

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 48 OF 2022

AMRI YAHAYA MFIKILWA APPLICANT

VERSUS

FATMA MOHAMED NAMPEMBE RESPONDENT

**(From the decision of this Court (Hon. Mwaseba, J) dated
6th January, 2022 in PC Civil Appeal No. 104 of 2021)**

RULING

4th and 25th March, 2022

KISANYA, J.:

This Court is invited to certify the point(s) of law worth of consideration by the Court of Appeal in the intended appeal against its decision in PC Civil Appeal No. 104 of 2021. In terms of that decision, the applicant's appeal against the decision of the District Court of Kinondoni in Civil Appeal No. 106 of 2020 was dismissed for want of merit. It is noteworthy that the matter originated from the matrimonial proceedings lodged in the Primary Court of Kimara in Matrimonial Cause No. 126 of 2020.

The application is made under section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the AJA) and is supported by the affidavits of the applicant and his counsel one Geoffrey Luyanji.

When served with the application, the respondent did not file a counter-affidavit to contest the same.

During the hearing of this application, the applicant was advocated by Godfrey Ambeti and Mr. Geoffrey Luyanji, learned advocates, while the respondent fended for herself, unrepresented.

At the very outset, the respondent informed the Court she had not lodged a counter-affidavit because she was not contesting the application.

In the course of hearing this application, I implored the parties to address the Court on the competency of this application, specifically in view of the fact that the intended appeal to the Court of Appeal is against the decision of this Court in the exercise of its appellate jurisdiction in the matrimonial proceedings.

Mr. Ambeti submitted that the application is preferred under section 5(2) of the AJA. As far as the issue raised by the Court is concerned, Mr.

Luyanji contended that an appeal originating from the primary court cannot be filed to the Court of Appeal unless this Court certifies that there is a point of law to be determined in the intended appeal. Therefore, the learned counsel held the view that the application is competent. The respondent being a lay person had nothing to submit on the issue whether the application was competent before the Court.

Having heard the parties, I am now in a position of addressing the foresaid issue. It is common ground that the decision sought to be challenged originated from the Primary Court of Kimara in Matrimonial Cause No. 126 of 2020. I agree with Mr. Luyanji that, in terms of section 5(2) (c) of the AJA, it is a legal requirement that any appeal from the decision of this Court in the matter originating from the primary court can only be determined by the Court of Appeal upon this Court certifying that a point of law is involved.

However, an appeal against the decision of this Court in the exercise of its appellate jurisdiction in a matrimonial proceeding is governed by section 80(4) of the Law of Marriage Act, Cap. 29, R.E. 2019 (the LMA) which stipulates:-

"Any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal therefrom to the Court of Appeal on any ground of law or mixed law and fact."

Reading from the above provision, it is clear that an appeal to the Court of Appeal against the decision of this High Court in the matrimonial proceeding may be on a ground of law or both law and fact. This implies that it is not a requirement to seek and obtain a certificate on a point of law before lodging an appeal against the decision of this Court in the exercise of its appellate jurisdiction in matrimonial proceedings. See the case of **Modesta Namkunga vs Francis Joseph Mushi**, Misc. Civil Application No. 7 of 2020, HCT at Songea (unreported) in which this Court (Moshi, J) arrived at a similar position by holding as follows:-

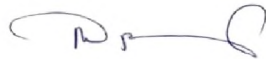
"Therefore the applicant can directly appeal to the Court of Appeal without having obtained a certificate on point law any ground being of law or mixed law and facts."

The above position was founded on the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurjwila vs Theresia Malongo**, Civil Appeal No. 102 of 2016 (unreported) where it was held that:-

"...,we hesitantly agree with the respondent learned counsel that a certificate on a point of law in matrimonial proceedings is not a requirement of law as envisaged under section 80(4) of the LMA..."

In the light of the foregoing, I hold the view that the application is incompetent. It is, accordingly, struck out with no order as to costs due to the nature of this case.

DATED at DAR ES SALAAM this 25th day of March, 2022.



S.E. Kisanya
JUDGE