

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MBEYA SUB - REGISTRY)**  
**AT MBEYA**  
**PC. MATRIMONIAL APPEAL NO. 03 OF 2023**

**SEBASTIAN SANGA ..... APPELLANT**

**VERSUS**

**FLAVIAN ALOYCE BADANGA .....RESPONDENT**

**RULING**

*Date of last order: 28/07/2023*

*Date of Ruling: 31/08/2023*

**NDUNGURU, J.**

This is a second appeal against the judgment and decree of the District Court of Mbarali at Rujewa in Matrimonial Appeal No. 01 of 2022 delivered on 04/11/2022. The appeal originates from a complaint by the respondent (the then applicant) against the appellant (the then respondent) before the Primary Court of Mbarali District at Rujewa in Matrimonial Cause No. 32 of 2022 seeking to be granted a divorce decree and division of matrimonial properties. The primary court ruled in favour

of the respondent. Discontented with the said decision, the appellant unsuccessfully appealed to the District Court of Mbarali in Matrimonial Appeal No. 01 of 2022 and dissatisfied, hence the instant appeal.

The appellant lodged a petition of appeal instead of a proper document which is a memorandum of appeal as provided under rule 37 of the **Law of Marriage (Matrimonial Proceedings) Rules**, G.N. No. 246 of 1997. In the said petition of appeal, the appellant was armed with a total of four grounds of appeal. However, for the reason which will be apparently shortly, I do not deem appropriate, for the purpose of this ruling to reproduce them herein below. It is noted that after being served with the petition of appeal, the respondent lodged a notice of preliminary objection on 29/05/2023 contained in the reply for the petition of appeal on point of law contesting the competency of the appeal. The incompetence of the appeal is expressed in the following ground;

- (i) That, the appeal is timely barred contrary to section 80(2) of the Law of Marriage Act, [Cap. 29 R.E. 2019].*

This ruling therefore, intends to determine the notice of preliminary objection on the competence of appeal as raised by the respondent.

On the day the appeal was called for hearing, Mr. Sebastian Sanga and Ms. Flavian Aloyce Badanga, the appellant and respondent respectively, were un-represented and they prayed the matter to be disposed by way of written submissions as agreed to the court scheduling orders.

To be noted that when deliberating on the respondent's preliminary objection I shall draw from her written submissions. The respondent begins that, the appeal is timely barred contrary to section 80(2) of the Law of Marriage Act, {Cap. 29 R.E. 2019}. The said section states that; "*an appeal to the High Court shall be filed in the magistrate's court within forty-five days of the decision or order against which the appeal is brought.*" The judgment of the District Court of Mbarali was delivered on 04/11/2022 and the appeal was lodged on 04/01/2023 which was about 60 days. Hence, the said appeal was beyond the required time for 15 days. The appellant was supposed to apply extension of time to file his appeal out of time. Failure to abide with the procedure renders this appeal as if it is not filed in the court of law hence, it entitles for dismissal by this court. To buttress his position, she cited the case of **Ngoni Matengo**

**Corporative Union vs. Ally Mohamed Othman** [1985] E.A 577, it was held that, *"any suit filed out of time, the remedy is dismissal."*

It was wrong for the appellant to invoke the provision of section 19(2) of the Law of Limitation Act, Cap 89 which cannot apply for matters that was originated from the Primary Court. She cited rule 37(1) and (3) of the **Law of Marriage (Matrimonial Proceedings) Rules**, G.N. No. 246 of 1997 provides very clear on the procedures of filing an appeal that was originated from subordinate courts and there was no requirement of attaching copies of proceedings and judgment. Even rule 36 of the **Law of Marriage (Matrimonial Proceedings) Rules**, G.N. No. 246 of 1997 clearly stipulate that, the subordinate court includes a primary court. From the above position it is very clear that, there was no requirement for obtaining a copy of proceedings and judgment for lodging an appeal to the High Court. She humbly prays before this court to dismiss this appeal as it is incompetent for being time barred.

On his part, the appellant contended that, it is settled law that once a preliminary objection is raised it must be determined first before the substantive case is heard and determined. He did not delay in filing the appeal. He argued that, after the delivery of the decision by the District

Court of Mbarali in the Matrimonial Appeal No. 1 of 2022, he applied to be supplied with certified copies of proceedings and judgment on 15/11/2022. He was supplied the said documents on 07/12/2022 and later on he filed his appeal on 04/01/2023. Therefore, the period of limitation started to run on the day he received the said copies.

Then, he cited the provision of section 19(2) of the Law of Limitation Act, (Cap. 89 R.E. 2019) which provide that, *"In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and **the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.**"*

Also, he referred this court in the decision of Director **of Public Prosecution vs. Nawazo Saliboko Shangi & 15 Others**, Criminal Appeal No. 384/2017 CAT (unreported) where it was held that: -

*"We are therefore settled that the time requisite for obtaining a copy of the proceedings and judgment for appeal purpose has been excluded... the Appellant was therefore entitled to file his*

*appeal within 45 days after receipt of the copy of the proceedings and judgment and he need not apply for extension of time to do so."*

He beseeched this court to dismiss the preliminary objection for being misconceived, and directed this appeal to be heard and determined on merits.

Having read the written submissions of the parties and carefully examined the record of appeal before this court, I am of the view that the issue for determination, as it was raised by the respondent, is whether the appellant's appeal to this court was filed within the prescribed period of 45 days under section 80(2) of the **Law of Marriage Act**, [Cap 29 R.E. 2019] that:

*"An appeal to the High Court shall be filed in the magistrate's court within forty-five days of the decision or order against which the appeal is brought."*

From the above clear position of law, an appeal against any decision or order, in respect of proceedings of the Subordinate Court, to the High Court, has to be lodged within 45 days before the subordinate

court which made or passed the decision from the date of the decision or order.

