IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

CIVIL REVISION NO. 62 OF 2003

MORGAN BRIGETTE MANDICA SHILINA

Versus

CORRADO VENETTONI

RULING

ORIYO, J

The application for Revision arises from custody proceedings at the Kinondoni District Court, Dar es Salaam. The respondent herein is an Italian citizen residing in Rome Italy. He has come to Tanzania to initiate Matrimonial Cause No. 64 of 2002 against the Applicant for orders that the applicant either returns an infant child to Rome or hands over custody of the said infant to the respondent.

The parties cohabited in Rome, Italy for a period of over 5 years. Their relation ship led to the birth of the infant child, **ALESSANDRO VENETTONI,** on 13th April, 1999. Subsequent to that, parties decided to part company and the applicant took away with her the infant child who has remained in the applicant's custody to date. Pursuant to that state of affairs the respondent applied for the custody of the infant child at the Juvenile Court of Rome which decreed in February 2002, that the infant remain in the custody of the applicant, with visitation rights to the respondent, but the right of overnight stay of the infant with the respondent was excluded..

The applicant, born of Tanzania parents and holder of a valid Tanzanian passport Number AO339 issued at Dar es Salaam on 25th July 2002, thereafter returned to Tanzania and brought the infant child along. The respondent then initiated the custodial proceedings at the District Court. The learned trial magistrate (Mbuya, SRM) granted custody to the respondent on 16TH June, 2003 and on 17th June, 2003 a warrant of Arrest was issued against the applicant for failure to hand over the infant to the respondent.

The applicant is dissatisfied and has applied for various reliefs including revision of the trial court proceedings, judgment and orders; an interim restrain order to prevent the respondent from removing the infant child from Tanzania. Further she prays for custody of the infant. The application is supported by an affidavit of the applicant stating, inter alia, that she has lived with the infant since his birth, that an Italian court has granted custody to her under a consent order and that the trial court has reversed the order of the Italian court and granted custody to the respondent. She added that the respondent is already in possession of air tickets for himself and the infant to travel back to Italy.

In countering the application, the respondent states, inter alia, that:-

(1) The infant, being an Italian citizen is entitled to grow up in an Italian and Roman Catholic Culture and attend the best schools which are not available in Tanzania

(2) The infant is registered in a substandard school in Tanzania.

(3) The infant is being taken to various churches in Tanzania while he is a baptized Roman Catholic

(4) The respondent is entitled to take his infant son back to Italy pursuant to the trial court's order of 16th June, 2003.

(5) As a general legal point the respondent asserts that the application for revision is improper because there is no error on jurisdictional matters raised.

In reply to the counter affidavit, the applicant points out to four instances of irregularities where the trial court wrongly assumed jurisdiction. These include the decision on the applicants status of her citizenship; the fact that the respondent is neither domiciled nor a resident of Tanganyika; custody had already been granted by an Italian court to the applicant and that the cause of action arose in Rome, Italy.

There are two issues for determination by this court, namely:-

(i) Whether the applicant has appropriately invoked the revisionary powers of the court.

(ii) Who is entitled to the custody of the infant.

Parties argued the application through written submissions. The applicant made her submissions through the services of Msemwa and Company, Advocates and the respondent was represented by the law firm of Dr.

Lamwai, Mdamu and Company, Advocates. Before determining on the merits of the substantive application, there is an objection raised by the applicant in its rejoinder submissions that the respondents submissions were filed out of time in contravention of the court order. On this ground the applicant prays for its rejection. In support of the prayer the applicant has referred the court to several foreign and local decided cases including:-

(i) Dr. Ally Shabhay .. vs.. Tanga Bohora Jamaat (1997) TLR 305.

(ii) Godwin Ndewesi and Karoli Ishengoma.. vs.. Tanzania Audit Corporation; Civil Application No. 57/94; Court of Appeal of Tanzania, Dar es Salaam – Registry (Unreported).

(iii) Tanga High Court Misc. Civil Application No. 21/2002; Africa MuslimAgency .. vs.. Dr. Ali Ebrahim Shabhay (unreported).

It is not disputed that the respondent did file its submissions late by one day. The said submissions were accompanied by Dr. Lamwai, Advocate's letter explaining the cause of the delay. Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended provides that in dispensing justice, courts of law should not be bogged down by legal technicalities but should primarily focus on substantive justice. The original version in Kiswahili reads as follows:-

" Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani:-

(a) ----------

(b) ----------

(c) ----------

(d) ----------

(e) kutenda haki bila ya kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka".

