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

MISC. CIVIL APPLICATION NO: 13 OF 2020
(Originating from Civil Appeal No: 46 of 2019 before De-Mello, J)

ELENA DONALD MAX.....APPLICANT
VERSUS
JANE MWANGO ROBERT MASABALI.....RESPONDENT

RULING

J. L. MASABO, J.

The Application is for the leave to file an appeal to the Court of Appeal against the decision of this Court in Civil Appeal 46 of 2019. It is supported by an affidavit sworn by Richard Madibi who is identified as Counsel for the Applicant. The brief background of the application is that in 2014 the Applicant successfully filed a Civil Case No. 131 of 2014 in the Resident Magistrate Court for Dar es Salaam at Kisutu against the Respondent and one Donald Kevin Max (now deceased), praying for, among other things, a declaration that the marriage between the respondent and the said Donald Kevin Max was a nullity as it was contracted during the subsistence of a monogamous marriage between the Applicant and the said Donald Kevin Max; an order compelling the Respondent to return the sums collected from parliament for subsistence and upkeep of the Donald Kevin Max while undergoing medical treatment in India; and damages for adultery. The Respondent was not amused; she appealed to this court. In her appeal, she marshaled six grounds the first of which being that the trial court erred in

law and fact for conducting the suit as normal suit while it was by its very nature a matrimonial dispute which ought to have been filed in the matrimonial cause register. The appeal was allowed on the basis of this one ground which was found to have sufficiently disposed of the appeal. The proceedings of the trial court were consequently nullified and set aside. This decision has disgruntled the appellant. She wants to challenge it in the Court of Appeal hence this application.

The Application was argued in writing. Both parties had representation. The Applicant enjoyed the representation of Mr. Ally Mohamed Ismail, learned advocate whereas the respondent was represented by Mr. Ibrahim Mbiu Bendera, leaned counsel.

Submitting in support of the application, Mr. Ismail submitted that, leave to appeal to the court of Appeal is granted upon consideration of three major factors namely, **First:** That the applicant has an arguable case; **second**, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal (there is a substantial question of general importance); and **third,** merits of the intended appeal (reasonable prospects for success). With regard to the first factor as to whether a prima facie case has been established, he cited the case of **Sango Bay Estate Ltd and Others v Dresdner Bank A.G** (1971) E.A 17 and argued that, there is indeed a *primafacie* case based on three issues namely: Whether the suit was a purely matrimonial cause?; whether it was filled in the wrong forum;

whether it was lawful for the court to nullify the proceedings of the trial court.

On the second factor he cited the cases of **Harban Haji Mosi & Another v Omari Hilal Seif & Another,** Civil Reference No. 19 of 1997, Court of Appeal of Tanzania at Zanzibar; **British Broadcasting Corporation v Eric Sikujua Ng'ymaro,** Civil Application No. 133 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Ruragina v The Advocates Committee and Clavery Mtingo Ngalapa**, Civil Application No. 98 of 2010 (CA) unreported and submitted that the question involved in the instant application has a disturbing feature and is of substantial and general importance because, the matters under dispute between the parties does not fall under the Law of Marriage Act, hence the matter was wrongly categorized as a matrimonial cause. The Book of **Muila, Code of Civil Procedure**, Vol. 1 at 756 was also cited. Lastly, on the third factor, it was submitted that the intended appeal has reasonable prospects for success.

In reply, counsel Bendera, recited the general principles applicable in applications of this nature and stated that: Leave to appeal is not an automatic rights, it must be accompanied by grounds and where the grounds are frivolous or vexatios, leave cannot be granted; leave can only be granted where a primafacie case exists; the grounds raised are worth of judicial consideration, where it involves a substantial question of law and there are greater chances of success. He then proceeded to argue that the instant application has failed to met the prerequisite conditions above, because the

the suit was purely a matrimonial cause because the core prayer by the Applicant was for annulment of marriage between the Respondent and Donald Kevin Max which can only be pursued and granted through section 81 of the Law of Marriage Act [Cap. 29 RE 2019]. The other prayers, it was argued, could not have stood in the absence of the declaratory order for a annulment. It was further submitted that, the question regarding the powers of the court to nullify the proceedings of subordinate court is not an issue as it is provided for under Order XXXIX Rule 33 of the Civil Procedure Code, [Cap 33 RE 200]. In sum, counsel Bendera argued that there is neither an arguable case nor a substantial question for determination and, there is, consequently, no chances of success.

