IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CIVIL APPEAL NO. 10 OF 2023

(Originating from Kahama District Court in Juvenile Misc. Civil Application No 23/2020)

MARRY BURULE MWITA.....APPELLANT

VERSUS

LUCAS KEYA.....RESPONDENT

JUDGMENT

09th October & 24th November, 2023

MASSAM, J.:

The appellant herein above filed an application at the Juvenile Court of Kahama at Kahama (Herein after referred to as "the Juvenile Court") for Tsh 90,000/= as maintenance of a child of five years namely Glory Lucas Keya being their child with the respondent though not married.

During their submission at the juvenile Court the appellant claimed for maintenance of 250,000/= on a monthly basis departing from her application of Tsh 90,000/=, which she prayed before.

After a full trial the juvenile Court ordered the appellant to pay the respondent Tsh 90,000/= monthly as maintenance of the said child.

Aggrieved by the decision of the juvenile Court, the appellant preferred this appeal on the following two grounds as follows:

1. *That, the trial court erred in both fact and law for not taking into consideration the opinion and recommendation delivered by social welfare of maintenance of the said child to be Tsh 250,000/= on monthly basis.*
2. *That, the trial court erred in both point of law and fact to order maintenance of Tsh 90,000/= per month the amount which is prejudicing the welfare of child.*

Owing to these grounds of appeal, the appellant is seeking, therefore and prays to this court to allow the appeal with costs.

The respondent resisted the appeal. The appeal was heard by way of written submission, the appellant enjoyed the legal service of Mr Evodius Rwangobe learned advocate while the respondent was represented by Mr. Festo Daniel Lema learned advocate.

Arguing in support of his grounds of appeal, the appellant's counsel submitted by starting to cite the decision in **Rajab Shaban Bwanga Vs Lilian Haule, Civil Appeal No 54 of 2022** (Tanzlii) at Dar es Salaam at page 13. He submitted that, under section 45(1) of the law of the Child Act, Cap 13 R.E 2019 provides for discretion to the court to order a social welfare officer to prepare a social inquiry report before consideration of an

application to make order for maintenance custody or access, and this aspect the position being an option to the court the same was exercised with the trial court, he mentioned **Section 85(1) of the law of the Child Act, (Juvenile Court Rules) G.N No 182 published on 20th May, 2016** which gives the reasons for having social enquiry report from the social welfare officer.

He argued that the trial court ordered social enquiry report from the social welfare officer and the same was complied but it failed to make consideration on the opinion and recommendation delivered by the officer for the maintenance to be 250,000/= on monthly bases.

He added that the trial court was in contravention with the requirement of Section 45(2) of the law of the Child Act, that *"the court **shall** in making such order, consider the social inquiry prepared by the social welfare officer"* and the decision in **Godfrey Kimbe Vs Peter Ngonyani, Civil Appeal No 41 of 2014 CAT at page 14** which defines the word *shall* used in the provision to mean mandatory. He also cited the case of **CCBRT Hospital Vs Daniel Celestine Kivumbi, Civil Appeal No 437 of 2020, CAT Dar es salaam at page 11,** the court ought to apply literal meaning since the word in provision is plain and unambiguous.

On the second ground he contended that, the amount ordered by the trial court of Tsh 90,000/= per month is too little to fit the current life in respect of maintenance of the welfare of the child and other needs including the medical expenses, food, shelter and clothes.

In his response Mr. Festo Lema challenged the submission by his learned friend by contending that, the social welfare report is no conclusive proof of the amount the child is required to be provided there from rather an opinion, but rather the requirement is the best interest of the child to be considered as provided under section 4 of the Law of the child. (Supra)

He submitted that the duty of social welfare office in the application for maintenance orders is to assess the ability of parents in maintaining and taking care of the child, and ascertain the accuracy of any statements relating to the parent's income and outgoings as well as liabilities, he cited the case of, **Veronica Agostino Shirati Vs Issa Ramadhan Kisibo, (Civil Appeal No 9 of 2020) [2020] TZHCN814 (05 June 2020.**

Mr. Lema insisted that the court is not bound by the recommendation/opinion delivered by social welfare in maintaining the child to the tune of 250,000/= as the appellant tries to persuade the court, he argued that the engagement of the social welfare is not mandatory according to Section 41(2) of the Law of the Child Act, and therefore the

court had to see viability and economic state of the parents concerned in maintaining the child to the tune of Tsh 90,000/= as applied by the appellant.

