

**Settlement of Matrimonial Disputes through Marriage Conciliation Boards in Mainland Tanzania: Critical Examination of the Law and Practice Governing Communal Boards**

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***Abstract***

*Concerns about irregularities occasioned by Marriage Conciliation Boards in the course of reconciliation of estranged couples are continuously becoming known in different ways, including, scholarly works and case law. This article examines the law and practices governing Communal Boards to finding out the adequacy of the law governing marriage reconciliation through the Boards and reasons for the emerging irregularities in the process of settlement of matrimonial disputes through Communal Boards. The study employed both documentary review and in-depth interviews as methods of data collection. The study found that the law governing the process of the settlement of matrimonial disputes through Communal Boards is inadequate. The study also found that a lack of awareness of the law governing Communal Boards among parties to matrimonial disputes and members of the Boards is the major reason for the irregularities in the process of settlement of matrimonial disputes through Communal Boards. The article recommends for reform of the law governing the process of the Boards and training of members of the Boards on their envisioned role in marriage reconciliation.*

**Keywords:** Marriage Conciliation Boards; Communal Boards; irregularities, matrimonial disputes; Tanzania Mainland.

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## 1. INTRODUCTION

One of the commonest features of most African marriage laws, Tanzania's laws inclusive, is the integration of customary and religious practices of various communities.<sup>1</sup> Both customary and religious communities exercise a form of authority over their members.<sup>2</sup> Submission to the powers or authority of the communities may be highly voluntary, unlike state laws which require strict compliance.<sup>3</sup> The assertion of communal powers may also be a hybrid of partly voluntary and partly coercive.<sup>4</sup> Thus, whenever rules of certain communities are integrated into the statutory laws it implies that members of the respective community must follow the statutory law to the latter.

Marriage reconciliation through community boards was duly recognized when the Government was canvassing to introduce a uniform law of marriage.<sup>5</sup> Customary and religious practices were duly recognised as they were found to yield some good results in the maintenance of peace and harmony in families.<sup>6</sup> Thus, in establishing Marriage Conciliation Boards, communities which had established committees or boards for marriage reconciliation were given due recognition by the Minister after they were designated to act as such.<sup>7</sup>

This article examines the law and practice governing Marriage Conciliation Boards in the settlement of matrimonial disputes in Mainland Tanzania with specific reference to Communal Boards.<sup>8</sup> A Communal Board is defined as a Marriage Conciliation Board designated under

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<sup>1</sup> David Pimentel, 'Legal Pluralism in Postcolonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 14 Yale Human Rights and Development Law Journal 59.

<sup>2</sup> Lynn D Wardle, 'Marriage and Religious Liberty: Comparative Law Problems & Conflict of Laws Solutions' (2010) 12(2) Journal of Law and Family Studies 315.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Jamhuri ya Muungano wa Tanzania, 'Majadiliano ya Bunge (Hansard): Taarifa Rasmi: Mkutano wa Pili.' (1971) (Dar es salaam: Mpiga chapa Mkuu wa Serikali) 67-68.

<sup>6</sup> Ibid.

<sup>7</sup> FK Kassam, 'Government Paper No. 1 of 1969: Government's Proposals on Uniform Law of Marriage: Notes and Comments' (1969) 2(3) Eastern Africa Law Review 338.

<sup>8</sup> A term communal comes from the word community. The term is defined under the Community Development Policy to comprise people of the same origin, living in the same area or people with similar occupation. A communal society is formed on the basis of common character, shared interests and values and it may serve religious, social, political or economic reasons while placing emphasis on the needs of eth community as opposed to those of an individual. See United Republic of Tanzania, 'Community Development Policy' (1996) Ministry of Community Development, Women Affairs and Children 2.

section 102 (2) of the Law of Marriage Act (LMA)<sup>9</sup> as a Board of the community for which it is so designated.<sup>10</sup> The term Board is also defined as a Marriage Conciliation Board established or designated under section 102 of the Act and includes a Communal Board.<sup>11</sup>

The LMA establishes Marriage Conciliation Boards under section 102 intending to provide a forum for marriage reconciliation to couples with disputes relating to breakdown or anticipated breakdown of marriages.<sup>12</sup> When the Government was contemplating on establishing Marriage Conciliation Boards, there were two main ideas to be reconciled:- (1) to ensure that divorces are not treated lightly as was the practice then and (2) to ensure that parties should not be forced to continue living together as husband and wife when the marriage between them has completely broken down.<sup>13</sup> Thus, section 101 of the LMA imposes a mandatory requirement for prior reference of matrimonial disputes or matters to the Marriage Conciliation Board before a petition for divorce is filed in court.<sup>14</sup> Where the Board is unable to reconcile the dispute to the satisfaction of the parties, it issues a certificate which acts as a gateway to either party to petition for divorce in a court of competent jurisdiction.<sup>15</sup> A certificate issued by the Board is *prima facie* evidence that the marriage between the parties has irreparably broken down.<sup>16</sup>

Reference to Marriage Conciliation Board means either the Board established in every ward subject to the provisions of section 102 (1) of the LMA as amended by the Laws Revision (Miscellaneous Amendments) Act<sup>17</sup> or Boards designated under section 102 (2) of the LMA.

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<sup>9</sup> Cap. 29 R.E 2019.

<sup>10</sup> See Regulation 2 of the Marriage Conciliation Boards (Procedure) Regulations, GN No. 240 of 1971.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, Reg. 9 (2).