Mr. Ismail, rejoined. His rejoinder apart from reciting the principles, recapped that there is an arguable case between the parties and that it is worth consideration by the Court of Appeal. Besides, he argued that appeal is a right guaranteed under the Constitution hence should not be hampered.

I have carefully read the pleadings and submissions made by both parties. Admittedly, and as argued by both parties, appeal is right which is guaranteed in our Constitution. The exercise of that right, is however not obsolete. There are certain procedures to be complied with before once can exercise his right to appeal and in the case of appeal from the High Court to the Court of Appeal, such procedures are stipulated under Section 5(1) (c) of the Appellate jurisdiction Act, [Cap 141 RE 2019]. This provision under which the instant application is preferred requires that, appeals to the Court

of Appeal against a decree, order or judgment of the High Court should be with the leave. The requirement for leave provides this court with duty to filter out frivolous and vexatious appeals and in so doing, spare the Court of Appeal by from the "spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance" (**Harban Haji Mosi & Another (Supra)**. Echoing this principle, the Court of Appeal in **Paulo Juma Vs Diesel & Auto Electrical Services Ltd & 2 Others**, Civil Appeal No 183 of 2007, Court of Appeal of Tanzania at Dar es Salaam (unreported) held that:

> "The purpose of the provision is therefore to spare the court the specter of un-meriting matter and to enable it to give adequate attention to cases of public importance".

As stated in the authorities cited by both parties, the application is within the spectrum of discretionary powers of this court and is exercised only if the applicant sufficiently establishes that, he stands a reasonable chance of success or that the proceedings reveal disturbing features requiring the guidance of the Court of Appeal. The discretionary powers of the court in granting of leave and the exercise of that discretion is as stated in the excerpt below from the **British Broadcasting Corporation v Eric Sikujua Ng'ymaro**,(supra)

> "Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeals raise issues of

general importance or a novel point of law or where the grounds show a prima facie or arguable appeal"

Therefore, the only issue for determination is whether the application has merited this test. Having considered both grounds and the materials submitted in support, for the reasons I am about to divulge, it is my humble view that the Applicant has terribly failed the test. On the first ground as to whether there is an arguable case between the parties, I entirely agree with counsel Bendera's submission. The question posed by the Applicant is a purely question of law. It is well settled position of law that, pursuit of matters pertaining to marriage disputes should be done in accordance with the Law of Marriage Act which provides a special procedure to be applied in similar matters. Section 81 of the same Act is very articulated on this matter, and the position is well settled that "all proceeding for a declaratory decree or for a decree of annulment, separation or divorce, **shall be instituted by a petition**". In the instant case, as correctly argued by Mr. Bendera, the major prayer was for annulment of marriage between the Respondent and Donald Kevin Max. Such order can only be granted by a matrimonial court property moved under section 81 above. Without indulging into the merit of the anticipated appeal, it is crystal clear, as argued by counsel Bendera, that the annulment of marriage was a *sine quo non* for the grant of the subsequent prayers for refund of the monies and for damages in respect of adultery. Considering that, Mr. Ismail has not stated how the settled position above is arguable, I am unable to discern a novel point of law from the Court's finding that the matter was wrongly instituted. I am equally able to discern an arguable case and a novel point in the powers of this High Court

to nullify the proceedings of the trial court as the same is well articulated under Order XXXIX Rule 33 as well as Section 44(1) of the Magistrates Courts Act [Cap 11 RE 2019]. Considering that the anticipated appeal is a second appeal which does not principally involve re-evaluation of evidence but deals more with legal issues, it was anticipated that the intended appeal would zero down on the point (s) of law contravened or not considered by the court.

All having being said, in sum, I find the application to be devoid of merit as the Applicant has not demonstrate a point that merits consideration of the Court of Appeal.

In the end result, I dismiss the application with costs.

DATED at DAR ES SALAAM this 14th August 2020.

J.L. MASABO

JUDGE