

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

PC MATRIMONIAL APPEAL NO 38 2019

**RENOLD SEMU KOMBE.....APPELLANT
VERSUS
TUMAINI WILFRED MUNISI..... RESPONDENT**

JUDGMENT

MASABO J.L

This is a second appeal. It emanates from Magomeni Primary Court Matrimonial Case No 42/2017 where the Appellant Renold Semu Kombe successful petitioned for the decree of divorce. While dissolving the marriage the court restrained from making orders as to the division of matrimonial assets. Disgruntled the Responded filed an appeal to Kinondoni District on Court where the assets were distributed to the parties. The Appellant was disgruntled hence this appeal. The appellant is anchored on the following grounds: -

1. That, the Honorable Trial Magistrate grossly erred in both law and facts in finding that, the partly of the decision of the Primary court was full of mistakes.
2. That, the Honorable Magistrate grossly misdirected herself in fact and law in miserably failing to apply the law on the division of the Matrimonial properties as the appellate court could not consider or deal with issues were not pleaded and or raised at the primary court of Magomeni at Magomeni.

3. That, the honorable magistrate acted so unreasonably in concocting evidence as to the contribution of the respondent to the matrimonial properties and thereby proceeding to grant reliefs which were not even entitled to the respondent on the facts established as evidence including; a house comprised on plot No. KUN/KIL/170, Mbezi Beach Africana, Kinondoni, Dar es salaam.
4. That, the Honorable Magistrate was in error in not establishing, recording and giving due weight on the registration details of the alleged matrimonial vehicles listed by the Appellant as to the ownership and other incidental records including corroborative evidence would have been sought from the Regulatory Body of motor Vehicles (Tanzania Revenue Authority – VAT department before determining the issue involving ownership of the Motor vehicles as a result of the failure awarding purported matrimonial motor vehicles to the respondent.
5. That the Honorable Magistrate misdirected herself in not seeing that the list of matrimonial assets did not include a house comprised on plot No.KUN/KIL/170, Mbezi Beach Africana, Kinondoni Dar es salaam, consequently was an after sought by respondent.
6. That, the trial Magistrate was quite wrong as was swayed away by irrelevant evidence placed by respondent and in failing to take into account of the existing mortgage over the matrimonial assets by the directors guarantees in the matrimonial company; YEHOVA YIRE Limited in which the respondent is also the director *cum* shareholder.

7. That, the trial magistrate erred in law and facts in holding that the custody of a marriage issue be to the Appellant ordered to meet maintenance costs and wishes of the issues of marriage were not in consideration, which were not even the grounds of appeal, no right of visitation to parties.
8. That, the honorable Magistrate erred in law and facts in failing to attach due weight on evidence by the Appellant. Therefore, the judgment and decree was generally contrary to law, weight of evidence, probabilities of the cause and that the trial magistrate was biased and made conclusions against the weight of evidence.
9. That, the honorable magistrate erred in law and facts in disregarding the 3 grounds of appeal by the Respondent in determination and instead freshly drawn, adopted and proceeded to determine different issues not as grounds of appeals.
10. That, the honorable Magistrate erred in law and facts erred in law and facts as proceeded to determine the appeal from the Primary court which was bad in law for non-attachment of the appealed judgment dated 11th day of September 2017 and was out of time consequently in connection with time limitation, thus the District court had no jurisdiction.
11. That the entire impugned decision is otherwise wrong and faulted in law as no even originated with the mandatory marriage conciliation board certificate.

The appeal was argued in writing. The Appellant was represented by Mr. Alex Balomi, Learned Advocate submitted that the trial primary court correctly decided the case hence its decision ought to be upheld by the district court. Regarding the 2nd ground Mr, Balomi argued that the court should limit its findings on the issues revealed in the pleadings and no party should be allowed to go outside the pleadings. Hence the first appeal court erred by unreasonably concocting evidence on the contribution of the respondent to the acquisition of matrimonial properties and thereby proceeding to grant reliefs which the appellant was not entitled to. He further submitted that the distribution does not clearly show which assets belonged to the Appellant and those which belonged to the Respondent and neither did it assign reasons thereof as to the contribution towards the assets. He added that had the court correctly directed itself it could have seen that the couple have only two matrimonial houses on plot No.800 with CT No 86477 at Mbezi Temboni locality where they were staying all material times during the subsistence of their marriage and that the two properties were mortgaged to secure a loan at CBA Bank hence they are incumbered and incapable of being divided. He vehemently resisted that they do not have the matrimonial property comprised under plot number KUN/KIL/170 Mbezi Beach Africana. The appellant submitted further that the trial magistrate was in error in not establishing recording and giving due weight on the details regarding the registration of the motor vehicle that it would seek corroborative evidence from the regulatory body (TRA). Moreover, it was submitted that trial magistrate erred in law by vesting the marriage issues under the appellant and in ordering him to pay maintenance to pay costs

which were not the grounds of appeal. Mr. Balomi further contended that the court erred by failing to order visitation contrary to section 125 of the law of Marriage Act, 1971 and also in failure to take into consideration the wish of the issues. The Respondent vehemently resisted each of the grounds. I do not intend to reproduce the submission as I will discuss them in detail while determining the grounds of appeal. At this juncture suffice it to state that I have given due regard to the Respondents detailed submission.

