

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 58 OF 2022

(Arising from the Judgment of the Court at Dar es Salaam (Hon. Mwaseba, J) in PC. Matrimonial Appeal No. 50 of 2021, dated 14th January, 2022.)

JAFARI IJIMIJA MPEMBA APPLICANT

VERSUS

SADA MBUDO RESPONDENT

RULING

19th May, & 14th June, 2022

ISMAIL, J.

The applicant, an aggrieved party in the decision in the second appeal, has resolved to institute an appeal to the Court of Appeal of Tanzania. The subject of the impending appeal is the decision of this Court (Hon. Mwaseba, J) in Matrimonial Appeal No. 50 of 2021. In the said proceedings, the concurrent decisions of the lower courts were quashed and set aside, owing to the fact that extent of contribution of the parties towards the acquisition of the matrimonial assets was not evident. The reversed decisions ordered

that that the matrimonial assets be shared at the 60%:40% proportion between the appellant and the respondent. In the decision sought to be impugned and in respect of which a certification is sought, the Court ordered that valuation of the assets be done afresh after which the same should be shared equally.

The application, preferred under the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019; and Rule 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009 (as amended) is supported by an affidavit affirmed by the applicant himself. It sets out grounds on which the certification is sought. Paragraph 6 of the affidavit is what the applicant considers to be intended grounds of appeal from which a point of law may be extracted. These grounds challenge the propriety of the Court to hold in the respondent's favour, while the trial court failed to adhere to the rules governing admissibility of exhibits, and amidst the respondent's admission that the documents were not properly admitted by the trial court.

The respondent is valiantly opposed to the application. In the counter-affidavit sworn by the respondent herself, the intended appeal has been castigated as having no prospects of success. Christened as a waste of

resource and an attempt to subvert her rights, the respondent argued that rules of evidence on admissibility of documents were observed.

Disposal of the application took the form of written submissions.

In his submission, Mr. Godon Waduma, learned counsel for the applicant, considerably dwelt on the merit of the intended appeal by giving out details of the areas he considers to be the basis for the applicant's discontentment. The gravamen of the complaint has been packaged in two main issues which he intends that they should constitute the grounds of the intended appeal. These are:

- 1. Whether the High Court was proper to hold in favour of the respondent while the trial court failed to adhere to the rules of admitting exhibits; and*
- 2. Whether the High Court was proper for the High Court Judge to hold in favour of the respondent despite her admission that the documents were not properly admitted by the trial court.*

The applicant's view on the first issue was emboldened by the decision of the Court of Appeal of Tanzania in ***M/S SDV Transami (T) Ltd v. M/S***

STE DATCO, CAT-Civil Appeal No. 16 of 2011 (unreported), in which need for proper admission of exhibits was underscored.

Overall, the applicant's counsel was convinced that an irregularity exists and it calls for certification in order to set the ground for the applicant's quest for the appeal to the Court of Appeal.

The respondent has taken a divergent view on this. While contending that certification of a point of law is entirely in the discretion of the Court, she held the view that the applicant has failed to extract a satisfactory explanation for his inordinateness in applying for leave to file an appeal to the Court of Appeal.

On the raised flaws, the respondent's contention is that rules of procedure for admission of documentary evidence were followed, and that the Court analyzed the lower courts' decision before arriving at the finding that the applicant is opposed to. The respondent took the view that grounds adduced are not sufficient to move the Court to certify that there is a point of law.

The pertinent question for determination is whether the instant application has what it takes to succeed.

The settled position is that matters that trace their origin in the primary courts can only find their way to the Court of Appeal upon the Court's certification that there is a point of law worth of and relevant for consideration by the upper Bench. This is gathered from the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act (AJA), Cap. 141 R.E. 2019.

The imperative requirement in the cited provision has been highlighted in a multitude of court decisions. These include: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rubingwa v. Paulo Lazaro***, CAT-Civil Application No. 1 Of 2008; and ***Harban Haji Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997 (both unreported).

In ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported), the Court of Appeal of Tanzania held as follows:

"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."

It is worth of a note that the foregoing decision was an emphasis to what the upper Bench pronounced itself on, in ***Marco Kimiri & Another v. Naishoki Eliau Kimiri***, CAT-Civil Appeal No. 39 of 2012 (ARS-unreported), in which it was remarked:

"Section 5 (2) (c) of the Appellate Jurisdiction Act governs a certificate that a point of law is involved in an appeal under the Magistrates' Court Act, Cap. 11 R.E. 2002 originating from a primary court."

In the instant application, the consternation by the applicant resides in the contention that rules of evidence were flouted. He takes the view that the Court ought not to have cast a blind eye on this. The respondent feels that this is not good enough a ground for taking this matter to the Court of Appeal. I am constrained to agree with the respondent. The points raised by way of proposed grounds of appeal are factual issues which do not constitute points of law, let alone the fact that they are not of any serious magnitude to warrant escalation to the Court of Appeal. Issues surrounding the adequacy of evaluation of evidence or lack thereof, and whether the exhibit was regularly admitted are, in my considered view, issues which were

adequately covered by this Court. They do not deserve any further attention by a higher Bench.

It is my considered view that a case has not been made out for moving the Court to issue a certificate on the point of law in respect of the intended appeal.

Consequently, this application fails the test and it is hereby dismissed. No order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of June, 2022.



M.K. ISMAIL
JUDGE

