

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPEAL NO. 8 OF 2004

EDWIN SHAIKI APPELLANT

VERSUS

DOROTH SHAIKI RESPONDENT

Date of last order -13/2/2006
Date of judgment – 7/3/2006

RULING

Oriyo, J.

This appeal arises from a Matrimonial dispute in Misc. Civil Application No. 6/2003 in the Resident Magistrates Court at Morogoro in which the respondent had sought orders to force the appellant to pay her maintenance in arrears from 1997. The trial court held for the respondent and the appellant was ordered to pay shs.40,000/= per month as maintenance from 1997 to date of ruling. Further orders were that the appellant was to pay to the respondent a sum of shs.40,000/= as maintenance from the date of the ruling.

The appellant was aggrieved and preferred this appeal through Mr. Binamungu, learned counsel. In response, the respondent, through the services of Mr. Kashumbugu, learned counsel, raised two points of preliminary objection as follows:-

1. The appeal is time barred.
2. There has been non compliance in the filing of the appeal as required by the Matrimonial Proceedings Rules, 1971.

On that account the respondent prayed for the appeal to be struck out with costs. This ruling is in respect of the points of preliminary objection.

In support of the objections, the respondent contended that the law makes it mandatory for an appeal to be filed within 45 days. This appeal was filed beyond 45 days. She further stated that the appellant had no reason to delay because the appellant and his counsel were present in court when the ruling was delivered; they knew the contents of the ruling and the reasons thereof. She concluded that under the circumstances the appellant did not need a copy of the ruling and order to be able to appeal; and after all there is no legal requirement for a copy of the ruling and order to accompany the Memorandum of Appeal.

The second point of objection was that the memorandum of appeal was filed at this court straight away. It was contended that was a violation of the law which required the Memorandum of Appeal to be filed at the court which made the impugned decision; which was the Resident Magistrates Court of Morogoro.

The appellant conceded to the facts in that the ruling was delivered on 26th January 2004 and this appeal was filed on

5/5/2004; which was well past 45 days. The appellant argued that despite the lapse of time from the date of delivery of ruling and the actual date of filing; the appeal was otherwise within time because the copy of the order was supplied to him on 22/4/2004; and appeal filed on 5/5/2004; which was only two weeks away. The appellant further argued that the law does not state clearly that copies of ruling and order appealed against are not required. Further argument was that the law does not prohibit the same either. His further argument was that since a ruling and an Order are two separate and distinct documents; both are required. He stated that without reading the ruling and order, one cannot file a meaningful appeal even if they do not have to be annexed to the Memorandum of Appeal. He maintained that the appeal was timely filed under those circumstances.

On the second point of objection, the appellant also conceded that the appeal was filed in this court and not in the Magistrate Court. His argument was that it was not practical to lodge the memorandum of appeal in the Resident Magistrates Court while the trial record was already before this court.

SECTION 80 of the Law of Marriage Act stipulates; *inter alia*, on appeals:-

"(2) An appeal to the High Court shall be filed in the magistrate's court within forty five days of the decision or order against which the appeal is brought." (emphasis added)

Subsection (3) thereof limits the application of the Civil Procedure Code provisions on appeals in matrimonial proceedings in the following language:-

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

The procedure to be followed in appeals in Matrimonial Proceedings is provided for under Rule 37 of the Law of Marriage (Matrimonial Proceedings) Rules, 1971. Among others, the rule provides:-

"(1) An appeal to the High Court under section 80 of the Act shall be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against."

Subrule 3 thereof states:-

"Upon receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with the complete record of the matrimonial proceedings to which the appeal relates."

I have reproduced the above provisions not only for ease of reference but also to remove any doubts.

On the foregoing provisions, it is mandatory that an appeal in matrimonial proceedings be filed within 45 days of the decision. There is no dispute that this appeal was filed after about 100 days of the decision without leave of the court. The appellant argued that he needed copies of the decision and order to enable him file a meaningful appeal. The appellant had same counsel representation at trial and at the appellate court. Both the appellant and his counsel were present in court on 26/1/2004 when the ruling was delivered. Counsel was conversant with the relevant laws and if there was sufficient cause for delay as alleged; counsel should have sought enlargement of time; as appeals in matrimonial proceedings do not require copies of decisions and orders to be annexed to the Memorandum of Appeal.

It is also not disputed by the appellant that the law makes it mandatory that appeals have to be filed in the trial court which is obliged to transmit the memorandum of appeal and the complete trial record to this court. In this connection the appellant's argument that

"it is also immaterial (sic) to insist on filing in the District Court our memorandum of appeal while the entire record is already before the honourable court;"

is not true. Rule 37 (3) above sets out the procedure.

All in all, it is crystal clear that the appeal was filed out of the prescribed period of 45 days; it is time barred. The first point of preliminary objection is sustained. Had the appeal been timely filed, this court could, in the interest of justice and in the absence of any prejudice occasioned to the respondent, have allowed the appeal to proceed on merits. But since the appeal itself is not maintainable in law for being time barred; there is no other option except to strike out the appeal with costs.

The record shall be remitted to the trial court for their necessary further action.

K.K. Oriyo

JUDGE

7/3/2006

Coram: K.K. Oriyo, J.

For the appellant – Absent

For the Respondent – Kashumbugu advocate

Respondent – In attendance

C.C. Emmy

Court: Ruling delivered in the presence of the respondent and her counsel and in the absence of appellant and his counsel.

Order:

1. Appeal is time barred.
2. It is struck out with costs.


K.K. Oriyo

JUDGE

7/2/2006

1,252 words