Though the applicant's and the respondent's versions on the cause of the delay differ slightly; in the spirit of (e) above, the delay of one day can be accommodated without causing any injustice to the applicant. Further, the subject matter of the revision requires that it will be in the interest of justice and the welfare of the infant that both parties be heard. On those grounds, the applicant's prayer that the respondent's submissions be rejected, must fail.

On the issue of the applicant invoking the reversionary powers of the court, it is justified for the applicant that because the proceedings were tainted with irregularities and the court lacked jurisdiction. On the other hand it was argued for the respondent that the court did not lack jurisdiction but was exercising a concurrent jurisdiction with the Juvenile Court of Rome on the issue of the custody of the infant. This court was referred to the decision of the late BIRON j, in support of the argument in:-

In the matter of Patrick Ernest Hofmann, an infant (1971) HCD No. 409

Let me hasten to state that this case is not on all fours with the one at hand, therefore is distinguished. However, with due respect to the respondent, having concurrent jurisdiction does not extend rights to parties for duplicity of suits or to courts to reverse valid orders of the other court which orders were granted by consent and the matter is subjudice in Rome and fixed for 29 October, 2003.

Section 77 of the Law of Marriage Act, 1971 is titled:-

" Right to invoke jurisdiction". Subsection4 thereof provides:-

" (4) Any person may apply to the court for maintenance or for custody of infant children or for any other matrimonial relief if---

(a) he or she is domiciled in Tanganyika; or
(b) he or she is resident in Tanganyika at the time of the application; or
(c) both parties to the marriage are present in Tanganyika at the time of the application" (emphasis added)

According to Black's Law Dictionary, Seventh Edition; the word domicile is defined as:

"The place at which a person is physically present and that the person regards as home; a person's true, fixed, principal and

permanent home, to which that person intends to return and remain, even though currently residing elsewhere- Also termed permanent abode."

"Resident" is defined as a person who has a residence in a particular place; and "Residence" is:-

1. The act or fact of living in a given place for sometime.
2. The place where one actually lives.

An example of a resident is one who resides at his area of work though his fixed place of abode may be different.

It has already been pointed out that the respondent came to Tanzania on a tourist visa and would have left immediately custody was granted by the trial court if not for these revisional proceedings. He is neither domiciled nor Resident under the above provision. Thus he does not qualify to apply for custody in Tanzania courts under the circumstances.

Having established that the trial court had no jurisdiction to entertain and determine the custody proceedings as it did; the question is why the applicant chose to keep quite at the trial court. It is apparent from the trial court's record that some of the objections were raised in the applicant's Answer to the Petition but withdrew the same before determination.

Primarily, the issue of jurisdiction is the foundation upon which the justice system operates; lack of which vitiates proceedings, judgments, decrees, orders, etc; thereon. Notwithstanding the reservations by the respondent, the objection raised by the applicant on the lack of jurisdiction by the trial court is upheld.

In view of the foregoing, this court up holds that the applicant appropriately invoked the revisional jurisdiction of the court. The proceedings, judgment decree and orders of the trial court in Matrimonial Cause No. 64 of 2002 are therefore nullified and set aside. This suffices to dispose of the matter before the court.

The second issue for determination is who is entitled to the custody of the infant. In Tanzania, the power of courts to grant custody is governed by Section 125 of the Law of Marriage Act. 1971.

Section 125 (2) provides:-

" (2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant

---- ''(underlining provided). The " welfare principle" is internationality recognized as part of International Human Rights Law. The united Nations Convention on the Rights of the Child provides by Article 3 thereof:-

ARTICLE 3

" 1) In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

Tanzania is a signatory to the Convention

On the basis of the welfare of the infant principle, the custody of Alessandro Venettoni is restored to the applicant who has had custody of the infant child since his birth. The respondent is granted visitation rights on weekends and

public holidays but without the right to retain the infant for overnight stay. The respondent has shown concern on the standard of education being availed to the infant. In order for the respondent to contribute towards the maintenance of the infant, he shall pay for the costs of subsistence, school fees and medical expenses of the infant child.

There will be no order for costs in view of the circumstances herein. It is so ordered.

K.K. ORIYO

JUDGE

22/7/2003

Coram : S.A. Lila- DR

For the Applicant: Msemwa advocate for

For the Respondent: Mdamu, advocated for.

C/C Mavura

ORDER: Judgment delivered today in the presence of learned Msemwa, advocate for the applicant and learned Mdamu advocate for the respondent.

S.A. Lila
DISTRICT REGISTRAR