

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 32 OF 2015

THERESIA BENEDICT CHONYA.....APPELLANT

Versus

BENEDICT MUHENZA CHONYA.....RESPONDENT

Date of last Order 19/12/2016

Date of Ruling 08/02/2017

RULING

W.B. KOROSSO, J

Before the Court is an appeal by one Theresia Benedict Chonya against the Judgment and Decree in Matrimonial Cause No. 82 of 2005, District Court of Kinondoni at Dar es Salaam delivered on 28/04/2014. The appellant filed 5 grounds of appeal whose gist to the understanding of the Court can be compounded and the first ground being the appellants dissatisfaction with the trial Court distribution of House on Plot No. 1 Mandela Road Kibangu area; the Shamba in Kwembe area and the Property in Plot No. 28 constitution and of Bethel Enterprises Ltd/Chonya Inn Property. The second ground being that the trial Court erred in assessment of the appellant's contribution thereby improperly distributing the stated properties in ground no. 1.

On the 16th of September 2016, counsels for both parties prayed to the Court for hearing of the appeal to proceed by way of written submission, a prayer which was granted and a schedule for filing of submissions was prescribed for which parties complied with the orders of the Court on the same. During preparation of the Judgment, the Court in exercising its duty of determining the competence of the

appeal before it, discerned a legal issue important to determine before venturing into the merits of the case and which address whether the appeal is properly before the Court. The issue was whether the appeal before the Court was filed within time within the confinement of relevant laws. The Court raised the issue before the parties and they were invited to address the Court on the issue. Therefore, this Court shall first, proceed to determine whether the appeal is viable, that is whether it was filed in time, before venturing into addressing the merit of the case.

On this issue raised by the Court, on whether the appeal was within time, the counsel for the appellant submitted that although he found to be a fact that the appeal was filed on the 11th of September 2014 and the decision appealed from was delivered on 28th April 2014, the judgment and decree was available for collection on the 11th of August 2014 and the decree was available on the 19th of August 2014 hence the delay in filing the appeal. The learned counsel asserted that, the appeal which arises from a matrimonial cause filed in the District Court of Kinondoni is within time as it was filed within 45 days, which the boundaries of the time limitation prescribed by the Law of Marriage Act Cap 29 RE 2002 as read together with Section 19(2) of the Law of Limitation Act, Cap 89 RE 2002 which prescribes for exclusion of the time it had taken to get the judgment and decree when computing the limitation period.

The issue of whether time for retrieving the judgment has to be excluded, the appellants counsel contended was determined by the High Court in *Gregory Raphael vs. Castory Rwehabura (2005) TLR 99* and at pg 105(f) and (g) it was stated that the time of limitation ought to be calculated in exclusion of the time to acquire a judgment. It was their contention therefore that the appeal is within time. In the alternative, the appellants submitted that in the unlikely event that the Court finds that the appeal is time barred, first since the Court has already heard the parties on merit to rectify the illegalities and miscarriage of justice they contend has

been occasioned and that therefore the Court proceed to consider the appeal on merit using the supervisory jurisdiction over the trial Court vide section 44(1)(b) of the Magistrate's Court Act, Cap 11 RE 2002. Second, in view of the time it has taken since the institution of this appeal, brought by delay in transmission of records of trial court, reinstitution of another appeal will take more time to dispose of the dispute on hand. Such will be the same even if the Court in the interest of justice proceeds to grant extension of time to refile the appeal.

The appellants counsel contended further that such prayers for extension of time can be actualized if the Court is pleased to intervene to save the Court's time to resolve the dispute as decided in *SGS vs. VIP and Marketing Ltd (2004) TLR 137*. That it is the Courts discretion whether to re-initiation of the appeal by the Court or the Courts intervention will serve justice and the prayed for the Courts intervention.

The Respondent rival contention on this issue of whether the appeal is time barred was that the fact is, which is also admitted by the counsel for the appellant, the Judgment being appealed against was delivered on the 28/4/2013 and the appeal was filed on the 11/9/2013 and reasons advance for delay in filing of appeal being the Judgment and decree were obtained late. That the time to appeal is 45 days, and they contended that reasons advanced for delay in filing the appeal are weak since after the time for appeal expired, the appellant was supposed to seek the Courts leave to appeal out of time which they did not do so.

The respondents also submitted that section 80(2) and Section 19(2) of the Law of Limitation Act, Cap 11 could have applied if the appellants had prayed for leave first. Not having done so the appellants at this juncture cannot utilize the said sections, the appellant being late by four months and half. The respondent conceded that there is a possibility the appellants received the copy of judgment after the date to file an appeal had expired.

