

**IN THE HIGH COURT OF TANZANIA**  
**MTWARA DISTRICT REGISTRY**  
**AT MTWARA**  
**PC. CIVIL APPEAL NO.1 OF 2023**

*(Arising from the District Court of Mtwara at Mtwara in Matrimonial Appeal No.10 of 2022 and Originating from Mikindani Primary Court in Matrimonial Case No.14 of 2022)*

**ISMAIL RAMADHANI FUNDIKIRA.....APPELLANT**  
**VERSUS**  
**NEEMA ISAAC MWAKABONGA.....RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> & 27<sup>th</sup> July 2023*

**LALTAIKA, J.**

This appeal originates from the Primary Court of Mikindani (hereinafter referred as the trial court) in Matrimonial Cause No.14 of 2022. In that case, the respondent herein, **NEEMA ISAAC MWAKABONGA** petitioned for a decree of divorce, division of matrimonial assets and custody of children. The Petition was instituted by the respondent after the Matrimonial Board of ZIWANI WARD had failed to reconcile them. After the trial court had litigated the parties it granted the decree of divorce, divided the matrimonial assets and custody of Ibrahim Ismail Fundikila (12) and Iptisam Ismail Fundikila (5) were placed under the custody of the respondent.

Dissatisfied the appellant appealed to the District Court of Mtwara (the first appellate court) vide Matrimonial Appeal No.10 of 2020. On 07/12/2022 the matter was transferred from Hon. L. Jang'andu, RM to Hon. C.J. David RM by way of re-assignment. Upon the matter being transferred the respondent raised a preliminary objection that the appeal is time barred. After the first appellate court had concluded the hearing of the preliminary objection, it dismissed the appeal on the ground that it was time barred.

Again, dissatisfied with the decision of the first appellate court, the appellant has lodged the present appeal by way of Memorandum of Appeal and has predicated three grounds of appeal. The grounds of appeal can be paraphrased as follows:-

- 1. That the learned Resident Magistrate erred in law and fact in not considering the fact that the appellant had filed a notice of appeal and requested for copies of proceedings and judgment and he could not have prepared his memorandum of appeal before getting copies of the said papers. The appellant only got those papers on 15 AUG 2022, and thus the period between the date of the Primary Court Judgment. In the computation of time, therefore, the first Appellate Court should have excluded the period between the date of Judgment and the date the Appellant was served with the necessary papers.*
- 2. That the learned Resident Magistrate erred in law and fact in not considering the fact the Appellant had first filed his Memorandum of Appeal and paid the prescribed fees but was later order to amend the Memorandum of Appeal and put it in prescribed format, which he did and filed on 24 October, 2022. The first Appellate Court should thus have held that the appeal was timely filed on 30 August, 2022 when the Appellant first filed his reasons for the appeal and initiated the appeal, not when he filed the Amended Memorandum of Appeal after the Court's order.*
- 3. That the learned Resident Magistrate erred in law and fact in finding that the Appellant's appeal was time barred.*

When this appeal was called on for hearing both parties appeared in person and unrepresented. At the outset the appellant submitted on the background of the matter and how his appeal was dismissed. Thereafter, he

was invited to submit on the grounds of appeal he had lodged. On the first ground of appeal, the appellant submitted that he took the letter on 30/8/2022. He went on and contended that the copy of the judgement was given to him on 15/08/2022. To prove his assertion the appellant averred that he signed the register book of the Mtwara District Court. The appellant stressed that he went at trial court but the same was not ready until the 15<sup>th</sup> of August. On the other hand, the respondent replied that the reason is not plausible because judgement was delivered on 2/7/2022 and he received a copy on 15/7/2022. The respondent submitted further that she received the summons on 30/8/2022 explaining the reasons for the appeal. She contended that the appellant never prayed for extension of time.

Submitting on the second ground of appeal, the appellant contended that he thought that was obvious and he amended his document. The appellant submitted further that even the magistrate told them that he would no longer deal with their matter, but another magistrate would be assigned. He submitted that on the date they went back the new magistrate was still not there. The appellant maintained that there was no difference between letter he wrote and the appeal he lodged as the grounds of appeal remained the same. In response, the respondent submitted that she thought that they were different. She contended that the first was simply a letter to the Magistrate in Charge while the second was an appeal. However, the respondent conceded that the reasons for the appeal are the same as those in the letter.

On the third ground of appeal, the appellant submitted that his concern was that the time for waiting was not excluded while counting the delay. He

insisted that the magistrate simply accepted the reasons advanced by the respondent. In reply, the respondent insisted that the appeal was time barred. The respondent contended that as far as she knows, the counting starts on the date of judgement. She stressed that in the present case it was 45 days. The respondent submitted that the appellant appealed on 24/10/2022 that means it was more than 45 days later.

