

**IN THE HIGH COURT OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**CIVIL REVISION NO. 2 OF 2019**

(Originating from Misc. Civil Application No. 8 of 2018, of the Juvenile Court of Dodoma at Dodoma)

**STEPHEN MBEBA.....APPLICANT**

**VERSUS**

**HASSAN MAULID MOHAMED .....RESPONDENT**

*24/3/2020 & 18/5/2020*

**RULING**

**MASAJU, J**

The Law of the Child Act, [Cap 13] provides for consolidation of laws relating to children, rights of the child and promotion, protection and maintenance of the welfare of Children in line with international and regional conventions on the rights of the child; affiliation, foster care, adoption and custody of the child, regulation of employment and apprenticeship of the child and the provisions with respect to a child in conflict with law and some other related matter. The law in its section 97 establishes the Juvenile Court. The jurisdiction and procedure of the said Court is provided for under sections 98 and 99 thereof respectively. Section 99 (1) of the Law of the Child Act, [Cap 13] is categorical that

*"the procedure for conducting proceedings by the Juvenile Court in all matters shall be in accordance with rules made by the chief justice for that purposes, but shall, in any case, be subject to the following conditions;*

- (a) The Juvenile Court sit as often as necessary;*
- (b) Proceedings shall be held in camera;*
- (c) Proceedings shall be informal as possible, and made by enquiry without exposing the child to adversarial procedures;*
- (d) A social welfare shall be present;*
- (e) A right of a parent, guardians or next of kin to be present;*
- (f) The Child shall have a right to next of kin and representation by an advocate;*
- (g) The right to appeal shall be explained to the child and*
- (h) The Child shall have a right to give an account and express an opinion.*

*(2) Apart from members and officers of the Juvenile Court, only the following persons may, at the discretion of the Court, attend any sitting of Juvenile Court;*

- (a) Parties to the case before Court, their advocates, witnesses and other persons directly concerned or involved in the case; and*
- (b) Any other person whom the Court may authorize to be present."*

As for the jurisdiction of the Juvenile Court, section 98 of the Law of the Child Act, [Cap 13] provides thus;

*"98 (1) The Juvenile Court shall have power to hear and determine*

- (a) Criminal charges against a child; and*
- (b) Applications relating to Child care, maintenance and protection.*
- (2) The Juvenile Court shall have jurisdiction and exercise powers conferred upon it by any other written law.*
- (3) The Juvenile Court shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults"*

The Juvenile Court of Dodoma at Dodoma when considering an application made under Rule 63 (1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 for custody of Children learnt that there is Rule 71 (1) (2) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 which provides thus;

*"71 (1) At the first hearing the Court shall enquire of the parties whether they have seen a mediator and, if not, where practicable and appropriate to do so, adjourn the hearing for a period of no more than 28 days to allow the parties to resolve the issues through mediation.*

*(2) Where the parties have seen a mediator and evidence is provided that they have not been able to resolve their differences, the Court shall proceed to hear the case."*

The said Juvenile Court found further that the word "*mediator*" has not been interpreted in Rule 3 of the Law of the Child (Juvenile Court

Procedure) Rules, 2016 and that her perusal of the law of the Child Act, [Cap 13] was not helpful as well, though Rule 65 (6) of the Law of the Child (Juvenile Court Procedure) rules, 2016 provides that the procedure for issue and service of summons shall be the procedure provided under Order V of the Civil Procedure Code.

The said Juvenile Court was of the position that "*mediator*" named in Civil Procedure Code applies to issue and service of summons only, hence her forwarding the case to the Court for guidance.

Since the parties to the Application for custody have the advocacy services by the learned counsels Juma Malimi and Fred Kalonga for the Respondent and the Applicant respectively, Court summoned the said learned counsels to advise the Court on the law accordingly on the 20<sup>th</sup> day of February, 2020.

