

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

AT DAR ES SALAAM

CIVIL REVISION NO. 18 OF 2020

(Arising from the order of the Resident Magistrates Court of Coastal Region
at Kibaha dated 19th September, 2019 in Matrimonial Cause No. 07 of 2017
before Hon. J. Mkhoi, **RM**)

WAZIRI YUSUPH GOGA APPLICANT

VERSUS

FATUMA RAJAB MWAMBA RESPONDENT

RULING

05th May 2021 & 04th June, 2021.

E. E. KAKOLAKI J

In this revision application the applicant preferred under section 79(1)(a)(b) and (c) of Civil Procedure Code, [Cap. 33 R.E 2002] and section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2002] has moved this court to call for the records of execution proceedings in Matrimonial Cause No. 7 of 2016 and examine the proceedings and order of the Court dated 19/09/2019 so as to determine legality, regularity and propriety of the said proceedings and orders and revise them. He therefore seeking for the three reliefs:

- (1) This Court be pleased to revise the quantum of maintenance putting into account the station of life of the applicant.
- (2) The custody of the issues be given to the applicant.
- (3) Costs be in the course.

The application is supported by the affidavit of **Waziri Yusuph Goga**, the applicant. The same is contested by the respondent by filing the counter affidavit through her advocate one **August Mramba**.

Briefly the facts that gave rise to this revision can be simply narrated as follows. On the 01/11/2006 at Tabora the appellant and respondent tied knot under Islamic rites and were blessed with two issues aged 11 years and 7 years respectively now, before their marriage was declared broken down irreparably hence issue of divorce decree issued on the 29/06/2016 by the Resident Magistrates Court of Coastal Region at Kibaha in Matrimonial Cause No. 7 of 2016. Further to that order the trial court placed custody of the issues to the respondent, ordered for payment back of 1million shillings to respondent's account and divided the matrimonial house located at Boko – Kibaha to the issues for their maintenance. Discontented with the decision especially on the orders following the divorce decree, the applicant successfully appealed to this Court against the order of division of the said house to the two children of their marriage. In its judgment handed down on the 25/10/2018 this court (Luvanda, J) reversed the trial court's decision and ordered the said house to be divided equally between the applicant and respondent. Further to that it ordered the applicant to provide maintenance of the two issues of marriage presumed to be in custody of the respondent's mother at Tabora, for an amount to be assessed and fixed by the trial court.

Following that decision the applicant on 03/04/2019, filed the execution cause before the trial court in Matrimonial Cause No. 07 of 2016 seeking to execute this Court's order on the division of the said matrimonial house. In the course of hearing of that execution proceeding the trial court vide Hon. J. Mkhosi on the 19/09/2019, arrived to the two orders against the appellant. For the purpose of easing the determination of this application, I quote the proceedings of the said date:

Date: 19/09/2019.

Coram: J.J. Mkhosi – RM

Petitioner(s): Present

Respondent(s): Present.

Court Clerk: Siriwa.

Advocate Kumwenda for the Decree/Holder

Advocate Michael Kasungu together with advocate Mramba for the Judgment/Debtor.

Signed: J.J. Mkhosi – RM

19/09/2019

Advocate Kumwenda:

The case is coming for the execution based on the maintenance costs of the two issues, we leave for the court to assess the

amount of the maintenance for the issues of the marriage who are under the custody of the J/Debtor/Petitioner.

Advocate Kasungu:

I pray the court to consider that, those two children who are now aged five (5) years and nine (9) years are schooling, hence there are school fees which must be paid to both children. Also, those children are required to get their needs, I pray the court to consider that.

Orders:

- i. The D/holder (Respondent) to provide the maintenance of two issues of marriage who are now under the custody of the J/Debtor (Petitioner) at the tune of Tshs. 200,000/= per month, starting from September, 2014.*
- ii. The D/Holder (Respondent) is ordered to make sure he pays the school fees of both children, so as the medical expenses whenever required.*

Signed: J.J. Mkhoyi – RM

19/09/2019

It is the two above cited proceedings and orders which aggrieved the applicant, which this revision application is seeking to assail. Both parties were represented during the hearing of this application and upon grant of leave of the court opted to dispose of the matter by way of written submissions. The applicant hired legal services of Mr. Barnaba Luguwa

learned advocate, whereas the respondent retained the services of her advocate during the trial Mr. August Mramba learned advocate.

I had an ample time to travel through the impugned proceedings and orders as cited above, affidavit in support of the application as well as the entire execution proceedings and fighting arguments by both counsels for the parties. It is the applicant's complaints as submitted by Mr. Luguwa and deposed in paragraphs 7,8 and 9 of the applicant's affidavit that, the trial court's order against him for payment of Tshs. 200,000/= per month as maintenance for the two issues of marriage did not consider, **one**, the provisions of section 129 of the Law of Marriage Act, [Cap. 29 R.E 2019] (LMA) that requires consideration of father's means and station in life. **Second** that the children are in the custody of their grandmother and not the respondent. **Third**, it contravened the order of this court, Luvanda J, by ordering retrospective payment of maintenance costs way back 2014 and not from 2016 when the petition was filed in court. **Fourth** and lastly that it did not take due regard of the fact that the respondent was still enjoying rent from the house which is subject of execution proceedings and the only appellant's means for collection of money to maintain the said children as the applicant is jobless. The court was therefore invited to revise the orders by quashing the execution proceedings and the said two orders against the applicant. In his reply submission Mr. Mramba for the respondent was categorical that, the arguments as submitted by Mr. Luguwa were such that he was giving evidence during hearing. He challenged the submission in that it was proper for the trial magistrate to fix the maintenance costs from 2014 as the judgment of the trial court delivered on 29/06/2016 by Hon. Mwailolo,

