IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CIVIL APPEAL NO. 26253/2023

REFERENCE NO. 20231128000026253

(Arising from the Ruling and Order in Matrimonial Cause No. 03 of 2022 of the District Court of Bunda (Hon. M.P. Kamuntu, SRM)

AGNESS SAMWEL SAMSON/MAGDALENA GHATI.....APPELLANT

VERSUS

DANIEL CHAINA/DANIEL JOSEPH MAKOLELE..... RESPONDENT

Date of Last Order: 14/02/2024
Date of Judgment : 19/02/2024

JUDGMENT OF THE COURT

Kafanabo, J.:

The parties herein are husband and wife having contracted their marriage in 2003. It is also not in dispute that they cohabited since 1992 and are blessed with four issues of the marriage. It is alleged that from 2017 to 2020 various incidents between spouses, including cruelty, made their marriage embittered. The parties made several attempts to resolve the challenges of their marriage amicably at the family level, and in other informal forums, and they even sought assistance from the gender desk of the Tanzania Police Force. However, their efforts proved to be an exercise in futility.

Eventually, they referred their misunderstanding to the Nyamakokoto Ward Marriage Conciliation Board (hereinafter 'the board') where they failed to reach an amicable settlement, and thus the board issued a certificate of failure to resolve their matrimonial dispute. The said certificate (Form No. 3)

is dated 14/04/2022. Based on the said certificate, on 28th October 2022, the appellant filed a petition for divorce and division of matrimonial properties, that is Matrimonial Cause No. 03 of 2023 in the District Court of Bunda, between the parties herein.

The district court commenced a hearing of the matter. The petitioner and her witnesses were duly heard and, ultimately, the petitioner closed her case. Then, as the night follows the day, the matter was scheduled for a defence hearing on 18/08/2023. However, when the parties appeared in court equipped to proceed with the hearing of the defence case the District Court of Bunda, Hon. M.P. Kamuntu-SRM, unexpectedly, delivered a ruling dated 18th August 2023.

The ultimate order in the said ruling was that the trial magistrate decided to strike out the divorce petition filed by the appellant herein for, allegedly, being incompetent because the marriage conciliation board to which the initial dispute was referred for conciliation, was the ward conciliation board and not the church's conciliation board to which the parties, presumably, belonged. It was the learned magistrate's view that the parties were reconciled by the improper marriage conciliation board which did not fit their faith.

Given the situation, the appellant was dissatisfied with the decision of the district court of Bunda hence this appeal. The memorandum of appeal that initiated this appeal contains two grounds of appeal couched in the following terms:

"1. That, the trial court erred in law and fact by composing a ruling suo moto which proceeded to strike out the appellant's case without affording the parties the right to be heard.

2. That, the trial magistrate misdirected himself in interpreting and holding that the parties having(sic) contracted a Christian marriage were first required to refer their dispute to the church reconciliation(sic) board and not a ward reconciliation(sic) board namely Nyamakokoto ward reconciliation(sic) board."

The appellant also prayed for the appeal to be allowed, quashing and setting aside the decision of the trial court together with the costs of the appeal and the court below.

At the hearing, Ms. Suzan Jacob Gibai, learned Advocate, entered an appearance for the appellant, and Mr. Godfrey Muroba, learned Advocate, entered an appearance for the respondent.

This court starts considering submissions of the parties as regards the second ground of appeal on whether it was correct for the trial court to rule that 'the parties having contracted a Christian marriage were required to refer their dispute to the church marriage conciliation board and not the ward marriage conciliation board'.

In support of the second ground of appeal, Ms. Gibai, learned counsel for the appellant, submitted that the trial magistrate misdirected himself in deciding that the parties were supposed to refer their dispute to the church's marriage conciliation board. She argued that the trial magistrate failed to and did not consider the fact that amicable settlement failed at the marriage

conciliation board of Nyamakokoto ward, and that is when the matter was referred to the court by way of petition for divorce as per section 101 of the **Law of Marriage Act, Cap. 29 R.E. 2019 (hereinafter 'the LMA').**

It was further submitted that section 102 of the LMA establishes the marriage conciliation boards, and the law makes it mandatory that the marriage conciliation board shall certify that the marriage has irreparably broken down before a person petitions the court for divorce. The Law does not make it mandatory that parties should refer their dispute to the church's conciliation board if they had celebrated a Christian marriage, instead, the law requires the dispute to be referred to the marriage conciliation board recognized by law. The learned counsel further submitted that the court was simply required to satisfy itself that the parties referred the matter to the marriage conciliation board. This is not in dispute, as the dispute was referred to the Nyamakokoto Marriage Conciliation Board.

