**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA SUB- REGISTRY**

**AT MWANZA**

**PC CIVIL APPEAL NO. 117 OF 2022**

**SUZANA CHARLES.....APPELLANT**

**VERSUS**

**JUMA KABELELE..... RESPONDENT**

**JUDGMENT**

*Last Order: 30/03/2023*
*Judgment date: 17/04/2023*

**M. MNYUKWA, J.**

Suzana Charles and Juma Kabelele contracted their marriage according to Islamic rites and they were blessed with two issues during their happily married life. The parties were wife and husband respectively. It is the wife (appellant) who petitioned for a decree of divorce and the division of matrimonial properties acquired during the subsistence of their marriage before Sengerema Urban Primary Court.

During the hearing of the petition, the petitioner called one witness, Joseph Charles while the respondent did not call any witness and in his

testimony he wanted the matter to be remitted back to the elders of BAKWATA who authorized their marriage to be contracted. After hearing both parties, the parties' marriage was dissolved on 28th July 2022 after the trial court Magistrate was satisfied that the marriage is broken down beyond repair and proceeded to order the division of the matrimonial properties acquired by the parties during the subsistence of their marriage.

Dissatisfied with the decision of the trial court, the respondent appealed to Sengerema District Court in Matrimonial Appeal No 20 of 2022 and advanced five grounds of appeal. The three grounds of appeal challenged the certificate issued by the marriage conciliation board, the other ground of appeal challenged the evidence relied upon by the trial court to issue a decree of divorce while the other ground challenged the order of the equal division of the matrimonial assets between the parties.

After hearing both parties, the District Court questioned the jurisdiction of the marriage conciliation board and he ended up allowing the appeal and invoked his power under section 21 (1) (c) of the Magistrates' Courts Act, Cap 11 R.E 2019 to quash and nullify the decision and proceedings of the trial court for the reason that, since the parties were married according to Islamic form, the proper marriage conciliation

board is BAKWATA as it is provided for under section 107(3) of the Law of Marriage Act, Cap 29 R.E 2019. He also quashed the decision and nullified the proceedings of the trial court on the reason that, there is no evidence to prove that the respondent was duly notified to appear in the marriage conciliation board.

Aggrieved by the above decision, the appellant approached this Court with two grounds of appeal as reproduced hereunder:

1. *That the 1st appellate court erred in law and fact by failing to take into consideration that the marriage conciliation board established under the Law of Marriage Act is legally mandated to reconcile all kinds of marriages*
2. *That the 1st appellate court misdirected to satisfy itself on whether the respondent was duly served to appear before the board for reconciliation without going through the records of the board itself.*

During the hearing of the appeal, both parties were unrepresented, and the appeal was argued orally. It is the appellant who kicked the ball rolling by quickly praying to adopt the petition of appeal filed in this Court to form part of her submissions. He briefly argued that, the 1st appellate court erred to hold that the marriage

conciliation board was not vested with jurisdiction to reconcile the parties. She added that, the respondent was summoned more than three times but she failed to appear. Therefore, she prays for the appeal to be allowed.

On his part, the respondent was very brief, he firstly adopted his reply to the petition of appeal to form part of his submission and he averred that, he was not summoned in the marriage reconciliation board and therefore prayed the appeal to be dismissed.

Upon hearing the submission for both parties, the main issue for consideration and determination is the jurisdiction of the marriage conciliation board to resolve the dispute when the parties were married according to Islamic rites and if the respondent was summoned before the marriage reconciliation board.

To start with, it is a trite position of the law that, no person shall petition for divorce unless he/she has referred the matrimonial dispute to the marriage conciliation board which is mandated to reconcile the parties, and if it has failed to reconcile the parties, it must issue a certificate to certify that it has failed to reconcile them. It is also a settled position of law that any petition filed without a certificate from the marriage conciliation board to certify that it has failed to reconcile the parties, the

said petition is prematurely brought before the court and it is incompetent. In other words, it is the certificate from the marriage conciliation board which gives court the jurisdiction to hear and determine the petition of divorce since the issue of jurisdiction is fundamental and it goes to the root of the matter. Therefore any decision rendered without jurisdiction is a nullity.

To be sure, section 101 of the Law of Marriage Act, Cap 29 R.E 2019 is a cornerstone on the requirement of referring the matrimonial dispute to the marriage conciliation board. The section provides that:

> *"No person shall petition for divorce unless he or she has referred the matrimonial dispute or matter to a board and the Board has certified that it has failed to reconcile the parties."*

In the present case, the 1st appellate court's decision revolves around two issues, first the board that reconciled the parties was not vested with jurisdiction to reconcile them by virtue of the provision of section 107(3) of the Law of Marriage Act, Cap 29 RE. 2019 and second, the respondent was not summoned in the marriage conciliation board.

In determining this appeal, 1 will start with the first issue as to whether the Mission conciliation board had no jurisdiction to determine

the dispute if the parties were married according to Islamic law as it is provided for under section 107(3) of the Law of Marriage Act, Cap 29 R.E 2019.

