

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 199 OF 2004

**(From the decision of the District Court of Ilala in
Matrimonial cause No.31 of 2002 N.T Mwankenja,
SDM and Kabuta RM)**

MOHAMED S. KIJIDAAPPELLANT

VERSUS

FRANSICA D. KIJIDARESPONDENT

J U D G M E N T

A.Shangwa,J.

This is an appeal against the decision of Ilala District Court in Matrimonial cause No 31 of 2002. Basically, this appeal is against the said court's order of equal division of the house located at Mazizini, Ukonga area, Dar es Salaam and its omission to make an order for distribution of other properties in form of households following its assumption that the parties marriage has broken down irreparably.

Upon examination of the Ilala District Court's record, I have come across an error of law which was committed by the learned Senior District Magistrate on 16/1/2003. This error goes to the root of the Court's record. For this reason, instead of determining this appeal on merit, I have decided to revise the Court's entire proceedings in order to correct it.

The District Court's record shows that on 16/1/2003, the case was fixed for mediation before **N.T.Mwankenja, SDM** . On that day, the Petitioner was present in person. The Respondent was represented by one Justus. The said Magistrate did not record what was agreed by the parties during mediation. Instead, he made a very controversial observation which is as follows and I quote:

" Court : The parties marriage is broken down beyond recall –see the case of BUJIKU VS BUJIKU. What follows for adjudication before Court are:-

- 1. Custody of the only child of the marriage.**
- 2. Division of matrimonial assets.**

Sgd. Mwankenja, SDM

16/1/2003.

File be sent to RM I/C for assignment to trial Magistrate mention 27/1/2003.

Sgd Mwankenja, SDM

16/1/2003".

Indeed, the case file was sent to the RM I/C who assigned it to Mrs Kabuta, RM who went ahead to hear and determine the case on the issue of custody of the child and the division of matrimonial assets. Her decision on the above

issues was delivered on 2/7/2004. The Appellant was not satisfied with it and he appealed to this Court.

From what was recorded by the learned Senior District Court Magistrate on the date fixed for mediation, it can be seen that he observed on record that the marriage between the parties has broken down irreparably by relying on the case of **Butiku Vs Perucy Muganda Butiku (1987) TLR at Page 1** which was wrongly cited as BUJIKU Vs BUJIKU. The said case is authority for dissolving a marriage at the first hearing of the petition in cases where both parties plead that their marriage has irreparably broken down and desire for divorce.

In this case, there is nothing in the petition and in the answer to the petition which were filed in the District Court that shows that both of them are pleading to the fact that their marriage has broken down irreparably and that they

are desiring for divorce. Also, there is nothing on record to show that both of them agreed before the learned senior District Magistrate that their marriage be dissolved by the Court. The parties did not sign anywhere to that effect. This means that the said Magistrate's observation that their marriage has broken down irreparably is not based on facts. In fact, the case of **Butiku Vs Perucy Muganda Butiku** which he cited in support of his observation was misapplied by him.

As matters stand, the marriage between the parties has not been dissolved by the Court. Therefore, it was wrong for the learned senior District Magistrate to remark that what follows for adjudication before Court are custody of the only child of marriage and division of matrimonial assets.

As the marriage between the parties has not been dissolved, the District Court was not supposed to hear and

determine the issue of custody of the child of the marriage and division of matrimonial assets. Indeed, its process of doing so amounted to putting the cart before the horse. For this reason, I hereby nullify the District Court's entire proceedings in Matrimonial cause No.31 of 2002, and quash the order of custody of the child and the order of equal division of the house at Mazizini, Ukonga. For the avoidance of doubt, both parties are still husband and wife until when their marriage is dissolved by another Court of competent jurisdiction to which their matrimonial problems may be referred by any of them. As none of them has won or lost in this appeal, I make no order as to costs.


A. Shangwa

JUDGE

30/11/2005

Delivered in Court this 30th day of November, 2005


A. Shangwa

JUDGE

30/11/2005