In the instant appeal, the record clearly shows that, while the decision by the District Court of Mbarali was rendered on 04/11/2022, the appeal to the High Court against that decision was lodged by the appellant on 04/01/2023. This is beyond the period of 45 days as prescribed by section 80(2) of the **Law of Marriage Act**, [Cap 29 R.E. 2019]. It is also clear that before lodging his appeal, the appellant had not approached the High Court for extension of time. The appellant's claim that the computation of 45 days starts to run from the day he obtained the copy of judgment which was on 07/12/2022. The appellant maintained that the appeal was lodged on time. On the other hand, the respondent claimed that the appeal is out of time and there was no requirement for attaching a copy of the decision in order to appeal.

It is settled law that, there is no mercy to cure lapse of time except extension of time with due reasons. It is bad in law to file and entertain appeal which is time barred. All statutory procedure in time limitation and appeal out of time must be observed. Appeal is a



statutory right and the law provides that in order to appeal in matrimonial proceedings to the High Court on matters originated from subordinate court there is no legal requirement to attach copies of the proceedings and judgment. The procedure for lodging an appeal is provided under rule 37 of the **Law of Marriage (Matrimonial Proceedings) Rules**, G.N. No. 246 of 1997 which provides that;

*"37 – (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.*

*(2) Every memorandum of appeal shall be either in Kiswahili or in English and shall state briefly the grounds of objection to 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.*



*(4) The High Court shall not reject or refuse to entertain any memorandum of appeal by reason only of any defect in the form of the memorandum but shall admit every memorandum of appeal."*

It is statutory position that, copies of matrimonial proceedings, judgment and decree of the subordinate court is not mentioned as legal requirement in order to lodge an appeal before the High Court. Eventually, the requirement and the practice realize that, an appeal to the High Court is supposed to be lodged before the subordinate court which rendered the said decision appealed against. Since copies of matrimonial proceedings, judgment, orders, and decree was not required in appeal from subordinate to the High Court, reason of the appellant has perished naturally and no time to excuse the adopted practice contrary to the law.

Looking at the cited provisions and what transpired in the matter under scrutiny, the appellant relied on improper position of the requirement of accompanying copies of decision appealed against. In relying to the provision of section 19(2) of the Law of Limitation Act, Cap 89 that in computation of time to lodge an appeal

is misconceived of the law guiding on the procedure of lodging a matrimonial appeal. The said section 19(2) of the Law of Limitation Act is applicable only to those appeal that are clearly prescribed by the requirement of procedural laws that copies of proceedings, judgement and decree appealed against is necessary for attachment.

The aim of court records is to provide the assistance to the aggrieved party or parties to prepare the sound grounds of appeal. Although there is no requirement of law to attach the said court records but still the aggrieved party has a room to make application in the subordinate court for purpose of accessing the said records for perusal or inspection. After inspection of the matrimonial court records then, the aggrieved party will be in a good position to prepare his or her appeal in a sound grounds of appeal.

Court records are not automatically available to the public as matter of course. However, the public may make an application for access of court records under Item 34 of the First Schedule to the Fees payable in the High Court, Courts of Resident Magistrate and District Court, and Item 9 of the Second Schedule to the Fees payable in Primary Courts both are found within the **Court Fees**

**Rules**, 2018 G.N. No. 247 of 2018. In **Dring vs. Cape Intermediate Holdings Ltd** [2019] UKSC 38, the UK Supreme Court found that in determining such application, the court would need to balance the principle of open justice against any the interest of others and the risk of harm;

*"There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disable adults, the protection of privacy interests more generally, and the commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in patent case."*

Any judgment or order made 'in public' is a public document and automatically available to the public. The general rule is that all hearings of matrimonial proceedings are in public, subject to the court's discretion to order a hearing to be held in the exclusion of the

public. The conditions of section 84 (a), and (b) of the **Law of Marriage Act**, [Cap. 29 R.E. 2019] apply to judgments and orders made in public.

It should be emphasized that lodging an appeal before any court within the period of limitation prescribed by the law is imperative because the issue of limitation goes to the root of the jurisdiction of the court. This court adopts reasoning of the decision of **District Executive Director Kilwa District Council vs. Bogeta Engineering Limited**, Civil Appeal No. 37 of 2017 CAT at Mtwara (unreported) which was cited in the case of **Juma Lupoli vs. Charles Ngobetse**, Civil Appeal No. 487 of 2022, CAT at Kigoma (unreported), faced with a similar position, in determination of limitation of time in lodging an appeal, it was held that;

*"On our part, we think in the circumstances of this appeal in which the issue of limitation touches on jurisdiction of the Court, insisting on the compliance of mandatory requirement of lodging an appeal within the prescribed time goes in tandem with facilitating the just determination of the matter before us in accordance with the law. We think the issue of time limit is not a technicality which goes against the just determination of*

*the case or undermines the application of overriding objectives principle contained in section 3A (1) and (2) and 3B (1)(a) of Act, No. 8 of 2018."*

In view of what I have discussed above, I unhesitatingly find that the appellant's appeal to this court was filed out of time. That being the case, bearing in mind that the appeal was time barred and this court has no jurisdiction to entertain it. Consequently, the preliminary objection is sustained in the event, I dismiss the appeal for being time barred. This matter being a matrimonial dispute hence, no need to award cost of the suit. Each party to bear it is own cost.

It is so ordered.



  
**D. B. NDUNGURU**  
**JUDGE**  
**30.08.2023**