

IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA

MISC. CIVIL APPLICATION NO. 155 OF 2019

(Arising from the Judgment of the High Court of Mwanza (Hon. Rumanyika, J) in PC. Matrimonial Appeal No. 23 of 2018, dated 2nd September, 2019.)

KADONGE PAULO APPLICANT

VERSUS

SELINA NGELEJA RESPONDENT

RULING

23rd April, & 19th June, 2020

ISMAIL, J.

In this application, the applicant seeks to move the Court to certify that there is a point of law worth of determination through an appeal to the Court of Appeal of Tanzania. The intended appeal is against the decision of this Court (Hon. Rumanyika, J) in respect of PC Matrimonial Appeal No. 23 of 2018, in which the applicant emerged a loser. The Court found nothing blemished in the reasoning and conclusions made by two lower courts. He, consequently, dismissed the appeal with costs. At stake during the trial and in subsequent appeals is the issue of distribution of

matrimonial assets between the parties, erstwhile spouses who are now estranged. The applicant feels hard done by when the courts shrugged off his contentions and ordered that the matrimonial assets be shared between the parties. He has hence taken the bold decision to move up the ladder.

The application is preferred under the provisions of Section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and it is supported by the applicant's own affidavit, setting out grounds on which the prayers are sought. The supporting affidavit sets out details on the reasons for which the prayers are made. Of most relevancy are paragraphs 3 and 4, the latter of which reveals what he considers to be a point of law that should be certified by the Court for determination in his impending appeal. It states as follows:

(a) Whether properties obtained in absent (sic) of wife due to neglect of marriage at time of (sic) marriage are subject to distribution as matrimonial property upon dissolution of marriage as per the law.

In a swift rejoinder made through a counter-affidavit, the respondent contends that the application is devoid of any merit, since the distribution

of the matrimonial assets took into account the fact that both parties contributed to the acquisition of the assets.

Disposal of the application was ordered to go by way of written submissions, consistent with a schedule which was duly conformed to by the parties. Submitting in support of the application, Mr. Akram Adam, learned counsel contended that, while the Court acknowledged that the parties had lived apart for 25 years during which the applicant allegedly acquired what is now matrimonial assets, the said assets had been ordered for distribution. He held the view that the Court's finding offends the provisions of section 114 of the Law of Marriage Act, Cap. 29 R.E. 2019 and the decision in ***Bi Hawa Mohamed v. Ally Sefu*** [1983] TLR 32. He fortified his argument by citing the holding in ***Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo***, CAT-Civil Appeal No. 102 of 2018 (Tanga-unreported).

Mr. Adam held the view that the point of law to be certified is whether the properties obtained in 25 years of neglecting the marriage are subject to distribution as matrimonial properties upon dissolution of marriage in terms of section 114 of Cap. 29.

The respondent was diametrically opposed to the contentions raised by the applicant. Through Ms. Fatmah Kimwaga, learned counsel, she contended that the profound question which should be put for the Court's determination is whether the decision sought to be appealed against raises a point of law which is worth of consideration by the Court of Appeal. She quoted the reasoning in the case of ***British Broadcasting Corporation v. Erick Sikujua Ng'imaryo***, CAT-Civil Application No. 138 of 2014 (DSM-unreported), in which circumstances under which leave to appeal is grantable were laid out. The learned counsel found no fault in the decisions of the Courts that would be said to reveal anything of disturbing features as to require guidance of the Court of Appeal. He was of the view that all the three courts considered the requirements of section 114 of Cap. 29. She urged the Court to dismiss the application with costs.

From these concise submissions, the question to be resolved is whether the decision sought to be appealed against exhibits any point of law worth certifying for consideration by the Court of Appeal. As demonstrated above, the parties are varied in their views. Before I delve into that, let me lay a general foundation on the requirement of certification on a point of law before an appeal is preferred. The legal

position is that appeals originating from the primary court can only be filed to the Court of Appeal upon the Court's certification that there is a point of law worth consideration by the superior Court. This is the imperative requirement under section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019) which provides as hereunder:

*"Notwithstanding the provisions of subsection (1)-
no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order."*

This position of the law has been restated and emphasized through case law. The Court of Appeal of Tanzania had the following guidance to offer, in this respect, in **Marco Kimiri & Another v. Naishoki Eliau Kimiri**, CAT-Civil Appeal No. 39 of 2012 (ARS-unreported):

"Section 5 (2) (c) of the Appellate Jurisdiction Act governs a certificate that a point of law is involved in an appeal under the Magistrates' Court Act, Cap. 11 R.E. 2002 originating from a primary court."

In ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported) this requirement was underscored when it was held:

"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."

See also: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rublingwa v. Paulo Lazaro***, CAT-Civil Application No. 1 Of 2008; and ***Harban Hajl Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997 (both unreported).

Gleaning from the supporting affidavit, what comes out as the applicant's gravamen of complaint is that division of matrimonial assets was ordered in respect of the assets which were acquired while the couple had separated and the respondent had not contributed anything towards their acquisition. This, the applicant contends, went against the provisions of section 114 of Cap. 29, and the legal holdings in respect thereof. This introduces the question as to whether the provisions of section 114 of Cap.

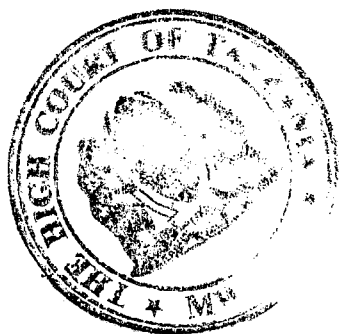
29 envisions division of matrimonial assets which were not acquired jointly and while the spouses are estranged. In this case, the contention by the applicant is that assets ordered for dissolution were acquired during the 25-year period of separation and, therefore, not jointly acquired. The respondent takes a different view and she is of the view that no disturbing feature is apparent on the decision to require guidance of the Court of Appeal. With respect, the position taken by the counsel for the respondent has mistakenly assumed that the application is one in which leave to appeal is sought.

The respondent's erroneous comprehension notwithstanding, it is my conviction that from what has been submitted by the counsel for the applicant and what is gathered from the application, there exists a point of law that is worth of consideration on appeal to the Court of Appeal, through the impending appeal. I, therefore, certify that the question as to ***whether the Court's decision to uphold division of matrimonial assets whose acquisition was made during the period of the couple's separation was consistent with the provisions of section 114 of the Law of Marriage Act, Cap. 29 R.E. 2002 (now R.E. 2019)***, is a point of law worth of consideration by the Court of Appeal.

Accordingly, I grant the application as prayed. Costs shall be in the cause.

It is so ordered.

DATED at **MWANZA** this 19th day of June, 2020.




M.K. ISMAIL

JUDGE

Date: 19/06/2020

Coram: Hon. F. H. Mahimbali, DR

Appellant: Mr. Akram, Advocate

Respondent: Absent

B/C: Leonard

Order:

Ruling delivered.



F. H. Mahimbali
DEPUTY REGISTRAR

At Mwanza

19th June, 2020