

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

CIVIL APPEAL No. 214 OF 2020

(Appeal from the proceeding, decision and orders of the Juvenile Court of Dar es Salaam at Kisutu, delivered by J.L. Lyimo dated on 18th August, 2020 in Juvenile Application No. 171 Of 2020)

SAMEER ABDULMAJID JUNEJA..... APPELLANT

Versus

YASMIN KASSU MOHAMED.....RESPONDENT

JUDGMENT

22nd October, 2020 – 15th April, 2021

J. A. DE - MELLO J;

The Appellant is dissatisfied by the decision and, orders of the Juvenile Court of Dar es Salaam at Kisutu, delivered by J. L. Lyimo, dated the **18th August, 2020** in Juvenile Application No. 171 of 2020.

He has opted an Appeal before this Court on the following grounds;

- 1. That, the honourable Magistrate erred In law by admitting hearing deciding the point of objection raised by the Respondent in the course of proceeding without according the Appellant with fair hearing and while aware that the matter was pending for mediation in the office of Social Welfare. (*sic*)**
- 2. That, the honourable Magistrate erred in law and, fact by dismissing Juvenile Application No. 171/2020 on the**

ground of Res Judicata while aware that, the appellant application was an application for access to children and not for custody.

3. That, the honourable Juvenile Court Magistrate faulted in law by dismissing the Juvenile Application No. 171/2020 without taking precautions and consideration to the best interest of the children as the law requires.

Wherefore, the Appellant prays for this appeal be allowed, orders and decisions of the Juvenile Court be set aside, order for a fresh hearing. On the **22nd of October, 2020**, and, following prayers by Counsels, the Court granted, while ordering the Appeal be disposed by way of written submissions. Both have complied to and, timely.

In support of his arguments, the Appellant submitted that, records on the **18th August, 2018** scheduled the matter for mention with a view of conducting mediation as scheduled by **Hon. D. J Msoffe**. Strangely and, against this order, the matter attracted the attention of **Hon. J Lyimo (RM)** departing from the earlier order, without adducing reasons. Before **Hon. Lyimo** and, absence of the Appellant, disregarding mediation, availed the Respondent to argue and, granted the objections raised. Obviously, the Appellant's right to be heard and, fair hearing against the objection raised, did violate **Article 13 (6)** of the **Constitution** of the **United Republic of Tanzania** as well as **Universal Declaration of Human Rights**, which is a fundamental basic right, he stated. Submitting further, the Appellant faulted the Trial Court in addressing 'custody instead of access of children' made under **section 38 and Rule 63 (1)** of the **Law of the Child Act No. 20 of 2009** in **Application No. 171 of 2020**. This lead to a **Res Judicata** finding based in that wrong premise

of custody, which the Trial Magistrate held to have already been determined. This notwithstanding, none existence of **Matrimonial No. 15 of 2015** existed between the parties, while **Civil Application No. 727 of 2017** was an application for Leave to Appeal to the Court of Appeal, with **Application No. 171 of 2020** not having issues directly related or substantially to refer '**Res Judicata**' but, if any then '**Res Subjudice**'. The Appellant found the objection raised, Ex Parte entertained and, upheld, not under the eyes of law, It not being a pure point of law but rather stories, against what the case of **Mukisa Biscuit Co. Ltd vs. West End Distributors Limited (1969) E.A page 700**, settled. Regarding the third ground, the Appellant finds the dismissal of the Application violate of 'Best Interest of the Children' as guided under **section 4 (2) of the Law of the Child Act No. 21 of 2009**, for a matter which was yet to be mediated.

Opposing the Appeal, **Counsel Shadrack** for the Respondent claimed to have questioned the competence of the Appeal having been brought prematurely as it ought to set aside dismissal order and, not appeal. That, with no reasons for the Appellant's absence, the Court was justified to proceed **Ex Parte** in line with **Order IX Rule 9 of the Civil Procedure Code, Cap. 33 R.E 2019**. The right to be heard is not absolute, as it is subjected to other privileges and rights, thus no justifiable reasons has been adduced by the Appellant that, warrants this Court to set aside the Ex-parte ruling delivered on **18th August, 2020**, he retorts. Counsel believes the honourable Trial Magistrate was correct in deciding the matter by adhering to **section 64 (1) (a) (d), 64 (2) (a) (b) of the Law of the Child (Juvenile Court Procedure) Rules GN No. 182 of 2016**, requiring Court, when dealing with access applications, to do so

within twenty eight (28) days, attracting judgment within forty two (42) soon thereafter, all in view of best interest of a child. With regard to dismissal of **Juvenile Application No. 171 of 2020** reason being **Res Judicata**, Counsel reiterates the long background since **Matrimonial Cause No. 45 of 2015** at **Kisumu Resident Magistrate Court**, ruled in favour of the Respondent. An appeal to the **High Court of Appeal** vide **Misc. Civil Application No. 56 of 2017**, again was ruled in favour of the Respondent, with **Appeal No. 149 of 2018** before the Court of Appeal, all revolving around custody, maintenance, distribution of properties and access to his children. Coming from the Juvenile Court and seeking the same orders, tantamounts to **Re Subjudice**, which the Trial Magistrate found it wise to dismiss. In absence of narrating how best interest of a child has been affected, Counsel refutes allegations brought forward under the **3rd** ground. All along and, on record this has been considered, the reason more why custody is currently in the Respondent's care.

Rejoining, the Appellant challenges the haphazard raising of Preliminary Objection without notice, the dismissal of the application for want of prosecution but worse even for Res Judicata disregarding the fact that, the matter is pending on another Court, it being **Res Subjudice**.

In addressing this Appeal, I find it pertinent to ascertain whether or not the matter before the Court skipped the order for mediation or not? Record has it that, on the **6th of August 2020** the matter was reportedly for mediation with an order that reads;

Order: "M on 18.8.2020

Parties to appear before mediator for proceeding with mediation 

As this was the position, on that said date and, in absence of the Applicant, the matter diverted to another one Magistrate Lyimo, logically for mediation but ended up entertaining the Respondent's objection submissions, which the Court confirmed, ultimately declaring the Application to be '**Res Judicata**'. The pending Application was dismissed. It is apparent that, the Respondent took advantage of the absent Applicant and, proceeded with the objection, which the Court blindly or deliberately entertained, notwithstanding the fact that, first; it was the first time it was placed before that Magistrate, two; overlooking what the last Court order was, that of mediation. Wisdom and, practice demanded exercise of discretion judiciously in the interest of justice. Right to be heard more so on issues of such nature, was highly paramount to be ignored. Several and, many cases have settled for the need such as this one of **Rex vs. Sussex Justices, Exparte Mc Cathy (1924) 1 KB 256, 259** it was held that;

"...it was not merely of some importance, but is of fundamental importance that justice should not be done but manifestly and undoubtedly be seen to be done".

Can not agree more with the Appellant that, the conduct left much to be desired having violated **Article 13 (6) (a)** of the **Constitution of United Republic of Tanzania, 1977**, as amended. Before I entertain a nullity myself, I will refrain to address the rest of the grounds based on the fact that, the diversion from the order of the Court dated the **6th of August, 2020** was illegal. It rendered the entire proceedings and, its ultimate findings, misconceived.

It is for that only reason that, I find the Appeal meritorious and, revert the matter back to the Trial Court for where it left on the **6th of August 2020** before the same Mediator Magistrate.

It is so ordered.




J. A. DE- MELLO

JUDGE

15th April, 2021