

**IN THE HIGH COURT OF TANZANIA**

**AT DODOMA**

**PC CIVIL APPEAL NO. 11 OF 2015**

**(Arising from Civil Case No. 14/2015 of District Court  
of Dodoma, Original from Dodoma Urban Court)**

**AZIZA SALUM.....APPELLANT**

**VERSUS**

**JULIUS BERNARD MWEBAJA .....RESPONDENT**

**23/6/2016 & 3/10/2016.**

**A. MOHAMED, J;**

**JUDGMENT**

The appellant is appealing against the decision of the District Court of Dodoma in Appeal No. 11 of 2015 on the following two grounds;

1. That, the trial Court erred by giving custody of the child to the respondent, a bachelor, without considering the child is young and needs the care of her mother.
2. That, the trial Court erred in ordering the distribution of matrimonial properties without indicating which properties were to be distributed.

This is a dispute between divorced parties over custody of a 7 years old child and the distribution of marital properties. The trial primary Court ordered the dissolution of the marriage, distribution of

matrimonial properties and gave custody of their only child to the respondent. Aggrieved, the appellant preferred her 1<sup>st</sup> appeal to the District Court of Dodoma which confirmed the trial Court's decision. Against it, the appellant appeals to this Court.

On 23/6/2016, the parties agreed to argue the appeal by way of written submissions and both duly abided by an order to that effect.

Both parties submitted on their respective contentions. I found their submissions both relevant and substantive.

However, upon review of the lower courts' records, I discovered the trial Makole Primary Court failed to comply with the requirements of section 7 of the Magistrate Courts Act [Cap. 11 R.E 2002] pertaining to assessors. Subsection (1) of the same reads:

***"In every proceeding in the Primary Court, including a finding, the Court shall sit with two assessors"***

Further, subsection (2) stipulates:

***"All matters in the Primary Court including a finding in any issue, the question of adjourning the hearing....., the assessment of any monetary award and all questions and all issues whatsoever, shall, in the event of difference between a***

***magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of equality of votes, the magistrate shall have the casting vote in addition to his deliberative vote"***

The proceedings of the Makole Primary Court in Civil Case No. 6 of 2010 reveal two assessors, Bukobi and Wailes, were present at the commence of hearing on 15/2/2010 and heard both parties until 22/3/2010 when they were rejected by then applicant (now respondent). Consequently the trial Magistrate B. Kivumbi recused himself on 22/3/2010 and Massoya Massoya, Principal Primary Court Magistrate took over assisted by two new assessors to wit Tatu and Amelikufi who heard the rest of the case and were present when judgment was pronounced.

I find this change of assessors in the middle of the hearing who proceeded to hear the matter until determination was a misdirection on the part of the learned trial Magistrate and was fatal to the proceedings *ab initio*. Consequently the trial and the 1<sup>st</sup> appellates' Courts proceedings and decisions were a nullity.

After the foregoing I quash both lower Courts proceedings and decisions. The matter is to be heard *denovo* before a different magistrate and assessors.

It is so ordered.



**A. MOHAMED**

**JUDGE**

**3/10/2016**

The right of appeal explained.



**A. MOHAMED**

**JUDGE**

**3/10/2016**

