

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**(TEMEKE HIGH COURT SUB – REGISTRY)**  
**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**MATRIMONIAL CAUSE NO. 09 OF 2021**

**MERGITU EBBA..... PETITIONER**

**VERSUS**

**JULIUS MUHUMUZA.....RESPONDENT**

**RULING**

**12/7/2023 & 28/7/2023**

**M. MNYUKWA, J.**

This Ruling is in respect of the preliminary objection raised by the respondent through his learned advocate, Mr. Tumaini Shija to move this Court to struck out the petition by sustain the preliminary objection raised and argued by the parties which is to the effect that:

*“The Respondent was not afforded the right of being heard by the Marriage Conciliation Board contrary to section 104(1) of the Law of Marriage Act and principles of natural justice”.*

The notice of preliminary objection was filed in this Court on 10/07/2023 and served to petitioner’s counsel on 11/07/2023. As a rule of practice demand, the preliminary objection was argued first. Pursuant

to the court order dated 11/07/2023, the preliminary objection was argued by way of oral submissions whereby both parties enjoyed legal representation. The petitioner was represented by Ms. Joan Mwesigwa while the respondent afforded the legal services of Mr. Tumaini Shija.

Briefly, the background of the petition goes that; the petitioner and the respondent are wife and husband respectively. Both of them are not the citizens of Tanzania, as the petitioner is a Canadian citizen and the respondent is a Ugandan citizen. However, they have been living in Tanzania for some years in different places such as Mbeya and Dar es Salaam. The parties were blessed with two issues namely, Kakiza Muhumiza who was born on 8<sup>th</sup> September 2011 and Ejersa Muhumiza who was born on 24<sup>th</sup> September 2014. In her petition, the petitioner prayed among other things the dissolution of the marriage, custody of the children, maintenance of issue of marriage by providing funds for children, medical expenses, accommodation, clothing, food and general welfare, division of the matrimonial assets and damages for committing adultery by the respondent.

The present petition was filed on 21<sup>st</sup> December 2021. As per the court record, the whereabouts of the respondent was not known and therefore, the petition was heard ex-parte. Ultimately, on 28<sup>th</sup> January, 2022 this Court issued the following orders; the parties' marriage is

dissolved and the decree of divorce be issued, petitioner was granted custody of the children and maintain them until when the respondent surfaces, matrimonial properties at the leased shamba in Mbozi, Mbeya be sold and proceeds of sale be divided equally between the parties, while a bar and a bakery in Mbeya be shared at 40% and 60% to the petitioner and respondent respectively, petitioner and children's air tickets costs to Canada to be recovered from the respondent's share in the properties divided between them and no order to costs.

When the decision was delivered, the respondent filed the Misc. Civil Application No 02 of 2022 prayed before this Honourable Court to make an order setting aside Ex-parte Judgment and Decree issued by this Court on 28<sup>th</sup> January 2022 against the respondent and be heard inter-parties. On 11<sup>th</sup> July 2022, this Court set aside the ex-parte judgment in matrimonial cause No 9 of 2021 and ordered the matter to be heard inter-parties.

It is the decision in Misc. Civil Application No. 2/2022 which made the parties to appear before me for hearing of the petition of divorce. However, before hearing of the petition started, the respondent raised the preliminary objection as indicated above. By the order of the court, the preliminary objection was argued orally.



Arguing in support of the preliminary objection, the respondent's counsel submitted that, section 104(1) of the Law of Marriage Act, **[Cap 29 R.E 2019]** requires the board to which the matrimonial dispute is referred to, to require the attendance of the parties and shall give each of them an opportunity to be heard. He enlightens that it is mandatory for the board to call the parties and hear the dispute because their function is provided by law and it is couched with the word shall to mean that the performance of the said function is a must as it is provided for under section 53(2) of the Interpretation of Laws Act, **[Cap 1 R.E 2019]**.

He went on that, since it is a mandatory requirement for the board to require the attendance of the parties and give each of them an opportunity to be heard, it is upon the petitioner to show that the provision of section 104(2) of the Law of Marriage Act, **[Cap 29 R.E 2019]** is complied with by summoning the respondent in order for him to get an opportunity to be heard.

