

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 89 OF 2020

(From Civil Appeal No. 83 of 2018 of Temeke District Court)

(Mushi-Esq RM)

FATUMA D. MALANJE..... APPELLANT

VERSUS

ALLY S. KIMWEGE..... RESPONDENT

JUDGEMENT

22nd October & 26rd November 2020

ACK. Rwizile, J

Having married in 2011 and blessed with no children, parties to this appeal got fed-up with their marriage. The respondent filed a matrimonial cause at Temeke Primary Court. He petitioned for divorce and division of matrimonial assets. The case was heard, a decree of divorce was granted and distribution of the matrimonial properties was made. The appellant was aggrieved by equal division of matrimonial properties, she unsuccessfully appealed to the District Court of Temeke. This is the second appeal protesting the Primary Court decision.

she has advanced three grounds of appeal to wit;

- 1. The first appellate court magistrate erred in law and in fact by upholding the trial court's decision without considering the fact that the same was not properly decided as to the rights of the parties regarding the distribution of properties after divorce.*
- 2. The first appellate court magistrate erred in law and in fact by upholding the trial court's decision without further evaluation of evidence adduced during trial as the same was weak to support the respondent's case.*
- 3. The first appellate court's decision was otherwise at default and bad in law.*

She therefore prayed, this appeal be allowed, judgement and orders of the lower courts quashed/ reversed. She also prayed for the declaration that the pharmacy shops, a plot of land at Picha ya Ndege and a part of a plot of land at Vikindu are her properties. At the hearing, the appellant appeared in person but was offered legal aid by WLAC who prepared her submission, while the respondent had the service of Mr. Mohamed Menyanga learned Advocate.

Arguing in support of this appeal, which was done in written submissions, the appellant abandoned the 3rd ground of appeal. She therefore argued the first and second grounds of appeal together. It was her submission that, she married the respondent in 2011. She said, in subsistence of their marriage she managed to acquire her own pharmacy shops, a plot at Picha ya Ndege and part of a plot of land at Vikindu.

She asserted that when they were getting married, she had her own pharmacy and she was doing business while respondent was jobless. The appellant argued that, she knows that all properties acquired by spouses through their joint efforts or that were substantially developed during the subsistence of marriage are subject to distribution between them. She made reference to section 114 (3) of the Law of Marriage Act, [Cap 29 R.E 2019]. It was her submission that during their marriage, the respondent did not contribute anything in acquiring of the said properties.

As if that was not enough, she added the first appellate court did not consider her evidence as adduced at the trial, when she was proving acquisition of her properties as per section 111 and 112 of the Evidence Act, [Cap 6 R.E 2019]. Then, she said, failure of the first appellate court to consider the said evidence led to an unjust decision. She added that, it was wrong for the District Court to declare the said properties as matrimonial properties. She therefore prayed for quashing the decision and order of the lower courts.

When opposing the appeal, it was submitted for the respondent that, this appeal was filed out of the prescribed time. He said, the decision subject of this appeal was delivered on 15th January 2019 while this appeal was filed in 2020.

On the merits of the appeal, it was stated that the appellant did not prove how she acquired the said properties. According to him, a pharmacy shop at Picha ya Ndege was improved after the respondent contributed Tsh. 2,000,000/=.

He added, it is a trite law that in distribution of the matrimonial properties the trial court adopted section 114(2) (b) of Law of Marriage Act, which requires equal distribution of the said assets. According to him, the appellant was required to prove his case on balance of probabilities, the standard she failed. She did not produce any documentary evidence to prove her oral evidence. To support his argument, he cited Section 110 (1) of the Evidence Act and the case of **Ikizu Secondary School vs Sarawe Village Council**, Civil Case No. 163 of 2016. He therefore prayed for this appeal to be dismissed with costs.

Rejoining, the appellant argued that counsel for the respondent is not qualified since his name did not appear in TAMS (Tanzania Advocate's Management System). According to her, the same was not enrolled as an advocate, and it was wrong for him to draft the respondent's documents. He added that since the said document (submission) was prepared by the unqualified person, the same are incompetent and should be struck out as per section 39 (1) and 41 (1) of the Advocate's Act, [Cap 341 R.E 2019] and the case of **Amina Mhongole vs Medical Stores Department (MSD)**, Revision No.331of 2016.

Advancing his argument further, the appellant was of the view, that the respondent's submission was prepared by the unqualified/incompetent person. He said, it is as if, the respondent did not enter appearance and therefore failed to prosecute his case. To support this argument, he cited the cases of **Seti Tete vs Mwanjelwa Saccoss**, Misc. Civil Application No. 22 of 2018, **Harold Maleko vs Hary Mwasanjala**, Civil Appeal No. 16 of 2000 and **EATV and Radio Ltd vs Zainul Mzige**, Labour Revision No. 276

of 2010. She therefore prayed for this court to quash and set aside judgement of the lower courts.

Having considered the submissions of the parties and gone through the records of the lower court, before determining the crux of this appeal, I have to determine first the issue raised by the respondent that this appeal is out of the prescribed time before this court. Respondent in his submission argued that this appeal was filed in 2020, while the judgement subject of this appeal was delivered on 15th January 2019, so he said, the same is out of time. This assertion by the respondent could be true but it has to be clear that, appellant filed this appeal on 5th March 2019 and not in 2020.

It is apparent on the record that, decision of the District Court which the appellant is appealing against was delivered on 15th January 2019. This appeal was lodged on 4th March 2019 and admitted on that day. Payment of the same was done on 5th March 2019, it is therefore clear that this appeal was filed after 46 days. This is after excluding the day of delivery of the judgement as per section 19 (2) of the Law of Limitation Act, [Cap 89 RE 2019]

This appeal is the second appeal since the first one was before the District court challenging the decision of the primary court arising from a Matrimonial proceeding. Therefore, this appeal is also subject of time limit as provided under section 80 (1) (2) of the Law of Marriage Act, [Cap 29 RE 2019] which provides *interlia* that;

80.-(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.*

It is the law that, the appellant was supposed to file this appeal within 45 days after the date of the decision of the first appellate court. As shown, this appeal was filed after 46 days. It is unfortunate that this appeal is out of time. Limitation is a point that can be raised at any time. It was raised during the hearing through the respondent's submissions. By way of rejoinder, the appellant was expected to offer some explanation on this aspect. Instead she attacked the submissions of the respondent to have failed to answer her points and that the same were prepared by the incompetent person. Since Mr. Menyanga who prepared the same has no license to practice as an advocate of this court. I agree with the respondent and cited authorities in this aspect that submissions are as good as a hearing made orally before the court. Therefore, the hearing cannot be conducted on that behalf by a person not legally allowed by law to represent a party to a case.

If I were to follow that logical thinking, I have to disregard the said submissions.

It may follow from there that the matter has not been prosecuted or rather defended. Is it going to change the fact that the appeal is out of time for one day? There is no law, in my view and I have not been cited any, that says, it is mandatory for parties to conduct a hearing after they have filed, their memorandum of appeal and replies thereto.

It follows therefore that upon having such pleadings completed a court may consider the grounds filed and make its decision even without going to the so-called hearing.

The appellant ought to have filed an application to extend time before filing this appeal, she did not do so. Having said so, there is nothing this court will do apart from striking out the same for being filed out of the prescribed time. This appeal is therefore struck out. Since it arises from the matrimonial cause. Each party shall bear its own costs.

**AK. Rwizile
Judge
26.11.2020**

Delivered in the presence of the parties, this 26th day of November 2020

**AK. Rwizile
Judge
26.11.2020**

 Recoverable Signature

X 

Signed by: A.K.RWIZILE

