

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
PC. CIVIL APPEAL NO 75 OF 2018**

(Arising from Kinondoni District Court Matrimonial Appeal No 2 of 2018)

MBARAKA ATHUMANI.....APPELLANT

VERSUS

ZUHURA JUMA.....RESPONDENT

JUDGEMENT

Date of last order: 23/07/2019
Date of judgement: 23/10/2019

MLYAMBINA, J.

This matrimonial appeal arises from Matrimonial Appeal No. 2 of 2017 before the Kinondoni District Court. The matter has its genesis as a matrimonial cause No. 67 of 2017 before the Kinondoni Primary Court. It is not in dispute between the parties that the trial Court decision was pronounced on 8th day of November, 2017. The appellant filed his appeal on 29th December 2017 before the District Court of Kinondoni. The respondent on appeal successfully raised a preliminary objection on time limitation. Hence the appeal was dismissed for being time barred. The appellant being dissatisfied with the above Ruling and drawn order dated 8th May 2018 appealed to this Court against the said ruling on the following grounds:

1. That, the honorable Resident Magistrate erred in law and by deciding that the appeal is out of time.
2. That, the honorable Resident Magistrate erred in law and fact by exercising jurisdiction not vested to him.

WHEREFORE, the Appellant prayed for the following orders:

- (i) That, the judgment and decree of Kinondoni District court be reversed.
- (ii) The respondent been condemned to pay the cost of this appeal.
- (iii) Any other reliefs this honorable court may deem fit to grant.

The appeal was disposed by way of written submission at the consent of both parties. In his written submission, Yahya Njama for the appellant while arguing the first ground of appeal stated that the trial Magistrate erred in law and fact by deciding that the appeal was out time. The appellant was of the view that the appeal at District Court of Kinondoni was filed within time. The primary court Magistrate granted 45 days to appeal to the District Court of Kinondoni. The appellant filed his appeal on 29th December 2017. These were 43 days from the date of primary court decision. Therefore, when the appellant filed his appeal to the District court of Kinondoni it was within 45 days as the appellant complied with the directives of the primary court with regards to the time of appeal.

The appellant argued that, Section ***80(1) of the law of marriage Act Cap 29 R. E. 2002***, provides for time to appeal for any person aggrieved by the decision or order of Resident Magistrate, a District Court or Primary Court in Matrimonial proceeding, the time provided is 45 days. Therefore, the appellant was of view that he was within the time when he filed the appeal to Kinondoni District Court. In his further view, what was wrong was that he filed his appeal in a wrong court. The Appeal was

therefore incompetent for being filed in the wrong court. The remedy in such situation where a litigant has filed his proceeding timely but in wrong forum is to strike the proceeding or to mark the same withdrawn with the leave to file the same in the proper forum. On that effect, the appellant would be entitled to re-file his appeal in proper forum and he would be entailed to extension of time.

The respondent in his reply submission argued that the counsel for the appellant and appellant himself did not read the judgment carefully because all claims raised to be appealed against are all true. The trial Magistrates decided this case fair to both parties. ***The Law of Marriage Act Cap 29 R.E 2002***, under ***Section 80 (1) and (2)*** governs those appeal which goes direct to the High Court. There is nowhere stated in this provision where it was mentioned primary court is exclusive with the appeal within 45 days as it was claimed by appellant. This shows that the appellant wants to mislead the court for wrong interpretation.

The respondent argued that, it is very unfortunately that the appellant has kept insisting that his appeal was in time and the decision of the appellate court of Kinondoni District court was wrong which is not true. The law is very clear that once the law governing the specific matter does not provide time for such matter, one has to apply other law relating to such matter, and the relevant law to be applied in this case at hand is ***The Magistrate Court Act***, which provides that the time to appeal under ***Section 20(3)*** is 30 days. The section states that "*every appeal to a district court shall be by way of petition and shall be*

filed in the district court within 30 days, after the date of decision or order against which the appeal is brought”.

