

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 633 OF 2021

ABUBAKARY MOSHI MAKANDO APPLICANT

VERSUS

AISHA ABDUL SHEBE RESPONDENT

(Arising from Civil Appeal No. 85 of 2021)

RULING

8th and 30th June, 2022

KISANYA, J.:

This Court is moved to exercise the powers conferred to it under section 5(1)(c) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2019] (the AJA) and rule 45(a) of the Court of Appeal Rules, 2009 [R.E. 2019] and to grant the applicant leave to appeal to the Court of Appeal. The decision subject to this application was delivered by this Court (Laltaika, J.) on 30th November, 2021 in Civil Appeal No. 85 of 2021.

The sequence of events leading to this application can be summarized as follows: The applicant is the respondent's husband. He petitioned for separation at the District Court of Ilala. Upon being served the respondent lodged a cross-petition in which she prayed for divorce, custody of children, division of

matrimonial property and maintenance order. As the appellant withdrew his petition for separation, the cross-petition was heard. At the end of the trial, the cross petition was struck out on the reasons that it was accompanied by a defective certificate of the Marriage Conciliation Board.

Unamused, the appellant unsuccessfully appealed to this Court. His appeal was dismissed, and the decision of the trial court upheld. Indenting to appeal to the Court of Appeal the applicant filed the present application.

Upon the prayer made by the parties, this matter was heard by way of written submissions.

The appellant prefaced his submission by referring me to section 5(1)(c) of the AJA and rule 45(a) of the Court of Appeal Rules, R.E. 2019 which enables this Court to determine this matter. He also prayed to adopt his affidavit in support of the application to form part of his submission.

The appellant went on to submit that the parties referred the matrimonial dispute to the Marriage Conciliation Board which certified that it had failed to reconcile them. He therefore faulted this Court to order the parties to refer the matter to the Board. He was of the view that the legal points to be considered by the Court of Appeal are:

- 1. Whether the High Court was justified in ordering the parties to firstly referring (sic) their matrimonial dispute or matter to the Marriage Conciliation Board whereas they had already referred the same before the said Board and the Board had certified to have failed to reconcile the parties as required by the law.*
- 2. Whether the High Court was justified in holding that the Trial Court could not proceed to compose its judgment despite the fact that both parties and their respective witnesses had adduced their evidences and conceded on the grant of the Decree of Divorce, thus causing miscarriage of justice to the parties.*
- 3. Whether the High Court was justified in holding that the Trial Court was correct in raising suo mottu the defect of the certificate issued by the Marriage Conciliation Board without availing the parties an opportunity to be heard, thus leading to breach of the principle of natural justice.*

The appellant urged me to be guided by the cases of **Yahaya Seleman Mralya vs Stephan Sijia and 2 Others**, Civil Appeal No. 316 of 2017, CAT at Dodoma, **Kibura Abdallah Yusuph vs Ibrahim Hussein Uhemba**, Misc. Land Application No. 577 of 2017 and **The Executive Secretary Wake and Trust Commission Mambomsiige vs Said Salum Amar** [1991] T.L.R. 198. He was of the view that it was in the interest of justice that this application be granted.

On her part, the respondent in the first place prayed to adopt her counter-affidavit to be read as part of her reply to the submission. She was of the view that this Court was right in upholding the trial court's decision which ordered the parties to refer the matter to the MCB. Further, the respondent submitted that the High Court was justified to uphold that the trial court's recourse of not composing the judgment on merit after noticing the defects on the certificate issued by the MCB. She went on contending that the principle of justice was not contravened. That said, the respondent invited this Court not to grant the leave to appeal to the Court of Appeal. In lieu thereof, she prayed that the matter be dismissed with costs.

Having considered the rival submissions advanced by the applicant and respondent, I find it appropriate to restate the settled position the role of this Court at this stage is to consider whether the proposed grounds raise arguable issues for further determination at appeal stage. [See the case of **Victoria Real Estate Development Limited vs Tanzania Investment Bank and Three Others**, Civil Application No. 225 of 2014 (unreported)].

It is also trite law that the grant of leave is not automatic and that it is granted upon the Court being satisfied that the proposed grounds raise arguable issues for the determination by the appellate court. There is a list of

authorities to support that position, including, the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported) in which the Court of Appeal held that:-

"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 will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: Buckle v Holmes (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

Being guided by the above position, the issue that arises is whether the grounds deposed in the supporting affidavit have issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.

Reading from the record, it is common ground that the petition for divorce and ancillary orders was struck out on the sole ground that the marriage certificate issued by the Marriage Conciliation Board was defective.

Pursuant to section 101 of the Law of the Law of Marriage Act [Cap. 27,

R.E. 2019], a petition for divorce cannot be filed in Court unless the petitioner has first referred the matrimonial dispute or matter to the Board and a certificate that the Board has failed to reconcile the parties issued.

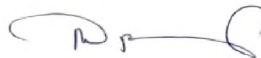
In this case, the parties referred their matrimonial dispute to the Marriage Conciliation Board. It was the findings of the trial court and this Court that the petition for divorce was filed when the Marriage Conciliation Board had not certified that it has failed to reconcile the parties. The record bears it out that the petition for divorce was filed on 16th July, 2019 while the certificate of the MCB was issued on 17th August, 2019. In that regard, it is clear that the petition for divorce was filed in contravention of section 101 LMA. Considering that the law is settled that any proceedings and decision made in contravention of the section 101 of MLA is a nullity, I am of the humble view that the proposed first and second grounds do not raise issues of general importance or a novel point of law.

As regards the third ground, the applicant contends that he was not accorded the right to be heard on the defect of the certificate of the Marriage Conciliation Board. I agree with him, right to be heard is enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Its violation renders the entire decision a nullity. It does not matter

whether similar position would have been made after hearing the parties. Apart from the case of **Yahaya Seleman Mralya** (supra), this position was stated in the case of **Mbeya Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251. Therefore, the ground that the applicant was not heard cannot be labelled as frivolous, vexatious or useless or hypothetical. I find it an arguable ground worth of consideration in the intended appeal.

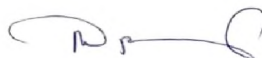
In event, this application is hereby allowed. Accordingly, the applicant is granted leave to appeal to the Court of Appeal. Given the nature of this case, I make no order as to costs.

DATED at DAR ES SALAAM this 30th day June, 2022.



S.E. Kisanya
JUDGE

COURT: Ruling delivered this 30th day of June, 2022 in the presence of the application and the respondent.



S.E. Kisanya
JUDGE

