

TANZANIA / JUDGMENT

SARA JONAS MKHANDI VS WAI MAULID MINANI JUDGMENT

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6 May 2024

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA DC CIVIL APPEAL
NO 10180 OF 2024 (Arising from the Decision of the Juvenile Court of Dodoma in Misc. Civil
Application No 75/2023) BETWEEN SARA JONAS MKHANDI.....APPELLANT
VERSUS WAI MAULID MINANI.....RESPONDENT

JUDGMENT

Date of last order: 12/09/2024 Date of Judgment: 07/11/2024 LONGOPA, J.: This is an appeal against the decision of Juvenile Court of Dodoma in Miscellaneous Civil Application No. 75 of 2023. Brief facts of the case as ascertainable from the record are that the respondent is the biological father of the child in question one Minani Wai Maulid@ Jonathan who was born in 2009. The appellant is the biological mother of the child and that 1|Page the child is in custody of the appellant who has been responsible for upbringing of the issue since birth to date. The respondent filed an application for sole custody and maintenance of the issue whereas the trial Juvenile Court granted the custody of the child to the respondent. Upon being dissatisfied with the whole of the ruling of the trial Juvenile Court the appellant herein on 6th May 2024 filed an appeal on the following grounds:

1. That, the trial magistrate grossly erred in law and fact by proceeding to hear and determine the case without first referring it to mediation processes as the law requires.
2. That, the trial magistrate erred in law and for failure to call the interested person who lives with the child to attend the proceedings.
3. That, the trial magistrate erred in law and in fact for failure to properly consider the recommendations of social investigation or inquiry report basing on wrong reason that 2|Page placing custody of the child to the appellant herein is to deny access, love and affection to the respondent.
4. That, the trial magistrate erred in law and fact for failure to take into account the ascertainable wishes and feelings of the applied child and ultimately introduced extraneous matters in the judgment which were not submitted by the parties during trial.

5. That, the trial magistrate erred in law by entertaining application for custody and maintenance was instituted under wrong format.
6. That, the trial magistrate erred in law and in fact to place custody of the child in issue to the respondent while the environment does not favour the best interest of the child. The parties were called upon to address this Court orally on the grounds of appeal on 12th September 2024. The appellant enjoyed legal services of Mr. Josephat Mbeba and Elisha Jones, learned advocates while the respondent enjoyed the services of Ms. Winfrida Kalua and Mr. Alto Komba, learned advocates. On viva voce hearing of the appeal, Mr. Josephat Mbeba, advocate was the first to argue the grounds of appeal. On the 1st ground of appeal, it was submitted that trial magistrate erred to hear and determine without referring the parties to mediation processes as the law requires as per Rule 69(2)(a) and (b) and Rule 71(1) and (2) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016. According to the appellant, the stated Rules require the Court to inform the parties on the date of hearing and provide any details of any mediation services available. The parties must be informed that they are required to undergo mediation and try to settle the dispute through mediation before the hearing of the case. Also, Rule 71(1) and (2) is couched with mandatory requiring the court on the first hearing to enquire whether the parties have seen the mediator. If not, the Court shall adjourn the hearing and allow parties to resolve their dispute through mediation. It is provided that the court shall only proceed to hear the case only if there is evidence that resolution through mediation has failed. There is no disclosure in the proceedings indicating the parties were informed about mediation. need to undergo mediation before hearing and there is nowhere revealing the court had enquired to parties if they have seen a mediator or not, nor there is nothing showing that evidence was provided to the court that parties have failed to resolve their differences through mediation. It was argued that on 22/01/2024 the trial court scheduled hearing on 05/02/2024 and the hearing proceeded. It was submitted that the application of this nature, mediation is of paramount importance to create favourable conditions for the child custody which shall be in the best interest of the child. Simply, it is very easy for parents to comply with conditions for custody of the child on terms agreed by the parties themselves than those impose by the Court. The appellant cited the case of Joyce A. Runyunya versus Phile James Shinyaka, Juvenile Appeal No. 18 of 2023 High Court of Tanzania at Tabora at pages 9-10, the Court stated on the effect of non-compliance to Rule 69(2) and 71(2) of the Juvenile Court Rules. The Court noted that non-compliance is fatal and retrial of the matter was ordered. The principle in the case of Neria Nuhu Mwanajimba, High Court of Tanzania, at pages 14-16 was cited to elaborate three stages on hearing of the application for custody and access of the child. These are that: First, inform parties on mediation and direct them to attend mediation process. Second, hearing of the case by calling evidence. Third, consideration of social welfare report before determining the matter. On the 2nd ground, it was submitted that there was failure to comply with Rule 65(3) and (4) and Rule 69(2) (c) of the Juvenile Court Rules. The law requires that where a child is living with a person who is not party to the case, such person shall be deemed as necessary/interested party thus shall be served with

