

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 491 OF 2018**

(Arising from the decision of the High Court in PC Civil Appeal No. 106 of  
2017 –I.K. Banzi J dated 27<sup>th</sup> July 2018)

**RUKIA SAID ..... APPLICANT**

**VERSUS**

**JUMA HEMED MNYEPE ..... RESPONDENT**

**RULING**

11<sup>th</sup> August & 18<sup>th</sup> September, 2020.

**E. E. KAKOLAKI J**

In this application the applicant is seeking for leave to appeal to the Court of Appeal against the decision of this Court in PC Civil Appeal No. 106 of 2017 which was entered on 27<sup>th</sup> July, 2018. It has been brought under section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] supported by affidavit of **Joseph Kipeche** advocate for the applicant. In opposition the respondent filed his counter affidavit in the names of **Juma Hemed Mnyepe** strongly challenging merits of the application.

Briefly the applicant successfully petition for divorce decree and division of matrimonial properties at Kinondoni Primary Court in Matrimonial Cause No. 35 of 2016. She was awarded 30% share of matrimonial properties namely a house at Msasani area, farm located at Mbezi Malamba Mawili and Vikindu area and one motor vehicle. Discontented the respondent appealed to Kinondoni District Court in Civil Appeal No. 47 of 2016 which decision partly allowed his appeal by setting aside the divorce decree and orders for division of matrimonial properties and substituting for them with the rebutted presumption of marriage. Further to that the 30% shares of the earlier awarded matrimonial properties were substituted with three properties namely flat No. 09, 1<sup>st</sup> floor Upanga area CT No. 186171/32/24, flat No. 09, ground floor Upanga area CT No. 186071/32/25 and flat No. 30 3<sup>rd</sup> floor Block "M" Kisutu area CT No. 186053/31/29. Disgruntled the respondent successfully appealed to this Court against the appellate court decision that set aside the decisions, decree and orders of distribution of matrimonial properties made by Kinondoni District Court. That decision aggrieved the applicant who on 03/08/2018 filed a Notice of Appeal to the Court of Appeal intending to challenge the decision of this Court. It is from that Notice this application for leave to appeal to the Court of Appeal is preferred for the third appeal.

The respondent in this application appeared in court for the last time on 03/10/2019 through his advocate one Juma Mtatiro. Since then he has never appeared in court until when the court ordered the applicant to proceed by way of written submission. The applicant is represented by Mr. Joseph Kipeche, learned advocate. Mr. Kipeche prefaced his submission by a prayer

to adopt his affidavit in support of the application. He thereafter proceeded to submit that in this application for leave there are matters of law which the applicant is intending to appeal against. He mentioned them to be:

- (a) The High Court held that there is no presumption of marriage while there is ample evidence on record that the applicant and respondent had stayed together under one roof from 1962 to 1972 and acquires the status of husband and wife.
- (b) That, the High Court set aside the orders of division of matrimonial properties while there is evidence showing that the same were acquired by the applicant and respondent.

With those two grounds Mr. Kipeche invited this court to grant the leave to appeal to the Court of Appeal. Before considering and determining this application, the Court paused and raised a question suo motto whether this application is competent before this court. In order to answer the question Mr. Kipeche was summoned to address the court first on the competence of the application.

As alluded earlier herein above the intended appeal by the applicant is the third appeal as the decision of this court sought to be challenged is sourced from Kinondoni Primary Court in Matrimonial Cause No. 35 of 2016. The law under section 5(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] bars all appeals from the decisions or orders of the High Court originating from the Primary Court decisions without prior certificate of the High Court issued that a point of law is involved. The section reads:

*"2(c) 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."*

Head (c) of part III to the Magistrates Courts Act, [Cap. 11 R.E 2019] refers to Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts. It follows therefore that unless the High Court certifies that a point of law is involved, no appeal from the High Court decision when exercising its appellate or revisional jurisdiction on matters originating from the Primary Court can lie to the Court of Appeal.

In the present application the applicant is seeking leave to appeal to the Court of Appeal under section 5(1)(c) of the Appellate Jurisdiction Act. The section reads:

*5(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(a) NA*

*(b) NA*

*(c) With the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.*

The above cited provision refers to appeal originating from *every other decree, order, judgment, decision or finding of the High Court* which in my

opinion covers all appeals originating from the decision of District Court or Resident Magistrates Courts or such other tribunals when exercising their original jurisdictions whose appeals lie to the High Court. In this application the decision of the High Court sought to be impugned was entered when exercising its appellate jurisdiction in a matter originating from the Primary Court thus falling under the purview of section 5(2)(c) of Appellate Jurisdiction Act. Thus the applicant ought to have applied for certificate of the High Court that a point of law is involved in order to appeal instead of preferring an application for leave to appeal. It is from that glaring error this court arrives to the finding that this application has been wrongly preferred. In the circumstances, I would hold as I hereby do that this application is incompetent and is hereby struck out without costs.

It is so ordered.

DATED at DAR ES SALAAM this 18<sup>th</sup> day of September, 2020.



E. E. KAKOLAKI

**JUDGE**

18/09/2020

Delivered at Dar es Salaam this 18<sup>th</sup> day of September, 2020 by the Deputy Registrar of the High Court, in the presence of the applicant and Ms. Lulu Masasi, court clerk and in the absence of the respondent.

Right of Appeal explained.



E. E. Kakolaki

**JUDGE**

**18/09/2020**