<sup>13</sup> See United Republic of Tanzania, ‘Government Proposals on Uniform Law of Marriage and Divorce: White Paper No. 1 of 1969; Jamhuri ya Muungano wa Tanzania, ‘Majadiliano ya Bunge (Hansard): Taarifa rasmi: mkutano wa pili (1971); United Republic of Tanzania, ‘Inquiry and Report on the Law of Marriage Act, 1971’ (1994) Law Reform Commission of Tanzania and LMA, ss. 101 and 140.

<sup>14</sup> See *Patrick William Magubo v. Lilian Peter Kitali*, Civil Appeal No. 41 of 2019, Court of Appeal of Tanzania at Mwanza Registry (unreported). See also *Hassani Ally Sandali v. Asha Ally*, Civil Appeal No. 246 of 2019, Court of Appeal of Tanzania at Mtwara Registry (unreported).

<sup>15</sup> See section 76 of the Law of Marriage Act, 1971 (R.E 2019).

<sup>16</sup> *George Sayi Nzunzulima v. Claudia Paulo Leo*, Miscellaneous Civil Application No. 74 of 2019, High Court of Tanzania at Mwanza District Registry (unreported), Manyanda, J., at p. 6 of the word processed judgment.

<sup>17</sup> LMA, s. 102 (1) as amended by the Laws Revision (Miscellaneous Amendments) Act No. 9 of 1996 establishes Marriage Conciliation Boards in every ward in Mainland Tanzania. See also J Alphonse, C Binamungu and SM Bakta ‘Factors Hindering Couples from Accessing Marriage Conciliation Boards in Mainland Tanzania’ (2022) Journal of African Law.

This implies that parties to matrimonial disputes have the flexibility to choose the forum for reconciliation that is either the secular Boards or Communal Board designated for their respective community.<sup>18</sup>

The Minister responsible for legal affairs is empowered to designate committees or body of persons established for any community in Tanzania as Marriage Conciliation Boards and the Board so designated is referred to as a Communal Board. The Minister exercises his powers when satisfied that the community has established for itself a Committee or a body of persons to perform the functions of Marriage Conciliation Boards and that it is desirable for such committee or body of persons to be designated as the Board with jurisdiction over the members of that community.<sup>19</sup>

In that regard, the Appointment of Communal Conciliatory Boards Notice enlists 343 designated Marriage Conciliation Boards in respect of the communities specified in the Notice.<sup>20</sup> These are mainly religious communities that serve on the Board designated as the Commissioner for Social Welfare Committee under the Ministry of Health and Social Welfare. The established Committee caters for all the communities in Mainland Tanzania.<sup>21</sup> The enlisted designated communities under the Notice include 1 for the Bohora community in Dar es Salaam; 110 for Christian communities, 8 for Khoja Ismailis communities,<sup>22</sup> 1 for KhojaShia Ithnasheri community in Songea, 75 for the Lutheran Christian communities, 143 for Catholic Christian communities,<sup>23</sup> 3 for Muslims community in Dar es salaam and the Commissioner for Social Welfare's Committee, Ministry of Health and Social Welfare in Dar es Salaam.<sup>24</sup>

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<sup>18</sup> See s. 103 (2) (b) of the LMA.

<sup>19</sup> LMA, s. 102 (2). See also LMA, s. 2 where reference to the Minister means the Minister responsible for legal affairs.

<sup>20</sup> See G.N No. 245 of 1971.

<sup>21</sup> Ibid. See Item 124 of the Notice.

<sup>22</sup> These are in Dar es salaam, Dodoma, Mbeya, Tabora, Mwanza, Moshi, Tanga and Mtwara Regions.

<sup>23</sup> The Communal Boards for Christian communities are mainly in Peramiho-Songea, Iringa, Morogoro, Mbeya, Kasulu-Kigoma and Moshi-Kilimanjaro.

<sup>24</sup> See G.N No. 245 of 1971. It is to be noted that at the time when the study was conducted, the Commissioner for Social Welfare was based in Dodoma under the Ministry of Health Community Development Gender Elderly and Children. Most of public institutions had shifted from Dar es salaam to Dodoma.

A review of the literature and analysis of case law show that the requirement for prior reference to Marriage Conciliation Boards is tainted with irregularities in several respects.<sup>25</sup> Meanwhile, neither the LMA nor the subsidiary legislation made thereunder appear to offer guidance on important matters or principles that would enable Boards to comprehend their envisioned role in ensuring that divorces are not treated lightly.<sup>26</sup> Thus, available literature reveal that, several irregularities in the process of the Boards suggest malfunctioning of the institution entrusted to oversee the institution of marriage.<sup>27</sup>

The study by Rwezaura and Wanitzek indicates that, the requirement for reference to Marriage Conciliation Board is a statutory encapsulation of the traditional dispute settlement process found in most African societies. However, the formalization of the process led to some practical difficulties.<sup>28</sup> Thus, the authors suggest that the requirement for prior reference to the Boards and its practice requires a careful study.<sup>29</sup> Besides, both the High Court of Tanzania and the Court of Appeal of Tanzania have on several occasions nullified proceedings on account of irregularities in the process of the Boards.<sup>30</sup> It is against this backdrop that the current study examines the law and practice governing Marriage Conciliation Boards with specific reference to Communal Boards.<sup>31</sup>

