

**IN THE HIGH COURT OF TANZANIA
(DAR-ES-SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 17 OF 2003

JENNIFER MWAMASAGE APPELLANT

VERSUS

USWEGE MWAMASAGE RESPONDENT

Date of Last Order: 26/7/2006

Date of Judgment: 26/9/2006

R U L I N G

MLAY, J.

The appellant filed a petition for divorce in the Court of the Resident Magistrate of Dar es salaam at Kisutu, praying inter alia, for dissolution of marriage, equal division of matrimonial property and custody of issues of the marriage. In the judgment of the court delivered on 18/10/2002, the trial Resident Magistrate found that the marriage was anullity and for that eason, found it was not relevant to discuss the issue of divisiion of matrimonial property. Being aggrieved by the decision of the Resident Magistrate, the appellant filed a "petition of Appeal" in this court on 29/1/2003.

The respondent, through his advocate Mr.E.D. Kisusi gave notice of a preliminary objection on a point of law that "this appeal is incompetent in that no appeal lies to this Honourable Court from a decision of a Resident Magistrates' Court in matrimonial matters and or this appeal was not filed in the Resident Magistrates Court which made the decision against which of this appeal is brought, contrary to the mandatory provisions of section 80 (2) of the Law of Marriage Act, No. 5 of 1971, as amended by Act No. 15 of 1980 and on Rule 37 (1) of the Law of Marriage (Matrimonial proceedings Rules 1971, GN No. 136 of 1971."

The appeal came up for hearing before Kaganda J, who ordered the parties to file written submissions on the preliminary objection. Both parties have duly filed their written submissions, and this ruling is on that preliminary objection.

In the written submissions filed by Mr. Kisusi on behalf of the respondent he challenged the competence of the appeal on two grounds, the second ground being in the alternative. In the substantive ground, Mr. Kisusi submitted that no appeal lies to this court from a decision of the Resident Magistrates Court in matrimonial matters. Mr. Kisusi referred to the provisions of section 80 of the Law Marriage Act, 1971 as amended by Act No. 15 of 1980 which provides as follows:

"80-(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 the High Court

(2) An appeal to the District Court or the High Court shall be filed, respectively, in the primary court or in the District Court within forty five day of the decision or order against which the appeal is brought."

Mr. Kisusi argued that the above provision only makes provision for appeals to the High Court by a person aggrieved by a decision of the District Court. He pointed out that District Courts are established by section 4(1) of the Magistrates Courts Act, 1984 while section 5(1) of the same Act, gives powers to the Chief Justice by order published in the Gazette, to establish Courts of a Resident Magistrate which shall be subject to the law in or exercise jurisdiction in such areas or as may be specified in the order. He submitted that it is obvious that a District Court is different from a Resident Magistrates Court, at least for the purposes of the Law of Marriage Act. He argued that since a District Court does not include a Court of the Resident Magistrate and section 80 of the Law of Marriage Act does not make reference to a Resident Magistrates Court, it must be taken to mean

that the provision does not apply to Resident Magistrates Court, Mr. Kisusi referred to section 80 of the Law of Marriage Act, as it stood before the amendment by Act 15 of 1980 and as it was introduced to the Act in 1973 providing as follows:

"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 there from to the High Court."

Mr. Kisusi argued that since the above provision was repealed and replaced by the present section 80 which makes no mention of the Resident Magistrates Court, and the provision has remained as it is for 12 years since it was introduced, parliament must have intended section 80 (1) of the Law of Marriage Act to read the way it reads at present. He further fortified his argument by stating that the omission is not a printing error for if it had been, nothing would have been easier than for the Attorney General to publish a rectification of the same under section 21 of the Interpretation and General Clauses Act.

Mr. Kisusi did not end here. He added a second limb to his submission on the first ground. The second limb is that a right of

appeal can only be created by a statute. He cited Civil Appeal No. 125 of 1997 (High Court Dar es salaam Registry) Unreported, Harnam Singh Bhogal v Javda Karasan [1953] E.A.C.A. 17 at page 18, Republic v Industrial Court, Ex parte Aeronautical Engineering Association [1953] 1 Lloyd's Rep. 597 at page 601 where it was stated.

