

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

MATRIMONIAL APPEAL NO. 03 OF 2021

(Originating from Matrimonial Appeal No. 08 of 2020 of Karagwe District Court and also originating from Matrimonial Cause No. 09 of 2020 of Kayanga Primary Court)

SUMAIYA ALLY.....APPELLANT

VERSUS

PHILBERT CHILAHAWA.....RESPONDENT

JUDGMENT

07th June & 18th June 2021

Kilekamajenga, J.

In 2020, the appellant approached the Primary Court of Kayanga – Karagwe seeking a decree of divorce and distribution of matrimonial assets. It is alleged that, the appellant and respondent got married in 2013 under civil marriage. The appellant alleged desertion as the evidence of the breakdown of the marriage. At the end of the trial, the Primary Court was convinced that the marriage had broken down beyond repair hence the decree of divorce was granted. The trial court further proceeded to order division of matrimonial assets and custody of children. The respondent was not happy with the decision of the Primary Court; he appealed to the District Court of Karagwe armed with six grounds of appeal. The respondent won the case at the District Court. The District Court confined the reasoning of the decision on **section 75 of the Law of Marriage Act, Cap. 29 RE 2019** hence decided that the Primary Court has no jurisdiction to



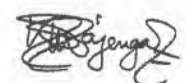
entertain a matrimonial dispute originating from civil marriage. In his robust discourse, the Resident Magistrate relied on the decisions in the case of **John Kahamila v. Paschal Jonathan and another [1986] TLR 104** and a recent decision of the Court of Appeal of Tanzania in the case of **Wilson Andrew v. Stanley John Lugwisha and Tatu Joseph, (PC) Civil Appeal No. 226 of 2017**, CAT at Mwanza (unreported). He finally nullified the proceedings and decision of the trial Primary Court.

Being disgruntled with the decision of the District Court, the appellant rushed to this Court looking for justice and the correct interpretation of **section 75 of the Law of Marriage Act, Cap. 29 RE 2019**. The appellant had two grounds to

- 1. That, the first appellate court erred in law and on fact to hold that jurisdiction of Primary Courts in matrimonial proceeding is derived from **section 75 of the Law of Marriage Act, Cap. 29 RE 2019**.*
- 2. That, the trial court magistrate erred in law for failure to note that the decision of **John Andrew v. Stanley John Lugwisha and Tatu Joseph** was distinguishable as in that case the petitioner claimed damages for adultery in Primary Court and not decree of divorce and other authorities relied upon were decided before the amendment of **section 18 of the Magistrates' Act (sic)**.*

This being a matrimonial dispute, it was prioritised and fast-tracked to allow its speedy disposal. The parties were invited to argue the appeal. The appellant who was absent, enjoyed the legal and professional services of the learned advocate, Mr. Projestus Mulokozi whereas the respondent appeared in person and without representation. The respondent prayed to dispose of the appeal by way of written submission and the court granted the prayer without objection. In the written submission, the counsel for the appellant impugned the decision of the District Court for deciding that the jurisdiction of the primary court derives from **section 75 of the Law of Marriage Act, Cap. 29 RE 2019**. This provision of the law falls under **Part V of the Law of Marriage Act, Cap. 29 RE 2019** which is on miscellaneous actions and not on matrimonial proceedings. He argued that the jurisdiction of the Primary Court derives from **section 76 of the Law of Marriage Act which is part VI of the same Act**. Under the law, the High Court, Resident Magistrates' Court, District Court and Primary Court have concurrent jurisdiction in matrimonial proceedings.

Furthermore, the counsel for the appellant was of the view that the District Court misconstrued the cases of **John Kahamila** (*supra*) and **Wilson Andrew** (*supra*) because the two cases dealt with cases on claims for damages for adultery which do not fall under matrimonial proceedings which is Part II and VI of the Law of Marriage Act as defined under **section 2(1) of the Law of**

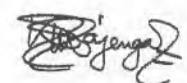


Marriage Act. The counsel urged the court to quash the judgment of the District Court of Karagwe and uphold the decision of the Primary Court.

In response, the respondent conceded to the misconception of **section 75 of the Law of Marriage Act, Cap. 29 RE 2019** as opposed to **section 76 of the Law of Marriage Act, Cap. 29 RE 2019**. The respondent further conceded to the misinterpretation done by the District Court on the two above cases.

In determining this appeal, I wish to address the two major issues raised in the grounds of appeal. **First**, whether the Primary Court has jurisdiction to determine matrimonial proceeding originating from a civil marriage. **Second**, whether the District Court correctly interpreted the two above cases in connection with the jurisdiction of the Primary Court in matrimonial proceeding. It is important to know that jurisdiction of the Primary Court in matrimonial proceeding derives from two pieces of legislation, namely the Magistrates' Courts Act, Cap. 11 RE 2019 and the Law of Marriage Act, Cap. 29 RE 2019. Under the Magistrates' Courts Act, section 18(1) gives power to the Primary Court to determine matrimonial proceeding. The section provides:

***18.-(1) A primary court shall have and exercise jurisdiction
(a) in all proceedings of a civil nature-***



(i) where the law applicable is customary law or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings of a civil nature relating to land;

(ii) for the recovery of civil debts, rent or interests due to the Republic, any district, city, municipal or town council or township authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sublease or contract, if the value of the subject matter of the suit does not exceed fifty million shillings, and in any proceedings by way of counter-claim and set-off therein of the same nature and not exceeding such value;

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; and

(b) in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act.

