

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 412 OF 2021

(Arising From Civil Appeal No 253 of 2020 at Temeke District Court)

ANASTAZIA MASIRORI MWITA.....APPLICANT

VERSUS

FRANCIS MATIKU MANGIRA.....RESPONDENT

7/12/2021 & 14/1/2022

RULING

N.R. MWASEBA, J.

The applicant, Anastazia Masirori Mwita, has brought this application under **Order XXXIX Rule 27 (1) (b) of the Civil Procedure Code** Cap 33 R.E. 2019 seeking for an order to allow her to file additional evidence in the pending civil appeal No 253 of 2021.

The application is accompanied by an affidavit sworn by the applicant. It is pleaded in that matter that her husband complains among other

things that he was not aware that their first two children were not of his blood.

However, the applicant says in the early days of their relationship with the respondent she personally informed him that the first two children were not his.

The applicant states that, she has now found new important documents which will assist the court in making just decision as to when the respondent became aware that the first two children are not his and thus grant or refuse the respondent's application for extension of time to file petition for annulment of marriage.

Before this court the applicant was represented by Mr Mfinanga learned counsel while the respondent appeared in person. The application was disposed of orally.

In her submission, the learned counsel for the applicant prayed to adopt the affidavit of the applicant. He further argues that when the matter was determined at the district court the applicant did not have those documents. He thus avers that the main dispute here is on the issue of parentage of the two issues that the respondent was not aware that they are not of his blood until he was served with the petition for

divorce. So, the applicant desires to tender among other documents the respondent's diary of 1985. The diary reads on 26/6/1985 that:

"Kasuku ameniambia kuwa ana mimba nachukia, ananisihi nimsamehe, ananiahidi kuwa maishani hatanikosea."

He says that the said diary will prove that the respondent knew that his wife had another relationship and he accepted.

In his reply, the respondent objected the application to file additional documents to be granted due to the fact that the cited provision allows only where the court has directed for extra evidence to be tendered and not a party to apply.

He further avers that the additional evidence they are praying to tender were not tendered before the district court, therefore one cannot claim that they were denied. So, he says this is a new fact and he prays that the application be dismissed and his appeal be determined.

In his rejoinder the counsel for the appellant reiterated what he submitted in chief. He says what is required in these applications is to show sufficient cause as to why you want to bring additional evidence. So, he prays that their application be granted.

After having the submissions from both sides, the issue is whether this application has merit.

Before going further, I wish to quote the provision that this application has been made that is **Order XXXIX RULE 27 of Civil Procedure Code**, (Supra) which states as hereunder:

(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 appeal stage except for two scenarios. The first scenario is where the court which passed the decree which is subject for an appeal refused to

admit the evidence which ought to be admitted. Unfortunately, this is not the case in the current application. In fact, it is revealed from the submission of the counsel for the applicant that when the matter was determined at the district court the applicant did not have those documents. Likewise, the applicant never asked the court to tender those documents. Thus, they cannot fall under the first scenario.


The second scenario is when the court requires any document to be produced or any witness to be examined. In the case at hand, it is not the wish of this court to inquire additional evidence. Therefore, I concur with the respondent that this application has no merit and should be dismissed.

The upshot of this application is that it has no merit and therefore I dismiss it. Due to the nature of the case, each party shall bare their own costs.

It is so ordered.

DATED at DAR ES SALAAM this 14th day of January, 2022.




N.R. MWASEBA
JUDGE

14/01/2022