

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 657 OF 2019

BETWEEN

FURAHA MSAKI.....APPLICANT

AND

JOYCE HAINNESS TESHA.....RESPONDENT

RULING

Date of last Order: 06/05/2020

Date of Ruling: 14/07/2020

MLYAMBINA, J.

The instant application is for leave to appeal to the Court of Appeal against the decision of this court passed in Civil Appeal No. 104 of 2013. It is preferred by the Applicant under the provisions of *Section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 (R.E. 2002)* and it is supported with an affidavit of the Applicant.

According to the Applicant, the reasons for applying for leave is that the impugned decision is problematic and illegally decided which need the attention of the Court of Appeal on the following issues:

- i) Whether it was proper for the court to issue divorce on cohabitation.

- ii) Whether it was proper for the court to issue divorce where there is existence of valid monogamous marriage.
- iii) Whether it was proper for the court to dissolve none existing marriage.
- iv) Whether it was proper for the court to hold personal property/ a property acquired before marriage as matrimonial property.
- v) Whether it was proper to provide custody of child who is above 18 years old without establishing first best interest of the child.

The Respondent did not file a counter affidavit to resist the application. On 14th July, 2020 when the matter came for mention, the Respondent conceded to the application for leave to appeal to the Court of Appeal.

I have had time to digest on the raised points. I `m of found view that the proper court to decide on the merits or demerits of the raised legal points will be the Court of Appeal. It suffices to observe that for application of this nature to be granted the court has to get satisfied on; **one**, whether there are sufficient reasons to go to the Court of Appeal of Tanzania; **two**, whether there is issue of principle to be decided by the Court of Appeal of Tanzania; **three**, whether there is injustice on the face of record. In assessing the three criteria this court must be cautious so that it does not seat

as a court of appeal by itself when it comes to application of this nature. In the case of **British Broad Casting Corporation v. Erick sikujua Namanyo**, *Civil Case No. 138 of 2004 at page 6-7*, where it was held:

As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie arguable appeal.

This court in *Misc. Civil Application No. 643 of 2017 Lemmy Paschal Bashange (Applicant) versus grace Julius Makoa* (Respondent) observed that; the principles enunciated in the case of **British Broad Casting case** (*supra*), in determining an application for leave to appeal to the Court of Appeal of Tanzania, this court has to consider inter alia two grounds, to wit:

1. Whether the appeal is arguable.
2. If there is an issue of general importance.

The court went further to state that Section 5 (1) (c) of the Appellate Jurisdiction Act (*supra*) had a purpose of inviting the high court to decide: **First**, whether a party who applied for leave have sufficient ground to go to the Court of Appeal of Tanzania. **Second**, whether there is any issue of principle to be determined

by the Court of Appeal of Tanzania. *Third*, whether there is an injustice which is reasonably clear in the matters raised.

Having considered that the Respondent do not object this application; and taking into consideration that there are legal points raised that needs determination by the Court of Appeal of Tanzania; I therefore grant this application with no order as to costs.



Y. J. MLYAMBINA
JUDGE
14/7/2020

Ruling delivered and dated 14th July, 2020 in the presence of the Applicant in person and in the presence of Respondent in person



Y. J. MLYAMBINA
JUDGE
14/7/2020

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CRIMINAL REVISION NO. 04 OF 2018

(Originating from Criminal Case No. 1031/2010 in the District Court of Kinondoni at Kivukoni)

BONIFASI KUSUBI.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of last Order: 04/06/2020

Date of Ruling: 16/07/2020

MLYAMBINA, J.

Under the provision of *Section 373 (1) (2), 313 (1) and 361 (2) of Criminal Procedure Act Cap 20 (RE 2002)*, the applicant brought this application, by way of chamber summons, praying for three orders:

- a) That, this honorable court be pleased to call for proceedings of the subordinate court vide Criminal Case No. 1031 of 2010 revise and issue appropriate order (s).
- b) That, this honorable court be pleased to quash the conviction and set aside the remaining sentence for failure by the subordinate court to forward the proceedings within a prescribed time.

c) Any other order (s) or relief this Honorable Court may deem fit and equitable to grant.

The application was supported with an affidavit of the applicant. There are five reasons contained in the affidavit and reiterated in the submission by the applicant: **one**, the applicant was convicted of Armed Robbery *Contrary Section 287 A of the Penal Code Cap 16 [R.E 2002]* and sentenced to 30 years imprisonment by Honorable Rugemarila (RM) on 11th August, 2011. **Two**, upon conviction, he was informed of his right of appeal. Thus, he filed a notice of appeal on time. **Three**, thereafter, the applicant began to pursue for court proceedings for purpose of appeal. **Four**, the applicant has written several letters to the SRM in charge of the subordinate court requesting to be transmitted with a judgement and court proceedings. **Five**, for the past seven (7) years, the applicant has bothered a lot the Prison Authority to pursue for him the said copies but their concerted efforts have not yielded anything.

In reply, Senior State Attorney Credo Rugaju, resisted the application. The objection of which was earlier on recorded by way of counter affidavit sworn by one Bryson Harrold Ngidos a State Attorney in the Attorney General Chambers.

According to Senior State Counsel Credo Rugaju, if the applicant was aggrieved with the decision of the trial court, he ought to have filed a notice of appeal and an appeal. That, it is not proper to file revision proceedings because revision is not alternative to appeal.

The other point advanced by Mr. Rugaju was that, there is no proof of further records that the applicant continued to make follow up and there is no proof by an affidavit from the lower court that it has failed to trace records.

In rejoinder, the applicant stated that there is an affidavit of the Kinondoni RM'S in charge declaring loss of the file.

I have had enough time to go through the annexures to the supporting affidavit and the entire records in this case. I did not come up with an affidavit from the lower court RM'S in-charge about missing of records. It is hard to establish that the lower court records cannot be traced anymore for this court to think of an alternative solution including of ordering reconstruction of records.

Even if true that there is such affidavit from the court, as properly argued by Mr. Rugaju, if the applicant was aggrieved with the decision of the lower court, he should have appealed on the said order rather than to file revision. A right of appeal is a statutory right. In the case of **M/S NBC Ltd v. Salma Abdallah and Faisa**

Abdallah, *Civil Application No. 83 of 2002* Court of Appeal of Tanzania, while citing the case of **Halais Pro Chemical v. Wella A.G** 1996 TLR 269 and **Moses Mwakibete v. the Editor Uhuru Ltd** (1995) TLR 134; it was held that:

Revision powers conferred to the court are not meant to be used as an alternative to the appellate jurisdiction of the court. Therefore, the court cannot be moved to use its revisional jurisdiction where an applicant may exercise his Right of Appeal to the court.

The right of appeal is not only limited in Civil cases, Section 359 (1) of the Criminal Procedure Act Cap 20 (R.E. 2019) also provide for the right of appeal to the High Court to any person who is aggrieved by any finding, sentence or order made or passed by the subordinate court in its ordinary powers.

I have noted true that the applicant had procured an extension of time to file appeal out of time from my Sister Honorable Judge Banzi. He could therefore seek another extension of time to file his appeal on the second bite and explain his reasons for delay.

In the circumstances, the application is dismissed for being incompetent before the court.



Y. J. MLYAMBINA

JUDGE

16/07/2020

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Ruling delivered and dated 16th July, 2020 in the online presence of the applicant in person and Senior State Attorney Credo Rugaju for the respondent.



Y. J. MLYAMBINA

JUDGE

16/07/2020

A handwritten signature in blue ink, written over a curved line that connects to the seal on the left.