

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
CIVIL APPEAL NO. 52 OF 2022**

*(Arising from Matrimonial Cause No. 04 of 2018 a of Kinondoni District Court before
Hon. F. Kiswaga SRM)*

CONTADO DONATAPPELLANT

VERSUS

ROSE DIDASRESPONDENT

RULING

Date of last order: - 20/03/2023
Date of Judgment: - 06/04/2023

OMARI, J.

Contado Donat (the Appellant) is Appealing against the decision of the District Court of Kinondoni in Matrimonial Cause No. 4 of 2018. After hearing the parties, the District Court found that the Appellant and one Rose Didas the Respondent herein, lived under a rebuttable presumption of marriage from 2010 to 2015. It awarded 60% and 40% shares of a landed property to the Appellant and the Respondent respectively. The Court also gave the

Respondent custody of their one issue whilst giving the Appellant access rights. Further the Appellant was ordered to pay the Respondent a maintenance allowance of TZS 100,000/= per month as the cost for food and clothing. The Appellant was also ordered to pay school fees and other school expenses. Aggrieved by the decision, he appealed to this Court praying for orders that the Appeal and orders resulting from the decision be quashed.

In the course of replying to the Memorandum of Appeal, the Respondent filed a notice of a Preliminary Objection on a point of law that the Appeal is time barred. On the day set for hearing, the Respondent prayed that the Preliminary Objection be disposed by way of written submission, the prayer was granted, and the Preliminary Objection was argued by way of written submissions.

The Respondent was very brief in her submission. She submitted that the Appeal before this Court is time barred. The Respondent stated that the time to Appeal in matrimonial cases from the District Court to the High Court is 45 days as provided for under section 80(1) and (2) of the Law of Marriage Act, Cap 29 R.E 2019 (the LMA). The Respondent submits further that the impugned judgment for Matrimonial Cause No. 4 of 2018 was delivered on

29 August, 2022; the Appellant filed his Appeal on 26 October, 2022 which makes the Appeal out of time. In conclusion the Respondent prayed for the Appeal to be dismissed with costs.

Appellant was also very brief in his submission. Essentially, he reiterates what transpired after the decision in Matrimonial Cause No. 04 of 2018 in that, he sought copies of the judgment and proceedings. He attached a copy of a letter dated 05 September, 2022 addressed to the Resident Magistrate of Kinondoni District Court requesting for a copy of the judgment and proceedings for appeal purposes. He further submits that he obtained the said certified copy of the judgment without proceedings on 04 October, 2022 and lodged the Appeal on 26 October, 2022 and that if one were to count the number of days from 04 October, when he obtained the certified copy of the judgment then the Appeal is on time as per section 80(1) and (2) of the LMA.

He concludes his submission by reminding the court that justice delayed is justice denied; it is the court (the District Court) that delayed to serve him with a copy of judgment thus, the Preliminary Objection raised by the Respondent be dismissed for want of merit.

In her Rejoinder the Respondent reiterated that the Appeal is time barred for the Appellant was required to file his appeal within 45 days as per section 80(1) and (2) of the LMA. She added that under section 80(1) and (2) of the LMA there is no mandatory requirement of attachment of a copy of the judgment in matrimonial appeals from the District Court to the High Court. In addition to this, the Respondent submitted that extension of time for an appeal is not automatic. This means the Appellant was required to apply to court for extension of time to file an appeal out of time. She concluded by insisting that the Appeal is time barred; therefore, the Preliminary Objection has merits. She prayed for the Appeal to be dismissed with costs.

Having considered the parties submissions on the raised Preliminary Objection there is only one issue for me to determine; whether the Preliminary Objection is meritorious or not.

The parties are not at issue as to when the decision of the District Court was delivered that is, 29 August, 2022. The Appellant is averring that he filed the Appeal on 26 October, 2022 because the District Court delayed to supply him with a certificated copy of the judgment and the proceedings, he therefore, beseeched this Court to begin counting the day from when he got the certified copy of the judgment. The Respondent in her Rejoinder was

adamant the Appeal is time barred for section 80 does not require the judgments or proceedings to be attached to the Memorandum of Appeal; what's more there is no automatic extension of time, the Court needs to be moved to extend the time.

I am inclined to agree with the Respondent on both points raised in her Rejoinder. Section 80(2) of the LMA is very clear that an appeal should be filed 45 days from the date of the decision. For clarity I reproduce it: -

'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.'

The Appellant is not refuting that they did not file the Appeal 45 days after the judgment was rendered. He is putting up a defence that his delay is occasioned by the District Court not supplying him with copies of the judgment and proceedings within time therefore the counting of days to be done from the date he was supplied with the judgment.

Essentially, his argument is not a good one in so far as matrimonial cases go. Rule 37(1) and (3) of the Law of Marriage (Matrimonial Proceedings)

Rules (the Rules) does not require an Appellant to attach copies of the judgment and or proceedings.

For convenience I reproduce Rule 37(1) and (3) hereunder: -

'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 proceedings to which the appeal relates.**' (Emphasis supplied)

In essence the Appellant should have filed his Memorandum of Appeal in the District Court within 45 days from that date of the decision he is seeking to appeal against. Had he done so, he would have not needed to wait for the judgment to be supplied to him since the above Rules stipulate that the District Court would have transmitted to this court his Memorandum of Appeal together with the record.

Before I conclude, let me also address the argument that the counting of days should be done from the day the Appellant was availed with the certified

judgment, that is 04 October, 2022 as this would make the Appeal to be within time. Even in the absence of Rule 37(1) and (3) of the Rules, this argument would not hold water since as submitted by the Respondent extension of time is not automatic it has to be sought; regardless of the circumstances that occasioned it. Being there was no extension sought the Appeal is filed out of time.

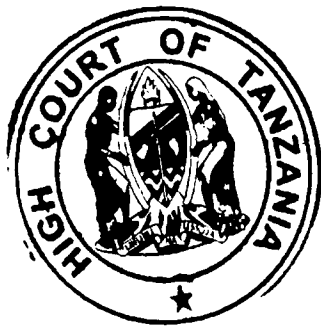
Regarding the lapse of the limitation period, the Court of Appeal in the case of **NBC Limited and IMMA Advocates v. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 (unreported) had this to say:

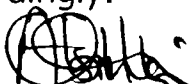
'It is that courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which limitation has expired'
[emphasis supplied]

In view of the above position of the law my hands are tied, this Appeal was filed out of time, I have no jurisdiction to entertain it. Upon noticing that they were out of time the Appellant ought to have invoked the provisions of Section 14 (1) of the Law of Limitation Act, CAP 2 [RE 2019] apply for leave to file their appeal out of time.


Accordingly, the raised Preliminary Objection is upheld. I find and hold that the Appeal is lodged contrary to section 80(2) of the LMA, it is hereby dismissed.

Due to the nature of the matter and the parties relationship; each party to bear their own costs. Order accordingly.




A.A. OMARI
JUDGE
06/04/2023

Judgment pronounced and dated 6th day of April, 2023 in the presence of the parties appearing in person.


A.A. OMARI
JUDGE
06/04/2023