

# **IN THE HIGH COURT OF TANZANIA**

**(AT DAR ES SALAAM)**

**CIVIL APPEAL NUMBER 108 OF 2012**

**(Originating from Miscellaneous Civil Case Number 2 of 2012 at Juvenile Court of Dar es Salaam at Kisutu-I.C. Mugeta)**

**RYNA SAID NASSOR.....APPELLANT**

**VS**

**ZULEKHA ABDULWAHID.....1<sup>ST</sup> RESPONDENT**

**ABDULWAHID ISMAIL.....2<sup>ND</sup> RESPONDENT**

## **JUDGMENT**

**Date of last Order:** 11-10-2012

**Date of Ruling:** 14-12-2012

**JUMA, J.,**

This is an appeal from a ruling of the Juvenile Court of Dar es Salaam at Kisutu dated 23 August 2012 which granted to the two respondents, Zulekha Abdulwahid and Abdulwahid Ismail Osman of Dar es Salaam, a temporary custody of an infant Hanna Jasmine. According to the ruling, this temporary custody of the infant is scheduled to expire by 23<sup>rd</sup> February 2013.

Appellant Ryna Said Nassor and respondent Esmail Abdulwahid Esmail were married at Magomeni, Dar es Salaam, on February 5, 2011. A daughter named Hanna

Jasmine, whose custodial status is the subject of this appeal, was born to them on February 19, 2012. The two respondents, Zulekha Abdulwahid and Abdulwahid Ismail Osman, commenced their application for custody of an infant by Chamber Summons which they filed on June 22, 2012. Respondents' application for custody at the subordinate court was premised on the need to protect the welfare of their granddaughter, Hanna Jasmine. Respondents contended in their application that unless their prayer for custody was given, their granddaughter's mentally ill mother would take the infant back and subject her to more serious danger since the appellant had previously abandoned the child, and had also threatened to commit suicide. Apart from other matters which they deposed, the two respondents suggested in paragraph 13 of their joint affidavit that their son Esmail was away for medical treatment and they attached a letter from their son purporting to hand over the infant Hanna Jasmine to the care and custody of Ms Zulekha Abdulwahid.

In her Counter Affidavit to oppose the application for custody, the appellant maintained that she was still legally married to the respondents' son, Esmail Abdulwahid Esmail

and she deserved the custody of the infant child of their marriage.

Appellant and two respondents were represented by learned Advocates when the hearing of the application begun at the Juvenile Court on 13 July 2012. Respondents as applicants were represented by Mr. Tobias Laizer, whereas Mr. Fulgence Massawe represented the appellant herein. At the subordinate court, the hearing of the application was at first presided over by D. Kisoka-RM. But on 20<sup>th</sup> July 2012, the learned Resident Magistrate disqualified herself from the conduct of the matter for reasons which she did not wish to disclose. I.C. Mugeta-SRM took over the conduct of the application and delivered his Ruling on 23<sup>rd</sup> August 2012.

The memorandum of appeal was prepared by the Legal and Human Rights Centre. The appellant's Memorandum of Appeal contains ten grounds of appeal. The substance of these grounds of appeal and the submission of the learned Counsel thereon range from the grievance that the learned trial magistrate failed to consider the best interests of the infant child, right up to the grievance that the trial court should not have given a conditional custody of the infant for six months. Standing

out amongst appellant's grievance is her understanding that the best interests of a six-months old infant are with her mother; and appropriateness of conducting custody proceedings under the **Law of the Child Act No. 21 of 2009** outside the framework of matrimonial proceeding envisaged under the **Law of Marriage Act, 1971**.

I should perhaps mention in passing that the Ruling subject of this appeal, did not touch the question regarding which law, between the **Law of Marriage Act, 1971** and the recently enacted **Law of the Child Act, 2009**, is better placed to provide a permanent solution of the issue of the custody of Hanna Jasmine whose parents' marriage has not been dissolved in accordance with the **Law of Marriage Act, 1971**. Before moving further, I should perhaps note that while perusing the records of this appeal, the issue of appropriateness of this appeal caught my immediate attention. I have noted that what is stated in the Drawn Order is at variance with what the Ruling of the Juvenile Court of Dar es Salaam actually states. The operative part of the trial court's DRAWN ORDER has incorrectly indicated that the six months custody expires on 23<sup>rd</sup> February, 2012 instead of 23<sup>rd</sup> February, 2013:

**IT IS HEREBY ORDERED THAT:**

- i. The applicants are granted temporary custody of the child Hannah Jasmine for a period of six months up to 23<sup>rd</sup> February, **2012**.
- ii. On expiry of that period the child be given back to its parents or any one of them but in the presence of the other in case they have so agreed.

