

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DODOMA DISTRICT REGISTRY)**

**PROBATE APPEAL NO 2 OF 2021**

(Arising from Probate Revision No. 3/2020 at Dodoma District Court arising  
from objection proceedings No. 14/2019 and Original Matrimonial Cause No.  
4 of 2011 both at Chamwino Urban Primary Court)

**HUSSEIN LEGUNA.....APPELLANT**

**VERSUS**

**ZUBEDA JUMA OMARY..... RESPONDENT**

**JUDGMENT**

18/11/2021 & 02/12/2021

**KAGOMBA, J**

The appellant, Hussein Leguna, being dissatisfied by part of the Ruling of the District Court of Dodoma at Dodoma delivered by Hon. M.I. Senapee, RM, on 26<sup>th</sup> November, 2020 has appealed to this Court basing on the following ground:

“1. That, the District Court erred in law and fact for confirming the Judgment of Matrimonial Cause No. 4 of 2011 apart from being bad in law ab initio”.

The impugned Ruling of the District Court resulted from a *suo mottu* revision prompted by a letter from the Magistrate In-Charge of Chamwino Urban Primary Court, apparently voicing the complaints lodged by the respondent to the said primary court, and another complaint lodged to the Resident Magistrate In-Charge by the appellant that Zubeda Juma Omary, (the 'respondent') had instituted at Chamwino Urban Primary Court a Probate Cause No. 14 of 2018 of appellant's deceased wife, one Hadija Hangali Duho, without his knowledge. These cross-complaints led formulation of three issues which were determined by the District Court, as follows:

- 1) whether the matrimonial cause No. 4/2011 of Chamwino Urban Primary Court was fabricated.
- 2) what were the reliefs in the matrimonial cause No. 4/2011 at Chamiwino Urban Primary Court and
- 3) whether the respondent/ applicant can be restored to be administratrix of the deceased's estate, one Hadija Hangali Duho.

It was established by the lower courts that while the deceased was an aunt to the respondent, she was married to the appellant. It is contested if the deceased had divorced appellant before her death. Upon revision, the District Court ruled that the said matrimonial cause No. 4/2011 was not fabricated; that, after divorcing, the deceased and appellant were ordered by the said primary court to distribute the matrimonial house with each of them to take two rooms except the room built by the deceased on her own effort. On the third issue, the District Court held that there was no evidence

to prove distribution was done as ordered. The District Court upheld the decision of Chamwino Urban Primary Court for the appellant herein to be the Administrator of the deceased's estate for purpose of obtaining his share as it was decided in matrimonial cause No 4/2011. The District Court observed that since the parties had also disputed on the ownership of the said house, and the court could not determine such a dispute, the parties were advised to lodge a suit for determination of ownership in a court of competent jurisdiction. The appellant is dissatisfied with part of that decision, hence this appeal.

During hearing of the appeal, Ms. Maria Ntui, learned advocate appeared for the appellant while the respondent was represented by Ms. Gracia Komba, learned advocate. To argue the sole ground of appeal, Ms. Ntui submitted that the judgement in Matrimonial Cause No. 4/2011 is loaded with many shortfalls in the eyes of law which the District Court did not address in its revisional Ruling. She cited and submitted on those shortfalls as follows:

**Firstly**, there is no opinion of assessors as required by section 7 (1) of the Magistrates Courts Act, [Cap 11 R.E 2019] (the "MCA"). She argued that while the primary court is required to seat with assessors under the cited provision of the law, the Chamwino Urban Primary Court (the "trial court") did not seat with assessors, nor were their opinion recorded as required by law. She argued further that the District Court was to consider not only that there was a Matrimonial Cause No. 4/2011 but also whether

the procedures were observed and the judgment met the criteria of a proper judgement in the eyes of the law.

To support the above submission, Ms. Ntui cited the case **Aziza Salum V. Julius Bernard Mwebaja**, PC Civil Appeal No. 11 of 2015 where this Court, presided by A.Mohamed J (as he then was), discovered that section 7 of the Magistrate Courts Act was not complied with. Upon such discovery, the court decided not to deal with the grounds of appeal raised but addressed itself to see if the requirement of the law were observed and held:

“However, upon review of the lower court’s records, I discovered the trial Makole Primary Court failed to comply with the requirement of s. 7 of the Magistrates Courts Act [Cap 11 R.E 2002] pertaining to assessors...”

The appellant’s advocate called upon this court to observe that in the case at hand, section 7 of the MCA was not complied with by the lower courts. She enjoined this court to quash the said decision, by refereeing to the case of **Tanzania Pharmaceuticals Industries Ltd V. Dr. Ephraim Njau [1999] TLR 299** where Lubuva, J (as he then was) held, *inter alia*, as follows:

“ a legal issue not raised at the trial can be raised at an appellate stage, the legal status of the judgement Debtor Corporation may

have to be ascertained on appeal to ensure that the decree is executed against the right party”.

She further referred to the decision in **Kurwa Kabizi & 2 Others V. Republic [1994] TLR 210** with regard to the role of the appellate court to evaluate evidence on record and arrive at its own right decision. For this reason, Ms. Ntui prayed the court to peruse the records of the lower courts and quash the award of divorce that resulted from such faulty proceedings.

**Secondly;** the trial court awarded division of matrimonial assets before awarding divorce, as shown in the trial court’s proceedings of 14/3/2011, where the trial court concluded by saying the following:

“baada ya wadawa kuthibitisha kuwa wana nyumba moja yenye vyumbna vinne, na Mahakama kwenda kukagua nyumba hiyo, Mahakama imeamua kuwa wadawa wagawane kila mmoja vyumba viwili na kile alichojenga Mdai abaki nacho kama nguvu yake.

.....  
.....

Haki ya Rufaa imeelezwa, ipo wazi ndani ya siku 45.

AMRI: Talaka itolewe baada ya siku 45 kuisha kuanzia leo.”

Ms. Ntui submitted that usually the court should grant divorce order first and then proceed to give orders on distribution of matrimonial property and asserted that doing otherwise is wrong in the eyes of the law. She

argued that in the said trial court's decision the divorce was not issued since the court ordered that the same be issued after elapse of 45 days, leaving behind questions as to what would the court do to its decision if divorce would not be given after elapsing of the said 45 days? And, how would the trial court know if the divorce had been given after those 45 days? She further argued that such a decision was against the provision of rule 3 of Order XX of the Civil Procedure Code, [Cap 33 R.E 2019] ("CPC") which prohibits a judgment from being altered after being given. She asserted that such a judgment lacks qualification mentioned under Order XX of the CPC and becomes unimplementable.

Yet on the same judgement, Ms. Ntui submitted that section 20(3) of the MCA requires that an appeal should be preferred within 30 days and not 45 days as decided by the trial court.

Thirdly; lack of evidence to show that the Matrimonial Cause started at Conciliation Board as required by the Law of Marriage Act [Cap 29 R.E 2019] (the "LMA"). Ms. Ntui submitted that the proceedings don't show if both parties commenced their dispute at a Conciliation Board. She asserted that the parties did not appear before BAKWATA and that even the appellant was surprised to come to a knowledge of the Matrimonial Cause which he was not aware of, but only came to know about it during revision at the District Court. She argued that the appellant was surprised to learn that BAKWATA had issued the divorce while he had never been there and his signature was forged.

Ms. Ntui further attacked the divorce form J/PCF/34 for being blank on several key issues; having different signatures of the Magistrate affixed on it compared with the signature of the same Magistrate that appears on the Judgement; payment in respect of the divorce being made on 03/7/2020 which is the date when the divorce was issued. She further pointed out that while the divorce was ordered to be given after elapse of 45 days from the date of the judgment, which was 14/3/2011, the same was issued on 3/07/2020. She further said the divorce neither shows the name of Conciliation Board nor the date of conciliation. For all these reasons, Ms. Ntui prayed the court to quash the judgment of the lower courts with costs.

Responding to the above submission, Ms. Gracia Komba, learned advocate for the respondent fiercely opposed the appeal asserting that the impugned judgment of the trial court is a legitimate judgment and the District Court was right to confirm the same. Ms. Komba argued that in order to ensure that the court does justice, the learned District Magistrate In charge states in court proceedings that she took trouble to visit the trial court following allegation that the Matrimonial Cause No. 4 of 2011 was fabricated but found that the said matter was truly filed in the trial court's register on 20/01/2011.

Regarding the defects cited by the appellant's advocate, Ms. Komba submitted that the appellant's counsel has an intention of using this appeal to challenge the trial court's judgement and not to challenge the Ruling of the District Court in Probate Revision No. 3 of 2020. She further submitted

that what the appellant's advocate does is to use this appeal as a short cut to challenge the trial court's decision by giving this court jurisdiction to determine an appeal against Primary Court's, using a back door.

Ms. Komba submitted that any person who is aggrieved by a decision of a court is supposed to appeal against it and if his appeal is out of time, he has to file an application for extension of time to file his appeal. She submitted that the impugned judgement of the trial court did not deny the appellant a right of appeal, but the appellant has chosen to sleep on his right to appeal.

To emphasize on the above argument, Ms. Komba sought support from the decision in **Mansoor Daya Chemicals Ltd V. National Bank of Commerce Ltd**, Civil Application No. 464/16 of 2014 CAT, DSM (unreported) where the Court of Appeal stated:

"Relying on the above authorities, we find that it is a settled principle of law that if there is a right of appeal, then that right has to be pursued first".

She further referred to the decision of the Court of Appeal in **Mussa A. Msangi and Rafia Msangi V. Anna Peter Mkomea**, Civil Application No. 188/17 of 2019, CAT, DSM, (unreported), where the Court cited the case of **Mansoor Daya (Supra)** emphasizing as follows:

“the court restated the principle that if there is a right of appeal the right has to be pursued first unless there are sufficient reasons amounting to exceptional circumstances which will entitle a party to resort to the revisional jurisdiction of the court”.

It was Ms. Komba views that both decisions of the Court of Appeal are emphasizing on the right of appeal to be taken first where the same is available. She submitted that in this appeal, it is obvious that the appellant has not been satisfied by the trial court’s decision on divorce proceedings in Matrimonial Cause No. 4 of 2011 and that his right of appeal was still open. Ms. Komba wound up her submission by reminding her learned colleague of her duty as an officer of the court to seek justice for her client by applying principles of law and not attempting to put this court into a trap of hearing an appeal contrary to the established legal principles. She prayed for dismissal of the appeal with costs.

In her rejoinder, Ms. Maria Ntui challenged the assertion that the appeal is being submitted to this court through a back door. She rejoined that her client came to know about the matrimonial proceedings during hearing of the Probate Revision No. 3 of 2020 which was filed by the respondent. She said, the appellant “partially” appeals against that District Court decision and is in agreement with the rest of the decision. That, the appellant is aggrieved only by that part of divorce proceedings in which he did not appear for not being made aware of. She further clarified that the

appellant does not challenge the division of matrimonial property, and as such the appeal is not brought under a back door.

Ms. Ntui conceded to the respondent's advocate that there are procedures for filing an appeal, which she said she has followed as the appeal originates from Probate Revision No. 3 of 2020, which arises from Objection Proceedings No. 14 of 2018 (and Not 2019). She said, since the shortfalls were discovered during hearing of the Probate Revision in the District Court and not before then, there exists exceptional circumstances as per decision of the Court of Appeal in **Mussa A. Msangi (supra)** in that the appellant would be out of time if he were to leave the Probate matter in pendency to pursue the appeal as suggested by the learned advocate for respondent.

