IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CIVIL APPEAL NO. 50 OF 2021

(Appeal arising from the ruling and drawn order of the Juvenile Court of Ilemela District at Ilemela in Civil Application No. 6 of 2021)

ABED GILBERT KASONGO MAFWELE .....APPELLANT

versus

HOBOKELA YESAYA MWANDENGA ..... RESPONDENT

JUDGMENT

4th & 18th October, 2021

RUMANYIKA, J.:

The appeal is with respect to the judgment, decree and in favor of the respondent orders of custody of Abigail Abed Mafwele, Azarial Abeid Mafwele and Hobokala Abed Mafwele (the children) dated 17/08/2021. Abed Gilbert Kasongo (the appellant) and Hobokela Yesaya Mwandenga (the respondent) they are father and mother respectively.

When, by way of audio teleconference the appeal was called on 04/10/2002 for hearing, the appellant appeared in person and the respondent was represented by Miss Nyaki learned counsel. I heard them through mobile numbers 0761 001 998 and 0686 029 780 respectively.

However, when, for the 1st time the appeal was called on 01/10/2021 I had to hear the parties on a time-bar based preliminary point of objection (the p.o) according to records formally raised on 28/9/2021 and now taken by Miss Judith Nyaki learned counsel. At the time Mr. C. Mtalemwa learned counsel appeared for the appellant.

Miss J. Nyaki learned counsel submitted that pursuant to Rule 123(1) and (2) of the Child Act (Juvenile court procedure) Rules, 2015 one had only 14 days but the appeal was lodged on 10/9/2021 much as having had asked for the requisite copies (Rule 133(2) of the rules, among others it could copy of a judgment or order and the appellant had a copy of the impugned ruling well within time, yet, but contrary to provisions of S.3(1) of the Law of Limitation Act Cap RE 8 2019 (the Act) without extension of time sought and granted the appellant filed it beyond the prescribed time limit that the time barred appeal was liable to be dismissed (cases of **Steven Mbeba v. Halfan Maulid Mohamedi,** Civil Revision No. 2 of 2019, Hc. at Mwanza unreported and **Suzana Rose Tenga v. Musa Seleman Mbwana,** Civil Appeal No. 296 of 2020 Hc. at Dar es salaam, unreported. That is all.

Mr. C. Mutalemwa learned counsel submitted that the p.o was misconceived for wrong interpretation of the rules much as indeed 14 days was the limit but the provisions of S.19 (2) of the Act excluded all the days the appellant was waiting for the copies mandatorily required under Rule 123 (1) of the rules to be appended on the memorandum of appeal much as really delivered on 17/8/2021 the impugned decision wasn't a judgment but a ruling out of which therefore, one needed a copy of certified

extract/drawn order which one, upon application the appellant obtained on 3/9/2021 and he lodged the appeal on 10/09/2021 hardly six(6) days later, say 8 days before time therefore well within time. That had they wished to, in express terms the legislative should have given the same meaning to words judgment and order. We shall ask for no costs because the dispute was family based. The learned counsel further contended.

I overruled the p.o but reserved reasons therefor. Here are the reasons;

At least the learned counsel were agreed, **one;** that provisions of rule 123(1) of the rules set forth a 14 days limit. **Two**; in the present case, of much importance whether to be appended to the memorandum of appeal should be copy of the impugned judgment or order (Rule 123(2) of the rues), neither the rules nor the Child Act defined a judgment or, in this case ruling. At most with all intents and purposes the Juvenile court issued no judgment but a ruling which one, for the purposes of execution or appeal purposes for that matter appellant only needed a copy of concise expression of the impugned decision. If it was a judgment and decree or, like Mr. C. Mutalemwa learned counsel argued in this case a copy of extract/drawn order as the case may be. It follows therefore upon application no way the appellant could have had the requisite copy until as late as 03/09/2021 then he lodged the appeal on 10/9/2021 hardly seven (7) days later in fact as it stood one had another seven good days to go. It is for these reasons that I dismissed the p.o.

Now on the merit part of the application;

This time around having had chosen to, the appellant appeared in person and, in a nutshell he argued the six (6) grounds of appeal as follows: - **(i)** That with regard to the respondent's social status the learned resident magistrate ignored his evidence namely actually in the US the respondent had a pending application for asylum therefore, in favor of the respondent exclusive custody of the children it wasn't a suitable order **(ii)** That the freely born in Tanzania children should not have gone to the mother's exclusive custody two of them having had chosen to say back with the father much as they were above 7 years old **(iii)** That the parties were entitled to be mediated but the lower court made no such attempts **(iv)** That the electronically generated documentary evidence was attested and its authentically certified by one and the same advocate for the respondent. What a conflict of interest! **(v)** That they had their family home here in Mwanza and for whatever reasons the children never missed schools but the lower court ignored the evidence **(vi)**, but in the alterative, the court order that the lower court re hear the matter but before another competent magistrate other than Sumari, Rm. That is all.

