

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA  
(IRINGA SUB-REGISTRY)  
AT IRINGA**

**MATRIMONIAL APPEAL No. 02 OF 2022**

**KARIM ABDALLAH MKUPASI ..... APPELLANT**

**VERSUS**

**KULWA KENYA MWINYIPEMBE ..... RESPONDENT**

(Being an appeal from the Judgment and Decree of the District Court of Mufindi at  
Mafinga)

**(Hon. S.E. Kyungu (RM))**

**Dated the 22<sup>nd</sup> day of March, 2022**

**in**

**Matrimonial Appeal No.4 of 2021**

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**JUDGMENT**

Date of last order: 27.04.2023

Date of Judgement: 02.06.2023

**S.M. KALUNDE, J.:**

This an appeal filed against the decision and orders of the Mufindi District Court sitting at Mafinga (henceforth 'the appellate court') in **Matrimonial Appeal No. 01 of 2021**. In the said appeal, the appellate court upheld the decision of the Mafinga Primary Court (henceforth 'the trial court') in **Matrimonial Cause No. 4 of 2021**.

Briefly, the facts which gave rise to this appeal is as follows; The appellant was the respondent before the trial court in Matrimonial Cause No. 04 of 2021 whereby the respondent petitioned for the divorce,

custody and maintenance of the children and division of matrimonial properties. After full trial, on 25.06.2021, the trial court granted the petition for divorce, and order the appellant to pay Tshs. 150,000/= per month as maintenance and also divided the matrimonial properties equally between the parties.

The appellant was aggrieved by the decision of the trial court basically in the division of the matrimonial properties claiming to be unjust and also the amount awarded for maintenance of the children being so excessive and was not awarded regarding the income of the parties. He appealed to the appellate court vide Matrimonial Appeal No. 01 of 2021, unfortunately, on 22.03.2022, the verdict of the trial court was upheld. He was supplied with the certified true copies of the ruling on 29.03.2022. Further aggrieved by the decision of the appellate Court, the appellant has approached this court to show his grievance by filing a memorandum of appeal containing eight grounds of appeal.

In reply, the respondent filed a reply to the petition of appeal rejecting the appeal. Together with the reply to the petition of appeal, the respondent filed a notice of preliminary objection containing the following points of law:

1. First; That, the matter is hopeless time barred
2. Second; That, the appeal is bad in law as it contravenes mandatory requirement of Section 80(1) and (2) of the Law of Marriage Act, Cap 29 R.E 2019 and rule 37 of the Law of Marriage (Matrimonial Proceedings) Rules GN. No 246/1997. (hereinafter 'the rules')

Before this court, all parties enjoyed legal representation at the hearing of the preliminary objections. While the appellant was represented by MR. SULEIMAN KAGANDA learned counsel, the respondent was being represented by the late, MR. GASTER MDEGELA, learned counsel.

In support of raised preliminary objection. Mr. Mdegela argued the in accordance with section 80(1) of **the Law of Marriage Act, Cap 29 R.E** ("the LMA) an appeal from District Court to High Court must be filed within forty-five (45) days from the date of delivery of the impugned order or Judgment. He added that, the appeal at hand had been filed after an expiration of 58 days from the day when the impugned judgment was delivered. this made it to be time barred. To support his argument, he cited the case of **Sweya Selili Vs. Shilingito Dombasa** (1978) LRT No.48, however, he subscribed that, the matter which have been declared to be time barred deserves to be dismissed as it was held in the case of **Stephen Masatu Wass1ra Vs. Joseph Sinda Warioba & Another** (1999) TLR 334, whereby the Court of Appeal stated inter alia that;

*"Having held that the application before it was time barred, the High Court had under Section 3(1) of the Law of Limitation Act, 1971 only the power to dismiss it and not to strike out."*

In view of the above, the learned counsel argued that appeal was argued beyond the limitation period and without leave of the court. In the end, he argued that the appeal was hopeless time barred and ought to be dismissed with costs.

Regarding to the second limb of preliminary objection, Mr. Mdegela submitted that, the appeal at hand is not proper before this court as it contravening mandatory requirement of the LMA. The counsel insisted that, since the matter started before the primary court, a second appeal ought to have been filed before the District Court and not before this High Court. To support his argument, he referred to section 80(2) of the LMA (Supra) which provides that.

*"Any appeal to the High Court shall be filed in the magistrate court within forty five days of the decision or order against which the appeal is brought."*

In the circumstance, Mr. Mdegela argued that, the appeal at hand was supposed to be filed before the District Court of Mufindi at Mafinga and not before the registry of the High Court of Tanzania at Iringa. He prayed that the appeal be dismissed for being incompetent before the court.

