

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO: 45 OF 2017

*(Arising from Misc. Civil Application No. 115 of 2016 of the
Juvenile Court of Dar es Salaam at Kisutu)*

BHARAT DAYAL VELJI.....APPELLANT

VERSUS

CHANDNI VINESH BHARAT.....RESPONDENT

JUDGMENT

I. ARUFANI, J.

The respondent, Chandni Vinesh Bharat was in 2008 married to one Vinesh Bharat. Unfortunately the couple could not stay long following the death of the husband, Vinesh Bharat in 2013. During their union the duo were blessed with two issues namely, Kritika Vinesh Dayal and Rian Vinesh Dayal. Following the death of her husband, the respondent successfully, applied for the custody of her children before the Juvenile Court of Dar es Salaam at Kisutu via Misc. Civil Application No. 115 of 2016. The appellant on the other hand is the father in law of the respondent and a biological grandfather of the children in issue. The appellant is not satisfied with the decision of the Juvenile Court of Dar es Salaam hence he decided to come to this court by a way of appeal. Mr. Salim H. B. Mnkonje, learned advocate for

the appellant filed in this court a memorandum of appeal containing nine grounds of appeal as follows:-

1. That the trial court erred in law in entertaining application for custody when it had no jurisdiction for Zanzibar based parties.
2. That the trial court erred in law in not writing proper ruling.
3. That the trial court erred in a law and fact in not taking into consideration the appellant's affidavit in opposition to the application for custody.
4. That the trial court erred in law and fact in not considering the best interest of the children to the unemployed mother while she has no means to support them.
5. That the trial court erred in law and in fact in not considering the appellant was providing maintenance and quality international school education to his grandchildren.
6. That the trial court erred in law and fact in not considering the appellant was providing proper Hindoo religious and culture training.
7. That the trial court erred in law and fact in not considering the respondent and the children were provided with free residence in Zanzibar.
8. That the trial court erred in law and in fact in not considering that the appellant and the respondent's family are all based in Zanzibar.;

9. That the trial court erred in law and in fact in not considering other welfare interest for the children.

Submitting in support of the first ground of appeal the learned counsel for the appellant argued that, the respondent and her parents together with her matrimonial home is based in Zanzibar. He added that the respondent ran away from Zanzibar when issues of inheritance and other rights of the children commenced. It was submitted further that, the respondent started the issue of children in Zanzibar after reporting to the *Idara ya Ustawi wa Jamii* and argued that, the matter should be instituted in the local limits of the court whose jurisdiction the defendant actually and voluntarily resides or carries on business or personally works for gain. He made reference to section 18 (a) of the Civil Procedure Code, Cap 33 R.E 2002. He maintained that, the parties are Zanzibar, children are schooling in Zanzibar and submitted that, in the stated circumstances the decision of the trial court should be dismissed.

The learned advocate argued in relation to the second ground of appeal that, the ruling of the trial court does not comply with Order XX Rule 4 of the Civil Procedure Code, Cap. 33 R.E 2002. He argued that, the ruling does not meet statutory requirement of the law as it contains no point of determination and reasons for the decisions. He referred the court to the number of authorities to that effect, including the case of **Edwin Isdori Elias V. Serikali ya Mapinduzi Zanzibar [2004] TLR 297** and **Hamisi Rajabu Dibagula V. R [2004] TLR 181**. Further to

that, the learned advocate lamented that, the trial court did not consider the appellant's affidavit in opposition to the application for custody of the children. He added that, the counter affidavit contained evidence regarding the issue of custody and ability to cater for International school education which the appellant was providing. He submitted that, the appellant has been fulfilling the welfare of the children without any form of discrimination.

The learned advocate submitted further that, the best interest of the children is a paramount consideration when giving custody of a child to a person. He said the requirement outweighs the presumption of minority of a child. The learned advocate was of a view that the trial court ought to give custody to the appellant who is capable of providing for the best interest of the children than the respondent who is unemployed. Moreover, the learned advocate continued to challenge the decision of the trial court on the ground that, it did not consider the fact that the appellant and the respondent's family are based in Zanzibar. He maintained that the cultural upbringing the children in Zanzibar was much more convenient than in Dar es salaam where even the children does not get enough sleep due to avoidance of traffic jam.

