

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION No. 13/2022

(Arising from Civil Appeal No. 143 of 2020 between Winjuka Godson Mangare Vrs

John J. Ottaru before Hon S. M. Kulita, J.)

WINJUKA GODSON MANGARE APPLICANT

VERSUS

JOHN J. OTTARU RESPONDENT

Last Order:28/04/2022

Ruling date:14/06/2022

RULING

MANGO, J

The Applicant, Winjuka Godson Mangare filed this application seeking for leave to appeal to the Court of Appeal of Tanzania against the Judgment and decree of this court in Civil Appeal No. 143/2020. The Application is by way of chamber summons made under section 5(1) (c) of the Appellate Jurisdiction Act, [Cap. 141 R. E 2019] supported by an affidavit to counter the contents of the counter affidavit sworn by the Applicant. The Respondent had no objection to the application although he filed a

counter affidavit to counter the contents of the affidavit filed by the Applicant.

The Applicant prayed to file a supplementary affidavit to add more facts that establishes merits of the application. Upon filing the supplementary affidavit and submission in support of the application, the Respondent contended that the Applicant added facts that need to be countered as they do not reflect the truth. He prayed to file a supplementary counter affidavit to counter the contents of the supplementary affidavit. The Court did not grant the Respondent's prayer to file a supplementary counter affidavit because he did not object the application, and the contents of the supplementary affidavit will be considered together with court record in the course of determining the application.

In principle, application for leave is not merely a procedure set to cause bureaucracy to parties before they have their matter determined by the highest court in this Jurisdiction. Applications of this nature are meant to act as a screening point to ensure only matters that have serious issues to be determined by the Court of Appeal are granted leave to be lodged before the Court of Appeal. Thus, the Applicant need to establish a serious issue that was not properly determined by the Trial Court and this Court

when it exercised its appellate jurisdiction before she is granted leave to approach the Court of Appeal.

According to the Applicant's affidavits and submission the issues upon which leave is sought for them to be determined by the Court of Appeal are as follows;

- (a) Whether it was proper for the High Court to hold in favour of the Respondent without evaluating evidence tendered before it.
- (b) Whether it was proper for the High Court for failure to weight evidence before the Trial Court that warrant the conclusion that the Applicant's marriage with the Respondent has broken down beyond repair.
- (c) Whether it was proper for the High Court to disregard the fact that the Applicant and the Respondent are living under separation for more than 3 years.

A thorough reading of the issues raised by the Applicant, reveals that the Applicant is of the view that, the trial Court and this Court did not evaluate properly evidenced tendered during trial. Such dissatisfaction of the Applicant is reflected clearly in first issue. The second and third issue also touch the issue of evaluation of evidence. The Applicant is of the view that, had the two courts evaluated evidence on record, they would have

found that the Applicant and the Respondent have been in separation for more than three years and the marriage between them has broken down irreparably.

Court record reveal that, the Court did properly evaluate evidence adduced by the parties in this matter as reflected in page 5 to 11 of the judgement of this Court in Civil Appeal No. 13 of 2022. The Court, after evaluation of evidence on each ground of Appeal found that, there is no evidence that marriage between the Applicant and the Respondent has broken down irreparably. According to section 107(1) and (2) of the Law of Marriage Act, [Cap 29 R.E.2019], the Court is supposed to consider all issues that may be regarded as evidence that the marriage has broken down irreparably. The section reads: -

'107. (1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular shall-

(a) unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrongdoing; and

(b) have regard to the custom of the community to which the parties belong.

(2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a

marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree-

(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest;

(b) sexual perversion on the part of the respondent;

(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;

(d) wilful neglect on the part of the respondent;

(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;

(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;

(g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;

(h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or

(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage.'

Evidence in court record does not establish existence of any of the matters mentioned in section 107(2). Court record establishes that, the

Applicant no longer wishes to continue with her relationship with the Respondent and she vacated their matrimonial home without the consent of the Respondent. The Applicant's act of vacating their matrimonial home cannot amount to voluntary separation under section 101(2)(f) of the Law of Marriage Act because, the Respondent has not consented to the alleged separation. The Applicant's act may be considered to be desertion which would have been a good ground for the Respondent to seek a decree of divorce and not the Applicant. In brief, the Applicant's petition for divorce based on her own wrongdoing.

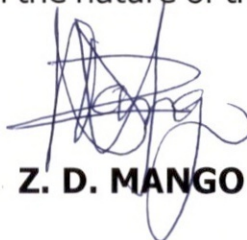
I am of a considered view that, a family being an important unit of the society need to be protected. The Law has set a number of conditions to protect marriages from being broken down for selfish reasons as reflected in section 107(1)(a) of the Law of Marriage Act. The married couples are also duty bound to protect their marriages for the benefits of their children and the society in general. Thus, before seeking for divorce or separation, couples need to consider welfare of the children who are mostly affected by divorce and separations.

Despite such observations, I find it to be prudent for this matter to be considered by the Court of Appeal because the Court has not issued any order to repair or annul the marriage between the Applicant and the

Respondent. The Respondent wishes to continue with his marital relationship with the Applicant while the Applicant no longer wishes to live with the Respondent as her husband. This is evident by the fact that the Applicant has already deserted her husband for more than 3 years. If no order is issued to repair or annul their marriage it will mean that, they are forced to live together as husband and wife which will be contrary to section 140 of the Law of Marriage Act which prohibits proceedings to compel cohabitation.

In addition to the dictates of section 140 of the Law of Marriage Act, it is very dangerous to leave such relationship hanging as the couple might seriously harm or even kill each other merely to seek freedom from a relationship they no longer wish to be attached to.

For that reason, I hereby grant leave for the Applicant to lodge her Appeal to the Court of Appeal. Given the nature of this application, I do not award costs.



Z. D. MANGO

JUDGE

14/06/2022