

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. CIVIL APPLICATION NO. 43 OF 2022

*(Arising from Matrimonial Appeal No. 05 of 2022 High Court of Tanzania at Bukoba Originating from
Matrimonial Cause No. 01 of 2021 District Court of Karagwe)*

ADELINDA @ ADERIDA BESINGIZA..... APPLICANT

VERSUS

BERENADO RUMUELEILE..... RESPONDENT

RULING

15th and 17th February, 2023

BANZI, J.:

Before the District Court of Karagwe, the Applicant petitioned for divorce, division of matrimonial assets, custody of the last issue of marriage and maintenance of both the petitioner and children. After receiving the evidence of both parties, the trial court disallowed the petition by refusing to grant divorce for want of evidence to prove that, the marriage between parties has broken down irreparably. This decision did not impress the Applicant and she decided to appeal before the High Court but the same was dismissed for want of merit. Still aggrieved, the Applicant lodged the notice of appeal to the Court of Appeal of Tanzania and as required by law, she preferred this application under section 5 (1) (c) of the Appellate Jurisdiction

Act [Cap. 141 R.E. 2019] seeking leave to appeal to the Court of Appeal against the decision of the High Court. The application is supported by an affidavit of the Applicant. The Respondent opposed the application by filing counter affidavit.

At the hearing, the Applicant enjoyed the services of Mr. Ibrahim Mswadick, learned counsel whereas, Mr. Samwel Angelo, learned counsel appeared for the Respondent.

Mr. Mswadick began his submission by adopting the affidavit of the Applicant. He further mentioned four grounds upon which they are intending to argue before the Court of Appeal, thus;

- I. That, the Honourable Court erred in law for failure to rule out that beating to the appellant/Applicant by the Respondent amounted to cruelty and was a genuine ground to grand (sic) divorce to the parties.*
- II. That, the Honourable Court erred in law for failure to hold that the act of the Respondent to have love relationship with one Ester Zawadi Tibika till they get a child out of the celebrated Christian marriage between the Appellant and*

the Respondent which in fact was typically adultery, it was a genuine reason to grant divorce between the parties.

III. That, the Honourable Court erred in law and fact for failure to rule out that, the act of the Respondent in failure to consummate in marriage between the parties amounted to divorce as the Respondent could not perform the act in which the marriage intended thereto.

IV. That, the Honourable Court erred in law and fact for failure to order divorce between the parties and lastly to order division of matrimonial assets acquired in joint efforts and order maintenance of the issues they were blessed in their celebrated Christian marriage.

He further submitted that, although the evidence adduced by the Applicant at the trial established cruelty, adultery and desertion but neither the trial court nor the High Court did consider the same in order to arrive into conclusion that, the marriage between the Applicant and the Respondent has broken down irreparably. Instead of granting the divorce, both courts forced the parties to remain in the broken marriage. He added that, like in the matter at hand, once there is evidence to establish that the marriage has broken down irreparably, the only remedy available is to grant

divorce as it was stated in the case of **Valence Shayo v. Jackline Wilson Kimaro**, Matrimonial Appeal No. 21 of 2020 HC at Moshi (unreported). In that regard, he prayed that application be granted with costs by granting leave so that they can seek intervention of the Court of Appeal.

In his reply Mr. Angelo urged the Court not to grant the sought leave because the Applicant did not mention any error committed by the High Court. He added that, at the trial court, no evidence was brought by the Applicant to prove adultery, cruelty and desertion. The Applicant was supposed to bring evidence to prove her allegations as stated in the case of **Lamshore Limited and Another v. Bizanje K.U.D.K.** [1999] TLR 330, but she failed to discharge that duty. In that view, it was not the duty of the court to grant divorce without evidence proving that, the marriage between the Applicant and the Respondent has broken down irreparably. Thus, he prayed that this application be dismissed but as to costs, since it is matrimonial matter, he prayed for each party to bear its own costs.

In his short rejoinder Mr. Mswadick insisted that, the High Court did not consider allegations raised by the Applicant which were proved through the testimony of the Applicant and her witnesses who testified before the trial court. Therefore, he prayed for the application to be granted.

Having carefully considered the Court record, affidavit, counter affidavit and submissions by both parties, the main issue for determination is whether the present application raises arguable issue(s) warranting judicial determination by the Court of Appeal.

It is a settled principle that, in any application for leave, the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard. This was stated in the case of **The Regional Manager TANROADS Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported). In another case of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 CAT (unreported) it was held 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 chances of success as a factor to be considered for the grant of

leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

It is apparent from the extract above that, in granting leave, we are confined to determine whether the Applicant has presented an arguable issue to be considered in the appeal and not to determine whether the intended appeal stands better chances of success.

Reverting to the matter at hand, looking closely at chamber summons, affidavit and the submission of Mr. Mswadick, the Applicant is challenging the judgment of the trial court and High Court for not considering the evidence adduced by the Applicant which proved adultery, cruelty and desertion before refusing to grant the divorce sought. It was also his argument that, it was not proper for both courts to force the Applicant and the Respondent to stay in the marriage while there was clear proof that the same has broken down beyond repair. On the other hand, it was the contention of learned counsel for the Respondent that, the Applicant has failed to establish existence of cruelty, adultery and desertion which are the only ground towards proving broken down of marriage beyond repair. Looking closely at the rival submissions, it is apparent that, the parties are arguing on misapprehension of evidence by the two courts. For that reason,

there is arguable issue for judicial consideration by the Court of Appeal. The question on the substance or propriety of that issue, is a matter to be considered and adjudicated by the Court of Appeal in the appeal.

Thus, I grant the application by granting leave to the Applicant to appeal to the Court of Appeal so that the merits or otherwise of the aforesaid issue(s) shall be considered. This being a family matter, I grant no orders as to costs.



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I. K. BANZI
JUDGE
17/02/2023

Delivered this 17th day of February, 2023 in the presence of Mr. Ibrahim Mswadick, learned counsel for the Applicant who is also holding brief of Mr. Samwel Angelo, learned counsel for the Respondent.



A handwritten signature in blue ink, appearing to be "I. K. Banzi".

I. K. BANZI
JUDGE
17/02/2023