

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
DAR ES SALAAM SUB-REGISTRY**

**CIVIL APPEAL NO.133 OF 2023**

*( C/f Matrimonial Cause No.1 of 2023 at the District Court of Kisarawe at Kisarawe)*

**DAVID JOHN GATUNA.....APPELLANT**

**VS**

**EVA EVANCE PHILIP.....RESPONDENT**

**JUDGMENT**

*Date of last Order:9-2-2024*

*Date of Judgment:9-4-2024*

**B.K. PHILLIP, J**

Aggrieved by the judgment of the District Court of Kisarawe at Kisarawe, the appellant herein lodged this appeal on five grounds. The same are reproduced verbatim hereunder.

- i) That the learned trial magistrate erred in law and fact by dissolving the marriage while there was no evidence tendered before it to prove that the dispute passed (*sic*) before the Marriage Conciliation Board and that the Appellant was involved in the same process.
- ii) That the learned trial magistrate erred in law and fact by dividing the house at Makurunge, Kiluvya Ward, Kisarawe without considering that the same property was acquired by the Appellant himself before subsistence of marriage.

- iii) That the learned trial magistrate erred in law and fact by admitting exhibit P1 while the said exhibit was neither attached in the petition nor filed as an additional document.
- iv) That the learned trial magistrate erred in law and fact by composing a judgment based on exhibit P1 which was not served to the Appellant before the commencement of hearing.
- v) That the learned trial magistrate erred in law and fact by ordering the division of the house at Makurunge, Kiluvya Ward, Kisarawe, 70% to the Respondent and 30% to the Appellant based on Exhibit P1 which was neither attached in the petition nor filed as an additional document.

The appellant prayed this court to declare that his marriage is not irreparably broken. In the alternative, he prayed that if this court finds necessary to dissolve the same, then, the division of the house located at Makurunge area, Kiluvya Ward by the district court be set aside since he built it before he married the respondent herein.

A brief background this appeal is worth it to appreciate the coming discussion. The appellant and respondent celebrated their Christian marriage on 25<sup>th</sup> August 2018 after they had stayed together under one roof as wife and husband since 2017. Their marriage was blessed with one issue, namely Doreen Davidi Gatuma, born on 11.8.2017. They enjoyed a happy marriage up to 2022 when misunderstandings which led to fights, infidelity, and the use of abusive words between them, cropped up in their marriage.

Measures to solve their quarrels did not bear fruits as a result the respondent herein lodged a petition for divorce, vide Matrimonial Cause No.1 of 2023, at the District Court of Kisarawe, praying for the following orders;

- i) A decree for dissolution of the marriage ( divorce) between them be issued.
- ii) An order vesting the custody of the issue of marriage to the petitioner.
- iii) An Order requiring the respondent ( Appellant herein ) to pay school fees and all school expenses for the issue of marriage until when she completes the university level.
- iv) The respondent be ordered to pay the petitioner Tshs. 300,000/= every month from April 2023 as maintenance for the issue of marriage and the petitioner on top of the school fees.
- v) An Order for division of matrimonial assets which are; a house and plot located at Makongo Juu Hamlet, Kiluvya Ward, in Kisarawe District, Coastal Regional, motor vehicle -Nissan Ex-trail -T.258 DRJ, Household wares, four sofa sets, cupboards, one dining table, water tank, one TV set, one radio and coffee table.
- vi) Costs of the suit.

The appellant and respondent were the sole witnesses for each side. Upon receiving evidence from both sides the trial court entered judgment as

follows; It granted the decree for divorce and vested the custody of the issue of marriage to the respondent. The appellant was granted the right of visitation, 70% of the value of the house located at Makurunge, Kiluvya Ward, Kisarawe was granted to the respondent whereas the appellant was granted 30%, the appellant was granted the motor vehicle with registration No.T.258 DRJ. The utensils were awarded to the respondent. Further, the appellant was ordered to pay maintenance for the issue of marriage to the tune of Tshs.100,000/= monthly.

At the hearing of this appeal, both parties appeared in person, unrepresented. The appeal was heard viva voce. The appellant's arguments in support of the appeal were as follows; On the 1<sup>st</sup> ground of appeal, the appellant argued that the trial court erred in granting the decree for divorce while there was no proof that the quarrels between them were referred to the Marriage Conciliation Board ( Henceforth "the MCB") as required in the Law of Marriage Act, ( Henceforth "the LMA") before filing the divorce petition.

On the 2<sup>nd</sup> ground of appeal, the appellant argued that the trial court erred in ordering the distribution of the house located at Kiluvya Ward, Makurunge, Kisarawe on the ground that he built that house before getting married to the respondent. About the 3<sup>rd</sup> ground of appeal, the appellant argued that the trial Court erred in admitting exhibit P1 because it was not annexed to the petition that was served to him by the respondent. On the 4<sup>th</sup> ground of appeal, the appellant submitted that the trial court erred in relying on exhibit P1 in its decision because the same was wrongly admitted. On the 5<sup>th</sup> ground

of appeal, the appellant argued that the trial court erred in giving him 30% only of the value of the house at Kisarawe by relying on exhibit P1 which was wrongly admitted in court.

In conclusion of his submission, the appellant submitted that If at all this court finds that the marriage should be dissolved then, the distribution of the house located at Kisarawe should be varied to the effect that he should either be granted 50% or 70% of the value of the house in question. He prayed that this appeal be allowed with costs and decision for the trial court be set aside.

