

**MODIFIED ORIGINAL JURISDICTION OF DISTRICT
AND PRIMARY COURTS IN MATRIMONIAL
PROCEEDINGS IN TANZANIA: A CASE FOR
CONCERN**

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ABSTRACT

The Law of Marriage Act [LMA] is a product of integration of personal laws. From inception, the LMA vested original concurrent jurisdiction in matrimonial proceedings to the High Court, a court of a resident magistrate, a district court, and a primary court under section 76. It vested Primary Courts to civil related matters under section 75. This legal position has all along been in force over six decades now without challenges. Recently, the High Court of Tanzania in the cases of **Hamisi Ammri, Burton Nyerema, and Ester Rogatio**, held that district courts have no jurisdiction of handling matrimonial disputes based on customary marriage without first seeking for leave of the High Court. Primary Courts on the other hand, have been held to have no powers of handling matrimonial disputes based on civil marriages. This paper has reviewed related literature, case law, updated statute indices, and observed that no amendment has so far been made on the LMA. It is argued that the High Court decisions in the named above cases were made in error. It recommends that the Court of Appeal, *suo motu* by way of revision or by exercising supervisory powers, be pleased to rectify the situation in order to maintain certainty in the administration of justice in matrimonial disputes.

Key words: *Integration; jurisdiction; civil proceedings; matrimonial proceedings, customary marriage; civil marriage.*

1.0 INTRODUCTION

This article examines recent High Court decisions that have modified the original jurisdictions of District and Primary courts in matrimonial proceedings. The question that needs to be addressed is, what has gone wrong with the jurisdictions of the Primary and District Courts in handling matrimonial disputes arising out of civil marriages pertaining to Primary Courts and Customary marriages in the case of District Courts in Tanzania mainland?

Research interest in this matter was prompted by three High Court decisions recently made in this jurisdiction stating categorically that Primary Courts have no jurisdiction of handling matrimonial disputes emanating from civil marriages and that District Courts have no jurisdiction of handling matrimonial disputes emanating from customary marriages.¹ The author of this paper is not aware of any appeal preferred by any aggrieved person to the Court of Appeal in these cases. This means, under the doctrine of precedent applicable in this country, the High

¹ See **Hamisi Amri v. Martha Watson Simtor**, Civil Appeal No.94 of 2012, High Court of Tanzania, Dar es Salaam District Registry (unreported). Judgment delivered on 19th 01/2016; **Burton Nyerema v. Asia Wilson Ngulwa**, Civil Appeal No. 7 of 2018, High Court of Tanzania, Dar es Salaam District Registry (unreported), judgment delivered on 12th July 2018; **Ester Rogation v. Respicus M. Kamuhanda**, Civil Appeal no 43 of 2017, High Court of Tanzania, Dar es Salaam District Registry (unreported). Judgment delivered on 24th October 2018.

Court decisions are binding upon the subordinate courts,² but do not bind other judges of the High Court.³

In answering the question above, a review of statutory law was conducted assisted by two statute indices available in this country.⁴ In this regard, the Law of Marriage Act [LMA] was read through and its rules.⁵ Other statutory materials reviewed were the Magistrates' Court Act [MCA],⁶ and the Judicature and Application of Laws Act [JALO].⁷ In terms of case laws, the reported and unreported cases were gathered and thoroughly reviewed. Law Report indices⁸ helped the author to do the updating of law. Then, the literature on integration of personal laws was also read. Journal articles accessed through Hein online database were reviewed.⁹ Few books available in Tanzania were

² See **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1988] T.L.R. 146. [CAT]. See also: January Nkobogo (2012) 'The Doctrine of precedent in the High Court and the case of conflicting decisions: Efforts to ameliorate the problem', **The Tanzania Lawyer**, pp. 1-20, at p. 13.

³ Andrew Lyall, 'Precedent in the High Court of Tanzania', (unpublished paper), pp.42-60 at p. 54.

⁴ See Index to the Laws of Tanzania Mainland, Covering laws in force up to 31st December 2016, compiled by Prof. Ibrahim H. Juma, Justice of Appeal, Court of Appeal of Tanzania, Dar es Salaam. See also, 55yrs of Subsidiary-Law Making in Tanzania: 1961-2016, 2ndEd, Revised up to 31-12-2016; See also Auda's Index.

⁵ The Law of Marriage Act, Cap. 29 R.E. 2019 and the Matrimonial Proceedings Rules, GN. No. 136/1971 (as amended from time to time).

⁶ Cap. 11 R.E. 2019.

⁷ Cap. 453, R.E. 2019.

⁸ The East Africa Law Reports Index 1957-2005 Vol. 1; The Tanzania Law Report Index 1983-1998, The Law Report Index 1998-2006.

