

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTIRICT REGISTRY OF MUSOMA
AT MUSOMA**

PC Misc. CIVIL APPLCATION No. 34 OF 2021

(Arising from the High Court (Musoma District Registry) in PC Matrimonial Appeal Case No. 10 of 2020; District Court of Bunda at Bunda in Matrimonial Appeal Case No. 1 of 2020 & Originating from Bunda Urban Primary Court in Matrimonial Cause No. 72 of 2018)

GARENDE NYABANGE APPLICANT

Versus

NYANZARA NYABANGE RESPONDENT

RULING

02.03.2022 & 02.03.2022

F.H. Mtulya, J.:

An appeal was registered in this court and determined to its finality in **PC Matrimonial Appeal Case No. 2020** (the appeal) between husband and wife, Mr. Garende Nyabange and Nyanzara Kiharata respectively. After full hearing of the appeal, this court upheld the decision of the **District Court of Bunda at Bunda** (the district court) in **Matrimonial Appeal No. 1 of 2020** originating from **Bunda Urban Primary Court** (the primary court) in **Matrimonial Cause No. 72 of 2018** (the case). Finally this court dismissed the appeal in its entirety without cost, as the contest is in matrimonial dispute.

The reasoning of this court is displayed at page 8 of the decision is that the second appellate court cannot interface the

findings of two (2) lower courts in judicial hierarchy unless there are good reasons. The decision of this court dissatisfied the appellant and wishes to put the decision into scrutiny to our superior court of the land, the Court of Appeal. Following his grievances the appellant instructed Mr. Deya Paul Outa, learned counsel to draft an application and register in this court praying for access to the Court of Appeal.

Being aware of the law enacted under section 5 (2) (c) of the **Appellate Jurisdiction Act** [Cap. 141 R.E. 2019] and Rule 46 (1) of the **Court of Appeal Rules**, 2009 (as amended in 2019), Mr. Outa preferred an application for certification on point of law in **PC Misc. Civil Application No. 34 of 2021** (the application) and registered sixteen (16) complaints to be checked in this court for leave to appeal to the Court of Appeal.

The application was scheduled for hearing today afternoon. However, Mr. Outa declined to submit all sixteen (16) grounds hence decided to argue only three (3) grounds to persuade this court to decide in favour of the applicant. When Mr. Outa was invited to submit on the grounds, he briefly cited paragraph 5 (i), 5 (vii) and 5(x) of his affidavit duly sworn by him on 28th June 2021.

In brief, Mr. Outa submitted that the parties live at Nyangere village within Bunda District of Mara Region and the dispute arose at Nyangere area within the jurisdiction of Ikizu Primary Court and the parties had previously filed **Matrimonial Cause No. 1 of 2017** at **Ikizu Primary Court**, but the case was struck out, and were ordered to follow the law regulating matrimonial disputes. However, the respondent filed another matrimonial dispute at the primary court in the case, out of geographical territory of the cause of action.

With the second reason in support of the application, Mr. Outa submitted that the judgment of the primary court in the case shows that the parties were denied opportunity to cross examine witnesses Wambura Garende, which is contrary to the law and finally Mr. Outa complained on proper application of the law in Rule 46 (3) of the **Primary Courts (Civil Procedure) Rules, GN. No. 310 of 1964**, contending that witnesses were not asked of their facts after registration on record so that they can reply on correctness of their facts.

Replying the submission of Mr. Outa, the respondent stated that the dispute started at Nyamswa, but was advised to go Nyamang'ute Ward Reconciliation Board, after the decision of Ikizu Primary Court. According to the respondent she went at Ikizu

Primary Court, but was advised by the Ikizu learned magistrate to file the case at Bunda Urban Primary court, hence she cannot be blamed for the court.

With regard to cross examination of Wambura Garende, the respondent stated that she did not appear in the Primary Court at Bunda as witness, but a child who came to testify on abuses against the respondent, and finally she contended that the magistrate in the case at primary court asked them on correctness of their evidence.

I have perused the record of this application. It is fortunate that the first reason was not protested by the parties, and I found the record supports the submission. The dispute was initiated at Bunda Primary Court. The question whether it was filed in a wrong registry or different court out of territorial jurisdiction of the dispute will be determined by our superior court. I leave the reply to the question to the Court of Appeal.

I understand the complaint on the decision of the primary court to contain a statement of the learned magistrate who sat and decided the case mentioning Wambura Garende at page 7 of the judgment. However, the record is silent or does not reflect the name of such person. The question whether mentioning of Wambura Garende in the judgment was proper or not is not in the jurisdiction

of this court to hold. I leave the same to the appropriate forum, the Court of Appeal.

The final complaint is related to an issue on jurisdiction of this court to determine a question which was raised at the district court, but the district court declined to reply. As I said, the complaint or this nature cannot be determined at this court as this court has completed its work. The issue whether this court as the second appellate court can decide on a matter which was left untouched by the district court, will be resolved by our superior court, the Court of Appeal.

The only role of this court is just to check whether there is any point of law which may invite an interpretation of the Court of Appeal. In the present application, there are three complaints on point of law which cannot be resolved in this court. The practice in applications, like the present one, shows that disputes of this nature may be granted leave to access the court of record, the Court of Appeal, to put the record of courts proper.

I am moved to allow the parties to access our superior court and hereby grant the application without costs. The applicant may wish to access the Court of Appeal in accordance with the laws regulating appeals from this court to Court of Appeal. I award no

costs because the dispute is matrimonial and the contest is still on the course.

Ordered accordingly.



F. H. Mtulya

Judge

02.03.2022

This Ruling was delivered in Chambers under the seal of this court in the presence of the applicant, Mr. Garende Nyabange and his learned counsel Mr. Deya Paul Outa and in the presence of the respondent, Nyanzara Kiharata.



F.H. Mtulya

Judge

02.03.2022