

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)**

AT MOROGORO

PC MATRIMONIAL APPEAL NO. 26568 OF 2023

(Arising from the Decision of Morogoro District Court in Matrimonial Appeal No. 19 of 2021 delivered on 3rd March, 2022 originating from Matrimonial Cause No. 44 of 2021 at Morogoro Urban Primary Court)

AMINA AUGUSTINO.....APPELLANT

VERSUS

JUMA KHALIFANIRESPONDENT

Date of Last order: 18.03.2024

Date of Judgement: 22.03.2024


JUDGEMENT

MAGOIGA, J.

This is a second appeal with a very interesting history which will later be revealed in this judgement. The appellant petitioned before Morogoro Urban Primary Court (the trial court) vide **Matrimonial Cause No.44 of 2021** for orders of divorce, equal distribution of matrimonial properties, maintenance and custody of the two disabled issues. After hearing parties on merits, the trial court delivered its decision on 10th day of September, 2021 in which it dissolved the parties' marriage as it found to have irreparably broken down. Further, the trial court issued an orders for equal

division of the matrimonial properties at 50% each, maintenance of Tshs.80,000/= per month and custody of disabled issues was placed to the petitioner.

Aggrieved by the said decision, the respondent appealed to the District Court of Morogoro (first appellate court) via **Matrimonial Appeal No. 19 of 2021** in which after hearing parties, delivered its decision on 3th March, 2022 dismissing the appellant's appeal for lack of merit and added that the said house be valued and sold, and the proceeds be equally distributed among the parties herein as ordered by the trial Court.

The records of the first appellate court shows that no appeal was taken by either of parties since 03/03/2022. Consequently, the case file was remitted before the trial court for execution process. In the course of execution, the record shows further that the appellant challenged the execution on the ground that the house should not be sold as the disabled issues have no domicile and she also complained of the mount of maintenance issued by the trial court Tshs. 80,000/=, which according to her was not enough to maintain those two issues. After hearing the objections, Hon. Kangole-SRM (the executing officer) delivered her **Ruling in Matrimonial Cause No. 44/2021 on 30th May, 2023** dismissing the appellant's claim for lack of merit. 

It is also on the record that, the appellant being dissatisfied with the Ruling of Hon. Kangole-SRM (executing officer) appealed before the District Court of Morogoro via **Matrimonial Appeal No. 18 of 2023** which was delivered by Hon. Lukumai-SRM on 31st October, 2023 by dismissing the appellant's appeal for being misconceived and want of merits. The record is loud that, in dismissing the appeal, the District Court reasoned as follows; -

"The question which rightly clicks my mind is whether the appeal is proper before the court. I think it is not. I say so because as I stated hereinabove, this issue had already been determined by this court in Matrimonial Appeal No. 19 of 2021 and no appeal was preferred thereto. I wonder why the Appellant preferred this appeal again before this court, to me this is an abuse of court process because this court cannot make a decision on the same issue twice. In addition to that, in my view, it was not proper for the Appellant to appeal against an order made in execution".

From the above, the District Court exercised its revision powers under section 22 of **Magistrates' Courts Act [Cap.11 R.E. 2019]** and affirmed the decision of the executing court, hence, the matter was


remitted back to the trial primary court and executing court to proceed with execution of the decree.

Aggrieved with the decision of the District Court, the appellant lodged an appeal before this court challenging the decision of the District Court of Morogoro in **Matrimonial Appeal No. 19 of 2021** which was delivered on 03/03/2022 by Hon. Ushacky-SRM.

It is from the above backdrop, when this appeal was called on for hearing, the respondent in the course of reply informed the court that the instant appeal is time barred because the appellant is appealing against the decision of Hon. E.B. Ushacky-RM delivered on 03.03.2022 and the instant appeal was filed on 30/11/2023 which is more than 1 year and eight months.

In circumstances narrated above of this appeal, I will not reproduce the grounds of appeals for reasons shortly to be made in this judgement.

As a matter of procedure, once an issue of legality of the appeal is raised, as in this appeal, the court is supposed to firstly deal with the raised issue before embarking to the merits or otherwise of the appeal. This is because, if the objection is sustained, it will put the appeal to shelf. In this appeal, guided by the above position, I will deal with legal issue raised



by the respondent in respect of the limitation of time for lodging the appeal before this court. I decided to deal with the legal issue first and if it is sustained, the appeal will be put to shelf, but if it fails, I will deal with the merits of the appeal.

The appellant expounding the point submitted that the appellant's appeal was filed on 30/11/2023 while the District Court decision subject of this appeal was delivered on 03/03/2022, hence filed out of time as the law requires appeals be filed within 45 days.

In response to the objection taken and argued, the appellant being a lay person, she had nothing useful to respond but she generally argued that the appeal was filed within time and urged this court to dismiss the objection and determine the appeal on merits.