⁹ Ghai, Y. (1971) 'The New Marriage Law in Tanzania', **Africa Quarterly (New Delhi)**, Vol. 11, pp. 101-109.

also reviewed.¹⁰ This triangulation method was preferred in order to ascertain the possibilities of legal developments that might have influenced the divergence of opinion of the jurisdiction of the courts under this discussion, without the knowledge of the author. Data obtained from these various sources were analysed qualitatively and the results were used to answer the question raised above. Drawing from the literature and the decision of the Court of Appeal in *Mariam Mbaraka*, here is the answer to the question. There is apparent nothing wrong with the jurisdiction of Primary Courts and District Courts in handling matrimonial disputes enshrined under section 76 of the LMA, which has occurred so far to change the legal standing of jurisdiction since it was fixed by the LMA in 1971.

After introducing the subject matter, the second part starts with a discussion of the law governing matrimonial proceedings in Tanzania mainland. Under this part, a critical examination of the background to the LMA is carried out first. Then, the discussion proceeds with examining the law in force. The third section analyses High Court decisions on the point and raises questions about the effect of these decisions to the subordinate courts and to the national ethic achieved in 1971 through the LMA. The decisions analysed are in *Hamisi Amri's case*, *Burton's Case*, and *Ester's Case*. The central argument advanced in this paper is that the courts that passed decisions in the three cases listed above arrived at such decisions erroneously. The last part is a conclusion.

¹⁰ See Mashamba, C. (2017) **Introduction to Family Law in Tanzania**, 2ndEd, LawAfrica; Mwaikasu, R.J.A. (2015) **Enhancing the Status of African Women Through law: The Place of Family Law and other related legislations**, Mkuki na Nyota Publishers.

2.0 THE LAW GOVERNING MATRIMONIAL PROCEEDINGS IN TANZANIA MAINLAND

2.1 Background

Recently, the High Court of Tanzania has developed a divided opinion on the jurisdiction of District Courts and Primary Courts in handling petitions for divorce and division of matrimonial property originating from Customary or Islamic matrimonial disputes without leave of the High Court. The High Court, also, has a divided opinion regarding the jurisdiction of Primary Courts handling petitions for divorce originating from Christian and Civil Marriages.¹¹ This situation is unhealthy to law users, particularly legal practitioners and trainers in various academic institutions.

The Law of Marriage Act [LMA] came into force on 1st May 1971.¹² Prior to the coming into force of the LMA, the system

¹¹ See for instance, Utamwa, J. in **Hamis Amri v. Martha Watson Simtor**, Civil Appeal No. 94 of 2012, High Court of Tanzania, Tabora Registry, (Unreported). Judgment delivered on 19/01/2016. The Judge, at p. 10, stated that Primary Courts have no jurisdiction to handle matrimonial petitions emanating from civil marriages. Mlacha, J. in **Gladness Jackson Mujinja v. Sospter Crispine Makene**, High Court Matrimonial Appeal No 4/2014, Mwanza Registry (unreported). Judgment delivered on 16th November 2018, stated at p. 11, of the judgment that the High Court, Resident Magistrates' Court, the District Court or the Primary Court have original jurisdiction under section 76 of the Law of Marriage Act to handle matrimonial matters. Mtungi, J. in **Burton Nyerema v. Asia Wilson Ngulwa**, Civil Appeal No. 7 of 2018, High Court of Tanzania, Dar es Salaam District Registry (unreported), Judgment delivered on 12th July 2018 and **Ester Rogation v. Respicus M. Kamuhanda**, Civil Appeal No. 43/2017, High Court of Tanzania Dar es Salaam District Registry (unreported), judgment delivered on 24th October 2018, held that the District Court of Kinondoni erred when entertained the matter without leave of the High Court.

¹² GN. No. 97/71

introduced by the British, sometimes known as 'legal pluralism,' prevailed in this country.¹³ The plurality of personal laws which existed at that time included, Customary Law which applied to the members of different African communities who form the majority of the population; Islamic law of various schools which applied to the large Muslim section of the population, under the Marriage, Divorce, and Succession (non-Christian Asiatic) Ordinance,¹⁴ Christian and monogamous civil marriage provided for by the Marriage Ordinance,¹⁵ and matrimonial causes in the case of such marriages were governed by the Matrimonial Causes Ordinance,¹⁶ and the District Courts (Separation and Maintenance) Ordinance.¹⁷ At that time, divorce and separation involving customary and Islamic marriages, were extra-judicially obtained.¹⁸ It was Christian and Civil Marriages, which could be dissolved by the courts of law.¹⁹

The LMA repealed and replaced all these ordinances.²⁰ The spirit was to achieve the national ethic and values. To date, no one has suggested that the integration process has failed.²¹ The LMA

¹³ See Y.P. Ghai (1971) 'The New Marriage Law in Tanzania', 11 **Africa Quarterly (New Delhi)** pp.101-109, at p.101.

