

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MATRIMONIAL APPEAL No. 9 of 2019

**(From Matrimonial Appeal No. 22 of 2018 – Mpanda District
Court- Original Matrimonial Case No. 32 of 2017 – Mpanda Urban
Primary Court)**

JANNETH D/O SAMWELAPPELLANT

VERSUS

CHARLES S/O ALPHONCERESPONDENT

JUDGMENT

19th February – 04th March, 2020

MRANGO, J.

This is a second appeal. The matter originated from Mpanda Urban Primary Court (henceforth the trial court) where the appellant herein petitioned before the trial court against the respondent in a matrimonial cause No. 27 of 2017 claiming for divorce, order for maintenance of children and division of matrimonial properties acquired jointly.

The trial court successfully determined the matter with an order for division of matrimonial properties being granted but it declined to issue an order of divorce after it has found that the parties had been in illegal relationship that does not amount to valid marriage and as well declined to issue an order of maintenance to the children born out of their relationship as all were found to be adult, thus unqualified.

Being dissatisfied with the judgement and orders of the trial court, the respondent filed an appeal before the District court of Mpanda (Henceforth Appellate Court) with the complaints that, that the learned Magistrate erred in law and fact by sitting on a case which is Res judicata, that respondent was to file a new case if was not satisfied with the first judgement, that the learned Magistrate erred in law and fact to order the sale of the House located at Mwangaza as the same was built jointly with his married deceased wife, and that the learned Magistrate erred in law and fact to order the sale and division of produce of sale of two motor vehicles as one motor vehicle (Landover) was once sold while they were together and the other one, Suzuki Carry was bought by his effort after receiving a loan (now unpaid) from Alphonse Charles.

At the appellate court, both parties were represented, appellant being represented by Mr. Sindamenya – learned Advocate whereas the respondent was being represented by Mr. Elias Kifunda – Learned Advocate.

Having heard the appeal, the appellate court found that the dispute was not a matrimonial dispute as the parties had no valid legal marriage as

they were merely concubines, hence it allowed the appeal with an order for the respondent if he has any claim against the appellant arising from their concubinage relationship to sue the appellant in a civil suit.

Being aggrieved by the appellate court decision the appellant has preferred this appeal with one complaint as quoted hereunder;

“That the District Court grossly erred in law to entertain and determine the appeal filed out of time”

Unlike it was in the appellate court, before this before this court the appellant had a legal service of Elias Julius Kifunda – Learned advocate while the respondent appeared in person unrepresented.

When the case was called on for hearing on 19. 02. 2020 Mr. Elias Kifunda – Learned advocate for the appellant argued that the learned District Magistrate erred when he admitted the appeal and heard it while the appeal was filed out of statutory time under section **80 (1) (2) of the Law of Marriage Act**, the appeal from Primary Court to the District Court prescribed period of time is forty five (45) days.

He further said the Primary Court delivered its judgement on 31. 08. 2018 and the respondent lodged his appeal at the District Court on 29th November 2018, a total of ninety (90) days from the date of the trial court.

Mr. Kifunda further argued that before the appeal was heard at the District Court, the appellant raised a preliminary point of objection arguing that the appeal was time barred, however the objection was overruled on 14. 02. 2019. He said that was an interlocutory order and is not appealable as per **section 43 (2) of the Magistrate Court Act, No. of 1984 as amended by Act No. 25 of 2002.**

Learned advocate is of the view that the appeal before the first appellate court was time barred as a result they pray for this appeal be allowed and dismiss the appeal before the first appellate District Court with costs.

In reply, the respondent prayed for the court to adopt the reply to the petition of appeal he has lodged.

In the reply to the petition of appeal, respondent argued that the ground that the District Court grossly erred in law to entertain and determine the appeal filed out of time, the same ground was overruled (attached a copy of ruling to the reply). He said the respondent being a

layman highly depended on a copy of judgement to draw his grounds of appeal there from, that he had no any knowledge of what to narrate to any legal practitioner of what he could appeal of when the judgement was read to him by the Primary Court since he was very much confused by it, it was until time when he got a copy of judgement which he took to a lawyer and the law expert got some grounds of appeal to file an appeal.

He further argued that the ground that the appeal was filed out of time is highly disputed because the case was decided on 31. 08. 2018, and the respondent applied for a copy of judgement on 03. 09. 2019 which was on time and the same was supplied to him on 14. 11. 2019 and from there he lodged his appeal on 29. 11. 2019 which was still on time.

He is of the view that the ground of appeal projected bears no any substance since it is overruled by the provisions of the Overriding Principle or the construction of the Civil Procedure Code, where it was provided that the general rule is to the effect that, the procedural rules are handmaiden in the administration of justice, they are made to facilitate the dispensation of substantial justice, therefore, a strict construction of them is discouraged. The case of **South British Insurance Co. Ltd (1973) E.A 210** at page 214 is hereby given as a reference to this present case where

it was held that in deciding appeal a fair court endeavor not to allow technicalities to cause failure of justice but rather looks to the substance of the matter. He therefore prays for the appeal be dismissed with costs, the decision of the District Court be upheld.

The issue for this court to determine is whether the appeal has merit or not.

To our case, it is from the record that the matrimonial dispute before the trial tribunal was determined and thereupon the judgement was delivered on 31. 8. 2018. The record further shows that the respondent filed an appeal before the appellate court on 29. 11. 2018 which is almost 90 days elapsed contrary to the statutory time of 45 days as provided under **section 80 (2) of the Law of Marriage Act, Cap 29 RE** which requires any appeal of matrimonial proceeding to the appellate court shall be filed within forty five days (45) of the decision or order against which the appeal is brought.

From the wording of section 80(2) cited above, it appears to this court that, it is mandatory for a person aggrieved by the decision of the trial court to file an appeal before the appellate court within 45 days of the decision or order of the matrimonial dispute.

It has also been held several time by this court and the court of appeal that for appeals in matters originating from Primary Courts time to appeal starts to run after the delivery of judgement. See case of **Lukas Ndoloma vs. Afya Kitanta, Misc. Land Appeal No. 11 of 2012, H C. Sumbawanga**, also case of **Gregory Raphael vs. Pastory Rwehabura [2005] TLR 99**

In above case of **Gregory Raphael vs. Pastory Rwehabura**, B.M Luanda, J, had this to say;

“Attachment of copies of decrees and Judgements is a condition precedent in instituting appeals originating from District Courts and Courts of Resident Magistrates, but for appeals in matters originating from Primary Courts there is no such requirement and the filing process is complete when the petition of appeal is filed upon payment of requisite court fees, accordingly the appeal in this case is time barred as time started to run after the delivery of the decision of the District Court.”

Having above position of the law in mind, the respondent decision to file the appeal to the appellate court beyond statutory time of 45 days to

my firm view made his appeal to be time barred. What the respondent could have done first was to file application for leave to appeal out of time which is provided under **rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules 1963, GN. 312 of 1964.**

It is pertinent to note that the **Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules** is the legal regime governing all civil appeals originating from Primary Court filed before both to District Courts and the High Court. The rule 3 of the above Rules provides thus;

"An application for leave to appeal out of time to a district court from a decision or order of a primary court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order."

Also, **the Magistrate Court Act, Cap 20 RE 2002 under section 20 (3)** provides the general principle on how the appeal from the Primary Court to District Court is to be filed, it provides thus;

Every appeal to a District Court shall be by way of petition and shall be filed in the district within thirty days after the date of the decision an order against which the appeal is brought. [Underlined emphasized].

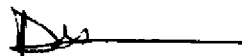
The above cited provision of the law provides for a person to appeal to a district court from the decision of the Primary Court has to file only a petition of appeal subject to payment of requisite fees. To add to above principle of the law, **Rule 4 (1)** also provides the manner of appeal from primary court to District Court ought to be, which in fact correspond to above position of cited provision of Magistrate Court Act. It thus read;

Every petition of appeal to a district court from a decision or order of a primary courtshall set out precisely and under distinct heads numbered consecutively the grounds of objection to the decision or order appeared against and shall be signed by the appellant or his agent.

The law does not require for a person to appeal to a district court to have a copy of judgement at hand but only a petition of appeal at hand suffices the process of appeal. Therefore, the respondent argument that the delay to file an appeal was contributed as a result of him being a layman who depend only on a copy of judgement to put forward his grounds of appeal is devoid of merit. The demand of the law as elaborated above cannot be bypassed by the Overriding Principle. The respondent if he had strong conviction to draw grounds of appeal of which seems not could have applied before the trial court to have a direct perusal of the file for himself or his advocate.

In the premise, this court allow the appeal as argued by the appellant that the appeal which was determined by the first appellate court was filed out of time. No order as to cost is made.

It is ordered.



D. E. MRANGO

JUDGE

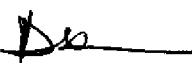
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Date - 04.03.2020
Coram - Hon. D.E. Mrango – J.
Appellant - Absent/without notice
Respondent - Present in person
B/C - Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 4th day of March, 2020 in presence of the Respondent and in the absence of the Appellant and Mr. Elias Kifunda – Advocate for the Appellant.

Right of appeal explained.


D.E. MRANGO
JUDGE
04.03.2020