This article has four (4) major parts: Part one is the introduction, where the authors provide an overview of the law governing Marriage Conciliation Boards in Mainland Tanzania. Part two

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<sup>25</sup> *Seif Omary Ngunge v. Husna Ally Mikengesi* Civil Appeal No. 397 of 2021, High Court of Tanzania at Dar es salaam (unreported). Kamana, J.; *Humphrey Lyimo v. Magreth Stephano* (PC) Civil Appeal No. 19 of 2021, High Court of Tanzania at Moshi Sub-Registry (unreported), Mwenempanzi, J.; *Happiness Masisi v. Maximillian Buhatwa* (PC) Civil Appeal No. 12 of 2019, High Court of Tanzania at Dar es salaam Sub-Registry (unreported), Mlacha, J. pp. 7-9; *Said Abdallah v. Pili Jumanne Ndaluya* (PC) Civil Appeal No. 62 of 2017, High Court of Tanzania at Dar-es-Salaam District Registry, (Unreported); Mutungi, J.

<sup>26</sup> C Binamungu, 'A Competent Matrimonial Case in Tanzania Mainland: Lessons from Recent High Court Decisions' (2018) 1 (1) the Tanzania Lawyer 1, 75. BA Rwezaura, 'Gender Justice and Children's Rights: A Banner for Family Law Reform in Tanzania' (1997) International Survey of Family Law, 413.

<sup>27</sup> Ibid. See also C Binamungu, 'Book Review: Introduction to Family Law in Tanzania' (2020) 30 (2) Journal of Management and Development Dynamics 1, 4.

<sup>28</sup> BA Rwezaura and U Wanitzek, 'Family Law Reform in Tanzania: A Socio-Legal Report' (1988) 2(1) International Journal of Law and the Family 1, 21.

<sup>29</sup> Ibid.

<sup>30</sup> See *Clemence Ngonyani v. Roswita Komba* [2017] TLS LR 176 and *Egil Steen Wisloff Nilssen v. Rose Mukangarambe Nilssen*, Civil Appeal No. 3 of 1989, Court of Appeal of Tanzania at Dar es salaam (unreported).

<sup>31</sup> See J Alphonse, C Binamungu and SM Bakta, 'Factors Hindering Couples from Assessing Marriage Conciliation Boards in Mainland Tanzania' (2022) 66 (3) Journal of African Law 439 for a discussion on Secular Boards.

dwells on the methodological aspects addressing the type of research, research methods employed to carry out the study and analysis of data obtained from the study. Part three discusses the law and practices governing Communal Boards in Mainland Tanzania. The discussion in this part relates to the findings obtained from the study. The findings reveal that the law governing the process of marriage reconciliation through Communal Boards is inadequate. Besides, the many irregularities occasioned in the reconciliation of matrimonial disputes through Communal Boards are due to lack of knowledge among disputants and members of the Boards on the requirements for prior reference to Boards duly designated under section 102 (2) of the LMA. Part four presents the conclusion and recommendations.

## 2. METHODOLOGY

The study applied both doctrinal and non-doctrinal legal research and qualitative research approaches.<sup>32</sup> It employed both documentary review and in-depth interviews as methods of data collection. The researchers first consulted primary sources of law through the analysis of legislation and case law relevant to the area of the study.<sup>33</sup> The study reviewed selected constitutions establishing religious institutions and other documentary materials such as proceedings of Communal Board and the courts in matrimonial cases,<sup>34</sup> books of authority, journal articles, government reports and Speeches by the Minister for Legal Affairs and the Minister of Health Community Development Gender Elderly and Children.

Consequently, in-depth interviews were conducted with members of Communal Boards and religious leaders including Sheikhs from the National Council of Muslims of Tanzania; Parish Priests and the Judicial Vicars from the Roman Catholic Church; the Pastor in charge for the Evangelical Lutheran Church of Tanzania, the Evangelistic Assemblies of God of Tanzania; the Tanzania Assemblies of God and the Anglican Church. Other categories of respondents were

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<sup>32</sup> Rattan Singh, *Legal Research Methodology* (LexisNexis 2013) 84.

<sup>33</sup> The legislative materials included the Law of Marriage Act, Cap 29 RE 2019; the Marriage Conciliation Boards (Procedure) Regulations; the Appointment of Communal Conciliatory Boards Notice, GN No. 245/1971; the Societies Act Cap. 337 RE 2002.

<sup>34</sup> This included review of certificates and proceedings of the Boards. Court records reviewed included the matrimonial case filed from 2017-2020 when the study was conducted. Court proceedings were reviewed from Morogoro (Nunge) Primary Court, Kingolwira Primary Court and Chamwino Primary Court, District Court and Court of Resident Magistrate in Morogoro. In Kilimanjaro Region, court proceedings were reviewed from Moshi Urban Primary Court, Marangu Primary Court, Kindi Primary Court, Himo Primary Court, the District Court and Court of Resident Magistrate of Moshi at Moshi.

Social Welfare Officers at District and Ward levels and the parties who had made reference of matrimonial disputes to Communal Boards. The identified categories of respondents were purposively selected, based on the criteria that they had information relevant to issues relating to Communal Conciliatory Boards.<sup>35</sup>

Data obtained from the study were processed and developed into notes and themes and subsequently analysed through content analysis.<sup>36</sup> The researchers observed confidentiality throughout the study. In this regard, permission to conduct the study was sought from relevant authorities. Moreover, the researchers ensured that informed consent was obtained from all respondents who took part in the interviews.

