

A some time and as sections 76 and 77 testify, it is unaware of the present four-tier system. Granted, however, that appeals from Zanzibar have by virtue of these provisions to be on matters of law, that does not answer the present problem. These provisions do not require the points of law to be certified by the High Court. We think on the other hand that the decision in *Yussuf Suleiman Taib* (3) had nothing to do with sections 76 and 77. That was an appeal in a matter originating in a Primary Court. Ramadhani, C.J. (as he then was) remarked that in a second and a third appeal to the High Court, the regional Court should certify a point of law. That was an appeal to the High Court, not to this Court, and sections 76 and 77 which relate to appeals to this Court do not provide for a certificate. Moreover, whether certification is required or not for certain appeals to the High Court of Zanzibar is not relevant to the problem at hand. A certificate of the regional Court to that end has no relevance to the requirements of sections 5(2)(c).

E There was, finally, a general question raised by the Court as to the mischief the requirement of certification was intended to combat. Dr Lamwai responded, and correctly, that the purpose of a certificate for the class of appeals in matters originating in Primary Courts was to ensure that deserving cases only reached the Court of Appeal. The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance. Would this objective be defeated by absence of certification in appeals from District Court proceedings in Zanzibar. We do not think so, but, ironically, the Zanzibar Court system is better equipped to attain that objective. There is that extra appeal to the regional Court which does not obtain on the Mainland.

H For the reasons we have set out, we hold that an appeal in proceedings originating in a District Court in Zanzibar does not require a certificate on a point of law; it only requires leave of the High Court in accordance with section 5(1)(c). As with the Mainland a certificate on a point of law is required only in a matter originating in a Primary Court. We note that a panel of the Court came to the same conclusion in

the later case of *Harban Haji Mosi and Another v. Omar Hilal Seif and another* (4), also from Zanzibar, and we agree with the decision therein. Perhaps it might be desirable, in order to put the position beyond doubt, for the Legislature to recast section 5(2)(c) and for the learned Chief Justice to revisit rule 89(2) in order to reflect the Court system in Zanzibar. As leave to appeal was granted in this case, the appeal will proceed to hearing without more.

R v. R

HIGH COURT OF TANZANIA AT DARES SALAAM

(Luanda, J.)

MATRIMONIAL CASE No. 1 OF 2001

Family law – Divorce – Spouse being no longer in love – Whether a sufficient ground for the Court to grant divorce – Section 107(1) and (2) of the Law of Marriage Act 1971.

Family law – Divorce – Grant of divorce – Whether the Court may summarily grant divorce.

Family Law – Matrimonial causes – Party establishes that a matrimonial offence has been committed – Whether that fact entitles the party to an automatic right to a divorce decree.

Civil Practice and Procedure – Matrimonial causes – Parties not at issue on their marriage being broken down irreparably – Whether the Court may on that basis summarily pronounce judgment – Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules 1971, Order XV, rule 1 of the Civil Procedure Code 1966 and section 107 of the Law of Marriage Act 1971.

A The petitioner filed a petition for divorce and the respondent cross petitioned for division of matrimonial property. The Petitioner requested the Court to issue divorce decree summarily as the spouses were no longer in love, and were not at issue regarding their marriage being broken down.

B **Held:** (i) Applying Order XV, rule 1 of the Civil Procedure Code 1966 in matrimonial proceedings will defeat the whole concept of judicial care;

C (ii) section 107(1) and (2) of Law of Marriage Act 1971 does not confer a party to a matrimonial proceeding an automatic right to a decree of divorce even where he establishes a matrimonial offence has been committed.

Petition dismissed

Case referred to:

D (1) *Butiku v. Butiku* [1987] T.L.R. 1

Statutory provisions referred to:

- E** 1. Law of Marriage Act 1971, section 107
2. Law of Marriage (Matrimonial Proceedings) Rules 1971, rule 29
3. Civil Procedure Code 1966, Order XV, rule. 1

F *Mr Mkatte* for the Petitioner

Ms Rwebangira for the Respondent

RULING

G (Delivered 7 June 2002)

H **Luanda, J.:** The petitioner through the services of Mr Mkatte, learned counsel, has instituted a matrimonial cause in this Court against the respondent for the following prayers, quote:

- I** 1. That the marriage be dissolved.
2. That the parties bear their own costs.
3. That this Honourable Court grant any other relief deemed fit.

