

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM SUB REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 183 OF 2023**

*(Arising from Court Order of the District Court of Ilala at Kinyerezi  
delivered on 30<sup>th</sup> August of 2023 by Honorable R.Z. LYANA in  
Miscellaneous Civil Application No 46 of 2023)*

**LUCY HASSAN MAKUNGANYA ..... APPELLANT**

**VERSUS**

**CASTRO SAMWEL HANANGA.....RESPONDENT**

**JUDGMENT**

**7<sup>th</sup> & 31<sup>st</sup> May 2024**

**MKWIZU, J:-**

Custody of seven (7) years old boy is at issue in this matter. It began way back in 2018 after the dissolution of the couple's marriage by the Ukonga Primary court in Maombi ya talaka No. 233 of 2018 where the appellant was given the custody of the child at issue the decision maintained in several other decision by the district Court including Revision No 4 of 2022.

Still determined to have his child on his hands, in 2023, respondent moved the Juvenile Court through Application No. 46 of 2019 seeking for variation of the custody order blaming the applicant for denying him right of access to the child, abandoning the child on several occasion

without supervision, leaving the child with neighbours up to late hours, misusing the maintenance money and that though he is paying the school fees, the appellant is not caring of the child's school attendance . The application was inherently opposed. And having considered all the issues, the juvenile court granted the prayer.

Unhappy with the decision, the appellant had moved this court with one ground faulting the district court for failure to consider her evidence regarding to custody of the child.

Before this court, the appellant was in person without any legal representation while the respondent had the service of Mr. Yuda Thadei Paulo advocate. The hearing was on 8<sup>th</sup> April 2024, ordered to proceed by written submissions.

The appellant's submissions were short but focused. She strongly believed that the decision to grant the respondent custody of the issue was not in the best interest of the child because the respondent had from the beginning denied being the father of the child and he is currently living alone, with a lot of traveling making it impossible to have a proper care to the child.

She went further asserting that she has been in custody of the child since birth and immediately after Court order in August 2023, the respondent had been denying access of the child to the appellant such that she is not even aware of the status of the child as the respondent has refused to communicate arguing the court to allow the appeal, quash and set aside the decision of District Court of Ilala in Misc No 46 of 2023 revising the decision by giving her the custody of the child at issue. .

On his part, the respondent was in support of the trial court's decision. He said, the decision was properly given after considering the welfare of the child as required by the law and having heard and observed the child at issue particularly his education, age of the child, evidence of the parties and the best interest of the child which went ahead to giving the appellant access to the child. He finally prayed for the dismissal of the appeal with costs.

I have inquisitively considered the arguments by the parties, and the records of appeal. My task here is very simple, to see if the trial court's order was appropriately given by considering not only the evidence by the parties but also the governing laws. The emphasis on matters pertaining custody of a child globally is placed on "***the best interest of the child***" anchored in Art. 3(1) of the **Convention on the Rights of the Child** and in Art. 24(2) of the **Charter of Fundamental Rights of the European Union**. Both instruments give children the right to have their best interests taken into account as a primary consideration in all actions or decisions that concern or affect children. In addition, Art. 24(3) of the Charter further addresses the need to take into account the child's right to maintain a relationship with both parents. In our jurisdiction, the principle is demonstrated by section 4 of the law of the Child Act which states:

*"4. (1) A person below the age of eighteen years shall be known as a child.*

*(2) The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies.*

That is a general provision to be considered in all dealings involving a child whether the biological parent of the child is alive or not. Section 26 of the law of the Child caters for the situation where the child's parents are separated. Section 26 (1)(b) of this law reserves the right of a child to live with the parent who, in the opinion of the court, can raise and maintain the child in the best interest of the child. Section 37(4) and 39 of the same Act requires the courts when granting custody to that primarily consider the best interests of the child. Section 39 for instance says:

*"39. -(1) The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access.*

*(2) Subject to subsection (1), the court shall also consider –*

*(a) the rights of the child under section 26.*

*(b) the age and sex of the child.*

*(c) that it is preferable for a child to be with his parents except if his right is persistently being abused by his parents.*

*(d) the views of the child, if the views have been independently given.*

*(e) that it is desirable to keep siblings together.*

*(f) the need for continuity in the care and control of the child;  
and*

*(g) any other matter that the court may consider relevant. "*

The appellant faults the trial court for not considering her evidence in granting custody to the respondent. I have revisited the records. The respondent was able to demonstrate with evidence the circumstances under which the child was undergoing. He said, he paid school fees to Maximilian school, a school which the child was to be enrolled in accordance with the court order but instead, the appellant took the child to JAICA school contrary to the court order. And the academic result was tendered to show the child academic status that was corroborated by the appellant here in court.

Essentially, the submission by the appellant was an admission of the appellant claims over the child' welfare particularly on the academic drop, her capacity to take care of the child and harassments to the respondent, the child's father alleged in the affidavit in support of the application and that there was nothing substantiation in her submissions that would have engrossed a different opinion by the trial court than agreeing with the application. The appellants submissions in response to the application for custody by the respondent are simply recorded as hereunder:

*"I oppose this application. I never denied his access to the children. The applicant to register Anthony to St. Maximilian School if it's all about his best interest in education. I do not want Antony to be taken by the applicant and I gave birth to all my children purposely to live with them all.*


*I have also a right to live with Anthony because I'm a biological mother and I'm a fit person to take care of Anthony i can also take Anthony to Maximillian School, on my own  
"malezi ya Pamoja ya Watoto siyakatai ila mimi ni mama yao*

*pia sitaki Anthony Akaishi na wenzake” He was the one who left me. He divorced me. I’m a good mother to my children. On Anthony’s school performance it is true he dropped because he moved from Maximilian to Jaica school. I promise to take back Anthony to Maximilian School guarantee that as mother I will never harass the applicant. I pray the application to be dismissed because as a mother I Also need to stay with my child Anthony.”*

Having considered the parties arguments, considering section 4, 26, 37 and 39 of the law of the Child Act and the child’s opinion, the trial magistrate was of the view that it is in the best interest to grant the custody of the child to the respondent. Having that background in mind and in absence of any fact to contradict what was considered by the trial magistrate I find the decision deserving. The appellant complaint is without merit.

Consequently, the devoid appeal is dismissed in its entirety. No order as to costs.

**Dated at Dar es Salaam, this 31<sup>st</sup> day of May 2024.**

The seal of the High Court of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE HIGH COURT OF TANZANIA" and a star at the bottom.  
*E.Y. Mkwizu*  
**E.Y. MKWIZU**

**JUDGE**

**31/5/2024**