### **3. THE LAW AND PRACTICE GOVERNING COMMUNAL BOARDS**

This part presents the findings of the study that sought to examine the law and practices governing Marriage Conciliation Boards with specific reference to Communal Boards. The study was motivated by existence of several irregularities in the process of reconciliation through Communal Boards in Mainland Tanzania. Some irregularities have been identified after parties had spent considerable time prosecuting their matrimonial disputes. This occurs when the dispute is at the second or third appellate court and the effect is that proceedings of the Board are nullified thus causing distress and humiliation to the parties. This is because after nullification, regardless of the stage that had been reached, the parties will be urged to initiate fresh proceedings.<sup>37</sup>

The data obtained from the study suggests three (3) major findings:- First, the law governing the process of the Boards is inadequate and; second, parties to matrimonial disputes lack awareness of the role of the Boards and in locating Boards competent for marriage reconciliation. Members of Communal Boards do not comprehend their role as envisioned under section 101 of the LMA. These findings are presented below in three headings, namely; composition of Communal Boards, designation of Communal Boards and the process of the Boards.

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<sup>35</sup> Purposive sampling is one form of non-probability sampling whereby some elements of the population have no chance of being selected. See Singh, (n 26) 116.

<sup>36</sup> See MQ Patton, *Qualitative Research & Evaluation Methods* (3<sup>rd</sup> Ed, Sage Publications 2002) 339. See also C Chatterjee *Methods of Research in Law* (Old Bailey Press) 31.

<sup>37</sup> See *Sadiki Rashid v. Mariam Mohamed* (supra).

### 3.1 Composition of Communal Boards

Marriage Conciliation Boards are constituted by a chairman and not less than two and not more than five other members.<sup>38</sup> This means that the minimum number of members of the Board is three (3) and the maximum is six (6). The Marriage Conciliation Boards (Procedure) Regulations<sup>39</sup> provide for a different form of composition for Communal Boards. This is despite that a Marriage Conciliation Board is defined to include a Communal Board.<sup>40</sup> Regulation 3 (1) states in part that, every Communal Board shall consist of a Chairman and not less than four (4) other members. This implies that Communal Boards are duly constituted by a minimum of five (5) and the maximum is unlimited. While this is the case, Regulation 4 of the Marriage Conciliation Boards (Procedure) Regulations provides for the quorum necessary for the transaction of the business of a Board to be three (3) members.

The composition of the Communal Board established for all Communities in Mainland Tanzania, (the Commissioner for Social Welfare's Committee) include the Commissioner for Social Welfare as the Chairman, the Senior Welfare Officer as the Vice Chairman and three (3) other members who are appointed by the Commissioner for Social Welfare.<sup>41</sup> The Boards designated for the National Council of Muslims/BAKWATA at the district level consists of eleven members while the Roman Catholic and Evangelical Lutheran Church of Tanzania (ELCT) comprise five and six members respectively. Meanwhile, Items 344 of the Appointment of Communal Conciliatory Boards Notice<sup>42</sup> designates as a Marriage Conciliation Board any Board or Committee established by any religious community duly registered under the Societies Act provided *inter alia* that such Board or Committee consists of not more than five (5) and not less than three (3) members including the Chairman. This provision conflicts with Regulation 3 (1) of GN No. 240 of 1971 in that the latter does not specify the maximum number of members to constitute a Communal Board.

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<sup>38</sup> LMA, s. 103 (1).

<sup>39</sup> See GN No. 240 of 1971.

<sup>40</sup> Ibid, Regulation 3 (1).

<sup>41</sup> See the Notes to the Appointments of Communal Conciliatory Boards Notice GN 196 of 1971.

<sup>42</sup> Ibid.



Furthermore, under Item 345 of the Notice, any Marriage Conciliation Board establishment by BAKWATA in any area of Mainland Tanzania is a designated Communal Board provided *inter alia* that the Board shall consist of a Chairman and not more than five (5) and not less than three (3) members appointed by the proper organ of BAKWATA.

The analysis of the Constitutions of religious communities indicates that, Committees or Boards established for the settlement of matrimonial disputes are constituted by at least five (5) members.<sup>43</sup> However, the practice has revealed that some religious leaders would singlehandedly determine a matrimonial dispute brought before them for reconciliation and proceed to certify on failure to reconcile the parties. Further analysis reveals that the Constitutions of designated communities are not aligned with the provisions of the LMA. This omission has caused the Board to handle matrimonial disputes contrary to the requirements envisioned under the LMA. In *Sadiki Rashid v. Mariam Mohamed*,<sup>44</sup> a petition for divorce was accompanied by a letter signed by a Sheikh in his individual capacity and not as a Chairman, Vice Chairman or a member of a Marriage Conciliation Board. The High Court observed that BAKWATA is one of the Boards designated under the Appointment of Communal Conciliatory Boards Notice. However, it was concerned about the composition and the contents of the letter attached to the petition of divorce. The High Court held that the said letter under any stretch of the imagination could not be treated as Marriage Conciliatory Board certificate and thus proceeded to quash the proceedings of the lower courts. The High Court observed that the letter did not bear the signature of the Chairman, Vice Chairman or any member of the Board but rather of BAKWATA Sheikh for Morogoro District sitting as a religious marriage dissolution organ and not as a Marriage Reconciliation Board.<sup>45</sup>

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<sup>43</sup> See Baraza la Maaskofu Katoliki Tanzania, *Katiba ya halmashauri ya walei Tanzania* (Green Earth Paper Ltd 2019) 27. See also Bazara Kuu la Waislam wa Tanzania, *Katiba ya baraza kuu la waislam wa Tanzania (BAKWATA) ya mwaka 1999* (2018); Kanisa la Kiinjili la Kilutheri Tanzania: Dayosisi ya Kaskazini, *Katiba: Kanuni, sheria na maongozi ya Sharika* (2018).