He further submitted that, the petition of divorce was filed in this Court on 21<sup>st</sup> December, 2021 and determined on 28<sup>th</sup> January 2022 in an ex-parte hearing that lead to an ex-parte judgment. He said that, however, on 11<sup>th</sup> July 2022, Hon. Mugeta, J set aside the ex-parte judgement upon finding that:



*".....the respondent had the ability and the means to inform the applicant about her petition for divorce before the ex-parte judgement was passed but she deliberately withheld the information."*

He highlighted that, the above findings of this Court followed the existence of the email communication between the petitioner and the respondent that's why this Court found that it was untrue that the respondent was unreachable. Attacking on the present petition for divorce he averred that, the foundation for petition for divorce is mandatorily require the certificate from the marriage conciliation board pursuant to the provision of section 101 and 104 of the Law of Marriage Act, **[Cap 29 R.E 2019]**.

Challenging the certificate accompanied the present petition he submitted that, the said certificate was issued on the reason that the respondent was not reachable while that was not the case as established by the Misc. Civil Application No 2 of 2021.

Pointing out the role of the marriage conciliation board, the respondent's counsel submitted that the same is not supposed to act as a rubber stamp or just to issue a certificate, rather to hear and reconcile the parties. And that, the board could not have performed its statutory duty provided by the law without hearing the respondent as it is required



under section 104(1) of the Law of Marriage Act, **[Cap 29 R.E 2019]** and the already established principles of natural justice. He remarked that, as it was already established in Misc. Civil Application No 2 of 2021, the conciliation board had the opportunity of hearing the respondent but for unknown reason, they chose not to hear him which denied him the right to be heard which prejudiced him.

He thus prayed the petition to be struck out and the petitioner be ordered to refer the dispute back to the marriage conciliation board.

Responding, Ms. Mwesigwa started by saying that, she is in agreement with a learned brother that it is a mandatory requirement for a petitioner of divorce to tender before the court a certificate from the marriage conciliation board issued under the prescribed principle as submitted by the learned advocate of the respondent. However, she begs to take an umbrella under the provision of section 101 (1)(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]** which gives an exception to comply with the mandatory provision of section 101 of the above law.

She went on that, she took reference to the above section because the intention of the petitioner is not to prosecute matrimonial proceedings in absence of the respondent as she informed the court in the Misc. Civil Application and the Matrimonial Cause No 9 of 2021 before its judgement



was set-aside that, she proceeded the way she did because of the circumstances she was facing and the same circumstance was also stated in the marriage conciliation board. The counsel for petitioner stated that, the reason was that she was in Tanzania under dependant visa and the same had expired on 23<sup>rd</sup> August 2021. And that, during that time the petitioner and the respondent were not living together for a period of one year, her rent that was paid was expired and the petitioner was in a danger to be evicted.

The counsel averred that, the petitioner also involved the respondent for the family to move in Canada since the petitioner and the children are all the citizens of Canada and by that time, both of them were unemployed and there was no chances to get job. She submitted that, the petitioner was in danger of not getting the basic needs like food, clothing and shelter for the family and he thought that the only resort is to go back to Canada with children where she can be provided with all basic needs. She added that, as the respondent did not give cooperation to the petitioner, the only resort was for her to get the decree of divorce, an order for custody of children so that she can move out of the country.

She further submitted that, during the whole processes of filling the petition of divorce and going to the marriage conciliation board, she was requested by the migration to get out of the country. The petitioner was

stressed and she did not get the respondent that's why the board granted her the certificate on the basis that the respondent was not reachable.

She retires praying the court to take into account the difficulties facing the petitioner and to overrule the preliminary objection.

Re-joining, the respondent's counsel argued that, the petitioner cannot seek refuge under the provision of section 101(1) (f) of the Law of Marriage Act, [**Cap 29 R.E 2019**] as the same is only applicable when there are extra ordinary circumstances that makes reference to the board impracticable and the court certify on that extra ordinary circumstances.

He added that, in the matter at hand, the petitioner makes reference to the marriage conciliation board and submitted certificate from the board and therefore the petitioner cannot seek refuge under section 101(1) of the Law of Marriage Act, [**Cap 29 R.E 2019**]. He stressed that, in her submission, the counsel for petitioner enumerated a number of reasons on the so called the circumstances, however, when submitting, she repeatedly stated that there was communication between the two. And therefore, that cannot be a reason to be relied on.

The counsel also submitted that, the petitioner pointed out the issue of visa expiring, though admittedly, she was not living together with the respondent for almost a year prior to the institution of the petition of



which she could use that chance to process petitioner divorce comfortably instead of waiting for the urgency that came four months after the said visa had expired. He insisted that, the visa was expired on 23<sup>rd</sup> August 2021 while the petition for divorce was filed on 21<sup>st</sup> December, 2021.

