

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB – REGISTRY)

AT KIGOMA

CIVIL APPEAL NO. 9 OF 2023

ISSACKA ISSA LULAMYE..... APPELLANT

VERSUS

JACKILINE JOSEPH MUSHI..... RESPONDENT

(Arising from Uvinza District Court at Uvinza)

(Majula-SRM)

dated 31st day of May 2023

in

Miscellaneous Civil Application No. 2 of 2023

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JUDGMENT

4th December 2023 & 4th March 2024

Rwizile J.

At the primary court of Nguruka via Matrimonial Cause No. 1 of 2023, the respondent petitioned for divorce, division of matrimonial properties, and custody of their children. The trial court heard the dispute, granted custody of their children to her, and ordered the division of their matrimonial assets. It further ruled that there was no legal marriage between the parties and therefore declined to issue a divorce decree.

The judgment was pronounced on 20.1.2023. Upon the elapsed of 30 days as ordered by a primary court, the respondent apply for execution. It is at this juncture the appellant approached the district court for leave

to file an appeal out of time. The same was not blessed. Hence this appeal with the following grounds of appeal: -

1. That, the learned Magistrate grossly erred in law and fact when he used the Law of Magistrates' Court Act to determine the matrimonial case which was contrary to section 80 of Law of Marriage Act, 1971 read together with Written Laws (Miscellaneous Amendments) Act No. 15/1980 third column.
2. That, the learned Magistrate grossly erred in law and fact by deciding in favor of Respondent while the Appellant adduced sufficient reasons to warrant the extension of time to appeal out of time against the decision of the trial primary court of Nguruka.
3. That, the learned Magistrate erred in law and fact when relying upon the respondent's allegations that to appeal against the trial primary court decision is not necessary to have the copy of judgment to prepare the sound grounds of appeal.
4. That, the learned Magistrate grossly erred in law and fact when he misdirected himself on the Respondent's reference while conceding that the reference is not good for the court's record.
5. That, could the learned Magistrate consider the sick sheet of the Appellant on record as per Exhibit "B" to the Appellant's affidavit supporting his application for extension of time to appeal, the same could not have denied granting an extension of time to the Appellant. Hence abrogation of the principle of natural justice to the Appellant.

At the hearing, the applicant was under the service of Mr. Damas Sogomba learned advocate, while the respondent was unrepresented. The appeal was heard by written submissions.

Supporting the appeal, it was submitted on the first ground that it was erroneous for the district court to apply the Magistrates Court Act, [CAP.11 R.E. 2019] as guidance for time to appeal on matrimonial proceedings that originate from the primary court to the District Court. It was argued that the time to appeal is not 30 days, but 45 days as provided for under section 80(2) of the Law of Marriage Act.

It was submitted that the applicant was late to file an appeal for 7 days, and the medical chit proved that the delay was caused by illness. Yet, this sound reason was not considered by the district court. He then sought guidance from the case of **Vodacom (T) PLC vs Commissioner General (TRA)**, Civil application No.101/2021 whereby it was decided that 12 days was considered to be a reasonable delay.

Joint submission on grounds 2 and 5 also hinged on delay caused by illness. It was submitted that the delay was not due to negligence but illness which was out of his control. He added that a medical chit which was admitted as exhibit B, revealed that the appellant was sick and was taken to Nguruka Health Centre and discharged on 27th January 2023. According to the learned advocate, this point was ignored by the district court and if it could be considered, it could be taken as the reason to grant an extension of time to appeal out of prescribed time.

Submitting on ground 3, it was the view of the learned advocate that, the copy of the judgment was necessary. He added that the parties have to be supplied with a copy of the judgment to prepare the appeal and attach it to the petition of appeal. He said failure to supply a copy of the judgment in time, hindered the process of appeal.

Arguing ground 4 of the appeal, it was submitted that the district court erred when it decided that, to appeal to the district court a copy of the judgment is not needed. In the view of the learned counsel, this is wrong. Then, he asked this court to allow this appeal with costs.

Opposing the appeal, the respondent, submitted on the first ground that section 82(2) of The Law of Marriage Act, does not provide 45 days as time within which to prefer an appeal from the primary court to the district. He added that it was proper for the district court to apply section 20(3) of the Magistrate Court Act [Cap 11 R.E 2022]. It was concluded therefore that an appeal to the district court from the primary court is 30 days. He also submitted that it is upon the court to exercise its judicial discretion to the extension of time. To support the same, he cited the case of **Mwita Mhere and Ibrahim Mhere vs Republic**, [2005] TRL 107, he also cited Black's Law Dictionary, 9th Edition.

In addition to that, he submitted that every day of delay must be accounted for. To support this point, he cited the cases of **William B. Nusu vs. Respusrces International (T) Limited**, Misc. application No. 178 of 2019, on criteria set for extension of time. As well, he cited the case of **Attorney General vs. Mkongo Building and Civil Works and another**, civil application No. 266/16 of 2019 where it was held that the following ought to be considered before granting an extension of time;

- i. The applicant must account for all the period of delay;
 - ii. The delay should not be inordinate;
 - iii. The applicant must show diligence, and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take;
- and,

- iv. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In connection with the cited cases above, it was then submitted that the appellant did not meet the standard set in the cases cited. It was added that the delay was caused by negligence in the sense that after being aware that there was an execution, it was at this moment that he applied for an extension of time.