It was further submitted that the trial magistrate misdirected himself in interpreting the law and in deciding that the matter was to be referred to the church's marriage conciliation board.

In response to the submissions supporting the second ground of appeal, the learned counsel for the respondent submitted that the court directed itself properly as the parties were required to refer their dispute to the church's marriage conciliation board and not to the ward marriage conciliation board. The respondent's counsel also submitted that in section 102(2) of the LMA, the law recognizes various boards mandated to reconcile matrimonial disputes, but since the parties celebrated a Christian marriage in the catholic

church, they were required to refer their dispute to the catholic church's marriage conciliation board.

This court now, in canvassing the second ground of appeal, and after according a deserving consideration to the rival submissions of the parties, clenches that the niche of the dispute is on whether the trial court was right in striking out the appeal based on the trial magistrate's opinion that it was wrong for the marriage conciliation board of the Nyamakokoto ward in the Bunda district to entertain a reconciliation of a matrimonial dispute of spouses who had celebrated a Christian marriage in a catholic church. This entanglement can be resolved by interpreting the relevant laws governing the marriage conciliation boards and their proceedings in our jurisdiction.

The appropriate starting point is section **101 of the LMA** which provides that:

> *"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:"*

To appreciate the import of the above section, one has to understand how the board is established and its jurisdiction. The boards are established under section 102 of the LMA which reads:

> *"(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.*

(2) Where the Minister is satisfied that any community in Tanzania has established for itself a committee or a body of persons to perform the functions of a Marriage Conciliation Board and that it is desirable that such committee or body of persons be designated to be the Board having jurisdiction over the members of that community, the Minister may so designate such committee or body of persons."

Moreover, section **103(2) of the LMA** provides for aspects of jurisdiction as follows:

"(2) The Board having jurisdiction for the purposes of this Act shall be:

(a) the Board or any one 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 the intended wife resides;

(b) where both parties belong to the same community, the Board, if any, designated to be the Board for that community."

According to the above provisions, as regards the jurisdiction of the marriage conciliation board, the jurisdiction is either based on the residence of the husband or wife as the case may be, depending on whether or not the husband is a resident of Tanzania; or jurisdiction based on the community to which all the parties belong. The latter is referred to as the 'communal

board' according to the **Marriage Conciliation Boards (Procedure) Regulations, G.N. No. 240 of 1971** which, in regulation 2, reads:

> *"Communal Board" means a Marriage Conciliation Board designated under the provisions of subsection (2) of section 102 of the Act as a Board of the community for which it is so designated;*

Therefore, a communal board is a marriage conciliation board designated for a particular community properly designated by the minister under section 102 (2) of the LMA.

In light of the above provisions, the law does not make it mandatory that a person or persons belonging to a particular community must refer their matrimonial dispute to a communal board relevant to the community to which they, supposedly, belong. Under section 101 of the LMA, the law requires the matrimonial dispute to be referred to the marriage conciliation board regardless of whether it is a ward marriage conciliation board or a communal marriage conciliatory board.

Furthermore, it is important to note that the communal marriage conciliatory board, relevant in a particular locality, does not exist automatically just because a particular community also exists in that area. It has to meet conditions stated in section 102(2) of the LMA and regulation 3 of the Marriage Conciliation Boards (Procedure) Regulations, G.N. No. 240 of 1971. The designated communal marriage conciliatory boards were, and are

established under Government Notices numbers 96 of 1971, 211 of 1971, and 245 of 1971. Most of these communal marriage conciliatory boards are established by religious communities and the same may continue to be established under items 344 and 345 of the relevant government notices.

It is also apparent from the law that even when a matrimonial dispute is referred to and determined by the Marriage Conciliation Board which has no jurisdiction pursuant to section 103(2) of the LMA, the situation is rescued by the provisions of section **104(7) of the LMA** which provides that:

> ***"The proceedings of a Board shall not be invalid by reason only of the fact that it did not have jurisdiction under subsection (2) of section103."***

Therefore, even if, the learned trial magistrate were correct that the parties' matrimonial dispute was entertained by the improper marriage conciliation board, which, with respect, he was wrong, the remedy was not to strike out the petition because the law, as above reproduced considers the proceedings of any of the boards legally established as valid even if it lacked jurisdiction as per the law.