<sup>44</sup> (PC) Civil Appeal No. 3 of 2021, High Court of Tanzania at Dar es salaam District Registry (unreported), Kakolaki, J. at p. 8-10.

<sup>45</sup> See also *Happiness Masisi v. Maximillian Buhatwa* (PC) Civil Appeal No. 122 of 2019, High Court of Tanzania at Dar es salaam District Registry (unreported), Kakolaki, J and *Amani Abdallah v. Hamisa Msabaha* (PC) Civil Appeal No. 2 of 2011, High Court of Tanzania at Tabora District Registry (Unreported), Wambali, J.

In *Egil Steen Wisloff Nilssen v. Rose Mukangarambe Nilssen*,<sup>46</sup> a letter addressed to the Resident Magistrate and of which indicated that a matrimonial dispute between the parties could not be resolved was signed by the pastor in his personal capacity. The Court of Appeal held categorically that the emphasis on Form No. 3 is placed on the matrimonial dispute being referred to a Marriage Conciliatory Board, as distinct from an individual or individuals and that the certificate issued pursuant to such a reference is issued on behalf of the Board. The Court said that, looking at Exh. P3 one does not gather the impression that the matrimonial difficulty was referred to the Rev. pastor James C. Bangsund as a Conciliatory Board, and not in his capacity as an individual.<sup>47</sup>

In-depth interviews with the Chairman and Secretary of a Marriage Reconciliatory Tribunal established by the National Council of Muslims of Tanzania in Morogoro and Moshi Municipalities revealed that the composition of the Tribunal is eleven (11) members. The Chairman of the Marriage Tribunal for Morogoro said that in the event there is one member available, he can attempt to reconcile parties to a matrimonial dispute and failure to reconcile entitles such member to singlehandedly certify on failure to reconcile the parties. A similar observation was made by the pastor in charge of the Evangelical Assemblies of God of Tanzania (EAGT) in Moshi that he can attempt to reconcile the parties and proceed to determine their dispute even when other members of the Reconciliatory Committee are absent. The pastor added that on failure to reconcile the parties, he would write a letter referring the parties to court. In a further interview with the pastor, it was revealed that the pastor was oblivious to the requirement for the designation of the Reconciliatory Committee in terms of the LMA.

This finding implies that the requirements of the LMA on the composition of Communal Boards and their role for the purposes of section 101 of the LMA are unknown among members of the communities designated as Marriage Conciliation Boards and even parties who refer matrimonial disputes to the religious communities.

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<sup>46</sup> Supra (n 25).

<sup>47</sup> Ibid, p. 3 of the typed judgment.

### 3.2 Designation of Communal Boards

The LMA gives jurisdiction to the Committee or body of persons designated for any community to perform the functions of a Marriage Conciliation Board where both parties belong to the same community.<sup>48</sup> It has been stated in the introductory part that for a Committee or body of persons established for a certain community to perform the functions of a Marriage Conciliation Board, the prior designation is imperative.<sup>49</sup> Thus, the Appointment of Communal Conciliatory Boards Notice<sup>50</sup> enlists 343 designated Communal Boards for various communities in Mainland Tanzania.

In terms of Items 344 and 345 of the Notice, any Committee or Board established by any religious community duly registered under the Societies Act and any Marriage Conciliatory Board established by BAKWATA in any area of Mainland Tanzania are designated as Marriage Conciliation Boards provided that they fulfil certain conditions.<sup>51</sup> For a Committee or Board established by any religious community to be designated as a Marriage Conciliatory Board it must meet the following conditions:-

- (a) it must consist of not more than five and not less than three members including the Chairman;
- (b) the Chairman and the members must have been appointed by the proper officer of the community by a letter of appointment in writing;
- (c) the proper officer of the community must have notified the Registrar of the establishment of such Board or Committee;
- (d) and the Board or Committee shall exercise jurisdiction as a Marriage Conciliatory Board in respect of the members of the community.<sup>52</sup>

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<sup>48</sup> LMA s. 103 (2) (b). The designated Boards are for the following communities: Bohora, Khoja/Ismaelis, Khoja Shia Ithnasheri, Catholic and Lutheran Christians.

<sup>49</sup> LMA s. 102 (2).

<sup>50</sup> Supra.

<sup>51</sup> BAKWATA stands for Baraza Kuu la Waislamu Tanzania (The National Council of Muslims of Tanzania). The Council with its headquarter in Dar-es-salaam, is listed under Item 88 of the Appointment of Communal Conciliatory Boards Notice as a conciliatory Board for Muslim Communities. Other listed Conciliatory Boards for Muslims include the Sunni-Ibadhi Conciliatory Board (Dodoma Region) and Sunni Muslim Jamaat Conciliatory Board (Dar-es-salaam Region). BAKWATA is connected from national to grassroots level with 22 Regional and 113 District offices all over the country. Muslim Council of Tanzania, 'African Faith Commitments for a Living Planet: Long Term Plan on the Environment' ([www.arcworld.org/downloads/Tanzania-BAKWATA-Summary](http://www.arcworld.org/downloads/Tanzania-BAKWATA-Summary), 2012 accessed 14<sup>th</sup> August 2020. See also Baraza Kuu la Waislam (n 37) Art. 38(7).

