IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 55 OF 2022
(C/f High Court of Tanzania at Arusha, Misc. Civil Application No. 56 of 2020, Originating from the Resident Magistrates' Court of Arusha, Matrimonial Cause No. 2 of 2011)

DEOGRATIUS STEPHEN ..... APPELLANT

Versus

ANNA APAIKUNDA ..... RESPONDENT

JUDGMENT

10th August & 7th October 2022

Masara, J.

The Appellant herein preferred this appeal aiming to have the ruling of the Resident Magistrates' Court of Arusha (henceforth "the trial court") delivered in the favour of the Respondent herein on 31/05/2019 overturned. The Appeal is premised on the following grounds:

a) *That, the trial court erred in law in issuing the execution order while the court was not having jurisdiction or did not note that the decree and judgment was not executable; and*
b) *That, the trial court erred in law not consider (sic) of finds (sic) that the Appellant was already (sic) paid the decretal amount subject to the appeal vide the evidence presented before the trial court.*

At the hearing of the appeal, the Appellant was represented by Mr Edmund Ngemela, learned advocate, while the Respondent was

represented by Mr Elibariki Maeda, learned advocate. By consent of the Court, the appeal was disposed of through filing of written submissions.

For better appreciation of the appeal, it is appropriate to recount facts antecedent thereof, albeit briefly. They are as follows: The Respondent petitioned for a divorce in the trial court vide Matrimonial Cause No. 2 of 2011. She also prayed for other orders; including the division of matrimonial assets, custody of their child, an order for maintenance of the child at the tune of TZS 200,000/= per month, medical and school fees of the child and costs.

On the basis of the evidence adduced, the trial court found that there was no proof that parties herein were married as alleged. It also held that the presumption of marriage was not proved. Hence, the trial court declined to grant an order of divorce and did not make a distribution of matrimonial assets. However, on the basis of evidence, the trial court had no hesitation in holding that the two were parents of a single child, Hopeman Deogratius. As Hopeman was considered to be very young, his custody was vested on Respondent. The Appellant was ordered to pay TZS 100,000/= monthly as maintenance of the child. He was equally ordered to provide medical treatment and payment of school fees. According to the records, there were several attempts by the Appellant to appeal

against that decision, but for unknown reasons he did not appeal despite being granted extension of time to do so.

Incidentally, the Appellant did not abide by the decision of the trial court. On 15/01/2019, the Respondent approached the trial court seeking to execute the order for maintenance, which remained unpaid for 78 months, as at that time. The Appellant was summoned to show cause as to why execution should not issue. In his submissions before the trial court, the Appellant stated that he did not pay maintenance because he had agreed with the Respondent to take the child to an English Medium School, and the Respondent compromised the TZS 100,000/= as part of her contribution to the child's educational expenses. That contention was strongly disputed by the Respondent through her advocate. After hearing both parties, the trial magistrate granted the execution. The Appellant was ordered to pay the decreed amount of TZS 7,800,000/= within two months. The trial court further directed that if the Appellant failed to pay the decreed amount, an attachment and sale of the Appellant's shop located at Mbuguni be made so as to satisfy the decretal amount.

Two months went by, but still the Appellant did not satisfy the court order. On 19/09/2019, counsel for the Respondent went back to the trial court complaining that the Appellant had not paid the decretal amount. Further,

that he had even stopped paying school fees for the child. The trial court ordered the attachment of the Appellant's shop and proclamation orders to issue forthwith. A court broker was appointed to execute the orders. The record reveals further that on 14/01/2019, the Appellant filed Misc. Civil Application No. 3 of 2019, moving the trial court to grant him custody of the child. In its ruling of 31/05/2019, the application was dismissed for want of merits. The Appellant, undaunted, filed Misc. Civil Application No. 56 of 2020 before this Court, seeking extension of time to appeal against the impugned ruling. The Appellant was granted extension of time, hence this appeal.

Submitting in support of the first ground of appeal, Mr Ngemela stated that the trial court had no jurisdiction to entertain the matter before it after finding that there was no marriage between the parties. That, maintenance of a child born outside marriage ought to be dealt with under the Child Act, No. 21 of 2009. He intimated that, in terms of section 97(1) of the said Act, there are established Juvenile Courts to deal with all affairs of the child born outside marriage including custody and maintenance. According to him, Matrimonial Cause No. 2 of 2011 was instituted in 2011, three years after the Child Act was enacted and became operational. Since this is a point of law touching jurisdiction of the court, it was Mr Ngemera's

contention that it can be raised at any stage of the proceedings, including the appeal stage.