¹⁴ Cap. 28 R.E. 2002.

¹⁵ Cap. 109. It was operational from 1st July 1921.

¹⁶ See Cap. 364. It was operational from 1st April 1956.

¹⁷ See Cap.274, No. 22 of 1949. It was operational from 23rd June, 1950.

¹⁸ See **Abdallah Saidi v. Mwanamkuu** [1978] LRT no. 43, where Samatta, Ag.J. held that dissolution of marriage is by court of law only

¹⁹ See Y.P. Ghai (supra).

²⁰ See James S. Read (1972) 'A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania', 16 **J.Afr.L.**19, at pp.20-22; See also, Bart Rwezaura(1994-95) 'Tanzania: Building a new law out of a plural legal system', 33 **U. Louisville J.Fam L.**523, pp.523-540, at p. 525.

²¹ See Bart Rwezaura(1994-95) 'Tanzania: Building a new law out of a plural legal system', 33 **U. Louisville J.Fam L.**523, pp.523-540, at p. 526.

vested the High Court, District Courts, Resident Magistrates' Courts, and Primary Courts with original concurrent jurisdiction to handle matrimonial cases, which has now been modified. Is the modification proper?

2.2 The Law in force

The Law of Marriage Act provides under section 76, expressly thus, Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, the court of a resident magistrate, a district court and a primary court. The review of literature shows a unanimous legal standpoint of what section 76 of the LMA articulates.²² There is one source entitled, **The History of Administration of Justice in Tanzania**, which speaks the language, which could be interpreted differently. It reads on p. 58:

'Proceedings in respect of marriage, guardianship or inheritance under customary law may not be commenced in any court other than a Primary Court

²² See Section 76 of the LMA, Cap. 29 R.E. 2002. See also: B.A. Rwezaura, (1981) **Sheria ya Ndoa Tanzania**, Taasisi ya Uchunguzi wa Kiswahili Chuo Kikuu cha Dar es Salaam, at p.38; See also: B.A. Rwezaura and Ulrike Wanitzek (1988) 'Family Law Reform in Tanzania: A Socio-Legal Report', **International Journal of Law and the Family**, Vol. 2, pp. 1-26, at pp. 7-8; R.J.A. Mwaikasu (2015) **Enhancing the Status of African Women Through Law**, Mkuki na Nyota, at p. 83. He states that except for the limitation imposed on Primary Courts in respect of proceedings concerning breach of promise to marry, return of gifts given in contemplation of marriage, damages for adultery and enticement, all courts have concurrent jurisdiction in matrimonial proceedings arising from all forms of marriage. See also Clement J. Mashamba (2017) **Introduction to Family Law in Tanzania**, 2ndEd, LawAfrica publishers, p.350.

unless the High Court gives leave for such proceedings to be commenced in some other court'.

The extract above uses the words, which appear, under section 63 of the Magistrates' Court Act. It is uncertain if the said words were extracted from the statute mentioned above. For the sake of convenience, the proviso to section 63 of the Magistrates' Courts Act is reproduced hereunder:

...Provided that no civil **proceedings in respect of marriage, guardianship or inheritance under customary law**, or the incidents thereof, and no civil proceedings in respect of immovable property, other than proceedings relating to land held on a Government lease or a right of occupancy granted under the Land Act **shall be commenced in any court other than a primary court unless the Republic is a party thereto or unless the High Court gives leave for such proceedings to be commenced in some other court.**
[Bolding mine]

The proviso above is apparently ambiguous. The apparent ambiguity originates from the use of the word 'proceedings'. The word 'proceedings' is not defined. The word could refer to matrimonial proceedings under parts IV and VI of the LMA²³ or civil proceedings under Part V of the LMA.²⁴ The concept of 'civil proceedings' refers to any matter which is not criminal in nature. So, civil proceedings are opposed to criminal proceedings. However, going by that broad brush, one will miss the point, because the scope becomes too broad and difficult to handle.

²³ Cap. 29 R.E. 2019.

²⁴ Cap. 29 R.E. 2019.

Hence, one should resort to the definition section under the LMA, which defines the concept matrimonial proceedings as such matters covered under parts II and VI of the LMA. The Law of Marriage (Matrimonial Proceedings) Rules,²⁵ also define matrimonial proceedings as proceedings:- (a) on an objection under section 20 of the Act; (b) for divorce, separation or annulment; (c) for maintenance of a spouse; (d) for custody or maintenance of children of the marriage; (e) for a declaratory decree under section 94 of the Act.²⁶ Going along with that understanding, what remains are matters covered under part V of the LMA, which could now be termed as civil matters, leading to civil proceedings.

