

**IN THE HIGH COURT OF TANZANIA
AT Mtwara
MATRIMONIAL APPEAL NO. 1 OF 2007
ORIGINAL Mtwara DISTRICT COURT
MATRIMONIAL CAUSE NO. 1 OF 2003**

BETWEEN

**MWARAMI HAMISI MANYARA APPELLANT
VERSUS
RAHMA MTANI RESPONDENT**

**DATE OF LAST ORDER – 10/3/2008
DATE OF RULING – 1/4/2008**

RULING

MJEMMAS, J.

The parties in this matter were husband and wife until when their marriage was dissolved on 28/4/2005 by the District Court of Mtwara in Matrimonial Cause No.1 of 2003. It appears from the record that no one was aggrieved by that order of dissolution of their marriage. After the dissolution of the marriage the District Court proceeded to determine issues relating to the custody and maintenance of children and division of matrimonial property. The husband, who is the appellant in this matter was aggrieved by the orders/decision of the court on maintenance of children and division of matrimonial property so he preferred an appeal to this court. The respondent then filed a "Notice of preliminary objection on a point of law" stating that, I quote: "PLEASE TAKE NOTICE that at the first

hearing of this appeal, counsel for the Respondent will raise a preliminary objection on a point of law, namely:-

The Appeal is misconceived, incompetent and bad in law for having been filed out of time, without leave for so doing, having been sought and granted prior to its filing in the court. The said counsel for the Respondent will, therefore, pray that the Appeal be dismissed with costs to the Respondent.”

At the hearing of the preliminary objection the appellant appeared in person, unrepresented while the respondent was represented by Mr. Mlanzi, learned advocate. Mr. Mlanzi submitted that the appeal was not properly before the court because it was time barred and no leave was granted to extend the time to file the appeal. He contended that the appeal was filed on 8/2/2007 with a view to challenge the decision of Honourable T.K. Simba which decision was given on 24/2/2006. Mr. Mlanzi referred this court to item one of the first schedule of the Law of Limitation Act No.10 of 1971 to support his argument that the appeal is time barred because the period provided for appealing is ninety (90) days. According to Mr. Mlanzi the period of appealing expired on 25/5/2006. He argued further that when the appeal was filed in court i.e on 8/2/2007 it was 259 days since the decision was given. In his view, the appellant was late so he was required to seek extension of time under section 14(1) of the Law of Limitation Act, 1971. Mr. Mlanzi submitted further that the appellant has no automatic right to be granted extension of time because that is a discretion of court and he has to show valid grounds for his application. Mr. Mlanzi also submitted that even the

court has to be moved to extend the period of appealing otherwise it cannot do so in its own motion. To support that contention he referred this court to the case of **Abdurasul Ahmed Jaffer and Two others V. Parin A. Jaffer (CA) Civil Appeal No.5 of 1994, Dar es Salaam Registry (unreported)**. He therefore urged this court to dismiss the appeal with costs.

The appellant who appeared in person unrepresented, contended that the court gave its judgment on 24/2/2006 and he made a written application on 27/2/2006 to be supplied with a copy of judgment. He wrote a reminder on 20/4/2006 and filed a notice of intention to appeal to the High Court on 8/5/2006.

The appellant went on to argue that he was supplied with the copy of judgment of the District Court on 1/2/2007 and he filed his appeal on 8/2/2007. He went on to submit that under those circumstances he was not to blame for the delay. He contended that he could not prepare his appeal without having a copy of the judgment and that the days or period required for the preparation of the judgment should be excluded in computing the period of limitation. To support his argument or submission, the appellant referred this court to the case of **Mary Kimaro V. Khalfani Mohamed [1995] TLR.2002**. He concluded his submission by arguing that his appeal is within time and the court should proceed to hear it.

The main issue to be determined in this matter at this stage is whether or not the appellant's appeal is time barred. Mr. Mlanzi learned counsel contended that the appeal is time barred because it was filed after ninety (90) days contrary to item 1 of the first schedule of the Law of Limitation Act. No.10 of 1971. He urged this court to dismiss the appeal because no application was made by the appellant to the court to extend the period of limitation. There is no dispute that the decision or order which the appellant seeks to appeal against was delivered on 24/2/2006 and it related to maintenance of children and division of matrimonial property.

Section 80(1) - (3) of the Law of Marriage Act, 1971, Cap.29 of the Revised laws, 2002 provides:

S.80(1) "Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court."

S.80(2) "An appeal to the High Court shall be filed in the magistrates' court within forty-five days of the decision or order against which the appeal is brought.

S.80(3) "Save to the extent provided in any rules made under this Act, the provisions of the Civil Procedure Code relating to appeals shall not apply to appeals under this Act.

From the above provisions it is clear that the time or period provided for preferring an appeal to the High Court is forty-five (45)

days since the decision or order was given and not ninety days as contended by the counsel for the respondent. The question which arises is, did the appellant file his appeal within forty-five days of the decision of the district court? From the record of the case and as argued by the appellant himself the district court gave its decision on 24/2/2006. The appellant filed his appeal on 8/2/2007. That was 304 days after the period of forty-five days (24/2/2006 – 10/4/2006) which he was required to have filed his appeal.

