THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. JUVENILE CIVIL APPLICATION No. 3 OF 2022

(Originating from Juvenile Court of Manyara at Simanjiro Misc. Juvenile Application Case No. 26 of 2021)

THADEI POROKWA MAMASITA..... APPELLANT

VERSUS

SALOME LENGOJE KELELE.....RESPONDENT

JUDGMENT

24th October & 29th November 2022

TIGANGA, J.

The Juvenile Court of Manyara at Simanjiro herein **"the trial court"** heard and determined the matter on maintenance of the four children, the issues of the appellant and the respondent. For the sole purpose of hiding their identity, the children's names will not be disclosed in this judgment. Instead, the letters **"ABCD"** respectively shall be referred to if the need so arises. The decision and decree issued by the trial court aggrieved the appellant who for satisfaction of his soul justly, filed this appeal in this Court.

The memorandum of appeal contains eight (8) grounds. These grounds are written down hereunder as follows:

1. That, the trial Court erred on point of law in deciding the matter basing on none existence (sic) law.
2. That, the trial Court erred in law and fact in that (sic) it determined the matter without considering the real evidence adduced by the parties thereto and the real village life of the appellant.
3. That, the trial Court erred in law and fact in that (sic) it determined and decided the matter without considering the requirement of the reality and the nature of the matter before it.
4. That, the trial Court erred in law and fact in deciding and ordering the appellant to pay Tshs. 400,000/= without any justification at all.
5. That, the trial Court erred in law in its decision without giving reasons thereto.
6. That, the trial Court erred in law and facts in hearing and determining the matter without jurisdiction.

7. That, the trial Court erred in law and facts in hearing and determining the matter which was premature.

8. That, the trial Court erred in law and fact for failure to consider the appellant's defence that he has no any source of income at all, hence it amounts to the (sic) punishment to the appellant as he cannot raise that money as ordered the (sic) trial Court.

The respondent declined all those eight grounds and considered them to be of no merits. Owing to that, the matter was heard on its finality. At the hearing, while Mr. Lecktony L. Ngeseyan represented the appellant, the respondent appeared in person fending for herself. Upon application of the parties, I allowed the appeal to be disposed by way of written submission. Both parties filed their respective submissions as ordered and scheduled. Indeed, as in this Court, the matter in the trial court was also disposed of by way of written submission.

On the first ground of non-existing law, Mr. Ngeseyan argued that the provisions of the law used by the trial court which is rule 83(1) of the Law of the Child (Juvenile Court Procedure) G.N. No. 182 of 2016 do not exist. Counterarguing on this point, the respondent was of the view that, the contentions by Mr. Ngeseyen might have been misapprehended. Further that, the said provision gives out on how the

application for maintenance can be presented in JCR Form No. 7 together with JCR Form No. 1.

The rival has taken me to the said law for the sake of depicting therefrom the truth. In this, I earlier on decline to agree with Mr. Ngeseyen's submission but rather purchase the one made by the respondent. The base for that finding is soon going to be revealed. Before I make the reality open, I would like to say a word or two to Advocates. Despite the fact that their paramount duty is to defend their clients they should also not forget that they are duty bound to help the Court in reaching the fair and justifiable decision for the best interests and protection of our noble profession.

Back to the ground. As said, the alleged to have been not existing law is the Law of the Child (Juvenile Court Procedure) G.N. No. 182 of 2016 particularly rule 83(1). It has taken me not more than a minute to retrieve the said law from the well-established Tanzania Legal Information Institute (TANZLII) of which I commend to all lawyers make the regular use of it. It is a friendly user and simple in doing research, mark my words and try.

The said provision of the said law states:

83-(1) An application for maintenance may be made under section 42 of the Act in the format as set out in JCR Form No. 7 in the Third Schedule of these Rules.

The provisions are provided under Part IX of the Rules with the title "Maintenance" and the marginal notes "*Application for maintenance order.*"

Thus, the contention by Mr, Ngeseyan that the law is non existing is disapproved by the said existing law as quoted above and therefore, the ground remains redundant, deserving dismissal as I hereby do. It is dismissed.

The next ground to consider is ground number 6 because it is on jurisdictional matter. Mr. Ngeseyeni on this ground argues that, the trial court had no jurisdiction because there was already a notice of appeal lodged by the appellant on Criminal Case No. 64 of 2012 involving the **Republic versus Lowema Thadei and Thadei Porokwa**. He says the matter under scrutiny emanated therefrom. To bolster his argument, he cited the cases of **Awiniel Mtui, Rogathe Minja, Lilian Mamuya and Vodacom versus Stanley Ephata Kimaro (an attorney for for Ephata Mathayo Kimambo)**, Misc. Civil Application No. 34 of 2014, **National Bank of Commerce versus National Chicks Corporation**

Limited, Issack Bugali Mwamasika, Harold Issack Mwamasika, Atuganile Issack Mwamasika and Innocent Mwamasika, Consolidated Misc. Commercial Causes No. 148 & 161 of 2015 (both unreported).

Replying, the respondent supported the trial court's decision on this ground. She said, criminal case cannot bar the application for maintenance of children. She distinguished the cases cited by Mr. Ngeseyani as irrelevant and not applicable in the circumstances of this appeal.