Review of cases prior to the cases which have prompted the authorship of this paper, shows that all courts save the Court of Appeal have original concurrent jurisdiction. For instance, the High Court in **John Omari Mbaga v. Lightness Mbaga**, ruled that the Resident Magistrate Court had original jurisdiction to handle matrimonial proceedings.²⁷ In that case, the proceedings were substantially with regard to an application for maintenance for the respondent and her children, filed in the Resident Magistrate Court in Moshi. The issue of jurisdiction came up, because the applicant resided in Moshi while the respondent resided in Dar es Salaam. The Judge observed that the Resident Magistrates' Court of Moshi had substantially the jurisdiction to handle the matter save that in that case, the respondent was out of its jurisdiction.

There are several cases, which originated from the Resident Magistrates' court up to the Court of Appeal, which were based

²⁵ GN.136 of 1971 (as amended).

²⁶ See Rule 2 of GN. No. 136/1971.

²⁷ See the case of **John Omari Mbaga v. Lightness Mbaga** [1974] LRT no. 33, Bramble, J.

on Customary and Islamic Marriage. These cases were finally determined, without the Court of Appeal observing that the lower court lacked jurisdiction. Such cases, include, **Salum Bugu v. Mariam Kibwana**,²⁸ in this case, the petition was filed in the Resident Magistrates' Court of Tanga in Tanga, seeking for dissolution of marriage and division of matrimonial property. The case was finally determined by the Court of Appeal on merit without raising any query that the trial court had no jurisdiction when it handled a petition based on Islamic marriage. The Case of **Maryam Mbaraka Salehe v. Abood Salehe Abood**²⁹, the couple, Muslims, the appellant petitioned for divorce and division of matrimonial property in the Resident Magistrate Court at Kivukoni. In the High Court, the matter was presided over by Justice Rubama. The judge observed that the law applicable was supposed to be Islamic law, stating further that for those who profess Islam have a comprehensive set of laws embracing all walks of life -domestic, social, financial, moral and spiritual. The Court of Appeal made a very important observation as follows:

'The learned judge was clearly in error in deciding the case under Islamic Law bearing in mind the clear and mandatory provisions of section 9(3A) of the Judicature and Application of Laws Ordinance, Cap.453 which says: Notwithstanding the provisions of this Act the rules of Customary Law and the rules of Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971'.

The Court of Appeal went further stating thus:

²⁸ Civil Appeal No 29 of 1992, Court of Appeal of Tanzania at Dar es Salaam (unreported). Judgment delivered on 11th March 1993.

²⁹ Civil Appeal No. 1 of 1992, Court of Appeal of Tanzania at Dar es salaam(unreported). Judgment delivered on 29th June 1992.

'As the petition for divorce was filed, heard, and determined by the court of first instance under the Law of Marriage Act, and not under Islamic Law, the application of Islamic Law by the High Court in dealing with the question of distribution of matrimonial assets was uncalled for and clearly irregular in view of section 9(3A) of the Judicature and Application of Laws Ordinance Cap 358. The decision of the High Court is accordingly hereby set aside'.³⁰

Reasoning from the above authorities, statutory law and case law, one would argue that section 76 of the LMA, confers original jurisdiction to the District Courts and Primary Courts to handle matrimonial cases regardless of whether the marriage involved is civil, customary, Islamic, or Christian in form.

3.0 CASE ANALYSIS

These section analysis three cases separately in order to find out the source of confusion in the decisions of the High Court.

3.1 Hamisi Amri v. Martha Watson Simtor³¹[hereinafter, Hamisi Amri]

The parties in this case contracted a civil marriage in 1995, but later they decided to bless it religiously in Islamic form.³² The

³⁰ Civil Case No 1/1992, Court of Appeal of Tanzania, at Dar es Salaam(unreported), at pp. 8-9.

³¹ Civil Appeal No 94 of 2012, High Court of Tanzania at Dar es Salaam District Registry (unreported), Utamwa, J.

³² On 7th July 1995. See p. 5 of the word processed judgment. The respondent tendered a certificate of marriage contracted in civil form dated 2/6/1995. The appellant produced the Islamic marriage certificate dated 7th July 1995. The Trial court, the Primary Court of Ilala District held that the Islamic marriage which was in accordance with the Islamic

