

**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. 548 OF 2022

IGNATUS MAZIKU LUBYAGILA APPLICANT

VERSUS

ZAWADI IBRAHIM SINDA.....RESPONDENT

(Arising from the decision of this Court in Civil Appeal No. 345 of 2021)

RULING

25th July & 22nd August, 2023

KISANYA, J.:

This application is predicated under section 5(1)(c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 and Rule 45 of the Court of Appeal Rules, 2009 as amended (now R.E. 2019). The applicant is seeking leave to appeal to the Court of Appeal. The decision subject to this application was handed down by this Court (Mgonya, J, as she then was) in Civil Appeal No. 345 of 2021. Supporting the application is an affidavit sworn by the applicant, Ignatus Maziku Lubyagila.

At the hearing of this matter, the applicant was represented by Mr. Mussa Kiobya, learned advocate, while the respondent was represented by Mr.

David Pongolela, also learned advocate. With leave of the Court, the matter was disposed of by way of written submissions.

In his submission, Mr. Kiobya started by pointing out that the decision against which it is desired to appeal against originates from Kinondoni District Court. In that regard, he argued that the law requires that this Court has to satisfy itself that there is a point of law worth for consideration by the Court of appeal. The learned counsel further submitted that factors to be considered in determining an application of this nature have been developed by case law. Making reference to the case of **Safari Mazembe vs Juma Fundisha**, Civil Application No. 503/06 of 2021 (unreported) and **Nurbhai N. Rattansi vs Ministry of Water Construction, Energy Land and Environment & Another** [2005] T.L.R 220, he submitted that for leave to be granted, the Court has to be satisfied that the grounds of the intended appeal raise arguable issue(s) for consideration.

It was his further argument that, at this stage, the Court is to confine itself to the determination of whether the proposed grounds raise arguable issues before the Court of Appeal. He was of the firm view that the issues deposed in the supporting affidavit require an intervention of the Court of Appeal. The learned counsel further contended that the said issues are pure

points of law worthy to be determined in the intended appeal to the Court of Appeal.

Replying, Mr. Pongolela submitted that the powers of this Court to grant leave to appeal to the Court of Appeal are discretionary and that the same must be exercised judiciously. To buttress his argument, he cited the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported). In view of that position, he submitted that this Court is duty bound to scrutinize the material before it and satisfy itself as to whether the applicant has established sufficient reasons worthy of intervention by the Court of Appeal. He was in agreement with the applicant's counsel that, leave to appeal is granted where there is an arguable issue for determination, or where the intended appeal raises issue of general importance or novel point, a prima facie or arguable appeal and that, the grounds are not frivolous, vexatious, useless or hypothetical.

As regards the issues or grounds deposed in paragraph 7(a), (b), and (c) of the supporting affidavit, Mr. Pongolela, contended that there are not points of law. According to him, the deposed grounds are just an elaboration of grievances which the applicant has suffered without indicating any disturbing features worth of the Court of appeal precious time. This Court was

referred to the case of **Charles Kombe vs Kinondoni Municipal Council**, Misc. Civil Application No. 90/2017 (unreported).

Mr. Pongolela went on submitting that, the Court of Appeal being the second appellate Court is barred from disturbing the concurrent findings of facts of the two lower courts save for exceptional reasons. He pointed out that this Court and the trial court arrived at a concurrent finding on the issues of presumption of marriage, respondent's contribution to the matrimonial property (landed property KND/KWE/KUK12/126 Ukwamani Street Kawe Kinondoni Municipality) and maintenance of three issues. That being the case, he was of the view that the ground of appeal deposed in paragraph 7(a),(b) and (c) of the supporting applicant's affidavit will not disturb the concurrent findings of the two lower courts. In conclusion, he submitted that the applicant had failed to establish or rather meet the prescribed conditions for leave to appeal to the Court of Appeal and thus, prayed for this application to be dismissed with costs.

I have considered the affidavits, counter affidavit, arguments of both parties. The main issue for determination is whether the application is meritorious.

At the outset, it is essential to restate here that the law does not state the factors to be taken in determining an application for leave to appeal. The said factors have been developed by case law as held in the case of **COWI Consult (T) and 2 others v. Pius Kuhangaika and others**, High Court Civil Revision No. 8 of 2004, at Dar es Salaam (unreported).

It is also important to restate the position of law that the court has discretion to grant or refuse leave to appeal. For leave to appeal to be granted, the Court must be satisfied that the intended ground of appeal raises issue of general importance or novel point of law or a prima facie or arguable appeal. On the hand, leave not be granted where the grounds of appeal are found to be frivolous, vexatious or useless or hypothetical. The foregoing position has been stated in a number of cases including, **British Broadcasting Corporation** (supra) and **Rugatina CL vs The Advocates Committees and Mtindo Ngalapa**, Civil Application 98 of (2010) [2011] TZCA 143 (18: February 2011). I will be guided by that position of law.

As rightly observed by both counsel this application is based on the following grounds deposed in paragraph 7(a), (b) and (c) of the supporting affidavit: **One**, the issue of rebuttable presumption of marriage between the applicant and the respondent not pleaded in the petition for divorce, framed

during trial and supported by the testimonies. **Two**, the respondent was not entitled to share in the landed property designated as KND/KWE/KUK12/126 located at Ukwamani Street at Kawe, Kinondoni Municipality. This ground is based on the contention that the two courts did not consider the extent of the respondent's contribution and the fact that the said landed property was owned jointly by the applicant and his father Severino Lubyagila. **Three**, whether this Court was justified to order that the applicant to pay TZS 600,000/= as for maintenance of three issues of marriage without considering the ability of the applicant and other factors.

It is my considered view that the said intended grounds of appeal raise points of law. They also give rise to the issues of importance namely, whether the decision was based on the pleadings, issued framed and evidence adduced by the parties; whether the said landed property was a matrimonial property and whether the respondent's extent of contribution towards its acquisition was considered; and whether the ability of the applicant was taken into account before making an order for maintenance.

Mr. Pongolela urged me to hold that the Court of Appeal cannot disturb the concurrent findings of this Court and the trial court on the proposed grounds of appeal. With due respect to the learned counsel, it is settled

position that, at leave stage, the court must confine itself to the determination whether the proposed grounds raise an arguable issue(s) before the Court of Appeal. This Court has no mandate to determine the merits or otherwise of such proposed. [See the case of **The Regional Manager-TAN ROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported)].

For the foresaid reasons, I find no reason to deny the application. I hereby grant leave for the applicant to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No. 345 of 2021. This being a matrimonial matter, I make no order as to costs.

DATED at DAR ES SALAAM this 22nd day of August, 2023.



S.E. KISANYA
JUDGE
22/08/2023