IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 03 OF 2021

(Arising from the Decision of the Resident Magistrates Court of Morogoro at Morogoro in Matrimonial Appeal No. 08 of 2020 before Hon. Lihamwike, **RM** dated 19th August, 2020, Originating from Kingowira Primary Court in Matrimonial Cause No. 01 of 2020)

SADIKI RASHID ..... APPELLANT

VERSUS

MARIAM MOHAMED ..... RESPONDENT

JUDGMENT

03rd June, 2021 & 02nd July, 2021.

E. E. KAKOLAKI J

In this second appeal which is contested by the respondent, the appellant is challenging the decision of Resident Magistrates Court of Morogoro at Morogoro in Matrimonial Appeal No. 08 of 2020 which to a large part was entered in favour of the respondent by confirming the trial court's decision, in its judgment handed down on 19/08/2020. On the 24/01/2010, parties to this appeal knotted their ties under Islamic rites, as before that in 1998 they had contracted customary marriage. The couple was blessed with four issues

in which two of them were begotten before contracting Islamic marriage while the other two came after. The two led their marriage life peacefully but in between the appellant developed disrespect behaviour and ceased to provide maintenance to both the respondent and their children the conducts that moved the respondent to process a divorce through Islamic procedures commonly known as "talak". She therefore had to refer their matrimonial dispute to BAKWATA for Morogoro District that heard both parties before she was issued with a letter for dissolution of marriage commonly known under Islamic laws (sharia) as "Khuluwi" after she had paid back to the appellant the dowry in compliance with the Holy Quran Q2:229. It the said letter which was used by the respondent to petition for divorce, custody of the children, maintenance and division of matrimonial assets before the Kingorwira Primary Court in Matrimonial Cause No. 01 of 2020. A copy of the said BAKWATA letter addressed to the respondent was attached to the petition. The trial court having received the said letter from BAKWATA treated it as a certificate from the Marriage Conciliation Board in compliance of section 104(5) of the Law of Marriage Act, [Cap. 29 R.E 2019] and proceeded to hear and determine the petition. In the ended it issued the divorce decree to the respondent and proceeded to divide the matrimonial properties and award other reliefs sought. It was ordered among other orders that one house found to be matrimonial properties be divided amongst the two where 75% of its value was awarded to the appellant and 25% to the respondent. As regard to the custody of children two of them were placed under appellant's custody while the other two were left under respondent' custody. Discontented with the trial court's decision the appellant unsuccessful

appealed to the Resident Magistrates Court of Morogoro Region that confirmed the trial court's decision hence dismissal of his appeal. It is worth stating that one of the ground of appeal which was dismissed by the appellate court concerned competence of the petition before the trial court for want of valid certificate from the Marriage Conciliatory Board as required under of section 101 of the Law of Marriage Act, [Cap. 29 R.E 2019] herein to be referred as LMA. It is from that decision the present appeal is preferred by the appellant manifesting his dissatisfaction in four grounds of appeal as follows:

1. The judgment is bad in law. The learned Magistrate on appeal failed to appreciate the necessity of a Matrimonial proceedings to be referred to a Conciliation Board before embarking to court.
2. That the Magistrate on appeal failed to comprehend that the petition is founded exclusively on the Respondent's wrong doing. In determining the share of Matrimonial property and the amount of maintenance.
3. The Magistrate on appeal failed to ignore the fact that the issue of the house given to the Appellant has been marked with an 'X' as a sign of a house to be demolished was not denied as a matter of fact by the Respondent.
4. That, the Magistrate on Appeal failed to appreciate that the proper remedy for the parties in this case was separation and not divorce.

The court was therefore invited to consider those grounds and prayed to allow the appeal by varying or dismissing the appellate court decision with costs. When the matter was called on for hearing both parties in this appeal

appeared unrepresented and with leave of the court agreed to dispose of their matter by way of written submissions. The filing schedule orders were complied with by the parties save for the appellant who waived his rights to file rejoinder submissions. I will therefore treat the submission as presented before the court and I have chosen in this judgment do deal with each ground in seriatim if need be.

