

IN HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

MISC. CIVIL APPLICATION NO. 56 OF 2021

(Arising from Misc. Civil Application No. 73/2020 and HC Civil Appeal No 19/2019)

ELIZABETH MWANGAAPPLICANT

VERSUS

AMOS N MWANGA RESPONDENT

RULING

14/12/2021 & 22/02/2022

KAMUZORA, J.

Elizabeth Mwanga, the applicant herein is seeking leave to appeal to the Court of Appeal against the judgment and decree of the High Court in Civil Appeal No. 19/2019. The Application was brought under the provision of section 5 (1)(c) of the Appellate Jurisdiction Act (Cap 141 RE 2019) and supported by the affidavit deposed by the applicant. The said section read: -

"5 (1), In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

The respondent did not appear or file counter affidavit to oppose the application hence the matter proceeded ex-parte against the respondent.

Briefly, the respondent instituted matrimonial cause No. 4/2018 before the District Court of Arusha (the trial court) petitioning for a decree of divorce, distribution of matrimonial properties and compensation to the tune of Tshs 13,440,000/= as rent arrears following the eviction done to the respondent from the matrimonial house. The trial court made a finding that, there existed no formal marriage between the parties and the presumption of marriage was rebutted thus no decree of divorce was issued but rather, the order of division of the house jointly acquired was issued at the rate of 65% to 35% to the appellant and respondent respectively.

Aggrieved by the decision of the trial court, both parties appealed to the High Court by filing an appeal and cross appeal registered to this court as Civil Appeal No 19/2019. Both the appeal and the cross appeal were dismissed for lack merit and the court upheld the decision of the trial court. After obtaining leave of this court to file an application for leave to appeal out of time, the applicant brought this application and supported it with the facts deponed in the affidavit.

Few facts that can be depicted from the affidavit are that there are matters of mixed law and facts which need to be dealt with by the Court of Appeal. Under paragraph 8 of the affidavit, the following were mentioned as matters of law and facts that need to be considered by the Court of Appeal: -

a) Whether the trial court and the appellate court had powers to determine and rule on the issue not framed or litigated by the parties.

b) Whether the trial court and the court and appellate court can shift a case for divorce to the presumption of marriage without giving the parties right to be heard and present their case.

Arguing in support of the application the counsel for the applicant, Mr. Wilson Moses Mafie submitted that, the applicant believes to have prima facie arguable grounds of appeal which raises the issues of general importance and novel point of law as it touches the jurisdiction of the court. That, as the applicant plead illegality and not being satisfied by the judgment issued by this court the only remedy is to appeal to the Court of Appeal of Tanzania. He urged this court to grant the application as it is the requirement of the law that leave be sought before appealing to the court of appeal. To cement the submission the counsel cited the case of **Restitute Frank Msongole vs. Michael Ngaya Shoo**, Misc. Land Application No 55 of 2020.

The main issue calling for the determination by this court is whether intended grounds are arguable grounds based on legal points worth granting leave to appeal to the Court of Appeal. This court is alive of the fact that leave to appeal is not automatic. It is within the discretion of the court to grant or not to grant and for this court to exercise its discretion it must be moved with sufficient reasons and or a point of law worth the consideration of the Court of Appeal. See the case of **British Broad Casting Corporation Vs. Erick Sikujua**

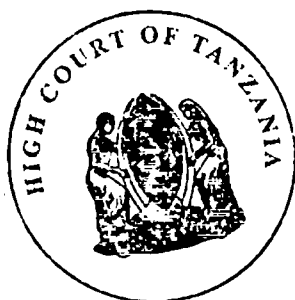
Ng'maryo, Civil Application No 138/2004 CAT at Dar es Salaam
(Unreported)


This court is also aware that in an application of this nature, it is not expected for this court to determine the merit of the ground of appeal. The court have to confine itself to the determination of whether the proposed grounds raise an arguable issue before the court of Appeal in an event leave is granted. In the current application, upon reading the chamber application, affidavit in support of application and the submission by the applicant's counsel, I am satisfied that there are arguable grounds on both facts and law. The two points raised by the applicant are centred on the illegalities and right to be heard. I find that the same needs the attention of the Court of Appeal.

Application for leave to appeal to the Court of Appeal is hereby granted. The applicant is given 45 days within which to file his appeal to the Court of Appeal. I make no order as to costs.

Order accordingly.

Dated at Arusha this 22nd day of February 2022




D.C. KAMUZORA,
JUDGE.