IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO.17 OF 2022

(Originating from Civil Appeal No.14 of 2019)

ASUMINI MOHAMED MKIWA.....APPLICANT

VERSUS

MZEE ISSA ATHUMANI.....1ST RESPONDENT

ALLY ISMAIL NAMKONO.....2ND RESPONDENT

RULING

20/10/2022 & 25/10/2022

LALTAIKA, J.:

The applicant, **ASUMINI MOHAMED MKIWA** is praying for this court to grant her leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Mtwara in PC Civil Appeal No.14 of 2019 delivered on 08/5/2020 by Hon. P.J. Ngwembe, J. The applicant is moving this court under Rules 45(a) and 47 of the Tanzania Court of Appeal Rules,2009 GN No.38 and section 5(1)(c)(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019]. The application is supported by the affidavit affirmed by the applicant. Needless to say, that the application is vehemently resisted by a joint counter affidavit deponed by Mr. **Rainery Songea**, learned advocate for the respondents.

When this matter was called on for hearing the applicant was being represented by Mr. Saulo Kusakala, learned Advocate while the respondents enjoyed the legal services of Mr. Issa Chiputula, learned Advocate.

When hearing commenced, Mr. Kusakala submitted that the application id for leave to appeal to the Court of Appeal made under Rule 45 and 47 of the Court of Appeal Rules, G.N. No.358 and section 5(1)(c)(2)(c) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019].The learned counsel submitted that the grounds for the application are (a)whether the marriage between the late Mohamed Mkiwa and the applicant's mother one Mwanafaza Hamidu was not recognized by Tanzania laws,(b)Whether the reason for the 2nd appellate court not to consider appellant's exhibit tendered and admitted before the PC was correct,(c) whether the SM3,SM4 and SM5 evidence is hearsay,(d) whether it was proper for the second appellate court to dismiss the appeal based on the issue of scientific evidence of DNA raised during composition of judgment and (e) whether the best principle required in the standard of proof of civil cases was properly considered and applied before the determination of appeal. The learned counsel stressed that the above grounds are crucial to be determined by the court of appeal hence he prayed this court to grant the application.

In response, Mr. Chiputula objected the application and contended that the applicant has failed to show the legal grounds on points of law in convincing this court in granting leave to appeal to the Court of Appeal. Furthermore, the learned counsel prayed to adopt the joint affidavit of the respondents and form part of his submission. The learned counsel submitted that the decision to grant or deny leave to appeal to the Court of Appeal is a discretion of this court. He stressed that such discretion must be based on the law and facts. The learned counsel contended that since the matter originate from the primary court, the law requires that

only points of law must be indicated to enable the application to be granted.

Mr. Chiputula stressed that it the duty of the applicant to adduce those legal grounds. To that end, the learned counsel contended that the applicant has failed to adduce the grounds. Furthermore, the learned counsel submitted that to enable this court to grant leave, it must consider (i) point of law (ii) whether there was an arguable case at the appeal level and (iii) whether there are chances of success of the appeal. To this end, the learned counsel submitted that those grounds were discussed in the case of **Kahitira Masinde Bwire v Godfrey Mtei Assenga**, Misc. Land Case Application No.469 of 2020 HTC Dar & **Mwita Chacha Gasaya vs Abdallah Rashid Mtumbo**, Misc. Land Application No.4 of 2019 HCT LD, Dar.The learned counsel submitted that at page 5 of the Kahitira's case this court explained the prima facie case and explained that the reason for prompting that a point of law be established originates from the Court of Appeal in the case of **Saidi Ramadhani Mnyanga vs. Abdallah Salehe** [1996] TLR HCT, Dar used the case to explain that the same is to spare the court with unmerited matter and enable it to give adequate attention to cases of true public importance.