On the 3rd and 4th grounds, it was submitted that there is no letter requesting a copy of the judgment. It was added that the copy of the judgment is not a legal requirement for an appeal originating from the primary court to the district court. To reinforce his submission, he cited Rule 4 of the Civil Procedure (Appeals in proceedings originating in Primary Courts) Rules G.N No. 312 of 1964.

It was further submitted that it was ignorance of the law to wait for a copy of the judgment to appeal while it is not a legal requirement. Such type of ignorance, it added, is not a good cause to warrant an extension of time. To support this argument, the cases of **Kadogo Mambina vs. Juma Mambina**, Pc Civil Appeal No. 13 of 2021, **Hamimu Hamisi Totoro @ Zungu Pablo and 2 others vs The Republic**, Criminal application No. 121 of 128, and **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015 were cited to support the point. Finally, the respondent asked this court to dismiss this appeal.

Having gone through the records of the district court, I found nowhere the Magistrates Court Act was applied in deciding the time limit to file an appeal to the district court. What was done, is the quotation of section

20(3) of the MCA to show that the section does not put mandatory terms to attach the copy of judgment when appealing to the district court.

Despite all that, and for the matter of clarity, the aggrieved party by the decision or order of the primary court in matrimonial causes, is required to appeal to the district court within 45 days. This is provided for under section 2 of The Laws Revision (The Rectification of Printing Errors) (The Law of Marriage Act [Cap. 29 R.E 2019] Notice, 2022. It is Government Notice No. 487 published on 17/7/2022. It rectifies the printing errors that appeared under section 80(1)(2) of the Law of Marriage Act [Cap 29 R.E 2019], which provides;

"The printing errors appearing in section 80 of the Law of Marriage Act [Cap. 29 R.E 2019] are rectified by deleting subsections (1) and (2) and substituting for them the following: -

'(1) Any person aggrieved by any decision or order of a primary court, or by any decision or order of a district court, may appeal from that court, respectively, to the district court or the High Court.

(2) An appeal to the district court or the High Court shall be filed, respectively, in the primary court or the district court within forty-five days of the decision or order against which the appeal is brought."

From the above, any party, if aggrieved by a decision or an order of the primary court on matrimonial cause, may appeal to the district within 45 days.

On the issue of the necessity of a copy of the judgment to appeal from the primary court to the district court, I agree with the respondent's submission that this is not a legal requirement. An aggrieved party may

appeal from the primary court to the district court without a copy of the judgment.

However, the law applicable when dealing with appeals on civil matters originating from the primary court is The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1963 (GN. 312/1964). Rule 4(1) provides; -

"Every petition of appeal to a district court from a decision or order of a primary court and every petition of appeal to the High court from a decision or order of district court in the exercise of its appellate or revisional jurisdiction shall set out precisely and under distinct heads numbered consecutively the grounds of objection to the decision or order appealed against and shall be signed by the appellant or his agent."

From the foregoing, it is clear that attaching a copy of the judgment to the petition of appeal is not a legal requirement in instituting appeals originating from primary courts. See also the case of **Gregory Raphael vs Pastory Rwehabula**, [2005] TRL 99. On page 100 it was stated that;

"Attachment of copies of decrees and judgments is a condition precedent in instituting appeals originating from District Courts and courts of resident magistrates, but for appeals in matters originating from Primary Courts there is no such requirement and the filing process is complete when the petition of appeal is filed upon payment of the requisite court fees".

Therefore, from both, the law and the case law, any aggrieved party by the decision of the primary court, may appeal to the district court by filing his appeal petition without attaching a copy of the judgment. Having so

said this cannot amount to a good cause to grant an extension to appeal out of time.

The issue of illness as a cause of delay in connection to the appeal at hand was this way. The judgment was delivered on 20th January 2023, and the appellant was admitted to the hospital on 23rd January 2023 and discharged on 27th January 2023, it is almost 4 days in terms of exhibit B. Illness can be a ground for an extension of time if proven to cause the delay, illness in this case existed for almost 4 days.

From the records, the appellant filed his application to the district court on 13th March 2023, which is after 52 days. As long as an appeal to the district court from the primary court is 45 days, therefore, from the day the judgment was pronounced, till the time when the appellant lodged his application to the district court, it is eventually the delay of 7 days.

It should be noted that the extension of time is an absolute discretion of the court. But still, principles to apply were re-stated in the case of **Attorney General vs. Mkongo Building and Civil Works and another(supra)**, that at least days of delay must be accounted for, that the delay should not be inordinate, as well that the applicant (appellant in this case) must have not been sloppy or negligent in prosecuting the matter.

The appellant in my view proved that he got sick for at least 4 days. In all fairness, four days out of seven he delayed have been accounted for. There are three days remaining. Taking it from there, three days in the circumstances of this case cannot constitute an inordinate delay. But still, the application was pursued immediately thereafter. Still one more thing. It is not a legal requirement to attach a copy of the judgment to a

memorandum of appeal, but I think, it is not possible to challenge a judgment that you do not have. It is my considered view that grounds of appeal are in most cases drawn from the judgment. It is therefore a tool that should be supplied on the day the judgment is delivered. Failure to do so cannot be taken as no hindrance to the aggrieved party to take action as filing an appeal. It is not disputed that the judgment was not supplied on the day it was delivered. It means, failure to supply one delays the process of appeal.

Therefore, I find merit in this appeal. As a result, the appeal is allowed with no order as to costs. The appellant is given 30 days from the day of this judgment to appeal.



A handwritten signature in black ink, consisting of a stylized 'A' followed by a series of horizontal strokes.

A.C.K Rwizile
JUDGE
04.03.2024