

IN THE HIGH COURT OF TANZANIA
AT IRINGA
MATRIMONIAL APPEAL NO. 2 OF 2015

BERTHA ISRAEL BEHILE ----- APPELLANT

VERSUS

ZAKARIA ISRAEL KIDAVA ----- RESPONDENT

16/02/2016 & 29/03/2016

RULING

KIHWELO, J.

The appellant filed this appeal on 12th May, 2015 having being aggrieved by the decision of Njombe District Court in Matrimonial Appeal No. 3 of 2015. The appellant preferred three main grounds of appeal namely:-

- 1. That the trial Magistrate (sic) erred in law and fact in ordering for the division of a house which is not a matrimonial one.*
- 2. That the trial Magistrate (sic) erred in law and fact in entering judgment without considering the weight of evidence adduced by both parties including the Respondent himself.*

3. That the trial Magistrate (sic) erred in law and fact when engaged (sic) himself as a cancel (sic) for the Respondent being bias and hence ignoring the fact of him being un umpire.

Both the appellant and the respondent appeared in person.

On 3rd August, 2015 the Respondent filed a Notice of Preliminary Objection to the effect that;

The Memorandum of Appeal filed by the appellant is hopeless and bad in law as it contravenes Section 80(3) of the Law of Limitation Act, Cap 29 RE 2002 and Section 25(3) of the Magistrates Courts Act, Cap 11 RE 2002.

Since parties were not represented and in order to afford them fair hearing the court directed that the preliminary objection be disposed by way of written submission which were dully presented as scheduled.

The gist of the preliminary objection was premised on the provisions of Section 80(3) of the Law of Marriage Act, Cap 29 RE 2002 as well as Section 25(3) of the Magistrates Courts Act, Cap 11 RE 2002.

The respondent spiritedly argued very briefly that the appellant has wrongly filed the present appeal in disregard of the above provisions. He strenuously submitted that Section 80(3) of the Law of Marriage Act, Cap 29 RE 2002 is very categorical in that the provisions of the Civil Procedure Act do not apply in matters related to marriage. He went on to argue that according to the provisions of Section 25(3) of the Magistrates Courts Act all appeals to the High Court shall be by way of Petition.

The respondent finally alluded that the instant appeal has been brought by way of Memorandum of Appeal which essentially has to be accompanied with a decree which apparently is missing and that even if the decree was present it would have been fatal since a Memorandum is a creature of the Civil Procedure Code which don't apply in the instant case.

In response to the respondent's submission the appellant was equally brief and essentially he faulted the respondent's preliminary objection as being baseless and tainted to defeat the ends justice in support of this assertion he invited this Court to Article 107A(2)(e) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time which directs that in dealing with criminal or civil cases, courts shall administer substantive justice without undue regard to technicalities. The appellant

therefore prayed that the preliminary objection should be dismissed with costs for being baseless.

On a careful scrutiny of the rival submission by the parties the central issue for determination is whether the instant appeal is competent before this court.

On my part I have no flicker of doubt that the origin of the instant appeal is from the Matrimonial Cause No. 8 of 2012 from Makambako Primary Court and that the respondent successfully appealed to Njombe District Court hence the instant appeal before this Court.

Section 25(3) of the Magistrates Courts Act, Cap 11 RE 2002 reads that;

“25(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought”.

It must be borne in mind that Section 25 of the Magistrates Courts Act is found under Part III (c) which deals with Appellate and Revisional Jurisdiction of the High Court in Relation to matters originating in Primary Courts. Undoubtedly, the instant appeal ought to be initiated by way of Petition of Appeal which was to be filed at Njombe District Court. It therefore goes without saying that the appellant contravened this provision of the law.

Often times the court has made it very clear that where the law has provided the form and manner of instituting the matter that form must be complied to the letter. In the case of **Ibrahim Rehani V Iringa Municipal Council**, Land Case Appeal No. 3 of 2009, High Court of Tanzania at Iringa (unreported) the court held that;

“Be that as it may, the form of appeal preferred by the appellant in the instant matter is Petition. It goes without saying that this is not the form provided for in the law. As the law states in mandatory terms, and since the interpretation is to mean an obligation which must be performed, the appeal before the court is incompetent”.

Furthermore Section 80(3) of the Law of Marriage Act states that;

“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”.

The provision of Section 80(3) has to be read together with the provisions of Section 80(1) and (2) which they provide that an appeal like the instant one has to be lodged in the Magistrates Court within seventy five days from the date of decision. Apparently the appellant lodged the instant appeal before this court in contravention of the law.

Finally I am not in agreement with the appellant's interpretation of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977. This is because, taking into account the position of the Court of Appeal of Tanzania in the case of **Zuberi Mussa V Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported) which was also affirmed in **Elly Millinga V The Republic**, Criminal Appeal No. 268 of 2014 (unreported) the Court of Appeal of Tanzania had the following to say on the provisions of Article 107A (2) (e) of the Constitution:-

“--- article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivery --- one cannot be said to be acting wrongly or unreasonably when he is executing the dictates of law”.

The Court of Appeal of Tanzania went on to say that;

“We are increasingly of the view that Article 107A (2) (e) featured in our Constitution does not do away with all rules of procedure in the administration of justice in this country or that every procedural rule can be outlawed by that provision of the Constitution”.

See also the case of **China Henan International Cooperation Group V Salvand K. A. Rwegasira**, Civil Reference No. 22 of 2005 (unreported).

It is my respectful opinion that rules of procedures are made in order to be obeyed and not to be disobeyed.

In the light of the above considerations and for the reasons advanced I am of the considered opinion that the preliminary objection has merit as such the appeal is dismissed. However, given the fact that this matter is a matrimonial cause I will not award any costs hence each part should bear costs for the present matter.

Accordingly ordered.

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P.F. KIHWELO

JUDGE

18/03/2016

Ruling to be pronounced by the Deputy Registrar on 29th
March, 2016.

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P.F. KIHWELO

JUDGE

18/03/2016