IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

DC CIVIL APPEAL NO. 15 OF 2019

(C/F Miscellaneous Civil Application No. 40 of 2017 District Court of Moshi at Moshi)

SHUFAAA KIBAYA ..... 1ST APPELLANT

AMARIDO BASHIRI .....2ND APPELLANT

VERSUS

BATULI OMARI .....RESPONDENT

Date of last order 14/11/2019

Date of ruling 18/02/2020

JUDGMENT

MKAPA, J:

Appellants appeal from the judgment of the District Court of Moshi in Miscellaneous Civil Application No. 40 of 2017 delivered on 19th July 2018 (P.S. Mazengo, PRM) which was decided in favour of the respondent. Brief facts giving rise to this appeal are that, the 2nd appellant and the respondent are spouse married under the Islamic marriage in 2014. They were blessed with two issues Nurdin Amarido bashiri aged five (5) and

Zainab Amarido Bashiri aged three (3) respectively. The 1st appellant is a biological mother to 2nd appellant and a mother in law to the respondent. It is alleged that in 2017, the appellants chased away the respondent from her matrimonial home and retained custody of both children while the 2nd applicant left for Qatar to work for gain leaving behind the children with their grandparent (1st appellant) who was not willing to hand over the said children to the respondent. The respondent approached the District Court of Moshi in Misc. Civil Application No. 40 of 2017 where the court gave her custody and ordered the 2nd appellant to take care of both children. Aggrieved with the decision, the appellants preferred this appeal advancing nine (9) grounds, which in my assessment can be summarized into three grounds of appeal as follows;-

1. That, the trial magistrate erred in law and fact in ordering the respondent be given custody of Nurdin Amarido Bashiri without considering welfare of the said children and the ability of the respondent in maintaining them.
2. That, the trial magistrate erred in law and fact in entertaining the matter in the absence of the 2nd appellant and without proof of service while the 2nd appellant was in abroad.
3. That, the trial magistrate erred in law and fact in ordering the 2nd appellant to pay child maintenance at the rate of two hundred thousand

shillings (200,000/=) per month and accommodation while there was no divorce granted by the court.

Both parties consented to argue the appeal by way of written submissions and the court so ordered. At the hearing the appellants were represented by Mr. Tumaini Materu, learned advocate while the respondent had the services of Mr. M. Kilasara also learned advocate.

Supporting the appeal, Mr. Materu argued that, the trial court erred in not considering the status of the respondent who is dependent hence under no means to fulfill basic needs of her children. He added that the 2nd appellant is still living abroad and is nowhere to be found to comply with the court order to pay the amount awarded since his living standard is difficult to be ascertained. He further argued that, the 2nd appellant was not properly served with summons to appear before the trial court hence denied the right of fair trial specifically, the right to be heard of the allegations levelled against him.

Mr. Materu contended further that, the custody and maintenance orders were issued while there was neither official court order for separation nor divorce. He thus prayed the appeal to be allowed and the trial court's decision be quashed and set aside.

Submitting against the appeal Mr. Kilasara contended that respondent is of sound mind, mentally capable of taking care of her children as she started life of her own soon after being chased away from the matrimonial home by the appellants. He added that, the children are of tender age and need motherly care from their biological mother, (the respondent) and not the grandmother as was held in the case of **Halima Kahema V Jayantilal G. Karia** (1987) TLR 147 that, under section 125 (3) of the law of Marriage Act, CAP 29, R.E. 2002 there is a rebuttable presumption that it is for good interest of the infants to stay with the mother. He added that, the same position was also maintained in the cases of **Ramesh Rajput V Mrs Sunanda Rajput** (1988) TLR 96 and **Abdulrahman Salim Msangi V Munipa Margaret** (1984) TLR 133. Mr. Kilasara further argued that, **section 63 (a), 115 (1) (a), 129 (1) and 130 (1) (a) (b) of the Law of Marriage Act** provides that it shall be the duty of every man/husband to care for his wife and children by providing the basic necessities such as food, accommodation and clothing which is similar to the instant case. Mr. Kilasara argued further that, the 2nd appellant was dully served with the summons to appear though the 1st appellant (his mother) knows the where about of his son but declined to comply with court order to enter appearance. Lastly the learned counsel submitted that, section 125 (1) and section 130 (1) (a) (b) and (d) of the Law of Marriage Act provides that the court at any time may order a man

to pay for maintenance of his children. This means separation or divorce is not a condition precedent for a man to pay maintenance of his children. For these reasons, he finally prayed that the appeal be dismissed with cost. In rejoinder the appellants reiterated their submission in chief.