marriage was blessed with four children. The marriage crept into problems that led to the respondent (Martha) to refer the same to BAKWATA for reconciliation without success. Finally, the respondent petitioned for divorce and division of matrimonial property and custody of children of the issues of the marriage in the Primary Court of Ilala District, at Ukonga in Dar es Salaam. The appellant opposed the petition and raised the issue of jurisdiction. The trial court found out that the law applicable was Islamic law and went ahead deciding the matter in favour of the petitioner (respondent). The trial court granted a decree for divorce, equal division of matrimonial property and custody of children was granted to the appellant (Hamisi). The respondent and the appellant were each aggrieved by the judgement of the trial court, an appeal and a cross appeal were filed to the District Court. The judgement of the District Court did not please the appellant despite getting an award of custody of children in his favour. On further appeal to the High Court, the judge found out that the trial court had no jurisdiction to determine the matter. It held, '...the trial court did not have jurisdiction to entertain matters of civil marriage as rightly argued by the appellant. Section 75 of Cap. 29 provides that the jurisdiction of primary courts is limited to where parties were married in accordance with customary law or in Islamic form...'.³³

religion, prevailed over the Civil Marriage, that is why the certificate of the board came from BAKWATA, an Islamic Organization. It also held that the applicable law was Islamic law as rightly argued by the appellant.

³³ **Hamisi Amri v. Martha Watson Simtor**, Civil Appeal no 94 of 2012, High Court of Tanzania, Dar es Salaam District Registry (unreported) at p. 10. Consequently, the appeal was allowed and the proceedings of the trial court were nullified.

Two issues arise in the above case. First, what is a legal effect of contracting a second marriage over the first marriage? Second, was section 75 of the LMA applicable in this case?

3.1.1 Effect of contracting a second marriage

The LMA, allows spouses to convert potentially polygamous civil marriage to Islamic marriage. The law also allows conversion from a potentially polygamous Islamic marriage to civil marriage. The procedure for such transformation process is provided for under section 11 of the Law of Marriage Act.³⁴ The conversion however does not change the status of the parties. This is so because marriage confers a status of husband or wife. Once, one attains such a status, there is nothing else to change when one changes religion. Msumi, J. in **Abdallah Hamid Mohamed v. Jasnena Zeludova**,³⁵ quoting a common law case, **Thynne v. Thynne**,³⁶ held that a second marriage ceremony after the parties validly married is of no legal importance. Indicating further that, since the purpose of marriage is to acquire marital status, then any subsequent marriage purporting to do what has already been accomplished is legally redundant. Justice, Teemba in the case of **Ramla Massawe v. Abdulrazack Kingi**,³⁷ which is similar to the case at hand, held that the second marriage was simply to recognize the marital status of parties under Islamic rites but as far as their civil rights are concerned, the first marriage was not affected. In view of this authority, change of religion in Hamisi Amri's case, did not change the status of marriage, the civil form

³⁴ Cap. 29 R.E. 2019.

³⁵ [1982]T.L.R 314 (HC). See also **Ramla Massawe v. Abdulrazack Kingi**, PC Matrimonial Appeal No 3 of 2012, HCT at Songea Registry (unreported). Judgment by Teemba, J. delivered on 18th April 2013.

³⁶ [1955]ALL ER 129.

³⁷ PC Matrimonial Appeal No. 3 of 2012, High Court of Tanzania at Songea Registry (unreported).

marriage remained intact. The next question is, 'Was section 75 applied correctly to justify the decision that the Primary Courts had no jurisdiction of handling matrimonial disputes based on civil marriage?

3.1.2 Application of section 75 of the LMA to matrimonial proceedings

Section 75 of the LMA, reads:

A primary court shall have jurisdiction to entertain a suit under this Part where the parties were married in accordance with customary law or in Islamic form or, in the case of a suit under section 69 or section 71, if the court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form.

The above provision is beyond the ambit of matrimonial proceedings envisaged under section 76 of the LMA. Matters captured under this section are those ones falling under part V of the LMA. These matters include damages for the breach of promise to marry;³⁸ damages for adultery³⁹, damages for

³⁸ See Section 69 of the LMA, Cap 29 R.E. 2019. See for instance, **Generoza Ndimbo v. Blasidus Yohanes Kapesi** [1988] T.L.R. 73. The respondent successfully sued the appellant in Mtwara Primary Court for breach of promise to marry and the return of gifts given in contemplation of marriage. The High Court found that there were no gifts given while in contemplation of marriage. Appeal allowed.

³⁹ See section 72 and 74(2) of the LMA, Cap 29 R.E. 2019. See also the case of **Gai Ipenzule v. Sumi Magoye** [1983] T.L.R. 289. The suit was filed in Nyambiti Primary Court. The claimant was awarded ten head of cattle as damages. In arriving that award took into consideration the customs of the community in the area. The appeal was dismissed; See **Jumanne Jingi v. Njoka Kiduda** [1984] T.L.R. 51. A suit for damages for adultery was filed in the Primary Court without success. Examples for cases of

