IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CIVIL APPEAL NO. 01 OF 2023

(Originating from Miscellaneous Civil Application No. 23 of 2022 before the District Court of Babati at Babati)

PASCHAL JOSEPH.....APPELLANT

VERSUS

PASCHALINA SAREA AMI.....RESPONDENT

JUDGMENT

24th April & 8th May, 2023

Kahyoza, J.:

Paschal Joseph (the appellant) and **Paschalina Sarea Ami** (the respondent) are biological parents of two children. The respondent applied for maintenance of the two children. The Juvenile court ordered the appellant to pay Tzs. 200,000/= monthly as maintenance of their children. Aggrieved, the appellant appealed contending that the trial court erred by failure to consider the evidence, the court ordered the appellant to pay Tzs. 200,000/= without considering other factors together with a fact that the appellant stays with one child and finally that the court erred by its failure to explain to him the right to appeal.

The appellant raised three grounds of appeal, which culminate into the following issues are-

1) did the trial court analyze the evidence properly?

2) is a maintenance order of Tzs. 200,000/= monthly justifiable?

3) does the trial court's failure to explain to a right to appeal to the parties?

The appeal was heard orally. The appellant enjoyed the services of Mr. Joseph Mniko, learned advocate while the respondent fended for herself.

The appellant and the respondent although married are not living under the same roof. The appellant is staying with Gudlack Paschal Joseph who is almost four years old (29/11/2019). The respondent stays with Chrisent Paschal Joseph who is two years old (12/04/2021). The respondent applied for a maintenance order before the juvenile court and the court ordered the appellant to pay Tzs. 200,000/=. Indisputably, the appellant is a teacher and the respondent a house wife. The respondent alleged that the appellant neglected to maintain his children from May, 2022.

Did the trial court analyze the evidence properly?

In support of the complaint that the trial court did not properly, the appellant's advocate, Mr. Mniko submitted that the appellant proved by counter affidavit that he was staying with one of them. The District court did not take that fact into consideration, instead it ordered the appellant to pay

Tzs. 200,000/- as maintenance. An affidavit is evidence, it was therefore imperative for it be considered. He further argued that an affidavit is evidence. To support his contention, he cited the case of **Bruno Wensiaus Nyalifa vrs. The Permanent Secretary Ministry of Home Affairs & Another**, Civil Appeal no. 82 of 2017 (CAT_ unreported).

The respondent responded that the appellant was staying with one child against the law as the child was three and half years old. She wanted to know if it was proper for the appellant to stay with a child of that age.

There is no dispute that the appellant and respondent marital relationship was blessed with two issues. The appellant is staying with the first born who is three and half years. I wish to state that a basic principle governing cases involving children is that is that cases must be decided in the interest of the child. The interest of the child below seven years is to stay with her mother. This is a position of the law. Section 125(3) of the Law of Marriage Act, [Cap. 29 R.E. 2019] stipulates that-

> ***(3)*** *There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody.*

The trial court ordered the appellant to pay Tzs. 200,000/= to respondent as maintenance as the court had in mind the requirement of the law that it is in the best interest of the child under seven year to stay with her mother unless the contrary is proved. I see nothing wrong to require this Court's interference. I agree with the appellant that the trial court was wrong to say that two children are under the custody of **Paschalina Sarea Ami** while the evidence showed that **Paschal Joseph** had custody of the first born. All in all, I hesitate to interfere with the trial court's decision and order the appellant to pay maintenance for only one child as it would be construed as giving custody of a child under 7 years to **Paschal Joseph** the appellant.

Is a maintenance order of Tzs. 200,000/= monthly justifiable?

The appellant submitted regarding the second ground of appeal, that the trial court erred to order Tzs. 200,000/= as maintenance because he had custody of one child. He added that the appellant is a mere teacher, who is currently serving a loan, and remains with a take home salary of Tzs 340,000/=. Now in an event that the said decree will be satisfied from his salary, he will be unable to survive. He is rather ready to contribute TZS. 60,000/=.

The respondent submitted that the appellant can pay the maintenance as he was teacher and that before they separated the build two houses. She submitted that life is very expensive and demanded the amount to be uplifted the maintenance order.

I wish to state at the outset that, the argument that trial court erred to grant Tzs. 200,000/= as maintenance while the appellant has custody of one child is bound to fail. I have already stated that when a child is below seven years old his best interest is to stay with the mother, unless the father may prove otherwise. The appellant has not proved that for the good of the child the respondent should not have the custody of the first-born child.

The appellant's second argument is that he has no means to pay Tzs. 200,000/= as maintenance as he has a loan to service. I examined the record especially the counter affidavit. Unfortunately, the appellant did not aver in his affidavit that he has a loan to service and adduce evidence to prove that. This is argument is a submission from the bar. It is settled that a submission from the bar is not evidence. This is a position pronounced by the Court of Appeal in **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others,** Civil Appeal No. 147 of 2006. The Court held-

" . . *submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case.* ***They are elaborations or explanations on evidence already tendered.*** *They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."* (Emphasis added)

I therefore, find that the appellant has not proved that he is not capable to pay Tzs. 200,000/- to the respondent as maintenance. I uphold the trial court's decision, which relied on the social welfare report.

Does the trial court's failure to explain the right to appeal to the parties vitiate the ruling and the proceedings?

The appellant complained that the trial court erred for its failure to to inform the parties that they have a right to appeal. Submitting in support of third complaint, Mr. Mniko argued that the trial court had a duty under rule 123 (1) of the **Law of the Child** (Juvenile Court Procedure) to notify them that they have a right to appeal.

Indisputably, the court making a ruling or a judgment has a duty to notify the parties that they have a right to appeal within fourteen days. Rule 123 (1) of the Rules states that-

123.-(1) The court shall, when a finding, sentence or order is made or passed, inform the parties that they have fourteen days in which to enter an appeal.

Even though, the trial court omitted to notify parties that they have a right to appeal, the appellant did appeal on time. Thus, the omission has not caused injustice to the appellant. It is settled a law that procedural irregularity should not vitiate proceedings if no injustice has been occasioned. Rule 123(1) is a rule of procedure breach which does not vitiate the proceedings or the subsequent decision or judgment unless its beach resulted into injustice. In the instant case, there is no any injustice as the appellant appealed on time.

The Court of Appeal took this position in **the Judge In-charge High Court Arusha v. N.I.N. Munuo Ng'uni**, CAT (Arusha) Civil Appeal No. 45 of 1998 (unreported)-

> *"...we agree with the respondent that rules should not be used to thwart justice. In fact, a prominent judge in this jurisdiction the late BIRON, J. said ... that 'rules of procedures are handmaids of justice and should not be used to defeat justice'....To clinch it all, the thirteenth Amendment to the Constitution has promulgated Article 107A...*

I agree that the trial court erred to omit to inform the parties that they have a right of appeal and to so within 14 days, however that error is not fatal as it did not occasion any injustice. I dismiss the third ground of appeal for want of merit.

In the end, I find the appeal without merit and dismiss it. I uphold the decision of the trial court.

Dated at **Babati** this 8th day of May, 2023.

John R. Kahyoza,
Judge

Court: The Judgment delivered in the presence of the appellant and the respondent in person. B/C Ms. Fatina present. Right to appeal explained.

John R. Kahyoza,
Judge