Having revisited the lower courts records and the law, I discovered that the present appeal is challenging the decision of **Matrimonial Appeal No. 19 of 2021** which was delivered by the District Court of Morogoro by **Hon. Ushacky-SRM on 03/03/2022** and not the District Court's decision in **Matrimonial Appeal No. 18 of 2023** delivered by **Hon. Lukumai on 31/10/2023**. It shows that the present appeal was filed and registered in this Court on **31/11/2023 at 14:31:17** with **Receipt No. 26438**. This means that, the appellant's appeal before this Court was

filed after elapse of **one years** and **eight months** as argued by the respondent herein.

The above position is supported by the appellant's petition of appeal which was clear that the appeal before this court is against **Matrimonial Appeal No.19 of 2021**. For easy of reference, I beg to let the heading of the petition of the appeal subject of this appeal to speak of itself:

**"IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB REGISTRY)**

AT MOROGORO

PC MATRIMONIAL APPEAL NO 26668 OF 2023

**(Appeal from the decision of the District Court of Morogoro in
Matrimonial Appeal No. 19 of 2021 Originating from Morogoro
Urban Primary Court in Matrimonial Cause No. 11 of 2021
(which was not that but 44 of 2021)**

AMINA AUGUSTINO APPELLANT

VERSUS

JUMA KHALFAN RESPONDENT"

In the foregoing, there is no dispute that the appellant is appealing against the decision of the District Court of Morogoro to decision delivered on 03/03/2022 by Hon E.B Ushacky- RM and quite obviously contrary the provision of section 80 (1) (2) of the Law of Marriage Act, [Cap 29 R.E. 2019] as amended by Notice No. 22 [the Laws Revision[Rectification of



Printing Errors] The Law of Marriage Act. The said provisions for easy of reference provide as follows:

"Section 80(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 to the High Court.

(2) An appeal to the District Court or to the High Court shall be filed, respectively, in the Primary Court or in the District Court within 45 days of the decision or order against which the appeal is brought."

Going by simple calculation, the instant appeal was filed after a year and 8 months, hence, hopeless out of time as argued by the respondent.

The argument by the appellant that her appeal is in time is for the reasons stated above is devoid of merits and is rejected.

In the foregoing, therefore, I find that the appellant's appeal before this court is incompetent for being filed out of time without this court's leave. Therefore, it is hereby dismissed as I hereby do.

However, before I wind up this judgement, I wish to point out and direct the executing officers that, during execution, as a general rule no appeal

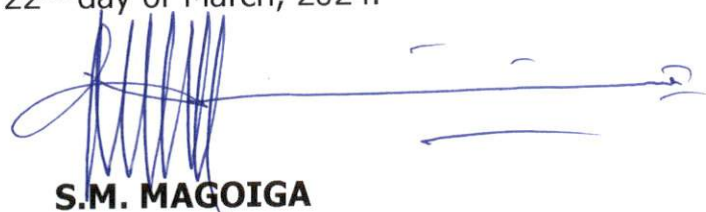
can lie against the order or decision of the executing officer save for three grounds namely: **one**, where the order or decision of the executing court has touched matters that were not decided by the trial court; **two**, the decision which the executing court is called to execute is inexecutable in that the decision or order are illegal or unprocedural and has caused miscarriage of justice; and **three**, that the trial court had no jurisdiction to try the matter and issue any order or decision worth for execution.

In this appeal, no exception was pointed out to warrant the entertainment of an appeal originating from the executing officer who was executing the exact orders as decided by the trial Court.

That said and done, I hereby dismiss this appeal and given the relationship between parties, I order each party bears his/her own costs.

It is so ordered.

DATED at **MOROGORO** this 22nd day of March, 2024.

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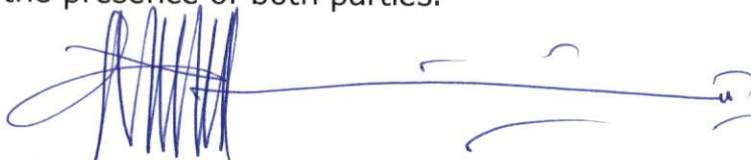
S.M. MAGOIGA

JUDGE

22/03/2024

Court:

Judgement delivered under my Hand and Seal of this Court in Chamber's
this 22nd day of March, 2024 in the presence of both parties.

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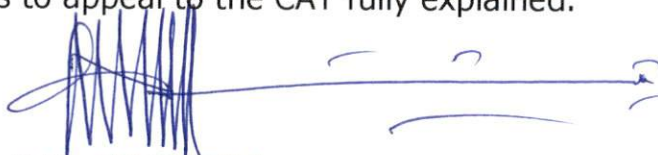
S.M. MAGOIGA

JUDGE

22/03/2024

Court:

Rights of the parties to appeal to the CAT fully explained.

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S.M. MAGOIGA

JUDGE

22/03/2024