

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

MISC. CIVIL APPLICATION NO. 78 OF 2019

(Original Misc. Civil Application No. 14 of 2017 from Arusha Resident Magistrate)

LUCAS JAMES MSIMO..... APPLICANT

VERSUS

TUMAINI LOTH RESPONDENT

RULING

11th August 2020 & 18th Nov. 2020

GWAE, J:

The applicant, **Lucas James Msimo** and respondent, **Tumaini Loth** are husband and wife respectively. The parties contracted a Christian marriage in the year 2006 and their marriage is blessed with two issues namely; Willeart s/o Lucas (13 years old) and Ibrahim Lucas (10 years old) and currently the parties are in informal separation.

On the 30th January 2017 the respondent filed an application before the Court of Resident Magistrate at Arusha praying for orders of maintenance of her two children and herself as well as the custody of the children. The trial court delivered its decision in favour of the respondent by placing the custody of the

children to her and ordering the applicant to pay Tshs 300, 000/=monthly as maintenance costs for his children.

Evidently, the respondent filed an application for execution of her decree requesting the applicant's salary to be monthly deducted however the applicant's employer, Sokoine University of Agriculture through its letter dated 18th July 2018 declined to have such amount deducted on the ground that his salary deductions should be more than 1/3 of his salary which is contrary to the public Service requirement.

The applicant subsequently filed this application complaining that he was not served with summons and that there was no proof of service. He is now seeking a revision of the ex-parte decision.

When this application was called on for hearing, both parties appeared in person, unrepresented, and they orally argued this application. The applicant sought adoption of his affidavit and added that he be given a custody of the children as the children are of age which entitles him custody or alternatively, the custody be placed to his wife.

In her reply to the applicant's submission, the respondent vigorously argued that, the applicant is not eligible parent for being placed with custody of

the children as he has no love with them and he has not been taking care of them, including the respondent.

In his rejoinder, the applicant stated that he was taking care of his children as opposed to the respondent's contentions and that he is ready to build a house different from that of the respondent's parents which will be used by the respondent and children.

Sensibly looking at the trial court's records together with the grounds for sought revision, I am unable to hold that the applicant was not served with summons on the alleged basis that no proof of service that was made by the respondent. I say so simply because the record clearly indicates that on the 15th February 2017 the applicant entered his appearance before the trial court (**N. A Baro-RM**) however on 17th February 2017 when the matter was called on for the so called "mention" the applicant glaringly defaulted appearance and the matter was ordered to be heard ex-parte on 21st February 2017. The respondent was heard ex-parte as ordered and its ruling was delivered on the 13th April 2017. I thus find no illegality or irregularity done by the trial court magistrate to justify this court revise the trial court proceedings and decision thereof for this ground of the sought revision.

However I have further examined the proceedings and decision of the trial court and noted some illegalities due to reason that issues of custody and

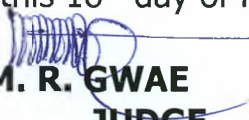
maintenance of the children require social inquiry report to enable the court to justly and fairly determine the contentious issues before it (See section 45 of the Law of the Child Cap 13 Revised Edition, 2019, Rule 72 and Rule 85 of the Law of the Child (Juvenile Court Procedure G.N No. 182 of 2016. It is my firm view that without proof on economic status of the parties as well as willingness and feelings of the children as to their custody, suitability of an environment of the children's parents in which the custody is to be placed, mode of payment of maintenance costs for instance through a parent caring the child or to the social welfare department and whether the maintenance order is reviewed annually for the purpose of ascertainment of compliance and related matters thereto.

Having noted the above anomalies, the trial court's proceedings and decision thereto are hereby quashed and set aside. The matter is thus remitted to the Resident Magistrate Court to be tried denovo in conformity with the law by a different Resident Magistrate. Considering the parties' relationship, each party to bear his or her costs.

It is so ordered.


M. R. GWAE
JUDGE
18/11/2020

Dated and delivered at Arusha this 18th day of November, 2020


M. R. GWAE
JUDGE
18/11/2020

Order: As the applicant is not refuting being a biological father, for the interest of the children I hereby temporarily order him (applicant) to ensure that he is maintaining his children to his current earnings which is yet to be proved.




M. R. GWAE
JUDGE
18/11/2020