The learned counsel, Juma Malimi, advised the Court that apart from Rule 71 (1) (2) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 (GN. No. 182 of 2016), Rule 16 (1) (m) thereof also provides that the Juvenile Court magistrate Court shall have the power to encourage the parties to use an alternative dispute resolution procedure if appropriate and facilitate the use of such procedure. Yet, there is no forum or procedure that have been named in the law of the Child Act, [Cap 13] and the Law of Child (Juvenile Court Procedure) Rules, 2016 thereof on the said mediation. That the trial magistrate was therefore right to think that there was ambiguity on the matter about adopting the Procedure in the Civil Procedure Code, [Cap 33]. That both Rules 16 (1) (m) and 71 (1) (2) of

the Law of the Child (Juvenile Court Procedure) Rules, 2016 have been coached in mandatory terms by the use the word "*shall*". That, despite of the said guidance still Rule 16 (1) (m) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 require the Court to facilitate the use of such procedure. That the trial magistrate should have therefore asked the Magistrate Incharge of the Juvenile Court to appoint another magistrate for mediation. That the word "*Mediator*" has been defined by Black Law Dictionary, 8<sup>th</sup> Edition, 2004 at page 1003, thus:-

*"Mediator is a neutral person who tries to help disputing parties reach an agreement"*

The said another magistrate could have qualified for a mediator, for all Magistrates by law and ethics are required to be neutral.

The learned counsel, Fred Kalonga, on his part joined issues with the advice by the learned counsel Juma Malimi. He added that Rule 16 (1) (m) of the Law of Child (Juvenile Court Procedure) Rules, 2016 read together with Rule 69 (2) (a) (b) of the said Rules further provide that the Court should provide details of any mediation service that is available and inform the parties that they will be required to attempt to settle their dispute through mediation before the first hearing. That, the trial magistrate should have referred the case file to the magistrate Incharge of the Juvenile Court for appointment of the mediator. That rules 60 (1) (2) and 99 (10) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 provide for application of the Civil Procedure Code, [Cap 3] for service of

notice, summons and pleadings and for application to set aside care order and the freeing the child for adoption respectively.

The two learned counsels so advised the Court. The Court appreciates their service to the Court.

That said, the Court is of the considered reasoning and position thus,

1. That the law of the Child Act, [Cap 13] neither provides for mediation nor alludes to mediation.
2. That, the Civil Procedure Code, [Cap 33] in its section 64A and the First Schedule thereto particularly in its Order VIII Rules 24 – 39 on mediation does not state that it shall apply to the Juvenile Court.
3. That, the Law of the Child (Juvenile Court Procedure) Rules, 2016 nowhere provides for adoption and application of the Civil Procedure Code, [Cap 33] on mediation. Where the Civil Procedure Code, [Cap 33] was intended to apply to the procedure in the Juvenile Court, the said Rules so specifically provides in Rules 65 (6), 66 (1) (2) and 99 (10) of the Law of the Child (Juvenile Court Procedure) Rules, 2016. So, in the absence of specific legal guidance to that effect in either the Law of the Child Act, [Cap 13], the Civil Procedure Code, [Cap 33] or the Law of the Child (Juvenile Court Procedure) Rules, 2016, the Juvenile Court cannot adopt and enforce the rules of procedure for mediation in the Civil Procedure Code, [Cap 33]. After all, the

magistrates in the Juvenile Court are not among those who qualify for nomination to act as mediators so provided for under Order VIII Rule 25 (6) of the Civil Procedure Code, [Cap 33 RE. 2019].

4. That, though the words "*mediation*", "*mediation service*", and "*mediator*" have been used in Rules 65 (1) (c), 69 (2) (9) Law of the Child (Juvenile Court Procedure) Rules, 2016, the said words have not been defined under its interpretation Rule 3 or elsewhere in said Rules. The Law of the Child (Juvenile Court Procedure) Rules, 2016 neither provides for mediation Procedure nor the persons who qualifies to act as mediators in disputes brought before the Juvenile Court dispites of the fact that Rule 16 (1) (m) provides the Court's encouragement of the parties to use alternative dispute resolution procedure if appropriate and facilitation of use of such procedure. Rule 16 (1) (m) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 does not provide for mandatory mediation service but just gives the Court the power to encourage the parties to use the alternative dispute resolutions to settle their disputes.