enticement and return of gifts made in contemplation of marriage, which has not been contracted.⁴⁰ These form part of civil proceedings, which are envisaged, under section 63 of the MCA. They do not form part of matrimonial proceedings. This is so because, the LMA itself defines the concept of matrimonial proceedings under section 2(1), to include matters filed under Parts IV and VI of the LMA. Matters falling under Part IV include, disputes involving spousal consent.⁴¹ It is therefore submitted that section 75 of the LMA was not applicable to the case at hand. However, since no appeal was preferred to overturn the decision of the High Court, the judgement remains valid until such time when the superior court overturns it. This means the decision in Hamis Amri's case (supra) is valid until it is overturned by the Court of Appeal of Tanzania.⁴²

enticement include: **Ramadhani Ramadhani v. Sungi Andalu** [1984] T.L.R. 158. The claims failed because there was no proof of the existence of marriage. In **Juma Ng'osha v. Amos Mutanda** [1989] TLR 96 (HC), Mwanza High Court Registry, the trial court was Igalukiro Primary Court. In **Musa Mwaugala v. Ndesha Hota** [1998] T.L.R. 1, HCT Mbeya Registry. The trial court was Ruiwa Primary Court.

⁴⁰ Section 73(1), (2) and S.74 of the LMA, Cap 29 R.E. 2019. Examples of cases filed in the Primary Court include: **Mafuru Magabanya v. Joseph Mulya** [1987] T.L.R. 22. The original case was filed in the Primary Court of Bunda. This was a serious case of enticement and adultery. Lived together and the Respondent was giving company to the woman on journey.

⁴¹ See section 59 (1) and (2) of the LMA, Cap. 29 R.E. 2019. Examples of such cases are like; **Itembwe Mnana v. Esther Faida**, PC Civil Appeal No. 47 of 2017, HCT, Mwanza Registry,

⁴² See Oriyo, J. in **Zainuri Ramadhani v. Godfather Mola**, PC Civil Appeal No 116 of 2004, High Court of Tanzania Dar es Salaam District Registry (unreported), at p. 4.

3.2 Burton Nyerema v. Asia Wilson Ngulwa⁴³[hereinafter Burton case]

The respondent was customarily married to the appellant in 2003 in Dar es Salaam. The couple was blessed with two children. According to the respondent, the couple managed to acquire some assets in Kimara Korogwe in Dar es Salaam region. In 2006, the appellant's mother came up and informed her that the appellant had a wife in Mbeya with two children. The appellant would beat the respondent and turned hostile for no reasons. Later, he deserted. The matter was then referred to Marriage conciliation Board and subsequently, a petition for divorce was filed in the District Court of Kinondoni. The decision of trial court was partly in favour of the petitioner. The appellant on appeal in the High Court, argued the issue of jurisdiction, contesting that the matter was filed in the District Court without leave of the High Court. Otherwise, the matter ought to have been filed in the Primary Court. The Respondent opposed the arguments by the appellant saying that section 18(1) (a) of the MCA, did not apply. The judge cited section 75 together with section 76 under the LMA and section 63 under the MCA in support of the decision. The Judge delivered the judgement, holding as follows, '...

I am of the settled view, the trial court had no jurisdiction... since, the conflicting parties had contracted a customary marriage under customary law, and the respondent had paid bride price. This being a customary marriage, the District Court enjoys concurrent jurisdiction with the primary courts in marriage matters. The respondent was obliged to file her petition of divorce with the leave of the High Court. Consequently, the same

⁴³ Civil Appeal No 7 of 2018, High Court of Tanzania, Dar es Salaam District Registry (unreported).

renders the entire proceedings, judgment, and decree a nullity...!.

The appeal was allowed. Two issues emanate from the judgment. First, did the trial court deal with customary issues because the matrimonial dispute involved a customary marriage? Second, were sections 18(1) (a) of the MCA and section 75 of the LMA applicable in the matter before the trial court?

Reading the judgment of the High Court, one observes that the trial judge was wrong when reasoned out that because the parties were married under customary law, therefore, customary law was the law applicable in the matter. This is not correct. The law applicable is the LMA, unless the same law dictates otherwise. This status of the law was achieved when the integration of personal law was achieved. There are clear areas in the LMA, which provide for the application of customary law. Such areas include, contracting marriage in customary form or in Islamic form.⁴⁴ Therefore, question number one is answered in the negative. Question number two is also answered in the negative because section 75 does not apply to matrimonial proceedings, but to civil proceedings.⁴⁵

3.3 Ester Rogation v. Respicus M. Kamuhanda⁴⁶[Ester case]
In **Ester case**, the parties were married under customary rites in 2009. In 2015, matrimonial problems cropped up. The couple could not be reconciled. The appellant petitioned for divorce and division of matrimonial property in the District Court of Kinondoni. The Court granted a decree for divorce, but rejected the prayer for division of matrimonial property, hence the appeal.