Prof. Shaidi, learned advocate represented the respondent in this appeal and opposed the appeal. He submitted that, the issue of claiming for the custody of the children arose when the respondent had shifted and settled in Dar es Salaam with her children following the death of her husband in Zanzibar. The

learned advocate submitted that, the respondent and her parents resides in Dar es Salaam, and it was where her marriage was contracted. He stated that, the children are schooling in Dar es Salaam and it would be ridiculous for the court in Zanzibar to sit and determine the rights of the children.

With regards to the second ground of appeal the learned advocate for the respondent replied that, a ruling is not a judgment. He said a judgment is a product of a trial where parties agrees on issues for determination and the judgment has to address those issues. In the given circumstances, the learned advocate argued that, the ruling of the trial court meets the entire legal requirements. He argued that, the trial court relied on age of the children to grant custody of the children to the respondent.

The learned advocate for the respondent submitted further that, the appellant's affidavit was considered by the trial court and that is why he was given access to visitation of the children. He added that, the respondent has been staying with her children for about a year and taking them to school without any problem and that has demonstrated her capability to provide for the welfare of her children. Further to that, the learned advocate argued that the respondent's affidavit indicates that, she was being sexually abused by her brother in law and that her children also sexually abused in the extended family environment where they were in Zanzibar.

Further to that, the learned advocate submitted that the best interest of a child principle is not the only consideration that the court shall consider when granting custody of a child. He submitted that, the court shall consider the importance of a child being with his mother in terms of section 39 (1) of the Law of the Child Act, 2009. He added that, the reason of financial muscle relied upon by the appellant to win custodian of the children is not the main reason for the grant. The learned advocate maintained that, there is no point for the children to stay with their grandparents while their biological mother is still alive. He made reference to the case of **Halima Kahema V. Jayantilal G. Kiria [1987] 147** where it was held that, welfare of the child requires that the child be in hands of either of the parents rather than the child's grandparents.

After considering the submission of the counsel for the parties and going through the record of this matter the court has found before going to the merit of the appeal it is proper to state at this juncture that, the appeal was improperly filed in this court out. The court has come to the above finding after seeing the appeal before the court originates from the Juvenile Court and was filed and determined under the Law of the Child Act, 2009. Section 130 of the said law read together with Rule 123 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 (Hereinafter referred to as the Rules) requires a party intending to appeal against the decision of the Juvenile Court made under the above law to be lodged in the court which passed the decision

within fourteen days from the date of the impugned decision or order.

The court has found though the procedure to appeal against the decision of the Juvenile court is as provided above but the appeal at hand which is challenging the decision of the Juvenile Court of Dar es Salaam at Kisutu delivered on 2nd day of December, 2016 was filed directly to this court on 15th day of February, 2017 which is out of time and no leave of the court was sought to file the same out of time. Secondly the appeal was filed directly in this court instead of being filed in the trial court as provided under Rule 123 (3) (a) of the Rules.

As the appeal was filed in this court improperly and out of time prescribed by the law it is the finding of this court that, the same is improperly before the court and its consequences would have been to strike out the same. However, the court has found before striking the same out, as the above point was raised by the court suo moto it is proper to go to the merit of the appeal as this appeal is touching the rights of the children which the courts are casted with a duty of protecting the same.

The court has carefully considered the rival submission of the learned counsel for the parties in relation to the grounds of appeal filed in this court by the appellant and after going through the record of the trial court, the court has found the issue of jurisdiction of the trial court raised in the first ground of appeal is baseless. The court has arrived to the above finding after seeing that, the respondent and the children she was seeking for

the order of their custody stays in Dar es Salaam where the trial court sits and exercises its jurisdiction.

Even if it would have been stated there is another court which had jurisdiction to entertain the matter than the trial court as stated in the submission of the appellant but that point of jurisdiction was not argued and determined in the trial court so that it can be brought to this court by way of appeal. The court has found that, despite the fact that the said point of jurisdiction of the court was raised in paragraph 15 of the respondent's counter affidavit but the same was not argued to enable the trial court to determine the same. To the contrary the record of the trial court shows that, after the affidavit, counter affidavit and the reply to the counter affidavit being filed in court, the counsel for the parties notified the court through Advocate Lucy Mwang'ombe who held their brief that, they had agreed the court to proceed with the matter without submission.