It is Mr. Chiputula's submission that the conditions are to ensure that the court is not weighed down by cases without merit. Thus, the learned counsel contended that the applicant wants to ask the Court of Appeal whether the marriage between the late Mkiwa and the mother of the applicant Mwanafaza Hamidu was not recognized by Tanzanian laws. The learned advocate submitted that reading through the facts of lower courts, it is clearly indicated that SM2 (Mwanafaza) was secretly married to the late Mohamed Hamisi Mkiwa. Mr. Chiputula submitted that the

applicant want to ask the Court of Appeal whether a secrete marriage is recognized in Tanzania. The learned counsel opined that the question is not worth of the Court of Appeal. In addition, the learned counsel stressed that the Law of Marriage Act [Cap.29 R.E. 2019] provides for the types of marriages in Tanzania. The learned counsel stressed that one of the conditions for a valid marriage is that the marriage must be conducted in public place. The learned counsel added that the law provides that there must be a certificate of marriage and a celebration which are provided under section 28 of the Law of Marriage Act. Mr. Chiputula contended that since the SM2 asserted that she conducted Islamic marriage secretly, the law at section 30(1) and (3) provides for the procedure of conducting the same. To this end, he stressed that there is no secrete marriage.

Submitting on the second ground, the learned counsel contended that the learned counsel for the applicant has not mentioned the exhibit. Mr. Chiputula argued that it is a clinic card which was a copy and not an original. The learned advocate went on and stressed that the facts indicates that the applicant was born in Mwanza but surprisingly the card was issued in Mtwara. The learned counsel submitted that according to the law governing the lower court namely The Magistrates Court Act (Rules of Evidence in Primary Court) Regulations and other authorities, documents must be original. Furthermore, the learned counsel submitted that since the document was a copy and not original and since this court had stated so at page 4 of its judgment which he believed to be sufficient legal reasons for refusal.

Moreover, Mr. Chiputula went further to submit on the third ground that the evidence of the witnesses was hearsay because of lack of deceased affidavit or any other explanation makes the evidence of the

witnesses' hearsay. To this end, the learned counsel submitted that it lacks merit because there is no secret marriage in law.

Submitting on the fourth ground, the learned counsel submitted that the only evidence that can prove parentage was DNA which is a scientific proof. Mr. Chiputula submitted that lack of DNA evidence makes the applicant unable to prove relationship and the court was justified to deny the leave. The learned counsel went on and submitted that court resort to scientific evidence where it is not vested with knowledge of such a technical matter. To this end, the learned counsel contended that the applicant was the one who alleged, he was supposed to prove the same.

Regarding the fifth ground, Mr. Chiputula submitted that the position of the law that he who alleges must prove as per section 110 and 111 of the Evidence Act. The learned counsel contended that the applicant failed to prove that she is the biological daughter of the deceased. The learned counsel went further and argued that the evidence of the applicant and her mother to prove that the applicant was a daughter of the deceased. To this end, Mr. Chiputula argued that the court was justified and this court's hands are tied by the Constitution. The learned counsel submitted that there is also a principle that litigation must come to an end.

In response, Mr. Kusakala contended that they are not arguing the appeal. The learned counsel went on submitted that the learned counsel has cited section 25 of the Law of Marriage Act on how marriages are conducted section 25(1)(b). The learned counsel submitted that the Islamic Law (Reinstatement) Act 9(4) according to Shia School the presence of witnesses is not necessary nor is it necessary for the marriage

to be known. The learned counsel insisted that it is important to bring this to the attention of Court of Appeal.

Submitting on the clinic card, Mr. Kusakala contended that the same was never denied and referred this court to page 4 of the typed proceedings of the trial court (PC Mtwara Urban Primary Court). The learned counsel stressed that it is not true that the card was rejected. Furthermore, on where the child was born. The learned counsel submitted that the court indicated that the argument needed to be addressed by an expert witness (second appellate court can nullify admission of a crucial exhibits).

