IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN DISTRICT REGISRY BUKOBA

AT BUKOBA

MATRIMONIAL CAUSE APPEAL NO. 2 OF 2020

(Arising from matrimonial cause No.1/2019 of Bukoba Resident Magistrate Court at Bukoba)

JOHANSEN KAHWA.....APPELLANT

VERSUS

JANSINTA KATABAZI.....RESPONDENT

RULING

NGIGWANA, J.

08/09/2021 &24/09/2021

This matrimonial appeal having been registered by the appellant in this court as matrimonial appeal No.2 of 2020, encountered a preliminary objection raised by the respondent in the due course of filling the reply to the memorandum of appeal which was couched viz: "*This purported Appeal is incompetent, misconceived and bad for being wrongly filed in great breach of section 80 of the Law of Marriage Act (Cap.29 R.E.2019)*"

Invited for submission on the raised P.O, Advocate Pilly Ally who represented the respondent argued that the law under section 80(1) & (2) of the Law of Marriage Act Cap 29 R.E 2019 is very clear as it provides that any person who is aggrieved by the decision of the Resident Magistrate Court or District Court and wants to appeal to High Court shall file his appeal within 45 days in the Resident Magistrate Court or District Court. Filing the appeal directly

to the High Court, the appeal becomes incompetent and contrary to section 80(2) of Cap 29(Supra). He buttressed his stance by the decision of this court in **Agustina Salvatory vs Gridon Ndibalema,** (H/C) Civil Appeal No.8/2005 (Unreported) where the matrimonial appeal which was not filed in the court which gave a decision was struck out for incompetency having been filed in High Court contrary to law.

Invited for the reply, Mr. Frank Karoli for the appellant faulted the raised P.O for being vague as it only mentioned section 80 of LMA without disclosing which subsection was referring to. However, he went on to reply that filing the appeal to High Court instead of the court which gave decision as required by the law is not fatal and cannot render the appeal incompetent. That the irregularity is curable as the intention of the legislature was only to speed up the hearing of the appeals. That the use of the word "shall" is not always interpreted to mean mandatory. Frank added that the referred case by the respondent's counsel is persuasive and not binding. On his argument that the word "Shall" should not always be interpreted to mean mandatory, He cited the case of **Director of Public Prosecutions vs 1. Freeman Aikael Mbowe and Another**, Criminal Appeal No.420 of 2018, CAT at Dar es Salaam (Unreported).

In her rejoinder. Advocate Pilly reiterated that since the clear provision of law was not complied with, the appeal becomes incompetent. It was the argument of Ms. Pilly that since the appellant's counsel did not provide any law to show that the appeal was competent being filed in High Court, the same is incompetent. That section 53(2) of the Interpretations of laws Act, Cap 1 (R.E 2019) has interpreted the word "shall" to mean mandatory and

complying with mandatory provisions has nothing to do whether any party was prejudiced or not. The respondent's learned counsel conceded that the referred case by the appellant's emphasizes the need to do away by undue technicalities but the overriding objective should not be applied blindly where there is mandatory provision of law.

Having given a due consideration to the duo submissions of parties by their respective advocates, I am now invited to determine whether the raised preliminary objection has merit.

The quoted relevant provisions on section 80(1) and (2) of Cap 29 (Supra) upon which this discourse resonates is reproduced for easy reference as hereunder:

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.*

Section 80(2) of Law of Marriage Act, is plain and clear which in my view, it is not hard to interpret. The intention of the legislature was to expedite appeal cases in matrimonial proceedings by requiring all appeals from District court or Resident Magistrate Courts appealable to High Court to be filled in the same magistrate courts which gave a decision so that the magistrate courts promptly transmit the entire record of appeal to the High Court.

The legislature, in my view did not merely enact the said provision for its self-enjoyment rather it seriously intended to be complied with. Matrimonial cases or proceedings are sensitive in nature as they touch on the social welfare of parties in the community.

I am fortified with, Rule 37 (1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules GN No. 246 of 1997, states as follows: -

"37 (1) An appeal to the High Court under section 80 of the Act shall be commenced by a memorandum of appeal ***filed in the subordinate court which made or passed the decision, order, or decree appealed against.***

(3) Upon receipt of the memorandum of appeal/ ***the subordinate court shall transmit to the High Court*** *the memorandum of appeal together with a complete record of the matrimonial proceeding to which the appeal relates."*

From the above provisions of the matrimonial proceedings rules which was enacted after the LMA, Cap 29 ,it is apparent that the need to file the appeal to the registry of the court which gave the decision was reiterated in the matrimonial proceedings rules hence it cannot be said that the requirement of filing the appeal to the subordinate court was inadvertently made instead it was intended and is a binding and mandatory provision which even this court cannot exercise its discretion to help a party to circumvent the mandatory provision of law hiding in the shield of overriding objective principle. I also drive much help from the decision of this court in **Agustina Salvatory vs Gridon Ndibalema** (Supra) as referred by Ms Pilly the

respondent's Advocate and the case of **Keneth K. Lukaija versus Ritha Jigulu** Civil Appeal No. 87 of 2019 HC-DSM. Conversely, the case of **Director of Public Prosecutions vs Freeman Aikael Mbowe and Another** (supra) is distinguishable as the provision which the Court of Appeal was called upon to determine, in that case, the word "shall" was not couched in mandatory terms as it was bestowed with the discretion provisal, the circumstance which is different from this case at hand.

Without much ado, I am of the respected view that the Preliminary objection raised is meritorious as the appeal is incompetent having been filed directly to the High Court registry instead of being filed in the court which made the decision as required by the law. The same is struck out with no order to costs.

It is so ordered.

E.L. NGIGWANA

JUDGE

24.09.2021

Ruling delivered this 24th day of September, 2021 in the presence of the Appellant in person, respondent and her Advocate Ms. Gisera Maruka and Mr. E. M. Kamaleki, Judges' Law Assistant.

E.L. NGIGWANA

JUDGE

24.09.2021