

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 175 OF 2020

(Arising from judgment of the High Court of Tanzania at Dar es Salaam

in PC. Civil Appeal No. 100 of 2019)

IDDI HASSANI JUMA **APPLICANT**

VERSUS

ZUHURA TAMIMU **RESPONDENT**

RULING

25th August & 20th October, 2021

BANZI, J.:

The Applicant, Iddi Hassani Juma and the Respondent, Zuhura Tamimu were husband and wife whose marriage was officially dissolved on 24th August, 2018 by the Primary Court of Ukonga following a divorce proceeding filed the Respondent. After dissolving the marriage, the trial court ordered among other things, division of matrimonial property, a house located at Chanika Magengeni at the percentage share of 70 – 30 to the Applicant and Respondent respectively. Dissatisfied with that decision, the Respondent unsuccessfully appealed to the District Court of Ilala at Samora Avenue. Still dissatisfied, she appealed to this Court where her appeal was partly allowed

by substituting the percentage share of distribution of the said matrimonial property in 50 - 50.

Aggrieved with that decision, the Applicant lodged a Notice of Intention to Appeal to the to the Court of Appeal of Tanzania. At the same time, he filed an Application for a certificate on a point of law to fulfil the requirements of section 5 (2) (c) of the Appellate Jurisdiction Act [Cap. 141 R. E. 2019] ("the AJA"). This ruling is about this Application. The Application is supported by an affidavit of the Applicant himself. The Respondent, apart from objecting the Application through a counter affidavit, raised two preliminary points of objection challenging the competence of the Application, thus:

- 1. That, application is hopelessly time barred as it offends the provisions of the law.*
- 2. That, application is incurably defective as the Honourable Court is moved by wrong provisions of the law.*

For purposes of convenience, the preliminary points of objection and main Application were argued jointly by way of written submissions. The Applicant enjoyed the services of Mr. Hassan Kilule, learned advocate, while the Respondent appeared in person.

I would like to state right from the outset that, the two points of preliminary objection were raised without speck of merit. I now turn to explain why. It was the contention of the Respondent that, the Application at hand is time barred as it was filed thirty-five days after delivery of the judgment, which is contrary to Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended ("the Court of Appeal Rules"). On the other hand, Mr. Kilule, learned counsel for the Applicant submitted that, Rule 45 (a) of the Court of Appeal Rules, refers to applications for leave to appeal to the Court of Appeal, which is distinct from applications for certificate on point of law, like in the instant case. He added that, since there is no provision in the AJA, nor in the Court of Appeal Rules which sets the time limit for filing application of this nature, the only resolve is found in paragraph 21 of Part III of the Schedule to the Law of Limitation Act [Cap. 89 R.E. 2019] ("the LLA") which provides for sixty days' time limit.

It is common knowledge that, section 5 (2) (c) of the AJA provides for the requirement of filing an application for certificate on point of law in respect of civil appeals originating from the Primary Court. It is also true that, neither the AJA nor the Court of Appeal Rules provide for the time limit within which such applications can be filed. As rightly pointed out by Mr.

Kilule, Rule 45 (a) of the Court of Appeal Rules provides for time limit of thirty days in respect of applications for leave, which are different from applications of certificate on point of law. Nevertheless, inspired by the spirit of paragraph 21 of Part III of the Schedule to the LLA, the Court of Appeal of Tanzania in the case of **Halais Pro-Chemie v. Wella A.G.** [1996] TLR 269 set the time limit of sixty days for applications whose time limit is not provided either in the AJA or in the then Court of Appeal Rules. This position was re-affirmed in the case of **James Masanja Kasuka v. George Humba**, Civil Application No. 2 of 1997 CAT (unreported), in respect of all such civil applications.

In that regard, therefore, it is the considered view of this Court that, the sixty days rule is applicable in respect of this Application. That being said, the first point of preliminary objection is overruled.

