

IN THE HIGH COURT OF TANZANIA**AT DAR ES SALAAM****CIVIL APPEAL NO. 34 OF 2004****PONTIAN MUTAYABARWA APPELLANT****VERSUS****CHIKU H. LUGONZO RESPONDENT****R U L I N G****Oriyo, J.**

The ruling is in respect of a preliminary objection raised by the respondent against the appeal pending in this court filed by the appellant. The appeal arises from an interim ruling and order of the District Court of Ilala at Samora Avenue in Matrimonial Cause No. 10 of 2003 between the parties. When the Petition for Divorce and other reliefs was pending; the respondent applied for custody and maintenance. These reliefs were granted on 5/9/2003 and the case set to continue on 20/10/2003. The appellant felt aggrieved by the interim orders and filed this appeal on 22/9/2003. The respondent filed a Notice of Preliminary Objection on a point of law that the appeal is incompetent as it contravenes the provisions of the Civil Procedure Code 1966 as amended by Act No. 25 of 2002. The

relevant provision relied upon by the respondent, section 74 (2), Civil Procedure Code, provides thus:-

“(2) Notwithstanding subsection (1), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the suit”.

On the strength of the cited amendment, the respondent prays for the dismissal of the appeal with costs. In reply, the appellant does not dispute the effect of the amendment above on ordinary cases. He states that appeals in matrimonial causes are not governed by the provisions of the Civil Procedure Code; they are governed by the Law of Marriage (Matrimonial Proceedings) Rules 1971. On that account, he prays for a dismissal of the preliminary objection with costs.

The issues for determination here is whether the procedure in appeals in matrimonial proceedings is governed by the general provisions of the Civil Procedure Code or by the Matrimonial Proceedings Rules, 1971. Section 80 of the Law of Marriage Act, 1971 provides for a right to appeal in Matrimonial Proceedings,. Subsection (3) of section 80 provides as hereunder:-

"Save to the extent provided in any rules made under this Act the provisions of the Civil Procedure Code, 1966 relating to appeals shall not apply to appeals under this Act". (Under living mine).

It is therefore obvious from this provision that the provisions of the Civil Procedure Code as stipulated in section 74 as amended, are explicitly excluded from application to appeals in matrimonial proceedings. However, section 80 (3), the Law of Marriage Act, makes an exception in that the Civil Procedure Code provisions may be applicable in appeals under the Law of Marriage Act, where the rules made there under permit the same. By virtue of Rule 38 of the matrimonial proceedings Rules which is under Part VIII of the rules and is titled "APPEALS" provides for the application of the provisions of ORDER XXXIX of the Civil Procedure Code titled APPEALS. The application of rules 9 to 37 of Order XXXIX is provided for use in appeals in matrimonial proceedings with some exceptions listed therein. Therefore, the application of rules 9 to 37 of Order XXXIX of the Civil Procedure Code are extended to apply to appeals in matrimonial causes.

It is trite law that a subsidiary legislation cannot override the provisions of the main statute. Therefore the provisions of rule 38 cannot override those of section 80 (3). The fact still remains the

same in that the provisions of section 74 (2), which is in the body of the principal legislation, are not applicable to appeals in matrimonial proceedings except as provided under section 80 (3). The respondent had relied on the provisions of Rule 29 (2) of the Matrimonial Rules in support of the preliminary objection. But with due respect, that rule is applicable to trials in the trial court and does not extend to appeals. The correct rule is 38 above; however, the principle is that the Civil Procedure Rules will only be invoked where the Matrimonial Proceedings Rules do not provide for the situation.

Having stated the foregoing, the preliminary objection lacks merit. It is accordingly dismissed. The respondent being a legal aid recipient from WLAC, there is no order for costs.

K.K. Oriyo

JUDGE

6/04/2005

722 words