**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MOROGORO DISTRICT REGISTRY)**

**AT MOROGORO**

**CIVIL APPEAL NO. 4 OF 2022**

***(Originating from Misc. Civil Application No. 01 of 2022; in the Juvenile Court of Morogoro, at Morogoro)***

**LEILA YANGE..... APPELLANT**

**VERSUS**

**DOFRIAN JOHN WALJ..... RESPONDENT**

## JUDGMENT

**Date: 24th June, 2022**

**CHABA, J.**

Before the Juvenile Court of Morogoro, at Morogoro the Respondent **Dofrian John Walj** claimed that he was in love relationship with **Zena Yange @ Zena Ally Rajabu** (now the deceased person) in which they were blessed with a child born on 7th day of April, 2012 and given two different names; **LJW** and **NKS** (Her real names withheld). The child was also registered with two different birth certificates bearing the following numbers: **C. No. 1001981846 and BB/No. 1643415**, respectively.

At first, the respondent (petitioner) petitioned for parentage of the child and further filed a certificate of urgency seeking for the custody of child, pending determination of the main suit. His main argument was to the effect that since the child was schooling in Arusha, she was supposed to continue with her studies while under his custody. However, the appellant (respondent at the trial court), was unhappy with the trial court

decision as the ruling of the court on the face of it appeared to determine the matter conclusively while she believed that the petitioner is not the biological father of the child. Part of the said impugned decision is hereunder quoted:

> *"..... from those few facts at present, I do not hesitate to order the respondent to hand over the custody of the child to the petitioner immediately. In conclusion the child to be placed to the petitioner without any delay ....."*

Discontented with the above orders issued by the trial court, the appellant, **Leila Yange** (the deceased's relative) rushed before this court armed with seven grounds of appeal listed in the memorandum of appeal as follows:

1. *That, trial court erred in law and fact by ordering Respondent to have a custody of child based on the application which contains wrong enabling provision of the law and a dead law.*
2. *That, the trial court erred in law and in fact by ordering Respondent to have a custody of a child without any evidence tendered by the parties.*
3. *That, the trial court erred in law and fact by ordering respondent to have a custody of child, without first determining the issue of urgency of the matter and proceed to determine the merit of the application.*
4. *That, the trial court erred in law and in fact by ordering respondent to have a custody of a child, without giving reasons and considerations which are recognized by the law when the issue of a custody of the child is in question.*

5. *That, the trial court erred in law and fact by ordering respondent to have a custody of child, without affording the respondent with a right to be heard and tendered evidence.*
6. *That, the trial court erred in law and in fact by ordering respondent to have a custody of child, without first determine the question of the parentage which was a basis of his application.*
7. *That, the trial court erred in law and in fact by ordering respondent to have a custody of child, without giving conditions on the said custody pending determination of the parentage aid of the child.*

When the appeal was called on for hearing, by the parties' consensus the court ordered this appeal be disposed by way of written submissions. Both parties did abide by the scheduling orders. During submissions of pleadings, the respondent filed a notice of preliminary objection on a point of law to the effect that the present appeal is bad in law as it contravened the provision of section 74 (2) of the Civil Procedure Code [Cap. 33 R. E. 2019] (the CPC).

Being a trial Judge, I had an opportunity to entertain the point of preliminary objection raised by the respondent and after considering it on merit, I sustained the same, mainly on the ground that the trial Senior Resident Magistrate after he had pronounced the ruling, he did not indicate if the said decision was an interim order pending determination of the main application. Moreover, the ruling pronounced was unclear and had a lot to be desired. Upon heard both parties, I observed that, the impugned decision which is the subject of this appeal doesn't appear to be an interlocutory order and it was more difficult to interpret it as custody of the child was placed to the petitioner without specifying whether the custody had

been issued pending determination of the petition for parentage of the child. Indeed, this was the crux of the matter which driven me to sustain the point of objection raised.