(c) in all proceedings in respect of which jurisdiction is conferred on a primary court by the First Schedule to this Act;

(d) in all proceedings in respect of which jurisdiction is conferred on a primary court by any other law; and

(e) in all proceedings in which the Attorney General's right of audience is excluded.

Before going further, it is apposite to know the meaning of matrimonial proceeding as defined by the Law of Marriage Act. According to **section 2(1) of the Law of Marriage Act** defines thus:

'Matrimonial proceeding means any proceeding instituted under Parts II and VI of this Act or any comparable proceeding brought under any written law repealed by this Act, in any court.'

For an in-depth understanding, it is pertinent to know the matters contained **under part II and VI of the Law of Marriage Act**. Part II of the Law of Marriage Act encompasses all matters pertaining to the nature of marriage; its validity; procedures of contracting a marriage and the manner of contracting the marriage. It is under this part where civil marriage as one of the ways of contracting a valid marriage features. **Section 25(2) of the Law of Marriage Act** provides that:

25.—(1) A marriage may, subject to the provisions of this Act, be contracted in Tanzania—

(a) in civil form;

*(b) in **civil form** or, where both the parties belong to a specified religion, according to the rites of that religion;*

(c) where the intended husband is a Muslim, in civil form or in Islamic form; or

(d) where the parties belong to a community or to communities which follow customary law, in civil form or according to the rites of the customary law.

Now, Part VI of the Law of Marriage Act is all about matrimonial proceedings which include jurisdiction of courts in matrimonial proceeding; petition for divorce and separation; division of matrimonial assets; custody of children;

maintenance and other relevant matters. It is very unfortunate that **section 75 of the Law of Marriage Act** which was relied by the District Court falls under Part V of the same Act. In other words, the same section is irrelevant in deciding jurisdiction of the Primary Court in matrimonial proceedings. Precisely, the above section falls under the category of miscellaneous rights of action. Therefore, the proper section on jurisdiction of the Primary Court in matrimonial proceedings is **section 76 of the Law of Marriage Act** which falls under Part VI of the Act. For clarity, I take the discretion to reproduce the section thus:

76. Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court.

Therefore, the above provision of the law simply means, regardless of the nature of the marriage, be it civil marriage, customary marriage, or Christian marriage, in case of any dispute where the petitioner seeks a decree of divorce or separation, maintenance of the children, division of matrimonial assets or custody of children, the matter may be filed at the Primary Court, District Court, Resident Magistrates' Court or High Court because all these courts have concurrent jurisdiction on matrimonial proceedings. The only thing the parties may consider is their convenience in terms of availability of witnesses and possibly the location of the matrimonial assets. It was therefore wrong for the

District Court to consider **section 75 of the Law of Marriage Act** in deciding the jurisdiction of Primary Court.

Concerning the interpretation of the cases of **John Kahimila** (*supra*) and **Wilson Andrew** (*supra*), many people confuse between the jurisdiction of the Primary Court in matrimonial proceedings and in other actions. For clarity, I wish to point out that the claims in above cases were hinged on adultery. Under the Law of Marriage Act, claim for damages for adultery falls under the jurisdiction of the Primary Court. Provided such damages must be claimed in the petition for divorce. The reason for this comes from the fact that **section 109 of the Law of Marriage Act** which provides for claim for damages for adultery fall under Part VI which is under the category of matrimonial proceedings. In the case of **Wilson Andrew** (*supra*), the situation was different because the claim for adultery did not originate from the petition for divorce. Furthermore, in that case, the parties' marriage fell under the doctrine of presumption of marriage which is provided under section **160 of the Law of Marriage Act**. This section is under **Part VIII of the Law of Law of Marriage Act**. In my view, where there is a petition for divorce and the issue of presumption of marriage arises, the Primary Court cannot refrain from determining such a case because the original claim is based on petition for divorce which falls under Part VI of the Law of Marriage Act. One has to heedfully read the two above cases before jumping

into conclusion. It all depends on the original claim filed in the Primary Court. In fact, most spouses come to court seeking decree of divorce or separation. In my view, the court cannot speculate their nature of marriage before the trial otherwise it may be so ironical. Based on the reasons stated above, I hereby set aside the decision of the District Court and uphold the decision of the Primary Court. It is so ordered.

DATED at BUKOBA this 18th day of June, 2021.




Ntemi N. Kilekamajenga.
JUDGE
18/06/2021

Court:

Judgment delivered this 18th June 2021 in the presence of the appellant and her counsel, Mr. Projestus Mulokozi (Adv) and the respondent present in person. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga.
JUDGE
18/06/2021