Submitting on the first ground the appellant faulted the learned magistrate in the appellate court for failure to appreciate the requirement of the law under section 101 of LMA for referring the matrimonial dispute to the Marriage Conciliatory Board before presenting the petition in court of law. He argued in this matter there is no certificate on record from the Board proving that the matter was referred first to the Board before petition was presented in the trial court, something which rendered the said petition for divorce premature and incompetent before the court. To reinforce his argument the appellant referred the court to the decision of this court in the case of **Shilo Mzee Vs. Fatuma Ahmed** (1994) TLR 112. He therefore invited the court to find the ground of appeal has merit and proceed to sustain it and allow the appeal with costs. Opposing the appellant's submission on this ground the respondent reposted that, in arriving at their decisions both trial and appellate court took into consideration evidence in a whole and exhibits tendered including the document from BAKWATA tendered and admitted as Exhibit SMK1, which the appellate court equated it to Form No. 3 a certificate from Marriage Conciliatory Board. It was his submission the said letter from BAKWATA title YAH: KUJIVUA KATIKA NDOA (KHULUWI) was accompanied with Form No. 3, and it was lawfully issued by

a competent Board dully established and constituted under sections 102(2) and 103(b) of the LMA as both parties belong to the Islamic community. According to her the petition for divorce was competently preferred and therefore the appellant court was right to dismiss the appeal. It is from that decision this court was prayed to find this ground devoid of merit and the same be dismissed.

Having carefully gone through the entire record in both trial and appellate courts and considered the fighting argument by the parties the issues for determination before this court are **one**, whether the alleged letter from BAKWATA complied with the requirement of the law under section 101 of LMA and **second**, whether the appeal before the court is competent.

To start with the first issue, it is settled law under the provision of 101 of the Law of Marriage Act, [Cap. 29 R.E 2019] that, no petition for marriage divorce shall be instituted in court unless the dispute has first been referred to the Marriage Conciliatory Board and the certification is made to the effect that the Board has failed to reconcile the parties. The said section 101 provides thus:

> *S. 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 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.

The law provides further under section 104(5) of the Law of Marriage Act that, a certificate of marriage conciliation board shall set out findings of the Board. It is that finding of the Board and reference of parties to the court that makes the trial court competent to hear and determine the divorce petition. The said subsection (5) of section 104 of LMA reads: *(5) Where the Board is unable to resolve the matrimonial dispute or matter referred to it to*

the satisfaction of the parties, it shall issue a certificate setting out its findings.

As alluded earlier in the background story of this matter, the respondent when lodging the petition in the trial court attached the letter from BAKWATA 18/11/2019 which the court treated as certificate of Marriage Conciliation Board, assumed competence of the petition and proceeded to hear and determine the it. It is the decision of the said trial court which was appealed against to the Resident Magistrates Court of Morogoro Region and later on to this court. It is the law and I need cite any authority that, for any appeal to be competent before the appellate court the same must be premised on the proceedings and decision of the court(s) with competent jurisdiction to try and determine the matter. As alluded to earlier this ground of incompetence of the purported certificate from BAKWATA was raised during the appeal before the appellate court. The learned appellate magistrate in addressing that issue at page 4 of the typed judgment reasoned that, the said letter from BAKWATA was issued to the respondent when effecting Islamic marriage dissolution practice commonly known as "Khuluwi" which to him was a proof that parties underwent reconciliation before the same was issued. For that reason found it proper to dispense with the requirement of certificate under LMA as to him the difference between the said letter from BAKWATA and form No. 3 is the title but the contents are the same. With due respect to the learned magistrate I think his reasoning is neither supported by facts or evidence in record nor is it premised on the provisions of the law. I will demonstrate why.

Under section 102(1) of LMA, the Minister may establish one or more Marriage Conciliatory Board in any ward. The provision reads:

> *102.-(1) The Minister shall establish in every ward a Board to be known as a Marriage Conciliation Board and may, if he considers it desirable so to do, establish two or more such Boards in any ward.*

The minister in exercising his powers under section 102(1) of LMA above through Government Notices No. 96, 211 and 245 all of 1971 Appointment of Communal Conciliatory Boards Notice appointed several Marriage Conciliatory Boards one of which is the BAKWATA. The Board under section 103(1) of LMA makes it mandatory that a Board must be constituted with not less than three (3) members but not more than five. The said provision reads:

> *103.-(1) Every Board shall consist of a Chairman and not less than two and not more than five other members.*

Under Rule 4 of The Marriage Conciliation Board (Procedure) Regulations, GN. No. 240 of 1971, when sitting in its session, the quoram of the Board shall be three members presided over by the Chairman as also provided under Rule 6 of the regulation. The said Rule 4 provides thus:

> *4. The quoram necessary for the transaction of the business of a Board shall be three members.*

Further to that the said certificate from Marriage Conciliatory Board form No. 3 is provided under the schedule of GN. No. 240 of 1971 too. And for easy of reference I reproduce it hereunder:

FORM 3

MARRIAGE CONCILIATION BOARD

.....