This being a second appeal I will be guided by the principle **The Director of Public Prosecutions V. Jaffari Mfaume Kawawa** [1981] TLR 149 that in the second appeal the court does not make findings or interfere with findings of fact by the courts below unless there are misdirection's or non-directions on the evidence (See **The Director of Public Prosecutions V. Jaffari Mfaume Kawawa** [1981] TLR 149.

Having stated this principle, I now move to the grounds of appeal. I have taken liberty to start with the 10th ground in which the appellant complains that the proceedings in the appeal court are a nullity in that the appeal was filed out of time and that the copy of judgement was not appended to the petition of appeal contrary to the requirement of the law. My choice to start with this ground rests on the fact that this ground if found to be meritorious, the appeal will naturally terminate hence there will be no need to proceed with determination of the rest of the grounds.

Having scrutinized the court record, I have noted that the appellant raised for preliminary objections against the first appeal. I will only reproduce the first two objections are relevant to the instant matter:

1. That the petition of appeal is incurably defective for not being accompanied with a copy of the decree/judgment
2. That the appeal is time barred

The preliminary objections were argued in writing a ruling thereto was delivered on 13/6/2018. To start with the failure to append copy of judgment to the petition of appeal, it was held that the provision of Order XXXIX Rule 1(1) of the Civil Procedure Code, Cap 33 RE 2002 which requires attachment of judgment was inapplicable as the appeal originated from the primary court hence it was governed by the Civil Procedure (Appeals in Proceedings Originating from the Primary Courts) Regulation G.N No. 312 of 1964. This is indeed the position of the law as stated in **Asha Said v Given Manyanga and Another** Misc. Civil Application No. 28 of 2003.

As regards the objection it is on record that the decision of the primary court was delivered on 11 September 2017 whereas the appeal was lodged on 24th October 2017. Section 20(3) of the Magistrate Courts Act, Cap which regulates appeals from Primary court to district court provides that:

(3) Every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought.

While determining the preliminary objection the first appeal magistrate having reproduced section 20(3) of the Magistrate Courts Act made the following finding:

“in my view on the preliminary objection which been raised by the Respondent is sustained, simply the appellant must rely on the section 20(3) of the Magistrate Courts Act 1985 whereby the section which is quoted by the Respondent gives forty-five days appeal from the District court to High Court.” (page 4).

However, in conclusion, the trial court invoked Article 107 A (2) of the Constitution of the United Republic of Tanzania and proceeded to overrule all the objections as they were technicalities.

In essence, the appeal magistrate found the argument by the Respondent that the appeal was filed out of time to be meritorious in that the applicable to appeals from primary court to district court is 30 days and not 45 days provided for under the section 80 of the Law of Marriage Act which apply to matrimonial appeals from district courts to High Court. The issue will then be, did the appeal court properly direct itself on this issue? Or in other words, is the issue of time limitation a mere technicality? Or was the Court correct in invoking Article 107A (2)? The answer to this question is strictly in the negative. There are numerous decisions in this respect. In **Uledi Hassani Abdallh Vs. Murji Hasnein Mohamed; Returning Officer, Mtwara Town Constituency; and Attorney General**, Civil Appeal No. 2 Of 2012,

CAT (Mtwara) the Court of Appeal held that “if a party flouts his obligation to comply with the requirements of clear requirements of statutory provisions he cannot expect courts to invoke article 107(2).

This has been the position of the court even after the incorporation of the principle of overriding objective into the Civil Procedure Code through section 3A of the Civil Procedure Code as amended by the Written Laws Miscellaneous Amendment Act, No. 3 of 2018. In **Njake Enterprises Limited v Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017; where it explicitly stated that:

“The overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case.

(Also see the case of **Mondorosi Village Council & Others v Tanzania Breweries Limited & Others**, Civil Appeal No. 66 of 2017)

From the foregoing, I am of the considered view that the court misdirected itself in labeling the issue of time limitation as mere technicality. Such label would entirely defeat the rationale for a time table for the conduct of litigation and would practically entail endless litigation which in my considered opinion was not the intention of the Constitution, as that would be tantamount giving the parties a liberty to disobey the orders of the court and taking actions at their own convenient time.

Accordingly, I invoke the powers of this court under Section 44(1) of the Magistrate Courts Act and quash the proceedings of the appeal court for being a nullity and proceed to set aside the judgment and decree of the first appeal court. The Respondent is free to reinstate her appeal by following the relevant procedures for extension of time. Parties are to bear their costs.

It is ordered, accordingly

DATED at DAR ES SALAAM this 15th day of October 2019.


J.L. MASABO
JUDGE

Judgment delivered this 15th day of October 2019 in the presence of Mr. Alex Balomi, counsel for the Respondent and Respondent present in person.


J.L. MASABO
JUDGE