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

MATRIMONIAL CAUSE NO. 1 OF 2003

RAKESH BALI ..... **APPLICANT**

VERSUS

NAZMINA KATE ISMAIL BALI ..... **RESPONDENT**

Date of last order: 03/12/2010
Date of ruling: 15/12/2010

R U L I N G

Twaib, J:

In this ruling, I am called upon to determine an issue touching an important aspect in the life of Khairah Bali, a child of tender years, who is now 8 years of age. It is thus a decision that should take the interests of the child as paramount: See section 4 (2) of the **Law of the Child Act**, 2009. In determining the application before me, therefore, I accord precedence to those interests over all others.

This matter started as an application by Rakesh Bali for the custody of Khairah Bali, the only issue of his marriage with Nazmina Kate Ismail Bali. Since then, there have been a number of applications and counter applications, to the extent that the title "Applicant" and "Respondent" have

changed hands a few times. For instance, while Rakesh Bali was the Applicant in the original application filed in 2003, and was so referred to therein, the present application was filed with the title showing Nazmina Bali as the Applicant and Rakesh Bali as the Respondent. For that reason, the use of the two titles has become rather confusing. To avoid such confusion, I have decided to revert to the original titles as appears above, and will mostly use the parties' own names.

In a ruling delivered on 18th December 2003, this Court (Ihema J.) granted custody of the child Khairah to the Applicant Rakesh Bali. It was also ordered that in terms of the provisions of section 126 (2) of the **Law of Marriage Act**, 1971, the said child would continue to reside with Rakesh Balis's family. The child was thus placed temporarily in the care and control of Rakesh Bali's parents, Mr. and Mrs. Billy Kartar Chand Bali, until further orders of the Court. The Respondent Nazmina Bali was given right of access to the child as the parties may determine after consultations.

It would appear from the evidence produced through the parties' affidavits that the parties were able, up until sometime in mid-2008, to agree on arrangements which were mutually satisfactory. The child continued to live with the parents of Rakesh Bali, and Nazmina had frequent access to her. Indeed, the record shows that as time went by, Rakesh and his parents were prepared to allow Nazmina more and more access, to the extent that she was allowed to take the child to her home and spend weekends with her. From sometime in 2005, Rakesh allowed Nazmina to take the child for four days. After those four days, Nazmina refused to return the child. This prompted Rakesh to file an application for contempt of Court. The application was withdrawn on 12th October 2010, in order to allow the Court to proceed to determine the real matter in dispute, namely, custody of the child.

By way of a chamber summons filed on 24th July 2008, Nazmina filed the application that is the subject of this ruling. It was filed under sections 133, 130 and 139 of the **Law of Marriage Act**. She is praying for the following principal orders (I quote *verbatim* from the chamber summons):

1. That the Court may be pleased to revise the temporary order for custody of Khairah Bali now aged six years granted to Mr. and Mrs. Bili Bali and in lieu grant custody of the minor to the applicant

2. That the court may be pleased to order the respondent to provide the applicant with full maintained for the upkeep of Khairah Bali.

3. That the court may be pleased to restrain permanently the respondent, his agents and workmen from interfering with the applicant's life and the custody of Khaira Bali.

It needs to be pointed out that the application as filed contains the following flows:

First, while section 133 of the **Law of Marriage Act** provides for "variation" or "rescission" of orders for custody, the chamber summons contains a prayer for revision. However, as I stated at the beginning, the interests of the child Khairah Bali are paramount in determining the issues before me. In a case like this one, as far as possible, the Court should look at the merits of the application rather than dwell on technicalities of procedure or engage in the niceties of semantics. I would thus not consider this error as fatal. It is curable. I hereby cure the error by reading the word "revise" as "vary" and proceed accordingly.

Secondly, the application seeks to restrain not only Rakesh Bali and "his agents" from interfering with the applicant's life, but also his "workmen". Clearly, the drafter of the chamber summons did not intend to use this word "workmen". This is a human error which I shall ignore.

Thirdly, but perhaps more significantly, the application seeks for variation of a "**temporary order** for custody of Khairah Bali now aged six years **granted to Mr. and Mrs. Bili Bali** and in lieu grant custody of the minor to the applicant" (sic!, emphasis supplied). First of all, in his order, Ihema J. did not grant custody to Mr. and Mrs. Bali as stated in the application, affidavit and even by Mrs. Rwechungura, learned counsel for Nazmina Bali. It may be pertinent at this point to quote the words of Ihema J. in his said ruling. He held:

> "In the circumstances I will allow the application and grant custody of the infant to the applicant as prayed. In terms of section 126 (2) of the **Law of Marriage Act** 1971 I order that the infant shall continue to reside with the Balis family and will continue to be temporarily in the care and control of Mr. and Mrs. Billy Kartar Chand Bali until further order of this court. The respondent has the right of access to the infant at such times and frequency to be determined upon consultation with the parties."

