

IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION

(Mbeya Registry)

Hk Tabora

(PC) CIVIL APPEAL NO. 12 OF 2002

(From Civil Appeal No. 57/99 in Mbeya D/Court
and Original Civ.C. No.177/99 Urban Pr. Court)

OCTAVINA E. MWINGIRA APPELLANT

VERSUS

FATUMA MWAITENDA RESPONDENT

JUDGEMENT

MREMA, J.

OCTAVINA E. MWINGIRA, in this appeal referred to as the Appellant, engaged the services of the Learned Counsel Mr. A.R.M. NAALI, who, on behalf of the appellant instituted the present appeal seeking to upset the decisions of the trial primary court and appellate district court both of which gave judgement in favour of FATUMA MWAITENDA, herein after referred to as the Respondent. The bone of contention in both the lower courts and now in this court is on the ownership of a house at Majengo, within the Municipality of Mbeya, belonging to the appellant's deceased husband, the late Ernest Thobias Mwingira. At the primary court of Mbeya, Mbeya District Octavina successfully petitioned to be appointed administratrix of the properties in the estate of her deceased husband and no doubt she was granted the letters of administration. That appointment was never challenged on appeal in the district court.

The appeal to the district court was against the decision of the primary court that had excluded one of the deceased's house at Majengo from the lists of assets under the administration of the appellant. This was the result of an objection raised by the respondent Fatuma who claimed that she was the second wife of the late Ernest T. Mwingira both of whom bore three children during their cohabitation. Further that the Late Ernest had bought the said house specifically for the three children. The appellant's appeal to the district court was dismissed and the learned Senior Resident Magistrate Mr. Karua (as he then was) reiterated that the disputed house

at Majengo should be listed in the probate and administration as the property of the respondent's children. It is this decision or order which embittered ~~the~~ the appellant and she preferred the present appeal to this court.

But after I scanned through the entire proceedings it came to light that this appeal is not properly before this court because it is hopelessly time barred. It is not easy for me to tell whether or not the Learned Appellant's Counsel Mr. Naali overlooked the relevant Limitation Law applicable in appeals before this court which originated from the primary court. The way Mr. Naali drafted the Memorandum of Appeal (i.e. Petition of Appeal) apparently shows that he had in mind the Law of Limitation Act, Act No. 10/1971. Section 19 - (2) of the said Act provides for exclusion of the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed.

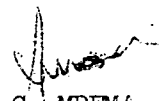
It is explicitly clear that limitation period in civil appeals and revisions before this court whose proceedings stemmed from the primary court is provided under section 25 - (1) (b), Part III head (c), of the Magistrates' Courts Act, 1984. Section 43 of the Law of Limitation Act No. 10/1971 makes it very clear that the provisions of Act No. 10/1971 shall not apply, inter alia, to "any proceeding for which a period of limitation is prescribed by any other written law, save to extent provided for in section 46" (Section 43 (f)). What does section 46 of Act No. 10/1971 say? It provides as follows:-

"46. Where a period of limitation for any proceeding is prescribed by any other Written Law, then, unless the contrary intention appears in such Written Law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act".

The period of limitation to appeal from the judgement or order of the district court to this court, in terms of section 25 - (1) (b) of the M.C.A., Act No. 2 of 1984, is thirty (30) days from the date of the judgement or order sought to be appealed against. It would also appear,

in my considered view, that this rule cannot be read in isolation of the CIVIL PROCEDURE (APPEAL IN PROCEEDING ORIGINATING IN PRIMARY COURTS) RULES, 1963, GOVERNMENT NOTICE NO. 312 of 1964; made under the Judicature and Application of Laws Ordinance, Act No. 57/1961 (Section 4). Rule 3 of G.N. No. 312/1964 creates a condition that an aggrieved party by the decision of the district court who desires to appeal against that decision to this court, but fails to appeal within the time prescribed by section 25 - (1) (b) of Act No. 2 of 1984 (which is 30 days) must seek leave to appeal out of time showing the reasons why he failed to comply with the 30 days limitation period. It is for this reason I am persuaded to believe that section 43 of the Limitation Act, Act No. 10/1971, cannot be invoked in the instant proceedings because of the contrary intention that appears in the other Written Law (supra).

The judgement in this case was delivered on 25/1/2000 and by virtue of section 25 - (1) (b) of Act No. 2/1984 the appellant was obligated to file his appeal within thirty days from 25/2/2000, i.e. the date the decision sought to be appealed against was made; and by simple arithmetic calculations the appeal in this case ought to have been instituted on or before 26/3/2000. But that was never done and the appellant, or her advocate, never adhered to the Law by seeking leave to appeal out of time, upon showing sufficient cause for the failure to comply with the 30 days limitation period. From the evident record the appeal was filed on 3/7/2000 and this means it was filed three months and 11 days after the period of limitation had expired. Clearly, therefore, this appeal is hopelessly time barred and I know of no law that authorizes this court to hear an appeal which is incurably out of time. As this court is seized of no jurisdiction to hear a stale appeal there is nothing more this court can do other than dismissing the appeal forthwith on the account of being incompetence, with costs.

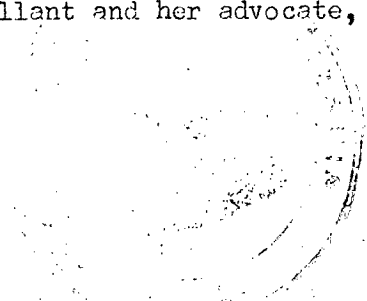

A. C. MREMA

JUDGE

10.03

AT MBEYA, in the presence of the Respondent in person.

The appellant and her advocate, absent.



A. C. MREMA

JUDGE

31.10.2003