

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL REFERENCE NO 8 OF 2021**

**[Arising from Civil PC Civil Appeal No 4 of 2021, originating from the decision of the District Court of Mkuranga in Civil Appeal No 3 of 2020]**

**BETWEEN**

**HALIMA SAIDI KAZUWA.....APPLICANT**

**Versus**

**SAID SELEMAN NGALUNDA.....RESPONDENT**

**RULING**

**MRUMA, J.**

The Reference before the Court is dated 20<sup>th</sup> September, 2021 and was lodged on 6<sup>th</sup> September 2021. It seeks this Court to find that the claim presented in PC Civil Appeal No.4 of 2021 which arose from the decision of the District Court of Mkuranga in Civil Appeal No 3 of 2020 was not justified.

In her oral submission to this court it is the Applicant's case that she has come before me to claim for inclusion of one plot which she considers to be part of matrimonial property and which she listed in her petition but was not considered in the division of the properties jointly acquired.

On his part, the Respondent contended that the properties the Applicant wants to be included in the jointly acquired properties are his own properties which were acquired before the couple started to live together. He said that the Applicant didn't contribute anything towards their acquisition.

Regarding the reference made to this court the applicant submits that, it moved the Court for reference because she was dissatisfied with the decision made by this court in PC Civil Appeal No. 4 of 2021.

On the basis of the pleadings and submissions by the parties herein, I consider that two issues merit my determination; these are;

*(i) Whether the application is properly before the court; and*

*(ii) Whether the question raised in the Reference is a question that can be litigated before this very court;*

As stated hereinbefore this application is pegged under Section 77 of the Civil Procedure Code [Cap 33 R.E. 2019]. The said law provides that:

"Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High court and the High court may make such order thereon as it thinks fit"

From the wordings of the above quoted provisions of the law, I have no doubt that the court envisaged by the law is not the high court because high court cannot refer the case to itself. For reference to qualify for the High court's opinion it must fall within the four corners of Section 77 of the Civil Procedure Code. It must be matter arising in case which is before a

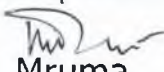
court subordinate to the High court. High court is not subordinate to itself therefore it cannot make any order in respect of a matter which arises from its own decision except by way of review made under Section 78 of the Civil Procedure Code.

It was therefore erroneous for the Applicant to bring this reference for purposes of requesting this court to revise its own orders. Secondly, it is not in doubt that the subject matter of this Reference revolves around the *issue of* division of matrimonial property. The Respondent was dissatisfied by the decision of the Primary Court which gave him 30% (percent) and the Appellant 70% (percent) of what it considered to be matrimonial property. The Respondent herein was aggrieved and he successfully appealed to this court (Rwizile J), which reversed the decision of the District appellate court and ordered a 50% share in the matrimonial property per spouse. The Appellant seem to have been aggrieved by that order and hence this reference. The term reference is defined in Black's Law Dictionary to mean "refer to". In other words reference is a legal process in which a party who is discontented with a decision of a lower court to refer the matter to the higher court for corrections.

In the case at hand the Applicant was dissatisfied with the order of this court (Rwizile J), which reduced shares in the division of matrimonial property from 70 to 50. This is a matter that squarely concerns Court of Appeal. Thus instead of applying for reference, the Applicant ought to have appealed to the Court of Appeal because this Court is functus officio in that the subject-matter of the Reference is similar to the issues raised and determined by itself in PC Civil Appeal No. 4 of 2021. Having perused the

pleadings/proceedings in PC Civil Appeal No 4 of 2021, and the resultant Judgment by this Court (*Rwizile, J.*) delivered on 27<sup>th</sup> July 2021, it is clear to me that the main issue in the appeal was whether the division of matrimonial property in the ration of 70% to the present Appellant and 30 to the present Respondent was justifiable. The Reference before me raises the same issue. I find that the issue raised in the Reference is substantially similar to the determined by this Court (Rwizile J) in PC Civil Appeal No. 4of 2021. The issue, having been so determined, cannot be resuscitated at the same court guise of reference. Any party aggrieved by the decision of the High Court, can only challenge the same, by way of an appeal to the Court of Appeal.

Having so found, I have no hesitation in declaring this Reference for opinion of the High Court, incompetent and an abuse of the process of Court. The same cannot therefore escape an Order for dismissal.

  
A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 28<sup>th</sup> Day of March 2022.