In reply, Ms. Nyaki learned counsel submitted; **(a)** that actually the order for custody of the children it wasn't exclusive to the respondent but in express terms both had free access to the children **(b)** that the appellant did not prove the alleged asylum status of the respondent much as he admitted that the family of 5 having had them all resided in the US, for no reasons other than matrimonial disputes he ran back to Tanzania with the children **(c)** That the best interest of the children demanded that the appeal be dismissed because if at all, notwithstanding their choice to

remain back in Tanzania under the father, in the US the children enjoyed free shelter, free education also the respondent worked therein for gains unlike herein Tanzania where the children missed the parents as they were only placed under a 3rd party (not even a step mother) and they missed fees and, at times dropped out of schools much as it was also on record that the appellant was since 2013 jobless **(d)** that the Child Act did not provide for mediation and S.64 (A) of the Civil Procedure Code Cap 33, RE 2019 gave no fallback position (the case of **Steven Mbemba v. Hassan Mohmedi Mohamedi,** Civil Revision No. 2 of 2019 Hc. unreported **(e)** That there was nothing wrong with the appellant's advocate certifying and authenticating the electronically generated documentary evidence **(f)** That with regarding her status in the US and the respondent falsifying the evidence the appellant should have objected and challenged it before. That there was nothing to fault the lower court.

As between them the lovely and happily marriage may have had turned sour and they knew the reason yes, at least parties were voluntarily separated. Be as it may, only the best interest of the children counted much as, consulted or not consulted by court one or two of the children may have had chosen and opted to remain back in Tanzania with the father granted; but courts need not to agree with them whole sale until they had warned themselves. Just like patients were not at liberty to prescribe for medication. For obvious reasons therefore, when considering the best interest of the children judicial officers shall make sure that the process was not that participatory and democratic. It is common knowledge that unless some peculiar circumstances otherwise dictated

which is not the case here, perhaps due to strong parent bondage during 9 months plus or minus 14 days pregnancy created and later post natal and breast feeding to be particular, it is common knowledge and I entertain no doubts that majority of the mothers more lovely and cared for their children than men did. Therefore with that in mind if courts allowed exclusive custody which actually wasn't the case here anyway, I would rather go for mothers however difficulty their lives may be. I think if, even in prison cells, but under their mothers children looked lovely and by impression promised bright future, what about those with their free and at liberty mothers abroad!

Leave alone also the records and the fact that throughout back in the mother land Tanzania the appellant was jobless, and if at all the latter was employed as at 26/5/2021 his CRDB Bank Account and or statement witnessed to have transacted shs. 18,284,551/= leave alone in January, 2021 with the other client business having had earned shs. 6,200,000/= yes, but the fact that he did not sufficiently dispute the local welfare social officer's report and the respondent's allegations that a combination of lack of the father's close care, fees and all that at times the innocent young girl and boys had dropped out from schools, one therefore would have suggested that neither parental care education for the children it wasn't the appellant's first priority.

Moreover going by theory of the jobless appellant and asylum status of the respondent and, as said, the former did not sufficiently enough dispute the fact that the respondent was employed, however minimal the wage she received yet the respondent eagerly waited for release and

arrival of the three innocent children and was ready to take care and bring them up. I think for betterment of the family and country an employed therefore busy diaspora abroad was better than a jobless resident in the country of origin much as the appellant admitted that that the respondent had sending some money in Tanzania being school fees and maintenance allowances for the children. The issue of the respondent being asylum or beggar abroad therefore it was neither here nor there.

It is very unfortunate that for all these five (5) months of the parties in courts the best interest of the three innocent children has been held in abeyance and very lucky for not releasing the children the appellant was not arrested, charged and prosecuted for offence of disobedience of the court's lawful order or court attempt to say the least. It is very unfortunate that the appeal was preferred and admitted in the first place. The decision of the lower court is upheld entirely.

The appeal lacks merits. I shall have no other option but, as I hereby do dismiss the appeal. It is so ordered.

Right of appeal explained.

S. M. RUMANYIKA
JUDGE
18/10/2021

The judgment delivered under my hand and seal of the court in chambers this 18/10/2021 in the presence of Ms Nyaki learned counsel for the respondent and the appellant.

S. M. RUMANYIKA
JUDGE
18/10/2021