IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 60 OF 2021

(Appeal from the Judgment of the District Court of Kinondoni at Kinondoni in Civil Revision No. 13 of 2018 before Hon. C. Kiliwa, **RM** dated 12/09/2018)

SALUM MAKUBI.....APPELLANT

VERSUS

SAADA OMARY LUBUVA..... RESPONDENT

JUDGMENT

29th Sept, 2021 & 29th Oct, 2021.

E. E. KAKOLAKI J

Before this court the appellant is challenging the ruling of the District Court of Kinondoni at Kinondoni in Civil Revision No. 13 of 2018, dated 12/09/2018, ordering him to provide maintenance to the respondent as his wife and her two children to the tune of Tshs. 5,000,000/- per year, equivalent to Tshs. 416,666.66 per month. He has therefore presented five grounds of appeal going thus:

1. That the Resident Magistrate erred in law and fact by holding that the Appellant is the husband of the Respondent (his step son).
2. That the Resident Magistrate erred in law and fact in finding that there was a decision of the Primary Court worth of revising as the said decision was a nullity *ab initio*.

3. That the Resident Magistrate erred in law and fact in upholding the decision of Hon, H. Futuruni, PCM dated 5th June, 2017 of the Manzese/Sinza Primary Court in Civil Case No. 245 of 2016 ordering the appellant to provide maintenance to the children and the Respondent (alleged wife) using the provisions of the Law of Marriage Act, 1971, Cap. 29 R.E 2002 without considering whether a marriage between Appellant and the Respondent exists.
4. That the Resident Magistrate erred in law and fact by upholding the decision of Hon. H. Futuruni dated 5th June, 2017 of the Manzese/Sinza Primary Court in Civil Case No. 245 of 2016 without considering that such decision ought to be impugned for being fraught by illegality.
5. That the Resident Magistrate erred in law and fact by condemning the Appellant to provide maintenance to the children namely (Z. A. M and A.A.M identity withheld) and the Respondent his alleged wife for the tune of Tshs. 5,000,000/- per year, equivalent to Tshs. 416,666.66 per month, in absence of a marriage between them

The appellant is therefore praying the court to allow the appeal by setting aside the decision of the Manzese/Sinza Primary Court dated 05/06/2017 and order of the District Court in its ruling dated 12/09/2018.

Briefly in 2016 the respondent and wife of Ally Mussa Mkubi, sued the appellant (her step son), before the Manzese/Sinza Primary Court in Civil Case No. 245 of 2016, for provision of maintenance to her and her two children (half sister and brother to the appellant). Hearing of the case proceeded ex-parte as it appears the appellant's presence could not be secured the result of which was the court to order him to provide

maintenance as claimed but without declaring specific the amount to be paid, either monthly or annually. Discontented with the decision for not being executable before District Court of Kinondoni vide Revision Application No. 13 of 2018, the Respondent moved the court to revise the decision of the Primary Court of Manzese/Sinza in Civil Case No. 245 of 2016 as it was not indicating the amount to be provided to her as maintenance. Despite of being served by way of substituted services, once again the appellant failed to enter appearance in court to defend the application, hence hearing proceeded ex-parte. In its ex-parted ruling dated 12/09/2018 the District court having upheld the findings of the trial court on the maintenance order to the appellant, guided with the provisions of sections 115(1) and 129(1) of the Law of Marriage Act, [Cap. 29 R.E 2002] and acting on belief that the appellant was husband to the respondent, went on to revise the trial court's decision by ordering payment of maintenance costs to the tune of Tshs. 5,000,000/- per year, equivalent to Tshs. 416,666.66 per month. This decision which came into appellant's knowledge sometimes late could not be appealed against timely as he was found himself time barred. He however successfully managed to secure extension of time within which to appeal to this court vide ruling of this court dated 17/04/2020 in Misc. Civil Application No. 549 of 2019, hence the present appeal.