This court is persuaded by the holding in the case of **Said Abdallah vs Pili Jumanne Ndaluya (PC Civil Appeal 62 of 2017) [2018] TZHC 2764** (22 June 2018) where her Ladyship Mutungi, J., overruled the argument that BAKWATA marriage conciliation board had no jurisdiction to reconcile matrimonial dispute by resorting to section 104(7) of the LMA.

Moreover, his Lordship Mwalusanya, J., in the case of **Halima Athumani vs Maulidi Hamisi [1991] TLR 179** was faced with a situation like the one in the case at hand. It can be deduced from the decision that the spouses in that case had contracted an Islamic marriage in 1983. Later their marriage turned sour, and efforts to have the spouses reconciled at the Arbitration Tribunal proved abortive. The dispute was referred to a primary court which dissolved the marriage. The husband appealed to the district court which reversed the decision of the trial court on the grounds that both parties belonged to an Islamic community and their marriage was according to Islamic law, the proper board to reconcile them was a board of the Islamic community. It was further held that since the board was not in accordance with section 103(2)(b) of the Law of Marriage Act. No. 5/1971, there was no reconciliation ever made. When the appeal reached the High Court, the decision of the district court was reversed, and His Lordship Mwalusanya. J., held that:

> ***"On my part, I find that the learned District Magistrate was wrong. It is provided under section 104(7) of the Law of Marriage Act that: The proceedings of a Board shall not be invalid by reason only of the fact that it did not have jurisdiction under section 105(2). Therefore, the mere fact that it was not the Moslem Conciliatory Board that reconciled the parties, does not render the reconciliation a nullity. An ordinary Marriage Conciliatory Board can perform those functions and that would be effectly****(sic)*** **alright".**

This court is persuaded by the above holding and wholly subscribes to it. Moreover, the position that ward marriage conciliation boards could entertain matrimonial disputes which would have otherwise been referred to the communal marriage conciliation boards is cemented by the provisions of section **104(1)(2) of the LMA**. The said sections provide as follows:

> ***"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 considers it necessary, adjourn the proceeding from time to time.*
>
> *(2)* ***Where a Board is of the opinion that it is necessary for it to require the attendance of any person before it, it may by notice in writing, require such person to attend before the Board*** *on the date and at the time and place specified in such notice."*

This court is of the firm view that the above sections make it clear that any of the two categories of the board, be it communal marriage conciliation board or ward marriage conciliation board is allowed by law to hear such other persons as it deems fit and require their attendance before the board. This means that even if a person or persons who had referred their matrimonial dispute to the ward marriage conciliation board but belong to a particular community, like in the present case, the board seized with the fate of the dispute has the mandate to require the attendance of any person

whom they think it is necessary for the reconciliation of the dispute. This means that even religious leaders or members of the community to which parties belong may be summoned to attend the board's proceedings with a view to assisting the board in a healthier reconciliation of the parties to a dispute.

Further, the marriage conciliation board, if deems fit or necessary, may transfer proceedings of the board under regulation 12 of the **Marriage Conciliation Boards (Procedure) Regulations, G.N. No. 240 of 1971**. The relevant regulation reads:

> *'Where a Board to which a matrimonial dispute has been referred is of the opinion that it is desirable, in the interests of justice, that another Board having jurisdiction in the matter should determine the dispute, it may transfer the dispute to such other Board:*
>
> *Provided that no dispute shall be transferred to any Communal Board unless all the parties to the dispute are members of the community for which the Board has been designated.'*

Therefore, reading section 103(2)(b) of the LMA and the proviso to regulation 12 above, it comes down clean that the restriction on jurisdiction of the marriage conciliation board is very strict on the communal board compared to the ward marriage conciliation boards. For a communal board to hear and reconcile a dispute, the parties to a matrimonial dispute must be members of the same community. However, the ward marriage

conciliation board is vested with jurisdiction depending on the residence of the parties, especially that of the husband.

In light of the above, it is the opinion of this court that it is safe to conclude that the ward marriage conciliation board has jurisdiction to hear and reconcile any matrimonial dispute if the board is established for the ward within which the husband or intended husband resides, or where the husband or intended husband is not resident in Tanzania if the board is established for the ward within which the wife or the intended wife resides regardless of whether the parties to a dispute belong to one community or otherwise. On the other hand, the communal board has jurisdiction to hear and reconcile a matrimonial dispute provided that all the parties to the dispute are members of the community for which the board has been designated.

