IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 234 OF 2020

SAKINA HUSSEIN MWASA.....APPLICANT

VERSUS

SADICK MFAUME.....RESPONDENT

RULING

Date of last Order: *14/04/2021*
Date of Ruling: *28/05/2021*

MLYAMBINA, J.

The calling issue for determination in this application is; *whether the Applicant has adduced sufficient cause to enable the Court to grant extension of time to appeal out of time against the decision of the Kinondoni District Court in Matrimonial Appeal No. 18 of 2018.* At the centre of it is an issue; *whether in matrimonial cases, an aggrieved party of the decision or order of the Primary Court can appeal direct to the High Court of Tanzania.* The application was brought under *Section 25 (1) (b) of the Magistrates Courts Act, Cap 11 (R.E. 2019) and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N No. 312 of 1964.* It is supported with the affidavit of Sakina Hussein Mwasa, the Applicant.

The reasons contained in the supporting affidavit and written submissions are five. *First,* the proceedings in Primary Court and the District Court are tainted with illegality as some of the crucial documents referred in the appeal were never tendered before the Court during the trial and the only explanation that can be made is that they were illegally put into the Primary Court file after the matter was already determined. One of such documents is the letter from Ndugumbi ward marriage reconciliatory board referred at page 4 of the typed judgement in *Matrimonial Appeal No. 18 of 2018* which the Applicant has no knowledge of.

Second, another illegality is on the jurisdiction of the Magomeni Primary Court which is Kinondoni District, while the matrimonial homes are at Ilala District in Dar es Salaam and in Tanga.

Third, the Applicant was denied access to the Primary Court file so that she could see what exactly was/is in the Court file as most evidence relied by the Resident Magistrate in appeal, come to her as a surprise and despite of constant follow ups the said record was never availed to her as a result, she had to complain to the Primary Magistrate's Court In-charge.

Fourth, the Applicant has been dealing with her son for quite sometime, who has been suffering from insanity which made the

Applicant to lose proper concentration on the case and more on her sick child.

Fifth, the intended appeal has a high chance of success.

Both parties have no dispute that where there is a complaint of illegality or irregularity on the part of the trial Court, such complaint constitutes sufficient ground and a fit case for grant of extension of time so that the Court of Appeal may have an opportunity to correct the illegality complained of and put the record right. This was stated in the case of **Principle Secretary, Ministry of Defense and National Service v. Devram Vallambia** [1992] T.L.R. 185. Also, in the case of **VIP Engineering and Marketing Litied and 3 Others v. Citibank Tanzania Limited,** Consolidated Civil Reference No. 6, 7 and 8 of 2006 in which the Court of Appeal (unreported) stated:

> *We have already accepted it as established law in this country that where the point of law as issue is the illegality or otherwise of the decision being challenged that by itself constitutes "sufficient reasons".*

In the case of **Amour Habib Salim v. Hussein Bafagi,** Court of Appeal of Tanzania, Civil Application No. 52 of 2009 the Court held:

In our view, when the point at issue is one alleging illegality of the decision being challenged the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right.

The Respondent in his counter affidavit disputed all the claims. In his reply submission, however, the Respondent never Respondent to the rest of the alleged illegalities except on the interpretation of *Section 80 (i) of the Law of Marriage Act* which provides:

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.

The Respondent argued that the word used in *Section 80 (1) (supra)* is "may" which means a state of possibility but not a command or order. In view of the Respondent, appeal direct from the Primary Court to the High Court is an option that one can do but it is not an order or command that should strictly be abided to. The Respondent was of further submission that matrimonial dispute can be instituted where a party opts. The parties to this

dispute after failure to settle the matter decided to institute it at the Primary Court which was also a right Court where the Respondent was residing. The Respondent *cited Section 19 of the Civil Procedure Code Cap 33 (R.E. 2019)* which states:

> *No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.*

In rejoinder, the Appellant was of submission that the use of *Section 19 of the Civil Procedure Code Cap 33 (R.E. 2019),* as contained at the last paragraph of the second page of the Respondent's reply submission has also been taken out of context because *Section 80 (3) of the Law of Marriage Act* (*supra*) has forbidden the application of *the Civil Procedure Code* (*supra*) on matters of matrimonial nature. It is only *the Act (Cap 29)* and its *Rules (Matrimonial Proceedings Rules, 1971* are permitted. Section 80 (3) (*supra*) reads:

Save to the extent provided in any rules made under this Act, the provisions of the Civil Procedure Code relating to appeals shall not apply to appeals under this Act.

