IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT IJC MOROGORO

CIVIL APPEAL NO.28 OF 2023

(Originating from petition/civil case No.1 of 2023; in the Juvenile Court of Mvomero at Mvomero)

AZIZA JUMA HAJI
(As administratix of deceased
estate ZUWENA MAJID JAFARI) ..... APPELANT

VERSUS

DIA KHALID..... RESPONDENT

JUDGEMENT

DATE OF JUDGEMENT- 20/02/2024
LATIFA MANSOOR, J.

Before the Juvenile Court of Mvomero (the trial Court), the appellant herein instituted an application for a parentage of the infant Majid Salim Msangi. After full trial, the trial court entered judgment and decree against the appellant herein. Whereas, among other orders, the respondent was declared a biological parent of the child.

Discontented with the decision of the District Court, the appellant appealed to this Court against the decision based on seven grounds of appeal;

1. That, trial court erred in law and fact by ordering the Respondent to be the biological parent and to have custody of the child based on weak and cooked evidence of the respondent.

2. That, the trial court erred in law and in fact by ordering the Respondent to be the biological parent based on illegal measures, forged documents (birth certificate and clinical cards) and Legal technicalities to prove the parentage.

3. That, the trial court erred in law and fact by considering the respondent to have custody of the child, without first determining the issue of unlawfully taking/kidnaping the child based on cooked evidence.z

4. That, the trial court erred in law and in fact by ordering the respondent to be the biological parent of the child, without having sound reasons and considerations which are recognised by the law when the issue of unlawful of the child is in question.

5. That, the trial court erred in law and fact by ordering the respondent to have custody of the child who is below 7 years old while the

respondent failed in adducing relevant and genuine evidence to prove as far as the best interest of the child is concern.

6. That, the trial court erred in law and in fact by ordering the respondent to be the biological parent without proof on proper procedure and to have the custody of the child aged 7 years old without first determining the question of the parentage which was the basis of her application.

7. That, the trial court erred in law and in fact to order custody of the child based on an opinion of social welfare who failed even to solve the matter at an early stages and by became the investigator instead of being a referee for following the principles of adversarial system.

Before dwelling on into the petition of appeal, I find it apt to give the background story that gave rise to this memorandum of appeal as discerned from the Court records: Briefly, the appellant, Aziza Juma Haji, was appointed as the administrator of the estates of her late sister the late Zuwena Majid Jafari who died during the delivery of her son Majid Salum Msangi. The biological father of Majid Salum Msangi was unknown.

After the demise of Zuwena Majid Jafari, her family conducted the meeting to know the fate of the child and the appellant was chosen to take care of him. The child was raised with the support from the family but unfortunately without the appellant's approval on 10th of March 2022, the respondent, Dia Khalid, took the child claiming to be his biological father. Striving to get back the custody of the child, the appellant unsuccessfully instituted a criminal case against the respondent. Still adamant for her cause, the appellant (being the administrator of the Late Zuwena Majid Jafari) instituted a Petition No.1 of 2023 at the District Court of Mvomero subject of the instant appeal seeking to be declared as the guardian of the child and again the matter was not determined on her favour, dissatisfied with the decision the appellant, she decided to register the instant appeal.

With the leave of the Court, the hearing of the application was canvassed by way of written submission by the order of this Court dated 30th day of November, 2023. According to the court's scheduled orders, the appellant was supposed to file her written submission in chief on or before 14/12/2023, whereas the respondent had to file his reply to written submission in chief on or before 28/12/2023 and rejoinder (if any) had to be filed on or before 11/1/2023.

The records reveal that, the appellant drew her written submission in support of the appeal and filed the same on 14/12/2023 as ordered by the court, however, it is on record that, the respondent didn't comply with the orders of this court and as a result, on 11st January, 2023, the appellant filed her rejoinder complaining on the same. For the purpose of saving the precious time of this Court, I find no need of reproducing the submissions by respondent as it is a settled stance of law that, when the court orders the matter to be disposed of by way of written submissions and a party default to comply with such orders, the omission is tantamount to failure to prosecute the same. This position was underlined in the case of **P3525 LT Idahya Maganga Gregory Vs. The Judge Advocate General, Court Martial,** Criminal Appeal No. 2 of 2002 (unreported) in which the Court observed: -

> "It is now settled in our jurisprudence that the practice of Filling written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend as the case may be."