Regarding the second point, that the Court is moved by wrong provisions of the law, it is also the position of this Court that, this point is unmerited. The complaint by the Respondent that, the Applicant cited section 5 (1) (c) instead of section 5 (2) (c) of the AJA and therefore, the Court was wrongly moved is misconceived. I agree with the submission by

Mr. Kilule that, that is no longer the position of the law owing to the introduction of the principle of overriding objective in our jurisprudence.

Notably, the Applicant moved this Court by citing section 5 (1) (c) of the AJA. It is undisputed that, the said section is about leave and not certificate on point of law, which falls under subsection (2) paragraph (c) of the same section. In my considered view, wrong citation of subsection (1) instead of subsection (2) is not fatal and does not take away the jurisdiction of this Court to grant the orders sought by the Applicant, nor does it prejudice the parties. See cases of **Advatech Office Supplies Limited vs Ms. Farhia Abdullah Noor and Another**, Civil Application No. 353/17 of 2017 CAT (unreported), **The Attorney General vs Jeremia Mtobesya**, Civil Appeal No. 65 of 2016 CAT (unreported), **Abdallah Hassan vs Juma Hamisi Sekiboko**, Civil Appeal No. 22 of 2007 CAT (unreported) and **Bitan International Enterprises Ltd vs Mished Kotalu**, Civil Appeal No. 60 of 2012 CAT (unreported). For the reasons thereof, I find the present Application competent and I overrule both points of preliminary objection for being non-meritorious.

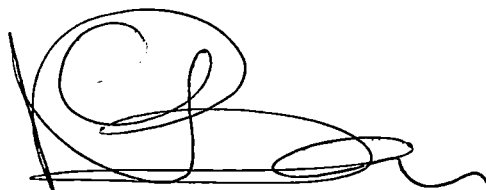
Now, turning to the substance of the main Application, Mr. Kilule, learned counsel for the Applicant submitted that, the certificate on point of law is sought because there are the following points of law:

- (i) Whether the courts below properly involved (sic) the legal requirements under section 114 of the Law of Marriage Act [Cap. 29 R.E. 2002] in distribution of matrimonial assets.*
- (ii) Whether the High Court being the second appellate Court can legally entertain factual issues at the expense of ground(s) of law and, in the absence of misapprehension of evidence, miscarriage of justice and violation of principles of natural justice.*
- (iii) Whether the High Court can impeach the record of the trial and first appellate courts and vacate from the finding of facts and base its findings on facts which are not part of the available record.*
- (iv) Whether the second appellate Court can legally distributed (sic) the house at Chanika Magengeni into 50% to the Appellant and Respondent respectively without considering the contribution of the Applicant's (then Respondent's) second wife.*

That is according to the contents of paragraph 5 of the Applicant's affidavit. I have carefully considered the contended points of law by the Applicant. Intrinsically, all the four points boil down to one complaint, that is about distribution of matrimonial property, the house located at Chanika Magengeni. Clearly from the record, the concern revolves around is the 50 – 50 percentage division of that property. In that regard, therefore, I certify that, the following should be the point of law worth of consideration by the Court of Appeal to wit:

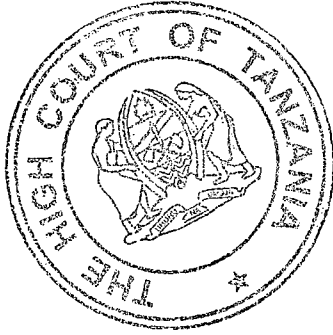
1. Whether the learned appellate Judge properly invoked the requirement of section 114 of the Law of the Marriage Act [Cap.29 R.E. 2019] in distribution of matrimonial property, a house located at Chanika Magengeni.

Therefore, I grant the Application. Owing to the nature of the case, each party to bear its own costs. It is accordingly ordered.

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I. K. BANZI
JUDGE
20/10/2021

Delivered this 21st October, 2021 in the absence of the Applicant and
in the presence of the Respondent.



A handwritten signature in black ink, appearing to be "I. K. Banzi", written over a horizontal line.

I. K. BANZI
JUDGE
20/10/2021