

IN THE HIGH COURT OF TANZANIA

AT DAR ESSALAAM

PC CIVIL APPEAL NO. 53 OF 2010

*(From Civil (Matrimonial) Appeal No. 80 of 2008 of the District
Cour of Kinondoni Originating from Matrimonial No. 5 of 2008 of
Magomeni Primary Court)*

WEGESA LAMECK MWITA.APPELLANT

VERSUS

JUMA ADAM NG'WADI.RESPONDENT

Date of last Order: 27/10/2010

Date of Judgement: 08/02/2011

JUDGEMENT

MASSENGI, J.

Appellant Wegesa Lameck Mwita unrepresented is appealing against the decision of Kinondoni District Court in its appellate jurisdiction from Civil cause No. 5 of 2008 of Magomeni

Primary Court. Respondent Juma Adam Ng'wadi was represented by the learned advocate Mr. Kakamba.

Appellant have raised three grounds of appeal which are:-

- 1) The learned Resident Magistrate erred in law and fact in that he made distribution of the matrimonial asserts without ascertaining the value of the said assets.
- 2) The learned Resident Magistrate erred in law and fact in that he failed to call further evidence to ascertain the value of matrimonial asserts.
- 3) The learned Resident Magistrate erred in law and fact in that he awarded to the appellant a very small amount as her share of the matrimonial asserts.

It was agreed that the appeal to be argued by way of written submission. In her submissions the appellant argued that she contracted a civil marriage with respondent in 1987 by then she was employed by NBC Foreign Branch and respondent was employed by Trailers and Low Loaders (T) Limited. They were blessed with four children. Also through joint efforts they acquired a residential house at Mwenge area Dar es Salaam, residential house at Tegeta Area Dar es Salaam, residential house at Wazo Hill area Dar es Salaam, a farm at Mikese area Morogoro and two companies SAPHIRE CO. Ltd and MISIGA CO. Ltd both dealing

with stationeries as matrimonial asserts. The Mwenge house later was sold. Appellant was retrenched in 1996 and her terminal benefits were about 3,500,000/= Respondent was retrenched in 1999. In matrimonial proceedings at the Primary Court she was awarded Tshs. 2,000,000/=. She is also dissatisfied and has appealed to this court. Arguing her first ground of appeal she submitted that at the Primary Court she had no legal assistance and therefore she might not adequately argued her case and the remedy to that short coming was the District Court to call additional evidence as empowered by Section 21 (1) (a) of the Magistrate's Court Act. Though she required the District Court to exercise that power by ordering the Government valuer to ascertain the value of the said matrimonial asserts but the District Court didn't make such order. Therefore the distribution was not fair. She now prays this court to step in the shoes of District Court and order that additional evidence to be adduced or in the alternative to order the sale of the asserts and divided the proceeds between the parties.

In reply the respondent's advocate argued that there is no appeal at all before this court as the purported appeal has been filled out of time as stipulate by Section 25(1)(b) of the Magistrate's Court Act as well as the Law of Limitation Act of

1971. Also the petition for appeal was not accompanied by a copy of the Decree and judgement.

Since the issue of time limitation of filling an appeal is very mandatory as it touches the issue of jurisdiction. It can be raised at any time in the course of trial, I have to determine as whether the appeal was filed out of time or not and if it was filled out of time then did the appellant obtain leave of the court to file it out of time?

After going through the trial courts record the decision upon which the appeal emanates from was delivered on 28/10/2009 and was certified on 10/12/2009. Therefore the time for appeal is to be computed from 10/12/2009 that is the appeal was to be filed within 30 days from that date. The appeal was presented for filling on 12th May, 2010 through it was admitted on 18/06/2010. Even if the appeal was admitted in 12th May, 2010 it was already five months later that was about.