In view of the above authority, it suffices to hold that, the respondent's learned counsel, one Charity Mzinga who was physically present before this Court when it made its scheduling orders, intentionally disobeyed the same. This court cannot condone such an act as it was observed in the case of **Olan, Tanzania Limited Vs. Halawa Kwilabya, DC. Civil Appeal No. 17 of 1999,** which was cited with approval in the case of **Famari Investment T. Ltd Vs. Abdallah Selemani Komba**, (Misc. Civil Application 41 of 2018) [2020] TZHC 386 (11 March 2020), where this court held that: -

> "Now what is the effect of a court order that carries Instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of Justice will grind to a halt or if will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. **So, if a party fails to act within prescribed time, he will be guilty of in diligence in like measure as if he defaulted to appear**..... This should not be allowed to occur. Courts of law should always control proceedings,

to allow such an act is to create a bad precedent and in turn invite chaos". [Emphasis is mine].

With that being observed as such, I hold that, as the respondent's written submissions were filed out of time and without the leave of the court, the same is tantamount to respondent's failure to appear on the date of hearing to defend his case, it follows therefore that, I will neither reproduce nor consider his reply submissions filed on 11th January 2024. As a consequence, the matter will proceed exparte against him as if he did not appear at the hearing.

Now reverting to the appellant's written submission, as regards to the first ground of appeal the appellant submitted that, the trial magistrate failed to observe the law which require the child under the age of seven years to be under supervision of his family. It was also her observation that the trial court erred to order the respondent to be the biological father of the child without ordering DNA test.

On the second ground of appeal, the appellant observed that the trial magistrate ordered the respondent to be the biological parent basing on illegal measures and forged documents (birth certificate and clinical

cards). She maintained her observation by submitting that the trial magistrate's orders were founded on irrelevant evidence and quickly she registered her surprises as to why the trial magistrate failed to ask the respondent on how he obtained the clinic card and she concluded that the trial court neither considered nor assessed the validity of the clinic card of the child.

Regarding the third ground of appeal, the appellant was of the view that the trial court magistrate failed to act judiciously by ignoring the surrounding circumstances of the instant case to include the deceased family reaction after disappearance of the child. To fortify her stance, she referred this court to the case of **Patrick Ezron vs Republic,** (DC) Criminal appeal No.51 of 2020, H.C of Tanzania - Kigoma, A. Matuma, J.; which cited a decision in the case of **Angelina Reubeni Samsoni and Another vs Waysafl Investment Company**, (DC) Criminal appeal No.51 of 2020, H.C - Kigoma (all unreported); which call upon trial magistrates to be curious to do justice by inquiring into whatever fact that transpires to them as a detriment to justice.

In relation to the fourth ground of appeal, it was the appellant observation that, the trial court declared the respondent to be the biological parent of

the child, without giving sound reasons and considerations which are recognized by the law. It was the appellant submission that there was no good and sound reason based on law or facts in issue advanced by the trial court's magistrate to declare that the respondent as a putative father. She demonstrated further that there was no proper procedure followed by the respondent to declare the son belongs to him, she maintained further that the advice from social welfare officer considered by magistrate was reached upon unfair investigation advanced by respondent. She was of the view that the appellant managed to prove in petition that the son MAJIDI SALUMU MSANGI was left with unknown father hence bears his grandfather's name SALUM SAIDI MSANGI on his birth certificate.

In regard to the fifth ground of appeal, the appellant submitted that the trial court magistrate never considered the best interest of child as the circumstances reveals how the deceased died. She submitted further that the child is below 7 years and thus has to be under the custody of their parents as per the Law of Child Act for good care.

Regarding the seventh ground of appeal, she submitted that the whole procedure and process of social welfare to make investigation were not

properly observed. She demonstrated further that there was no inquiry done to the appellant or family of the late deceased and she was wondering how the report was completed. The appellant concluded that the tendered report was cooked.

To sum up, the appellant urged this court to quash and set aside the judgment and orders of trial court.

I have considered the appellant's submission in support of the appeal, as well as the grounds of appeal which in my view boils up to one pertinent issue as to whether the trial magistrate properly evaluated the evidence on record in reaching to her decision.

Being mindful of my task as the first appellate court to re-evaluate the evidence adduced at the trial court, I took pain to go through the trial courts record and found an anomaly on the petition for parentage which in my view mislead the trial magistrate in resolving the dispute before her as she proceeded to entertain the petition which did not properly move the trial Court.

