

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

AT MOROGORO

MISC. CIVIL APPLICATION NO. 44 OF 2023

(Originating from the order of setting aside ex parte judgement by Kihonda Primary Court in Matrimonial Cause No. 08/2022 and Matrimonial Appeal No. 17/2022 in the District Court of Morogoro at Morogoro)

MUGANDA MICHAELAPPLICANT


VERSUS

ELIZABETH RAPHAEL KAZIMOTORESPONDENT

RULING

16/02/2024 & 23/02/2024


KINYAKA, J.:

In the present application the applicant seeks the indulgence of the Court to enlarge time within which he may appeal to this Court against the decision of the District Court of Morogoro in Matrimonial Appeal No. 17 of 2022 between the parties herein. The application was preferred under the provisions of section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019, (hereinafter, the "LLA"); section 95 and Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2019 (hereinafter, the "CPC"); and any other enabling provision of the law. 

The facts as deduced from the affidavit and the supplementary affidavit of the applicant reveal that at the District Court of Morogoro, the applicant preferred Matrimonial Appeal No. 17 of 2022 upon his dissatisfaction with the decision of Primary Court of Kihonda in Matrimonial Cause No. 08 of 2022. The primary Court of Kihonda heard the suit *ex parte* and made a decision in the respondent's favour and against the applicant. The applicant was unamused with the decision of the District Court, but could not prefer his appeal on time. Upon finding himself out of the prescribed statutory time to appeal against the said decision, the applicant channeled the instant application to this court.

When the application was called for hearing, both parties were duly represented by advocates. The applicant enjoyed the services of Mr. Deckrine Dominic Kweka, learned Advocate and the Respondent was duly represented by Mr. Aziz Mahenge, learned Advocate.

Having found that the application emanated from the decision of the primary court in Matrimonial Cause No. 08 of 2022, I asked parties to address me on the propriety of the application in terms of Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964, (hereinafter, the "Rules").



Mr. Kweka admitted that the dictates of Rule 3 of the Rules require the applicant to state reasons for his delay to lodge an appeal within 30 days. He submitted that the Rule require the applicant to attach petition of appeal or to state in the affidavit, grounds of objection to the decision he desires to appeal against. The learned counsel argued that the applicant complied with Rule 3 of the Rules by stating that the cause for delay to file his intended appeal within time was due to sickness. He admitted that the applicant has not attached a petition of appeal or grounds of objection to the decision as required under Rule 3 of the Rules. He added that although Rule 3 of the Rules is not cited in the chamber summons, the words 'any enabling provision of the law' encompass Rule 3 of the Rules. He urged the court to invoke the oxygen principle under section 3A and 3B of the CPC. He concluded by praying the application to be struck out without costs but with leave to refile.

In reply, Mr. Mahenge admitted that Rule 3 of the Rules require the applicant to attach a petition of appeal to his application for extension of time or to set out grounds of objection to the decision he desired to appeal against. He submitted that the provisions cited by the Applicant in the chamber summons do not apply in the circumstance of the present application emanating from

the decision of the primary court. He argued that the applicant ought to have cited the applicable Rule 3 of the Rules and not 'any other enabling provision of the law' which create a burden to court to find the relevant provision of the law.

Mr. Mahenge referred the Court to the decision in **PC Civil Appeal No. 13 of 2021 between Kadogo Mambina v. Juma Mambina**, TANZLII (2021 TZHC 6336), where the High Court held that Rule 3 of the CPC must be complied with. He also cited the case of **Kalunga & Co. Advocates v. National Bank of Commerce Limited (2006) TLR 325** on page 235 to amplify his position. Mr. Mahenge prayed for dismissal of the appeal with costs as the applicant's previous appeal, PC Matrimonial Appeal No. 13 of 2023, was dismissed for being improperly lodged in the High Court instead of the District Court.

In rejoinder, Mr. Kweka submitted that the prayer for dismissal of the application by the learned Counsel for the respondent is misconceived. He submitted that in the case of **Cyprian Mamboleo Hiza v. Eva Kioso & Mrs. Semwaiko, Civil Application No. 3 of 2010**, the Court of Appeal stated the difference between striking out and dismissal. He argued that a suit is struck out if it is incompetent, but it is dismissed only when it has

been heard on merit. He submitted that the present application has not been heard on merit, and any defect would render the application incompetent with a consequence of being struck out. Counsel reiterated his prayer for striking out the application with leave to refile.

From the parties' respective submissions summarized above, I find it apt to begin my determination regarding the concern raised by Mr. Mahenge in his reply submissions as to whether the applicant's failure to cite Rule 3 of the Rules is fatal or not as it was.

I wish to state from onset that non-citation of Rule 3 of the Rules is not fatal. The applicant cited the applicable section 14(1) of the Law of LLA enabling the Court to entertain the present application. The applicant's failure to cite Rule 3 of the Rules, would not oust the jurisdiction of this court to entertain the application if it was competent.