Consequently, I ordered this appeal to be set for hearing. Apart from the memorandum of appeal filed by the appellant, I requested both parties to first, address this court on the following pertinent issues:

1. *Whether the certificate of urgency filed before the trial court alongside with the main case and registered as Misc. Civil Application No. 1 of 2022 was proper before the trial court.*
2. *Whether the orders issued by the trial court was an interlocutory order in the eyes of the law.*

At the hearing of this appeal, the appellant was represented by Mr. Michael Mwambanga, whereas the respondent enjoyed the service of Mr. Marwa Masanda.

To kick the ball rolling, Mr. Mwambanga submitted in brief that the certificate of urgency filed alongside with the main case registered as Misc. Civil Application No. 1 of 2022 did not comply with the Third Schedule, JCR Form No. 04 (Chamber Summons) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 (the Rules, 2016) and Form No. 3 of the same schedule. He contended that, when the trial court pronounced her ruling on 21/01/2022 and the appellant felt unhappy with such decision, the only feasible option which was available to her in accordance with the governing rules was to follow the procedural law by lodging an application seeking to vary the decision of the trial court through JCR Form No. 11. He further accentuated that the trial magistrate was duty bound to state clearly that the appellant (respondent) had to hand over the child

to the respondent (petitioner) pending determination of the main case instead of issuing uncertain orders. He submitted that, in principle the trial magistrate failed to grant the orders sought by the respondent in accordance with the law (petitioner at the trial court).

He was of the view that, due to the irregularities highlighted above, it would be wise to remit the court record to the trial court to proceed with the trial. He concluded by asking this court to allow him to abandon the grounds of appeal listed in the memorandum of appeal.

In reply, Mr. Masanda highlighted that since the matter did involve the issue of parentage of the child, the respondent correctly filed his case before the Juvenile Court of Morogoro, at Morogoro in compliance with the JCR Form No. 1. He submitted further that the matter ought to have been filed and registered as Civil Case No.1 of 2022 instead of Misc. Civil Application No. 01 of 2022. In respect of the said certificate of urgency, the learned advocate underlined that the same was improperly filed.

As regard to the purported interim order issued by the trial court, Mr. Masanda had the view that section 37 (1) and (2) of the Law of the Child (supra) and Rule 55 (3) of the Rules, 2016 were proper provisions of the law to be invoked by the trial court. He however, emphasized that the order issued by the trial court contravened the condition set by the law. Due to the anomalies exhibited on the face of the impugned decision, he prayed this court to quash the proceedings of the trial court and the ruling dated 21/01/2022 and set aside all orders stemmed therefrom.

In rejoinder, Mr. Mwambanga had nothing to add but he conceded to the argument put forward by Mr. Masanda.

From the foregoing submissions advanced by the learned advocates for both sides, it is obvious that this is a straight-forward case. As noted above, the learned advocate for the appellant prayed to abandon all seven grounds of appeal hence I will only address the two issues, that I have requested the parties to address this court. Both parties are in agreement that the trial court decision was uncertain as the same did not indicate whether the order given was an interlocutory order or it conclusively determined the matter. Again, the purported certificate of urgency was filed without complying with the Third Schedule of the Rules, 2016 in particular Form No. 3 and 4. Mr. Mwambanga, learned advocate for the appellant also did inform this court that when the trial court issued an ambiguous order, the proper procedure ought to have been followed by the appellant to challenge the same, was through JCR Form No. 11 where the appellant would have applied to vary the orders issued by the trial court. Both the learned advocates had the view that, since the trial court proceedings were tainted with irregularities, the ruling dated 21/01/2022 and the orders sprang therefrom were nullity and void ab initio. They, therefore prayed this court to quash the trial court proceedings and set aside the orders issued by the Juvenile Court of Morogoro, at Morogoro.

As to the question whether the title of proceedings ought to have been registered as Civil Case No. 1 of 2022 instead of Misc. Civil Application No. 01 of 2022, in my view, the answer is not so hard to fetch up. According to JCR Form No. 1 of the Third Schedule of the Law of the Child Act, clearly portrays that in as much as the nature of the matter at hand is concerned, i.e., PETITION FOR PARANTAGE; the tittle proceedings ought to have been recorded as Civil Case No. 1 of 2022 as hereunder shown:

G.N. No. 182 (contd.) 94

**THIRD SCHEDULE**

**FORMS**

JCR Form No. 1

**TITLE OF PROCEEDINGS**

.....