It is Mr. Kusakala's submission that the proof of the child is not necessarily DNA and to that effect the learned counsel contended that section 3 of the Law of the Child Act provides that the term parent means, biological, adoptive and any other person under whose care the child has been committed. He further submitted that it is argued that the applicant was raised by the deceased. Regarding the assertion that he who alleges must prove, the learned counsel agreed but he contended that to what extent. More so, the learned counsel submitted that the applicant had tendered many things including certificates. To this end, Mr. Kusakala submitted that the counsel for the respondents is the one who is prolong things which can force them to go the Court of Appeal twice. Lastly, he prayed this court to grant the application.

Having keenly considered the application and submissions of both parties. At the outset, I would stress that what Mr. Chiputula has made an extensive submission on the grounds raised by the applicant which will be determined by the Court of Appeal if leave will be granted. Indeed,

what Mr. Chiputula has done is construed as interfering the jurisdiction of the Court of Appeal. What should be known to both learned counsel is that points of law on the raised grounds should be seen on the face of record. This means that, it does not entail a party or his representative to make strong and extensive argument in order to show the point of law or a matter of public importance. Looking at the face of the grounds appearing under paragraph 9(a-e) of the affidavit of the applicant and covered in the submission by the applicants' counsel suffices this court to find it if the parties have raised a matter point of law or public importance or there is prospect of succeeding at the appeal.

At this juncture, I would like stress that determination of points of law depends also on the availability of facts from the adduced evidence. See, **Hassan Marua v. Tanzania Cigarette Company ltd,** Civil Application No. 338/01 of 2019 CAT Dar es Salaam where the Court stated that; "Points of law do not exist in vacuum". Furthermore, a point of law cannot exist in isolation with the facts. However, my emphasis is that a point of law and the like are supposed to easily seen by our eyes and not to be tasked to find it. Based on the above observation, I hereby find the arguments by the respondents' counsel has infringed the way how a point of law or issue of public importance is to be founded by this court. Based on that observation, I find the extensive arguments made by Mr. Chiputula are devoid of merit hence, are dismissed.

Now, I am inclined, at this juncture, to determine whether the applicant has raised matters of point of law or the matter is fit for determination by the Court of Appeal as elaborated in the case of **Nurbhain Ruttansi vs Ministry of Water Construction, Energy and Environment** (supra). Also, it is trite law that leave may be granted

where there is a point of law, or the intended appeal stands a good chance of success or there is a point of public importance to be determined by the Court of Appeal. See, **Rugatina C.L vs The Advocates Committee and Mtindo Ngalapa**, (supra), the Court elaborated that: -

> *"Leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matter and enable it to give adequate attention to cases of true public importance"*

Also, the same principle was articulated in the case **British Broadcasting Corporation vs Eric Sikujua Ngámaryo**(supra) thus: -

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must however, be judiciously exercised on the materials before the Court. As a matter of general importance, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel of law or where the grounds show prima facie or arguable appeal."*

In the light of the afore said principles governing grant of leave to appeal to the Court of Appeal, I am now obliged to determine whether the applicant has advanced good reasons for this court to grant her leave to appeal to the Court of Appeal. I have curiously and with great diligence gone through the reasons advanced by the applicant in pursuing her application. In the light of the above authorities and in conjunction with the grounds advanced by the applicant as seen in his submission and paragraph 9(a-e) of the affirmed affidavit of the applicant. Based on the reasons advanced by the applicants and the position of law stated above, the reasons/grounds pinpointed have shown prima facie or an arguable appeal or raises matters on point of law which needs intervention of the Court of Appeal. For instance, the first ground which needs the Court of Appeal to determine the issue of whether the marriage between the late

Mohamed s/o Hamisi Mkiwa and the Applicant's mother one Mwanafaza Hamidu was not recognized by Tanzania laws. In addition, whether it was proper for the appellate court to dismiss the appeal based on the issue of scientific evidence of DNA raised during composition of judgment.

From the foregoing, I hereby allow the application with no order as to costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA

JUDGE

25.10.2022

This Ruling is delivered under my hand and the seal of this Court on this 25th day of October,2022 in the presence of Mr. Issa Chiputula, learned Advocate for the respondents.

THE HIGH COURT OF TANZANIA

E. I. LALTAIKA

JUDGE

25.10.2022