He went on to re-join that, the petitioner also point out the excuse that she wanted to travel with the children that's why she sought refuge under section 101 of the Law of Marriage Act, [**Cap 29 R.E 2019**]. Unfortunately, he strongly disputed that excuse by averring that, that is not a good excuse for failure to abide with the law as there are many ways that could have been used by the petitioner to travel with children.

He thus reiterates his prayer for the matter to be struck out so as the parties to refer their dispute to the marriage conciliation board.

From the above-competing arguments from the counsels of both parties, the main issue for consideration and determination is whether the preliminary objection is merited.

My take off point will be centred on the mandatory requirement of referring the matrimonial dispute to the marriage conciliation board as a pre-requisite before filing petition for divorce. The said mandatory requirement is provided for under section 101 of the Law of Marriage Act,



**[Cap 29 R.E 2019].** For easy of reference section 101 of the Law of Marriage Act, Cap 29 R.E 2019 provides that:

*"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 is likely to enter jurisdiction within the six months next ensuing after the date of 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 in preventive detention Act and has so detained under the Preventive Detention Act and has so detained for a period exceeding six months.*
- (e) Where the petitioner alleges that 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*

As it was rightly submitted by both parties, reference to the board is a mandatory requirement prior to a petitioner petition for a decree of divorce. However, parties lock horns on whether there are extraordinary circumstances which make reference to the board impracticable.

It was the petitioner submissions who seeks refuge under section 101(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]** that, the circumstances which befall to the petitioner is the one which resulted her to prosecute the petition the way she did. And that, it was not her intention to prosecute the matrimonial proceedings in absence of the respondent but there were some impediments which make the attendance of the respondent to the board in vain. Impliedly, one may say that, the petitioner's assertion is to the effect that, the marriage conciliation board failed to reconcile them because the circumstances she was going through before filling petition for divorce makes it impossible to get the respondent for purpose of reconciliation or it was impossible for the matter to be referred to the board.

On his part the respondent's counsel submitted that, the so called circumstances which resulted the parties not to be reconciled by the





marriage conciliation board is mainly based on the notion that, the respondent was not reachable which is defeated by the Ruling of this Court in Misc. Civil Application No 2 of 2021 which ruled out that the petitioner has the ability and means to find the respondent.

I had time to analyse the reasons submitted by the petitioner which makes her to seek refuge under section 101(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]**. The extraordinary circumstances highlighted by her counsel which faced the petitioner were; she was in Tanzania under dependant visa which was expired on 23<sup>rd</sup> August 2021, she was not living with the respondent for a period of one year, she rented the house at Masaki and its rent was expired and therefore she was in a danger of being evicted, and that she communicated with the respondent requested him to move to Canada since they were both unemployed, but the respondent was not cooperative with her and she think the only resort is to come to court and petition for a decree of divorce and custody of children so that she can move to Canada. She added that, during the filing of the petition and referring the matter to the marriage conciliation board, she was requested by migration to get out the country which stressed her and she was not getting the respondent that's why the board issued the certificate.



The above circumstances were countered by the respondent's counsel who averred that, the petitioner cannot seek refuge under section 101(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]** because the circumstances were not extra ordinary that makes reference to the board impracticable because the petitioner referred the matter to the marriage conciliation board which gave her certificate.

Challenging on the circumstances highlighted by the petitioner, the respondents counsel was of the view that, in her submissions, the petitioner counsel repeatedly stated that the two had the communication, this imply that the whereabouts of the respondent was known. On the expiring of the petitioner visa, the respondent's counsel submitted that, the parties were not living together for one year prior to the institution of divorce as submitted by the petitioner, therefore, his view was that, that was a right time for the petitioner to process her divorce comfortably instead of waiting four months after the expiration of her visa on 23<sup>rd</sup> August 2021 since the petition for divorce was filed on 21<sup>st</sup> December 2021. On the issue of going back to Canada, the counsel for respondent said that, the same is not a justifiable reason for the petitioner not to follow the procedure on petition for divorce because there are other ways that could have been used to obtain permission to travel with children.