"We have to be particularly careful that we do not allow the procedure by way of certiorari to be used to enable this court to sit as a Court of Appeal. We are not a Court of Appeal, unless an appeal is given by statute, this court will not sit as a Court of Appeal." He further cited the case of LEO K. LEKULE v J.V LIMITED Civil Appeal No. 3 of 1993 in which the High Court of Tanzania at Dar es salaam (Nsekela J.) cited the case of Attorney – General v Shah (No4) 1971 E.A 50 where it was stated.

"It has long been established and we think there is ample authority for saying that appellate jurisdiction springs from statute. There is no such thing as"

From the above, the Honourable Nsekela J. as he then was concluded as follows:-

"The Industrial Court of Tanzania Act is silent on this issue. This Court can only exercise appellate jurisdiction where the jurisdiction is given by laws of land. In the find analysis, I strike out the appeal as incompetent with costs. It is so ordered."

Mr. Kisusi submitted that since the law does not make provision for appeals to the High Court from decisions of the Resident Magistrates' Court in Matrimonial matters, no appeal lies to this court from the decision of the Resident Magistrates' Court made on 18th October, 2002. He therefore prayed that the appeal be struck out, with costs.

As an alternative ground, Mr. Kisusi submitted that the appeal is incompetent because it was filed in the Resident Magistrates Court which made the decision against which the appeal is brought, contrary to be mandatory provisions of section 80 (2) of the Law of Marriage Act, as amended by Act No. 5 of 1980 and Rule 37 (1) of the Law of Marriage (Matrimonial Proceedings) Rule 1971. The said Rule 37 (!) provides as follows:

"37 - (') An appeal to the High Court shall be commenced by memorandum of appeal filed in the

*subordinate court which made an passed the decision,
order or decree appealed against"*

Mr. Mpoki, the learned advocate for the appellant was equal to the task, in response to Mr. Kisusi's submissions on the preliminary objection. On the first ground relating to lack of jurisdiction of this court in matrimonial proceeding originating from the Resident Magistrates Court, Mr. Mpoki made a two pronged argument. In the first prong, Mr. Mpoki submitted that Article 13(b)(a) of the constitution of the United Republic of Tanzania, makes the right of appeal a statutory as well as a constitutional right she said Article 13(b)(a) provides as follows as quoted from the written submissions:

"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

Mr. Mpoki laid emphases on the words, **"and the right of appeal"**. He argued that any legislation which goes against the constitution cannot be left to remain in the law books. He further submitted that the constitutional right of appeal is couched in mandatory way as the word used is "shall" as opposed to "may"

which is used in the Law of Marriage Act. Mr. Mpoki referred to the provisions of section 80 of the Law of Marriage Act 1971 before its amendment by Act 15/1980 which stated:

*"any person aggrieved by a decision or order of a Magistrate's Court in a matrimonial proceeding **may appeal there from to the High Court** " (emphasis his)*

Mr. Mpoki quoted the provision providing for original jurisdiction in matrimonial proceedings which stated:

"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a Court of the Resident Magistrate, a District Court."

Although Mr. Mpoki did not cite the provision he must have been referring to section 76 which has not been changed, to date. Mr. Mpoki submitted that by the two provisions quoted above, before the 1980 amendment matrimonial proceedings could be instituted in any of the four courts mentioned in section 80 of the Law of Marriage Act and a person aggrieved by the decision of any of the Magistrates' Court, had the right of appeal to the High Court. He stated that the law as it now stands, as introduced by Act 15 of 1980, it has the effect of eliminating one of the courts, namely the Resident

Magistrate Court. Mr. Mpoki posed the question whether the omission of the Resident Magistrates Court was intentional or by a mistake. Mr. Mpoki referred to the case of JOSPEPH WARIOBA Vs STEPHEN WASSIRA (1997) TLR 272 where it was stated that:

"In interpreting the section to define the intention of the legislature it is permissible in the regard to have recourse to the objects and reasons of the Bill which was relevant to the inquiry"

Mr. Mpoki submitted that the Court of Appeal of Tanzania whose decision binds this court proved the principle of purposive approach as propounded by the Court of Appeal of England in the case of NOTHMAN Vs BARNET LONDON BOROUGH 1978 ER 1243 at page 1246 where it was held:

