of

Marriage Act, Cap. 29 R.E. 2019 (the Act), courts possessing original jurisdiction to adjudicate marital issues under it are concurrently vested in the High Court, a resident magistrate's court, a district court, and a primary court. However, section 75 designates the primary court the authority to handle cases where parties are united in matrimony in accordance with customary or Islamic laws. The parties in this instance solemnised their marriage through customary rituals. Given their deteriorating relationship, the appellant sought the dissolution of their union. Thus, it became the responsibility of the trial court to determine whether it had the jurisdiction to hear the case based on meeting the necessary conditions for granting the petition. This brings us to the prerequisites delineated in section 101 that one must comply with when seeking a divorce. As per the aforementioned section 101, it is stipulated that: Page 5 of 11 "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;
- (f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable. [Emphasis supplied]. According to the stipulations of this section, the trial court would lack jurisdiction if it proceeds with the divorce petition without the matter being first referred to the board for reconciliation. See the cases of Shillo Mzee v. Fatuma Ahmed [1984] TLR 112 and Yohana Balole vs Anna Benjamin Malongo (Civil Appeal No. 18 of 2020) [2021] TZCA 388 (19 August 2021). Expressly, in the case of Yohana Balole vs Anna Benjamin Malongo, it was stated that: Page 6 of 11 "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." [Emphasis supplied] Also, in the case of Patrick William Magubo vs Lilian Peter Kitali (Civil Appeal No. 41 of 2019) [2022] TZCA 441 (18 July 2022), it was stated that: ".....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." [Emphasis supplied]. Towards seeking a divorce after fulfilling the requirements of section 101 of the Act, a party must also

adhere to the stipulations outlined in section 106(2) of the aforementioned Act. This particular section states: "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." In this instance, Mr Alfred implored the Court to review the proceedings of the trial court prior to deciding on whether section 101 of the Law of Marriage Act had been adhered to. The parties asserted that they sought reconciliation at the Marriage Reconciliation Board and obtained a certificate, which was not presented in court. Upon meticulous Page 7 of 11 examination of the trial court's records and pleadings, this court discovered that the aforementioned certificate had been appended to the petition. Nevertheless, during the testimonies of both the respondent and appellant on 07/02/2024 and 14/02/2024, respectively, there was no indication that the certificate had been submitted as evidence in court. The pivotal question now arises: does the failure to submit the certificate from the reconciliation board as evidence in the trial court renders the proceedings invalid? In the premises, it should be noted that when the certificate under section 106(2) is attached to the pleadings, it does not automatically make it evidence. It must be tendered and admitted in the proceedings to form part of evidence in court. In my view, the attachment pertains to the inclusion of the same for contextual purposes while tendering, and it is admitted in evidence encompasses the formal introduction of the same to support one's case. Thus, if a document is merely appended to the petition for divorce and not tendered during the proceedings, its value as evidence would be considerably diminished. This is so because annexures have never been considered as evidence. Instead, they inform the other party of the proceedings of the documents to be relied on, lest they are taken by Page 8 of 11 surprise. The tendering and admission of a certificate in evidence is the trite position of law as was explicitly provided for in the case of Patrick William Magubo vs Lilian Peter Kitali (*supra*), where it was stated as follows: ".....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." [Emphasis supplied] The document intended for submission and admission as evidence in the case of Patrick William Magubo was the certificate from the Reconciliation Board. However, the certificate was neither attached nor formally admitted as evidence. Moreover, this decision by the Court of Appeal alluded to the case of Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar, Civil Appeal No. 47 of 2009 (unreported), wherein it was articulated 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 supplied] Page 9 of 11 Guided by the aforementioned authorities, it is indisputable that the failure to admit the certificate from the Marriage Reconciliation Board as evidence in the current appeal rendered its attachment inconsequential, akin to its nonexistence. Consequently, the entire process was

rendered futile, as the petition was deemed incomplete, premature, and incompetent; thus, the trial court lacked jurisdiction to address the matter due to the absence of proof of compliance with section 101 of the Law of Marriage Act. In the case of Mabula Sayi vs Kalekwa Malahya (Civil Appeal No. 195 of 2022) [2024] TZCA 1235 (10 December 2024), it was explicitly stated that: “.....in the instant appeal, since we have found that the alleged certificate from the Marriage Conciliation Board was not tendered and admitted in evidence as an exhibit to form part of the record of the trial court's proceedings, the said omission had rendered the petition for divorce incompetent on account of failure by the respondent to comply with the mandatory requirement of section 101 of the Marriage Act.” [Emphasis supplied] Therefore, given that the issue of jurisdiction strikes at the core of the case, there is no justification to entertain the grounds of appeal as they inherently collapse. As a result, I quash and set aside the decisions and orders thereto made by both the trial and the first appellate courts. Should the parties desire to pursue their divorce, they are free to do so Page 10 of 11 anew in accordance with the law. In light of the fact that the proceedings in the current appeal stem from the matrimonial dispute, I abstain from making an order for costs as per the stipulation in section 90(1) of the Act. It is so ordered. DATED at GEITA this 21st day of February 2024. G.V. MWAKAPEJE JUDGE Page 11 of 11

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