He further submitted that, the appellant made an application in the JCR Form No 7 which requires the applicant to mention the amount sought should be provided in maintaining the child, and the appellant asked for Tsh 90,000/= but during presentation the appellant asked the amount she did not asked under the JCR Form No 7 that is 250,000/=.

He argued that this was a new fact and that parties are bound to their pleadings and any evidence produced by any parties which does not support the pleaded facts must be ignored. He referred this court the case of **Maria Amandus Kavishe Vs Norah Waziri Mzeru (Administratrix of the estate of the late Sylvanus Mzeru) and Another, Civil Appeal No 365 of 2019 CAT at DSM page 16&17 (Unreported),** that the appellant had to make submission in line with what she filled before the Juvenile court.

He added that the appellant ought to make amendments on her pleadings before introducing new facts something which was not done by the appellant, he cited the case of, **The registered Trustees of Islamic Propagation Centre (IPC) Vs The Registered Trustees of Thaaqib**

Islamic Centre (TIC), Civil Appeal No 2/2020 CAT At Mwanza [Unreported] at page 17 to 18. He therefore submitted that regardless of the appellant going astray of her own pleadings, the court did consider the opinion of the social welfare and made its findings.

On the last ground he replied that, the trial court considered the welfare of the child and the appellant asked for the sum of 90,000/= in her application its surprisingly to see she is denying her own application of maintenance to the tune of Tsh 90,000/= and that she is estopped from denying the own cause as manifested through the records, therefore the trial court's decision was justified upon cloths its decision with the interest of the child. He prayed this court to dismiss the appeal with costs.

On his rejoinder, the counsel for the appellant pointed out that, through **Lucas Keya Vs Marry Burule Mwita, Civil Appeal No 18 of 2020** the court ordered retrial and in the cause of hearing the trial court ordered for social welfare inquiry to ascertain the respondent financial status and responsibilities, which was complied and the social welfare officer opined to the trial court that the respondent to pay not less than 250,000/= form maintenance per month.

And the argument that the appellant raised new issues which were not pleaded in the JCR No 7 the amount of 90,000/= was been asked

without considering the inquiry from social welfare officer, he added that in the **Lucas Keya Vs Marry Burule Mwita, Civil Appeal No 18 of 2020** this court nullified the entirely proceeding and ruling of the trial court, hence the respondent's arguments and cited cases are distinguishable in this matter.

After a careful consideration of the counsel's argument for and against this appeal, the record and the law, and now the point for determination is **whether this appeal is competent.**

Starting with the first ground that, the trial court erred in both fact and law for not taking into consideration the opinion and recommendation delivered by social welfare of maintenance of the said child to be Tsh 250,000/= on monthly basis. The appellant submitted that the trial court did not consider the social welfare recommendation in awarding maintenance of Tsh 90,000/= instead of Tsh 250,000/= as the inquiry report recommended. Also, on his rejoinder he contended that the ruling and proceedings of the trial court was set aside in appeal through **Lucas Keya Vs Marry Burule Mwita (Supra)** where this court ordered retrial and social welfare inquiry to ascertain the respondent's status and financial responsibilities.

On the other hand, the respondent argued that the social welfare inquiry report was considered by the trial court and that the appellant on her application she pleaded the trial court to order Tsh 90,000/= for maintenance and that the claim of Tsh 250,000/= came during submissions which was introduction of new facts.

First of all, it's the requirement of law that, the best interest of the child should always be considered on application to make order for maintenance be public or privately as provided under Section 4 of the Law of The Child Act (Supra).

In my perusal of the court records, the evidence reveals that the appellant did make an application through JCF No 7 for maintenance of her child to the tune of Tsh 90,000/= per monthly, and the Trial court ordered for the social welfare inquiry following the order of this court in the mentioned appeal which ordered for a retrial, it is also revealed that the report recommended that the respondent could pay not less than Tsh 250,000/= as maintenance on the monthly basis.

Also, during trial on the party's submission, the appellant claimed for the payment of the said Tsh 250,000/= according to the social welfare report departing from the previously claim/application of Tsh 90,000/=.

It is the settled principle that parties to the suit are bound by their own pleadings. As was held in the case of **Salim Said Mtomekela v Mohamed Abdallah Mohamed Civil Appeal No. 149 of 2019** Court of Appeal of Tanzania at Dar es Salaam (unreported) where the court held that;

> *"...since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored."*

See also **Tanzania Electric Supply Co, Ltd versus Muhimbili Medical Centre [2003] TLR 276.**

This position was further reinvigorated in the case of **Barclays Bank (T) v Jacob Muro, Civil Appeal No. 357 of 2018 (unreported)** in which the Court of Appeal whereby the author among other things said:

> *"... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment property made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as*

well bound by the pleadings of the parties as they are themselves...."

Regarding this ground the appellant in her rejoinder contended that this court ordered retrial and that the ruling and proceedings were nullified hence this claim of Tsh 250,000/= as maintenance instead of the previously amount of Tsh 90,000/=.

I have revisited the attached judgment at page 7 there is no where this court nullified the proceedings but the ruling and drawn order, and advised the trial court to order social welfare inquiry in case there was contention between the parties in relation to their financial status and responsibilities to assist the court in reaching to a just decision and not to change what was pleaded by the appellant from the start.

That is to mean, the application form was not amended by the appellant to meet her new facts of Tsh 250,000/= as maintenance. It is therefore clear that, there was the departure from the pleadings and the evidence adduced.

Nevertheless, the appellant contended that the trial court did not consider the social services report in reaching his decision, I have make a perusal in the trial court judgment at page 10 the trial court did consider the social welfare report which entails that one of the respondent's child studies at the ordinary school, where as per social welfare report the

school fees happens to be Tsh 610,000/= per year contrary to Tsh 1,700,000/= school fees at ARECA schools where the child in question is currently studying. This consideration made the trial court to meet with such decision.

Similarly, the evidence and the social welfare report unveils that, the respondent is a married man with three children depending on him, on the other hand the appellant was aware of what she was getting into when she started relationship with the respondent knowing that he was married man with a family, that being said, it will be no fair for the respondent to be burdened to pay schools fees of Tsh 1,720,000/= per year, other than Tsh 700,000/= per year which he is in position to pay compared to Tsh 610,000/= he is paying to his other child, all children are equal so it will not be fare for one child to study in an expensive school while the other is studying in the ordinary school. By the way, if the appellant thinks that her child should study at an expensive schools as the current one, she can pay the rest of the school fees, as she is the mother and she has also a responsibility to take care of the said child. Hence this ground has no merit.

On the second ground that, *the trial court erred in both point of law and fact to order maintenance of Tsh 90,000/= per month the amount which is prejudicing the welfare of child.*

The appellant submitted that, the amount ordered by the trial court is too little to fit the current life, in respect of maintenance of the welfare of the child and other needs including medical expenses, food shelter and clothes. As I have stated herein above that the appellant claimed through JCF No 7 the amount of Tsh 90,000/= as maintenance, and through the social welfare report the trial magistrate ascertained the financial status of the respondent and his financial responsibilities that the respondent can afford the maintenance of Tsh 90,000/=. And it ordered the appellant to submit a copy of birth certificate in order their daughter to be registered to the health insurance, and to pay her Tsh 700,000/= as school fees, this court finds out the amount for maintenance of 90,000/= prayed by the appellant was enough as the respondent is also paying for school fees and health insurance. Therefore, I find both grounds of appeal unmerited.

This court is of the firm view that there is no need to disturb the trial court finding. Based on the foregoing discussion, I dismiss this appeal in it's entirely. Regarding the nature of the case no order of the costs. It is ordered accordingly.

DATED at **SHINYANGA** this 24th day of November, 2023

R. B. Massam
JUDGE
24/11/2023