

IN THE HIGH COURT OF TANZANIA
[DAR ES SALAAM DISTRICT REGISTRY]
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 780 OF 2015

(Arising from the decision of the High Court of Tanzania at Dar es Salaam District Registry in Civil Appeal No.99 of 2014)

AHMED MOHAMED KIDEGE ----- APPLICANT

VERSUS

MSICHOKE PETER LUGOME ----- RESPONDENT

RULING

MUTUNGI, J.

The applicant in this application is seeking for the following reliefs;

- 1. That, This Honourable Court be pleased to grant leave for the Applicant to lodge an appeal to the Court of Appeal challenging the decision of Shangwa J, in Civil Appeal No. 99 of 2014 delivered on the 4th day of December 2015.*
- 2. That, costs of this application be provided for.*

3. *Any other relief (s) that this Honourable Court may deem just, fit and equitable to grant.*

The application via a chamber summons is made pursuant to section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002] and Rule 45 (1) of the Court of Appeal Rules, 2009. The same is supported by an Affidavit affirmed by the applicant.

The applicant in his affidavit avers, he was aggrieved by the decision of this court which was delivered on the 4th day of December 2015. As per paragraphs 4 and 5 of the said Affidavit, the applicant has pointed out the reasons to be considered in granting the application. For the sake of clarity, these paragraphs are couched in the following words and I quote;

4. *That, I have applied for copies of judgment, proceedings, decree and filed a Notice of Appeal prior to filing this application for leave and the intended appeal has overwhelming chances of success. Attached herewith are the copies of the said Notice of Appeal and letter requesting for*

copies of judgment, proceedings and decree is marked as Annex A.

5. That, I shall suffer irreparable loss over and above the loss already suffered should this Honourable court find inappropriate to grant the sought leave to appeal in the Court of Appeal.

The respondent in his sworn counter affidavit opposed the application and went on to state the same should not be granted. When the application was called for hearing, Mr. Mtobesya and Neemia Gabo learned Counsel appeared for the applicant and respondent respectively.

Mr. Mtobesya in his submissions has highlighted three points of which, the Court of Appeal should be invited to intervene in order to resolve the anomalies on record. First, the court was wrong to rely on the Law of Marriage Act under section 114 (1) which subsequently ruled the house was a matrimonial asset. He was of the view the said law does not apply therein.

The second point that, the court erred in law by not directing itself to the requirement of the law as regards

the division of matrimonial assets. He suggested the applicable law on that account is section 114 (2) of the Law of Marriage Act. He further challenged this court's decision in that, the contribution by the respondent was never proved in the lower court. This court was to give weight to such evidence.

On the third point, the counsel suggested the court had wrongly shifted the burden of proof to the respondent instead of appellant in respect of properties alleged to have been acquired during the subsistence of the troubled marriage.

Mr. Mtobesya prayed the application be granted.

Neemia Gabo in his submission argued that, the application at hand is not properly before the court. He submitted the application was drawn and filed on 17/12/2015 but the same was issued by the Registrar on 15/4/2015 and the intended judgment sought to be challenged was delivered on 04/12/2015. He was of the view the application was issued before the said decision was delivered. He further argued the application be struck out since the notice of appeal was

not served to the other party as per Rule 4 (1) of the Court of Appeal Rules.

Neemia Gabo referred this court to the cases of **TRANSPORT EQUIPMENT LTD VERSUS D. P. PALAMBIA [1993] T.L.R 91** and **DAPHAN PARRY VERSUS MURRAY ALEXANDER [1963] EA 546** in which the notice was refused because it was not served within the prescribed time. In respect of these glaring irregularities, he consequently prayed the application be dismissed with costs.

Basically, in rejoinder the applicant's counsel submitted, the respondent has not objected to the substance of the application since he merely raised points of law pointing at the defects therein. He further argued the alleged errors on the dates cannot be taken as grounds for the dismissal. More so, since they were occasioned by the Registrar. He cited the case of **CHARLES MHISO VERSUS GRACE NJAMA & ANOTHER [1997] 107**. He thus prayed the application be granted.

At this juncture, the issue is whether the application has merits or otherwise.

In the case of RUTAGATINA C.L. VERSUS ADVOCATES COMMITTEE AND CLAVERY MTINDO NGALAPA, CIVIL APPLICATION NO. 98 OF 2010 (CAT-DSM) (UNREPORTED) at page 6 and 7 cited with approval the case of BRITISH BROADCASTING CORPORATION VERSUS ERIC SIKUJUA NG'MAO, CIVIL APPLICATION NO. 133 OF 2004 (UNREPORTED) where it was stated, and I quote;

“Needless to say, leave to appeal is not an automatic. It is with the discretionary of the court to grant or refuse. The discretion must, however be judiciously exercised on the materials before the court. Leave to appeal will be granted where grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. (See Buckle Versus Holmes (1926) ALL ER Rep. 90 at page 91) However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted”. [Emphasis is mine]

In the application at hand, the applicant in his Affidavit merely hinted that the intended appeal has overwhelming

chances of success and if the application is refused, he might suffer irreparable loss. This is well demonstrated in paragraphs 4 and 5 of the Affidavit. The applicant's Counsel on the other hand went out of the way attacking the decision of this court as I have earlier elaborated in the ruling.

Be as it may, in line with the legal position stated in **Rutagatina C. L's case (supra)** I find the applicant has failed to demonstrate if the said grounds of appeal raised are of general importance or they contain a novel point of law or they show a prima facie or arguable appeal.

In paragraphs 4 and 5 of the affidavit reasons stated are not sufficient to support the application. The applicant has not elaborated in evidence of how he will suffer irreparable loss nor what are the overwhelming chances of success partening in the application. He has not related these with the sought leave subject of this application. He was supposed in his Affidavit to state clearly the novel points of law subject of the Court of Appeal's intervention.

There is a striking feature in the submission by the applicant's counsel in that, he submitted and argued on the points which were not stated in the filed affidavit. It would seem the

advocate and his client were on two different angles. The applicant's Affidavit is not compatible with the law requirements for obtaining leave to the Court of Appeal, hence can not pass the test in Rutagatina's case.

In the event, I find it is inappropriate to determine the raised points of law by the respondent's counsel during the hearing of the application. They are obviously not supported by the applicant's affidavit.

Consequently, I find the application has no merits. It is dismissed with no order to costs because the parties herein were husband and wife. It is so ordered.


B. R. Mutungi

JUDGE

02/05/2018

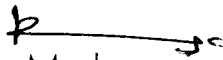
Right of appeal explained.


B. R. Mutungi

JUDGE

02/05/2018

Read this day of 2/5/2018 in presence of applicant and
Jaines Kiwelu, learned counsel for the respondent.


B. R. Mutungi

JUDGE

02/05/2018