THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO. 27 OF 2020

(Originating from the ruling of the Juvenile Court of Nanyumbu at Nanyumbu dated the 15th day of October, 2020 Civil Cause No. 1 of 2020)

SUMAIYA SALIMU PLANGO (A Minor suing by her Next of Kin COLLETHA ADAMU ABDUL)......................................APPLICANT

VERSUS

NOEL FRANCIS MBANGUKA............................1ST RESPONDENT

FATUMA SALUM TIMAMI...............................2ND RESPONDENT

RULING

23 March, & 9 April, 2021

DYANSOBERA, J.:

Noel Francis Mbanguka and Fatuma Salum Timami @ Najma Salum Timami, hereinafter to be referred to as the 1st and 2nd respondents, in that order, are ex love partners. It is on record that the relationship of

the duo resulted into the 2nd respondent becoming *en ventre* and on 16th August, 2005 she delivered a female child by the name Nibizi Noel Francis Mbanguka @ Sumaiya Salum Palango, the present applicant when she was not in good terms with the 1st respondent. She, therefore, started raising and taking care of the applicant alone without the assistance of the 1st respondent until the 2nd respondent entered into love affairs with Mr. Salum Palango whom she eventually married when the applicant was still young.

The 1st respondent then learnt that the 2nd respondent was in love relationship with and later married Salum Palango. His efforts to get the custody of the child proved futile. On 15th day of June, 2020, the 1st respondent knocked at the door of the Juvenile Court of Nanyumbu at Nanyumbu and filed a petition which was registered as Civil Cause No. 1 of 2020 requesting the court to declare him as biological father of the child, and make the orders that the petitioner pay maintenance of the child until she is fully employed, have a sole custody of the child, the 2nd respondent have access to the child upon the arrangement of the court. The same 1st respondent prayed to be allowed to provide for the medical and education expenses for the child when the need arises, costs of the suit and any other reliefs the court deemed fit to and just to grant.

The petition was resisted by the 2nd respondent.

On 16th March, 2021 when these revisional proceedings came for hearing, the applicant was represented by Mr. Gide Magila, learned counsel, in the time, the 1st and 2nd respondents appeared in person.

Arguing in support of the revision, Mr. Gide Magila prayed to adopt the affidavit filed in support of the application. Expounding on the affidavit deponed to by Colletha Adam Abdul, a close relative and next of kin of the applicant, Counsel for the applicant pointed out that the applicant was not a party to the proceedings before the Juvenile court at Nanyumbu and, therefore, had no right to appeal to this court against the decision of the lower court hence this application for revision. As to the reasons for seeking revision, Counsel for the applicant explained that the trial Court did not consider the best interest of the child in that from the time of her inception she has never been brought up by the 1st respondent and for the first time they met, the applicant was four years of age and now she is sixteen years old. He stressed that for all the time, the applicant has been reared by the 2nd respondent's husband as her foster father and this made her believe that he was her real father and the 1st respondent who has never lived with her is a total stranger and forcing her to live with him will be injurious to her health, would adversely affect her psychologically and that this would be contrary to

the Law of the Child Act and Juvenile Court Rules. Counsel for the applicant laid emphasis that in deciding custody and access of the child, the paramount consideration is the welfare of the child. He placed reliance on the case of **Andrew Martine v. Grace Christopher**, Civil Appeal no. 68 of 2003.

Mr. Gide Magila also pointed out another irregularity committed by the trial Juvenile court to be a denial of according the applicant an opportunity to give her opinion. He argued that when the petition was filed and heard in the subordinate court, the applicant was sixteen years old and schooling in Form One and was, therefore, competent to give her opinion on her wishes and that her participation could have assisted the court to come to a rational decision.

Counsel for the applicant insisted that the applicant does not contest the parentage only that she is against the custody order to a stranger and her removal from her biological mother.