It is worth noting that Rule 3 of the Rules is not an enabling provision but rather a procedural provision which merely provides a manner through which the application for extension of time to appeal against the decision of the Primary court ought to have been made to this court. The said rule stipulates:

"3. Applications for leave to appeal out of time

*An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction **shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order:***

Provided that where the application is to a district court, the court may permit the applicant to state his reasons orally and shall record the same." [Emphasis added]

As plain as it is, the cited Rule is only directive, prescribing the manner in which applications of the present nature are to be channeled to the Court. It follows that the same does not in any how move this Court to entertain the matter placed before it and grant the reliefs sought. In my view, much as I agree that it is important to cite the rule, I also hold that section 14(1) of LLA was a proper cited provision coached in generality, enabling the applicant to prefer his application for extension through a mode prescribed by the Rules. In this, I am fortified by the observation made by the Court of

5

Appeal in the case of **Williamson Diamonds Limited v. Salvatory Syridon and Another, Civil Appeal No 15 of 2015, CAT** (Unreported), where at page 6, paragraph 2 it was held;

"As for the non-citation of Rule 48 (1) of the Rules, we agree with Mr. Malongo that the Rule is not an enabling provision. It only prescribes, the manner in which applications to the Court are to be made. It does not clothe the Court with jurisdiction to determine any matter. Although it is desirable to cite it, its non-citation is not fatal".

Applying the holding of the authority above in the matter at hand, I hold the view that non-citation of the Rules is not fatal.

Reverting to the issue of competence or otherwise of the application at hand for noncompliance with mandatory provisions of Rule 3 of the Rules as it was risen *suo moto* by this court, it is clear that the parties are at one on the incompetence of the present application for the applicant's failure to attach a petition of appeal, and as an alternative, failure to state the grounds of objection to the decision of the District Court in Matrimonial Appeal No. 17 of 2022, contrary to the requirement of Rule 3 of the Rules.

I agree with the parties. There are plethora of decisions of the courts striking out applications for incompetency arising from the applicants' failure to

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list appears to be a directory or a roster of some kind.

2. The second part of the document is a series of short, handwritten notes or entries. These are also arranged in two columns, and they appear to be related to the names and addresses listed above. Some of the notes are quite brief, while others are more detailed.

3. The third part of the document is a series of longer, handwritten notes or entries. These are arranged in two columns, and they appear to be more detailed or explanatory than the previous notes. Some of the notes are quite long and contain several lines of text.

4. The fourth part of the document is a series of short, handwritten notes or entries. These are arranged in two columns, and they appear to be related to the names and addresses listed above. Some of the notes are quite brief, while others are more detailed.

5. The fifth part of the document is a series of longer, handwritten notes or entries. These are arranged in two columns, and they appear to be more detailed or explanatory than the previous notes. Some of the notes are quite long and contain several lines of text.

6. The sixth part of the document is a series of short, handwritten notes or entries. These are arranged in two columns, and they appear to be related to the names and addresses listed above. Some of the notes are quite brief, while others are more detailed.

7. The seventh part of the document is a series of longer, handwritten notes or entries. These are arranged in two columns, and they appear to be more detailed or explanatory than the previous notes. Some of the notes are quite long and contain several lines of text.

8. The eighth part of the document is a series of short, handwritten notes or entries. These are arranged in two columns, and they appear to be related to the names and addresses listed above. Some of the notes are quite brief, while others are more detailed.

9. The ninth part of the document is a series of longer, handwritten notes or entries. These are arranged in two columns, and they appear to be more detailed or explanatory than the previous notes. Some of the notes are quite long and contain several lines of text.

10. The tenth part of the document is a series of short, handwritten notes or entries. These are arranged in two columns, and they appear to be related to the names and addresses listed above. Some of the notes are quite brief, while others are more detailed.

comply with the requirement of attaching a petition of appeal or stating grounds of objection to the decision of the district court. See for instance the decision in the case of **Bonaventura Samuel v. Michael Grace Masatu and Two Others, Misc. Application No. 2 of 2021 [2022] TZHC 10638 (15 July 2022)** in paragraph 3 of page 6 of the decision. Based on the above decision whose circumstances are similar to the present matter, that is the decision sought to be challenged emanated from primary court, I hold that the application is incompetent for failure by the applicant to attach a petition of appeal or to set out grounds of objection to the decision of the district court, contrary to Rule 3 of the Rules.

I now turn to the consequence of non-compliance with the said Rule in relation to the present application as parties herein locked horns on whether the application ought to be dismissed or struck out. It is a settled position of the law that dismissal implies that a competent matter before the court has been disposed of, while striking out is when there is no proper matter capable of being disposed of. I fully subscribe to the decision of the Court of Appeal in the case of **Cyprian Mamboleo Hizza** (supra) cited by Mr. Kweka, learned Counsel for the applicant. On page 8 of the decision, the



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Court of Appeal cited with approval its holding in the case of **Ngoni-Matengo Cooperative Marketing Union Ltd v. Alimahomed**

Osman (1959) EA 577, where on page 580, the Court of Appeal held that: -

*'.....This court accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. **What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former implies there was no proper appeal capable of being disposed of.**' [Emphasis added].*

Mr. Mahenge, learned Counsel for the Respondent urged the Court to dismiss the application on the same manner as the applicant's appeal was dismissed by this Court for being improperly filed before the Court. Having regard to the circumstances of the instant matter, I do not accept such invitation to dismiss the present application. What is before me is an application for extension of time which I have not heard on merit due to its incompetency occasioned by non-compliance of Rule 3 of the Rules.

As such I proceed to strike out the application for being incompetent. Based on the fact that the non-compliance of Rule 3 of the Rules was raised by the Court *suo moto*, I make no order as to costs.

It is so ordered.

DATED at **MOROGORO** this 23rd day of February 2024.



H. A. Kinyaka
H. A. KINYAKA
JUDGE
23/02/2024