My understanding of this order is that Ihema J. expressly granted custody "to the Applicant as prayed". That order was not temporary, but permanent. It was only with regard to the order he made under section 126 (2) which put the care and control of the child in the hands of Rakesh's parents, that Ihema J.'s decision had a temporary effect, "until further orders of this Court". Hence, with all due respect to learned counsel who prepared the chamber summons, the prayer appearing therein, which seeks to vary a "temporary order for custody" granted "to Mr. and Mrs. Bili Bali" is misconceived.

However, going through the record of papers filed in respect of this application and the oral submissions made before me by counsel, it is clear that both parties were acting under the same misconception. It would appear that the misconception stems from the fact that though the Court granted legal custody to Rakesh Bali, it placed the actual care and control of the child in the hands of Mr. and Mrs. Bali.

Despite that misconception, however, it is clear to me that the same did not occasion any prejudice to any of the parties or their advocates, especially Rakesh Bali against whom the present application is brought. In view of this, therefore, and in the interests of justice, I am inclined to cure this irregularity and read into the chamber summons (as both parties have done herein), that the prayer being sought is for an order varying Ihema J.'s orders for custody of the child to Rakesh Bali and temporary care and control to Mr. and Mrs. Billi Bali and appoint Nazmina Bali in their respective stead. I do this in terms of sections 95 and 96 of the **Civil Procedure Code Act**, cap 33 (R.E. 2002).

While replying to the oral submissions of Mrs. C. Rwechungura, learned counsel for Nazmina Bali, Mr. Msemwa, learned counsel for Rakesh Bali, began with the argument that the application is misconceived. He submitted that section 133 of the **LMA** under which the application is made has three conditions which must be satisfied before an order for variation of an order for custody can be made. These conditions are:

1. Where the order granting custody was based on misrepresentation;
2. Where the order was based on a mistake of fact;
3. Where there are material changes in the circumstances;

Mr. Msemwa contended that the affidavit evidence produced does not show that the order was based on misrepresentation or mistake of fact. This is quite true. Neither in her affidavit and reply to counter affidavit, nor in affidavits of other persons she has filed in support of her application, has Nazmina Bali averred that there was a misrepresentation or mistake of fact in securing the earlier order of custody. However, it is clear that the application is based on the third criterion provided by the law, namely, material change in the circumstances. And since each criterion can stand on its own, even one criterion, when successfully pleaded and proved, may be enough to entitle a party to an order of variation. I therefore do not agree with Mr. Msemwa that the application is misconceived. It simply remains for this Court to determine the merits of the application for variation of custody orders based on the evidence made available to it in support of the allegation that there has been a material change of circumstances. To this aspect I now turn.

In support of the present application, Nazmina Bali has annexed her affidavit, sworn on 22nd July 2008. Rakesh Bali responded with his own counter affidavit, affirmed on 27th August 2008.

In her affidavit, Nazmina Bali begins with a narration of facts that led to the breakdown of the parties' marriage. These matters are irrelevant for the purposes of determining the issue at hand. The grounds for the application begins with the statement in paragraph 6 of her affidavit, where she states that she has now secured accommodation in a house in Masaki, Dar es Salaam, which she rents from the National Social Security Fund. In subsequent paragraphs, Nazmina Bali further states that from the age of three years, the child has been residing with her during school days and half the holidays, and spent the rest of her holidays with her grandparents, Mr. and Mrs. Billi Bali.

However, Nazmina complains that Rakesh and his parents have been interfering with the child's upbringing, who have been imposing restrictions on how the child should be raised and taken care of, which restrictions disturb her and the child. Nazmina Bali further avers in her affidavit that the child has been more comfortable living with her, where she has her own room, can play with children of her age and follows a proper school routine, than with Rakesh's parents. At Mr. and Mrs. Bali's house, she says, the child shares a bed with her grandparents, watches a lot of Television, and has no children of her age to play with, resulting in her having formed imaginary friends, which has subjected her to speaking and answering to herself.

With her reply to counter affidavit, Nazmina Bali also filed a number of affidavits sworn by her neighbours at Masaki and some photographs, basically supporting her averments that the child is lives a happy life with her.

