

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. CIVIL APPEAL NO. 17 OF 2018

(From Civil Appl. No. 3 of 2018, Kahama District Court, Original Kahama Urban Primary Court in Matrimonial Cause No. 58/2017)

AYUBU NYACHEKWEAPPELLANT

VERSUS

TABU EDWARD.....RESPONDENT

JUDGMENT

24/3/& 24/04/2020

G.J.Mdemu,J.;

Ayubu Nyanyekwe, the Appellant in the instant appeal, appealed to this court to challenge the decision of the District Court of Kahama which dismissed his application for enlargement of time to appeal. The intended appeal to the District Court was against the decision of Kahama Urban Primary Court in matrimonial cause No.58 of 2017 for divorce and division of matrimonial properties.

According to record of Kahama Urban Primary Court, the decision in matrimonial cause No.58 of 2017 was delivered on 17th day of November, 2017. The Appellant did not appeal. On 28th of January 2018, the Appellant lodged an application to the District Court of Kahama so that he be granted leave to appeal out of time. As stated above, the Court denied him the said leave. He thus lodged this appeal on the following two grounds of appeal:

- 1. That the learned Resident Magistrate erred both in law and facts in his determination that the Appellant*

has no sufficient cause to grant leave to file appeal out of time, whilst a copy of judgment , which was required by the lawyer for drafting the petition of appeal, was not issued to Appellant within time.

- 2. That the learned Resident Magistrate erred both in law and facts in his reasoning that the petition of appeal to be filed has no chance of success, whilst the intended appeal has overwhelming chances of success.*

On the 24th of March 2020, this appeal came for hearing. Both the Appellant and the Respondent appeared in person arguing the appeal. The Appellant prior to his submission, requested this court to adopt his grounds of appeal, as filed, forming part of his submission. He then submitted that, his delay to appeal to the District Court was actuated by want of proceedings and judgment which he received on 25th of January 2018. He added that, as the decision was delivered on the 17th of November, 2017, time to appeal was already due. He therefore, under the premises, urged me to allow his appeal.

In reply thereof, the Respondent prayed first to have his reply to the petition of appeal filed on 13th of August 2018 be adopted as part of her submission. In addition thereto, she stated that, the Appellant had no interest of appealing because he initiated the appeal processes after realizing commencement of execution processes by the Respondent. She thought therefore that, there is no one who prevented the Appellant from appealing. She could not find any substance to the appeal, thus urged me to dismiss the same.

In rejoinder, the Appellant came up with another new set of facts that, the learned trial magistrates had two judgments and was not in a position to release any. He also faulted the Respondent in his submission that he lost interest to appeal. Parties ended this way in their submissions.

In determining this appeal, I have taken into account submissions of the parties, grounds of the appeal, reply thereto and the entire trial court's record. There is only one question to be resolved, that is, whether the Appellant did not show sufficient cause for the granting of the application to extend time to appeal. According to the affidavit of the Applicant supporting the application for extension of time to appeal to the District Court sworn on 15th of January 2018, there are two main grounds which the Appellant trusted as to constitute sufficient cause for the granting of extension of time to appeal. One is that, the delay was due to waiting of copies of judgment and proceedings and two that, the appeal has overwhelming chances of success.

With the two grounds and upon hearing the parties, the learned Magistrate made the following observation:

"In the actual fact, having gone through the submissions by the parties and the trial court's proceedings and judgment, I am not in a position to allow this application, basically, on the ground that the Applicant's alleged sufficient cause for the delay, in my opinion, is not sufficient cause. And even if there could be a good cause, but again I have failed to see the likelihood of the intended appeal to succeed."

Elsewhere in the reasoning of the learned Appellate Magistrate in support of this finding stated that, as there is no requirement to annex a copy

of judgment and decree in appeals to the District Courts from Primary Courts, time to wait for such documents cannot constitute sufficient cause. At page 6 of the ruling it is stated that:

*“The law, see S.20 of the MCA which provides for the procedure to appeal from the Primary Courts to the District Court, has not put a legal requirement of attachment of the trial court judgment to the petition of appeal, and since the judgment is read in the presence of the parties, the grounds of his dissatisfaction are known. In the circumstances, the fact that the party had no copy of judgment cannot constitute sufficient cause in the instant case. And this is the reason I have distinguished the case of **Benedict Mumello**(supra) from this instant case before me.”*

My take to the above findings of the learned Magistrate is that, in terms of the provisions of section 20 (3) of the **Magistrates’ Court Act, Cap.11**, appeals to the District Courts from Primary Courts do not have a requirement to annex a copy of judgment. For clarity, the said provisions of the law is reproduced as hereunder:

“S.20(3) Every appeal to the 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.”

What however should be taken into account is, what was the basis of the complaint of the Appellant in the trial court regarding the delay to appeal? Grounds of the Appellant towards the delay are grounded on want of


proceedings and judgment. The Appellant however did not state to require the said documents in order to annex the same in his petition of appeal as observed by the learned Resident Magistrate.

I have also taken into account the need to have this matter determined to finality basing on the dissolution of the marriage which none of the parties is contesting, meaning that, the issue of divorce is not contested. As this is the position, the need to have also the issue of division of matrimonial properties litigated to finality is of at most importance. I am not contenting that it was not determined by the trial court, but as long as the Appellant was not contented and thought to challenge the same, substantive justice demanded affording opportunity to the Appellant to do so. These to me are circumstances peculiar to this appeal which perhaps may not be the same in others.

I am aware that, in extending time to appeal, courts have discretionary power to do so upon being satisfied that there are sufficient cause to do so. I am also aware that, the said discretion has to be exercised judiciously. Having that in mind, and in the interest of substantive justice, and also bearing in mind to affording an opportunity to the District Court to look at the complaint of the Appellant, which will only be resolved if the appeal is determined, I find that there are sufficient cause shown by the Appellant in the grounds of appeal.


In view thereof, this appeal is allowed. The decision of the District Court of Kahama dismissing application of the Appellant to appeal out of time is hereby quashed and set aside. This being a matrimonial matter, prudence dictates to refrain in ordering costs.

It is so ordered.


Gerson J. Mdemu
JUDGE
24/4/2020

DATED at SHINYANGA this 24th day of April, 2020




Gerson J. Mdemu
JUDGE
24/4/2020