<sup>52</sup> GN No. 245 of 1971, Item 344.

As regards Marriage Conciliatory Board established by BAKWATA;

- (a) the Board must consist of a Chairman and not more than five and not less than three members appointed by the proper organ of BAKWATA;
- (b) BAKWATA must give notice to the Registrar of the number of Boards established by it and shall also give the Registrar the postal address of the Boards and
- (c) each such Board shall exercise jurisdiction as a Marriage Conciliatory Board in matters where both parties are Muslims.<sup>53</sup>

It is worth noting that, despite the powers vested to religious communities to establish a Marriage Conciliation Board to cater for reconciliation of matrimonial disputes in respect to their communities, the list of designated Communal Boards was last updated under G.N No. 245 of 1971 as the researchers could not find any other Notice providing for the designated communities. It may be argued that the need to give notice to the Registrar of the number of Boards established after the publication of GN 245 of 1971 was to update the list of designated Communal Boards.

A review of Constitutions for religious institutions including Tanzania Assemblies of God (TAG), EAGT, National Muslim Council of Tanzania (abbreviated in Swahili as BAKWATA),<sup>54</sup> Roman Catholic<sup>55</sup> and Evangelical Lutheran Church of Tanzania (ELCT)<sup>56</sup> revealed that, there are established for the identified religious communities Committees for marriage reconciliation. The Committees are constituted in line with the provisions of Items 344 (a) and 345 (a) of the Appointment of Communal Conciliatory Boards Notice. However, the other requirements as regards notification to the Registrar of the establishment of organs to perform the functions of a Marriage Conciliation Board were not complied with. Interviews results with the District Registrar of Marriages in Moshi and Morogoro Municipalities revealed that these officers have not been issued with the notice on the establishment of Community Boards as per the requirements of the law.

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<sup>53</sup> Ibid, Item 345.

<sup>54</sup> BAKWATA is an abbreviation for Baraza Kuu la Waislamu Tanzania.

<sup>55</sup> Baraza la Maaskofu Katoliki Tanzania, (n 37).

<sup>56</sup> Kanisa la Kiinjili la Kilutheri Tanzania (n 37).

A study in Morogoro Municipality, Mvomero District, Moshi Urban and Moshi Rural Districts found the existence of various religious communities including Muslims and Christians of different sects and denominations respectively.<sup>57</sup> Most of these religious communities have established specific mechanisms in the form of committees or tribunals for the reconciliation of matrimonial disputes. It was also revealed that certain communities purported to handle reconciliation for the LMA without being designated. This is for the reason that such communities do not appear in the list of designated communities neither do they provide evidence of compliance with the requirements for registration as provided for under Items 344 and 345 of the Appointment of Communal Conciliatory Boards Notice.<sup>58</sup> For example, Roman Catholic Church in Morogoro Municipality has nine Parishes out of which, only three have been designated as Communal Boards.<sup>59</sup> The Evangelical Lutheran Church of Tanzania parishes at Bigwa and Tungi in Morogoro Municipality have committees comprising parish priests and church elders to assist parties in the reconciliation of their differences.<sup>60</sup> However, the two Committees are not designated as Marriage Conciliatory Boards.

A similar situation was observed in Mvomero District where communities existing in the visited areas such as TAG and ELCT in Mlali and Sangasanga Wards were not designated Communal Boards neither was there any proof that such communities are registered as designated Marriage Conciliatory Boards. In Kilimanjaro region, several communities that purported to handle the reconciliation of matrimonial disputes had not been designated. This included the TAG and the Free Pentecostal Church in Moshi Municipal Council. In Moshi District Council, Committees for reconciliation of matrimonial disputes at the Seventh Day Adventist (SDA) Church, EAGT and St. Joseph Catholic Parish all located at Longuo A Village in Uru South Ward were not designated Communal Boards.

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<sup>57</sup> Christians denominations include the Roma Catholic (RC), Evangelical Lutheran Church of Tanzania (ELCT), Tanzania Assemblies of God (TAG), Seventh Day Adventists (SDA), Anglican, Pentecostal church, to name just some.

<sup>58</sup> See G.N No. 245 of 1971.

<sup>59</sup> Ibid. See Items 326, 331 and 332.

<sup>60</sup> Interview with Mary Nnko, Pastor in charge, ELCT Bigwa Parish, (Morogoro Municipality, 5 February 2020).

Apart from Boards or Committees established for religious communities, Item 124 of the Appointment of Communal Conciliatory Boards Notice designates the Commissioner for Social Welfare's Committee as a Marriage Conciliation Board. This Board with its address in Dar es Salaam caters for all communities in Mainland Tanzania.<sup>61</sup> This implies that regardless of their religious belief or origin, parties may opt to refer their dispute to the Board established under the Commissioner for Social Welfare's Committee.

