

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MISCELENEOUS CIVIL APPLICATION NO. 07/2020

**(Originating from Judgement of High Court of Tanzania at Songea, PC.
Matrimonial Appeal No. 03/2019)**

MODESTA NAMKUNGA..... APPLICANT

VERSUS

FRANCIS JOSEPH MUSHI.....RESPONDENT

RULING

Date of Last Order: 29/10/2020

Date of Ruling: 19/11/2020

BEFORE: S.C. MOSHI, J.:

The application is brought under section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141 R.E 2019 and Rules 45(a) and (b) of the Court of Appeals Rules of 2009. The applicant is praying for the following orders:-

- 1. That, this court be pleased to grant Certificate on point of law to the Court of Appeal of Tanzania against the decision and orders entered by Honourable Judge Arufani on 04/08/2020 in Matrimonial Appeal No. 3 of 2019.*
- 2. Costs of this application be provided for.*

3. Any other or further order which this court shall deem necessary and just fit to grant.

The application is supported by applicant's affidavit. In opposition, the respondent filed a counter affidavit, challenging merits of the application.

The application was argued by way of written submissions which were timely filed. Both parties appeared in person.

The applicant submitted among other things that, there is a point of law which need to be settled and is based on section 114 (1) to (3) of the Law of Marriage Act, Cap. 29 R.E 2019. Section 114(1) provides thus:-

"The court shall have power when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale".

She stated that contribution of parties is clearly stated under section 114 (2) (b) which provides that in exercising the power conferred by subsection (1) the court shall have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets. Thus the extent of contribution in acquiring the house does not

apply to the respondent as he abandoned the family and left for Mozambique, hence he should not benefit from his own wrongs. The cornerstone of the dispute is that the court erred in law to interpret that the parties' house is subject to division by 40% to respondent and 60% to the applicant. Even at the time of buying the plot for building the house which is in dispute the respondent contributed nothing in terms of money, he did not witness the buying of the plot and even forged both the title deed and the signature which is in that title deed. The titled deed was submitted at the trial court by the respondent in support of his case. The respondent tendered the title deed of the house bearing the name and signature of the respondent but it disappeared under unknown circumstances.

She argued that, the Honorable Judge did not give reasons for reversing and altering the decision on division of matrimonial houses, frame shop (kibanda), livestock and other properties, this needs to be interpreted. The respondent sold other matrimonial properties at the price of three million five hundred thousand promising to give the applicant one million five hundred thousand but the respondent absconded with all amount of money without giving even a coin to applicant.

She contended further that marriage does not affect ownership of property to the parties during the time of their marriage, she cited section 58 of the Law of Marriage Act, Cap. 29 R.E 2002 which provides, that

"A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise."

Thus, even though the applicant was married by the respondent, this was not a bar to the applicant to acquire properties bearing applicant's names. She made reference to section 60 (a) of the Law of Marriage Act Cap. 29 R.E 2019. She argued that, the respondent failed to prove the extent of his contribution in acquiring the house in dispute.

In reply the respondent submitted that, the court evaluated the evidence and found that the respondent's contribution in acquiring the house in dispute was in terms of tasks of making soil bricks, supervising construction of the house and making its doors. In this respect he cited section 114 (2) (b) of the law of Marriage Act Cap. 29 R.E 2019 which provides for extent of contribution of the spouses towards the acquisition of matrimonial properties and the case of **Gabriel Nimrod Kurwijila vs**

Theresia Hassan Malongo, Civil Appeal No. 102 of 2018 Court of Appeal of Tanzania (Unreported) where the court held that: -

"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 advise towards the acquiring of matrimonial property".

He said that, therefore the applicant's contention is devoid of merit because the extent of contribution was clearly determined by this court.

He argued further that the court after evaluating both parties' evidence adduced at the trial court regarding the acquisition of the matrimonial assets, found that both parties had made the contribution in acquiring the said assets and ordered the same to be divided according to each party's contributions. He said that what constitutes joint efforts was stipulated in the land mark case of **Bi. Hawa Mohamed vs Ally Sefu** (1983) TLR 32 that:-

"The joint efforts and work towards the acquisition of the assets have Domestic efforts or work of husband and wife".

Thus his efforts or work toward acquisition of all matrimonial assets amounted to contribution and was properly considered by the High court.

He ended his submission by pointing out that the applicant's application seeking a certificate of point of law in matrimonial proceedings, is incompetent before this court as it was held in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (supra) at page 7 that a certificate on a point of law in Matrimonial proceedings is not a requirement of law as envisaged under section 80 (4) of the LMA.

The intended appeal by the applicant is a third appeal as the decision of this court sought to be challenged originated from Mlingoti Primary court in Matrimonial cause No. 14 of 2019. The law under section 5 (2) (c) of the Appellate Jurisdiction Act Cap. 141 R.E 2019 bars appeal from the decision or orders of the High Court originating from Primary Court decisions without prior certificate of the High Court showing that a point of law is involved. The section reads thus: -

"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' Court Act unless the High Court certifies that a point of law is involved in the decision or order".

Head (c) of part III of the Magistrates Courts Act, Cap. 11 R.E 2019 provides for Appellate and Revisional Jurisdiction of the High Court in

relation to matters originating in Primary Courts. It follows therefore unless the High Court certifies that a point of law is involved, no appeal from High court decision when exercising its appellate or revisional jurisdiction on matters originating from the Primary court can lie to the Court of Appeal.

The applicant seeks the court to grant certificate on point of law so that she can 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, judgement, decision or finding of the High Court.*

The above cited provision refers to appeal originating from every decree, order, judgment, decision or finding of the High Court. However it covers all appeals which requires leave of the High Court or of the Court of Appeal. In this application the impugned decision of the High Court was entered by the High Court exercising its appellate jurisdiction in a matter

originating from the Primary court thus falling under the purview of section 5(2) (c) of the Appellate Jurisdiction Act. Thus, the proper section was section 5 (2) (c) not 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141 R. E 2019.

However, as argued by the respondent, a certificate on a point of law in matrimonial proceedings is not a requirement of law as envisaged under section S. 80 (4) of the Law of Marriage Act Cap. 29 R.E 2019 which provides thus:-

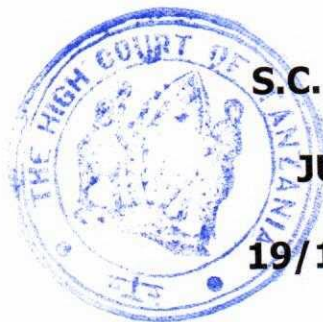
"Any person aggrieved by a decision or order of the High Court in its appellate Jurisdiction may appeal there from to the court of Appeal on any ground of law or mixed law and fact".

Therefore the applicant can appeal directly to the Court of Appeal without having obtained a certificate on point of law on any ground being of a law or mixed law and facts.

Therefore, basing on the aforesaid, I find that this application is incompetent and is hereby struck out without costs.

It is so ordered.

Right of Appeal Explained.



S.C. Moshi
S.C. MOSHI

JUDGE

19/11/2020