Regarding the second ground of appeal, which was preferred as an alternative to the first one, Mr Ngemela submitted that, according to the evidence adduced at the hearing of the execution application, the Appellant was maintaining the child by paying school fees in a boarding school. He maintained that the Appellant and Respondent had an agreement to compromise the decreed amount as part of the Respondent's contribution to the child's education. It was his argument that the Respondent came to court after the Appellant decided to legally marry another woman.

In rebuttal, Mr Maeda raised in his reply submission three points of preliminary objection challenging the competence of the appeal. The first objection is on the failure by the Appellant to attach in the appeal a copy of the drawn order, contrary to Order XL Rule 2 read together with Order XXXIX of the Civil Procedure Code, Cap. 33 [R.E 2019] (hereinafter "the CPC"). The second one is that the appeal contravenes Rule 37(1) of the Law of Marriage (Matrimonial proceedings) Rules, which requires appeals originating from subordinate courts to be lodged through a memorandum

of appeal, filed in the subordinate court which rendered the decision appealed against.

The last objection is that the decision appealed against was not an appealable decision. Mr Maeda maintained that an execution order is not amongst appealable orders listed under section 74(1) read together with Order XL Rule 1 of the CPC. To reinforce his contention, Mr. Maeda relied on the decision of **Felister Kifulugha vs Royal Mwalupembe, Misc. Land Appeal No. 28 of 2019** (unreported). He therefore implored this Court to strike out the appeal for being incompetent.

In the alternative to the preliminary points, Mr. Maeda, while submitting against the first ground of appeal, contended that the trial court had jurisdiction to entertain the matter before it as it had powers to issue custody and maintenance of the child. He also asked the Court to be cautious since the Appellant having not appealed against the decree in Matrimonial Cause No. 2 of 2011, should not be allowed at this stage to challenge the same through an appeal against the execution order.

Responding on the second ground of appeal, the learned advocate averred that the allegation that there was waiver of the decreed TZS 100,000/= per month, to be accommodated in the school fees for the child, was an afterthought. He submitted that the Respondent did not

have such an agreement with the Appellant. It was his further submission that the said child is now studying at Mbuguni, after he was expelled from the original school due to failure by the Appellant to pay school fees for him. He added that, to date, it is the Respondent who is paying for the child's school fees and providing all basic needs for him. He concluded by praying for dismissal of the appeal for being incompetent and for lack of merit.

Before embarking on the substantive part of the appeal, it is trite that I first address the preliminary objections raised by Mr Maeda in his submissions. Notably, the preliminary objections were raised by Mr Maeda in the reply submission. The Appellant's counsel had an opportunity to respond to the raised preliminary objections in the rejoinder submission, but opted not to as no such rejoinder submission was filed.

The first point of objection relates to failure by the Appellant to annex the order appealed against. Although Mr Maeda has not cited any provision of the law offended by that failure, it is my view that, being a point of law, it has to be dealt with. The law is clear that an appeal to this Court must be preferred in a memorandum of appeal accompanied by a decree or order extracted from the impugned judgment or ruling. Order XXXIX Rule 1(1) of the CPC provides:

"Every appeal shall be preferred in the form of a ***memorandum*** *signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the* ***memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded."*** (Emphasis added)

That position has been reaffirmed by this Court in numerous decisions, including **MIC Tanzania Limited vs Hamis Mwinjuma & 2 Others**, **Civil Appeal No. 64 of 2016** and **Paul Charles Mhere vs Felistas James Mhingwa, Probate Appeal No. 36 of 2020** (both unreported).

In **Paul Charles Mhere** (supra), it was observed:

"These two rules, simple (sic) means an aggrieved party against court Ruling must file in court Memorandum of Appeal accompanied with drawn order because a drawn order is extracted from a court ruling. ***To attach drawn order in any appeal against order is mandatory as rightly provided for in the rule itself."*** (Emphasis added)

In the appeal under consideration, counsel for the Appellant preferred the same in a *petition of appeal*, without attaching thereon the *drawn order*. Considering the position of the law above quoted, the appeal is rendered incompetent for being preferred without attaching the drawn order of the decision sought to be appealed against.