Incorrect citation of 23<sup>rd</sup> February, 2012 in the drawn order does not appear in the Ruling of the learned trial magistrate who had on page 24 stated:

*"..... I agree that applicants be granted temporary custody. I accordingly order that custody of the child Hanna Jasmine is temporarily granted to the applicants for a period of six months.*

*To be specific the temporary custody order period expires by **23<sup>rd</sup> February, 2013**. On expiry of this period and if no intervening court order to the contrary the dispute child should be handed back to its parents or any of them but in the presence of the other party as the case may be if so agreed between its parents. Mother and father of the child are allowed access to the dispute child on Mondays, Wednesdays and Fridays from 1100 hours to 1500 hours. I so order.*

Signed  
**I.C. MUGETA**  
**SENIOR RESIDENT MAGISTRATE"**

There are other salient matters of the Ruling which are not reflected at all in the drawn order which was filed together with the Memorandum of Appeal. The drawn order does not reflect what the Ruling has prescribed that on the expiry of the six-month period; the child should be handed back to her parents. The drawn order does not also reflect the operative portion of the Ruling allowing the mother and the father access to the infant on Mondays, Wednesdays and Fridays, from 1100 hours to 1500 hours.

ORDER XL rule 2 read together with Order XXXIX rule 1(1) of the **Civil Procedure Code** provide that in order for a memorandum of appeal to be competent it must be accompanied by a copy of a drawn order appealed against. Mapigano J. (as he then was) in the case of **Yusufu Mntambo and Others vs. Moez Alidina 1985 TLR 145** in my view correctly observed that a drawn order is a separate entity which has to be abstracted from the ruling, supplied and exhibited. I may also add that it is not for this court of first appeal that can within section 96 of the **Civil Procedure Code**, amend the clerical or arithmetical mistakes in the drawn order accompanying the memorandum of appeal. The power to amend of

such errors appearing on drawn orders belongs to the Juvenile Court of Dar es Salaam at Kisutu courts which delivered the Ruling and prepared drawn order subject of this appeal.

It is now settled law that a drawn order should agree with the ruling. Where a drawn order that accompanies the memorandum of appeal does not accurately reflect what was actually ordered in the Ruling, that drawn order shall be regarded as defective. This present appeal supported as it is by a defective drawn order cannot in law form a basis of an appeal to this court. Appellant's memorandum of appeal was prepared by Fulgence Massawe, a learned Advocate from the Legal and Human Rights Centre. The learned Advocate should have verified that the drawn order he filed along the memorandum of appeal to ensure that it agrees with the drawn order. This variance between the Ruling and the drawn order is not merely technical. It is an area clearly regulated by ORDER XL rule 2 read together with Order XXXIX rule 1(1) of the **CPC**. The law, as settled by several decisions of the Court of Appeal is to the effect that courts in Tanzania shall not waive clear requirements of the law and rules under the cover of substantive justice.

This is clearly restated by the Court of Appeal in **ULEDI HASSANI ABDALLH vs. 1. MURJI HASNEIN MOHAMED, 2. RETURNING OFFICER, MTWARA TOWN CONSTITUENCY, 3. THE ATTORNEY GENERAL CIVIL APPEAL NO. 2 OF 2012 (Mtwara).**

From my foregoing findings, I have come to the conclusion that this appeal which is accompanied with a defective drawn order is incompetently before this court and I hereby strike it out. I will not make any order as to costs because the appellant filed this appeal under the legal aid scheme of the Legal and Human Rights Centre.



**I.H. Juma  
JUDGE  
12-12-2012.**

Judgment is delivered in the presence of Mr. Nyaisa,  
Advocate (for the Respondents)



**I.H. Juma  
JUDGE  
14-12-2012.**

