

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC. MATRIMONIAL APPEAL NO. 30 OF 2021

AMINA JAMES MWIDUNDA.....APPELLANT

VERSUS

BITURO CONSTANTINE MAZIGO.....RESPONDENT

RULING

26th May, 2022

DYANSOBERA, J:.

The respondent herein has, through the legal services of the learned Counsel Mr. Angelo J. Nyaoro of Juristic Law Chambers Company Advocates, raised a preliminary objection praying this appeal to be dismissed with costs. The ground upon which the applicant relies in his notice of preliminary objection is that:-

The appeal is hopelessly out of time as contrary to Section 80 (2) of the Law of Marriage Act [Cap. 29 R.E.2019].

When the preliminary objection came up for hearing, Counsel for the appellant Mr. M.S. Mwanaupanga of Magongo and Co. Advocates, informed this court that after considering the preliminary objection, they are satisfied

that it has substance. Counsel for the appellant prayed the appeal to be struck out so that the appellant, if she wishes, takes appropriate action.

On his part, Mr. Angelo James pointed out that it is obvious that the appeal was filed outside the prescribed period of time. He urged this court to dismiss it under section 3 (1) of the Law of Limitation Act with no order as to costs, as, according to him, that is the legal effect of the time barred matter.

In a brief rejoinder, Counsel for the appellant maintained that due to the nature of the matter- a matrimonial one, the appeal should not be dismissed; rather, it should be struck out.

The arguments of learned Counsel for the parties are not without substance as this court has to determine whether this appeal should be dismissed or struck out and whether the provisions of Section 3 (1) of the Law of Limitation Act is applicable in the circumstances of this case. This court in Misc. Labour Application No.79 of 2014 between **Tanzania Breweries Ltd v. Edson Muganyizi Barongo** observed:

An order for dismissal implies that a competent suit/appeal has been disposed of while an order for striking out implies that there was no proper suit/appeal capable of being disposed of.

In the former, the only remedy available is to appeal but in the latter one can file a fresh suit/appeal.

This implies that when a case is dismissed, there is no right to reinstate it in future. This is another term in legal parlance that the case is closed and it cannot be re-opened.

This legal position is well elucidated by the Court of Appeal in the case of **Bernard Balele v. R.**, Criminal Appeal No. 81 of 2011 where, at p. 3 of the judgment, the Court observed:

'It is now settled law that an incompetent appeal is struck out not dismissed. An order of dismissal implies that, a competent appeal has been heard on merit. Whereas an order of striking out an appeal implies that an incompetent appeal has been disposed of on account of irregularities or defects therein...'

Having considered the legal position and the case laws cited above, I am constrained to align myself with the argument advanced by Mr. Angelo James that this appeal which is time barred should be dismissed and not struck out. The reason is that, for an appeal to be struck out it must be incompetent on account of either some defects or irregularities. However, the appeal under consideration is not incompetent but is as good as non-existent as it is barred by limitation. This suggests that the appeal cannot

be struck out, rather is has to be dismissed. Although this appeal owes its origin from the appeal which originated from the proceedings in the Primary Court, I am satisfied that the provisions of section 3 (1) of the Law of Limitation Act applies by virtue of sub-section (2) read together with sub-section (1) both of Section 3 of the Law of Limitation Act.

For the foregoing reasons, the respondent's preliminary objection that this appeal is time barred is sustained. The appeal is thus dismissed under Section 3 (1) of the Law of Limitation Act.

No order as to costs is made.



W.P. Dyansobera
Judge
26.5.2022

This ruling is delivered under my hand and the seal of this Court on this 26th day of May, 2022 in the presence of Mr. Angelo James, learned Counsel for the respondent and holding brief for Mr. Masoud Mwanaupanga, learned Advocate for appellant.



W.P. Dyansobera
Judge