

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. CIVIL APPLICATION NO. 52 OF 2023

(Originating from Civil Appeal No 31 of 2022 at Temeke High Court One Stop Centre)

ABUNERY ELIBARIKI SAIDIA-----APPLICANT

VERSUS

NINA NIMWESIGA RUTAKYAMIRWA-----RESPONDENT

RULING

Last Order date: 27.10.2023

Ruling Date: 10.11.2023

M. MNYUKWA, J.

The applicant filed this application for leave to appeal to the Court of Appeal by way of a chamber summons made under Section 5(1) of the Appellate Jurisdiction Act, Cap. 141[R.E 2019] and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 accompanied by his affidavit. The applicant prays this court to grant leave to lodge an appeal to the Court of Appeal against the decision of this Court dated 29.11.2023. During the hearing, the applicant was represented by Ms. Martha Mohamed, learned advocate while Mr. Deogratius Alex Butawantemi, learned counsel appeared for respondent.



Submitting first, Ms. Martha Mohamed for the applicant prays the court to adopt applicant's affidavit to form part of their submissions. She went on that, the applicant is applying for leave to appeal to the Court of Appeal against the decision which was decided against his favour. She went on to explain the intended grounds of appeal as stated by paragraph 7 (a) to (c) of the applicant's affidavit. Referring paragraph 7(a) of the applicant's affidavit, she stated that, this court erred to uphold that, birth of the child outside of a valid wedlock is the evidence to prove adultery. She also submitted that, on paragraph 7 (b) of the affidavit, the applicant complained about the findings of the first appellate court which upheld the decision of the trial court that the house at Mbweni which is built on plot No 621 Block B is the property of the respondent and not a matrimonial property. She added that, the same findings was done in respect of a motor vehicle in which the applicant alleged that the same was acquired during the subsistence of the marriage of the parties, hence a matrimonial property. She thus prayed leave to be granted.

Responding to the applicant's submissions, Mr. Butawantemi prayed this court to adopt the counter affidavit of the respondent to form part of his submissions. He strongly objected the applicant to be granted leave to appeal to the Court of Appeal He remarked that, leave is not automatic

as it is subject for this Court to see if there are arguable grounds of appeal before the Court of Appeal. He said that, on accusation for adultery, the applicant admitted to have a child outside of the valid wedlock. He went on that on the house situated at Mbweni and a motor vehicle in question, there is no evidence which shows that the applicant contributed to their acquisition. He therefore prayed leave not to be granted. Rejoining, Ms. Martha Mohamed reiterates what she had submitted in chief.

After hearing the submissions of both parties, the main issue for consideration and determination is whether there is arguable issues that need attention and determination by the Court of Appeal for this Court to grant leave.

It is the settled position of the law that, for the court to consider an application for leave to appeal to the Court of Appeal, there must be arguable issues on fact or law to be determined. It is also settled that grant of leave to appeal to the Court of Appeal is a discretionary power of this court. The law on this point is very clear on what should the court consider before granting leave to appeal to the Court of Appeal. As it stands, the decision which is intended to be appealed against was made by this court and my duty here is not to go to the merit of the decision and state my opinions but rather to state only if there are arguable issues.

In the determination of this application, this court is mandated to see if the intended appeal is arguable or not. This court lacks jurisdiction to go into merit or deficient of the judgment. In the case of **Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Application No. 154 of 2016, the Court of Appeal observed that;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is, for this reason, the Court brushed away the requirement to show that the appeal stands better chance of success as a factor to be considered for grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

Besides, in the case of **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012, the Court of Appeal of Tanzania as quoted with approval in the case of **Jireys Nestory Mutalemwa** (supra) it was pointed out that;

"It is now a settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard."

Guided by the above decisions, it is upon this Court to scrutinize the grounds advanced by the applicant and exercise judiciously the discretion to grant or refuse to grant leave to appeal to the Court of Appeal. I have perused the applicant's affidavit specifically in paragraph 7 (a) - (c) and observed that there are both, matters of law and facts worth for determination by the Court of Appeal.

For the foregoing reasons, an application for leave to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No 31 of 2022 is hereby granted. No orders as to costs since parties were spouses.

It is so ordered.




M. MNYUKWA

JUDGE

10/11/2023

Court: Ruling delivered on the 10th day of November 2023 in the presence of the parties' counsels.


M. MNYUKWA

JUDGE

10/11/2023