Therefore, this court is of the firm view that the trial magistrate was wrong in ruling that the parties herein were reconciled by an improper board because of their religious faith. The magistrate was also wrong in striking out the petition for divorce under the assumption that it was incompetent. Thus the second ground of appeal has merits and is allowed.

Having determined the second ground of appeal, now backpedaling to the first ground of appeal. In support of the first ground of appeal, Ms. Gibai submitted that the appellant and the respondent were not heard before the district court of Bunda made a decision to strike out the Matrimonial Cause

No. 03 of 2023. It was the learned counsel's submission that the court was supposed to hear both parties before addressing the matter it raised suo motto.

It was submitted that the court, on its own motion, raised the matter that it was wrong for the parties to refer their matrimonial dispute to the ward marriage conciliation board instead of their church's (communal) marriage conciliation board and determined the same without hearing the parties. The appellant submitted that what the court did was contrary to **Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977** (as amended). It was the appellant's further submission that the said article insists on hearing the parties first before making a decision on any matter. Since the parties were not heard it was unfair to them and thus prejudiced.

The Respondent, with respect to the first ground of appeal, responded by submitting that they object to the first ground of appeal. It was the respondent's counsel submission that in law every legal rule has an exception, the appellant knows that there is a right to be heard but there is an exception to that right. The respondent relied on the case of the **Judge Incharge High Court Arusha & Another vs Nin Munuo Ng'uni (Civil Appeal 45 of 1998)** (unreported) in which it was observed that 'we are aware of the right to be heard, like all legal rules, it has exceptions'. Therefore, it was the respondent's submission, that the district court of Bunda did not err in making the decision on the matter without hearing the parties and thus the right to be heard was not violated because there are exceptions to it.

This court, in addressing this ground of appeal, revisits the record of the subordinate court. The decision subject matter of this appeal is dated 18/08/2023. However, it is important to backtrack the proceedings to 21/06/2023 where the proceedings indicate that three issues, though questionably, seem to have been drawn for determination as follows:

"1. Whether the marriage between the petitioner and the respondent has broken down irreparably.

2. Whether parties have acquired properties by joint efforts during their(sic) subsistence of their marriage"

3. What reliefs are the parties entitled to?"

Considering the issues above, it is clear as sunshine that no issue was framed relating to the propriety of proceedings before the Nyamakokoto ward marriage conciliation board or any other board in that respect.

Thereafter, the petitioner prayed to close her case and the court granted the prayer by closing her case. Then the court ordered that a hearing for the defence case commence on 10/07/2023 when, however, the defence case could not proceed because the notice to produce issued by the respondent was not served on the petitioner. The matter was adjourned to 24/07/2023 where the record shows that the petitioner's advocate was absent on notice and thus the matter was adjourned to 18/08/2023 for hearing. The record further shows that on 18/08/2024 when parties appeared before the court for a defence hearing (the respondent's case), the trial magistrate came up with the ruling commencing with the following words:

"When I was about to start hearing defence by the respondent, I discovered from pleadings that, parties are Christian of the catholic faith and they celebrated their marriage on 19/04/2003 at Bugando Parish in Mwanza Region....'

Thereafter, the learned trial magistrate continued to address the matter himself without inviting the parties and/or their advocates, who were present in court, to address the court on the matter, and, regrettably, ended up striking out the petition for divorce. From the record, it is crystal clear that the trial magistrate condemned the parties unheard when he decided to swim on his own frolic, leaving the parties outside the conundrum. The law on hearing the parties before making a decision that affects their rights is well established in our jurisdiction and it is one of the basic tenets enshrined in our Constitution. **Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977** provides that:

"13(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) ***when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing*** *and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;"*

As the above article provides the parties' rights were being determined by the trial court, but the court decided to terminate proceedings by striking out

the matter for a reason unknown to the parties, and the parties were not accorded an opportunity to address the court, and thus it goes without saying that parties were treated unfairly by the trial magistrate.

The respondent in objecting to the ground of appeal argued that the right to be heard as any other legal rule has exceptions citing the case of **Judge Incharge High Court Arusha & Another vs Nin Munuo Ng'uni (Civil Appeal 45 of 1998)** (Unreported). However, Mr. Muroba, counsel for the appellant, did not provide any exception to the right to be heard relevant to the case at hand that justified the trial magistrate to act as he did.

