

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI SUB REGISTRY**

**AT MOSHI**

**MATRIMONIAL APPEAL NO. 17 OF 2023**

(Arising from Matrimonial Appeal No. 02 of 2023 of Moshi District Court at Moshi and Matrimonial Cause No.03/2022 of Marangu Primary Court)

**ROGATHE METHUSELAH MSELA ..... APPELLANT**

**VERSUS**

**DOMINICK JOSEPH KWAY..... RESPONDENT**

**RULING**

21/03/2024 & 03/04/2024

**SIMFUKWE, J**

This is the ruling on the preliminary objection raised by the respondent's counsel against the appellant's appeal contending that the appeal is bad in law for being time barred. The appeal is preferred as the second appeal from the decision of the District Court in Matrimonial Appeal No. 02 of 2023 delivered on 10/08/2023. The appellant filed the first appeal before the District Court challenging the decision of Marangu Primary Court in Matrimonial Cause No. 03 of 2022.

The preliminary objection was disposed orally whereby the appellant was represented by Mr. Mandela Mziray learned counsel while the respondent had the service of Mr. Duncan Somi, learned counsel.

Arguing in favor of the raised preliminary point of objection, Mr. Somi asserted that, appealing is the matter of the law. However, right to appeal should be exercised pursuant to the law. He stated that, this appeal was filed after 32 days had elapsed from the date of delivery of judgment of the District court contrary to **section 25 (1) (b) (i) of the Magistrates Courts' Act** (Cap 11 (R.E 2022), which prescribe a period of 30 days for appeals originating from the Resident Magistrates' Courts or District courts.

Mr. Somi submitted further that, the judgment of the District court was delivered on 10<sup>th</sup> of August, 2023 and this appeal was filed on 11<sup>th</sup> of September, 2023. That, counting from 10<sup>th</sup> August, 2023 to 11<sup>th</sup> September 2023 make a total of 32 days. In that regard, the learned counsel was of the view that, the appellant was supposed to seek extension of time to file his appeal but he did not do so. He added that, pursuant to the cited provision above, attachment of copy of judgment is not a legal requirement. In support of his argument, Mr. Somi referred the case of **Isack Kahwa vs. Pandora Salum**, Civil Appeal No. 06 of 2020

(H.C), which stated that, pursuant to section **25(1) (b) (I) of the Magistrates' Courts Act** (supra), the prescribed time to appeal for appeals originating from District Courts to the High Court is thirty days and attachment of copy of judgment is not a legal requirement.

Mr. Somi implored this court to dismiss this appeal with costs.

In his response, Mr. Mziray for the appellant vehemently opposed the raised preliminary objection by submitting that, this appeal was filed within time. He agreed with Mr. Somi that pursuant to **section 25 (1) (b) (i) of the Magistrates' Courts Act** (supra), an appeal should be filed within 30 days. He further agreed that the judgment of the District court was delivered on 10<sup>th</sup> August, 2023; thus, 30 days elapsed on 9<sup>th</sup> September 2023. He explained that, 9<sup>th</sup> September 2023 was Saturday and 10<sup>th</sup> September 2023 was Sunday. Therefore, he could not file this appeal on 9<sup>th</sup> September, 2023 nor 10<sup>th</sup> September, 2023. Instead, he filed it on 11<sup>th</sup> September, 2023 pursuant to **section 60(1) of the Interpretation of Laws Act**, (Cap 1 R.E 2002) which provides that where a time limited for doing a thing expires or falls upon excluded day, a thing may be done on next day which is not excluded day.

Mr. Mziray elaborate that, **section 60 (1) of Interpretation of Laws Act** (supra) defines excluded day to mean Saturday, Sunday or public holidays. Guided with the above provision, the learned counsel for the appellant insisted that this appeal was filed on time. To cement his argument, he cited the case of **Pastor Baraka E. Mshuma vs. Stanley Elipas Mra**, PC Civil Appeal No. 132 of 2021 (HC) at page 8 and 9, where in a similar situation the appellant failed to file his appeal on 21<sup>st</sup> and 22<sup>nd</sup> which were weekend and filed it on 23<sup>rd</sup> August 2021. The appeal was found to have been filed in time. Mr. Somi informed this court that they paid court fees within time on 11<sup>th</sup> September 2023.

Concerning the issue of not attaching copy of judgment as the legal requirement, Mr. Mziray submitted that the position is in respect of appeals from Primary courts to the district court. He made reference to the case of **Gregory Raphael vs. Pastory Rwehabula [2005] T.L.R 95** (CA) to support his assertion.

In his final remarks, Mr. Mziray prayed this court to dismiss the preliminary objection with costs.

In his rejoinder submission, Mr. Somi admitted that 11<sup>th</sup> September, 2023 was Monday. However, he opined that the learned counsel could have been cautious and filed the appeal within time.

Concerning attaching copy of judgment, Mr. Somi explained that he meant appeals originating from primary courts because this matter originated from the Primary court. He reiterated his prayer seeking the appeal to be dismissed.

I have considered the submissions of the learned counsels of both parties as well as the entire records of the lower courts below. It is undisputed fact that the judgment sought to be challenged in this appeal was delivered by the District Court on 10<sup>th</sup> August 2023. The issue is whether the appeal is time barred or not, counting from the date of judgment.

The learned counsels of both parties referred to section **25(1) (b) of the Magistrates' Courts Act** (supra) which prescribes the time limit for filing appeals from the district court to the High Court to be 30 days from the date of judgment. The learned counsel for the respondent lamented that the appeal was filed after 32 days whereas the learned counsel for the appellant submitted that the weekend days are to be excluded in counting days for filing an appeal.

With due respect to both counsels, it is a principle of law that, whenever there is specific law and general law, specific law prevails over general law. This principle is found under the Latin maxim: "***Generalia specialibus non derogant.***" It is undisputed fact that this matter is matrimonial in nature which was heard and determined by the district court in its appellate jurisdiction. In that regard, I find that the appellant's appeal to the High Court should be governed by the **Law of Marriage Act** [Cap 29 R.E 2019] which is specific law and not the **Magistrates' Courts Act** (supra) as the learned advocates tried to allude; as the **Magistrates' Courts Act** is a general law. According to **section 80(1) and (2) of the Law of Marriage Act** (supra), the time limit within which to file an appeal against the decision or order of a district Court is 45 days. As a matter of reference, the provision reads:

*"80 (1) Any person aggrieved by any decision or order of the court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court*

*(2) An appeal to the High Court shall be filed in the magistrate court within forty-five days of decision or order against which the appeal was brought."*

From the above provisions of the law, it is obvious that time limit to file matrimonial appeal from the District Court is 45 days from the date of the impugned decision or order.

On that basis, I now turn out to consider whether the appellant filed this appeal within time. As observed herein above, it is certain that the decision of the district court was delivered on 10<sup>th</sup> August, 2023. Counting from 10<sup>th</sup> August, 2023 to 11<sup>th</sup> September, 2023 when the appellant filed this appeal, thirty-two days only had elapsed. Thus, the appeal was filed within 45 days as the deadline was 24<sup>th</sup> September 2023.

Therefore, I hereby overrule the preliminary point of objection raised by the respondent, for being devoid of any merit. Hence, the hearing of the appeal should proceed on merit.

It is so ordered.

Date and delivered at Moshi this 3<sup>rd</sup> day of April, 2024.



  
**S. H. Simfukwe**

**Judge**

**03/04/2024**