Responding to the submission by Counsel for the applicant, Mr. Noel Francis Mbanguka, the 1st respondent, vigorously opposed the application. He contended that the application has been filed out of fourteen days prescribed by the law and that it has been filed in the wrong registry. He clarified that the provisions of Section 130 (1) of the

Law of Child Act read together with Rule 123 (1) of the Juvenile Court Rules are clear on this. Further that, the appeal or revision for that matter, had to be filed at the court which originally heard the petition. In a further elaboration, the 1st respondent said that the impugned decision was given on 15th October, 2020 and this application was filed on 26th day of November, 2020 after a period of 14 days had already elapsed which means that the application is out of time. Referring this court to rule 123 (3) (a) of the Juvenile Court Rules, the 1st respondent argued that the matter had to be filed before Nanyumbu Juvenile Court and not to this court. According to him, as the advocate for the applicant failed to follow the procedure, this application is incompetent.

On her part, the 2nd respondent told this court that she had nothing useful to comment owing to the fact that the applicant does not know the 1st respondent and has not been brought up by him even for a single day.

In a rejoinder, Mr. Magila said that since the 1st respondent has admitted that the law he has cited does not relate to the revision but relates to appeals and that in view of the fact that this is not an appeal but a revision, then the requirements for the matter to be filed at the court of first instance and within 14 days from the date of the decision

do not arise. Counsel for the applicant insisted that since the applicant was not a party to the case she had no automatic right of appeal and the proper avenue for her was to file this revision and this application is, on that account, properly before the Court.

I have heard the submissions of the learned counsel for the applicant and that of the 1st respondent. I have also perused the records requested to be revised. I have equally taken into account the legal provisions pertaining to the parentage, custody, access and maintenance of a child.

As rightly pointed out by the 1st respondent, the Law of the Child Act [Cap.13 R.E.2002] and the Law of the Child [Juvenile Court Procedure] Rules, 2016, GN No. 182 published on 20.5.2016, hereinafter to be referred to as 'the Rules', provide for the procedure of appeal. This procedure is clearly stipulated under Part XIII and in particular, rule 123 of the Juvenile Court Rules. According to sub-rules (1),(2) and (3) of Rule 123 of the Rules, parties are required to enter an appeal within fourteen days from the date of passing the finding, sentence or order. The appeal is to be in the form of memorandum accompanied by a copy of the proceedings, judgment or order appealed against and the memorandum is to be lodged in the court which heard the matter in the

first instance where, within thirty days upon receipt of the memorandum, the court transmits with the High Court together with a complete record of the court proceeding to which the appeal relate.

The law, however, is clear under sub-rule (1) of rule 123 of the Rules that 'the court shall, when a finding, sentence or order is made, or passed **inform the parties** that they have fourteen days in which to enter an appeal'.

Mr. Gide Magila is clear in his argument and is supported by paragraph 13 of the affidavit in support of the application that the present applicant was not a party to the proceedings, the subject of the revision. Indeed, this is clear from the record where it is indicated that in Civil Cause No.1 of 2020 filed in the Jevenile Court of Nanyumbu at Nanyumbu, the parties were Noel Francis Mbanguka, as the petitoner and Fatma Salum Timami as the respondent. Sumaiya Salum Palango, the present applicant, was neither a party nor did she feature at the trial court; therefore, an appeal being a statutory right, she was barred to appeal against the decision to which she was not privy or a party as she was a stanger to the proceedings before the Juvenile Court. It is on that basis that she has preferred this revision. The revision is, therefore, competently before this court.

Regarding the merits or otherwise of this application for revision, there is no dispute that, according to the application which is supported by the affidavit whose contents have been expounded by the counsel for the applicant, Mr. Gide Magila, the main complaints against the trial court's decision is the irregularities and illegalities committed by the learned trial Magistrae in the conduct and determination of the whole juvinile court proceedings.

As the chamber summons shows, this application for revision has been preferred under Section 44 (1) (b) of the Magistrates' Courts Act [Cap. 11 R.E.2019] under which it is provided as follows:-

> "44.
>
> (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–
>
> > (a)... (not relevant)
> >
> > (b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:

In the instant application, I have no flicker of doubt that this court has power to order revision under paragraph (b), subsection (1) of section 44 of the Act. However, such powers are circumscribed in that for revisional powers to be invoked, the court must be satisfied not only

that it has been properly moved but also that there has been an error material to the merits of the case involving injustice.