Submitting in support of her client's application, Mrs. Rwechungura in essence reiterated what Nazmina Bali stated in her affidavit. She contended that in 2005, when the child was three years old "the applicant got the infant" and she had been living with the child ever since and that they have been a lot of interference from the grandparents and she feels this is not proper because, as the mother of the child, she is entitled to decide how to raise the child. Counsel further argued that it is actually the grandparents who are demanding to have access to the child in their own terms—that the two parents should have shared custody, with the child staying a fortnight in turn at each home. Nazmina Bali does not think this is a good arrangement. She is only prepared to allow the child to spend weekends with her father. Her Counsel argues that moving the child up

and down would not do her any good. Also, since the infant is female, she should be living with her parents and not grandparents.

In response to the affidavit evidence given and made in support of the application, Rakesh Bali states that there were other factors that led to this Court's decision to give him custody of the child other than Nazmina's lack of residence. These included the fact that Nazmina was not employed, was living an immoral and reckless life, was taking a lot of alcohol, used obscene language and went out at night, and is a drug abuser. These facts, according to Rakesh, have not changed.

Rakesh further stated that while the Lease Agreement is made between Nazmina and one Patrick Chuwa, the rentals therefor are shown to have been made to the National Social Security Fund (NSSF), a factor which, he says, casts a shadow over the correctness of her allegations that she now has her own accommodation. He further stated that Nazmina, who is a foreigner, has no employment in Tanzania and that he is the one who has been paying for her upkeep, though this is not one of his responsibilities. He has also been the one who pays for his daughter's necessaries of life. In short, Rakesh avers further in his counter affidavit that the reasons why the Court first gave custody to him still exist.

On how the child came into Nazmina's custody, Rakesh Bali stated that in 2005 he decided on an unofficial arrangement to give the child to Nazmina for interim periods each week. As a concerned father, he put certain conditions with regard to the child's safety, a decision that he considers necessary due to Nazmina's situation. He denied having imposed any restrictions on Nazmina's domestic affairs, except those that ensure that the child's young mind is not affected by adverse influence.

In his reply submissions, Mr. Msemwa for Rakesh Bali in turn reiterated what his client had stated in his counter affidavit. He further stated that Nazmina Bali does not deny (presumably in her reply to counter affidavit and through her counsel's submissions) that she is in the habit of taking a lot of alcohol, that she uses obscene language and goes out at night, facts which are suggestive of weak morals. Since these averments have not been responded to, he argued, then they are to be taken to have been admitted, and that Nazmina is still engaged in those habits, which means she has failed to show that there is a change of circumstances.

Mr. Msemwa further reminded the Court that when Nazmina was given temporary custody by Wambura J. on 24th September 2008, she was ordered to surrender her passport. The order was made because she had once tried to run away with the child out of the country and was intercepted by the Police at Chalinze, despite an interim Court order. This is recorded in the ruling by Ihema, J. (page 4, para 2). In Mr. Msemwa's submission, Nazmina does not obey court orders and that she is coming to seek justice with dirty hands. Her tendency to disobey Court orders is also manifest in her refusal to allow the father access to the child after the order by Wambura, J. It was because of these acts that the application for contempt was filed at one point. Mr. Msemwa closed his submission by saying that the grounds given in support of the application are not sufficient to upset the orders made by Ihema J.

In her rejoinder submissions, Mrs. Rwechungura countered Mr. Msemwa's argument and stated that the situation has changed since 2003 and that her client is no longer an alcoholic, that the attempt to run away with the child was in 2003 and should not be an issue now, and that she is now living in Dar es Salaam and can be restricted from leaving the country with the child. She also said that it is not true that her client has been denying

the father access to the child. She also submitted that there is case law authority to the effect that it is a child's parents who have the right to his/her custody, and not the grandparents.

I have carefully considered the evidence on record and the learned submissions made before me by both counsel. I am of the view that the main issue in this case is whether there is material change in the circumstances that justify an order varying the decision and orders made by Ihema J. on 18th December 2003 regarding the custody, care and control of the parties' child Khairah. In other words, is there proof that the circumstances of the mother, Nazmina Bali, have sufficiently changed that she can now be taken to be a fit and proper person to be given custody? Likewise, have the circumstances of the father and his parents sufficiently changed that they can now be taken to be incapable of taking custody of the child (with respect to the father) or of taking care and exercise control over the child (with respect to the parents)?

However, all the above questions have to be weighted against the fundamental question as to whether, taking the interests of the child as the basis, it is now just and proper to change her custody? I think, while the test should be, as in any civil matter, proof on a balance of probabilities, it remains the burden of the party seeking a variation of the earlier order to prove that the circumstances have changed in material particulars and that it is now in order to change custody. I am inclined to believe that this is not the case.

In the first place, I do not think that there is enough proof that things have changed materially to dispel the fear that Ihema J. seems to have had on the suitability of the mother to take custody of the infant.