The respondent argued that, it is immaterial and impossible in our legal system for someone aggrieved with decision of the primary court, instead of filling his or her case to High court in hierarchy which is the District court and decides to take his appeal to High court and disregard District court, that will be disrespect of judicial system. This is what appellant tries to defend upon in his argument. Basing on the clear interpretation of **Section 80 (1) and 2 of the Law of Marriage Act**. Therefore, in view of the respondent, the appellant was hopelessly time barred as per the relevant law.

Considering the submission of both parties, the main issue raised is; *whether the District Court Magistrate erred in law and fact by deciding that the appeal was out of time*. This Court is of the view that the trial Magistrate was right to give right to either of the party to appeal within 45 days from the date of its decision to the District Court because the law provide the specific time for a party who is aggrieved by the decision in matrimonial proceeding to file his appeal within 45 days after the date of judgment as stated under section 80(1) &(2) of the Law of Marriage Act supra. Section 80 (1) (2) (*supra*) states:

- 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.*

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.

I have had enough time to go through the proceeding in primary court, the judgment was delivered on 17/11/2017 and appellant appealed to the District court on 29th December 2017. The 45 days lapsed on 1st January 2018. Under such circumstances, the trial Magistrate was wrong, to reach such decision. The appellant was well within 45 days appeal time.

Therefore, in the circumstances of the above, the first ground of appeal has merit.

On the second ground of appeal, the appellant argued that the trial Magistrate erred in law and fact in exercising jurisdiction not vested. It was the appellant's argument that in the first ground, the law applicable to appeal in matrimonial proceeding is The Law of Marriage Act, Cap 29 R. E. 2002 and not the Magistrates Courts Act, Cap 11 R. E. 2002, specifically under ***Section 80(1) & 2 of the Law of Marriage Act, Cap 29 R:E 2002.*** The Resident Magistrate ruled the procedures for appeal from primary court is provided under the Magistrate Court Act and The Law of Marriage Act are interchangeable. The learned Magistrate stated under page 5 of the ruling that the appellant is free to use either of the two procedures. The appellant argued that ***Section 80 of The Law of Marriage Act*** is very clear and specific and lay down the procedure for appeal in matrimonial proceeding, the existence of *Section 80 of The Law of Marriage Act* disapplies the general appeal provision of Magistrate Courts Act.

The "may" in **Section 80 (1) of the law of Marriage Act** only means that an aggrieved person has right to choose whether, he would appeal or not. But if he chose to appeal, then is bound by the provision of **Section 80 of the law of Marriage Act**. The word 'may' is not intended to give him choice whether or not to appeal because a party is not forced to appeal. Appealing is a matter of choice to aggrieved person. The Resident Magistrate has no jurisdiction to entertain matrimonial proceedings brought by appellant before him because according to the above cited provision it is only the High court which has jurisdiction to entertain matrimonial proceeding from primary court.

The respondent in reply to the argument by appellant, stated that, it is not true that the District court had no jurisdiction to entertain the matter, since the proper law which governs matter is the Magistrate Court Act. **Section 20 (3)** gives powers to every District Court to entertained matters as it did. So, the appellant sought of **Section 80 (2) of the Law of Marriage Act**, is totally wrong. But it has to be known that the duty of court is to make sure justice is seen done and also the time of the court is of more essence to preservation of the parties' rights in a case so as to attain the justice on time.

On the second ground, this honorable court is of the view that the trial magistrate was right to decide the matter by applying **Section 80 (1) & (2) of The Law of Marriage Act Cap 29 R. E. 2002** because it is the law which specifically governs matrimonial proceeding in Tanzania.

An appeal from the Primary Court decision lies to the District Court. Whoever aggrieved with the decision of the District Court has to appeal to the high Court by lodging his/her petition of appeal at the District Court which determined the first appeal. The fact that the trial magistrates complied with the interpretation of **Section 80 (1) & (2) of The Law of Marriage Act**, the second ground of appeal has no merit and it is dismissed.

In the end, the appeal is upheld on merits with no order as to costs. The decision of the District Court is over ruled. The appeal before the District Court be retried *denovo* on merits before a different Magistrate. Right of appeal is explained.

Y. J. Mlyambina

Judge

23/10/2019

Dated and delivered this 23rd day of October, 2019 in the presence of both parties in person.

Y. J. Mlyambina

Judge

23/10/2019