"the literal method (of construction) is now completely out of date. It has been replaced by the "purposive" approach in all cases now in the interpretation of statute we adopt such construction as will promote the general legislative purposes underlying the provisions. It is not longer necessary for the judges to wring their hands and say thee is nothing we can do about it. Whenever the strict interpretation of a statute gives rise

to an absurd and unjust situation, the judges can and should use their good sense remedy it-by reading words in, if necessary so as to do what parliament would have done had they the situation in mind"

Mr. Mpoki submitted that in the present situation applying strict interpretation to the amended section gives rise to an absurd and unjust situation. He contended that this is a proper case in which the court can look at the objects and reasons of the Bill to question, which can be found either in the bill as the Hansard Reports. Mr. Mpoki referred to the Hansard Report dated 14th and 16th April 1980 at page 65 in which the Minister for Justice in reported to Law stated in relation to the amendments, in section 80 of the Law Marriage Act, as follows:

"Sheria ya tano inayokusudiwa kufanyiwa marekebisho ni Sheria ya Ndoa ya Mwaka 1971. Marekebisho yanayopendekezwa yataiwezesha Mahakama ya Wilaya kusikiliza rufani za mashauri ya Ndoa yanayoanzia kwenye Mahakama za Mwanzo.

Kwa mujibu wa sheria ya sasa, Ndugu Spika rufani katika mashauri hayo, isipokuwa katika mashauri yanayohusu kuvunjwa ndoa, inabidi yapelekwe moja kwa moja kwa Mahakama Kuu."

Mr. Mpoki submitted that the mischief which was being remedied was to give jurisdiction to the District Court to hear matrimonial appeals from matters originating in the Primary Court and relieving the High Court the burden of hearing, all matrimonial appeals from the three Courts. Mr. Mpoki submitted further that it was not the intention of the legislature to include parties with matrimonial matters in the Resident Magistrate Court while allowing parties in the Primary Court and District Court a right of appeal.

Mr. Mpoki quoted from what he called the second holding in the case of WARIOBA Vs WASSIRA, which is in fact the third holding, that:

"The present was a fit case where the Court should interpret section 114 as including and extending to corrupt practice even though this meant reading words into the section. To do so in the present case would remove absurdity and avoid the discriminatory effect which would otherwise arise from a literal construction."

Mr. Mpoki invited this court to interpret and read words into the provisions in order to attain the intention of the legislature. As from the second ground of objection, Mr. Mpoki submitted that it does not

hold water. He quoted the provision of section 80(2) of the Law of Marriage Act as amended which states:

"An appeal to the District Court or to the High Court shall be filed respectively in the primary Court of the District Court within forty five days of the decision or order against which the appeal is brought."

Mr. Mpoki submitted that the provisions of section 80(2) do not state where an appeal from the Resident Magistrate's Court should be filed. He submitted that it follows therefore that the proper form where an appeal can be filed in the High Court, which the appellant has done. Mr. Mpoki contended that Rule 37(1) of the Law of Marriage Matrimonial Proceedings Rules contradicts the provisions of section 80 (2) of the Law of Marriage Act, in that the rules refers to subordinate court but the rules and the Act does not define what a subordinate court is. He argued that since the section is silent about the whole thing, appeals are brought in the ordinary way in which appeals are brought from the Resident Magistrates Court to the High Court.

On the last point that the appeal brought by a memorandum of appeal instead of a petition of appeal is incompetent, Mr. Mpoki

referred to the case of BASIL MASARO Versus PETRO MICHAEL, (1996) TLR 226 at page 228 where it was held.

"If an appellant used the word memorandum instead of petition in connection with his grounds of appeal in a case originating in the primary Court, that alone cannot render an appeal incompetent since it would be making a mountain out of a mouse mound." (emphasis his)

For the above reasons Mr. Mpoki prayed that the preliminary objection to the appeal be dismissed with costs.

In the rejoinder Mr. Kisusi submitted that the provisions of article 13(b)(a) of the Constitution does not create a constitutional right of appeal. Quoting the provisions of the said article Mr. Kisusi submitted that the article simply creates a duty upon the state to enact laws which guarantee the right of appeal **"or another legal remedy"** against decisions of Courts of law. He argued that the state has not yet enacted provisions guaranteeing the right of appeal from decisions of the Resident Magistrates Court to this Court in matrimonial matters. He however submitted that a person aggrieved by a decision of a Resident Magistrate does have another remedy in that such a person may challenge the decision by way of an application for revision under section 44(1)(b) of the Magistrates

Court Act 1984. As for the application of purposeful interpretation according to the decision in the case of JOSEPH WARIOBA Vs STEPHEN WASSIRA, Mr. Kisusi submitted that, that case is distinguishable from the present case in that the omission from the Elections Act 1985 which was supplied by the Court in that case, was not of the same kind as the omission in the present cases. He argued that the omission in that case did not amount to conferring jurisdiction upon any particular Court to exercise appellate jurisdiction. He contended that the right of appeal has peculiar features and will not be enough for a court to supply rule that an aggrieved party has a right of appeal where none has been created by statute.