In rebuttal, responding to the 1<sup>st</sup> ground of appeal, the appellant submitted that before filing the divorce petition, she referred their disputes to the MRB within their locality, and upon failure to reconcile them, the MRB gave the green light to institute a matrimonial cause if they wished to do so. She submitted that the 1<sup>st</sup> ground of appeal has no merit.

On the 2<sup>nd</sup> ground of appeal, the respondent submitted that she built the house in question using her own money. She started building that house in 2018 on her own. From 2013 to 2016 the appellant was in remand prison as he was arraigned in court for the offence of theft. She used to assist him. He was discharged in October 2016. After being released from the remand prison the appellant had no income. He was unemployed until January 2023 when he was employed as a driver in a Mount Moria school. However, the appellant submitted further that she used to send the appellant to the site to assist her supervisory works.

Moreover, the respondent argued that she is a businesswoman. She owns a company called Tanzania Mpya Enterprises which deals with local tourism, organizing seminars on religious matters and fashion shows. Her former boyfriend supported her in building the house in question. She finished building that house in July 2018 and was married to the appellant in August 2018. On the 3<sup>rd</sup> ground of appeal, the respondent submitted that exhibit P1 is a bank statement. It was properly admitted in court and the appellant did not object to its admission as an exhibit.

Concerning the 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal the appellant argued that she was not satisfied with the distribution of the house located at Kisarawe. The appellant did not contribute anything to the construction of that house but because she was tired of going to court she decided not to appeal against the trial court's judgment. She decided to forego the 30% of the value of the house which was awarded to the appellant. She felt that it was better to start afresh than to go on with the struggles for her rights in courts of law.

In conclusion of her submission, the respondent insisted that the house in question belongs to her. Her child is six years old. She needs a home for taking care of her child and she is not ready to go on with the marriage. She prayed for the dismissal of this appeal.

In rejoinder, the appellant submitted as follows; that he built the house in question on his own without any contribution from the appellant. He was arraigned in court and put in remand prison before he met with the respondent. During the hearing of the divorce petition, he objected to the admission of exhibit P1 and the letter from the Ward Executive Officer. He

was emphatic that he never attended MCB. He reiterated his prayer in his submission in chief.

Having analyzed the competing arguments raised by parties, I have noted that the appellant's complaint against the trial court's judgment can be conveniently classified into three groups, to wit; One, that the trial court erred to entertain the petition for divorce because the appellant and respondent did not refer their disputes to the MCB as required by the law. Two, the trial court erred to admit exhibit P1 on the ground that it was not annexed to the petition for divorce served to the appellant. Three, the trial court erred in distributing the house located at Kisarawe, because it was not a matrimonial house. Alternatively, four, the distribution of the House in question was erroneous in law since the trial court granted to the appellant 30% only of the value of the house in question.

Starting with the issue of whether or not the quarrels between the appellant and respondent were referred to the MCB before filing the divorce petition, let me reproduce the sections 101 and 106 of the LMA hereunder, for ease of reference and understanding of the coming discussion.

Section 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 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”.*

#### Section 106.

*“(1) Every petition for a decree of separation or divorce shall contain—*

*(a) particulars of the marriage between the parties and the names, ages and sex of the children, if any, of the marriage;*

*(b) particulars of the facts giving the court jurisdiction;*

*(c) particulars of any previous matrimonial proceedings between the parties;*

*(d) a statement of the principal allegations which it will be sought to*



*prove as evidence of the breakdown of the marriage;*

*(e) where the petitioner has been guilty of any marital misconduct, an admission of such misconduct;*

*(f) the terms of any agreement regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and*

*(g) particulars of the relief sought.*

***(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”.*

*( emphasis added.)*

In its judgment, the trial court did not address this issue despite the fact the appellant stated in his reply to the divorce petition that the disputes between him and the respondent were never referred to the MCB as required by the law and that the copy of the certificate from Kiluvya MCB annexed to the petition for divorce does not bear his name and had expired. According to sections 101 and 106 of the LMA, quoted in this Judgment, referring matrimonial disputes to the MCB is a mandatory requirement before filling a divorce petition since the word used in the LMA is “shall”. I have noted that

the proviso in section 101 of the LMA gives exceptions to the mandatory requirement in respect of the certificate from the MCB. However, the trial court was supposed to frame an issue on whether or not the disputes between the appellant and respondent were referred to the MCB and the validity of certificate from Kiluvya MCB annexed to the divorce petition as the first issues for determination by the court since it goes to the competency of the divorce petition. In other words , the trial court was supposed to ascertain the propriety of the divorce petition before proceeding with the determination of the merit of the allegations made by the parties. It is worth noting that this court is not in a position to deal with this issue since it was not dealt with by the trial court and requires evidence from both sides to ascertain what transpired before the filing of the divorce petition.

From the foregoing, it is the finding of this court that the trial court's failure to deal with the issue of propriety of the divorce petition bearing in mind the mandatory legal requirement that a divorce petition has to be accompanied by a valid certificate from MCB is fatal. Thus, I hereby quash and nullify the proceedings of the trial court as well as set aside the impugned judgment. Further, I hereby order trial *de novo* of this case before another Magistrate.



Dated this 9<sup>th</sup> day of April 2024

  
**B.K.PHILLIP**

**JUDGE.**