

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**PC CIVIL APPEAL NO. 80 OF 2016**

*(Arising from Matrimonial Appeal No. 7 of 2015 of the District Court of Kinondoni and Matrimonial Cause No. 81 of 2014 of Kawe Primary Court)*

**ANTHONY LUCAS ..... APPELLANT**

**VERSUS**

**MOSI MWITA ..... RESPONDENT**

*Date of last Order: 23/03/2018*

*Date of Judgment: 30/04/2018*

**JUDGMENT**

**I. ARUFANI, J**

The respondent, Mosi Mwita filed Matrimonial Cause No. 81 of 2014 in the Primary Court of Kawe against the appellant, Anthony Lucas seeking for dissolution of marriage, maintenance of the child and distribution of the matrimonial assets. After hearing the evidence of the parties the trial Primary Court ordered in the decision delivered on 13<sup>th</sup> day of March, 2015 that, there was neither marriage no presumption of marriage between the parties

as provided under section 160 of the Law of Marriage Act and the child namely, Angel was placed in the custody of the appellant as the father of the child.

The respondent was dissatisfied by the decision of the trial Primary Court and lodge Matrimonial Appeal No. 7 of 2015 in the District Court of Kinondoni to challenge the decision. Upon hearing the appeal the District Court of Kinondoni reversed the decision of the trial primary court and in its decision delivered on 2<sup>nd</sup> day of October, 2015 it ordered that, there was presumption of marriage between the parties, the house at Makongo be valued and sold and its proceeds of sale to be distributed to the parties and the respondent be given 40% and the appellant 60%, all the household utensils were given to the respondent and custody of the child was placed to the respondent. The appellant was ordered to pay Tshs. 50,000/= in each month as a maintenance for the child and he was given right of visiting the child.

The appellant was aggrieved by the decision of the District court and decided to appeal to this court through the petition of appeal admitted in the District of Kinondoni on 17<sup>th</sup> day of June, 2016. The grounds of appeal contained in the petition of appeal filed in the District Court are as follows:-

1. That the Honourable Magistrate erred in law and fact in entertaining an incompetent appeal from Primary Court to District Court as the same was time barred; the appeal was filed in the District Court on 29<sup>th</sup> day of April, 2014 about 46 days after the date of the decision against which the appeal was brought when 30 days after delivery of judgment expired of 13<sup>th</sup> day of April, 2014.
2. That Honourable Magistrate erred in law and fact in faulting the correct Primary Court decision and allowing the appeal without sufficient reasons.
3. That the Honourable Magistrate erred in law and fact in finding that there was marriage between the parties without sufficient reason.
4. That the Honourable Magistrate erred in law and fact in dividing what is purported to be matrimonial properties and issuing an order of custody and maintenance of the child of the presumed marriage without any decree of divorce or separation.
5. That the Honourable Magistrate erred in law and fact in entertaining and relying on evidence on appeal of a document account of a statement from Tanzania Women's Bank Ltd which was not produced at the hearing and

without an order for adduction of additional evidence or in the alternative that the Court erred in relying on a document whose nexus to the subject matter was not proved on a preponderance of probability.

6. That the Honourable Magistrate erred in Law and fact in admitting evidence on appeal hearing.
7. That the Honourable Magistrate erred in law and fact in deciding the appeal against the law.

When the appeal came for hearing the appellant was represented by Mr. Amin M. Mshana, learned advocate and the respondent appeared in person. As the respondent is not represented in the matter the counsel for the appellant prayed and the court allowed the appeal to be argued by way of written submission. I will start with the first ground of appeal because if it will be sustained there will be no need of labouring in determining the rest of the grounds of appeal as will not add anything substantial to the determination of the appeal rather than being for academic exercise which this court do not wish to venture at this moment.

The learned counsel for the appellant stated in relation to the first ground of appeal that, the appeal at hand was filed in the District Court of Kinondoni on 29<sup>th</sup> day of April, 2014 which is about

46 days from the date of delivery of the decision of the trial Primary Court while 30 days upon which the appeal was supposed to be filed in the District Court expired on 13<sup>th</sup> day of April, 2014. He argued that, there is no extension of time sought to lodge the appeal out of time under section 20 (4) of the Magistrates Courts Act, Cap11 R.E 2002 and section 14 (1) of the Law of Limitation Act, Cap 89 R.E 2002. He argued further that, according to section 20 (3) of the Magistrates Court Act copies of judgment and decree are not required to be attached to the appeal originating from the Primary Court to the District Court.

To bolster his argument he referred the court to the case of **Joseph Mtenga V. Jumuiya ya Maendeleo Msigani Mbezi**, Civil Appeal No. 101 of 2002 and **Monica Kavishe V. Meck Makundi**, Misc. Land Appeal No. 16 of 2006. He stated that, the delay to be supplied with the copies of judgment and decree would have been advanced in an application for extension of time. He submitted that, as provided under section 3 (1) of the Law of Limitation Act Cap 89 R.E 2002 any proceeding filed in court after expiration of the time provided by the law is bound to be dismissed.