Agreeably, from the records of the trial court, the petition that was lodged before the trial court was one of parentage made under section 56(1) of the Law of the Child (Juvenile court procedures) Rules, 2016. However, in her averments at paragraph 7 (a) and (b) on the reason for making the impugned petition, the petitioner stated;

"a) That the petitioner herein is the guardian (Admnistratix) of MAJID SALUMU MSANGI

b) That the petitioner herein be given authority to take care and maintenance of the child soon after death of her biological mother."

Further on the reliefs sought, what is depicted in the petition is that, the petitioner prayed for the following orders to wit;

i. *Declaration of the petitioner as guardian (admnistratix) of MAJID SALUMU MSANGI.*
ii. *That the lawfully/sole custody of the said MAJID SALIMU MSANGI be under the petitioner.*
iii. *Costs of the petition.*
iv. *Any other relief this honourable court may deem just and equitable to grant.*

From the extract above, it is clear that, the appellant didn't intend to move the trial court on the parentage as the name of the document she filed in court suggest. This is even evident in her evidence at the trial court, at page 12 of the typed written proceeding, where being cross examined by the defence counsel, the appellant responded thus;

> *"I don't know the father.....if it is known I am not ready that child kulelewa na baba yake...mtoto atamjua baba yake ukubwani...I want to return my child...I will not give a child to anyone"*

It is clear, as gleaned from the proceedings above, the contentious issue at the trial was not on parentage of the child but rather on the custody of the same. It therefore follows that, the proper route that the appellant had to take was to apply for the custody of the child, he ought to have followed the procedure for making an application for custody under rule 63 (1) of the Law of the Child (Juvenile Court Procedure), GN. 182 of 2016 which reads: -

> "63. -(1) An application for custody or access by a parent, guardian or relative who is caring for the child shall be made by filing JCR Form No. 8 set out in the Third

Schedule of these Rules."

Under the circumstances, in the absence of compliance to the above procedure, the appellant as the records stands, made an application for parentage and not custody despite of her testimony which appeared to move the court to make an order for custody. This is contrary to the settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored**. [See the case of Scan Tan Tour vs. The Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported)].**

Being guided by the such a law on pleadings, it is my view that, the honourable trial magistrate erred in making an order for parentage where the pleadings and the evidence adduced by the petitioner were premised on the prayer for custody of the child. I say so because it is not only the parties to the case that are bound to the pleadings but the courts are also inclined to abide to the parties' pleadings as it was the holding of the Court of Appeal in the case of **Salim Said Mtomekela vs Mohamed Abdallah Mohamed** Civil Appeal No. 149 of 2019(Unreported) that;

"In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such pleadings except where the court has granted leave to amend the requisite pleadings."

As plain as the above holding is, it follows that, on account of what is evident in the prayers in the purported petition for parentage, in the absence of any amendment on the same, the court ought to have refrained from determining the issue of parentage. I hold such a view, because in her judgment, the trial magistrate made a deliberation on the issue of parentage contrary to the pleadings which laid down the foundation of the case before her. For easy of reference, I reproduce the said extract of the judgment at page 35 as hereunder;

"consequently, I hereby grant the parentage of DIA KHALID and enter orders as under;

1. *The respondent is declared the parents of the child, MSM*
2. *The child has to renounce his names of MSM and be known as MDM*
3. *The parental order be served upon the registrar General of births and deaths for his necessary action pursuant to section 69 and 70 of the law of the Child Act*

4. *Since the court has made an order on a biological father such biological father shall assume the responsibility to the child in the same manner as may be in respect of a child born in wedlock and the child shall, subject to the religious beliefs of the father, have such other rights devolving from the parent including the right to be an heir."*

According to what is depicted above, it is evident that the trial court magistrate was misled with the heading on the pleading which reads "THE PETITION FOR PARENTAGE" and as a result departed from the appellant's pleadings. In my view, had she scrutinized the same, she could have ordered for its amendment and proceed to determine the issue of custody based on the fresh pleading which could have eventually be brought under rule 63 (1) of the Law of the Child (Juvenile Court Procedure) (Supra).

In view of what I have endeavoured to discuss above, this appeal is allowed to the extent explained. Consequently, I hereby quash and set aside the decision of the trial Court. If the appellant is still interested to pursue her claim on the custody of the child, she may institute a fresh case in compliance to the governing laws and procedures so that the trial

court will be availed with evidence that will assist it in determining the custody of the child. I make no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 20TH DAY OF FEBRUARY 2024

(L. MANSOOR J)

JUDGE

20TH FEBRUARY 2024