IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 237 OF 2021

(Arising from the Judgment of the Juvenile Court of Dar es salaam at Kisutu in Civil Application No. 443 of 2020 before Hon. D.J. Msoffe, **RM** dated 10/05/2021)

LEYLA YASSIN TEZURA.....APPELLANT

VERSUS

SALEHE MANYAMA.....RESPONDENT

JUDGMENT

13th Oct, 2021 & 12th Nov, 2021.

E. E. KAKOLAKI J

In this appeal the appellant is challenging the decision of the Juvenile Court of Dar es salaam at Kisutu in Civil Application No. 443 of 2020, handed down on 10/05/2021, allowing the respondent to have access of the child and refusal to grant her maintenance costs incurred for upbringing of the child, subject of this appeal. She has thus advanced three grounds of appeal as follows:

1. That the trial magistrate erred in law and fact for ordering access of the child on weekends (from 8.30 in the morning to 5.30 in the evening) without providing proper guidance on how that order can be executed, hence jeopardize the best interest of the child.
2. That the trial magistrate erred in law and fact for ordering access of the child for two weeks for long vacation and one week for short vacation without considering the best interest of the child.
3. That the trial magistrate erred in law and fact for failure to consider strong evidence adduced by the Appellant in relation to costs incurred for the wellbeing of the child for the period of ten years and for maintenance of the child after the said judgment. Thus declined to order the Respondent to pay the incurred and expected costs for maintenance of the child in issue.

The facts of the case that gave rise to this appeal as gathered from the record can simply be stated as follows. Appellant and Respondent in this matter way back 2009, had engaged into love relationship that gifted them with a male child in 2010 whom I shall be referring to as YT for the purposes of hiding his identity, before the respondent left for Sweden seeking for green pasture. He came back in the country in 2013 and since then tried

unsuccessfully to access his child until when he decided to lodge in court Civil Application No. 443 of 2020 before the Juvenile Court for Dar es salaam at Kisutu, for access and custody of his child as his mother had married to another man who was raising him. In opposing the application the appellant, apart from challenging its merit raised a counterclaim claiming for recovery of Tshs. 30,000,000/- being the costs incurred by her and her husband in raising and maintaining the child at issue from the time of conception up to the date of institution of the said application before the trial court. Hearing of the said application proceeded by way of written submissions while the court ordering for social inquiry report to be prepared by the social welfare officer which involved interviewing the parties as well as their child separately. Having considered both parties submission as well as the social inquiry report the trial magistrate found out that the application was meritorious and that the respondent was entitled to access his child as biological father and proceeded to issue some orders on how the said access could be effected while disregarding the counter claim of costs incurred by the appellant in raising the child. It is from that decision the appellant is aggrieved hence this appeal basing on the above stated grounds. The appeal proceeded by way of written submissions as appellant and respondent were

represented by Ms. Suzan J. Barnabas and Mr. Revocatus Sedede, both learned advocates respectively.

Submitting in support of the appeal Ms. Barnabas for the appellant opted to combine the first and second grounds of appeal while arguing the third ground separately. On the first and second grounds she argued, the trial magistrate when granting access of the child to the respondent did not provide proper guidance on how the child will be collected and returned to the appellant something which subjects the best interest of the child into jeopardy. She said, it is also unknown whether the respondent's residence will offer conducive environment for the child to live in during the vacation as the social inquiry report did not disclose that fact. And further that, the child has no strong bond with his father and other siblings apart from the ones he is living with now. To her submission, the child welfare ought to be of paramount consideration to the trial magistrate before granting access of the child to the respondent. On the third ground she faulted the trial magistrate for not considering the strong evidence adduced by the appellant that, she was the only parent providing for the child needs including school fees, health insurance, food, clothes and other daily needs, thus the court when providing access to the respondent ought to have ordered him also to

provide maintenance to the child and pay for the costs incurred by her in raising him. She backed her submission with the provisions of section 39(2)(a) of the Law of the Child Act read together with Rule 73 of the Law of the Child (Juvenile Court Procedure) Rules GN. No. 182 of 2016, directing the court when making orders for access of the child to consider also the rights of the child under section 26 of the same Act, such as right to maintenance and education. She thus implored the court to find the appeal with merit and allow it.