Having considered arguments by either side I think the question is who is the appropriate person to be given custody of the children. On the first ground of appeal, the appellants have argued that the trial court erred in giving custody to the respondent while she is not in a position to take care of them as she is not mentally stable. However, the appellants failed to adduce evidence to that effect at the trial court. It is noteworthy pointing out that the children in question are of tender age of five and three years respectively. It is trite principle that children have a right to live with their parents (father and mother) and in case of separation or divorce children who are of tender age their rights are stipulated under **section 26 (1) (a) (b) and (c) of the Child's Act, 2009** read together with section 125 of the law of Marriage Act which provides for rebuttable presumption that it is for the good of the children below the age of seven years to stay with their mother and there is a chain of cases to support the position as cited above. In **Celestine Kilala and Halima Yusufu V. Restula Celestine Kilala [1980] TLR 76, Andrew Martine v Grace Christopher, Civil Appeal No. 68 of 2003, HCT at Dar es Salaam** (unreported).

It is noteworthy that under the Islamic law '*talak*', does not become valid until the court has a final say on divorce. In the case at hand it is clear that the 2nd appellant divorced the respondent according to the Islamic faith but their divorce was never officiated in court that is why the trial magistrate ruled that their marriage is presumed valid though it has been established that they are not living together under the same roof. In such situation welfare of the children is pivotal. The 1st appellant admits that the 2nd appellant lives abroad in Qatar hence she is the one taking care of them as their grandmother. It has been established from the records that the spouse no longer live together. Neither prudence nor logic dictates for the grandmother to continue living with the children of tender age while their biological mother is alive and further that there is no clinically proven evidence of mental instability as alleged by the appellants. I find this ground meritless. On the second ground of appeal, that there was no proof of service to the 2nd appellant, this ground has no legs to stand for the reasons that first, the 1st appellant is a biological mother to the 2nd appellant and she knows that his son is in Qatar now working as a security guard, thus she knows his whereabouts. Second, the 1st appellant is the one looking after the children and she admitted that they are now going to school and it is the grandfather and the 2nd appellant who pays for the school fees meaning that they are communicating. Thirdly, this issue was also raised before the trial court

where the trial magistrate invoked **Order V Rule 15 of the Civil Procedure Code** which provides;

> *"Where in any suit the defendant is absent from his residence at the time when the service of the summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of summons on his behalf, service may be made on any adult member of the family who is of sound mind, whether a male or female, who, is residing with him."*

It is on record that, summons were issued at the residence of 1st the appellant who admitted to have notified the 2nd appellant, therefore he was aware of the case at hand and was not prejudiced of his right to be heard, at this stage of appeal. This ground also crumbles. On the third ground of appeal the appellants argued that, since the whereabouts of the 2nd appellant are not certain, the respondent will not will be able to sustain life depending on the two hundred thousand shillings (200,000/) which the trial court had ordered as child maintenance, instead the 1st appellant is capable of taking care of the children with the assistance of the 2nd appellant. I am of the settled views that, no mother can abandon and fail to care of her own children unless has proven mentally unfit, crippled, alcoholic, prostitute, thus unable to take care of them factors which none of them were established against the respondent. Under the

circumstances, the paramount concern should be the well-being and best interest of the child. Section 39 (1) of the Child's Act is instructive on what should be considered when awarding custody of the children and also Section 115 (1) and 130 of the Law of Marriage Act.

For the reasons discussed, I find this appeal devoid of merit and proceed to dismiss it in its entirety.

Dated and Delivered at Moshi this 18th day of February 2020.

S.B. MKAPA
JUDGE
18/02/2020

Certified True Copy of the Original

Registrar/Deputy Registrar/Resident Magistrate
The High Court