

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 136 OF 2019

(Originating from the ruling of District Court of Ilala at Kinyerezi in Misc.
Civil Application No. 212 of 2018 dated 08th May, 2019 before Hon. A.A.
SACHORE, RM)

FLORIAN STEVEN KITIWILI APPELLANT

VERSUS

MARIAM BENEDICT MAKOMBE RESPONDENT

JUDGMENT

3rd June 2020 & 03rd July, 2020.

E. E. KAKOLAKI J

In this appeal the appellant is challenging the decision of Ilala District Court at Kinyerezi in Misc. Civil Application No. 212 of 2018 that dismissed his application for rescinding the order of custody of children entered in favour of the respondent in Matrimonial Cause No. 5 of 2016. He is canvassed with three grounds of appeal as namely:

1. That, the trial Magistrate erred in law and fact by failure to put into records the material circumstances under which the appellant applied to vary the order.

2. That, the Trial Magistrate erred in law and in fact by failure to consider the best interest of the child and welfare of the children to choose where to stay.
3. That the Trial Magistrate erred in law and fact by misdirecting himself to consider the child of above the age of 7 where the custody determined in the basis of the welfare of the child principle.

Briefly the background story behind this appeal may be narrated as follows. In Matrimonial Cause No. 5 of 2016 the respondent successfully petitioned for divorce decree and orders for division of matrimonial assets, custody of the child who was under 7 years old one Faraja Florian Kitiwili and maintenance to the tune of Tshs. 100,000/= per month. It was also ordered that the other two children who were above 7 years of age were to appear before the court for choosing where and whom to live with. Steven Florian Kitiwili who is above 18 years now is leaving with the appellant whereas Gloria Florian Kitiwili 15 years old is in respondent's custody. It is not disclosed what happened but the court's order with regard to the little child who is now 9 years old was not complied with as the same is living with her father (Appellant) instead of the respondent as per the trial court's order. The appellant unsuccessfully filed an application in Misc. Civil Application No. 212 of 2018 for rescission of the trial court's order for custody of the children entered in Matrimonial Cause No. 5 of 2016 as the same was dismissed for want of merits. He is now before this court by way of appeal registering his dissatisfaction through the three grounds above stated.

By consent parties opted to argue the appeal by way of written submission and court's filing schedule was complied with. The applicant

is represented by Mr. Jonathan Wilfred Mndeme learned advocate whereas the respondent is under legal aid of Centre for Widows and Children Assistance who prepared her reply submissions. In presenting his appeal the appellant chose to combine the second and third grounds and argue them together and the first ground separately. Submitting on the first ground Mr. Mndeme lamented that, the trial Magistrate failed to put in record material circumstances under which the appellant applied to vary the order for custody of the children. He said the appellant submitted that:

"Since the custody moved to the Respondent the well-being of the children were not properly maintained. That I am capable of maintaining my children and I don't want them to be under custody of the respondent."

He continued that, the appellant explained the material change of circumstances when submitted that the Respondent is incapable of maintaining the child as per the requirements of section 133 of the Law of Marriage Act, [Cap 29 R.E 2019], but the court failed to put that evidence in record something which is contrary to the provisions of Order XVIII Rule 5 of Civil Procedure Code, [Cap. 33 R.E 2002]. That the evidence on material change is necessary for rescission of the custody order and was discussed in the case of **Halima Kahema Vs. Jayantilal G. Karia** (1987) TLR at page 147.

On the second and third grounds the complaint was on the trial magistrate's failure to consider the best interest of the child and the welfare of the children as required by the law under section 125(1),(2)(b) of the Law of Marriage Act, and the wishes and opinion of

the child under section 26(1)(b) of the Law of the Child Act No. 21 of 2009. It was contended that, the respondent is incapable of raising any income and has no permanent settlement hence unable to maintain the welfare of the child and that is why it is insisted that there was a need for the court to consider and vary the previous order for rescuing the child from psychological and physical torture. He added that children were not given a chance to express their opinion contrary to the law as that requirement was over emphasized in the case of **Mariam Tumbo Vs. Harold Tumbo** (1983) TLR 293 at page 307. For the foregoing Mr. Mndeme urged this court to allow the appeal with costs.

Responding to the appellant's submission on the first ground the respondent submitted that the appellant's assertion that his evidence was not recorded by the trial court is baseless and the provisions of Order XVII rule 5 of CPC and section 133 of the Law of Marriage Act cited to support the said assertion are irrelevant. She presented that the trial court recorded both parties evidence but the appellant failed to prove that there was any mistake of fact or misrepresentation or any material change of circumstances that could impress the court that the respondent is incapable of maintaining the child so as to vary or rescind the custody order. That it was the appellant who failed to provide maintenance costs to the issues as ordered by the trial court instead he kidnapped the youngest child one Faraja Florian Kitiwili since 2016 at the age of 6 years old disregarding the fact that girls are comfortable to express their needs to mothers. She argued that she has peace of mind and she is physically, mentally competent to have the custody of issues as the applicant failed to provide material evidence to support the cited case of **Halima Kahema** (supra) on the change of material

circumstances of her financial status and life style. That she is living comfortable life as the appellant's assertion that the respondent is incapable of raising any income is ill motivated and as such it is an introduction of new evidence at the appeal stage which is barred under Order XXXIX rule 27(1) of the CPC.