In rebuttal Mr. Sedede on the first and second grounds argued, the submission by the appellant is misconceived. He said, it is not true that the trial magistrate did not provide guidance on how that access of the child would be executed as the same was properly stated in the ruling. He added, section 38 of the Law of the Child is providing for periodic access of the child, thus the trial court was justified in issuing an order of access to the respondent. On the assertion that social inquiry report did not state anything concerning the environment at the respondent's residence he said, the respondent's residence was visited by social welfare and the trial court considered the report when granting the order of access. Thus the ground lacked merit as the appeal was based on speculation and not even supported

by authorities, Mr. Sedede stressed. He added, the appellant never raised the issue of living environment at respondent's residence in her pleadings considering the position of the law that parties are bound by their pleadings as the application was for custody and access orders only. On the third ground he countered, the application before the trial court was for custody and access orders brought under sections 37(1) and 38 of the Law of the Child Act and Rules 63,64 and 76 of the Law of the Child (Juvenile Court Procedure) Rules GN. No. 182 of 2016, in conformity with JCR form 8, and not for maintenance orders which is preferred under JCR form 7, so the trial magistrate was justified to disregard the applicant's prayer of maintenance costs. Mr. Sedede contended, while the appellant was pressing for grant of maintenance costs of the child in this appeal there was a pending case by the appellant before the trial court Juvenile Civil Application No. 335 of 2021, seeking for the same relief against the respondent. To him this ground of appeal lacked justification, therefore the entire appeal ought to be dismissed, Mr. Sedede submitted. In her rejoinder submission Ms. Barnabas reiterated what she had submitted in her submission in chief. She however added while citing the decision of this court in the case of **Aloyce Masalu Mapembe Vs. Paulina Romanus Masonga**, PC Matrimonial Appeal No. 03 of 2021

(HC-unreported) that, it is a legal responsibility of any parent to provide maintenance to his children regardless whether parents are married or not. She said, the legal principle is derived from both Law of Marriage Act, [Cap. 29 R.E 2019] and the Law of the Child Act,[Cap. 13 R.E 2019], thus the respondent should bear in mind that responsibility and discharge it even if not moved by the appellant. Further she countered the assertion by the respondent that there is a pending maintenance costs application before the trial court, stating the appellant had and still has a room to raise objection in this appeal challenging the related orders of maintenance costs if the said case exists, though it is too late. She therefore restated her prayers advanced during her the submission in chief seeking the judgment to be set aside with costs.

I have taken time to internalise both parties fighting arguments as well as perusing the assailed ruling and the entire record before the trial court. What is discerned from their submissions is that, there is no dispute that the two parties are biological parents of the child at issue and that the application before the trial court was for custody and access of the child under 37(1) and 38 of the Law of the Child Act and Rules 63,64 and 76 of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 2016. The only issues

at contest which are for determination by this court as reduced from the three grounds of appeal and submissions in support and against the appeal are, **one**, whether the trial court granted an order of access of the child to the respondent without considering the best interest of the child as claimed by the appellant. **Second**, whether the trial court erred to deny the appellant of her claim of Tshs. 30,000,000/- being costs incurred by her and her husband in raising the said child.

To start with the first issue which is seeking to resolve the appellant's complaints in the first and second grounds of appeal, it is trite law that, when considering the application for custody or access of the child court must consider the **best interest of the child and the importance of the child to be with his mother**. This is in terms of sections 37(4) and 39(1) of the Law of the Child Act. Other factors for consideration are as provided under section 39(2) of the Act and includes but not limited to **the rights of the child** under section 26 of the Act, **age and sex**, **independent views of the child**, **right of the child to be with his parents** and **keep siblings together** among others. See also the case of **Daniel Hamiliton Mwakio Vs. Pelagio Masu Kijuu**, Civil Appeal No. 88 of 2021 (HC-unreported). Section 39(1) and (2) of the Law of the Child Act provides thus:

*39.-(1) The court shall consider the **best interest of the child and the importance of a child being with his mother when making an order for custody** or access.*

(2) Subject to subsection (1), the court shall also consider –

*(a) **the rights of the child** under section 26;*

*(b) **the age and sex** of the child;*

(c) that it is preferable for a child to be with his parents except if his right are persistently being abused by his parents;

*(d) **the views of the child**, if the views have been independently given;*

(e) that it is desirable to keep siblings together;

(f) the need for continuity in the care and control of the child; and

(g) any other matter that the court may consider relevant.

