

**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO 107 OF 2021**

(Originating from MISC Civil Application No.63 of 2020 in the Juvenile Court of Dar es Salaam, at Kisutu)

**SUZAN ROSE SENGA.....APPELLANT**

**VERSUS**

**MUSSA SELEMAN MBWANA.....RESPONDENT**

**JUDGMENT**

Date of Last Order: 20<sup>th</sup> September, 2021

Date of Ruling: 14<sup>th</sup> December, 2021

**N.R. MWASEBA, J.**

The appellant is aggrieved by an enforcement order of custody of the child which was issued on the 14<sup>th</sup> day of April, 2021 by Hon Msoffe, RM at the Juvenile Court of Dar es Salaam at Kisutu. Thus, she has filed the following grounds of appeal before this court:

- 1. That the honourable resident magistrate erred in law and fact in granting enforcement of custody order of the child relying under rule 63(1) of the law of the child (Juvenile Court Procedure) Rules, 2016 and section 37(1), (2) of the law of the child Act, Cap 13 R.E 2019 (the Act) is out of respondent's chamber's application and the law of application for enforcement of custody order procedure.*

2. *That the honourable resident magistrate erred in law and in fact by not considering the appellant's submissions in reply to respondent's application hence reaching to the erroneous decision.*
3. *That the honourable resident magistrate erred in law and in fact by not properly determining the law of application for enforcement of custody order relying on a file of documents for MISC. Application of custody order No.303 of 2020 which was already taken to the high court for appeal is going beyond the procedure as established in our laws.*
4. *That the honourable resident magistrate erred in law and fact in granting enforcement of custody order to adhere immediately the child to respondent using previous decision of MISC. Application NO:303 of 2020 delivered on 13<sup>th</sup> November 2020 by J.Lyimo R.M. within a week is out of juvenile court procedure and our established laws.*
5. *That the honourable resident magistrate erred in law and fact in granting enforcement of custody order of the child to respondent prior determining the questioning of responds place of adobe which is already as a question of appellant's appeal at high court.*
6. *That the honourable resident magistrate erred in law and fact in granting enforcement of custody order relying on merits of appellant's appeal civil appeal no.296 of 2020 hence reaching erroneous decision.*

*7. That the honourable resident magistrate erred in law and fact in knowing the respondent's awareness of appellant's being aggrieved by the whole decision of juvenile court of Dar es Salaam at Kisutu, Misc. Civil Application No.303 of 2020 and appellant's appeal to high court, civil appeal No. 296 of 2020 hence erroneous decision.*

*8. That the honourable resident magistrate erred in law and fact by not writing "the right to appeal" on ruling MISC civil application No. 63 of 2020 while during giving of decision in court on 14<sup>th</sup> April 2021 informed the parties that they have 14 days to enter an appeal as written according to the law of juvenile court procedure on appeals is to make an appellant confuse and loose the case.*

Briefly, through Civil Application No. 303 of 2020, the respondent herein initiated the proceedings at the juvenile court seeking for custody of his daughter namely Mariana Mussa Selemani who since the demise of her mother she had been in the custody of her aunt (her late mother's sister). The court granted his application but the appellant herein did not release the child to comply with the court order. Later, the respondent filed a Misc. civil application No. 63 of 2020 in the same court to enforce its previous order. The court insisted its previous order that the respondent should be given custody of the child and that the appellant should comply with the court order within one week. This order aggrieved the appellant, hence this appeal.

Before this court the appellant appeared in person while Ms Jesca Massae represented the respondent. The appeal was disposed of by way of written submission.

I have carefully gone through the grounds of appeal and the submissions by both sides. Subsequently, I have noticed the main issue to be determined is whether an enforcement order from the juvenile court is appealable.

It should be noted that the enforcement order is an order compelling the compliance with the previous drawn order. In other words, it is an execution of the drawn order in the juvenile court on the application for maintenance, custody and access. **Rule 81 of the Law of the Child (Juvenile Court Procedure) Rules, 2016** provides that:

*"(1) An application may be made to the court for enforcement of an order under this Part where a party has failed to comply with the terms of the order as set out in JCR Form No.9 in the Third Schedule of these Rules.*

*(2) The burden of proving a breach of the order shall be on the applicant.*

*(3) Where the court is satisfied that the order has not been complied with, the court may vary the order as it sees fit."*

In my considered view, I do not think this kind of order is appealable. The decisions of which are appealable to the High Court are provided for

under **Section 74 (1) and Order XL of the of the Civil Procedure Code**, Cap 33 R.E 2019. The enforcement order which is execution by nature is not among the appealable orders that fall under the above-mentioned provisions. The appellant was supposed to have challenged the decision of the juvenile court which gave rise to enforcement proceedings or rather she could have challenged the enforcement proceedings by way of revision. This was well stated in the case of **General Tire (E.A) LTD VS Amenyisa Macha and Others**, Civil Appeal No 21 of 2003, H.C at Arusha (unreported) where the court stated that:

*"In the light of the aforesaid, apparently; no appeal lies from an execution order. Any person aggrieved by a decision on execution may challenge the same by way of a revision in the Court higher in the Judicial hierarchy".*

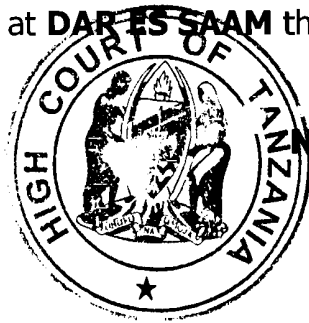
It is my considered opinion, the appellant was supposed to challenge the drawn order which was enforced and not the enforcement order since it is not among the appealable orders and even if it is appealed for, this court cannot deal with the original drawn order. The remedies which were available to the appellant was to appeal against a grant of custody order to the respondent in Civil Application No. 303 of 2020 which gave rise to the enforcement proceeding, or should have complied with the order of the court in the above suit while observing if the best interest of the child are being observed by the respondent and in case there is sufficient ground that there is any breach, she can apply to the same court to vary its previous order as per **Rule 79 (1) of the Law of the**

**Child (Juvenile Court Procedure) Rules, 2016.** Otherwise, the appellant had to challenge the enforcement order by way of revision and not by appeal.

Therefore, this appeal is incompetent before this court. It is hereby struck out with no order as to costs.

It is so ordered.

**DATED at DAR ES SAAM** this 14<sup>th</sup> Day of December, 2021.



*N.R. Mwaseba*  
**N.R. MWASEBA**  
**JUDGE**  
**14/12/2021**