

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

MISC. CIVIL APPLICATION NO.363 OF 2019

(From Civil Revision No. 15 of 2019 HC (Dar es salaam District Registry))

PARVEZ ABDULHUSSEIN HIRJIAPPLICANT

VERSUS

NIMROSE PARVEX HIRJI.....RESPONDENT

RULING

Last Order: 8/10/2021

Date of Ruling: 19/11/2021

MASABO, J.:-

The applicant has moved this court by a chamber summons made under Rule 45(a) of the Court of Appeal Rules, 2009 and section 5(1) of the Appellate Jurisdiction Act [Cap 141 RE 2019]. He is praying for leave to appeal to the Court of Appeal against the decision of this court in Civil Revision No. 15 of 2019. The application is supported by an affidavit deponed by Parvez Abdikhusein Hirji, the applicant.

The facts discernible from this affidavit are that the parties were a married couple. In 2017 the respondent instituted Matrimonial Cause No. 19 of 2017 before the Court of the Resident Magistrate for Dar es Salaam at Kisutu praying for the following three main prayers:

- (a) the honourable court be pleased to dissolve the marriage and grant a decree of divorce

- (b) the honourable court be pleased to issue an order of maintenance for the issues of the marriage at the rate of USD 2000 per month and pay for all their school fees and related expenses
- (c) the honorable court be pleased to issue a permanent restrain order to restrain the Respondent, his relatives, agents and whoever from inflicting harassment assault or interfering in any way with the petitioner's life or the lives of the issues of marriage.

The records show that prior to the hearing of the petition the parties agreed to resolve their dispute amicably. They executed a deed of settlement which was presented to the court. On 18/12/2017, the deed of settlement was recorded as final settlement under Order XXIII rule 3 of the Civil Procedure Code Cap 33 RE 2002 and it was subsequently decreed that:

- "1. ***the marriage between the parties have broken down irreparably Decree of divorce is issued*** [emphasis added]
2. Suit is marked settled out of court under Order XXIII rule 3 of the Civil Procedure Code Cap 33 RE 2002
3. The settlement is marked and it forms the judgment and decree of this Honourable court."

In the settlement deed which had consequently been converted into a decree, the applicant had agreed to pay the respondent a sum of USD 270,000 as full and final payment of all her claims and entitlements in the enterprises of HI-BRO'S CANVAS & TENTS Limited which was among the matrimonial assets as which is the main reason behind this application. The

sum was to be paid in installments agreed in the deed. The installment at a tune of USD 13,500 was paid on 15/12/2017. Thereafter, the applicant was to make subsequent installments of USD 10,000 payable monthly for 6 installment and USD 14,036 in the following month as last installment. Other orders are less relevant to this cause.

The applicant defaulted payment of the decreed instalments owing to what he claims to be mismanagement of the HI-BRO'S CANVAS & TENTS Limited by the respondent which resulted into freezing of the company's assets by the Tanzania Revenue Authority. As a result, he pleaded with the respondent for reduction of the monthly installments from USD 10,000 to USD 5,000 but the respondent refused. In turn, she successfully applied to the court to have the applicant detained as a civil prisoner. Disgruntled, the applicant filed a revision in this court which ended fruitless after it was dismissed for want of merit on 9th July 2019 by Kulita, J. He now intends to appeal to the Court of Appeal hence this application.

According to paragraph 14 of the affidavit, the applicant intends to move the Court of Appeal to consider and determine the following questions:

1. whether once an application for execution by mode of civil imprisonment is lodged in court the court should automatically sent the judgment debtor to prison without determining if the judgment debtor has means and is refusing intentionally to pay the decretal amount;

2. whether the High Court was right when it desisted to revisited and determine which is the correct amount that the judgment debtor has to pay to the respondent
3. whether the High Court was right when it did not take into consideration the loss that the Respondent has caused to the company which loss impends the applicant to be in position of paying the decretal amount.
4. whether the High Court was right when it did not determine that the amount that the respondent absconded to pay to TRA as VAT payment be set off from the decretal amount.

The application proceeded ex parte against the respondent defaulted appearance. On the day of hearing, Ms. Felister Msoka, the learned counsel who represented the applicant, did not make any submission in support of the application. She just prayed that this court be pleased to grant the applicant's prayer advanced in the chamber summons.

