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

MISC. CIVIL APPLICATION NO: 551 OF 2019
(Originating from the decision of the High Court of Tanzania, Dar es Salaam District Registry in PC Civil Appeal No. 52 of 2018)

GERALD MBWAMBO SENKORO.....APPLICANT

VERSUS

JACKLINE KIMU.....RESPONDENT

RULING

MASABO, J.L.:

The Applicant has moved this court by chamber summons made under Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009, as amended by GN No 362 of 2017. He is seeking for certification of a point of law so as to appeal to apex appellate court, the Court of Appeal of Tanzania. The application is supported by the Applicant's affidavit in which the grounds for the application are detailed. Before I proceed to the affidavit and its content, let me pause and give a brief account of the facts leading to this application.

The parties contracted a civil marriage in 2012 after the Applicant divorced his first wife. Their marriage subsisted for five years only. In 2017 the Respondent successfully petitioned for divorce before Manzese Primary Court which subsequent to dissolving the marriage restrained to issue division of matrimonial properties as it opined that there was no tangible

proof of matrimonial properties capable of being divided between the parties. The Respondent successfully appealed to the district court which reversed the decision of the Manzese primary court and ordered division of a matrimonial properties (including a house) at ratio of 40% to the respondent and 60% to the Applicant. Disgruntled the Applicant challenged the order in this court in PC Civil Appeal No 52 of 2018 where Luvanda J having heard both parties confirmed the finding that there were matrimonial properties worth of division but varied the ratio awarded to the parties by allotting 30% share of the matrimonial house to the respondent and 70% share to the appellant. It is this decision which the applicant intends to challenge in the Court of Appeal.

Having stated the background facts, let me now turn to the law regulating this application. As a general rule, originating in primary courts must end in the High Court (see Section 5(2) (c) of the Appellate Jurisdiction Act [Cap 141 R.E 2002]. If a litigant wishes to appeal to the Court of Appeal the High Court must certify that there is point of law (see the decisions of the Court of Appeal in **Ali Vuai Ali v Suwedi Mzee Suwedi** [2004] TLR 110, **Eustace Kubalyenda vs Venancia Daud** Civil Apeal No 70 of 2011; and **Elly Peter Sanya v Ester Nelson**, Civil Application No. 3 of 2015, Court of Appeal of Tanzania at Mbeya (unreported). The rationale behind the requirement for certification was well illustrated in **Vuai Ali Vuai** (supra) where the Court of Appeal stated that:

> "...the purpose of a certificate for the class of appeals originating in primary courts was to ensure that deserving

cases only reached the Court of Appeal. The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance."

What constitutes a point of law for the purpose pf Section 5 (2) (c) is, described by the Court of Appeal in **Mohamed Mohamed & Khamis Mselem v Omar Khatib**, Civil Appeal No. 68 of 2011, Court of Appeal of Tanzania at Zanzibar, where it was stated that:

> ".....further to the decision in **Ali Vuai Ali** *(supra)* a point of law worthy being certified for our decision would be, for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc. In this sense, a mere error of law will not be a good point worthy the certificate.

Based on this principle, the question that follows is whether or not the points raised by the applicant are worthy of certification. In disposing of this application parties were ordered to file written submissions. I have carefully considered the submissions and especially that of the applicant together with

the affidavit filed in support of the application. The points discernable from the affidavit and the written application are as follows:

i. That, the granted allotment by the court of 30% to the respondent of the proceeds of the division of the matrimonial properties lacks equity and is too high as the respondent had no hand or any proven contribution in the subject property (the house) no factual evidence on of substantial improvement of the already acquired property as required by the law of Marriage Act Chapter 29 R.E 2002 that the allotment was done without taking into account of the provisions of section 114(2) (b) and and section 60 (a) and (b) of the law of Marriage Act [Cap 29 R.E 2002].

ii. That in determining custody, the issue of marriage who is 17 years of age was not given an opportunity to express her opinion, and, in so doing, the court erred in not taking into account the provisions of section125 (2) (b) of the Law of Marriage Act; and lastly,

iii. The court erred in law by failure to take into account the provisions of section 136 (1) of the Marriage Act when determining when determine the appeal from the Kinondoni District Court in Civil Appeal No.43 of 2017

When the test in **Mohamed Mohamed & Khamis Mselem v Omar Khatib** (supra), is applied to the instant case, it can be said from the outset that the application fails the test. None of the points above stated raises a novel point of law compelling grant of a certificate to allow the applicant to proceed to the Court of Appeal.

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The first point on allotment of shares of the matrimonial assets is a factual issue as it entirely depends on the proof rendered in support of the contribution made by the spouse in the acquisition or improvement of the matrimonial assess, as the case may be. Although it was left undetermined in the trial court, it was full determined in the first and the second appeal. Guided by the principles laid down under section 114(2)(b) and section 60 (a) of the Law of Marriage Act [Cap 29 R.E 2002], the first and the second appeal courts allotted the respective shares to the parties. Hence, there is no point worth certification of this Court.

On the 2nd ground that the child aged 17 at the material time was not given a chance to express her opinion as to custody, is equally not worthy of certification. The first appeal court which canvased this issue gave due regard to the principle of the best interest of the child which is paramount in determination of custody of children and having given due regard to this principle it found that the it was it was in the best interest of the child that custody be vested in the mother and awarded maintenance at the rate of tshs 100,000/= which was reduced by the 2nd appellate court to Tshs 70,000/=. Considering that the paramount principle on this issue was considered and determined. The point raised by the applicant herein does not, certainly, constitute a novel point, worth of certification.

Based on these grounds, I dismiss the application in entirety. This being a matrimonial suit to which the Respondent is receiving free legal aid, I will award no costs.

DATED at DAR ES SALAAM this 10th day of February 2020.

J.L. MASABO

JUDGE

Judgment delivered this this 10th day of February 2020 the Applicant and the Respondent, both present in person.

J.L. MASABO

JUDGE