⁴⁴ See section 25(1)(a)-(d) of the LMA, Cap. 29 R.E. 2002.

⁴⁵ See 9(3A) of the Judicature and Application of Laws Ordinance, Cap.453.

⁴⁶ Civil Appeal No. 43/2017, High Court of Tanzania, Dar es Salaam District Registry (unreported).

In appeal, the judge raised the issue of jurisdiction *suo motu*.⁴⁷ However, the parties were invited to address the court on the point.⁴⁸ The parties addressed the court, although being lay people they could not put forward any legal argument. The appellant said, she was advised by the Marriage Conciliation Board where she referred the matrimonial dispute to go to the District Court, while the respondent, on the other hand, went to the District Court where the appellant had decided to file her case.

⁴⁷ See **Richard Julius Rukambura v. Isaack Ntwa Mwakajila & Tanzania Railways Corporation**, MZ Civil Application No 3 of 2004, Court of Appeal of Tanzania at Mwanza(unreported),at p.18, the Court stated that on a fundamental issue like that of jurisdiction a court can **suo motu**, raise it and decide the case on the ground of lack of jurisdiction without hearing the parties.

⁴⁸ After the decision of the Court of Appeal in Richard Julius Rukambura (supra), which was to the effect that the court could raise the issue of jurisdiction and decide on it without involving the parties, subsequent decisions of the same court improved the legal position by stating that it was fundamental to invite the parties to address the court on such an issue before the court could make a decision. See for instance, **Juma Kilimo v. R.**, Criminal Appeal No 70 of 2012, Court of Appeal of Tanzania at Tanga (unreported) at p. 10, the court held: 'PW1 Omari's demeanor were raised for the first time while the judgment was being composed. The appellant was not afforded opportunity to make any observations on this important aspect of the trial upon which his conviction for the gravest of all crimes was predicated'. See also: **John Morris Mpaki v. The NBC Ltd and Ngagalila Mgonyani**, Civil Appeal No 95 of 2013, the Court of Appeal of Tanzania at Dar es salaam(unreported).The Court hastened to point out that despite the grayness of the legal consequences, the right of the parties to be heard before any legal consequences is imposed is part and parcel of Rule 4 of the CPC. In another case of **Naziru Kamru v. MIC Tanzania Limited**, Civil Appeal no. 111 of 2015, Court of Appeal of Tanzania at Mwanza(unreported). The Judgment was delivered on 30th May 2016. At p. 22 of the word processed judgment, the Court of Appeal repeated the rule in **John Morris Mpaki** (supra).

The judge reasoned out basing on sections 18(1)(a)(i) of the Magistrates Courts Act[Cap. 11 R.E. 2002] and section 76 of the LMA⁴⁹ and observed that since the marriage was contracted under customary rites, the Primary Court had exclusive jurisdiction to entertain the same. The Court declared the entire proceedings, judgement, and decree of the District Court in Kinondoni a nullity and finally, struck out the appeal.⁵⁰ The question that follows is, Did the court direct itself properly on the issue? This question is answered in the negative. Few reasons may be advanced to show that the court did not address the matter properly.

First, the Magistrates' Court Act,⁵¹ is a law, which establishes District Courts⁵² and Primary Courts.⁵³ The MCA also vests general jurisdiction to these courts under section 63. The section reads:

63(1) Subject to the provisions of any law for the time being in force, where jurisdiction in respect of the same proceedings is conferred on different courts, each court shall have concurrent jurisdiction therein: -

⁴⁹ Cap. 29 R.E. 2019.

⁵⁰ See page 6 of the word processed judgment. It is noteworthy, that 'striking out the appeal means in the eyes of law, no proper appeal capable of being disposed of was in existence. Hence, the court was giving the appellant an easy way of filing the matter in the appropriate court. See **Hashim Madongo, Charles Leole and Damas Kagere v. Ministry for Industry and Trade, Attorney General and Dar es Salaam Regional Trading Co. Ltd**, Civil Appeal no 27 of 2003, Court of Appeal of Tanzania at Dar es salaam (unreported) at p.7. defining the concept to 'strike out'.

⁵¹ Cap. 11 R.E. 2019.

⁵² District Courts are established under section 4 of the Magistrates Court Act, Cap. 11 R.E. 2019.

⁵³ Primary Courts are established under section 3 of the Magistrates' Court Act, Cap. 11 R.E. 2019.

Provided that no civil proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof, and no civil proceedings in respect of immovable property, other than proceedings relating to land held on a Government lease or a right of occupancy granted under the Land Act shall be commenced in any court other than a primary court unless the Republic is a party thereto or unless the High Court gives leave for such proceedings to be commenced in some other court.