As said hereinabove, this court has been properly moved in that a person whose rights or interests have been prejudiced by a lower court decision may approach this court in revision where he/she was not a party to the proceedings giving rise to the impugned decision.

The issue for determination is, therefore, whether the applicant has established to the satisfaction of this court that there has been an error material to the merits of the case involving injustice. This I will tell.

The paragraphs of the applicant's affidavit on which this application is mainly pegged are the following:-

> 10. That, the applicant's mind is settled with the family in which she has been nurtured and she doesn't know any other family or relative apart from her mother's relatives (2nd respondent) and her foster father's relatives. She owns a bank account No. 71210005873 with NMB Bank, NHIF Card for medical care and now she is in Form One at MSAMARA MUSLIM SEC. SCHOOL in Songea. All the services are financed and taken care of by the foster father Mr. Salumu Palango and not the 1st respondent.

11. That the applicant does not dispute for the parentage of the 1st respondent, but she disputes the award of custody to the 1st respondent as the 1st respondent and his family are strangers to the applicant, therefore, forcing the applicant to be under the custody of a strangers at this age will render the applicant to severe mental distress and psychological problems because she enjoys living with the family which has fostered her.

12. That the applicant seeks for this Honourable Court to revise,quash and set aside the ruling and order of the Juvenile court at Nanyumbu in Civil Cause No. 1 of 2020 on the ground that the same was decided with material errors as the trial court didn't take due regard to the best interest of the child (the applicant) herein in awarding the custody of the child to the 1st respondent who is a stranger to the child (the applicant), secondly thetrial court denied a child (applicant) with the right to give her opinion in respect of an issue of her custody with substantially affects her well-being.

13. That, the applicant was not a party to the proceedings in the trial court therefore, the only way she can challenge the decision f the trial court is to invoke revisional powers of this Hon. Court.

14. That, the errors of the trial court as pointed out in paragraphs 12 above are very serious as the destiny of the applicant is in jeopardy for the reason that starting a new life with a strange parent, strange family and relatives is unhealthy to her life, therefore this Honourable court is humbly asked to exercise her appellate jurisdiction to correct the errors of the trial court.

The thrust of the complaint is that the applicant was denied an opportunity of being heard and was placed in the custody of a stranger who never brought her up and took care of her.

It is apothegmatic that the juvenile justice system demands that the right of all the children capable of forming a view to be heard and to be taken seriously is universally recognised. For instance, Article 12 of the United Nations Convention on the Rghts of the Child adopted by the United Nations General Assembly in 1989 encompasses such right under Sub-Article 1 and 2 as follows:-

1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of

the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of natural law.

On that basis, the juvenile justice system establishes the principle of natural justice that the child should not be condemned unheard and that no decisions should be reached behind his/her back and he/she should not be precluded from participating in the proceedings that affect his/her life.

This principle on the right to be heard is also enshrined in our Law of the Child Act, Cap. 13 R.E.2002 and the Juvenile Court Rules, 2016, GN No. 182 published on 20.5.2016 as will be demonstrated hereunder.

Back to the matter on hand. In the petition and application before the Juvenile Court of Nanyumbu at Nanyumbu, the 1st respondent averred that he and the 2nd respondent started cohabitation since 2003 to 2005 and a result of the said cohabitation, the 2nd respondent became pregnant and on 16th August, 2005, gave birth to a female child by the

name **Nibizi Noel Francis Mbanguka** at Ngarenaro Clinic, Arusha. The 1st respondent stated that he is employed as Monitoring and Evaluation Specialist at World Vision Tanzania and is getting a good income thus capable of providing maintenance to the child. He asserted that he was desirous of declaring parentage of the said child under the provision of the Law of the Child Act. Under paragraph 7 of the petition, the 1st respondent stated that he is the biological father of the said child who is a female aged fifteen years old, having born at Ngarenaro Clinic on 16th August, 2005 in Arusha Region. The reasons for the petition were set

The reasons why the 1st respondent preferred that petition of parentage were set out in paragraph 8 sub-paragrahps (i) to (vii) to the petition.