Furthermore there is evidence that appellant filed a notice to appeal on 11th January, 2010 against a judgement which was delivered on 28/10/2009 as demonstrated by ERV 40156253. It is obvious the notice was filed out of time as it was filled after about 75 days later. Then proceedings were obtained on 24/2/2010 as per ERV 40156795 Decree was obtained on 01/3/2010 as ERV

40155329 and judgment on 11/12/2009 as per ERV No. 149405. Taking into account the decree was obtained on 1/3/2010 which was the last document to be obtained as judgment and proceedings has been already obtained and then the appeal filed 26/05/2010 as per ERV 40156180 can we say the appeal was filed in time? Obvious the answer is in the negative. I am therefore fully satisfied and find that the appeal was not filed in time as demonstrate above. On two reasons, first the intention to appeal was filed out of time, as filling of an intention to appeal it does not require one having a copy of judgment or decree and no reason can be given so that intention to appeal can be filed out of time. This is a prove that what followed after that in regard to the intended appeal was out of time as demonstrated above. The issue of limitation cannot be disregarded in any way unless a leave of court is obtained to file an appeal out of time. In the case of **HEZRON M. NYACHIYA VS. TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS, AND ORGANIZATION OF TANZANIA WORKERS UNION**, Civil Appeal No. 79 of 2001. The Court of Appeal at page 9 – 10 observed:-

“Generally speaking, the Law of limitation plays

Many roles including the following: One, to set time within which to institute proceedings in Court of Law. Two, to prescribe the consequences where proceedings are instituted out of time without leave of the court.

According to Item 2 of Part II in the Schedule to the Law of Limitation Act Cap 89, (R.E 2002) an appeal has to be filed within 30 days. Section 46 of the same Act gives way whereby any other Law has prescribed time limit for filing an appeal then the time limit shall be computed according to such other law as if the Law of Limitation Act is not in place. The appeal at hand originates from Primary Court and Section 25 (1) (b) of the Magistrate's Court Act Cap 11 (R.E 2002) has prescribed time limit of filing such an appeal which originates from the Primary. It provides

“Appeals etc. from district courts in their appellate jurisdiction and revisional jurisdiction

(1) Save as hereinafter provided

(a).....

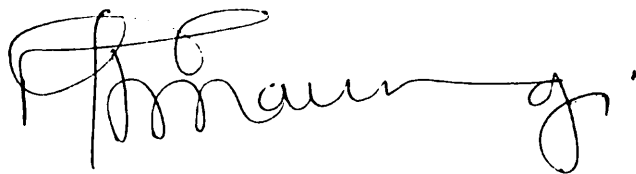
(b) In any other proceedings if a party is aggrieved by the decision or order of a district court in the exercise of its appellant jurisdiction or revisional jurisdiction may, within thirty days of the decision or order, appeal therefrom to the High Court and the High Court may extend the time of tilling the appeal either before or after such period of thirty days have expired”

(3) Every appeal to the High Court shall be by way of petition and shall be filled in the district court from the decision or order in respect of which the appeal is brought

(4) Upon receipt of the petition under this section the District Court shall forthwith dispatch the petition together with the record of the proceedings in the primary court and district court to the High Court.

The essence of subsection (3) and (4) is to dispense with the requirement of the petition of appeal to be attached with a copy of judgement and decree so as to cover time limit as to both will in the record of proceedings of both courts and speed up the dispensation of the appeal. And therefore there was no need for the appellant to apply for a copy of proceedings, judgement and decree and that is why computation of time starts to run immediately after delivery of judgement.

After finding that the appeal was filed out of time and no-leave of court was obtained first before the filing of the appeal is obvious this court has no jurisdiction to entertain the appeal and it is hereby dismissed with costs.

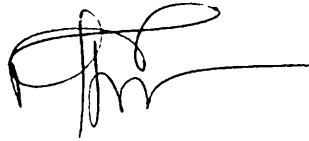
A handwritten signature in black ink, appearing to read 'F.H. Massengi', with a stylized flourish at the end.

F.H. Massengi

JUDGE

08/03/2011

Delivered in chamber court in presence of appellant and in
absence of respondent

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

F.H. Massengi

JUDGE

08/03/2011