This to my view connotes literally that, the said point of jurisdiction together with that of jurat of attestation being badly affirmed raised in the same paragraph fifteen of the respondent's counter affidavit were abandoned. If were abandoned the same cannot be raised in this court which is sitting as an appellate court as it will be contrary to section 19 of the Civil Procedure Code, Cap 33, R.E 2002 which requires the point of objection to jurisdiction of the court to be raised in the court of first instance unless there has been a consequent failure of justice as stated in

the case of **National Bank of Commerce V Risase Ndama** [1997] TLR 282.

The court has considered the submission by the counsel for the appellant that, the court denied them the right to raise preliminary points of objection and stated it will continue to dispose of the matter by way of affidavit and find the same is not supported by the record of the trial court as the record shows the parties informed the trial court through Advocate Lucy Mwang'ombe that, they had agreed the court to proceed to dispose of the matter without written submission. Since it has not been stated anywhere in the record of the case that the trial of the matter in the trial court resulted into failure of justice in any manner because of the alleged point of lack of jurisdiction it is the view of this court that, the point of jurisdiction raised in the appellant's first ground of appeal cannot be used to fault the finding of the trial court.

The court has carefully considered the argument of the counsel for the appellant in relation to the second ground of appeal where the appellant is stating the trial court erred in law in not writing a proper ruling. The finding of this court in relation to this ground of appeal is that, though the ruling of the trial court is very brief but is a proper and correct ruling as it contains all ingredients of the decision of the court expounded in the law and cases cited by the learned counsel for the appellant in his submission.

The court has arrived to the above finding after seeing the ruling of the trial court contains what the applicant prays from the court which is an order of custody of the children. The court has also found the ruling contains the decision of the court as it granted the custody of the children to the respondent in this appeal as prayed and gave the appellant who is the grandfather of the children right to visit the children. Also the court has found the ruling contains the reason which made the court to arrive to the said decision which is that, the children are very young and are living with the respondent in this appeal who is their biological mother. In the premises the court has failed to see what is missing in the ruling of the trial court which can make the court to find it was not written properly.

Coming to the rest of the grounds of appeal which I will deal with them together the court has found proper to start by stating that, a family is a unit consisting of parents and children, in which the later has a blood relation with the former. Section 7 of the Law of the Child Act, 2009 gives a child right to grow up with his parents. It is a common ground that the respondent is a biological mother and the remaining parent of the children in dispute. The appellant who is the grandfather of the children is challenging the decision of the trial court which granted custody of the children to the respondent. The grounds upon which he is disputing the decision lays on the grounds of appeal posed early in this judgment which leads the court in determining the issue as to whether this appeal has merits.

In consideration of the rival arguments from both sides and upon perusal of the record of the lower court, I am satisfied with the decision of the trial court that, the respondent who is the biological mother of the children is a better person to be granted custody of her children compared to the appellant who is the grandfather of the children. The factors considered by the trial court includes the fact that, the children were still young and they were leaving with their mother. These reasons in my view holds water. Since the children's father is no longer alive, the only close surviving relative is their mother. Basing on the submissions made to this court there is nothing strange to jeopardize the best interest of the child if they are to stay with their mother. Best interest carter far behind financial ability as submitted by the respondent's learned counsel. The children needs love, affection and care of which the mother is in a better position to offer to her children against the whole world.

The appellant's learned counsel's argument that the appellant was providing maintenance, quality international school education and teaching the children proper Hindu religious and culture has been considered by this court and found as rightly stated by the learned counsel for the respondent the children are continuing with their education at Al Muntazir school under the guardian of the respondent who is their mother. Since the respondent is also a follower of Hindu religious and culture she can continue to train the children about their faith as the appellant wanted to do. To the view of this court still all the rights mentioned by the learned counsel for the appellant can be

offered' by the appellant to support the children notwithstanding the facts that the custody of the children has been granted to the respondent.

In the light of all what has been stated hereinabove the court has found it is not only that the appeal filed in this court by the appellant was filed in court out of time and without leave of the court but the grounds of appeal filed in this court by the appellant have nothing substantial which can make this court to fault the decision of the trial court. In the upshot the appeal is hereby dismissed in its entirety for want of merit and the court is ordering each party to bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 23rd day of April, 2018



I. ARUFANI
JUDGE
23/04/2018