A In answer to the petition, the respondent through her advocate Ms Rwebangira did not refute much about the breakage of the marriage. She did not only file the answer to the petition, but she also filed a cross-petition which she mentioned, *inter alia*, the properties and how they were acquired. **B**

In brief she said some are her personal properties and some were acquired jointly. After receiving the answer and cross-petition, Mr Mkatte submitted that the marriage has broken down irreparably and asked the Court to grant divorce as per *Butiku v. Butiku* (1) Mr Mkatte contended that the issue remaining is division of matrimonial properties. As the Court was yet to hear the respondent, it fixed the matter for hearing so that parties to submit whether this Court can grant divorce summarily. It was agreed by both parties that the matter be-disposed of by way of written submissions. Both learned counsel filed their written submission, hence this ruling. So the question in this matter is whether this Court, under the aforesaid circumstances, can declare the marriage to have been broken down irreparable and grant divorce. **C** **D** **E**

It is Mr Mkatte's submission that the parties to this matrimonial proceeding no longer love each other. And this, Mr Mkatte went on to say is contained in the proceeding. In view of that fact, he submitted that the marriage has broken down irreparably. He cited *Butiku case*, where Biron, J. held, I quote the relevant portion: **F**

By rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules 1971. **G**

The Court shall propose to try a petition in the same manner as if it were a suit under the Civil Procedure Code 1966. And by Order XV, Part 1 of the Civil Procedure Code 1966: **H**

Where at the first hearing of the suit it is apparent that the parties are not at issue on sufficient questions of law or of fact, the Court may at once pronounce judgment.

In this matrimonial suit, both parties have by their counsel agreed on more that sufficient issues of fact and of law raised in their pleadings. **I**

- A The petitioner in his petition, and the respondent in her answer, establish that the marriage has irreparably broken down, as both assert it has, and each spouse in praying for a divorce. Consequently I have not the slightest hesitation in formally finding that the marriage has and in law irreparably broken down. Accordingly it is hereby ordered that a decree absolute dissolving the marriage is to issue.

Ms Rwebangira in the first place submitted that love is not an issue. And it is no wonder that the word love is not mentioned in the Law of Marriage Act, 1971. She said what constitutes evidence of irreparable break down of marriage is provided for under section 107 of the said Act.

D As to *Butiku case*; she said the facts are distinguishable with the present case. In that case she went on to say both parties were not at issue in any issues, the respondent was outside the country and it was by consent agreed that the division of matrimonial property was to be determined after the return of the respondent. In the instant case she submitted that both parties are present; on the part of matrimonial property no evaluation/assessment has been done to date to ascertain the value of the house at Tegeta and no agreement has been reached on all important issues of the case.

F In short Ms Rwebangira objected the issuance of divorce summarily.

G In reply Mr Mkate reiterated that the parties are no longer in love. Mr Mkate went on to say the respondent through her answer clearly shows that the marriage has broken down irreparably.

H First and foremost, it should be made very clear from the outset that the case of *Butiku v. Butiku* (1) is not binding upon this Court. However, the facts of that case are both parties, agreed on more than sufficient issues of fact and of law raised in their pleadings. The pleadings establish that the marriage has broken down irreparably; hence the dissolution of the marriage.

I In the instant case, parties are not at one on grounds of divorce. The petitioner said there is no love, whereas the respondent said it

A is the petitioner who caused the situation to be thus. Obviously the parties are not dancing so to speak, to the same music. It follows therefore that the facts of this case and that of *Butiku case* (1) are distinguishable.