Similarly, in terms of the said provision, the appeal ought to be preferred in a memorandum of appeal and not a petition of appeal. Mr Maeda submitted that the appeal was to be preferred under Rule 37(1) of the Law of marriage (Matrimonial Proceedings) Rules. With due respect, his argument is misplaced. This is an appeal against the execution order not against the Matrimonial Cause to which the said rules would be applicable. Since this appeal is preferred against the execution order of 31/05/2019, the applicable law is the CPC, which deals with executions generally. All the same, the CPC, as intimated earlier on, provides that an appeal to this Court must be preferred through a memorandum of appeal. The first and second points of objections raised by the Respondent's counsel are sustained.

The third objection relates to an issue whether the execution order issued by the trial court falls among appealable orders. I have scrutinized Order XL and section 74 of the CPC which enlists orders from which an appeal can lie. It is obvious that an execution order is not amongst such orders. It has been the practice that a party aggrieved by an execution order will challenge the same by way of a revision. In this respect, I am backed up by the decision of this Court in **Felister Kifulugha vs Royal**

Mwalupembe (supra). In that case, while critically interpreting Order XL and section 74 of the CPC, the learned Judge stated:

> *"Reading between the lines on the above provision that section implies that one cannot appeal against execution order only. I also wish to refer the decision of the Court as correctly cited by the respondent in* ***General Tyre (E.A) LTD vs Amenyisa Macha and Others****, Civil Appeal No 21 of 2003, H.C at Arusha (unreported) where the court observed and stated that:*
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> > *"In the light of the aforesaid, apparently; no appeal lies from an execution order. Any person aggrieved by a decision on execution may challenge the same by way of a revision in the Court higher in the Judicial hierarchy".*

From the above decision which is also the position of the law, there is no competent appeal before this Court. The appeal has been preferred against a non-appealable order and in a petition of appeal instead of memorandum of appeal as per the dictates of the law. The appeal is therefore found incompetent. The third objection is also sustained.

Having sustained the objections regarding the competence of the appeal, I would have proceeded to strike out the appeal, which would then end the matter. That notwithstanding, it is pertinent to address the grounds of appeal submitted by the Appellant.

In response to the first ground of appeal, Mr Ngemela contended that the trial court had no jurisdiction to entertain the matter before it because the same ought to have been dealt with in accordance with the Child Act of 2009. In as much as I agree with Mr Ngemela that matters relating to maintenance, custody and parentage are dealt with in the Juvenile Courts established under section 97(1) of the Child Act, I find the contention misplaced at this stage. The appeal before this Court is preferred against the decision of the trial court in the execution proceedings. Had it been preferred against the main case, that is to say Matrimonial Cause No. 2 of 2011, I would have sustained his arguments. As this appeal is against the execution order by the trial Court, the jurisdiction of the trial court in determination of the main suit is an afterthought and cannot be sustained. This is not the proper avenue upon which jurisdiction of the trial court in ordering maintenance can be challenged. Thus, the first ground is without merits.

Regarding the second ground, the Appellant's counsel contended that the Appellant had relinquished the decreed sum by paying the child's school fees. From the records availed to me, this contention was raised at the trial court whereby the trial magistrate dismissed the same for being

unsubstantiated, as there was no evidence to prove the existence of the alleged compromise.

As correctly found by the trial magistrate, I also harbour no doubts that such an agreement was not proved. The decreed amount was an order of the court, which ought to have been respected by the parties. If parties had agreed to the contrary, one would have expected the agreement modifying the order of the court to be brought to the attention of the trial court. Incidentally, there was no appeal preferred against the said order. The mere fact that the Appellant was paying school fees cannot itself be considered to constitute a Plus, paying school fees for the child was one of the orders of the trial court. That said, the second ground of appeal also fails.

From what I have endeavoured to state, the appeal herein is, in addition to being incompetent, devoid of merits. It stands dismissed in entirety. Ordinarily this Court would be inclined to condemn the Respondent to costs, but considering the nature of the dispute and the fact that parties herein are co-parents, it is directed that each party bears their own costs.

Y. B. Masara

JUDGE

7th October, 2022.