In view of the Appellant, the word "may" as contained under *Section 80 (1) of the Law of Marriage Act, Cap 29*, as cited by the Respondent has been taken out of context. The said word only means that the law has given the aggrieved party the right to either appeal or not to appeal, but if one wishes to appeal, then must do so directly to the High Court of Tanzania.

According to the Appellant, the Primary Court, District Court and Court of Resident Magistrate have concurrent jurisdiction on the matrimonial cases *as per Section 80 (1)* (*supra*). Therefore, in view of the Appellant, it was wrong for the District Court to entertain *Matrimonial Appeal No. 18 of 2018,* while the law requires the appeal to be filed directly to the High Court of Tanzania. That is why, under Rule 36 of *The Law of Marriage (Matrimonial Proceedings) Rules, 1971*, the word "subordinate Court" for the purpose of matrimonial cases, means both the Primary Court, District Court and Court of Resident Magistrate.

Also, according to *Rule 37 (1)* the aggrieved party is required to file the appeal at the Court where the trial proceedings emanates

and it is that trial Court, be it the Primary Court, District Court or the Court of Resident Magistrate, which has the duty to transfer the trial proceedings directly to the High Court of Tanzania. Indeed, the whole of *the Rule 37 (1) (2) (3) and (4) Matrimonial Proceedings Rule (supra)* has made only one reference of the Appellate Court, the High Court.

In the light of the foregoing, though I agree with the Appellant that granting of extension of time depends solely on the discretion of the Court, there circumstances, the present application being one, where there is an illegality in the proceedings, which raise a serious point of law, in itself, amount to sufficient cause.

The Appellant and the Respondent seems to be not informed of the existing provision of the law. Without going into un-necessary analysis, the true position of the law is found under *Act No. 15 of 1980* which may be cited as *the Written Laws (Miscellaneous Amendments) Act, 1980 which amended inter alia Section 80 of the Law of Marriage Act* by deleting *subsections (1) and (2) and substituting them the following subsections.*

> *80 (1) any person aggrieved by any decision or order of a Primary Court, or by any decision or order of a District Court,*

may appeal from that Court, respectively, or to the High Court.

(2) An appeal to the District Court or to the High Court shall be filed, respectively, in the Primary Court or in the District Court within forty five days of the decision or order against which the appeal is brought.

In the light of *Section 80 (1) of the Law of Marriage Act,* as amended in 1980, whoever aggrieved with the decision of the Primary Court in matrimonial matters, the appeal thereof lies to the District Court. The law does not allow direct appeal to the High Court as contended by the Appellant. Moreso, the *1980's amendment of Section 80 (1) of the Law of Marriage Act* (*supra*) has neither been re-amended or repealed by any subsequent amendment to the same Act. The error of not incorporating such amendment in the 2002 and 2019 Revised Editions does not make the provision inapplicable.

Needless, the afore position of the law, the Respondent has not disputed with equal weight on the rest of the advanced grounds. I therefore find in the interests of justice; the Applicant be availed with the right of appeal so that the other alleged illegalities can be addressed on merits.

In the end, the Applicant is given 14 days to lodge her appeal. Since the two lower Courts records are at this Court, I order the appeal be filed at this Court. Costs shall follow events.

Y. J. MLYAMBINA

JUDGE

28/05/2021

Ruling delivered and dated 28th August, 2021 in the presence of the Applicant in person and in the absence of the Respondent.

Y. J. MLYAMBINA

JUDGE

28/05/2021