Applying the law and principle above cited to the facts of the case at hand, I find the appellant's complaint is without merit for the following reasons. **One**, when denying the respondent with custody and granting him access of the child as biological father the trial court considered the best interest of the child and the importance of him living with his mother as he stayed with her since his childhood. Had the trial court failed to consider child's best interest as claimed by the appellant it would have given custody of the child

to the respondent. **Second**, the social inquiry report was also put into consideration in which my perusal has revealed that, the child disclosed to the social welfare officer his curiousness to know and meet his father. By allowing him to access his biological father in my opinion is and will continue favouring the best interest of the child as that will quench the child's thirsty of meeting his biological father and avail him with an opportunity to mingle with siblings from his father's side when visited, hence improvement of his both psychological and social orientation as well as bond to his father. **Third**, the child is entitled to enjoy both parental care and love from both parents regardless of the station of life of one of parents unless there is evidence that by periodic visit of the father his safety and welfare will be at stake. The submission by the appellant's counsel that the environment at the respondent's residence is unknown, thus risking the child's welfare during his visit to the father, in my opinion is based on mere speculations as rightly put by Mr. Sedede, since there is no evidence proving that during his periodic visit by the father as ordered by the court the child's safety and welfare will be at danger. As such the trial court did not order the child to spend night at his father's residence during the period of father's access as the access time is between 8.30 hours in the morning to 5.30 hours in the evening on

the specified periods. As to what place specifically will the respondent be meeting or collecting and returning the child this will depend on the circumstances prevailing at the time and the agreements and arrangements reached between the two parents, which this court highly encourages. I so hold as there are at time it might need the respondent to introduced the child to his siblings outside his mother's home hence pick up and returning of the child is unavoidable. What is important I hold is for the mother to be informed prior is when and where the child is being taken between 8.30 hours in the morning up to 5.30 hours in the evening. That said the first raised issue is therefore answered in negative as the trial court when granting the order of access to the respondent after considered the best interest of the child. I therefore see no justifiable reasons to interfere with the trial court's findings on that finding.

Next for determination is the second issue as to whether the trial court erred to deny the appellant of her claim Tshs. 30,000,000/- being the costs incurred by her and her husband in raising the said child. It is undisputable fact that the claim of refund of costs by the appellant to the tune Tshs. 30,000,000/- by way of counter claim during the trial was nothing but specific or special damages. In law special damages are such damages which

the law will presume to have existed and incurred. See the paper of **Justice Yaw Appau**, Justice of the Court of Appeal (Nigeria), during the Induction course to the newly appointed circuit judges at the Judicial Training Institute, **Assessment of Damages**, *(www.jtighana.org),* which this court finds relevant and useful. At page 5 of his paper the learned judge defines *Special damages* **thus***:*

> ***"Special Damages*** *are such a loss as will not be presumed by law.* ***They are special expenses incurred or monies actually lost. For example, the expenses which a plaintiff or a party has actually incurred up to the date of the hearing are all styled special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment centre, etc."*** *(Emphasis added)*

It is trite law that, specific damages must be specifically pleaded and strictly proved. The Court of Appeal in the case of **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137 at page 139, although not comprehensively express on special damages had this to say:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

Similar view was aired by the Court of Appeal in the case of **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) where the Court said:

> *"The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved…"*

In the case at hand when filing her reply to the application the appellant by way of counter claim raised the claim of Tshs. 30,000,000/- being the costs incurred by her and her husband in raising the child at issue before his father had applied for custody and access orders. As the principle in the above cited cases requires special or specific damages when pleaded the same must be strictly proved, in this matter there is no evidence to show the appellant proved the said specific damages claimed as per the requirement of the law. That being the clear position of the law the appellant's complaint in the third ground lacks legs to stand on. It is from that reason I dismiss the said ground for want of merit. Having so done, I wish to comment by passing that, since the appellant is riding another horse on claims of maintenance in Juvenile Civil Application No. 335 of 2021 which fact she is not disputing, then she is advised to pursue all matters and her claims concerning maintenance of the child there and not in this case as what was before the trial court in this

appeal was an application for custody and access orders only, though she forced in maintenance claims.

In the circumstances and for the fore stated reasons and law, I am convinced that this appeal is devoid of merits and the same is hereby dismissed.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of November, 2021.

E.E. KAKOLAKI

JUDGE

12/11/2021

Delivered at Dar es Salaam in chambers this 12th day of November, 2021 in the presence of Ms. Suzan Barnabas, advocate for the appellant, Mr. Revocatus Sedede, advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E.E. KAKOLAKI

JUDGE

12/11/2021


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