IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 774/01 OF 2022

SHABBIR GULAMABBAS NATHANI .....APPLICANT

VERSUS

SAJJAD IBRAHIM DHARAMSI .....1ST RESPONDENT

ALLY JAWAD GULAMABBAS JIVRAJ .....2ND RESPONDENT

(Originating from the decision of the High Court of Tanzania at Dar es Salaam)

(Mlacha J.)

Dated the 30th Day of October, 2020

in

Civil Appeal No. 42 of 2020

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RULING

15th & 23rd November, 2023

MAIGE, J.A.:

The current application emanates from a dispute between the parties pertaining to the custody of Alhasan Nathan, a child who was the product of a lawful marriage between the applicant and the late mother of the child one Sajida Gulamabbas Jivraj who expired on 7th June, 2019. It is irrefutable that soon upon concluding their marriage in 2004, the applicant and the late Sajida moved to and stayed in US where the child was born. For the reasons which may not be relevant in this matter, in 2010 the marital relation between them became irreconcilable and thus

the late Sajida came back to Tanzania with the child and procured a decree of divorce as well as a custody order of the child. Eventually, she contracted a marriage with the first respondent with whom she stayed until her death. They were staying with the child in dispute.

It is common ground that subsequent to the death of the late Sajida, the first respondent initiated a custody proceeding at the Juvenile Court of Dar es Salaam (the juvenile court) impleading the applicant and the second respondent (the maternal uncle of the child) as the respondents. Upon trial and in the absence of the applicant, the juvenile court granted the order. On becoming aware of the order subsequently, the applicant applied, in terms of rule 79 (1) of the Law of the Child (Juvenile Court) Procedure) Rules, 2016 (the Juvenile Court Rules) for variation of the custody order. He was successful as the juvenile court varied its previous order and placed the custody of the child to the applicant for the reason that it was in the interest of the child to be in the custody of his biological father.

Unhappy with the decision, the respondents jointly appealed to the High Court. The High Court having reviewed the evidence was of the view that, the best interest of the child was not to stay with his biological father, a citizen and resident of US but with his uncle in Tanzania. It, therefore,

reversed the order of the juvenile court and placed the custody of the child to now the second respondent. The applicant believes that the decision of the High Court is incorrect. As a necessary step to pursue his intended appeal, the applicant lodged, on 13th November, 2020 a notice of appeal. Though the decision was not as of law appealable without leave of the High Court or the Court of Appeal, the applicant perhaps mistakenly, instituted, on 21st May, 2021, the intended appeal without obtaining leave so to do. Upon noticing of the omission, it would appear, the applicant wrote, on 17th June, 2021, to the Registrar, to have the said appeal withdrawn and, on 25th June 2021, the Registrar marked the appeal withdrawn.

As the period within which to appeal had already expired, the applicant filed an application for extension of time to lodge a notice of appeal at the High Court on 21st October, 2021, the application which was dismissed, on 30th September, 2022 for want of merit. Yet this is another attempt by the applicant to have time to file a notice of appeal extended. The application is premised on rule 45 A (1) of the Tanzania Court of Appeal Rules (the Rules).

In accordance with the notice of motion which has been substantiated by an affidavit deposed on his behalf by Ms. Nakazael Lukio

Tenga, learned advocate, the applicant relies solely on illegality to justify the application. It has to be noted that, by way of an affidavit in reply deposed on their behalf by Ms. Mary Brown Francis, the facts in the affidavit have been opposed.

At the hearing, the applicant was represented by Mr. Albaraka Mfinanga, learned advocate assisted by Mr. Greyson Joseph Laiser, also learned advocate. On the other hand, the respondents were represented by Mr. Hussein Mohamed, learned advocate assisted by Mr. Raphael Maunda, also learned advocate.

In his submissions in support of the application, Mr. Mfinanga, started by adopting the notice of motion, affidavit and written submissions. He submitted thereafter that, this being a case of custody of child involving serious matters affecting the welfare of the child, it should not be caught by limitation statutes. The counsel invited us to follow the decision of the High Court of India in the case of **J. Meena v. T. Manikandan**, Miscellaneous Civil Appeal No. 1092 of 2015 where it was observed that; while dealing with custody cases, the court is "*neither bound by statutes nor by strict rules of evidence or procedure nor by precedents*".

In respect to the issue of illegality, the counsel having cited the case of **Lyamuya Construction Company Ltd v. the Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), pinpointed two important elements which in his contention constitute issues of illegality in the judgment and proceedings of the High Court. **First,** the initial custody order was procured fraudulently in that, it was based on false representation that the applicant's whereabouts was unknown. **Second,** while in accordance with section 7(1) of the Law of the Child Act, biological parents have priority rights to raise the child, the High Court denied custody of the child in dispute to the applicant the only surviving parent and granted the same to the second respondent, a maternal uncle who had never lived with the child as a foster parent or otherwise. Such decision, it was submitted, was based on an incorrect apprehension of the principle of the best interest of the child. The counsel urged me to follow the decision of the High Court of Kenya in the case of **KNCS and JKS v. NG and AS,** Civil Appeal No. 91 of 2015 (unreported) to the effect that, "custody, care and nurture of the child reside first in the parent."