In the same vein, the 1st respondent, in his chamber summons made under Rule 63 (1) of the Rules, applied for custody of the child named Nibizi Noel Francis Mbanguka in which he argued that he had right of custody of the child for the reasons he had set out under paragraph 5 (a) to (j) of his chamber application.

In her reply to the 1st respondent's petition, the 2nd respondent, apart from noting and denying some of the contents of the petition and putting the 1st respondent to strict proof, she strongly disputed

paragraph 3 of the petition and subjected the 1st respondent to strict proof. Besides, the respondent categorically stated that she never stayed/cohabited with the petitioner and had never borne a child named NIBIZI NOEL FRANCIS MBANGUKA. She, in addition, contended that the Certificate of birth the 1st respondent had attached to the petition showed that the mother of the claimed child is named Najma Salimu who is not the 2nd respondent. The 2nd respondent prayed dismissal of the petition with costs.

After the pleadings were complete, the learned Resident Magistrate, on 10th July, 2020 made the following order:-

> "**Court:** I have consider that before hear the submissions of both parties, this court order DNA TEST to be conducted as provided for under section 36 (2) of the Child Act Cap 13 R.E.2019."

On 4th September, 2020, the hearing of the petition took off by way of oral submissions and after hearing the submissions of both parties, the learned Resident Magistrate handed down the ruling granting the petition and ordering the reliefs I have stated above.

From the applicant's affidavit and the record of the Juvenile court, the Juvenile Court committed jurisdiction error hence demonstrating an error material to the merits of the case involving injustice in that it

displayed material irregularity by exercising its power illegally as well as in breach of the provisions of law.

In the first place, the order of DNA testing made by the learned Resident Magistrate on 10th day of July, 2020 before the hearing commenced was irregular and uncalled for as it substantially violated the clear provisions of rule 61 of the Rules which provide as hereunder:-

> "61.-
>
> (1) Where parentage is contested and the evidence produced before the court during the hearing is not sufficient to determine the parentage of the child, the court may, upon request of any party to proceedings or on its own motion, order a DNA or other medical test in accordance with the provisions of the Human DNA Regulations Act (No. 8 of 2009) to be conducted".

In this matter, apart from the fact that the parentage was not contested, the petition was yet to be heard so as to ascertain whether no sufficient evidence was produced to determine the parentage and there was no person who had requested such an order.

Second, the hearing and determination of parentage was violative of rule 59 of the Rules which stipulates that where an application for parentage is made and leave is given **the respondents to the application shall be the person whose parentage is in issue (the**

child) and any person who is or is alleged to be the parent of the person whose parentage is in issue.

Third, the hearing and determination of the custody, access and maintenance issues contravened Parts VIII and IX of the Rules. According to 70 of the Rules, in an application for custody and access, the child must be involved/joined. This was not the case in the present matter. Likewise, rules 72 on the involvement of the social welfare officer and the social inquiry report and rule 73 on factors to consider on making a custody and access order were not complied with.

Fourth, with respect to maintenance which is provided for under Part IX of the Rules, the provisions of rues 84, 85 and 86 on the considerations, social welfare report and payment of child maintenance were violated.

This blatant violation of the mandatory provisions of the law was an error material to the merits of the case involving injustice which merits the intervention of this court by way of revision.

For those reasons, I am satisfied and find that the revision has merit and should be granted. Invoking revisionary powers vested in this court by virtue of section 44 (1) (b) of the Magistrates' Courts Act [Cap.11 R.E.2019], I revise the proceedings of the trial Juvenile Court in

Civil Cause No. 1 of 2020 by quashing and setting aside the proceedings, ruling and attendant orders.

Each part to bear its own costs.

Order accordingly.

W.P.Dyansobera

JUDGE

9.4.2021

This ruling is delivered under my hand and the seal of this Court on this 9th day of April, 2021 in the presence of both 1st and 2nd respondents and in the presence of Mr. Gide Magila, learned Counsel for the applicant.

W.P. Dyansobera

JUDGE