It is not clear from the evidence as to how Nazmina got custody of the child, whether it was in 2005 or 2008, or whether she actually got such custody at the any time at all before the order of Wambura J. Parties are not at one in this. However, one of the grounds for the application is that ever since Nazmina has been living with the child, the parents have interfered a lot with her upbringing. This is not acceptable to Nazmina because she feels that as the mother, she is entitled to decide how to raise her child. She also does not accept the grandparents' demand to have access to the child in their own terms under which custody would be shared. She is only prepared to allow the child to spend weekends with her father.

I find this argument as showing a tendency of Nazmina's part to give the father as little access to the child as possible. She however must understand that contact between a father and his daughter is as much a right that must be enjoyed by the daughter as by the father. Denying the father such right is tantamount to denying the same to the daughter. That cannot be fair to either of them. Indeed, in the circumstances of this case, it actually supports Mr. Msemwa's contention that since this case began, Nazmina has been in the habit of disobeying Court orders. The order by Ihema J granting custody to Rakesh Bali, had the effect of granting him the right to decide how the child is to be raised. Section 126 (1) of the LMA provides:

> (1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, **shall entitle the person given custody to decide all questions relating to the upbringing and education of the infant.** (emphasis supplied)

Hence, it is Rakesh, and not Nazmina, who was granted custody of the child. It is to be noted that Ihema, J.s order for permanent custody in favour of Rakesh still stands (Wambura J.'s order was only temporary and could not, and it did not, give Nazmina any rights under section 126 (1) to decide over the upbringing of the child). Hence, her claim that the father's parents were interfering with the way she wants to bring up the child is, to say the least, misplaced. It also goes contrary to Ihema J.'s orders.

I also find Rakesh's serious allegations against Nazmina largely uncontested by the evidence. Nazmina has not said much, apart from some passing statements in the affidavits she appended to her reply to counter affidavit, to counter the allegation that she still lives what Rakesh calls "an immoral and reckless life", that she takes a lot of alcohol, uses obscene language, uses to go out at night, and is a drug abuser.

Furthermore, Nazmina is still unemployed to date, and there is nothing on record to show that she has tried to seek employment. However, I think this aspect of the case is not very strong, since the child's necessaries of life are taken care of by her father. It may be argued that the fact that she is not employed means that she cannot provide for the child, but this can be adequately covered if the father can provide maintenance, as is the case herein.

Then there is the argument that while the Lease Agreement is made between Nazmina and one Patrick Chuwa, the rentals therefor are shown to have been made to the NSSF. This contradiction belies Nazmina's assertions that she has a Lease Agreement with the said Patrick Chuwa. Neither Nazmina herself nor her advocate has said anything to counter this allegation. There is therefore no proof that Nazmina now has a fixed abode. Being unemployed, it remains doubtful as to how she manages to

pay the high rentals she claims to be paying for the said accommodation and the sustainability of that arrangement.

All in all, I am not convinced, on the strength of the evidence made available to me, that there has been material change of circumstances that may give good reason for a variation of the orders of Ihema J. made on 18th December, 2003. The application by Nazmina Bali to vary the same, therefore, stands dismissed. Consequently, the temporary orders given by Wambura J. on 24th September 2008 are hereby vacated.

Given this finding on the issue of custody, I see no reason to discuss the issue of maintenance, which now remains merely academic.

There is also the prayer that seeks to restrain Rakesh Bali from "interfering with the custody" of the child Khaira Bali. That is also an academic question, which need not be considered. However, it is perhaps pertinent to state that this latter prayer is not supported by any of the provisions of the law cited in support of the chamber summons. The cited provision, section 139 of the **LMA**, gives the Court:

> "...power during the pendency of any matrimonial proceedings or on or after the grant of a decree of annulment, separation or divorce, to order any person to refrain from forcing his or her company on his or her spouse or former spouse and from other acts of molestation."

The section does not cover "interference with the custody of an infant" when one of the spouses has such custody. The omission to cite the relevant and proper legal provisions is fatal, since it is tantamount to failure to properly move the Court.

Given the nature of the case and the fact that Rakesh Bali in whose favour this ruling is given does not insist on costs, I shall make no order as to costs.

Orders accordingly.

Dated at Dar es Salaam this 15th day of December, 2010.

F. Twaib

JUDGE

15th December, 2010

Ruling delivered in chambers in the presence of Mrs. Rwechungura, learned counsel for the Applicant (original Respondent) and Mr. J. Msemwa, learned counsel for the Respondent (original Applicant) this 15th day of December 2010.

F. Twaib

JUDGE

15th December, 2010