In conclusion, therefore, it was contended that, this being a dispute relating to the right of the child and the best interest of the child being at

stake, that by itself is a sufficient cause for extension of time so that the welfare of the child can be addressed. It was prayed thus; the application be granted.

In rebutal, Mr. Mohamed did not agree with the contention that this Court has option to decide whether or not to uphold the statutes of limitation. In his contention, limitation being a serious point of law, cannot be ignored without affecting the propriety of the exercise of the jurisdiction by the Court. In respect to Illegality, Mr. Mohamed while did not doubt its relevancy in a grant for an extension of time, he was of the contention that to amount as such, the alleged illegality must not only be apparent on the face of record but with sufficient importance as well. Citing **Lyamuya's case** (supra), the counsel urged me to distinguish between illegality and a mere error of law. The latter, he submitted, does not quality as a good cause for the purpose of extension though it can be a ground of appeal. He prayed, therefore that the application be dismissed with costs.

I will start my deliberation with the applicability of the law of limitation. I have been urged not to stick to the law of limitation as this is a matter which involves interest of a child. With respect, the request is uncalled for. The reason being that, what is before me, is an application

for extension of time and not the intended appeal itself. Therefore, whether the law of limitation should or should not apply in matters arising from custody of a child is not before me. Nor do I have mandate to deal with it in an application like this. Had the applicant been bold enough to raise the issue, he would have appealed despite being time barred and justify his action by the said contention. Having said that, I dismiss the claim.

I now proceed with the issue of illegality. I am in agreement with Mr. Mfinanaga that, an extension of time can, where appropriate, be granted solely on the ground of illegality. This is in line with the famous principle propounded in the landmark case of **Principal Secretary, Ministry of Defence and National Survive v. Devran Valambia** [1992] TLR 185. It is also the law as correctly submitted for the respondents that, for illegality to amount as sufficient cause, it has to be apparent on the face of record and of sufficient importance.

The question which follows, therefore, is whether the elements pinpointed in the applicant's submission are issues of illegality apparent on the face of record with sufficient importance. In the first issue, the complaint is that the initial *ex parte* custody order of the juvenile court was procured fraudulently as it was based on a false representation by

the first respondent that the whereabouts of the applicant was not known. The issue, it appears, was raised in the application for variation and was one of the basis for the grant of the variation. The respondents were aggrieved and appealed to the High Court whereupon the custody was placed not on the first respondent but the second respondent. The decision of the High Court was on merit and the justification of the determination of the initial order in the absence of the applicant was not at issue probably because the same was afforded a right to be heard in the variation proceedings. In the premises, the alleged illegality is neither here nor there. It cannot, therefore, be apparent on the face of the record.

The lamentation in the second ground is that, custody of the child was denied to the biological father of the child and granted to the uncle in violation of the principle of the best interest of the child. It suggestive in the applicant's submission that there is a rebuttal presumption in the Law of the Child that, the best interest of the child is to stay with his parents. It was submitted that the issue was not correctly decided as the child was denied to be raised by his biological father after the demise of his biological mother without there being evidence to rebut the presumption. For the respondent, it was submitted, the contention is misconceived as the same raises an issue of error of law and not illegality.

Admittedly, disputes as to custody of children are unique in the sense that, aside from there being contending interests between the parties, there is an interest of the child at the stake which takes precedence over the parties' interests. The child is, however, not a party to the proceedings. He is the subject of the allocation but has an interest in the allocation as well. Conversely, despite having conflicting interests in the allocation, each party purports to represent the interest of the child. This is so notwithstanding that the child is largely a person in his own right.

Ordinarily, disputes like these would arise between the parents. In here, it is between the biological father of the child and his uncle. The dispute erupted after the death of the biological mother of the child. Initially, the custody of the child was placed on the step-father. The order was subsequently rescinded and the child placed in the custody of his father. With the decision of the High Court in dispute, the custody has been placed on the uncle of the child. From the affidavits and submissions, it is apparent, there is a serious contention if the denial of the applicant a custody of his own child and placing the same on second respondent was in the interest of the child. On the face of it, the contention appears to be genuine. In my view, since consideration of the

best interest of a child is a condition precedent for a grant of an order of custody, and, the child being a none party to the proceeding, whether the principle was correctly applied or not raises an issue of illegality which would justify an extension of time. Every case has to be decided according to its own merit.

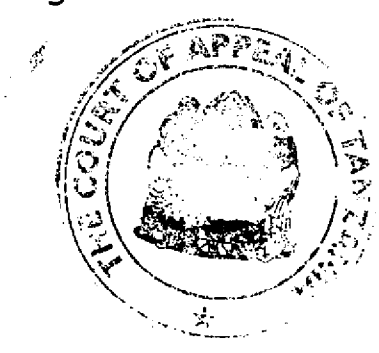
In my judgment, therefore, the application has merit and it is hereby granted. The notice of appeal should be filed within 10 days from the date hereof. I will not make an order as to costs in the circumstances.

It is so ordered.

DATED at **DAR ES SALAAM** this 21st day of November, 2023.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Hamis Albaraka Mfinanga, learned counsel for the Applicant and also holding brief for Mr. Hussein Mohamed, learned counsel for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL