

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY (ONE-STOP JUDICIARY CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 49 OF 2023

(Originating from Misc. Civil Application No. 8 of 2022 of Temeke District Court at One-Stop Centre)

ISSA MOHAMED HUDUMA..... APPELLANT

VERSUS

LATIFA IBRAHIM..... RESPONDENT

JUDGMENT

Date: 10/10/2023 & 16/10/2023

BARTHY, J.

The appellant aggrieved with the ruling and order of the district court of Temeke at One-Stop Judicial Center, lodged a memorandum of appeal before this court marshalling four grounds of appeal as follows;

- 1. That, the trial magistrate erred in law and fact by giving the chance to appeal while she did not produce any valid evidence of her delay to file appeal.*
- 2. That, the trial magistrate erred in law and in fact by ignoring the fact that the respondent already execute (sic) the case which she seek (sic) extension of time*



from the court to be given chance to appeal out of time.

3. That, the trial magistrate erred in law and in fact by failing to analyze that there was no good and sufficient evidence tendered to (sic) court by the respondent with respect to the reasons of her delay to file appeal in time.

4. That, the trial magistrate erred in law and fact by ignoring the fact that the high court already give (sic) the extension of time of 30 days, but the respondent with no proper reason fail (sic) to meet the time which was extended.

The appellant therefore prayed for his appeal be allowed with costs.

The respondent filed her reply to the memorandum of appeal contesting it in entirety. She contested the execution of decree of the matter to have not been filed. She added that, the trial court had considered the reasons advanced by the respondent and correctly granted the extension of time to file her appeal.

Before embarking into submissions of both sides with respect to this appeal, the brief background of this matter will be useful inorder to appreciate this appeal.



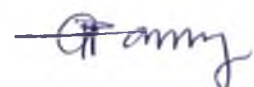
The respondent herein had petitioned for divorce and division of matrimonial assets before the primary court of Temeke vide matrimonial cause No. 43 of 2021. Following the decision of the primary court the respondent was dissatisfied with the decision and she appealed to the district court of Temeke vide matrimonial appeal No. 67 of 2021. Where the decision of the primary court on division of matrimonial assets was altered.

Again, the respondent was not amused with the decision of Temeke district court and she appealed to the high court of Temeke sub registry, where the court held that the district court had no jurisdiction to try the matter and ordered an appeal be instituted to the proper court within 30 days from its decision.

After the lapse of the period of 30 days the respondent filed an application to the district court seeking for extension of time to file her appeal out of time for the reason of sickness and the same was granted by court.

The appellant aggrieved with that decision he appealed to this court advancing four grounds of appeal.

During the hearing of this appeal, the appellant enjoyed the service



of Ms. Agnes Manyanga learned advocate and the respondent appeared in person.

The grounds of appeal were argued orally and the following is the submission of both sides;

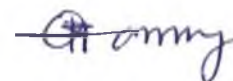
On submission in support of this appeal, Ms. Manyanga submitted that, there was the decision of the high court against the appeal from the district court of Temeke involving the parties.

The high court in its decision, it quashed and set aside the proceedings of the district appellate court and directed proper appeal to be instituted within 30 days from its decision.

However, none of the parties had lodged the appeal before the court. Then, the respondent herein lodged an application before the district court seeking for extension of time to file her appeal out of time.

It was the argument of Ms. Manyanga that the respondent had already sought to execute the decree before the primary court before she had lodged her application for extension of time.

She further submitted that, when the respondent was addressing her application, she did not advance any sufficient reason to warrant the



court extend the time to file the appeal. She pointed out to paragraph 11 and 12 of the affidavit supporting the said application, where the respondent had claimed when she was waiting for legal assistance she fell sick, but her medical report attached as the proof showed she was sick between 2008 and 2009.

It was the submission of Ms. Manyanga that the respondent did not have sufficient reason for her delay as required with the provision of section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019 and the court granted the same without any justification. She also added that, the respondent could not account for each day of delay and urged this court to quash and set aside the order granting the extension of time.

To prop her argument, she cited the case of **Phillemon Mangehe Bukine Traders v. Gerson Bajuta**, Civil Application No. 374 of 2022 Court of Appeal at Arusha where it emphasized on the need to have good cause and account for each day of delay when granting extension for time.

It was also stated by Ms. Manyanga that the action of the respondent to proceed with the execution of the decree of the trial court, it implied that she was satisfied with that decision. She was content that, granting the extension of time was the abuse of court process.