It has been observed that the Social Welfare Departments in municipalities and District Councils in Tanzania are performing the functions of Marriage Conciliation Boards. In the course of handling matrimonial disputes, the departments purport to act for the Commissioner of Social Welfare. However, it is noted under Item 124 of the Notice that it is only the Commissioner for Social Welfare's Committee that has specifically been designated as a Marriage Conciliation Board. It is not shown that the functions of the Committee can be delegated to Social Welfare Officers who are in various District Councils, City Councils and Municipal Councils.<sup>62</sup>

In *Happiness Masisi v. Maximillian Buhatwa*,<sup>63</sup> though both parties were duly represented by advocates, an irregularity as regards the status of Social Welfare institutions was raised suo motto by the High Court. The Court discovered that the appeal before it was incompetent. The main issue was whether the proceedings before the trial court were valid. The High Court deferred the judgment to afford the time to the Counsels of the parties to address the court on compliance with section 101 of the LMA. The High Court observed that section 162 (2) of the LMA empowers the Minister to make rules and regulations. By Government Gazettes No. 96, 211 and 245 of 1971, the Minister designated, among others, the Commissioner for Social Welfare Committee, the Ministry of Health and Social Welfare to perform duties of the Marriage Conciliatory Board to all communities in Tanzania Mainland.

The Court held that the designation of the said Commissioner by the Minister does not confer him powers to delegate his duties, as it is not so stated. Since the Commissioner for Social

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<sup>61</sup> See Item 124 of GN 245 of 1971.

<sup>62</sup> United Republic of Tanzania, 'Assessment of the Social Welfare Workforce in Tanzania: Final Report' Ministry of Health and Community Development, Department of Social Welfare 5.

<sup>63</sup> (PC) Civil Appeal No. 122 of 2019, High Court of Tanzania at Dar es salaam District Registry (unreported).

Welfare cannot delegate his duties to the District Social Welfare then the first issue was answered negatively that the Ilala District Social Welfare Officer who purported to reconcile parties had no mandate to sit as a Reconciliatory Board to entertain the parties' disputes. The Court held further that, even if it was assumed that the Social Welfare Officer had the mandate to entertain the dispute, still the letter issued by her was not in conformity with Form No. 3 of G.N No. 240 of 1971. This was the reason that the Social Welfare Officer signed it in her capacity and not as a Chairman of the Board or Committee.<sup>64</sup>

A review of reports and Budget Speeches for the Ministry of Community Development, Gender Elderly and Children indicates that Social Welfare Departments at the District, City and Municipalities in Mainland Tanzania are Marriage Conciliation Boards. These reports have provided the statistics of matters which were successfully handled by the Committees.<sup>65</sup> This is a misconception since the powers of the Committee cannot be performed by any other person or authority.

Another observation is that, High Court judges have developed two schools of thought on the status of Social Welfare Departments as Marriage Conciliation Boards. However, the two schools of thought do not override the provision of the law which does not appear to confer powers to the Social Welfare Departments to perform the functions of Marriage Conciliation Boards. This means therefore that although various religious communities and the Social Welfare Departments have established Boards for the reconciliation of matrimonial disputes, and indeed such Boards are performing the function of marriage reconciliation, their functions are not recognized for the purposes of section 101 of the LMA.

While some High Court judges have certainly held that Boards not appearing under G.N No. 245 of 1971 have no powers to perform the functions of MCB,<sup>66</sup> others have considered the Social

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<sup>64</sup> Ibid, p. 7 of the judgment.

<sup>65</sup> United Republic of Tanzania, 'Budget Speech for the Ministry of Health Community Development Gender Elderly and Children for the Financial Year 2019/2020 and United Republic of Tanzania, Budget Speech for the Ministry of Health, Community, Development, Gender, Elderly and Children for the Financial Year 2020/2021.

<sup>66</sup> See *Happiness Masisi v. Maximillian Buhatwa* (Supra). See also *Rose Athanas Temba v. Alex Rowland Shirima*, (PC) Matrimonial Appeal No 13 of 2005, High Court of Tanzania at Moshi District Registry (unreported), Fikirini, J; *Clemence Ngonyani v. Roswita Komba* (PC) Civil Appeal No. 1 of 2016, High Court of Tanzania at Songea

Welfare Departments as competent organs for marriage reconciliation in terms of section 101 of the LMA.<sup>67</sup> Some judges have treated the proceedings of undesignated Boards to be rescued under section 104 (7) of the LMA. The provision reads:- proceedings of a Board shall not be invalid by reason only of the fact that it did not have jurisdiction under subsection (2) of section 103. Certainly, the provision of section 104 (7) may only rescue proceedings from a Board legally recognized under section 102 of the LMA.<sup>68</sup>

### 3.3 Process of Communal Boards

The LMA under section 104 provides for the process of Marriage Conciliation Boards when attempting to reconcile the parties. According to section 104 (5) of the LMA, where the Board handling a matrimonial dispute or matter fails to reconcile the parties, then it must issue a certificate. According to section 104 (5) of the LMA, where the Board to which a matrimonial dispute was referred is unable to resolve the dispute to the satisfaction of the parties, then such a Board must issue a certificate indicating its findings. A certificate from the Marriage Conciliation Board must be appended to the petition for divorce in terms of Section 106 (2) of the LMA. Failure to attach the certificate renders a petition for divorce incompetent.

A certificate issued under section 101 of the LMA must be in a prescribed Form No. 3 which appears in the Schedule to the Marriage Conciliation Boards (Procedure) Regulations.<sup>69</sup> The main parts of a certificate include the title which states the full designation of the Board; the name of the parties to the dispute, the name of the person referring the dispute to the Board; a statement that the Board was unable to reconcile the parties, recommendations of the Board (if any); signature of the Chairman, stamp and date.