On the hearing date the appellant appeared represented by Mr. Charles Lugola learned advocate whereas the respondent proceeded under legal aid of Tanzania Women Lawyers Association (TAWLA) and both parties were allowed to dispose of this appeal by way of written submissions upon securing leave of the court. In this judgment I am intending to consider

each and every ground of appeal as canvassed by the parties if need be. To start with and for the purposes of smooth disposal of the matter I have chosen to consider first the third and fifth grounds of appeal where essentially the appellant's complaint is that, the Resident Magistrate erred to uphold the trial court's decision and to order the appellant to provide maintenance of Tshs. 5,000,000/- per year, equivalent to Tshs. 416,666.66 per month, to the respondent and her two children in absence of any evidence of marriage between them. The issue for determination by this court therefore is whether the Resident magistrate was justified to issue that order after invoking the provisions of sections 129(1) and 115(1)(b) of the Law of Marriage Act (LMA). It is Mr. Lugola's submission that, marriage relationship was not established between the parties, thus it was wrong for the court to order the appellant as step son to provide maintenance to his step mother as that was in contravention of the provision of LMA. He sought refuge in the decision of **Loswaki Village Council and Another Vs. Shibeshi Abede** (2000) TLR 204 where the Court to Appeal held *"Those who seek the protection of the law in a court of justice must demonstrate diligence"* while praying this court to find the grounds merotorious hence allow the appeal by quashing the decision of both lower courts and set aside the maintenance order.

In riposte the respondent in her submission while conceding not to be the appellant's wife resisted the submission by Mr. Lugola contending that, the District court was correct to order the appellant to provide maintenance to her and her two children for being the eldest child of the respondent's husband, who is also accused of misusing properties of the sick and bed ridden husband. She fortified her argument by citing the provisions section

42(2) of the Law of the Child Act, [Cap. 13 R.E 2019] submitting that, an application for maintenance can be made against any person who is eligible to maintain or contribute towards welfare and maintenance of the child which in this case she argued is the appellant. It was her prayer with that submission, this appeal be dismissed for being unmeritorious and the appellant be compelled to execute the order.

I have paid a close look to the conflicting arguments by both parties. What is discerned from their submissions is that, there is no dispute that parties in this matter are not and were at no time in memorial contracted marriage or presumed to be husband and wife as their relationship is that of son and step mother respectively. The only disputable issue is whether a party not husband or father to the child can be sued for maintenance of the woman or child. The respondent relying on section 42(2) of Child Act says yes, while Mr. Lugola submits, the law does not so provide. Section 42(2) of the Child Act, [Cap. 13 R.E 2019] provides thus:

> *42(2) The application for maintenance may be made against* ***any person who is eligible to maintain the child or contribute towards the welfare and maintenance of the child****. (Emphasis supplied)*

It is trite law that this court being a superior court is duty bound to supervise compliance of the law by the lower courts. This noble duty was overemphasised by the Court of Appeal in the case of **Marwa Mahende v. Republic** [1998] T.L.R. 249 when the Court stated that:-

> *"We think . . . the duty of the Court is to apply and interpret the laws of the country.* ***The superior courts have the***

additional duty of ensuring proper application of the laws by the courts below. *" [The emphasis is mine]*

Similar observation was made in the case of **Adelina Koku Anifa and Another Vs. Byarugaba Alex**, Civil Appeal No. 46 of 2019 (CAT-unreported) where the Court of Appeal had this to comment:

> *It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the Court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals.*

Now in the exercise of the above stated duty and from my reading and understanding of the above cited provisions of section 42(2) of the Law of the Child Act, it is true as submitted by the respondent that under Child Act, an application for maintenance order can be brought against any person only when the applicant is able to prove or demonstrate to the court that, the said person is eligible to maintain the child or contribute towards his/her welfare and maintenance. It is from that stance I hold the issue as to whether party not husband to the applicant or father to the child can be sued for maintenance of the child is answered in affirmative. Applying the above stated law to the facts of this case I find the law barred not the respondent from suing the appellant for maintenance of the children, in as long she was able to file the suit or application to the right court and be able to demonstrate to the court that, the appellant is eligible to maintain the children covered by the order. It should be noted however that, the court in exercising its powers on the application for maintenance

order and before granting the prayer has to satisfy itself first of the following conditions, **one**, income and wealth of the respondent. **Second**, any impairment of earning capacity of the person responsible to provide for maintenance. **Third**, financial responsibility of respondent towards other children. **Fourth**, the cost of living in that area and **fifth**, any other rights of the child under the Act. These conditions are provided under section 44 of the Law of the Child Act, which reads:

> *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.*

Reverting back to the issue at hand, my investigation of the trial court and District Court records in this matter has unearthed no evidence exhibiting that the above conditions in section 42(2) of the Act, were demonstrated by the respondent to the court and/or the ones enumerated under section 44 of the Act were considered by the trial and District Courts before reaching their decisions. Even if the same were successfully demonstrated by the respondent and properly considered by both preceding courts still I

would hold, the two preceding courts decisions were a nullity for want of jurisdiction as both court had no jurisdiction to try the said matter for not being designated Juvenile courts within the meaning of the Law of the Child (Designation of Juvenile Courts) Notice, 2016, GN. No. 314 of 09/12/2016, before the amendment on the jurisdiction of the court effected by Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020. The later on amendments amended section 97 of the Law of the Child, by adding subsection (3) empowering District and Resident Magistrates Courts to hear and determine matters triable by the Juvenile Court. It is however noted with concern from the record that, when issuing maintenance order against the appellant in this matter both preceding courts did not sit as juvenile court as they proceeded on wrong presumption that parties were husband and wife hence wrongly applied the provisions of sections 129(1) and 115(1) of LMA which provide for duty of the man to maintain his children and court's power to issue maintenance orders to a wife or former wife respectively. Section 129(1) of LMA reads:

> *129.-(1) Save where an agreement or order of court otherwise provides,* ***it shall be the duty of a man to maintain his children****, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof. (Emphasis added)*

And section 115(1) of LMA provides:

115.-(1) The court may ***order a man to pay maintenance to his wife or former wife-***

(a) – (g).

As it can be gleaned from the above cited provisions an order of maintenance to children or wife and/or former wife under Law of Marriage Act is only issued against **the man to his children** or **husband to his wife** or **former wife only** and/or **wife to husband** under section 115(3) of LMA and not to any other eligible person like the appellant in this case as provided under section 42(2) of the Child Act. Since in this case the respondent who is not the spouse to the appellant instituted against him Civil Case No. 245 of 2016, in the Primary Court and later on Revision No. 13 of 2018, in the District Court, the courts which had no jurisdiction to entertain maintenance application for the purposes of **any other eligible person** under section 42(2) of the Law of the Child Act, apart from the husband to wife or former wife and/or father to the children under the LMA, I hold the proceedings and decisions thereof were a nullity. The issue raised above therefore is answered in negative in that the Resident magistrate was not justified to uphold maintenance order after invoking the provisions of sections 129(1) and 115(1)(b) of the Law of Marriage Act (LMA) as the same was originating from null proceedings and decision of the Primary Court of Manzese/Sinza in Civil Case No. 245 of 2016. This affirmative conclusion of the third and fifth grounds of appeal has the effect of disposing of this appeal and for that matter I have no reason to consider other grounds of appeal as intended before. That being the position and given the fact that, proceedings and decisions in both preceding courts are nullity, I allow the appeal and proceed to invoke the

revisionary powers of this court as provided under section 44(1)(b) of the Magistrate Courts Act, [Cap.11 R.E 2019] by quashing both courts proceedings and set aside the decision and orders thereto. The respondent is therefore advised to institute the suit or petition afresh in a proper forum if she so wishes.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of October, 2021.

E. E. KAKOLAKI

JUDGE

29/10/2021

This Judgment has been delivered at Dar es Salaam today on 29th day of October, 2021 in the presence of Mr. Charles Lugola, advocate for the Appellant, the respondent in person and Ms. **Asha Livanga**, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

29/10/2021