Ms. Ntui further rejoined by the District Magistrate In charge taking unprecedented effort to visit the trial court to inspect the register, it shows that there were serious concerns on irregularities which engulfed the said Matrimonial Cause. She reiterated her submission in chief that the appellant had never appeared in that matrimonial cause and his signature was forged, among other shortfalls. She added that as the District Court had confirmed the existence of the said Matrimonial Cause, the appellant does no longer object its existence but complains about the several shortfalls observed which are against the law. She wound up her rejoinder by enjoining the court to understand the important reasons that made the appellant unable to

challenge the decision in Matrimonial Cause No. 4 of 2011 and prayed the court to grant this appeal with costs.

The court, after having heard the enthusiastic submissions by both parties and having perused the records of the lower courts, finds that there are two main issues to be determined in this appeal. **Firstly**; is whether the appellant has followed proper procedure in filing his appeal to this court; and if so, **secondly**; whether the appeal has merit.

To determine the first issue, the court is ably guided by the decisions of the Court of Appeal cited to this court by Ms. Komba, the learned advocate for the respondent. In the case of **Mussa A. Msangi (supra)**, the court of appeal emphasized that where there is a right of appeal, it has to be taken first. There is no dispute that a right of appeal does exist to the appellant against the decision of the trial court in Matrimonial Cause No. 4 of 2011. The appellant's advocate has however submitted that the appellant would not appeal because firstly he did not know about the existence of the matrimonial cause; and secondly, he would be time barred if he attempted to file the appeal late. The appellant's advocate calls upon this court to find that there exist exceptional circumstances, that should warrant this court to entertain the matter. From what the court has seen in the records of the lower courts, particularly, the trial court, the court would agree with Ms. Ntui that there exist exceptional circumstances to the appellant. However, the said exceptional circumstances, in terms of the decision of the Court of Appeal in **Mussa A. Msangi (supra)** should have entitled the appellant "to

resort to the revisional jurisdiction of the court” and not to appeal. Ms. Ntui may wish to read the judgement of the Court of Appeal in the case of **Mussa A. Msangi**, in full, to appreciate what the court intended by use of exceptional circumstances.

As regards, the concern for the appeal to be time barred, this court holds the view that Ms. Ntui had not considered the decision of the Court of Appeal in the case of **Permanent Secretary Ministry of Defence and National Service V. Devram Valambhia [1992] TLR 195**, which is a firm authority for a legal proposition that where there is a point of illegality in a decision being challenged, such an illegality shall be a sufficient ground for granting of time extension to file an appeal, despite the delay.

In this appeal, the learned counsel for the appellant has submitted that there are serious points of illegality in the impugned judgment of the trial court. Such grounds, as submitted here, may be enough to raise the appetite of a court to extend time for the appeal to be filed and considered. If Ms. Ntui had taken that route, this appeal would probably not be needed. As such, in view of the settled principle of law stated by the Court of Appeal in the two cited decisions, which is binding too, this court is inclined to determine that this appeal is not properly filed before this court for not exhausting the available procedure. The appellant was duty bound to consider filing his appeal, immediately he realized there was a decision he was not satisfied with, despite time lapse.


The court is fortified in holding as above by the fact that, the appellant, as submitted by Ms. Ntui in her rejoinder, does no longer challenge the existence of the said matrimonial cause at the trial court or the division of matrimonial property, rather he is dissatisfied with the divorce proceedings. As the appellant's wife is known to have already died, the appellant may weigh out the need to pursue the divorce proceedings further. Understandably the appellant retains such a right to appeal, after being granted time extension, even if it is for a sole purpose of correction of the alleged illegality.

Having determined the first issue as such, the second issue as to whether the appeal has merit does no longer arise. To recap on this decision, the appellant has the right to appeal against the decision of the trial court, and time limitation should not be an impediment if there are serious illegalities engulfing the impugned decision of the trial court. For stated reason, the appeal is dismissed. In the circumstances of this case, I refrain from ordering costs.

It is ordered accordingly.

**Dated at Dodoma this 20<sup>th</sup> day of April, 2022.**



  
ABDI S. KAGOMBA  
**JUDGE**