With regard to the 2nd and 3rd grounds the respondent submitted that the appellant's claim that the best interest of the child was not considered by the court is unfounded as the court considered them as stipulated in section 39(1) and (2)(b) of the Law of Child Act. She echoed that, before the court in Matrimonial Cause No. 5 of 2016 gave an order of custody of the child to the respondent the said children were summoned, interviewed and in their opinion chose to live with the respondent and the appellant knows that. She added that, the appellant's attempt to vary the court's order on custody of children is aimed at stressing and affecting the best interest of the issues. She therefore prayed for dismissal of the appeal with costs.

In rejoinder submission Mr. Mndeme denied the respondent's claim that the appellant failed to provide maintenance for his children and stated that two issues are in his hands because the respondent failed to take care of them and has never kidnapped any child. He claimed that the respondent is restricting the appellant to access the child who is living with her for no apparent reasons. He otherwise reiterated what he had stated in his submission in chief and the prayers of having this appeal allowed.

Having reduced down both parties' submissions, I now turn to consider and determine the grounds of appeal as argued. In the trial court it

behaved the appellant to prove one of the conditions provided under section 133 of the Law of Marriage Act, for the court to vary or rescind the order of the custody of the child. The section provides:

*"The Court may at any time and from time to time vary, or may rescind any order for the custody or maintenance of an infant on the application of any interested person, **where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been material change in the circumstances.**"* (emphasis supplied).

As per Mr. Mndeme's submission it appears the appellant in his attempt to rescind the court's order for custody of the child wanted to rely and prove the condition material change in the circumstances of life style of the respondent. It is in his first ground of appeal that the trial magistrate failed to put in record his evidence to prove that condition. That he wanted to prove that, since when the custody of children was moved to the respondent, children were not properly maintained as the respondent was incapable of raising income and he would not want children to remain in her custody as he was capable of maintaining them. The respondent denied those contention in that it is not true that appellant's evidence was not recorded but instead he failed to prove the condition of change of material circumstances as required by law and that he was trying to introduce new evidence at the appeal stage since the same was not tendered during the hearing of the application.

I agree with the respondent's submission that the appellant's contention that his evidence was not recorded by the trial magistrate is unfounded. There is no any substantial evidence to prove that allegation apart from mere assertion that it was not recorded. It is trite law that parties are bound by their pleadings. My perusal of the applicant's affidavit in support of the chamber summons has revealed that the said evidence which the appellant claims and wants this court to believe that was not recorded was never pleaded in his affidavit. Even if we are to assume that the same was adduced as evidence during hearing of the application without being pleaded in the affidavit in support of the application the same could not be considered and doing otherwise could be in contravention of the general law of pleadings which prevents the appellant to travel outside the pleadings. See the case of **Funke Ngwagilo Vs. AG** (2004) TLR 161.

With regard to the assertion by the appellant that the respondent has no capacity to raise income to maintain the issues the respondent submitted that this was an attempt by the appellant to introduce new evidence through written submission which is barred by Order XXXIX rule 27 of the CPC. In this I also share hands with the respondent that the appellant is trying to introduce new evidence at the appeal stage the practice which is reprimanded by Order XXXIX rule 27 of the CPC which provides:

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in court."

Similarly it is now settled law that submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence.

See the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** (2005) TLR 41. In his appeal the appellant wanted to introduce evidence of change of respondent's circumstances of life in his submissions. It follows therefore that his evidence allegedly tendered during hearing of the application and not recorded is disregarded as written submission cannot introduce evidence. This ground has no merit and is hereby dismissed.

On the 2nd and 3rd grounds the appellant is claiming that the trial magistrate failed to consider the best interest of the child and the children opinion was not obtained to establish their wishes as to whom they would choose to live with. The respondent is of the different view that the same was considered and that is why the court dismissed the application. And further that even in the Matrimonial Cause No. 5 of 2016 children's opinion was obtained and they chose to live with the respondent and that is why the court place their custody to her. It is true as submitted by the respondent that the court considered best interest of the child before dismissing the appellant's application basing on the material evidence provided by both parties and the ones found in record in Matrimonial Cause No. 5 of 2016. No evidence was presented in court by the appellant to prove change of circumstances so as to move the court to recall the children for reconsideration of their opinion. Since it is the appellant who sought court's order to rescind custody order under section 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019], he was duty bound to prove that the conditions provided under section 133 of the Law of Marriage Act were existing and that there was a need

of summoning the children for reconsideration of their opinion. As he failed to do so he is now barred from coming forward and try to shift a blame to the court. I therefore see no reason to fault the decision of the trial court on these two grounds. The grounds do lack merit and I dismiss them.

In the circumstances and for the foregoing reasons I am inclined to hold that this appeal is devoid of merits and is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at DAR ES SALAAM this 03rd day of July, 2020.


E.E. KAKOLAKI

JUDGE

03/07/2020



Delivered at Dar es Salaam this 03rd day of July, 2020 in the presence of the appellant, the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.


E. E. Kakolaki

JUDGE

03/07/2020

