

**IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(MOROGORO DISTRICT REGISTRY)**

AT MOROGORO

MISC. CIVIL APPLICATION NO. 12 OF 2022

(Made under Section 5 (1) C and 5 (2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019, Rule 45 (a) of the Tanzania Court of Appeal Rules 2009 as amended)

BABUU SHIRIMA..... APPLICANT

VERSUS

NYAKASANGA MAFURU.....RESPONDENT

RULING

Hearing date on: 30/09/2022

Ruling date on: 24/10/2022

NGWEMBE, J:

The applicant Babuu Shirima is seeking leave of this court to appeal to the Court of Appeal against the judgement of this court delivered on 31 March, 2022. The applicant seems to be aggrieved with this court's judgement and decree, hence intends to exercise his constitutional right to appeal to the Court of Appeal. But that right is subject to grant of leave by this court as per section 5 (1)(c) and 5 (2) (c) of the Appellate Jurisdiction Act [CAP. 141 R.E. 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009. In turn the respondent resisted the application by filing counter affidavit.


According to the affidavit in support of the chamber summons, the applicant averred in paragraph four (4), four legal issues upon which he is seeking leave of this court to appeal to the Court of Appeal.

On the hearing date, the applicant appeared under the services of Mr. Adolf Temba learned advocate, while the respondent appeared in person.

In support of the application, Mr. Adolf Temba prayed to adopt his affidavit in support to the chamber summons and proceeded to argue on the issues of maintenance and distribution of matrimonial properties.

On maintenance he claimed that, the applicant was not given a right to be heard due to the fact that the issue of maintenance was raised on the second appeal before this court. He further added that the element of maintenance is provided for in section 44 of the Law of the Child Act and rule 84 of the Law of the Child Juvenile Court Procedure Rules. Maintenance being a new ground on appeal parties cannot adduce evidence on same, hence denied right to be heard.

Without going into merits of the matter, lest may prejudice the intended appeal, I find the issue of right to be heard is fundamental. The issue of right to be heard is both natural right and is constitutional right. When same is raised, the court should always be conscious to consider it with due care. However, the question is, at what particular time should that right be raised and on what subject matter? Principles of law prohibit parties from raising new issues on appellate level. Unless it is so fundamental, legal in nature and goes to the root of the matter itself, the appellate court may direct the right course.



In this application, right to be heard is fundamental but at what particular time hierarchy was raised? I leave it to be answered in due course.

On matrimonial properties Mr. Adolf Temba submitted that the decision of Primary Court has never been challenged as ground of appeal, but was raised in the high court and again the applicant was not heard. He referred this court to the case of **Prisca Vs. Madaraka, Civil Case No. 36 of 2021** at page 3. Lastly, he prayed that these two points of law satisfies the legal requirements to obtain leave of this court to appeal to the Court of Appeal. Hence the application be granted.

Perusing inquisitively on the records below and the records of this court, it is evident the issue of distribution of matrimonial properties were raised and determined by the trial court as well as the first appellate court and by this court sitting as second appellate court.

The Resident Magistrates' Court of Morogoro upheld the findings of the trial court, but the High Court varied that distribution. This may be, triggered the applicant to prefer his appeal by applying for leave of this court to appeal to the Court of Appeal.

In this application the applicant grieved that also on distribution he was not given the right to be heard, I disagree with him as the records speak otherwise. But the issue of distribution of matrimonial properties has got very wide interpretation and it largely depends on the evidences produced and the prevailing circumstances of each case. The applicant has still a chance for this issue to be determined by the Court of Appeal also.



In the case of Gabriel **Nimrod Kurwijila Vs. Theresia Hassan Malongo, Civil Appeal No. 102 of 2018** Justice Mziray JA held:-

"The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring for the matrimonial property"

The Court went further to cite the case of **Yesse Mrisho Vs. Sania Abdu Civil Appeal No. 147 of 2016** where the Court of Appeal held:-

"There is no doubt that a court, when determining such contribution must scrutinize the contribution or efforts of each party to the marriage in acquisition of the matrimonial assets"

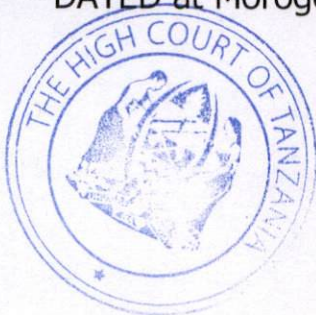
In turn, respondent strongly opposes the application. He submitted that the two grounds are not points of law, the applicant does not provide maintenance, the marriage was dissolved in 2020 but to date the applicant has failed to provide maintenance for the child. On matrimonial properties she submitted that division of primary court should be retained. She concluded that the need to appeal does not arise at all.

Despite the fact that the application is opposed, I refrain myself from discussing into details issues raised by the respondent for the obvious reasons that this court is not seating as an appellate court. I therefore, find the parties may have an opportunity to be heard by the Court of last instance in our jurisdiction.

In totality and for the reasons so stated, this application has merits same is granted, the issue of right to be held on the maintenance of the

child is relevant and capable of being heard by the Court of Appeal. Likewise, the issue of extent of contribution to the acquisition of the matrimonial properties is capable of being heard and decided by the Court of Appeal, leave is granted to the applicant to Appeal as prayed.

DATED at Morogoro this 24th day of October 2022.



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe", is written over a horizontal line.

P.J. NGWEMBE

JUDGE

24/10/2022

Court: Ruling delivered at Morogoro in Chambers on this 24th day of October, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of Ms. Esther Shoo, Advocate for the Applicant and in the presence of the Respondent person.

Right to appeal to the Court of Appeal explained.

SGD. HON. J.B. MANYAMA
AG/DEPUTY REGISTRAR

24/10/2022

