

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 110 OF 2021**

(Originating from the Judgment of the High Court in Civil Appeal No. 79 of  
2019 dated 30/06/2020 before Hon. S.M. Kulita,J)

**WILLIAM ISAYA MPINGA..... APPLICANT**

**VERSUS**

**JUDITH AUGUSTINO SIMON.....RESPONDENT**

**RULING**

27<sup>th</sup> July 2021 & 06<sup>th</sup> August, 2021.

**E. E. KAKOLAKI J**

In this application which is supported by the applicant's affidavit this Court is moved to grant him within leave to appeal to the Court of Appeal against the judgment and decree of this Court, Kulita, J, in Civil Appeal No. 79 of 2019 handed down on 03/11/2020, the decision which aggrieved him. The application has been preferred under section 5(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] hereinto referred as AJA and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended. When the chamber summon was served the respondent, she filed her counter affidavit vehemently contesting the merits of the application. Following that resistance with leave of the Court parties agreed to dispose of the matter by

way of written submissions and both complied with the filing schedule orders. The applicant was represented as he hired the services of Mr. Frank Chundu, learned advocate whereas the respondent enjoyed legal aid services from Women's Legal Aid Centre who prepared submissions for her gratis.

The brief background story behind this application is simple to tell. Before this court the respondent had instituted an appeal, Civil Appeal No. 79 of 2019 against the applicant which was partly determine in her favour. In its judgment delivered on 30/06/2020 this Court adjudged that one of the issue of marriage was wrongly placed in the applicant's custody by the trial Court, the District Court of Kibaha in Matrimonial Cause No. 8 of 2018 and further faulted the trial court for its failure to divide the two houses and one studio allegedly acquired by joint efforts of parties during subsistence of their marriage that survived under presumption of marriage from the year of their cohabitation in 2007 until 28/03/2019 when it was dissolved. Capitalizing on the factor of considering first the best interest of the child, custody of the disputed issue of marriage was placed to the respondent who was also at the time in custody of the second issue. This court further ordered for division of the three jointly acquired matrimonial properties to the respondent who was formerly awarded Tshs. 5,000,000/= as her contribution towards acquisition of the said properties. Aggrieved with the said decision the applicant on 20/07/2020 lodged with the Court of Appeal a Notice of Appeal against the whole decision. This appeal being the second appeal that lies to the Court of Appeal with leave of this court and having obtained copies of judgment and decree for appeal purposes, the applicant found himself time barred to apply for leave thus had to secure extension of

time within which to file this application, the application which was granted to him by this Court on 26/02/2021, hence the present application. In his affidavit the applicant raised six matters claiming to be points of law worth of consideration by the Court of Appeal as reproduced hereunder in seriatim:

1. That, whether without proof of joint efforts in the alleged matrimonial properties may still entitle one's share to the properties.
2. That, whether the best interests of the child principle is only for the children to stay with the mother.
3. Whether the provisions relating to custody of children can be read in exclusion of each other.
4. That, there has been misdirection of evidence resulting to erroneous decision.
5. That, the High Court erred in including properties which were acquired outside the alleged cohabitation to be matrimonial properties.
6. That, the High Court erred in law by determining the appeal originating from an erroneous decision which determined the matter as matrimonial proceeding while it was not hence having no jurisdiction.

Before I venture into determination of the merits of the application, I wish to put the record clear that in the course of submission in support of the application, the applicant silently abandoned the sixth point while arguing the rest of the points. It is trite law that grant of leave is not automatic. The same is granted on the discretion of the court and that discretion has to be exercised judiciously. Leave will be granted only when the court is satisfied that there issues of general importance or a novel point of law or where the grounds have disclosed a prima facie arguable appeal as raised by the

applicant is his intended grounds of appeal. This position of the law was well spelt by the Court of Appeal in the case of **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 (CAT-unreported), where the Court of Appeal stated thus:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must however be judiciously exercised on the materials before the court. **As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds have a prima facie of arguable appeal.** However, where the grounds of appeal are frivolous. Vexatious or useless or hypothetical, no leave will be granted."* (Emphasis supplied)

In a similar vein in the case of **Rutagatina C.I Vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (CAT-unreported), the Court of Appeal summarised it all when stated the following:

*"An application for leave is usually granted if there is good reason, normally on point of law or on a point of importance, that calls for this Court's intervention."*

