IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 626 OF 2019

(Arising from Matrimonial Appeal No. 78 of 2019, Masabo, Judge)

ZAMZAM HALFANI HASSANI.....APPLICANT

VERSUS

MWINYIMKUU MUSSA ZAME.....RESPONDENT

RULING

Date of Last Order: 21/07/2020
Date of Ruling: 09/10/2020

MLYAMBINA J.

The Court is being moved by the Applicant under *Section 5 (i) (c) of the Appellate Jurisdiction Act Cap 141 (R.E. 2002)* to grant the Applicant leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania in Matrimonial Appeal No. 78 of 2019, Masabo Judge. The application is supported with the affidavit of the Applicant Zamzam Halfan Hassani. Paragraph 5 and 6 of the supporting affidavits carries the gist of the application; for clarity, I will quote herein below:

5. That, the High Court disregarded the extent of contribution of the Applicant and at the same time superfluously exaggerated

that of the Respondent in division of the matrimonial asset (the matrimonial home).

6. *That, the intended appeal is based on misconceived decision over unequal distribution of matrimonial asset and invoking land laws in disregard of evidence in record.*

The application was objected by the Respondent through his counter affidavit. It was deposed that; **one**, the Honorable Judge was bound to apply land laws given the fact that the division involved consideration of land that was acquired long prior to marriage with the Applicant; **two**, the Applicant was not barred from finding relevant laws to apply in dispensing justice according to the Applicant; **three**, the Judgment did not leave further triable issues, thus, allowing this application will be wastage of resources and time of the Court of Appeal.

The application was heard by way of written submissions filed by Yohana Julius Ayall, Advocate of the Applicant and reply drawn by Clement Bernard Mubanga, Advocate but filed by the Respondent.

According to the Applicant, the points of law worth consideration by the Court of Appeal are:

1. Whether the High Court was right to hold that, the Respondent's contribution overweighed that of the Applicant since the Respondent, was prior to the marriage to the Applicant, the owner of the plot upon which, the matrimonial property was built subsequent to the marriage.
2. Whether the construction of *Section 114 (3) of the Law of Marriage Act* by the first appellate Court was right, since the Section gives guidance over properties prior to marriage owned by one spouse and substantially improved by the other or jointly to be among matrimonial assets liable to be distributed *under Section 114.* The Applicant on this points seeks leave to knock the doors of the apex Court of the land, for legal clarification whether a matrimonial property becomes more valuable after substantially being improved or not, since the first appellate Judge held that the land prior to substantial improvement was valuable to the extent of outweighing the substantial contribution of the Applicant which gave the disputed property the value it has as it stands.
3. Whether the first appellate Court was right to make heavy reliance to land laws in matrimonial division of assets instead of reliance on interpretation and construction of *Section 114*

of the Law of Marriage Act which is applicable in division of matrimonial assets.

On whether the first appellate Court was right in holding that the contribution by the Respondent out weighted that of the Applicant regard less of the fact that there is evidence on record of the trial Court showing Applicant's substantial contribution both monetary and through wifely services (supportive role), the Applicant cited the Plethora of Authorities by this Court and the Court of Appeal on the extent of contribution. For instance in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** Civil Appeal No. 102 of 2018, the Court held:

> *The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property.*

The Applicant went on to state that the Court of Appeal whilst arriving at its decision in the **Kurwijila Case** (*supra*) cited with approval its decision in **Yesse Mrisho v. Sania Abdu,** Civil Appeal No. 147 of 2016, where the Court of Appeal while upholding the decision on 50-50% equal distribution stated that:

There is no doubt that a Court, when determine such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.

On the other hand, the Respondent asked himself; if the plot was to be bought by both parties and a house constructed using both parties' funds, what percentage could the Court award each party? In the view of the Respondent, it would have been 50% each. As to what should the division be in this case? The answer of the Respondent was that there is no way the Applicant would have outweighed the Respondent in the interests vested in the house which was constructed with joint efforts in the Applicants plot acquired years ago before marriage.

I have considered the supporting affidavit, opposing counter affidavit and the submissions of both parties. It has to be noted that the duty of this Court at this stage is to see if there are grounds of appeal worth to be considered by the Court a of appeal. *Section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 (R.E 2002)* provides:

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

In the case **of Said Ramadhani Mnyanyi v. Abdullah Salehe** (1996) TLR 74 the Court of Appeal of Tanzania provided a guide that the matter must raise contentious issues of law and it is fit case for further consideration by the Court of Appeal. In another case of **Nurbhain Rattansi v. Ministry of Water, Construction, Energy, Land and Environment and Another** (2005) TLR 220, his lordship Justice of Appeal Lubuva, J.A (as he then was) held that:

The complaint that the High Court Judge did not deal with an appeal on its merits but instead dismissed it on other grounds which did not feature in the trial is a contentious legal point worth the consideration of the Court of Appeal.

I have carefully digested the point intended to be appealed, part of the impugned decision of my learned Sister her Ladyship Masabo J. read:

While there is no hard formula on the division of matrimonial assets the law as provided for *under Section 114 (2)* requires the Court to have regard to the extent of contribution made by each party. Thus, in this case, considering that there was already a plot which was acquired by the appellant single handedly, it would have been just and fair for the Court to have regard to this fact when dividing the asset to the parties. Failure to pay regards to this fact presupposes that the plot had no value which is *contrary to the spirit of the Land Act, Cap 113 (R.E 2002)* and the *Village Land Act, Cap 114 (R.E 2002)* which recognize an interest in undeveloped land as a valuable interest *Section 3 (1) (f) of the Land Act and Section 3 (1) (g) of the Village Land Act.* According to these sections, an interest in land is considered a valuable interest even where there are no unexhausted improvements in the said land. Accordingly any transaction that affects the land such as disposition must take into account the market value of the land, I am of the settled view that the Court erred in ordering that the house be divided in equal halves while in essence the contribution of the appellant outweighs that of the Respondent.

Considering the reasoning of my learned Sister Massabo, J, I'm satisfied that the application at hand do not present a pertinent point of law worth invoking the Court of Appeal.

It is an established principle of law that a bare land by itself has value. The fact that the Applicant do not dispute that she found the Respondent owning the land, a division of whatever developed thereof jointly must take cognizance of the value of land prior marriage. The assessment of the contribution will depend on what each spouses added on the land. The Respondent in addition is entitled to the value of the land prior marriage.

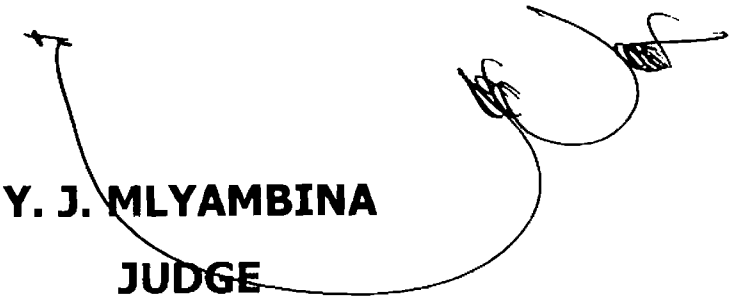
In the circumstances, the application for leave to appeal to the Court of Appeal of Tanzania is hereby dismissed for lack of points of law worth to be considered on appeal, bearing in mind the nature of the case, I award no costs.

Y. J. MLYAMBINA

JUDGE

09/09/2020

Ruling delivered and dated 9th October, 2020 in the presence of Counsel Yohana Ayall for the Applicant and the Respondent in person.



Y. J. MLYAMBINA

JUDGE

09/09/2020