(Give full designation of the Board)

WHEREAS a dispute exists between ..... (state name of husband) and ..... (state name of wife) who are lawfully married and such dispute was referred to this Board by ..... (name of the person who referred the dispute).

THIS IS TO CERTIFY that this Board has failed to reconcile the parties and that in the opinion of the Board -

.....

.....

(any recommendation which the Board may wish to make)

Signed .....

Chairman/Vice-Chairman/Member

Dated this ..... day of ..... 20.....

The letter from BAKWATA which the appellate magistrate suggested has the same contents as Form No. 3 though with different tittle reads and I reproduce it hereunder:

BARAZA KUU KA WAISLAM TANZANIA

BARAZA LA MASHEIKH BAKWATA WILAYA

S.L.P 193

MOROGORO

KUMB. NO. BKT/BUS/W/MG/V.....

TAREHE: ***18.11.2019***

KWAKO: ***MARIAM MOHAMED***

S.L.P ..... SIMU 0655-898872

Wilaya: ***MOROGORO***

Mkoa: ***MOROGORO*** *Nchi:* ***TANZANIA***

YAH: KUJIVUA KATIKA NDOA (KHULUWI)

Tafadhali husika na somo tajwa hapo juu.

Mtajwa hapo juu ametimiza sharti la sharia ya kujiokoa katika Ndoa yake (Khuluwi) na Bw. ***SADIKI RASHID*** *kwa mijibu wa* ***Q2:229*** *yaani kurudisha mahari ili uwe huru na ndoa hii.*

Kwa kuwa umetimiza sharti hilo la kurudisha mahari kwa aliyekuoa (aliyekuwa mmeo) mtajwa hapo nyuma, Baraza linathibitisha na kutamka kuanzia leo siku ya ***JUMATATU*** *Tarehe 18.11.2019 wewe Bi.* ***MARIAMU MOHAMED*** *si Mke tena wa Bw.* ***SADIKI RASHID*** *kwa sharia ya Khuluwi kuanzia sasa ni mwanamke huru na unaweza kuolewa ukipenda kufanya hivyo baada ya muda wa Edda kwisha.*

Baraza linakutakia maisha mema.

Jina ***MARIAM MOHAMEDI*** *Saini ..... Anayejivua*

Sheikh ***MUSSA BAUNGO*** *Saini.....*

Looking at the said BAKWATA letter attached to the petition by the respondent and relied upon by the trial court to establish the competence of the petition the same suffers serious deficiencies. **First**, it does not conform to the form and contents with the Certificate in Form No. 3 as provided under Rule (9)(2) of GN. 240 of 1971 and section 104(5) of the LMA for referring to the repayment of dowry back to the husband (appellant) to free the wife (respondent) from marriage bond and not reconciliation of parties. **Secondly**, it does not bear signatures of the Chairman, Vice Chairman or any member of the Board but rather of BAKWATA sheikh for Morogoro District sitting as religious marriage dissolution organ practicing "Khuluwi" and not marriage reconciliation board dully established under section 102(1) of the LMA. **Thirdly**, it does not suggest that parties were reconciled and the said reconciliation failed as they were dissolving their marriage under supervision of the sheikh. With all those defects it is the finding of this court that the said document under any stretch of imagination could not be treated as Marriage Conciliatory Board certificate as the trial court and appellate magistrate suggested and did.