Moreover, the said case purportedly relied upon by Mr. Muroba trying to justify the erroneous decision of the trial magistrate does not support the departure from the cardinal principle of the right to be heard. The Court of Appeal was referring to a situation where the right to be heard is given to a person who could not readily be traced but, in the end, ruled that the case before them did not fall into that category. The said case, however, insisted that the current trend demands not only that a person be given a right to be heard, but that he be given an "adequate opportunity" to be heard. Therefore, this court finds that the case of **Judge In Charge(supra)** supports the appellant's appeal.

Moreover, the right to be heard has been, on several occasions, addressed by the Court of Appeal of Tanzania from various angles. The Court of Appeal in the case of **Mary Mchome Mbwambo & Amos Mbwambo vs Mbeya Cement Company Ltd (Civil Appeal 161 of 2019) [2022] TZCA 179 (4 April 2022)**, quoting with approval the case of **Abbas Sherally &**

Another v. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported), the right to be heard before an adverse action is taken is well elucidated when the Court said:

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous 18 decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."*

The Court further held that:

> *The violation of the right to be heard is a breach of the cardinal principle of natural justice and an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977. See* ***Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma [2003] T.L.R. 251***.

Also in the case of **Oysterbay Villas Limited vs Kinondoni Municipal Council & Another (Civil Appeal 110 of 2019) [2021] TZCA 190** (7 May 2021) the Court of Appeal (on pages 9-11 of the typescript) ruled that:

> *"Natural justice is a cardinal principle which is entrenched as a fundamental right and includes the right to be heard amongst the attributes of equality before the law in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the*

Constitution). In this regard, the Court has in a plethora of decisions emphasised that ***the courts should not decide on a matter affecting the rights of the parties without giving them an opportunity to express their views, or else that would be a contravention of the Constitution and the decision would be rendered void and of no effect. See - TRANSPORT EQUIPMENT VS DEVRAM VALAMBHIA [1998] TLR*** *89,* ***KAPAPA KUMPINDI VS THE MANAGER TANZANIA, MBEYA RUKWA AUTOPARTS AND TRANSPORT LIMITED VS JESTINA MWAKYOMA*** *[2003] T.L.R 253, and at page 36* ***VIP ENGINEERING AND MARKETING LIMITED AND OTHERS VS CITI BANK TANZANIA LIMITED,*** *Consolidated Civil References No. 5, 6,7 and 8 of 2008* ***SAMSON NGWALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY,*** *Civil Appeal No. 86 of 2008;* ***R. S. A. LIMITED VS HANSPAUL AUTOMECHS LIMITED AND ANOTHER,*** *Civil Appeal No. 179 of 2016 and* ***CHRISTIAN MAKONDORO VS THE INSPECTOR GENERAL OF POLICE AND ANOTHER,*** *Civil Appeal No. 40 of (all unreported). In the latter case, the learned trial Judge had dismissed a suit on ground that it had no pecuniary jurisdiction on the matter it had raised suo motu while composing the judgment. The Court held:*

> *"Thus, consistent with the constitutional right to be heard as well as settled law, we are of the firm view that, in the case at hand the adverse decision of the trial Judge to reject the suit on*

account of lacking jurisdiction without hearing the parties is a nullity and it was in violation of the basic and fundamental constitutional right to be heard".

Moreover, on page 12 the court held that:

"Thus, consistent with the constitutional right to be heard as well as settled law, in the matter under scrutiny the adverse decision of the trial Judge to dismiss the suit on account that the expired certificate of approval of disposition vitiated the agreements without hearing the parties was in violation of the basic and fundamental constitutional right to be heard and is a nullity."

Therefore, in light of the above, as regards the first ground of appeal, this court finds that the learned trial magistrate acted in abrogation of the cardinal principle of natural justice of the right to be heard. The magistrate was required to hear the parties before rendering an adverse decision against them, especially the petitioner. Acting as he did renders his decision a nullity. Therefore, the first ground of appeal is also meritorious and thus allowed.

Taking into account prayers made by the parties and the decision of this court hereinabove, this court settles for the following orders:

1. This appeal is allowed in its entirety.

2. This court nullifies and sets aside the ruling and order of the trial court dated 18/08/2023.
3. The case file, that is Matrimonial Cause No. 03 of 2023 is hereby remitted to the trial court and shall proceed with the defense hearing before another magistrate.
4. No order as to costs.

It is so ordered.

Dated, signed, and sealed at Musoma this 19th day of February, 2024.

K. I. KAFANABO

JUDGE

The Judgment has been delivered in the presence of Mr. Emmanuel Mng'arwe, Advocate for the appellant (appellant also present) and in the presence of the respondent in person.

K. I. KAFANABO

JUDGE

19/02/2024