As earlier on indicated, the petition for divorce was accompanied by Form No 3 which is the certificate from the marriage conciliation board to certify that it has failed to reconcile the parties. I find it pertinent to extract part of the certificate in Swahili which read as hereunder:

*"Baraza limeshindwa kabisa kuwapatanisha watu hao wawili, yani mume na mke. Kwa hiyo maoni ya Baraza hili ni kuwa Taratibu za Talaka zifuatwe. Mume hajulikani alipo wametangana kwa kipindi cha mwaka mmoja sasa. Sababu za kutengana ni mume hakuwa muaminifu katika ndoa na kutelekeza familia."*

The above text loosely translates as follows:

*"The board has failed to reconcile the two that is the husband and wife. It is the opinion of the Board that the processes of divorce be followed. The whereabouts of the husband is not known since they are under separation for one year now. The reason for separation is because the husband was not faithfully in his marriage and he deserted the family."*

Reading between lines the wording in the above certificate, it is my humble view that the impugned certificate is invalid for stating falsely that the whereabouts of the respondent was not known while the petitioner had the communication with him as it was rightly stated by her counsel that the petitioner communicated with the respondent about the



expiration of the rent and the mission to move to Canada as the two of them were unemployed and there was no chances for them to secure job in Tanzania to cater their basic needs. For that reason, I am not in agreement with the petitioner that the whereabouts of the respondent was not known for the purpose of informing him to attend the marriage conciliation board. Again, taking judicial notice in the Misc. Civil Application No 2 of 2022, I am satisfied that, the respondent was reachable, but unfortunately the petitioner withheld the information about his availability.

In addition, as it was rightly submitted by the counsel for the respondent, the respondent cannot seek refugee under section 101(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]**. I say so because, the above section is an exception to section 101 of the Law of Marriage Act, **[Cap 29 R.E 2019]** which requires a person who petition for divorce to refer the matrimonial dispute to the marriage conciliation board. That is to say, if there are exceptional circumstances a person may petition for divorce without referring the matter to the conciliation board. Unfortunately, that was not the position in our case because the petitioner referred the matter in the marriage conciliation board which issued the certificate to that effect. For that reason, it is my humble view that the



petitioner cannot seek refuge under section 101(f) of the Law of Marriage Act, **[Cap 29 R.E 2019]**.

Further to that, the other circumstances like the expiration of the visa and the need to move back to Canada with children as a reason not to follow the law is baseless because the petitioner had an ample time to process her divorce in accordance to law after making the finding that a marriage between her and the petitioner has broken down, so as a decree of divorce to be issued as well as other reliefs accompanied with a prayer of decree of divorce.

Before I conclude, I wish to point out that section 104(1) of the Law of Marriage Act, **[Cap 29 R.E 2019]** requires the board to which the matrimonial dispute is referred to, to give opportunity to the parties to enjoy the right to be heard as one of the rule of natural justice. The section provides that:

*"S. 104(1) – A board to which a matrimonial dispute or matter has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it consider it necessary, adjourn the proceeding from time to time."*



I think I don't need to emphasize much on this as the provision is self explanatory. As I have earlier on noted, apart from giving the fundamental right of the right to be heard to parties, the board is also mandated to settle the differences between the parties and brings love and harmony between them. And that when conducting hearing, the board should not be bias and in essence should not rush to issue certificate of failure to reconcile the parties since it is empowered to adjourn the proceedings from time to time so as to get more time to reconcile the parties.

Needless to say, it is unsafe and contrary to the law to hear petition for divorce which is accompanied by invalid certificate in terms of section 101 of the Law of Marriage Act, **[Cap 29 R.E 2019]** as the same is regarded to be incomplete, premature and incompetent. See the case of **Shillo Mzee v Fatuma Ahmed** (1984) TLR 112 and the case of **Patrick William Magabo v Lilian Peter Kituli**, Civil Appeal No 41 of 2019.

All said and considered, as the body failed to exercise its statutory mandate to hear and reconcile the parties, the certificate issued to by them cannot be acted upon to grant the decree of divorce. Thus deserves the petition to be struck out.







Consequently, the petition is hereby struck out, the petitioner is at liberty to process her petition of divorce afresh in accordance with the law, if she so wishes.

No order as to costs as the parties are spouses.

It is so ordered.

  
  
**M.MNYUKWA**  
**JUDGE**  
**28/7/2023**

**Court:** Ruling delivered on 28<sup>th</sup> July 2023 in the presence of both parties' counsel.

  
**M.MNYUKWA**  
**JUDGE**  
**28/7/2023**