IN THE JUVENILE COURT OF ..... (Region)

AT .....

MISCL CIVIL/CRIMINAL APPLICATION/**CIVIL CASE No**.....

OF 20.....

In the matter of the Application/Petition for.....

(Under the Law of the Child Act 2009)

Between

..... APPLICANT or where appropriate PETITIONER

(State name of Applicant(s) or (where appropriate) Petitioner(s))

And

..... RESPONDENT

(State the name of Respondent(s))

.....

(State name of Child where appropriate)



However, under section 98 (1) (b) of the Law of the Child Act (supra) the law provides that, a Juvenile Court shall have power to hear and determine applications relating to a child-care, maintenance and protection. The word, child-care application has been defined under Rule 3 of the Rules, 2016 to mean an application for custody, access, parentage

and applications made under section *95 (sic)* 98 of the Law of the Child Act. Therefore, in my understanding, whether the trial court record ought to be titled as Misc. Civil Application or Civil Case as indicated by JCR Form No.1 and supported by Mr. Masanda, learned advocate, to me it sounds different. According to section 98 (1) (b) of the Law of the Child Act (supra) and Rule 3 of the Rules, 2016, a petition for parentage of the child, in its own is an application and not Misc. Civil Application or Civil Case as envisaged in JCR Form No.1, No.3 and No.6 respectively. In my considered opinion, the proper title ought to have been Civil Application or Application for Petition for Parentage No. 1 of 2022. On the other hand, it is my settled view that, the JCR Form No. 11 is a proper form to use or apply for any matters falling under the umbrella of Miscellaneous Civil Applications within the meaning of the Rules, 2016 as it deals with the Chamber Applications to vary, extension or discharge an order in existing proceedings.

What I have gathered from the above provisions of the law, the Rules, 2016 and the respective forms in particular JCR Form No.1, JCR Form No.3 and JCR Form No.6, respectively, do conflict each other. I say so because the Law of the Child Act and the Rules thereof in particular the above-mentioned forms are incompatible to each other. While the JCR Forms No.1 directs that petition for parentage be registered as Civil Case, the provisions of the law under sections 34 and 98 (1) (b) of the Law of the Child Act and Rule 55 (1) of the Rules, 2016 recognize petition for parentage as Civil Application. The practice further depicts that the petition for parentage is usually registered as Civil Application for parentage of the child and not as Civil Cases. To avoid confusions, to magistrates vested with the powers to entertain matters falling under the

Law of the Child, I think in my unfeigned opinion it is high time now to amend the Third Schedule to the Rules, 2016.

Having determined the proper way of filing a petition for parentage order and deliberated the submissions advanced by the learned advocates, I am now in a position to hold and declare that the trial court proceedings are void ab initio. I thus proceed to quash and nullify both the trial court proceedings and the ruling dated 21st day of January, 2022 and set aside all orders sprang therefrom. The case file registered as Misc. Civil Application No. 1 of 2022 in the Juvenile Court of Morogoro, at Morogoro also quashed on the ground for being improper. Parties are at liberty to institute a fresh Civil Application or Application for Petition for Parentage in accordance with law, if they so wish.

In the final analysis, I order and direct that the trial court record be remitted back to the Juvenile Court of Morogoro, at Morogoro. Each party to bear its own costs.

**It is so ordered.**

**DATED** at **MOROGORO** this 24th day of June, 2022.

**M. J. Chaba**

**Judge**

**24/06/2022**

**Court:**

Judgment delivered at my hand and seal of the court in chambers this 24th day of June, 2022 in the presence of Mr. Michael Mwambanga, learned advocate for the appellant and Mr. Marwa Masanda, learned advocate for the respondent.

**M. J. Chaba**

**Judge**

**24/06/2022**

Rights of the parties fully explained.


**M. J. Chaba**

**Judge**

**24/06/2022**