

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE-STOP JUDICIAL CENTRE)
AT TEMEKE**

MISC. CIVIL APPLICATION NO. 41 OF 2022

**EVARIST ELIAS LEKULE.....APPLICANT
VERSUS
ANA PETER YAE.....RESPONDENT**

(Arising from the decision of this court)

(Mugeta J)

Dated 21st July 2022

in

Civil Appeal No. 10 of 2022

RULING

Rwizile, J.

The application is for leave to appeal to the Court of Appeal of Tanzania against the decision of this court. This application is supported by an affidavit of Evarist Elias Lekule, the applicant. It is preferred under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141, R.E 2019]

The facts behind this case can be stated that the parties were married. After some years in their happy marriage, a divorce case on grounds of cruelty was filed.

The trial court ruled that the marriage was irreparably broken down, a decree of divorce was issued and their matrimonial assets were equally divided. However, the applicant was not satisfied with the decision of the trial court. He appealed to this court. This court only varied the order for the division, but otherwise dismissed the appeal. The applicant was not happy and therefore intends to appeal to the Court.

On 14th March 2023, oral arguments were heard from both parties. Submitting in support of the application, Mr. Frank Marko learned counsel, argued that, this court was not justified to hold that marriage was irreparably broken down when in fact there was no evidence proving so. At yet another point, the learned counsel held the view that shares in the matrimonial assets awarded to the applicant were not fair as the respondent was given three houses out of five.

The applicant was given a house in the village of Kilimanjaro and a place for the shop. In his view, his contribution warranted a bigger share since the respondent was a housewife and there was no evidence to prove the awarded share. To support his assertion, he cited the case of **British Broadcasting Corporation v Erick Sikujua Ng'maryo**, Civil Case No. 138 of 2004, Court of Appeal of Tanzania, page 7.

In reply, the respondent who enjoyed the services of MS Joyce Kabula learned counsel, stated that leave should not be granted as the applicant has no chance of succeeding. It was her argument that this Court analysed, re-evaluated evidence, and held in accordance with the weight of evidence.

In the rejoinder, the counsel for the applicant briefly submitted that the decision of this court is not legal or logical. He added; the evidence was not evaluated properly, so he asked this court to grant this application.

As a matter of principle, leave to appeal to the Court can be granted when the applicant raises and proves contentious issues and of general importance. It was held in the case of **Ramadhani Mnyanga v Abdallah Salehe** (1996) TLR 74, that;

"...for leave to appeal to be granted, the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of the appeal."

The applicant by his affidavit supporting the application averred the court erred in dissolving the marriage because there was no sufficient evidence to suggest so. In his view, the marriage was not irreparably broken down. As a consequence of annulment, he added, the trial court had the justification in awarding the division of the matrimonial properties. His assertion was clear that division was not based on the extent of contribution towards the acquisition of the property done by the parties.

As intimated before, section 5(1)(c) of the Appellate Jurisdiction Act, governs the issuance of leave to appeal to the Court of Appeal. Rule 46(1) of the Tanzania Court of Appeal Rules, GN 344 of 2019 states;

Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged.

By the foregoing dictates of the law, it is a mandatory requirement to file a notice of appeal before an application for leave can be preferred. In this matter, it was the duty of the applicant to manifest that the notice of appeal was lodged before applying for leave. This is important because the law is coached in mandatory terms. The applicant stated in his submission that a document was attached to prove a notice of appeal was lodged. In **Godwin Ndewesi Karoli Ishengoma v Tanzania Audit Corporation (1995)** TLR 200, it was held that Rules are made to be followed and rules of the court must prima facie be obeyed. It was the duty of the applicant to prove the notice was filed first before this application was been preferred.

Having said that, I find this application prematurely filed. Let the party follow the required procedure. This application, therefore, is hereby struck out. No order as to costs.




A.K. Rwizile
JUDGE
28.04. 2023

Date: 2/6/2023

Coram: Hon M. B. Mpaze, DR

Applicant: Mwanaisha Ally for

Respondent: Present in Person

C/C : Mohammed

Mwanaisha Advocate for the Applicant: The matter was coming for the Ruling we are ready.

Respondent: I am as well ready for the Ruling.

COURT: Ruling is hereby delivered in the presence of Mwanaisha Ally for the Applicant and Respondent in person.


M. B. MPAZE

DEPUTY REGISTRAR

2/6/2023