The respondent who appeared unrepresented, in her reply submission she was content she was not able to lodge her appeal within time because she fell sick.

Therefore, she lodged her application for extension of time where she submitted proof of her medical report and the court had found she had good cause to be extended time to file her appeal and the same was lodged and now it is pending before the court.

Responding to the claim that there is the execution matter pending before the primary court, the respondent argued that, after the first decision of the high court the records were reverted to the primary court where she went to make follow up on issue opined by honourable judge to have parties make reconciliation.

The respondent was firm there was no execution proceedings instituted by her and maintained her argument that there was sufficient reason to have her application for extension of time to appeal be granted by the district court.

Ms. Manyanga on her rejoinder submission she did not have much to say, but she maintained her argument she made in her submission in chief.



Having heard the arguments of both sides and going through the records on the matter that led to this appeal, the court is called in to determine whether the appeal has the merit or otherwise.

Before addressing the merit or otherwise of this appeal, it is clear that this appeal emanates from the decision of the district court that decided on the matter which did not conclusively determine the rights of parties. As it emanates from the decision of the district court that granted the extension of time to appeal.

It is the settled position of the law that, no appeal or revision shall lie or be made against in respect of any preliminary or interlocutory decision or order unless such decision or order has the effect of finally determining the suit.

This issue has been emphatically stated in a number of decisions to mention just few, see cases of **Peter Junior v. Omari Daudi Mshana**, Misc. Land Revision No. 27 of 2019, High Court Land Division and **Shenaz Ismail Noray v. Dhirajial Mulji Dursa**, Land Case Revision No. 23 of 2019, High Court Land Division. The decisions which I also subscribe to its findings.

See also the cases of cases of **Yusuf Hamisi Mushi & another v. Abubakari Khalid Hajj & Others** (Civil Application 55 of 2020) [2021] TZCA



589 citing with approval cases of **Murtaza Ally Mangunqu v. The Returning Officer for Kilwa & 2 Others**, Civil Application No. 80 of 2016 and **Peter Noel Kingamkono v. Tropical Pesticides Research**, Civil Application No. 2 of 2009 (both unreported).

The phrase "**finally determining the suit**" was well defined in the case of **Junaco and another v. Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 (unreported) the Court of Appeal further defined the phrase to mean;

"An order or decision is final if it finally disposes the rights of the parties"

In the present matter, decision of the district court was on the application for extension of time to appeal out of time, but it did not finally determine the rights of the parties.

Nevertheless, it is prudent for this court to determine this appeal following the claim which was raised before the district court and on the appellant's second grounds of appeal, claiming that the respondent had already filed the application for execution of the decision of the primary court which had originally entertained the matter, when she lodged the application for extension of time.



Going through the records of the district court it reveals that, the counter affidavit which was filed by the appellant herein who was then the respondent before the district court, he had attached the summons indicating he was required to appear before the primary court of Temeke on 1st December, 2022 on the execution proceedings against the respondent herein.

The records of the district court do not show that, apart from that summons there was any other proof to establish the execution proceedings was instituted before the primary court. There was also no proof that the appellant did appear in the said execution proceedings after receiving the summons.

The respondent herein before the district court her arguments were such that, she went to the primary court to make follow up of reconciliation made by honourable judge during the hearing of their appeal.

Without the proof of the document initiating the execution proceeding before the primary court, it cannot be ruled the same was dully instituted before the primary court. This ground is therefore devoid of merit and overruled.

The remaining first, third and fourth grounds of appeal do revolve

around the decision of the district court which did not finally determine the rights of the parties. With coming into force of the Written Laws Miscellaneous Amendment Act No. 25 of 2002 it had an effect of amending section 74 of the Civil Procedure Code [CAP 33 R.E 2022], (hereinafter referred to as the CPC), Section 43(3) of the Magistrates' Courts Act [CAP 11 RE 2019] which clearly provides that, no appeal or revision against the decision on preliminary objection or interlocutory order can be preferred unless such decision has the effect of finally determining the matter.


For that reason, I therefore find remaining grounds of appeal are devoid of merit and therefore dismissed.

For the reasons stated above, I find the appeal before this court is devoid of merit and I proceed to dismiss it entirely. Considering this matter emanates from matrimonial cause, I give no order as to costs.

It is so ordered.

Dated at Dar es salaam this 16th October, 2023.




G. N. BARTHY
JUDGE