The appellate magistrate in his judgment at pages 4 to 6 seems to suggest that by resorting to Khuluwi practice which under Islamic rites amounts to a lawful divorce, parties had already undergone marriage reconciliation process before the same Board and failed. So it will be unfair to refer them back to the Board while knowing that the marriage has broken down irreparably and the Board has already determined it. For those reasons he found it proper to dispense with the requirement of section 101 of the LMA and proceed to consider and hold that the letter from BAKWATA had

dissolved marriage between the parties under Holy Quran 2:229. With due respect to the learned appellate magistrate this court cannot close eyes to the clear misapplication or misinterpretation of the law as it has the duty of making sure that the law is clearly and properly applied by the lower courts. The duty of the superior courts in so doing was overemphasised by the Court of Appeal in the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249 when the Court stated that:-

> *"We think . . . the duty of the Court is to apply and interpret the laws of the country.* ***The superior courts have the additional duty of ensuring proper application of the laws by the courts below****" [The emphasis is mine]*

Similar observation was made in the case of **Adelina Koku Anifa & Another Vs. Byarugaba Alex,** Civil Appeal No. 46 of 2019 (CAT-unreported) where it had this to comment:

> *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.*

Trading on the principle stated in the above cited case, I make the finding that the appellate magistrate was in error to dispense with the mandatory requirement of section 101 of the LMA without extraordinary circumstances as provided under section 101(f) of LMA. It follows therefore that it was mandatory for the respondent to refer their matrimonial dispute to the Board

first before referring it to the trial court as required under section 101 of LMA since there was no extraordinary circumstances as provided under section 101(f) of LMA that prevented her from so complying. The importance of complying with the mandatory requirement section 101 of LMA emphasised by the Court of Appeal in the case of **Hassan Ally Sandali**, Civil Appeal No. 246 of 2019 (CAT-unreported) where had this to say:

> *We shall begin with the obvious. As seen above, the Primary court dissolved the marriage between the appellant and the respondent on the basis of section 107(3) of the Act.* ***However, the granting of the divorce under section 107(3) of the Act was not an end in itself. It 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.*** *(emphasis supplied)*

e above authority it is evident to me that certificate from the Board be dispensed with unless there are extraordinary circumstances, ı this case do not exist. It is from those reasons I disassociating rom the submission by the respondent and findings by both trial and e courts that, the said letter from BAKWATA constituted a Marriage

Conciliatory Board Certificate as not only the form does not bear contents of the Form No. 3, but also no reconciliation was ever conducted by a properly constituted Board between the parties and proved failure. Thus this is a clear infraction of section 101 of LMA by the respondent when lodging the petition of divorce before the Kingorwira Primary Court thus rendering the petition premature and incompetent as it was held by this Court in case of the **Shilo Mzee** (supra). In that case Court had this to say:

> *"In absence of certificate from a reconciliation board, a petition for divorce is premature and incompetent."*

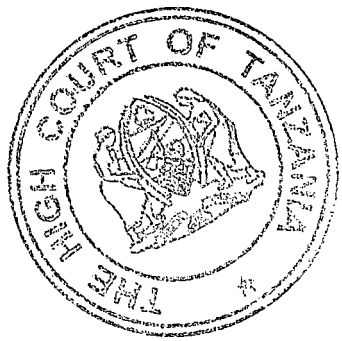
In view of the above deliberation and since the proceedings in the trial court were incompetent for being held prematurely the proceedings, decision and orders therefrom were nothing but a nullity. As the appellate court traded on the null decision its proceedings and judgment were also tainted with nullity. For that matter they cannot stand before this court. The first ground of appeal therefore has merit and I sustain it as it also has the effect of disposing of this appeal and see no reason to entertain the rest of the grounds.

In the circumstances, I invoke the revisionary powers bestowed to this court and proceed to quash the proceedings in both lower courts and set aside the judgment, ruling and orders thereto. The appeal is therefore incompetent before this court as there is no sound decision for this court to consider. I therefore proceed to strike it out the appeal for want of competence. The respondent is at liberty to file a fresh petition if she so wishes subject to compliance with the law under LMA.

Each party to bear its own costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of July, 2021



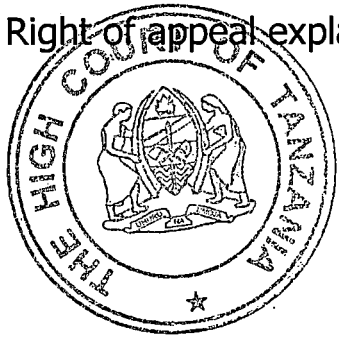
E. E. KAKOLAKI

JUDGE

02/07/2021

Delivered at Dar es Salaam in chambers this 2nd day of July, 2021 in the presence of both the appellant and respondent in person and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

02/07/2021