disclosed the fact that the appellant deserted the respondent and children since 2014. Citing the case of **George Genchev Ganchev Vs. Hope Elizabeth Yusuf Abbebe**, Civil Appeal No. 109 of 2019 (HC-unreported) where the duty of father to maintain his children was underscored, he argued despite of applicant's claim of being jobless his duty of maintenance to his family as a husband remains intact regardless of whatever means he has. As to the claim of respondent's collection of rent from the matrimonial house he countered the same is unjustified as she leaves alone in the house. He rested his submission by praying this court to dismiss the application for want of merits. In his rejoinder submission Mr. Luguwa almost reiterates his earlier submissions and prayers which I see no reason to reproduce them.

Having briefly stated both parties case, the issue for determination before me is whether there was illegality or impropriety in the trial court's proceedings and orders of 19/09/2019? The court records show that the application for execution was filed by the applicant to effect this Court's decision of 25/10/2018 in Matrimonial Appeal No. 117 of 2018 which ordered the matrimonial house to be divided amongst both parties by the trial court. However on the 05/08/2019 Hon. J. Mkhosi as Resident Magistrate in-charge exercising her powers of handling execution proceedings noted that there were two orders of this Court which were to be executed, being division of the matrimonial house to the parties and assessment and fixing of maintenance costs for the issues against the applicant. She therefore ordered the proceedings for assessment and fixing of the maintenance amount to be conducted first by the trial magistrate Hon. Mwilolo, RM, before the file could return to her to finalise with execution of the remaining

order. Unfortunately when the file was tabled before her on 13/09/2019, Hon. Mwailolo recused herself from the conduct of the matter and returned the case file to the RM in-charge who in turn was forced to entertain first the order for assessment and fixing of maintenance costs hence the impugned orders. My conviction on the proceedings of 05/08/2019 and 13/09/2019 is that they were properly conducted and the orders rightly arrived at.

As regard to the proceedings and orders of 19/09/2019, I find the same were tainted with illegality. I will tell why? Under section 129(1) of the LMA, it is the duty of the man to maintain his children by providing them with basic needs such as accommodation, clothing, food and education as may be reasonable having regard to his means and station in life. See also the case of **George Ganchev Ganchev** (supra). The Court under section 130(1) of LMA has powers and may at any time order the man to pay maintenance for the benefit of the child or children, and in doing so it has to determine the amount to be paid. In making consideration for the maintenance orders the law under section 44 of Child Act, [Cap. 13 R.E 2019] provides the matters to be considered. It provides thus:

44. A court shall consider the following matters when making a maintenance order-

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;

(b) any impairment of the earning capacity of the person with a duty to maintain the child; (c) the financial responsibility of the person with respect to the maintenance of other children;

*(d) the cost of living in the area where the child is resident; and
(e) the rights of the child under this Act.*

In view of these matters for consideration as mentioned in the above cited provision, I am of the firm conviction that, it behoves the trial court to conduct an inquiry first in assessing the amount to be fixed for the man as maintenance to his child or children by establishing the man's means and station in life and other matters as indicated in the above provision. My stance finds support in the case of **Festina Kibutu Vs. Mbaya Ngajima** (1985) TLR 42 the court held thus:

“In deciding what amount of maintenance should be paid the court should hold an enquiry as to the means of both parents in order to arrive at a just decision; where applicable the court should take into account the customs of the parties and conditions prevailing at any particular time.”
(Emphasis is mine)

In the present matter looking at the cited excerpt of the court proceedings dated 19/09/2019, I entertain no doubt that the trial court's orders were not in conformity with the provisions of section 44 of LMA. I therefore agree with Mr. Luguwa's submission that the learned trial magistrate failed to inquire into and pay regard to the appellant's means and station in life before entering the said orders. By failure to conduct the mandatory inquiry as held

in the case of **Festina Kibutu** (supra), find the trial court proceedings of 19/09/2019 and its orders thereto were a nullity, thus the application has merit and hereby granted. I further invoke the revisionary powers bestowed to me under section 44(1)(b) of the MCA, and proceed to quash the proceedings of trial court in execution proceedings from 19/09/2019 onwards and set aside the orders thereto. The case file of Matrimonial Cause No. 07 of 2016 is remitted to the Resident Magistrates Court of Coastal Region at Kibaha to proceed with execution proceedings from where it ended on 13/09/2019. For avoidance of doubt and confusion both decisions on execution proceedings and division of matrimonial properties proceedings pending before the trial court be handed down in one ruling.

This being a matrimonial cause I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 04th day of June, 2021.

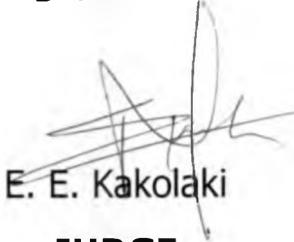


E.E. KAKOLAKI

JUDGE

04/06/2021

Delivered at Dar es Salaam this 04th day of June, 2021 in the presence of Mr. Philemon Mrosso advocate holding brief for both Mr. Barnaba Luguwa advocate for the appellant and Mr. August Mramba advocate for the respondent and Ms. **Asha Livanga**, Court clerk.

A handwritten signature in black ink, appearing to be 'E. E. Kakolaki', written over a faint circular stamp or seal.

E. E. Kakolaki

JUDGE

04/06/2021