He also referred the court to the case of **Hezron Nyachia V. Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania Workers Union**, Civil Appeal No. 78

of 2001 where it was held by the Court of Appeal that, the application instituted in court out of time without leave of the court deserve to be dismissed. He submitted that, the District Court of Kinondoni ought to have dismissed the appeal notwithstanding that, the issue of limitation was not raised by the appellant in this appeal and pray the first ground of appeal to be allowed to succeed with costs.

In reply to this ground appeal the respondent stated in her submission that, the appellant has nothing new to tell this court but is intending to waste the precious time of this court and is trying to deprive the rights of the respondent. She argued in relation to the first ground of appeal that, it is surprising to see the appellant is coming now with issue of delay to appeal to the District Court while that point was supposed to be raised at the District Court. She argued that, the appellant attended the matter at the District Court and exchanged the documents of the appeal with her and attended all the dates of hearing of the appeal up to the date of decision but he never raised the aforementioned point. The respondent referred the court to section 110 (1) of the **Law of Evidence Act**, Cap 6 R.E 2002 to support her submission.

The respondent stated that, after the decision of the Primary Court of Kawe be delivered, on 13<sup>th</sup> day of March, 2015 she applied

for the copy of judgment so that she can appeal as she would have not been able to appeal based on the legal words stated during delivery of the judgment. She stated that, despite the fact that she made several follow up but the copy of judgment was supplied to her on 21<sup>st</sup> day of April, 2015 which is after lapse of more than one month. The respondent stated that, the copy of the judgment was very vital document to enable the respondent to know where to start in lodging the appeal in court. She stated that, after getting the copy of judgment she found a lawyer to assist her to prepare the grounds of appeal and managed to file the appeal in court on 28<sup>th</sup> day of April, 2015. She submitted that, as the appellant was well aware of the appeal and he was given chance to defend the appeal and she didn't raise the alleged point then the first ground of appeal is baseless and is intended to waste the time of this court.

The court has carefully considered the rival submissions of the parties in relation to the first ground of appeal filed in this court by the appellant. After going through the record of the lower courts, the court has found there is no dispute that the decision of the Primary Court of Kawe in Matrimonial Cause No 81 of 2014 was delivered on 13<sup>th</sup> day of March, 2015 and the Matrimonial Appeal No. 7 of 2015 was filed in the District Court of Kinondoni by the respondent on 29<sup>th</sup> day of April, 2015. That being undisputed facts,

the court has found that, if you count from when the decision of the trial Primary Court was made up to when the appeal was filed in the District Court of Kinondoni you will find about 46 days had lapsed.

Having find those are the days which had lapsed from when the appeal was filed in the District Court, this court has gone through section 20 (3) of the Magistrates Courts Act and find the Matrimonial Appeal No. 7 of 2015 of the District Court of Kinondoni was filed in the said court out of time because as rightly stated by the learned counsel for the appellant the appeal was supposed to be filed in the District Court within thirty days from the date of the decision. Since the Matrimonial Appeal No. 7 of 2015 was filed in the District Court after expiration of the time prescribed by the law the court has found the District Court had no jurisdiction to entertain the appeal filed in the court out of time and without leave of the court to lodge the same out of time prescribed by the law.

The court has considered the argument by the respondent that the point of delaying to lodge the appeal in court was supposed to be raised in the District Court and not in this court which is sitting as the first appellate court and find the same has no merit. The court has arrived to the afore stated finding after seeing the Court of Appeal stated clearly in the case of **Sebastian**



**Rukiza Kinyondo V Dr. Medard Mutalemwa Mutungi, [1999]**

TLR 479 that, question of limitation and jurisdiction of the court to entertain the matter can be raised on appeal and determined by the appellate court like in the matter at hand.

As for the argument that she delayed to get the copy of the judgment of the trial court which would have assisted her to prepare the sound grounds of appeal the court has found that, the said argument would have been used in seeking for extension of time to lodge the appeal out of time and not to lodge the appeal out of time without seeking for leave of the court to file the appeal out of time. Upon finding the District Court of Kinondoni entertained the appeal filed in court out of time and without leave of the court to file the same out of time, the court has found the first ground of appeal has merit and deserve to be allowed.

The court has found this ground is enough to dispose of the appeal and there is no need to continue to deal with the rest of the grounds of appeal. In the premises the court is hereby quashing the proceeding and judgment of the District Court of Kinondoni made in Matrimonial Appeal No. 7 of 2015 for being null and void as the District Court of Kinondoni had no jurisdiction to entertain the matter lodged in the court out of time and without leave of the

court to lodge the same out of time. Each party to bear his own costs in this matter. It is so ordered.

Dated at Dar es Salaam this 30<sup>th</sup> day April, 2018



**I. ARUFANI**

**JUDGE**

**30/04/2018**