I have thoroughly scrutinized the application and its supporting affidavit and all the judgments/decrees, orders and all the document placed before me as annexures to the application. As already stated, this application is made under section 5(1) of the Appellate Jurisdiction Act [Cap 141 RE 2019], Rule 45(a) of the Court of Appeal Rules, 2009 which clothes this court with jurisdiction to determine applications for leave to appeal to the apex court, the Court of Appeal of Tanzania. These provisions have been extensively litigated such that, the position of law in this area is now fairly settled and

can be summarized as follows: Much as the right to appeal is basic right, appeals to the Court of Appeal is not automatic. In civil matters, save for appeals emanating from decisions made by the High in the exercise of its original jurisdiction (section 5(1)(a) and appeals emanating from orders listed under section 5(1)(b) and other decisions emanating from statutes which provide for automatic appeal to the Court of Appeal, appeals to the apex court require a leave obtainable from this court under section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2019.

The court's power to grant or to refuse to grant the leave sought is purely discretionary. But, it is trite that, much as the law does not prescribe the conditions to be considered by the court when exercising this discretion, the discretion should be judiciously exercised upon consideration of several factors developed from case law. The leave will basically be granted if, after examining the materials rendered by the applicant the court is of the view that they merit serious judicial consideration (**Sango Bay Estates Ltd & others v. Dresdner Bank** [1971] EA 17 (2)). Exemplifying this principle, the Court of Appeal in **British Broadcasting Corporation v. Eric Sikujua Ngmaryo**, Civil Application No. 133 of 2004) 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 judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal raise issues of general importance or novel point of law or where the grounds

*show prima facie or arguable appeal (see: **Buckle v Holmes** (1926) ALLER. 90 at page 91"*

In the view of the above, the question for consideration and determination by this court is whether the present application passes the test above. In specific, this court has to determine whether the 4 questions intended to be posed for determined by the Court of Appeal if the leave is granted raise a novel point or an arguable point. With respect to applicant, having considered the four questions in the light of the principles above, I was unable to discern an arguable point let alone, a novel point deserving the consideration and determination by the apex court. Much as I am very much aware that at this stage the court is expected to restrain itself from considering substantive issues that are to be dealt with by the appellate court and I have warned myself of the danger of surpassing the powers vested in me, I cannot desist from pointing out that, from the ruling of the lower court in Execution No 6 of 2019 and that of this court in Civil Revision No. 15 of 2019), I could not comprehend how the 3rd and 4th question would constitute an arguable case worth the consideration of the Court of Appeal considering that in both cases the courts were called upon to determine the mode of execution not the legality of the decree. To be more precise, in the ruling sought to be appealed against, the court was called upon to revise the execution proceedings, not the decree itself.

having considered the four questions in the light of the principles above. With regard to the 1st and 2nd question, in the absence of a submission from the applicant which could have elucidated what the applicant had in mind when framing the two questions, I have found it difficult to decipher how these points present an arguable case worth the consideration of the Court of Appeal.

Much as this finding leans heavily towards dismissal of the application for want of merit, I will allow the application so that in the course of the appeal, the legality of the decree from which Execution No 6 of 2019 and Civil Revision No. 15 of 2019 emanates, can be investigated and determined by the apex court. I say so because I have observed in the course of scrutiny of the court records that the kernel of this application is an order for distribution of matrimonial assets which is axillary to the decree of divorce issued under section 107(1) of the Law of Marriage Act, Cap 29 RE 2019 upon a finding that the marriage between the parties has broken down irreparably.

Much as none of the parties has complained about this point, it is crucial for the apex court to consider and determine the legality of the decree. The novel point requiring the determination of the apex court is whether the court can grant a decree of divorce and subsequent orders as to custody and maintenance in the absence of an enquiry as to whether the marriage between the parties has broken down irreparably.

For these reasons, I will proceed to allow the application and grant leave to the applicant to file his appeal in the Court of Appeal so that, the issue point above and other points raised by the Applicant can be determined.

DATED at DAR ES SALAAM this 19th November 2021.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

