

IBRAHIM BAKIFU MWANJALA

Vs

FLORINA PIUS MWANJALA

CIVIL APPEAL NUMBER 87 of 2009

RULING

JUMA, J.

On 22nd September 2009 Mr. T.A. Hyera, the learned Advocate for the respondent issued a notice of preliminary objection on point of law, to the effect that this HC Civil Appeal Number 87 of 2009 is improperly and prematurely before this Court. He submitted that the appeal should be struck out because it contravenes section 80-(2) of the **Law of Marriage Act, Cap 29 R.E. 2002**. At the hearing of the preliminary objection on 2nd December 2009 Mr. Ngundungi, the learned Advocate appeared on behalf of the respondent.

The main point for my determination is whether, as contended by Mr. Hyera this appeal is improperly and prematurely before this Court. In his pointed submission Mr. Hyera invited this Court to be guided by the mandatory terms of section 80-(2), providing:

- (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.*

Mr. Hyera contended that because the current appeal was filed in the High Court Registry but not in the magistrate's court as expected under the above-mentioned section 80-(2), this Court should with consequential costs strike out the appeal. Mr. Ngundungi responded by conceding that indeed the appeal was lodged in the High Court but not at the magistrate's court. He however hastened to point out that the anomaly was not fatal to be struck out. He submitted that the rationale behind section 80-(2) of the **Law of Marriage Act** is to enable the subordinate courts to assemble all requisite records of the trial and forward these records to this Court on appeal. He pointed out that the fact that the appeal and necessary documentation are already before this Court means that the objective of section 80-(2) has been attained and it will be absurd for the appellant to be referred back to the magistrate's court to initiate a fresh appeal. The technicality of first filing in the magistrate's court should be ignored and this court should proceed to hear the appeal. Mr. Ngundungi submitted that his plea falls within the objectives of Article 107A-(2) (e) of the **Constitution of United Republic of Tanzania, 1977** which exhort courts to dispense justice without being tied up with technicalities which may obstruct dispensation of justice. He also invited this Court to take into account the fact that any striking out this appeal will necessitate re-institution of this appeal but such a

procedure will serve no purposes other than occasioning further delay to speedy conclusion of the dispute between the parties.

I must admit that both sets of arguments presented ably by the two opposing learned Advocates are meritorious. Mr. Hyera is very correct in contending that section 80-(2) of the Law of Marriage Act is couched in mandatory terms; so much so that Court of Appeal while considering section 53 (2) of **Interpretation of Laws Act, Cap 1 R. E. 2002** was categorical that where the word "shall" is used in conferring a function the word "shall" must be interpreted to mean that the function so conferred must be performed: **AHMED MABROUK AND NAJMA HASSANALI KANJI Vs. RAFIKI HAWA MOHAMED SADIK COURT OF APPEAL OF TANZANIA (DSM) CIVIL REFERENCE NO. 20 OF 2005.**

With due respect I will also agree Mr. Ngundungi that the rationale behind section 80-(2) of the **Law of Marriage Act** is to procedurally enable subordinate courts to prepare ground work for appeal by assembling all requisite records of the trial and forward the assembled records to this Court to hear the impending appeal. It is my considered opinion that section 80-(2) of the LMA prescribes how appeal documents are assembled at subordinate courts and moved to this Court. I will give section 80-(2) a purposive construction. Given the purposive interpretation, section 80-(2) of the LMA should be construed as intended to facilitate the

preparation of necessary documents for intended appeal. It is a handmaid of justice so to speak but not an obstacle to justice at appellate level.

After an appeal is filed in this Court, registry officer must have scrutinized the appeal with a view to seeing as to whether proper court fees has been paid and whether the other formalities for filing the appeal have been complied with. It is at this stage where the appellant should have been directed to file his appeal at the subordinate court. My perusal of the records shows that the High Court Registry was not so rigid as to deny the filing of an appeal in this Court even if it was not filed first at magistrate's court. High Court registry in fact accepted this appeal even though it was not filed first at the subordinate court. Records show that on 1st June 2009 appellant took an essential step for appeal purposes by requesting the RM-in-Charge Kisutu to provide him certified copies of judgment and decree. On 13th July 2009 the Registrar of High Court asked the RM's Court Kisutu to forward original records of Matrimonial Case Number 7 of 2007 together with all documentary exhibits and any typed copies of proceedings for purposes of Civil Appeal number 87 of 2009. The RM's Court Kisutu sent the requested documents on 17-07-2009.

The foregoing role of the High Court Registry leads me to believe that the Registrar of this Court must be taken to have waived the

mandatory requirement to first file the appeal at the magistrate's court. It is also my considered view that the mandatory aspect of section 82-(2) is not applicable where all necessary documents for appeal to this court are already filed in this Court. In other words, this Court will not advance the process of justice by returning completed records of appeal back to the magistrate's court only for the same records to be forwarded to this court. It has not been shown that there are documents that are missing for purposes of this appeal which would not miss out had the appeal been lodged first at magistrate's court.

In the interests of justice, I hold that this appeal is validly in this Court. I will therefore dismiss the preliminary objection with consequent costs.

DATED and DELIVERED IN DAR ES SALAAM this 7th day of December 2009.

I.H. Juma

JUDGE

Ruling read on this 7th day of December 2009 in the presence of:

For the Applicants-

For the Respondents-

I.H. Juma

JUDGE

