

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. APPLICATION No. 86 OF 2021**

*(Arising from the HC Civil Appeal No.32 of 2019)*

**VALENCE DESDERIUS TUNUGU-----APPLICANT**

**VERSUS**

**JUDITH GERALD RUSATILA-----RESPONDENT**

**RULING**

*Last Order date: 15.10.2021*

*Ruling Date: 27.10.2021*

**M. MNYUKWA, J.**

This is an application for certification on point of law. The decision for which the certificate on points of law is sought to be granted was from HC. Civil Appeal No. 32 of 2019 delivered by Hon. Lady Justice Mgeyekwa, J. on 25<sup>th</sup> March 2020. It was in respect of the decision originated from the Juvenile Court of Ilemela at Ilemela District in Misc. Civil Application No 12 of 2018.



By a way of Chamber summons the application is preferred under section 5(1)(c) of the Appellate Jurisdiction Act Cap. 141 RE: 2019 and Rule 45(a) of the Court of Appeal of Tanzania Rules GN. No 368 of 2009, supported by the sworn affidavit of the applicant, Valence Deusderius Tunugu, and opposed by the respondent Judith Gerald Rusatila by the way of a counter-affidavit.

By leave of the Court, the matter was argued by way of written submissions. The applicant was represented by Boniphace Sariro learned counsel while the respondent enjoys the legal services of Msafiri Aloyce Henga.

The applicant advances only one point of law in his chamber summons. The proposed point of law has been pinpointed in paragraph 4(1) of the Affidavit. The applicant has demonstrated what he believes to be a point of law.

In his submissions in chief, the applicant submitted that the Court reached into a conclusion by granting custody to the respondent without considering the evidence of the applicant based on the principle of the best interest and welfare of the child.

In reply to the Affidavit and his submission, Mr. Msafiri Aloyce Henga was of the opinion that this is not a point of law deserving the

attention of the Court of Appeal. He thinks that it is a point of fact because the evidence is required to establish who is in a better position to have custody of the child.

The background facts of this application is short and clear. The dispute in this matter, therefore, pertains to who is entitled to be granted custody of a child born with a cerebral pause. It is the respondent who initiate the application of the custody of a child at the Juvenile Court of Ilemela on the ground that a childs' welfare is at stake as the applicant is not in a position to take care of a child born with a cerebral pause. She came out victorious. Aggrieved by the decision, the applicant herein filed an appeal to this Court in which one of his grounds of appeal was that the learned trial District Court Resident Magistrate erred in law and fact in granting the respondent custody of the child after she had deserted the said child and went to marry another man with whom she is now pregnant. Again the High Court decided the matter in favor of the respondent.

I have given careful consideration to the arguments for and against the application herein advanced by both parties, and the issue I have to determine is *whether the contentious point* raised is a point of law *in the matter which require a determination by the Court of Appeal.*





In light of the foregoing exposition of the factuality of the matter and reading from the contents of paragraph 4 of the Affidavit, I am satisfied that what is raised under paragraph 4 of the Affidavit demonstrated the important point of law namely; -

- I. *Whether custody of a child can be granted without considering the welfare of a child.*

In the final result, the application is granted and the above point of law is hereby certified for the purpose of appeal to the Court of Appeal.  
No order as to costs.

It is so ordered.



  
**M. MNYUKWA**  
**JUDGE**  
**27/10/2021**

Ruling delivered on 27<sup>th</sup> day of October, 2021 via audio teleconference whereby all parties were remotely present.

  
**M. MNYUKWA**  
**JUDGE**  
**27/10/2021**