In view of the above position what this court is called for to do in this application is to find out whether the applicant has raised any point of law or a point of importance or grounds that have a prima facie of arguable appeal. I have had an ample time to go through and consider the contents

of the affidavit and reply to counter affidavit by the applicant, the counter affidavit by the respondent, the intended impugned judgment as well as the submissions from both parties in support and against this application. Looking at the points or grounds raised by the applicant it is my observation that some of them are interrelated, I will therefore lump up them in the course of determination of this application. To starting with the first and fifth raised points, the alleged legal issues for determination are whether under section 114(1) of the Law of Marriage Act, [Cap. 29 R.E 2019] to be referred as LMA, a party is entitled to another person's share of properties without proof of joint efforts and whether as per section 114(3) of LMA a property acquired outside the union can be counted as matrimonial property without establishment of substantial improvement made by the other party. In respect of those points the respondent submitted there is no legal issues noted on the reason that the appellate court properly evaluated both parties evidence on the complained points before reaching its decision. It is true and I agree with the respondent that there is no any established legal issue or point in them worth of determination by the higher court as those provisions of the law are very clear that evidence on contribution towards acquisition of matrimonial properties (joint efforts) or substantial improvement on properties acquired before marriage must be established by the party claiming shares therefrom. Unless the complaint is on evaluation of the evidence concerning proof of respondent's contribution towards acquisition or substantial improvement of matrimonial properties which is not the case on the raised two grounds, I find the applicant has failed to establish that arguable legal issues exist in the said two points.

As regard to the 2<sup>nd</sup> and 3<sup>rd</sup> points Mr. Chundu for the applicant posed the legal issues as whether under section 125(1) of LMA the factor of best interest of the child entitles the mother only with custody of the child in matrimonial dispute and whether factors for consideration by the court when granting custody of the child under section 125 (2) of LMA can be read in isolation of other factors set under section 125(3) and (4) of the LMA. In response to these points the respondent argued, the appellate court after considering the best interest of the child and the need of the child girl to live with her mother rightly granted custody to her, thus the claimed points are not arguable grounds at all. After going through the complained of provisions of the law by the applicant, I find there is novel point of law worth of determination by the Court of Appeal in the two points raised. The reason is that it is the "welfare of the child" which is a paramount factor for consideration by the Court under section 125(1) of the LMA when placing custody of the child under either parent or party during matrimonial dispute unlike the "best interest of the child" which is a considered factor under the Law of the Child Act, [Cap. 13 R.E 2019]. Which factor is to be considered when determining custody of the child under matrimonial dispute amongst the two above mentioned factors I find is a legal issue worth determination by the Court of Appeal. Likewise whether the provisions of law on factors to be considered by court to grant custody of the child as listed under section 125(2) are read and considered in isolation of others as provided under section 125(3) and (4) of the LMA such as none requirement of placing two issues under one parent, in my considered view is also a legal issue that calls for determination by the Court of Appeal. There is merits in these two grounds.

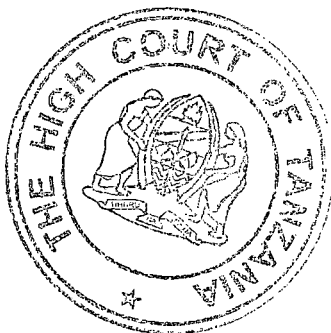
Lastly is the fourth ground on this court's misdirection on evaluation of some evidence more particularly on cohabitation of the parties. This ground though resisted by the respondent I find merit on it. As there is dispute whether cohabitation between the parties existed throughout the time until when divorce decree was issued which to some extent touches proof of contribution towards acquisition of matrimonial properties and improvement of properties acquired before marriage, there is a need for the higher court to look into and satisfy itself whether there was misdirection or not in evaluation of evidence as claimed by Mr. Chundu for the applicant.

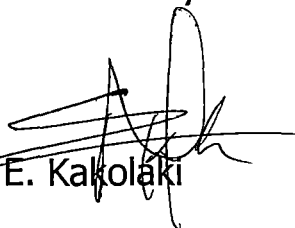
In the upshot I find the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> points as raised by the applicant contain legal issues and have raised prima facie arguable appeal as per the requirements of the law set in the cases of **British Broadcasting Corporation** and **Rutagatina C.I** (supra). This application has merit and leave to appeal to the Court of Appeal is therefore granted to the applicant.

Being a matrimonial matter, I order no costs to any party.

It is so ordered.

DATED at DAR ES SALAAM this 06<sup>th</sup> day of August, 2021.



  
E. E. Kakolaki

**JUDGE**

06/08/2021

Delivered at Dar es Salaam in chambers this 06<sup>th</sup> day of August, 2021  
in the presence of Mr. Frank Chundu advocate for the applicant, the  
Respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. Kakolaki

**JUDGE**

**06/08/2021**