In reply, Mr. Kaganda faulted the counsel for the respondent for wasting time of the court by raising the objection which were vague. The counsel contended that, the JSDS records showed that the appeal was filed on 12.05.2022 which means it was within time as per Rule 21(1) and (2) of **The Judicature and Application of Laws (Electronic Filing) Rules of 2018**. To cement his argument, Mr. Kaganda invited this court to refer the case of **John Chuwa vs. Anthony Sizya** [1992] TLR 233 and that of **Unita Exports LTD vs. EAC** (1970) No.403. In the later, the defunct Court of Est Africa observed that'-

*"I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the Civil registry until fees have either been paid or provided for by a general deposit from filing advocate from which authority has been given deduct court fees."*

From the above position, the counsel for appellant, argued that the appeal at hand was filed within time and therefore prays for the first limb of objection be overruled.

Arguing on the second limb, Mr. Kaganda submitted that, the error in filing the appeal before this court were very minor and did not go to the roots of the case. Thus, they cannot defeat the spirit of established overriding objective principle which demands substantial justice to override any minor errors or omissions. He urged the court to hear the appeal in its merit as it is stipulated under Article 107A (2) (e) of **the Constitution of the United Republic of Tanzania of 1977** as (amended from time to time) which states,

*"In dispensing justice, the Court shall not be tied up with undue technical provisions which may obstruct dispensation of justice."*

In further justifying his argument, the learned counsel referred to the case of **Yakobo Magoiga Gichere vs Peninah Yusuph**, Civil Appeal No. 55 of 2017 (Unreported) on page 13 where the Court held that:

*"With the advent of principles of overriding objectives brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT NO. 8 of 2018] which now*

*requires the court to deal with cases justly,  
and to have regard to substantive justice."*

Relying on the above submissions and cited authorities, the learned counsel prayed that the preliminary objections be dismissed and the appeal proceeds on merits.

In a brief rejoinder Mr. Mdegela reiterated what has been submitted in his submission in chief. However, he added that, the appellant has absolutely failed to challenge his submission and that they have failed to provide anything of substance.

Having considered the records and the submissions of the parties, the issue for my determination is whether the present appeal was filed outside the limitation period.

It is a settled principle of law that, the preliminary objection must be that of the point of law and not that of the facts or the mixture of the two. See the case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.** (1969) EA 696 and **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported),

In **Mukisa Biscuits** (supra), the defunct Court of East Africa observed that,

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

Having observed the records, I am satisfied that, in the present appeal the objection raises purely points of law as envisaged in the above cited authorities.

Having said that, there is no dispute that appeals from the District Court exercising its jurisdiction in matrimonial cases lies to this Court. This is provided for under section 80(2) of the LMA. Under the said section a person who wishes to appeal to the High Court against the decision of the District Court, has to do so within forty-five days from the date of the decision. The section reads:

*"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.**" (Emphasis is mine)*

It is common ground that, in the instant case, the decision of the first appellate court was delivered on 22.03.2022 and the certified copies of the judgement was supplied to the appellant on 29.03.2022. Thus the clock of limitation as stipulated under section 80(2) cited above started to run on 29.03.2022 and expired on 13.05.2022. There is also no dispute that the present appeal was filed on 20.05.2022. That was a delay of almost a week (seven days), and the filing was done without leave of the court.

It is a trite law that, the appeal filed out of time without the leave of the court has to be dismissed as the court lacks jurisdiction to entertain it. See the case of **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 and **Mondorosi**

**Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (both unreported). Also see section 3(1) (a) of The Law of Limitation Act, Cap 89 R.E 2019.

On another limb Mr. Kaganda argued that the appeal was lodged in the JSDS system on 12.05.2022 and payments were made on 20.05.2022 upon being issued with payment instructions. He implored that, until he had paid for the documents they were not dully filed. To substantiate his argument he cited the case of **John Chuwa vs. Anthony Sizya** [1992] TLR 233 and that of **Unita Exports LTD vs. EAC (1970)** No.403 regarding the validity of the documents to be filed.

However, with due respect to Mr. Kaganda, the cited cases are distinguished from the appeal at hand because, when I visited the records before the court, I realized that, this appeal was not lodged in the JSDS on 12.05.2022 as alleged by the learned counsel. Even the petition of appeal itself was signed by the counsel on 19.05.2022. On that account, he cannot claim that the same was filed on 12.05.2022. The records shows quite the opposite, the records are clear that payments were made on 20.05.2022 after being issued with the receipt on **Number EC10133664632481P** following the Government Bill issued on 20.05.2022 with **Control Number 991400653654**. This being the case, it is quite clear that, this appeal was filed out of time on 20.05.2022 and without the leave of the court. Mr. Kaganda's argument is, therefore, without any semblance of merits.

That said I sustain the first limb of the preliminary objection raised by the respondent. Since this point alone is sufficient to resolve the



matter, I will not proceed to determine the second limb of the objection.  
Consequently, I proceed to dismiss the appeal for being time barred.

**It is so ordered**

**DATED at IRINGA this 02<sup>nd</sup> day of June, 2023.**



  
**S.M. KALUNDE**  
**JUDGE**