

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MOROGORO DISTRICT REGISTRY)
AT MOROGORO

MISC. CIVIL APPLICATION NO. 36 OF 2022

*(Arising from Matrimonial Appeal No. 03 of 2022, originating from Matrimonial Cause
No. 06 of 2021, District Court of Morogoro)*

LINA MALISA MAFWERE APPLICANT

VERSUS

BHAKILANA AUGUSTINE MAFWERE RESPONDENT

RULING

Last court order on: 29/09/2022

Ruling date on: 11/10/2022

NGWEMBE, J.

Lina Malisa Mafwere, has moved this court under Order XXXIX Rule 27 (1) (b) of **the Civil Procedure Code Cap 33 R.E. 2019** and Rule 38 of **The Law of Marriage (Matrimonial Proceedings) Rules, GN. No. 136 of 1971**, seeking leave of this court to produce additional evidence in Matrimonial Appeal No. 03 of 2022 pending in this court.

The application is accompanied by the applicant's affidavit. The contents of the affidavit include the need to produce evidences related to Plot No. 72 located at Mkundi in Morogoro Municipality. That the documents related to ownership and survey of that piece of land is under custody of Morogoro Municipal Director who refused to avail certified



documents to the applicant in respect to that piece of land. In the absence of those certified documents, the applicant alleged that the trial court rejected admissibility of uncertified photocopied of those documents.

The applicant further states that, unless this court grants her leave to adduce additional evidences, she will suffer loss of the maintenance and division of the jointly acquired property, while having no means of subsistence.

In turn the respondent resisted this application by filing a counter affidavit and denied basically all relevant facts.

Upon completion of pleadings and on the hearing date, both parties were represented by learned counsels. While the applicant was represented by learned advocate Bartalomew Tarimo, and the respondent had the legal services of advocate Jovin Manyama.

Advocate B. Tarimo address this court by submitting *inter alia* that, the applicant faced difficulties in obtaining documents from Morogoro Land Office to prove ownership of plots No. 608 – 682 Block "Y" which were jointly acquired by the parties during subsistence of their marriage.

He referred to a letter wrote by the applicant to the Land Office, and the corresponding reply denying to supply those documents. He prayed that this court has powers to order Municipal Officers to appear in court and produce original records in respect to those plots of land.

In turn advocate Jovin Manyama objected the application by referring this court to section 76 (1)(d) of the **Civil Procedure Code**, that the section allows this court to take additional evidence, but it is not

absolute. He cited the case of **Idrisa Hayeshi Vs. Emmanuel Elinami Makundi, Civil Application No. 113/08 of 2020** and other useful precedents. In general, the cited authorities required the applicant to demonstrate in clear terms, sufficient grounds upon which the court can exercise its discretionary powers to call additional evidence.

Further argued that the applicant has not demonstrated any relevant ground to allow this court to invoke its powers to accept additional evidences. Likewise, the applicant failed to prove her case at trial. The decision of the trial court was delivered on 21/04/2022, and the said letters to Municipal Offices were written on 20/06/2022 while the judgment was already delivered two months prior. Such letter had nothing useful to the case which judgement was already delivered.

The counsel for the respondent argued further that, the applicant was the one who instituted a case before the District Court, she therefore, ought to have all material facts including the alleged documents to prove her case. Mr. Manyama condemned this application to have aimed at filling gaps on appeal contrary to the spirit of law and justice. Rested by a prayer to dismiss it forthwith.

In rejoinder, Mr. Tarimo reiterated what he submitted in chief and insisted that, the land registry officers will be required to appear before this court and produce all necessary documents in respect to plots of land. Rested to the same prayer that the application be granted.

Considering the rival arguments by both counsels, I find the central issue for determination in this application is whether this application has merit both in law and in fact. In answering this question, let me recap on



the provisions cited to move this court to determine the application. The contents of Order XXXIX, Rule 27 of **CPC** is quoted hereunder: -

Rule 27. -(1) *"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if-*

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Court may allow such evidence or document to be produced, or the witness to be examined."

Basically, this provision prohibits production of new evidence at the appellate stage, except for two circumstances, *First* - where the court which passed the decree refused to admit the evidence, which it ought to be admitted. *Second* - when the appellate court requires any document to be produced or any witness be examined.

Rule 38 of **The Law of Marriage (Matrimonial Proceedings) Rules** provide application of Order XXXIX of CPC to Matrimonial Proceedings and minimizing confinement to technicalities of procedure and grounds, with the spirit of avoiding undue delay.

Relevant to the provisions above, the court has already developed a good number of principles in respect to the cited rules. The Court of Appeal in the case of **Ismail Rashid Vs. Mariam Msati, Civil Appeal**

No. 75 of 2005 (CAT - unreported), categorically narrated several rules of thumb to be followed prior to accepting additional documents on appeal. Those rules are: -

- 1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- 2) The evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive; and
- 3) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

To my understanding these preconditions must be fulfilled in total as per scenarios provided for in Rule 27, irrespective of whether the move is *suo motu* or by an application of either party to the suit.