B For the sake of argument, assuming the facts are the same is it proper for a Court of law to dissolve marriage and grant divorce. To put it differently does the Law of Marriage Act 1971 allow granting of divorce summarily? Section 107(1) and (2) of the Law of Marriage Act 1971 is relevant. The section provides:

C Section 107(1) In deciding whether or not a marriage has broken down, the Court shall have all relevant evidence regarding the conduct and circumstances of the parties and, in particular:

D (a) Shall, unless the Court for any special reason otherwise directs refuse to grant a decree a petition is founded exclusively on the petitioner's own wrong doing and

E (b) Shall have regard to the custom of the community to which the parties belong.

F (2) Without prejudice to the generality of subsection (1), the Court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of such matter shall not entitle a party as of right a decree:

G (a) Adultery ... etc

(b) Sexual ... etc

(c) Cruelty ... etc

(d) Willful neglect ... etc

(e) Desertion ... etc

(f) Voluntary separation ... etc

(g) Imprisonment ... etc

(h) Mental illness... etc

A (i) Change of religion ... etc

[emphasis supplied]

B My understanding of subsection 2 of section 107 of the above quoted law is that it does not confer a party to a matrimonial proceeding an automatic right to a decree of divorce if he/she has established a matrimonial offence has been committed. The Court may or may not grant divorce. The Court is required to go further and see, whether in the interest of the parties and family as a whole it is proper to dissolve the marriage and grant divorce. And it is no wonder that one of the usual issue which features in the matrimonial proceedings is whether the marriage has broken down irreparably. This in my view shows that Court ought to first resolve whether the marriage has broken down.

E Thereafter the former issue of irreparability of the marriage follows. And this in my settled mind shows that the legislature has imposed a duty upon Courts of law to see to it that marriages should not be easily dissolved. The rationale is not far to seek families are foundation of a nation and it is truism that strong families breed strong nation. So Court of law should not be a place for rubber stamping, rather they are required to handle matrimonial dispute with judicial care. F Of course this does not mean that Courts should go to the extent of forcing the parties to stay together; not at all. Courts of law have no such mandate. Having said thus, I am of the opinion that applying Order XV, rule 1 of the Civil Procedure Code 1966 in matrimonial proceeding will defeat the whole concept of judicial care. And as procedural rules are not supposed to override substantive law, I hold that order should not be applicable in matrimonial proceedings. G

H In the final analysis, therefore, I decline to dissolve the marriage summarily.

I

A **TANZANIA HABOURS AUTHORITY v. AFRICAN
LINER AGENCIES CO. LTD**

B **HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

(Ihema, J.)

C **CIVIL REVISION No. 113 OF 2002**

Admiralty – Matters constituting admiralty – Contract for rendering services to a ship – Whether an admiralty matter.

D *Admiralty – Jurisdiction – Matters presented before the District Court concerned contract to render services to a ship – Whether District Court has jurisdiction to try the case – East African Merchant Shipping (Consequential Provisions) Act 1966, second Schedule.*

E *Admiralty matters – Pecuniary jurisdiction – Services rendered amounting to USD 273 355.43 – Whether District Court had jurisdiction to hear the case – Section 6 of the Civil Procedure Code Act 1966.*

F *Civil Practice and Procedure – Ex parte order – Interim ex parte Order – Pleadings not showing sufficient grounds for dispensing with the law – Whether Order issued in abuse of process of the law – Order XXXVII, rule 3 of the Civil Procedure Code Act 1966.*

G *Civil Practice and Procedure – Interim ex parte order – Order issued on 12 July 2002 but served on the Applicant on 21 August 2002 – Whether Order is compliant with the law – Order XXXVII, rule 3 of the Civil Procedure Code Act 1966.*

H *Civil Practice and Procedure – Revisional proceedings – Whether High Court can revise an interlocutory ex-parte order granted by the District Court – Section 44(1)(a) of the Magistrates' Courts Act 1984.*

I On 21 August 2002 the Port Manager of the Tanzania Harbours Authority wrote a letter to the Judge in-charge of the High Court of Tanzania, Dar es Salaam Registry drawing attention to an interim ex-parte order by the Ilala District Court dated 12