The above provision of law refers to 'civil proceedings in respect of marriage'. What does that phrase mean? The MCA does not define this phrase. The Interpretation of Laws Act, Cap. 1, does not define it either. However, 'civil proceedings' are distinguishable from 'matrimonial proceedings' under the LMA. The LMA, defines, 'matrimonial proceedings' as any proceedings instituted under Parts II and VI of this Act or any comparable proceedings brought under any written law repealed by this Act, in any court.⁵⁴ Part II of the LMA, covers the following matters: sections 9-17 are about the nature of marriage, sections 18-24 are about preliminaries to contract, sections 25-41 are on contracting of marriage. Part VI of the LMA covers matrimonial proceedings *per se*. The subheading⁵⁵ to this part reads, 'Matrimonial proceedings'. It is this part that covers petitions for divorce and separation, petitions for annulment and declaratory decrees, petitions for division of matrimonial property, just to mention a few. This being the case, it is argued that, section 63 of the MCA does not apply to matrimonial proceedings but to civil proceedings relating to marriage. The legal effect of this

⁵⁴ S.2 (1) of the Law of Marriage Act, Cap. 29 R.E.2019.

argument is that, applications for leave for one to file a matrimonial case in the District Court/Resident Magistrate Court do not arise.

4.0 EFFECTS OF THE DECISIONS

4.1 Uncertainty in the administration of justice

The High Court decisions in Hamisi Amri, Burton Nyerema, and Ester have created procedural uncertainties in handling matrimonial disputes in the judicial system. This is demonstrated by a situation whereby the same High Court Registry at the same time delivered judgments which diametrically opposes each other. In **Burton Nyerema's case**, the court ruled that the District Courts have no jurisdiction of handling matrimonial disputes without leave of the High Court, but in the same High Court registry (Dar es Salaam District Registry), during the same period (July/August 2018). In the case of **Adelina Paulo Rimoy v. Firigili A. Martin @ Jereme Alowis Moshu & Happiness Temu**,⁵⁶ Magoiga,J. determined an appeal of a matrimonial dispute emanating from a customary marriage. The Judge never invoked revisionary powers to nullify the proceedings for want of jurisdiction by the trial court. Similarly, in the case of **Hamisi Amri's** case on the other hand,, the High Court had decided that the Primary Courts have no jurisdiction of handling matrimonial disputes based on civil marriages, during the same period, the High Court of Tanzania Iringa District Registry, entertained an

⁵⁶ Civil Appeal No. 162/2016, HCT, Dar es Salaam District Registry,(unreported), Magoiga,J. Judgment delivered on **31st August 2018**. The Judge entertained an appeal originating from Morogoro Resident Magistrate Court, based on customary marriage. The Judge upheld the appeal on division of matrimonial property. The judge also recognized the second respondent who was the house girl of the appellants to have contracted a customary marriage with the first respondent. The Judgment in Burton Nyerema was delivered on **12th July 2018**.

appeal from Njombe District Court, but the original case was from Makambako Primary Court. The couple had contracted a civil marriage in 2013, but their marriage got into problems, hence, a petition for divorce in the Primary Court of Makambako. The appeal to the High Court failed because the respondent could not prove contribution in the assets (house and vehicle) they were contesting for.

4.2 Delays in seeking for justice

Cases whose proceedings are nullified or struck out, the effect is to make the aggrieved party to start fresh proceedings. For instance, if a case is struck out at the High level, with a direction that the aggrieved person is at liberty to file the matter in the appropriate court, such a party has to go around the entire procedure governing divorce petition. First, one has to go to Marriage Reconciliation Board of the Ward or the Community Reconciliation Board depending on the faith one professes. This step will have to be repeated because the law demands that a certificate from a marriage reconciliation board should be within six months at the time of instituting a petition for divorce.

5.0 CONCLUSION

This article has attempted to answer the question: 'What has gone wrong with the jurisdictions of the Primary Courts and District/Resident Magistrates' Courts in handling matrimonial disputes arising from civil marriages in the case of Primary Courts and Customary marriages in case of District/Resident Magistrates' courts?

The review of statutory law has revealed that section 76 of the LMA has never been amended since 1971. Further, section 76 provides for the original jurisdiction of courts in handling matrimonial proceedings and not section 75, which focuses on suits (civil proceedings). This legal position is further reinforced by the JALO; section 3(A), which excludes the application of Islamic and Customary law where the LMA is applicable. Scholars in family law are in all respects supporting the view that nothing has so far changed the legal position enshrined under section 76 of the LMA.

This paper observes that the High Court decisions discussed above were arrived at erroneously. The application of 75 of the LMA was extended to section 76 causing absurdity. It is also the opinion of this paper that if the Court of Appeal decision in Maryam Mbaraka Selehe's case was reported, this decision could have helped scholars to maintain the legal position expressly stipulated under section 76 of the LMA.