Despite also conceding the fact that the appeal has been heard and parties were awaiting for judgment, the respondent stated that that's why at the moment the appellant cannot proceed to pray for extension of time before the Court at the time the delivery of Judgment is awaited. That the appeal is out of time and the appellants have not shown any good reason and they prayed the appeal be dismissed for being time barred.

In consideration of the first matter before the Court, whether the appeal was filed within time, there is no dispute on the fact that the Judgment which was appealed against in Matrimonial Cause No. 82 of 2005, at Resident Magistrate's Court of Kinondoni (Hon. Mtarania RM) was delivered on the 28/4/2014 and certified on the 4/8/2014 and the Decree was extracted on the 19th of August 2014. The current appeal was filed on the 11th of September 2014. It suffices that the relevant section for appeal in matrimonial proceedings such as the current matter is section 80 (1) and (2) of the Law of Marriage Act, Cap 29 RE 2002 which reads:

80.(1) Any person aggrieved by any decision or order of a 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's court within forty-five days of the decision or order against which the appeal is brought.

Suffice to say that the above section should also be read with Rule 37 (1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules Among others, which provides for procedure in appeals grounded on matrimonial proceedings. 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."

and Subrule 3 thereof states:-

(3) "Upon 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 proceedings to which the appeal relates."

Apart from the above section which are relevant to the issue at hand related to whether the appeal is within time, the appellants counsel submitted to the Court that this section should be considered by the Court in computing the time, that is, section 19(2) of the Law of Limitation Act, Cap 89 RE 2002 which reads:

S. 19(2) -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.

It should be understood that generally speaking, the Law of Limitation plays many roles such as to set time limit within which to institute proceedings in a Court of Law, to prescribe the consequences where proceedings are instituted out of time without leave of the court and it is expected that where a period of limitation for any proceeding is prescribed by any other written law, the provisions of the Law of Limitation apply as if such period of limitation had been prescribed by the Law of Limitation Act unless the contrary is shown. The Court has considered and finds the cited case by the appellants counsel that of *Gregory Raphael vs. Castory Rwehabura (2005) TLR 99* distinguishable since it is not a case grounded on matrimonial matters and therefore the Law of Marriage Act, Cap 29 was not applicable.

Having considered the submissions of both parties on this issue, this Court is of the view that on the above expounded provisions, there is no doubt that it is mandatory

that an appeal in matrimonial proceedings be filed within 45 days of the decision. Section 80(2) of the Law of Marriage Act is very clear about this. It is also clear by virtue of the laid down procedure in the Matrimonial Proceedings Rules, Rule 37(1) that the appeal shall commence by filing a memorandum of appeal and Rule 37(3) that it is the duty of the Court having delivered the decision to transmit the records to the High Court after the memorandum of appeal has been filed. This in effect meaning the party is not required to wait for judgment or decree to attach it to the memorandum of appeal. This also means an aggrieved party is supposed to comply with the 45 time limitation provided.

The provision of Section 19(2) of the Law of Limitation Act, we find cannot apply to the current circumstances by virtue of the fact that, when one considers the provision of Section 80(2) of the Law of Marriage Act, and the related Rules of Procedure governing matters grounded on matrimonial matters, the limitation period provided is that of 45 days and the filing of an appeal is not subjected to the availability of a judgment or decree.

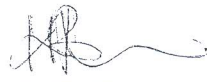
We find that the appeal to this Court having been presented or filed after the expiry of the forty five days (about 135 days) from the date the decision of the District Court of Kinondoni was delivered, and since the provisions of section 19(2) of this Law of Limitation Act do not apply to this appeal, the appeal we find is incompetent. The appeal being incompetent by virtue of being time barred limits the Court to proceed determining the submission on merit. The issue is what are the consequences thereto? The law of Marriage Act does not provide for consequences where the appeal is found to be time barred. By virtue of Section 43(f) and section 46 of the Law of Limitation Act, Cap 29 we are provided with a way forward. The Law of Limitation has a provision for the consequence where a proceeding is instituted out of time without leave of the Court. It is Section 3. Under that provision,

In the premises that being the position, for the reasons stated hereinabove, we find that that the appeal is time barred and it is consequently dismissed. Having regard to the circumstances of the case, each party to pay own costs. Ordered.



Winfrida B. Korosso
Judge
8th February 2017

Ruling delivered this day in Chambers in the presence of Mr. Edward Magayane learned Advocate for Respondents and Ms. Theresia B. Chonya the appellant.



Winfrida B. Korosso
Judge
8th February 2017