5. That, Rule 65 (1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 provide that "*every Respondent to an application for custody or access and any interested party should be served by the Court within fourteen days of the application being filed with a signed and sealed Court copy of :-*

*(a) The application*

- (b) The date of the first hearing before the Court which shall be no later than twenty eight days after the application has been filed; and*
- (c) Details of any mediation service available in the area, with details of how the service can be contacted."*

So, by virtue of Rule 65 (1) (c) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 there might be a situations where there are no mediation service in the local jurisdiction of the Juvenile Court. When there is no such services in the local jurisdiction of the Juvenile Court, Rule 65 (1) (c) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 shall not detain the Juvenile Court from excising its adjudication powers over the dispute. The said Court could still apply her powers under Rule 16 (1) (m) of the Law of the Child (Juvenile Court Procedure) Rules 2016 to encourage and facilitate the parties to the dispute to settle the dispute out the Court between themselves within 28 days with an option for extension thereof provided that the parties are so interested. This is very important because disputes belongs to the parties and not the persons (natural or legal) who have been mandated to resolve disputes between the parties. Unless mediation services, if any, are freely provided by mediators, subjecting disputants to mediation becomes a burden to the parties in addition to wastage of time in the event the mediation is not successful.



6. There is Constitutional guidance under article 107A (2) (d) of the Constitution of the United Republic of Tanzania, 1977 (The Constitution) for promotion and enhancement of dispute resolution among persons involved in the disputes. The Courts are enjoined to promote and enhance such procedure. The Constitution does not provide that such dispute resolutions should necessarily be made through particular institutions or persons. It is upon the parties themselves to consider going for an out of courts settlements of their own disputes upon advice by the courts. So, alternative dispute resolution referred to in Rule 16 (1) (m) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 does not necessarily mean particular institutions or persons designated to act as mediators. The parties to disputes can decide to reach an out of Court settlement between themselves without necessarily involving a third party and they can as well decide to go for mediation before a third party of their own choice but at the end of day they must report back to the Court for her necessary action and orders thereof accordingly.
  
7. That, pursuant to Rule 71 (1) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 the indulgence of the mediator by the parties to the dispute is possible only when it is **practicable** and **appropriate** to do so. That is to say, when there are no such mediation services in the local jurisdiction of the Juvenile Court, the said Court can still, pursuant to Rule 16 (1) (m) of the

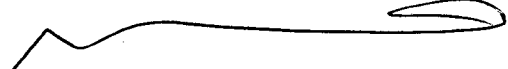
said Rules encourage and facilitate the parties to dispute to consider an out of Court settlement on their own or by the help of another person (mediator) of their own choice within a certain time say, the 28 days subject to extension at the option of the parties to the dispute and report back to the Court. When the said mediation or resolution of the dispute out of Court is not successful, the Juvenile Court will proceed to hear the case/dispute accordingly as so provided for under Rule 71 (2) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 with a view to deciding the dispute pursuant to the law.

Since by now there are no particular institution or persons designated for mediation services, within the local jurisdiction of the trial Juvenile Court and there is no rules of procedure governing such mediation services, it is prudent and advisable that the Juvenile Court shall encourage and facilitate the parties to the dispute to consider their own an out of court settlement between themselves or before a mediator of their own choice and then report back to the said Court for her action accordingly. When the said settlement or mediation, if any, fails the Court shall proceed to hear and decide the dispute between the parties in accordance with the law applicable accordingly.

It is also advisable that the enabling provisions of law for an application for child custody or access thereof would include the relevant provisions of section 37 of the Law of the Child Act, [Cap 13].

The trial Juvenile Court is hereby so guided as the Court so orders  
this 18<sup>th</sup> day of May, 2018.



  
GEORGE M. MASAJU

**JUDGE**

18/5/2020