Mr. Kisusi submitted that his argument that the appeal was incompetent because it was not filed in the court of the Resident Magistrate as provided for under section 80 (2) of the Law of Marriage Act, was an alternative argument to that one that no appeal lay to the High Court from the decision of the Resident Magistrate Court. He submitted that if Mr. Mpoki's argument was upheld that an appeal from the court of the Resident Magistrate lay to this court, it would follow as day follows night that the provisions of section 80 (2) of the Law of Marriage Act and Rule 37 (1) of the Law of Marriage (Matrimonial Proceedings) Rules which require appeals to be filed in the subordinate court which made or passed the decision being appealed, would apply. He submitted further that the expression

"subordinate court" as used in Rule 37 (1) must be understood in its ordinary sense to mean all courts within the courts hierarchy below the High Court. As for the appeal being brought by way of a petition of appeal Mr. Kisusi submitted that such an appeal is incompetent pursuant to the decision of this court (Arusha Registry) (Unreported) in the case of NAIBISE LIKIMBAWE Vs. NAIBELE LAIBUKE Civil Appeal No. 65 of 1993. For the above reasons, Mr. Kisusi prayed that the appeal be struck out, with costs.

The respondent through his advocate Mr. Kisusi has raised essentially, two points in the preliminary objection. I have used the term "essentially" deliberately because in the course of the written submission a preliminary objection relating to the use of the term "memorandum of appeal" instead of "petition of appeal" a matter which had not been raised in the notice of preliminary objection filed by Mr. Kisusi since the competence of the appeal is also being challenged on grounds of having been filed in the High Court instead of the resident Magistrate, I will reserve the decision on this dispute over "petition" and "memorandum" until I come to the issue of the proper court in which the appeal should have been filed.

The first point of objection which relates to the jurisdiction of this court to entertain the appeal, is whether in matrimonial proceedings in the court of the Resident Magistrate an appeal lies to the High Court. Counsels for both parties are in agreement that the

amendment of section 80 of the Law of Marriage Act. 1971 was effected by Act 15 of 1980 states that:

"Any person aggrieved by any decision an order of the primary Court, or by any decision of the District Court, may appeal from the court, respectively to the District Court, or to the High Court."

It is also a common ground that section 75 of the Law of Marriage Act 1971 enters "original jurisdiction in matrimonial proceedings ... concurrently in the High Court, a Court of the Resident Magistrate, a District Court and a primary Court." Equally it is not in dispute that prior to the amendment of section 80 by Act 15 of 1980, the section provided as follows:

"any person aggrieved by a decision or order of a Magistrate's Court in a Matrimonial proceeding, may appeal there from to the High Court."

In the provisions of section 80 as they were prior to the amendment of section 80, appeals by from the Primary Court, the District Court and the Court of the Resident Magistrate to the High Court, and from the High Court, to the Court of Appeal of Tanzania.

In the first point of the preliminary objection, it has been argued that the amendment took away the right of appeal in relation to matrimonial proceedings originating from the court of the Resident Magistrate and as the result, the court has no jurisdiction to entertain the appeal filed by the appellant in matrimonial proceedings originating from the Court the Resident Magistrate at Kisutu. Mr. Kisusi has in effect, invited this court to apply a strict interpretation of section 80 as amended and he has forcefully and correctly in my view, argued that jurisdiction is granted by statute. First I agree with Mr. Kisusi that Article 13 (6) (b) of the constitution of the United Republic of Tanzania 1977 does not confer a right of appeal but gives direction to state authorities to put in place procedures which will ensure that people get a right to appeal, for the purposes of ensuring equality before the law. The question is whether in enacting Act 15 of 1980 Parliament intended to take away the right of appeal in matrimonial proceedings originating from the Court of the Resident Magistrate. I do not think so. If that was the intention then Parliament would have stated in clear terms in the provision of section 80 as amended, that the decision of the Court of the Resident Magistrate in matrimonial Proceedings would be final and conclusive or Parliament would have made provision for appeal to lie from the Court of the Resident Magistrate to the Court of Appeal. It is inconceivable that parliament which is a State authority within the meaning of Article 13(6)(a) of the constitution, could have carefully intended to contravene the provisions of that article, by taking away

