

IN THE HIGH COURT OF TANZANIA
AT IRINGA

MATRIMONIAL APPEAL NO. 2 OF 2020

*(Originating from the Resident Magistrate Court of Iringa Matrimonial Cause No.
02/2019 by Kanje A, RM)*

DEODATUS RUTAGWERELA APPELLANT

VERSUS

DEOGRASIA RAMADHAN MTEGO RESPONDENT

RULING

Date of last order: 20/04/2020

Date of Ruling: 21/04/2020

NGWALA, J

A Preliminary Objection on Point of Law has been raised against this Appeal. It reads;-

*“The Appeal is incompetent as it offends the provisions of
**Section 80(2) of the Law of Marriage Act, Cap 29 R. E
2019 and Rule 37 (1)(3) of the Law of Marriage
(Matrimonial Proceedings) Rule GN No. 246 of 1997”.***

In support of the objection Mr. Barnabas Nyalusi, the learned counsel for the respondent submitted that this Appeal has been wrongly filed in this court, contrary to the mandatory requirements of the provisions of section 80(2) of the **Law of Marriage Act, Cap 29 R. E 2019** that reads;-

“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”

It is argued by Mr. Nyalusi that the Appeal is incompetent for being in a wrong court, whose jurisdiction has been ousted to hear the appeal. The cases of **Edwin Shaidi v. Doroth Shaidi, Misc. Civil Appeal No. 8 of 2004 High Court of Tanzania DSM Registry** (unreported) and **Bakari Mohamed v. Hadija John, Civil Appeal No. 4 of 2018 (High court of Tanzania DSM Registry** (unreported) were cited to fortify his contention in view of the cited provision of Section 80(2) (Supra).

The learned counsel for the appellant, Mr. Marenga Ndunguru resisted the objection by urging the court to take a liberal interpretation of the provision of Section 80(2) of the Law of Marriage Act. He insisted that the said provision has to be read in tandem with the overriding objective principle in the Written Laws (Miscellaneous Amendments) No. 3 Act No. 8 of 2019, which enjoins the courts to do away with technicalities. This principal is embodied in the provision of Article 107(2)(e) of the Constitution of the United Republic of Tanzania as amended from time to time.

The counsel maintained that the Appeal be entertained as Rule 38(c) of the Law of Marriage (Matrimonial Proceedings) Rules GN. No. 246 of 1997, provides that “the High court shall decide every appeal according to substantial justice without undue regard to technicalities of procedure and without undue delay”.

Upon hearing, the respective counsels for the parties, I have no doubt as pointed out in rejoinder by the learned counsel for the appellant, that the counsel for the respondent has admitted that they have offended the procedural requirements of the law. He is only trying to seek refuge in the overriding objective principle that cannot be applied in this case. I hold so because the overriding principle cannot be applied against the mandatory provisions of the procedural law as held by the Court of Appeal of Tanzania in **Mandorosi Village Council and two others v. Tanzania Breweries and four others, Civil Appeal No. 66 of 2017** that;-

“Regarding 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”

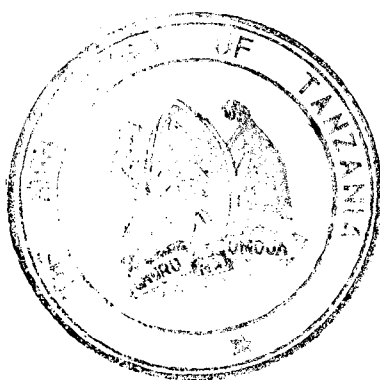
Rule 38(C) of the Law of Marriage (Matrimonial Proceedings) **Rules GN No. 246 of 1997**, cited by the counsel for the appellant in support of his arguments, is also only applicable when the Appeal is competently before the court. This rule is not a procedural requirement for a place of instituting an appeal. That Rule provides in mandatory terms the manner or way or how to handle matrimonial Appeals or a Matrimonial Appeal, when it has already been properly filed before the High Court. This point is driven home in the cited case of **Edwin Shaidi v. Doroth Shaidi (High Court of Tanzania, DSM) Misc. Civil Appeal No. 8 of 2004** (unreported) by Oriyo J, as she then was, held that:-

“The law makes it mandatory that Appeals have to be filed in a trial court which is obliged to transmit the Memorandum of Appeal and the complete trial record to this court”

It should be clear therefore, that the provision of section 80(2) of the **Law of Marriage Act, Cap 29 R. E 2019** provides in mandatory terms that Appeals against any decision or order of the court of Resident Magistrate, a District Court or a Primary Court in a Matrimonial Proceeding must be filed in the Magistrate court that tried the case. Here there is no mischief that requires constructive interpretation, and or purposive interpretation of the provision of section 80(2) of the **Law of Marriage Act, Cap 29. R. E 2002** that require this court to apply the golden rule or mischief rule of statutory interpretation in order to invoke the overriding objective principle.

For the foregoing reasons, I am satisfied that the Preliminary Objection raised is meritorious. It is accordingly upheld. The Appeal is struck out with costs to follow events. That is the respondent is entitled to costs in terms of section 30(1) of the **Civil Procedure Code, Cap 33 R. E 2002**.

It is so ordered




A. F. Ngwala,

Judge

21/04/2020

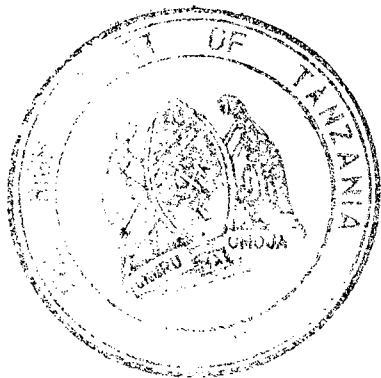
Date : 21/04/2020
Coram : Hon Dr. A. F. Ngwala, Judge
Appellant : Present
Respondent: Present
C/C : Glory


For appellant: Mr. Marenga Ndunguru (Advocate)

For respondent: Mr. Barnabas Nyalusi (Advocate)

Court: Ruling delivered in court in the presence of the parties
and their respective Advocates.

Court: Right of Appeal to Court of Appeal of Tanzania explained.




A. F. Ngwala,
Judge
21/04/2020