In the very beginning, I am answering this issue in the negative. It is not true that the provision of section 107(3) of the Law of Marriage Act, Cap 29 R.E 2019 requires the parties who are married according to Islamic form to refer their marriage dispute to BAKWATA for the purpose of reconciliation. The section requires the parties who contracted their marriage according to Islamic form and wished to dissolve their marriage according to Islamic form, to have first referred their marriage dispute to the marriage conciliation board established by the law and that board must have certified that it has failed to reconcile the parties. The body envisaged under section 107(3) of the Law of Marriage Act Cap. 29 RE. 2019 could be BAKWATA or any other board recognized by the law. The section does not state the parties who contracted their marriage in Islamic form must refer their marriage reconciliation board to BAKWATA. The section provides that:

*"S. 107(3) Where it is proved to the satisfaction of the court that-*

*(a) the parties were married in Islamic form*

*(b) a board has satisfied that it has failed to reconcile the parties:*

*(c) subsequent to the granting by the board of a certificate that it has failed to reconcile the parties, either of them has done any act which would, but for the provisions of this Act, have dissolved the marriage in accordance with the Islamic law,*

*The court shall make the finding that the marriage has irreparably broken down and proceed to grant a decree of divorce."*

The law as it is, makes the mandatory requirement for parties to refer their marriage dispute to the board established by the Minister under section 102(1) of the Law of Marriage Act, Cap 29 R.E 2019. The jurisdiction of the board is provided for under section 103(2)(a) of the Law of Marriage Act, Cap 29 R.E 2019 which states that:

*"The Board having jurisdiction for the purpose of this Act shall be the Board or any of the Boards established for the ward within which the husband or intended husband resides or where the husband or intended husband is not resident in Tanzania, the Board established for the ward within which the wife or intended wife resides."*

Therefore, it is neither the provision of law nor the case law which requires the parties who contracted their marriage in Islamic form to have

referred their matrimonial dispute to BAKWATA. Parties who contracted their marriage in accordance to Islamic form may refers their dispute either to BAKWATA or any other board established under section 102(1) of the Law of Marriage Act, Cap 29 R.E 2019. This is also the position of the case law in **Halima Athumani vs Maulidi Hamisi** 1991 TLR 179 where Justice Mwalusanya (as he then was) held that:

> *"The mere fact that the board that reconciled the parties was not a Moslem Conciliatory Board did not render the reconciliation a nullity."*

Therefore, the 1st appellate court erred to hold that, the board that reconciled the parties was not vested with jurisdiction on a mere reason that, it was not a Moslem conciliation board. For that reason, I find merit in the first ground of appeal and I hereby allow it.

The second ground of appeal challenged the decision of the 1st appellate court for its failure to to take into account the available record and to disregard the complaint from the respondent that he was not summoned in the marriage conciliation board and that there was no proof to show that he was called.

In determining this issue, my take-off point is the decision of the Court of Appeal in the case of **Abdallah Hamis Kiba v Ashura Masatu,** Civil Appeal No 465 of 2020 where the Court pointed out that: -

> *"Regulation 19(2) of the Marriage Conciliation (Procedure) Regulations 1971, Government Notice No 240 of 1971 provides that where the dispute is between a husband and his wife and relates to the breakdown of 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 Regulation as Form No 3 in the English language."*

In the instant case, the appellant accompanied her petition of divorce with a certificate from the marriage conciliation board which certified that it has failed to reconcile the parties. Along with the certificate from Mission ward conciliation board, the appellant also submitted the Minutes of the board which recorded the findings of the Board as it reads:

> *"Baraza limesikiliza maelezo ya mlalamikaji imependekeza kumtuma Mahakamnani ili imsikilize kwa sababu mwanaume tumemtafuta hapatikani."*

Upon going through the certificate of the board, I find the same indicates parties' names, that is the names of the husband and wife, the name of the party who referred the dispute, the board's certification that

it has failed to reconcile the parties and the opinion of the board which reads as hereunder:

*"Kumtuma Mahakamani ili asikilizwe kuhusu Mgogoro wa Ndoa Yao"*

The above certificate is similar to form No 3 both in form and contents. The above opinion of the Board which is recorded in Swahili language in English translation means that, the appellant is sent to the Court for her dispute to be heard. This statement indicated that, the Board has failed to reconcile the parties. The reason for them to have failed to reconcile the parties is the non-appearance of the respondent to the board. This can be proved by the evidence on record through the evidence of PW2 when he testified in examination in chief as seen on page 4 of the trial court's proceedings which shows that, the respondent was summoned and refused to appear. Also when he was cross-examined, PW2 maintained that the respondent refused to appear before the conciliation board when he was summoned and he even made an effort to call him to appear but he refused.

The refusal to appear at Mission ward conciliation board can be also impliedly seen in the evidence of the respondent in the trial court when he said that: -

> *"Mimi ninachotaka shauri hili lirudi kwa wazee waliotufungisha ndoa, BAKWATA, sina zaidi ya hayo."*

Given the above, it is quite clear that, the respondent did not want to hear anything rather than the dispute to be referred to BAKWATA. The evidence of the Minutes of the conciliation board that the respondent was not available and the evidence of PW2 which is supported by the submissions of the appellant makes this Court to believe that the respondent was summoned before the board but refused to appear.

It is my considered view that, if the party refused to appear, the board must issue a certificate that it has failed to reconcile the dispute and sent the party to the court for further steps. For that, the second ground of appeal has merit and it is hereby allowed.

All said and considered, I hereby set aside the order of the 1st appellate court which quashes the decision and nullifies the proceedings of the trial court. I further order the 1st appellate court to determine the remaining grounds of appeal as presented by the respondent.

In the final result, the file is remitted back to the 1st appellate court to be determined by the same Magistrate if he is still at Sengereme District Court.

It is so ordered.

**M.MNYUKWA**
**JUDGE**
**17/4/2023**

The right of Appeal explained to the parties

**M.MNYUKWA**
**JUDGE**
**17/4/2023**

**Court:** Judgement delivered in the presence of both parties.

**M.MNYUKWA**
**JUDGE**
**17/4/2023**