A review of court proceedings from the Primary Court, District Court and Courts of Resident Magistrates in Morogoro and Kilimanjaro revealed that certificates from Committees and Boards not enlisted as designated Boards were being received to initiate petitions for divorce. Despite

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District Registry (unreported), Chikoyo, J. and *Jonathan Mhagama v. Joyce Mangweru* (PC) Civil Appeal No. 2 of 2013, High Court of Tanzania at Songea District Registry (unreported), Chikoyo, J.

<sup>67</sup> See *Ester Siliacus v. Siliacus Marchory*, (PC) Matrimonial Appeal No. 2 of 2017, High Court of Tanzania at Bukoba District Registry (unreported).

<sup>68</sup> See *Halima Athumani v. Maulidi Hamisi* [1991] TLR 179. See also C Binamungu, 'A Competent Matrimonial Case in Tanzania Mainland: Lessons from Recent High Court Decisions' (2018) 1(1) *The Tanzania Lawyer* 1, 77.

<sup>69</sup> *Supra*.



that the courts are presided over by magistrates who are law graduates and therefore conversant with the legal requirements envisioned under section 101, they proceeded to determine matrimonial disputes without ascertaining the legality of the certificates from Marriage Conciliation Boards.

A study by Rwezaura and Wanitzek (1988) found that, some practical difficulties experienced by Marriage Conciliation Boards were associated with the imperfect understanding of the LMA.<sup>70</sup> After over fifty years of the operations of the LMA, the magnitude of the problem has increased despite that the civil justice system has shifted far from the position it occupied in 1988.<sup>71</sup> The discovery of the irregularities occasioned by the Marriage Conciliation Boards at the earlier stage of proceedings could assist the parties to rectify the anomalies before the determination of the dispute.

In *Rose Athanas Temba v. Alex Rowland Shirima*,<sup>72</sup> *Amani Abdallah v. Hamisa Msabaha*,<sup>73</sup> *Clemence Ngonyani v. Roswita Komba*<sup>74</sup> and *Jonathan Mhagama v. Joyce Mangweru*<sup>75</sup> the anomalies in non-designation of the Boards were discovered by the High Court when parties had prosecuted their disputes from the trial primary courts through the High Court. As a consequence, the Court held that the certificates from the undesignated Board had no legal mandate in law and could not support a petition for divorce. It would appear that in all the four cited cases, the Trial Court and the first Appellate Court could not ascertain the legality of the petition for divorce as to whether there was compliance with the mandatory requirements for prior reference of a matrimonial dispute to the Marriage Conciliation Board.

#### 4. CONCLUSION

The need for reconciliation through Communal Boards cannot be overemphasized. This is because members of the community are more confident when their disputes are resolved by

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<sup>70</sup> See BA Rwezaura and U Wanitzek, 'Family Law Reform in Tanzania: A Socio-Legal Report' (1988) 2(1) International Journal of Law and the Family 1, 21.

<sup>71</sup> See J Alphonse, C Binamungu and SM Bakta, 'Factors Hindering Couples from Accessing Marriage Conciliation Boards in Mainland Tanzania' (2022) 66 (3) Journal of African Law 439, 445.

<sup>72</sup> *Supra*.

<sup>73</sup> *supra*

<sup>74</sup> (PC) Civil Appeal No. 1 of 2016, High Court of Tanzania at Songea District Registry (unreported), Chikoyo, J.

<sup>75</sup> (PC) Civil Appeal No. 2 of 2013, High Court of Tanzania at Songea District Registry (unreported), Chikoyo, J.

people who are known to them. From the foregoing discussion, Communal Boards in various religious institutions are not aligned to operate in the requirements of the LMA. The main basis for this is the lack of awareness among members of religious communities and parties to the matrimonial dispute of the process of the Boards and the requirements for registration of their communities to be designated as Marriage Conciliation Boards.

Consequently, the courts have been receiving certificates from organs not recognized as Marriage Conciliatory Boards for the purposes of section 101 of the LMA. This means therefore that in some instances, Trial Courts have been entertaining matrimonial disputes without jurisdiction. This would lead to the nullification of all proceedings regardless of the expenses and time consumed by the parties in prosecuting their cases. Spouses whose marriages are irreparably broken down should be safely brought to an end timely. That way, the right to divorce will be realized by the party deserving the same timely.

It is therefore recommended that, despite the fact that, ignorance of the requirements for prior reference of matrimonial disputes to a Marriage Conciliation Board should not entirely be taken as a defence for the occurrence of the many irregularities, the government through the Ministry of Constitutional and Legal Affairs should design capacity-building programmes to sensitize religious communities on the requirements for reconciliation envisioned under section 101 of the LMA and subsequent processes following its failure to have the parties' dispute resolved.

The study subscribes to the recommendations made by the Law Reform Commission of Tanzania<sup>76</sup> that the ideal machinery for getting matrimonial disputes resolved is that which will provide solutions without imposing extra suffering on the parties. Observed irregularities in the process of Communal Boards are deemed to occasion a miscarriage of justice as they tend to cause a delay in the determination of matrimonial disputes. Therefore, through awareness programmes, justice will be rendered to the parties without unnecessary delays.

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<sup>76</sup> United Republic of Tanzania, 'Inquiry and Report on the Law of Marriage Act, 1971' (1994) Law Reform Commission of Tanzania 26.