

**IN THE HIGH COURT OF TANZANIA  
(TEMEKE HIGH COURT SUB- REGISTRY)  
(ONE STOP JUDICIAL CENTRE)  
AT TEMEKE  
CIVIL APPEAL NO. 27834 OF 2023**

*(Originating from Matrimonial Cause No. 260 of 2022 of the District Court of Temeke at One Stop  
Judicial Centre)*

**JANETH ANGETILE MWASOMOLA.....APPELLANT**

***VERSUS***

**ARESTIDES AGATHON LYAKUMBELE .....RESPONDENT**

**RULING**

Date of last order: 03/05/2024

Date of Ruling: 31/05/2024

**OMARI, J.**

This is a Ruling on a Preliminary Objection, lodged by the Respondent in this Appeal. In his notice of a Preliminary Objection he indicated two points of law that:

1. This appeal is incurably defective for non-compliance with the mandatory requirement for being directly brought and filed to this honourable court in contravention of section 80(2) of the Law of Marriage Act, Cap 29 R.E 2019 as well as Rule 37(1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules.

2. This appeal is bad in law for failure to comply with mandatory requirement of law for being filed without being accompanied with the judgment and decree.

When the parties appeared before me on the date fixed for the hearing, I ordered the same to be done by way of written submissions, the parties agreed and complied with the scheduling order. The Respondent's submission in support of the Preliminary Objection was drawn and filed by Majid Ngaa Shaban a learned advocate while the Appellant's were done by herself.

In his submission, Mr. Shaban sought to abandon the second point of the Preliminary Objection and submitted only on the first point of the objection. He argued that the Appellant filed the appeal in contravention of section 80(2) of the Law of Marriage Act, Cap 29 R.E 2019 (the LMA) and Rule 37(1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules (the Rules) which require an appeal of this kind to be filed in the subordinate court which made or passed the judgment and decree being appealed against. He cited the case of **Johansen Kahwa v. Jansita Katabazi** (Matrimonial Appeal 2 of 2020) [2021] TZHC 6526 which referred to the case of **Kenneth K. Lukaija v. Ritha Jigulu**, Civil Appeal No. 87 of 2019 and that of **Agustina**

**Salvatory v. Gidion Ndibalema**, Civil Appeal No. 8 of 2005 wherein appeals akin to the current one were struck out for being incompetent.

To conclude his submission, counsel argued that the provisions of the cited laws use the term "shall" therefore the Appellant cannot rely on the overriding objectives as held in the case of **Letika K. Felix v. Bonaventure Midala**, Misc. Civil Application No. 136 of 2017. Counsel then prayed for the appeal to be struck out with costs.

In her reply the Appellant started by pointing out that legal technicalities should not deprive the rights of an individual since courts are supposed to adhere to Article 107A(2) (e) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time) which calls upon courts to dispense justice without being tied up with technicalities. She urged this court to depart from cases cited by the Respondent since they are after all High Court decisions.

The Appellant also submitted on the second point of the Preliminary Objection which the Respondent had decided to abandon through their submission. She then concluded her submission in opposing the Preliminary Objection by stating that the grounds raised by the Respondent do not



qualify to be a pure point of law as they aim at defeating justice. The Appellant prayed for the Preliminary Objection to be dismissed with costs.

In his rejoinder, Mr. Shaban prayed for this court to ignore the Appellant's submission as regards the second point of the Preliminary Objection for it is baseless. He then went on to reiterate what he had already submitted in his submission in chief as regards section 80(2) of the LMA and Rule 37 (1) and (3) of the Rules adding that according to section 53(2) of the Interpretation of Laws Act, Cap 1 R.E 2022 these provisions are couched in mandatory terms. Counsel then referred this court to the case of **Bakari Mohammed v. Hadija John**, Civil Appeal No. 21 of 2018 where this court struck out an appeal for being filed at the wrong registry contrary to section 80(2) of the LMA.

As for the Appellant's reference to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, Mr. Shaban argued that the overriding objective principles cannot be blindly applied against mandatory provisions of procedural law which go to the foundation of a case. This, counsel added is as per the Court of Appeal case of **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No.

66 of 2017. He then concluded his submission by praying that the Preliminary Objection be found meritorious and sustained with costs.

Having gone through and considered the parties submissions let me first deal with the Appellant's assertion that the Preliminary Objection offends the law. Briefly, as per the case of **Mukisa Biscuits Manufacturing Co. v. West End Distributors Limited** [1969] EA 696 in which Sir Charles Newbold P. stated that a Preliminary Objection is in the nature of something demur, it raises a point of law which is argued on the assumption that what is argued by either side is correct and cannot be raised if any fact is needed to be ascertained or if what is sought is the exercise of judicial discretion. This is what can be said to be as the accepted description of a preliminary objection in our jurisdiction.

In the case of **Shose Sinare v. Stanbic Bank Tanzania Ltd and another**, Civil Appeal No. 89 of 2020 the Court of Appeal referred to its earlier decision in **The Soitasambu Village Council v. Tanzania Breweries Ltd and another**; Civil Appeal No. 105 of 2011 which discusses what is and what is not a preliminary objection. Since it is trite knowledge that a Preliminary Objection has to be on a pure point of law then it is in my view that the Respondent's Preliminary Objection is on a pure point of law since he is merely stating that the Appellant lodged the appeal in the wrong registry contrary to section 80(2)



of the LMA and Rule 37 (1) and (3) of the Rules. This, in view is something that needs no ascertainment of facts and or exercise of judicial discretion.

This, out of the way, I can now look at the cited provisions so as to get clarity.

Section 80 (1) and (2) of the LMA states:

*"(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 forty-five days of the decision or order against which the appeal is brought." (emphasis supplied)*

Further, Rule 37 (1) and (2) of the Rules provides:

*"(1) An appeal to the High Court under section 80 of the Act **shall be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against.**  
(3) Upon the receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with the complete record of the matrimonial proceeding to which the appeal relates."*

Both of the above provisions are couched in mandatory terms that require a person so aggrieved by a decision of a lower court is required by law to file

their appeal in the subordinate court which made or passed the decision order or decree appealed against. This means the correct registry for filing an appeal is at the court that decided the matter being appealed against, in this particular appeal that would have been the District Court of Temeke at One Stop Judicial Centre, which is in accordance with Rule 37 (3) of the Rules obligated to transmit the filed memorandum to the High Court.

The Appellant is urging this court to disregard (or not to be persuaded by) the decisions referred to by the Respondent as they are High Court decisions thus, not binding on this court. This is coupled with the assertion that the provision that the Respondent cited are technicalities that should be done away with for they are in contravention of the overriding objective principles.

In brief, the overriding objective principles are enshrined in our laws to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. However, as rightly pointed out by the Respondent's counsel the said principles are not meant to help a party circumvent mandatory rules of procedure or to facilitate disregard for procedures then invoke them to make problems disappear or change form.

Courts have already addressed this issue, that the principles were not meant for curing legal defects that would otherwise topple a matter before a court



in addition to the cases cited by counsel for the Respondent see for example the cases **Juma Busiya v. Zonal Manager, South Tanzania Postal Corporation** (Civil Appeal No.273 of 2020) [2021] TZCA 522 and **Jacob Bushiri v. Mwanza City Council & Others** (Civil Appeal No.36 of 2019) [2021] TZCA 300.

As for the Appellant's reliance and mention of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, I seek to be persuaded and guided by the wisdom of this court in **Shabani Mwangesi v. National Corporation**, High Court, Civil Appeal No. 44 of 1994, (unreported) where it was held: -

*'It is a cardinal principle of constitution law that where an issue can be resolved without recourse to the constitution, the Constitution should not be involved...'*

So, while it is true that this court can and should exercise its discretion and powers being guided by Article 107A (2) (e) of the Constitution of the United Republic of Tanzania and sections 3A and 3B of the Civil Procedure Code, Cap 33 R.E 2019 when dispensing justice, it is still obligated to do so within the confines of the law of the land.





Unfortunately, this appeal is indeed filed in the wrong registry against the provisions of section 80(2) of the LMA and Rule 37 (1) of the Rules. This in my view is a contravention of a procedural requirement which cannot be cured by overriding objectives. Accordingly, the raised Preliminary Objection is upheld. I find and hold that the Appeal is lodged contrary to section 80(2) of the LMA, it is hereby struck out. This being an appeal that emanates from a matrimonial matter, each party is to bear its own costs.

It is so ordered.





**A.A. OMARI**

**JUDGE**

**31/05/2024**

Ruling delivered and dated 31<sup>st</sup> day of May, 2024.



**A.A. OMARI**

**JUDGE**

**31/05/2024**