

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 5 OF 2022

SAID OMARY APPELLANT

VERSUS

MAGRETH JONAS KASAPA RESPONDENT

**(Arising from decision of the District Court of Mkuranga at Mkuranga
in Matrimonial Cause No. 2 of 2021)**

RULING

27th and 31st May, 2022

KISANYA, J.:

The appellant is aggrieved by the judgment of the District Court of Mkuranga at Mkuranga in Matrimonial Cause No. 2 of 2021 which was delivered on 26th November, 2021.

Briefly the event that triggered this appeal is traced way back in 2012 when the appellant and respondent started to live together as husband and wife. Their relationship was blessed with two issues. As the matrimonial dispute arose between the duo, the respondent filed a petition before the District Court of Mkuranga at Mkuranga praying for, a declaration that there was a rebuttable presumption of marriage between him and the appellant;

a declaration that the presumption of marriage had been broken down beyond repair; an order as to maintenance of the two children; and an order as to distribution of matrimonial properties.

At the end of the trial, the trial court entered the judgment in favour of the respondent. Apart from declaring that there was a rebuttable presumption of marriage and granting the decree of separation, the trial court ordered the appellant to pay Tshs. 100,000 being maintenance of two issues. It was further ordered that the house located at Mwandege, Mkuranga District be sold or divided at the ration of 40 % and 60% to the respondent and appellant respectively. Dissatisfied, the appellant filed the present appeal.

When the appeal came up for hearing, the appellant and respondent appeared in person without any representation.

Before the hearing could commence in earnest, I wanted to satisfy myself on whether the appeal is timeous. Therefore, I invited the parties to comment on whether the appeal was lodged within time set out by the law.

The appellant submitted that the appeal is timeous. His submission was based on the reason that the impugned decision was delivered on 26/11/2021 and the present appeal lodged on 10/01/2022. He was therefore, of the view that, the appeal was filed within forty five (45) days. The appellant went on to urge me to consider that the copy of judgment was availed to him on 21/12/2021. He then submitted that the time used to obtain the copy of judgment is excluded in computing the time limitation. When asked by the court as to when the court filing fees was paid, the appellant responded that it was on the date of filing the appeal.

The respondent had nothing to submit on the issue under consideration. She just urged this Court to determine the same in accordance with the law.

My starting point is the position that appeals arising from the matrimonial proceedings are governed by section 80(1), (2) and (3) of the Law of Marriage Act [Cap. 27, R.E. 2019] (henceforth the "LMA"). Apart from setting the time within to appeal against the decision of the district court in matrimonial proceedings, the said provisions provide for the mode of lodging appeals to this Court as quoted 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.

(3) 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."

A close scrutiny of the above provision indicates that the appeal must be filed within forty five days of the impugned decision of the subordinate court. As indicated herein and admitted by the appellant, the judgment subject to this appeal was delivered on 26th November, 2021. Therefore, the time within which to appeal against the judgment of the District Court of Mkuranga lapsed on 10th January, 2022.

The appellant contends that the appeal was filed on appeal on 10th January, 2022. Indeed, the memorandum of appeal purports to show that it was presented for filing on 10/01/2022. However, it is on record that the

court filing fees was paid on 28/01/2022. In view of the settled law, the appeal is deemed to have been lodged on the date of paying the required court fees. [See the case of **John Chuwa vs Antony Ciza** [1992] TLR 233].

Therefore, the document cannot be taken to have been filed in the court unless the required filing fees is paid. This position applies even if the document is submitted and received by the court. I am fortified by the decision of the Court of Appeal in **Ahmed Mohamed Suud vs Mohamed Suud and Two Others**, Civil Application No. 12/17 of 2019 (unreported) where it was observed that:-

"We think that the stamp affix at the bottom of the front page indicating that one, R. Komba signed to have received on 22nd January, 2019 cannot be taken to be the date of lodgment of the application since it lacks endorsement of the Registrar under rule 18 of the Rule and no fees was paid..."

With that position of law, I am of the view that this appeal was lodged when the appellant paid the court filing fees on 28/01/2022 and thus, out of time prescribed by the law.

I have considered the appellant's contention that the copy of judgment was supplied to him on 21/12/2021 and his argument that the time used to obtain the said copy be excluded in computing the time limitation. I am alive of the provision of section 19 of the Law of Limitation Act [Cap. 89, R.E. 2019] that the time requisite to obtain the copies of the judgment and proceedings is excluded in

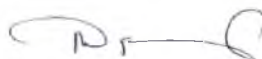
computing the time limitation. However, it is settled position that such time is excluded if the copy of judgment is required to be appended to the appeal.

In the present case, section 80 of the LMA does not provide for the requirement of appending to the memorandum of appeal, a copy of judgment and decree. Such requirement is provided for appeal under the Civil Procedure Code, Cap. 33, R.E. 2019 which does not apply to appeal in respect of matrimonial proceedings. Therefore, I am of the view that the time used by the appellant to obtain the said judgment cannot be excluded in computing the time limitation. Such argument was required to be advanced when praying for extension of time to appeal. Considering that the appeal is not timeous, this Court has no mandate to determine the same.

In view thereof, the appeal is hereby struck out. I make no order as to costs due to the nature of this case.

It is so ordered.

DATED at DAR ES SALAAM this 31st day of May, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 31st day of May, 2022 in the presence of the appellant and respondent. B/C Zawadi present.

Right of appeal explained.



S.E. Kisanya
JUDGE
31/05/2022