It is clear that the appellant filed his appeal after the period of forty-five days since the decision of the district. In other words he was late to file his appeal. Section 3(1) of the Law of Limitation Act, 1971, CAP.89 (r.e) 2002 provides

S.3(1) "subject to the provisions of this Act, every proceeding described in the first column of the schedule to this Act and which is instituted after the period of Limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

The present appeal or matter is not one of those proceedings described in the first column of the schedule of the Law of Limitation Act, however section 46 of the said Law of Limitation Act provides:

S.46 "where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."

From those provisions cited above the proper course for this court to take would be to dismiss the appeal. However, from the appellant's submission it appears that he wants this court to exclude the days taken to prepare the copy of judgment of the district court in computing the period of limitation. That was the essence of his argument which he supported by the case of **Marry Kimaro V. Khalfani Mohamed [1995] TLR.202**. I agree with the appellant that normally in computing the period of limitation for an appeal the period of time required for obtaining a copy of the judgment, decree or order is excluded. That is provided for under section 19(2) – (3) of the Law of Limitation Act, No.10 of 1971. With regard to the case cited by the appellant, that is the case of **Mary Kimaro V. Khalifani Mohamedi [1995] TLR.202** it should be noted that the case involved an application for leave to appeal out of time while the present case involves an appeal which is challenged to be time barred. I think I agree with the submission of Mr. Mlanzi, learned counsel for the respondent that the appellant was supposed to apply for extension of time to lodge his appeal and give his reasons for the delay. The court would then consider whether the reasons given by the appellant/applicant for the delay are reasonable or sufficient to make it extend the period of limitation for institution of the appeal. That is in conformity with section 14(1) of the Law of Limitation Act, which provides:

S.14(1) "Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a

decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.”

In the case of **Abdulrasul Ahmed Ahmed Jaffer (2) The National Housing Corporation (3) Registrar of Titles AND (1) Parin A. Jaffer (2) Amirali Ahmed Jaffer, Civil Appeal No.5 of 1994, Dar es Salaam Registry (unreported) the Court of Appeal of Tanzania** had opportunity to comment on section 14(1) of the Law of Limitation Act, 1970, quoted above. The Court of Appeal observed that;

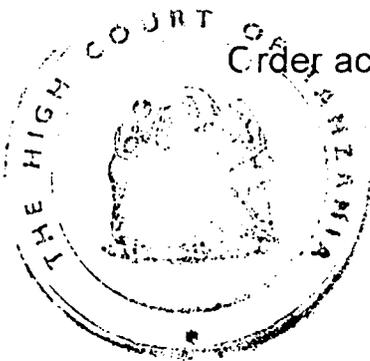
“It is quite apparent that this provision qualifies section 3(1) of the same Act, which generally requires the court to dismiss a proceeding instituted after the expiration of the period of limitation. Under this provision the court has discretion to enlarge the period of limitation except where the matter is an application for the execution of a decree. The question, however, is whether the provision empowers the court to enlarge the period of limitation suo motu or whether the court has to be moved. Upon careful reading of the provision we have come to the view that the discretion conferred under it is exercisable only if and when the court is moved to exercise it. It is hardly necessary to add that the court is enjoined to exercise that discretion judicially.”

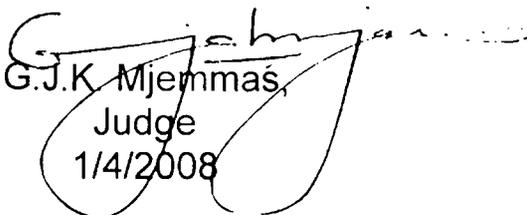
The Court of Appeal went on to state that:

"All that we have been trying to say is that in our opinion the court's discretion under section 14(1) reproduced above should be exercised only upon an application being made to the court in that behalf, and both sides have been given the opportunity of being heard. Such approach puts the court in a position where it can properly determine whether or not reasonable or sufficient cause has been disclosed for extending the time, and serves to ensure that the court's discretion is exercised judicially."

From what I have stated hereinbefore and guided by the decision of the court of appeal in the case cited above I hereby find that the appellant's appeal is time barred since it was filed after the prescribed period of limitation. The appellant ought to have filed an application for extension of time of the period of limitation giving his reasons for the delay. The application could have been filed before or after expiration of the time of limitation. Delay to get a copy of the judgment could have been one of the reasons for seeking extension of time. Since the appeal is time barred and this court has no power to extend the period of limitation suo motu, I hereby dismiss the appeal with costs.

Order accordingly.




G.J.K. Mjemmas,
Judge
1/4/2008

Date: 1/4/2008

Coram: Hon. G.J.K. Mjemmas, J.

Appellant: Present

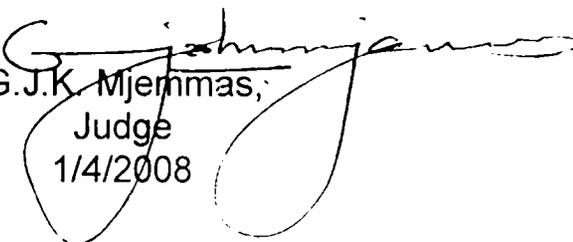
Respondent: Present

B.C: G. Luoga, RMA

Court: This matter is coming for ruling today.

Order: Ruling delivered in chambers today 1/4/2008 in the presence of the parties.




G.J.K. Mjemmas,
Judge
1/4/2008