Looking into the record, it is apparent that the appellant together with another person by the name of Lowena Thadei were criminally charged in Criminal Case No. 64 of 2018 for the offence of cruelty to children contrary to section 169A (1) and (2) of the Penal Code, [Cap. 16 RE, 2002] (Now R.E 2022). They were accused of conducting female Genital Mutilation (FGM) to the girls the subject of maintenance in this appeal, the daughters of the appellant and the respondent. Consequently, they were convicted and sentenced to a fine of 300,000/= and in default to serve five years imprisonment. They were also ordered to compensate the three girls involved at the tune of 3,000,000/= each, amounting to 9,000,000/= in total. It is because of

this case the alleged Notice of intention to appeal was made and filed. Now, Mr. Mgeyeseni is complaining that the said notice has been disrespected by the Court which heard the impugned application.

I am of the strong opinion that, Mr. Ngeyeseni might have misapprehended the concept under which the notice of intention to appeal applies as a bar. First of all, he ought to understand that these are two quite different cases. While the former was a criminal case, the latter was a civil (Juvenile application). These cases are dealt with in different courts with different magistrates and different set of laws. In the circumstances, one category of the case cannot bar the other from moving on. By the way, even remedies and parties are different. As per the respondent, I do not hastate to rule that the cases cited by Mr. Ngeseyani are misplaced and distinguishable here. The ground is dismissed.

Thus, the response to this ground also accommodates ground number 7 which states that the matter was heard and determined prematurely. Mr. Ngeseyeni complains that, in the Judgment of criminal matter under which the magistrate said something about the children's maintenance that the prosecutor should inform the District Social Welfare Officer to make a follow up immediately is binding and therefore

it was premature for the court to deal with application for maintenance. The respondent did not argue anything useful on this ground. Be as it may, the said words or order as the case may be, cannot bind the civil court when entertaining the issue of maintenance as already said above. If I may add, the question whether the order given in criminal case was proper or otherwise cannot be dealt with here but in criminal appeal. This ground also lacks merit. It is equally dismissed.

The 5th ground is that the trial magistrate did not give reasons for the decision. Supporting that point, Mr. Ngeseyani argued that, the trial court's decision lacks the reason for the decision. This means, by all necessary implication, the trial court did not say why it ordered the appellant to pay Tshs. 400,000/= for maintenance of four children. In his view, that is fatal and contravenes the law. He cited Order XX rule 4 of the Civil Procedure Code, [Cap. 33 R.E 2019].

In reply the respondent urged this court to disregard this complaint. She said, the reason for the decision was given by the trial court. She went on quoting what she considers to be the reasons for so holding. She quoted page 5 of the impugned judgment where the court held:

"... it is clear to me that; the respondent has wilfully neglected to provide for his children. Therefore, in the final analysis I find this application has merits and it is hereby granted."

I have gone through the impugned decision and find the following:

At page 4 of the said judgment the trial magistrate wrote:

"Gathering from the respondent's submission I find it hard to believe that he is a man of no source of income.

Even if he did pay a total of 9,000,000/= for maintenance in a case which was determined many years ago, that does not mean by any stretch of the imagination that, his duty to maintain his children ended."

In my view, this is a reason as to why the trial magistrate ordered the appellant to provide maintenance at the tune of 400,000/= to his four children. Saying otherwise is sailing within the boat of imaginations, of which I decline to board. This ground also is bound to fail. It is dismissed.

The remained grounds 2, 3, 4 and 8 will be delt jointly and together following the style adopted by the appellant's counsel. Submitting on them all Mr. Ngeseyan said, the respondent filed her

submission in the registry of the District Court of simanjiro at Orkesumet instead of the Juvenile Court of Manyara at Simanjiro. That, parties are bound by their own pleadings. He cited the case of **Pasinatti Adriano versus Giro Gest Ltd and Another** [2000] TLR 89 and **Tanzania Electric Supply Co. Ltd versus Muhimbili Medical Centre** [2003] TLR 276.

He added that, filing the cases in court registries is regulated by the law. That, it is a mandatory requirement that cases must be filed within proper registries. To buttress the contention, the case of **Omari Idd Sleyum versus Assa Idd Sleyum and 2 Others**, Civil Appeal No. 257 of 2018 was cited.

The respondent was of the view that, this issue is new and cannot be raised at this stage. The respondent is faulting the way Mr. Ngeyesan has raised these grounds. She said the same were raised during submission and which were not made a part to the grounds of appeal. In her view, the principle of law is very apparent here that, parties are bound by their own pleadings. Authorities to this are many. The case of **Jafari Mohamed versus The Republic,** Criminal Appeal No. 112 of 2006 (unreported) is loud for the purpose when dealing with this issue. It was held in relation to raising new ground of appeal:

"We take it to be settled law, which we are not inclined to depart from, that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal..."

According to her, the issue of filing the matter in the wrong registry was not among the issues in the trial court. Raising it now in the submission does not make it strong for consideration as for so doing will be going contrary to the above settled law. However, she said, the application was filed in a proper registry.

First of all, I would like to intimate that the issue is not new. It was raised in the trial court and decided upon. This can be revealed through page 3 of the typed impugned judgment where the trial magistrate decided upon the issue and rejected the contention by Mr. Ngeseyani.

On the record of the trial court, the submission by the applicant in support of the application for maintenance which was presented in Court for filing on 3rd November,2021 the title of the document reads "IN THE JUVENILE COURT OF MANYARA AT MANYARA" the rejoinder is tiled the same. It is the respondent's submission which was prepared by the

same Advocate, Ngeseyani who was representing the appellant in the trial court which bears the title "IN THE DISTRICT COURT OF SIMANJIRO AT ORKESUMET". It is surprising the same Advocate who made the mistake of writing the title of the court is the one who complains the mistake to have been done by the respondent.

The documents are clear and speaking for themselves. However, I am aware that submission does not institute the application or case and therefore cannot be considered as to have been initiated the application in a wrong registry. Submissions are neither pleadings nor evidence. They are elaborations of the evidence already tendered in court. See the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others,** Civil Appeal No. 147 of 2006 where it was observed that:

> "...*submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

In applications for maintenance the document which institutes the claims or applications is JCR form No. 7 provided for under the Third

Schedule to G.N No. 182 of 2016 made under section rule 83(1) of the same G.N No. 182 of 2016. In my view, the story would have been different and of course, in favour of the appellant only if the said prescribed form would have been titled otherwise. This ground is also devoid of merit.

Another complaint in this bundle of grounds raised by Mr. Ngeseyani is that the trial court did not frame issues to be determined. He said that this is contrary to Order XIV rule 1(1), (2), (3),(4),(5) and (6) of the Civil Procedure Code, [Cap. 33 R.E 2019]. That the case must decide matters based on the issues thereto. To cement on the submission, the Advocate cited the cases of **Tanzania Breweries Ltd DSM versus Herman B. Minja**, Revision No. 295 of 2008 and **Scan-Tan Tours Limited versus The Registered Trustees of the Catholic Diocese of Mbulu,** Civil appeal No. 78 of 2012 (all unreported and of this court).

Replying, the respondent was of the view that, the issue is raised at the first time and it should not be entertained at this level. Also, she said the cases cited are irrelevant to the circumstances of the case.

Indeed, the question of not framing issue is raised at this stage. In my view, it is proper because this is the first appellate court and the

issue is of law. It can be entertained and ruled upon. See the case of **Zaidi Baraka and 2 Others versus Exim Bank (Tanzania) Limited**, Civil appeal No. 194 of 2016 CAT at DSM (unreported).

I have gone through the record and impugned judgment of the trial court. It is vividly apparent that issues for determination were not framed by the trial magistrate. However, this does not mean that, the judgment was premised on vacuums. It stood somewhere on the platform which could not easily be identified but firm to ground the decision. I will explain.

The question of fatality of failure to frame issues was discussed at lengthy by the Court of Appeal of Tanzania in the case of **The Honourable Attorney General versus Reverend Christopher Mtikila,** Civil Appeal No. 45 of 2009 CAT at DSM where it was said:

> *"The mere omission, on the part of the trial court, to frame an issue in a matter of controversy between the parties, cannot be regarded as fatal unless, upon examination of the record, it is found that the failure to frame the issue had resulted in the parties (i) having gone to the trial without knowing that the said question was in issue between them, and (ii) having therefore failed to adduce evidence on the point.*

Reading the records of the trial court one can rest assured that the parties gave their evidences properly on the issue of maintenance. This clearly intimates that they both knew the matter which was before the court involving them. In the event, it is certain and proper to conclude that neither party including the appellant was prejudice by the failure of the trial court to frame issues for determination. The trial court stood on the same firmness of the application which made the parties to understand the tilt between them and give out its decision. The finding would have been different if the court would have determined the matter not presented before it because of failure to frame issues. However, this is not the case here. Having said so, this ground also lacks merit. It is dismissed.

The remaining story of the bundle of the grounds as indicated above is on evaluation of evidence. That the trial court did not properly consider the evidence adduced by the appellant. That, the omission erroneously made the court to order the maintenance of Tshs. 400,000/- to the appellant without assessing that his source of income is low. I have perused the evidence presented before the trial court. It is undisputed that the children of the parties who are required to be maintained are four in number. This means, every child was ordered to

be maintained at the tune of 100,000/=. Be as it may, maintaining the child in the current mode of life even if they are living in rural areas at the tune of 100,000/= is not excessive. I say so because, the impugned judgment did not categorize what such amount covers. It remains therefore, that the amount covers each and every requirement of the children in maintenance. This is to say, the amount covers from food, shelter, clothes, education and heath care. Varying the order is as good as denying the children their best interests and wellbeing. It is subduing the children to calamities they do not suppose be made to suffer. In the event, these grounds fail. They are dismissed as whole.

For the foregoing reasons, this appeal is hereby dismissed in its entirety. For the reason of marital relationship between parties, I order no costs.

It is ordered accordingly.

DATED at **ARUSHA** this 29th day of November 2022

J.C. TIGANGA

JUDGE