Testing the factors alluded above with this application, I will first consider whether the evidence could not have been obtained with reasonable diligence for use during trial? Advocate Tarimo sought to prove diligence of her client by referring this court to the letters written in the correspondence between the applicant and Municipal Director. In the contrary, advocate Manyama discredited the same as above shown that no diligence was ever exercised by the applicant. Referring to those letters, the applicant wrote to the Director on 20/06/2022 and the reply was on 24/06/2022 just four days from the date the applicant wrote her letter. On the other side, it was not disputed that the decision appealed against was delivered on 21/04/2022. Logically and Mr. Manyama was correct in two aspects, first the letter to the Director Morogoro Municipality had nothing to do with the judgement which was delivered



on 21/4/2022. Even if same would be given had nothing to do with the dispute which was already decided and conclusively settled by the trial court. Second, the one who instituted the suit in court was the applicant herein, hence was duty bound to have all relevant evidences to support her case prior to instituting it in a court of law.

Considering more inquisitively on the trial court's ruling, it is evident that the applicant herein did not seek to tender any of the alleged documentary evidences subject to this application rather, she wanted to tender a photocopy of her own letter and the same referred to different plots of land, which according to the trial court's records were not relevant to the case. The mere fact that the applicant attempted to tender some documents without following the required procedure does not make this application pass the first test alluded above.

The evidence which the court may allow to be admitted on appeal is which the trial court *refused to admit, but ought to have been admitted*. In this case, the applicant never attempted to tender the said evidence during trial. It is not known why the applicant failed to seek those relevant documents before instituting her case. Above all, it is evident the applicant was represented by an advocate during trial.

I am settled in my mind, the cited provisions do not stand to protect the indolent to the detriment of procedural laws. The risk of giving room to a party to fill gaps on appeal in disguise of legal provisions must be avoided, otherwise it may prejudice the adverse party and compromise the interest of justice.

Considering the remaining tests, that is test 2 and 3 on the issues of whether the evidence would have an important influence on the result

of a case and its credibility by the nature of this matter, I am of the strong view that the applicant has not established a strong case for it. Conversant of the spirit enshrined under rule 38 of the **Matrimonial Proceeding Rules**, I am comfortable that technicality and delay may not be occasioned by the course about to be adopted. In respect to this application, I am satisfied, even if the trial court would have the avenue of accepting the said documents, if any, which were even not annexed in the pleadings before the trial court, yet the same would have not influenced the trial court's decision. In page 2 of the trial court's ruling is quoted hereunder: -

"If that be the relief, yet the plots mentioned on the intended exhibit documents reads 'OMBI LA KUMILIKISHA VIWANJA VYANGU NAMBA 608 – 682 KITALU 'Y' MKUNDI MANISPAA YA MOROGORO' The Petition for Divorce reads 72 plots (From Plot No. 618 – 687) situated at Block 'Y' Mkundi ward within Morogoro Municipality, these are two different plots. This is a clear indicator that the petition(er) is not conversant or she is not knowledgeable with the document"

I have formed a strong opinion that this court in hearing of the main appeal, can exercise its powers to take additional evidence depending on the circumstances after revealing other relevant facts under Order XXXIX Rule 27 (1)(b) and Section 76 (1) of CPC. Section 76 is relevant to be quoted hereunder: -

Section 76.- (1) *"Subject to such conditions and limitations as may be prescribed, the High Court in the exercise of its appellate jurisdiction shall have power to-*
(a) determine a case finally;



(b) remit a case for re-trial;

(c) frame issues and refer them for trial; or


(d) take additional evidence or to require such evidence to be taken"

Depending on the nature of the application, the applicant moved this court under Order XXXIX, Rule 27 (1)(a), of CPC, which is contrary to Section 76 (1) as quoted above. When need arise, additional evidence on appeal may be admitted under section 76 of CPC without seeking leave of this court under Order XXXIX Rule 27 (1) (a) of CPC.

In totality and for the reasons so stated, this application lacks merits same is dismissed forthwith. Owing to the fact that parties still have the main appeal pending in this court, it is just and equitable to order each party to bear his/her own costs.

I accordingly Order.

Dated at Morogoro on this 11th day of October, 2022.


P. J. NGWEMBE
JUDGE
11/10/2022

Court: Ruling delivered at Morogoro in Chambers on this 11th day of October, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of Ms. Leah Mwasa Advocate for Applicant and in the Absence for respondent.

SGD. HON. J.B. MANYAMA
AG/DEPUTY REGISTRAR
11/10/2022