the right of appeal without providing for an alternative appellate procedure. Appeals from matrimonial proceedings by the provisions of section 80 of the Law of Marriage Act, as well as the Law of Marriage (Matrimonial Proceedings) Rules 1971 (6) (a) 136 of 1971.

Rule 37 – (1) provides as follows:-

"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 appended against (emphasis mine)

The term "**subordinate court**" is defined by Rule 2 as follows:

"Subordinate court" means a court **of the Resident Magistrate** or a District Magistrate but shall not include a primary Court." (emphasis mine)

The provisions of Rule 37(1) quoted above, together with the definition of "subordinate court", lend further assurance that appeals lie from the court of the Resident Magistrate to the High Court and

that Parliament did not intend to exclude matrimonial proceedings Originating from the court of the Resident Magistrate from the appellate jurisdiction of this Court. It there was any doubt on this matter, that doubt has now been laid to rest by the provision of section 80 (1) of the Law of Marriage Act Cap 29 R.E 2002, which is the current authoritative text of the statute on Law of Marriage in Tanzania, which provides as follows:

80 – (1) Any person aggrieved by any decision or order of a Court of Resident Magistrate a district court or primary court in a matrimonial proceedings may appeal there from to the High Court. (emphasis mine).

Any argument that this court does not have appellate jurisdiction over or that appeals do not lie from, a matrimonial proceeding originating from a court of the resident magistrate, is a mere academic exercise. I am aware of the two decisions by my brother Massati J. in MAHMOUD MOHAMED SHATE versus MARY SHAMTE CIVIL APPEAL No. 197 of 2001 (DSM – Registry) (unreported) and AMINA RAMADHANI versus OMARY MOHAMED CIVIL APPEAL NO. 49 OF 2003 (DSM Registry) (Unreported) for which texts have been provided by Mr. Kisusi. In so far as these decisions state that appeals do not lie from the Resident Magistrate Court to the High Court, I would happily not feel bound to follow

them. I am however comforted that by reason of section 80 (1) of the Law of Marriage Act as contained in Cap 29 R.E 2002, those decisions are no longer good law.

For the above reasons the first point raised in the preliminary objection fails and it is accordingly dismissed since Rule 37 of the Law of Marriage (Matrimonial Proceedings) Rules, provides that an Appeal to the High Court **"shall be commenced** by a **"memorandum of appeal."** It is clear that the present appeal commenced by a **"Petition of appeal."** and which has been filed by an a directs, did not comply with the mandatory provision of Rule 37. Even if this shortcoming were to be overlooked or considered not to be fatal, by reason of sub rule (4) of Rule 37, which requires this court not to reject or refuse to entertain an appeal due to defect in the form, sub rule (1) states that "An appeal to the High Court under section 80 of the Act **Shall be filed in the subordinate** court which made or passed the decision, order decree appealed against."

As a pointed out earlier on, a "subordinate court" has been defined to include court of the resident Magistrate. In the circumstances this appeal not only that it had to be commenced by way of a memorandum of appeal but the said memorandum of appeal should have been filed in the court of the Resident Magistrate which passed the judgment being appealed against.

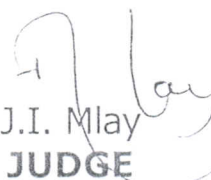
The present appeal which has been commenced by way of a petition of appeal and filed directly in this court has been commenced and filed in contravention of Rule 37 of the Law of Marriage (Matrimonial Proceedings) Rules and for that reason it is improperly before this court.

The second point of the preliminary objection is therefore upheld and the petition of appeal is struck out, with costs.


J.I. Mlay
JUDGE

Delivered in the presence of Mr. Damu advocate for the Appellant also holding brief for Mr. Kisusi advocate for the respondent this 26th day of September, 2006




J.I. Mlay
JUDGE
26/09/2006