Having dispassionately considered the submissions of the parties and the record of the lower courts, I am inclined to determine the merit or otherwise of the appeal. Apparently, before going any further, it appears that the **first page of the judgement of the trial court bears a date** different from that appearing at page 16 and 17 of the same. On page 1 the date of judgement appears to be 02/07/2022 while pages 16 and 17 bear the date of 02/08/2022. I have decided to address this issue because the respondent disputed the argument raised by the appellant that is not plausible because judgement was delivered on 2/7/2022 and the appellant received a copy on 15/7/2022.

I have scanned through the record of the trial court, and I came to realize that the appellant had rightly submitted that the trial court delivered the impugned judgment on 02/08/2022 and he received the certified copy on 15/08/2022. To this end, what appears on the first page of the impugned judgement is just a typing error which has no effect on the substance of the judgement.

This brings me back to the crux of the appeal. As alluded to earlier, the impugned judgment of the trial court was delivered on 02/08/2022 and the

appellant was supplied with the same on 15/08/2022. More importantly, on 30/08/2022 the appellant filed a letter at the first appellate court. For the interest of justice, I will produce part of the said letter as follows:-

*"YAH: KESI YA NDOA NAMBA 14/2022 MAHAKAMA YA MWANZO  
MTWARA MIKINDANI NEEMA ISSAC MWAKABONGA DHIDI YA  
ISMAIL RAMADHANI FUNDIKIRA*

*Tafadhari rejea shauri tajwa hapo juu.*

*Mimi ndiye niliyekuwa mdaiwa katika kesi iliyotajwa hapo juu.*

*Nakata rufaa kwenye Mahakama yako tukufu dhidi ya hukumu*

*iliyotolew na Hakim Mheshimiwa M.M. Mabifo ya tarehe*

*02/07/2022. Mimi sikuridhika na maamuzi aliyoyafanya Hakim  
kuhusu mgao wa mali kwa sababu zifuatazo:*

- 1. Kwamba mimi ndiye niliyechangia kwa kiasi kikubwa zaidi ununuzi wa kiwanja na ujenzi wa nyumba. Mchango wa mrufaniwa ukiwemo pia na mchango wake kama mke na mama hauzidi asilimia 30 kwa ujumla wake. Hivyo basi, Hakim alikosea kumpa mrufaniwa asilimia 50 (nusu) ya nyumba hiyo.*
- 2. Kwamba gari aina ya NOAH nilinunua mimi na mrufani hana mchango wowote hapo. Pia, ndilo gari ambalo kwa sasa nalitumia kwa usafiri na mahitaji mengine. Hivyo basi, Hakim alikosea kumpa mrufaniwa gari hilo."*

The record of the first appellate court shows that the matter was firstly adjourned by Hon. L. Jang'andu, RM on 28/9/2022 and ordered the issuance of the summons and calling of the record. Indeed, it is not on record of the first appellate court that what triggered the appellant on 24/10/2022 to file another document entitled SABABU ZA RUFEE. The document entitled SABABU ZA RUFEE bears the same grounds as appearing in the document filed on 30/08/2022. Reading through the quoted contents of the letter filed by the appellant, it leaves no doubt that the appellant, a layperson, believed that he filed the proper document. In addition, the same features the grounds of appeal which appeared again on the document filed on 25/10/2022.

Premised on the above and pursuant to the Overriding Objective Principle read in together with Article 107A(2) (d) and (e) of the Constitution of the United Republic of Tanzania of 1977 as amended from time I am inclined to say that the first appellate court misdirected itself when it dismissed the appeal on account that it was time barred. Since the appellant initially had no counsel, the document filed on 30/08/2022 which signifies his dissatisfaction should have been considered a legitimate attempt to access the court on time. The same could only be struck out and not suffer outright dismissal to the detriment of justice.

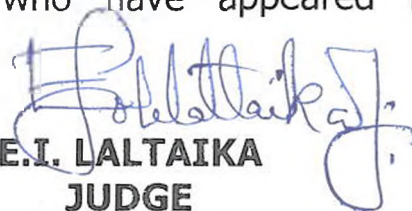
Said and done, I allow the appeal and quash the ruling of the District Court of Mtwara and set aside the dismissal order. Consequently, I hereby order that **Matrimonial Appeal No.10 of 2022** be retried by a different Magistrate with competent jurisdiction.



  
**E.I. LALTAIKA**  
**JUDGE**  
**27.07.2023**

Judgement delivered this **27<sup>th</sup> day of July 2023** in the presence of the appellant and the respondent who have appeared in person and unrepresented.



  
**E.I. LALTAIKA**  
**JUDGE**  
**27.07.2023**