documents and summoned to attend the 6|Page proceedings of the case even if that person is identified after the commencement of the proceedings. It was argued that summoning the interested party is very important to uphold the best interest of the child and enforce the court orders as without such person enforcement may be difficult. According to the appellant on pages 19-21 of the ruling, the child was not living with either of the parties as he stays with his maternal grandmother. However, the records are silent on whether the child's grandmother was served with documents or summoned to attend the hearing thus the procedures were not followed by trial court thus we invite this Court to nullify the proceedings for non-compliance. On 3rd ground, it was submitted that trial court failed to properly consider the Social Inquiry Report based on the wrong reason that placing the custody of the child to the appellant who is a mother would deny love and affection to the child. Rule 72(4) of the Juvenile Rule requires that Social Inquiry Report to be considered. Further, Rule 72(6) of the Juvenile 7|Page Court Rules – there must be stated explicit reasons for the departure to recommendation of social inquiry report. The Social Inquiry Report recommended that the child be placed in the custody of the mother on availability of friendly environment and supervision and to have bond with his young sister while visiting the father. The Social Inquiry Report at page 4 stated that the respondent is not fit to live with the child as he is living with his old mother who is also sick and informed the social welfare officer that nature of the respondent's work of regularly travelling makes it difficult for the child to live there unless a house maid to take care of the child in question as the father /respondent is not always at home. It was argued that surprisingly, at page 21 of the Ruling the Court departed from this recommendation of the social welfare officer on sole ground that it will be denying the love and affection to the father. This was error on part of the trial court. 8|Page On the 4th ground, it was submitted that there was failure to consider on the ascertainable wishes and feelings of the said child thus introduced extraneous matter in the ruling which were not submitted by the parties. Section 26 and 39(1) and (2) of the Law of the Child Act, Cap 13 R.E. 2019 and Rule 73 of the Juvenile Court Rules outlines the factors for consideration. These factors must be considered cumulatively including ascertainable wishes and feelings of the child. It was submitted that on page 3 of the Social Inquiry report, and page 16 of the proceedings, the child stated that he prefers to continue staying with his mother and be allowed to visit his father. It was argued that at page 20 of the decision/ruling, the court introduced new aspects that the child did say to be willing to live with anyone among the duo thus this was failure to accommodate the feelings and wishes of the child. On 5th ground, it was submitted that the Court erred to entertain the application that never adhered to the procedure under the law. Rule 63(1) of the Juvenile Rules, application for custody and access of child should 9|Page through a prescribed form No 8 of the Rules. The instant application was made by Chamber Summons supported by affidavit. This is not the procedure stated in the Rules as GN No 182 of 2016 especially Rule 125 of the Rules revoked the 2014 Rules which had that provision relating to use Chamber summons and affidavit. The application was prepared by an advocate. In the appellant's view the advocate ought to have adhered to the current position of the law not otherwise. The whole proceedings become incompetent as the application was void ab initio. On 6th grounds, it

was submitted that trial Court erred to place custody of the child to the respondent while the prevailing environment or conditions are not favourable to upholding the best interest of the child. The appellant argued that it is clear from pages 2-4 of the Social Investigation Report that the living conditions of the father were not favourable to the child. Such environment could not uphold the best interest of the child. It is clear from Social Inquiry report that the prevailing circumstances on the appellant's side are more favourable than those on the respondent's side. The child has been living with the mother since birth 10 | P a g e thus there was no need to change the custody of the child without any compelling reasons. The appellant prayed for allowing this appeal by quashing the ruling and setting aside the order of the Juvenile Court of Dodoma as it was arrived at erroneously. The respondent had a different view all together. Ms. Winfrida Kalua argued that on 1st ground the law is clear on the need to refer parties to the mediation processes as per Rule 71 and 69 of the Juvenile Rules. However, it is ambiguous in nature as there is no procedure except that in the Civil Procedure Code. It was respondent argument that the parties tried to settle their disputes prior to approaching the Court as stated by the respondent in page 4 of the proceedings. The same was not achieved as revealed at page 4 of the Ruling. The respondent cited the case of Stephano Mbeba versus Hassan Maulid Mohamed, Civil Revision No 2 of 2019, High Court of Tanzania, where at page 10 the Court noted that there are no rules for mediation of juvenile cases. As the parties tried mediation before the institution of the 11 | P a g e case, it is obvious that they attempted thus any court annexed mediation would be time consuming as the procedure is not clear. This ground lacks merits as per this submission. On 3rd ground of appeal, it is submitted that the Social Investigation Report must be considered as per Rule 72 of the Juvenile Court Rules. The Court is called upon to give reasons for departure to the recommendation of the social welfare officer report. The ruling of the trial Court at page 21 trial magistrate gave reasons for departure from recommendations. The reasons were clear. It was submitted that the reasons for departure was enough thus the respondent argued that this ground be dismissed for lack of merits. It was submitted that on 4th ground, the ruling which have reiterated the what the child stated on page 17 of the proceedings where he stated that she can stay anywhere between the two places but he prefers maternal grandmother's place. Social Inquiry report at pages 3-4 explained the prevailing circumstances but finally recommended that the child should be placed to the appellant. It was submitted that the child did not say he 12 | P a g e had problems with staying at either of the parties. It is obvious that the best interest of the child shall be upheld even if the child stays with the father. At this juncture, the respondent reiterated that this ground has no merits. On 6th ground, it was submitted that the respondent's environment favours the best interest of the child. The social investigation report stated that environment is conducive at both parties. This should be dismissed as there are no validity to it. Mr. Lucas Komba, advocate argue on the 5th ground where it was submitted that application was correct. It was reiterated that Rule 2 of the Juvenile Court Rules on the definition of the application provides it may be instituted in different ways, one of them being chamber summons supported by affidavit. The law recognizes the existence of Chamber Summons and affidavit. This application was therefore proper as it is covered by Rule 2. It was argued that advocates

for appellant have not stated to what extent was the appellant prejudiced by wrong institution document for the 13 | P a g e application. The appellant was served, filed necessary documents namely the counter affidavit and both sides were afforded opportunity to present their evidence thus the right to be heard. This ground is not meritoriously as there is nothing prejudiced any party to the case. It should be dismissed. On 2nd ground of the appeal, it is submitted that this ground was to be raised by the interested party/ person as is the one who should have stated how the failure to appear prejudiced the interest of the child or interested party. It was reiterated that Rule 65 allows the interested party to appear in court and to be served. That party is not one of the parties to the application, no documents is stated for that party to file. This ground therefore has no merits as failure to summon the interested party has not prejudiced the appellant in any manner. It was prayed that the same to be dismissed. The respondent added on 6th ground of appeal that the evidence is clear that the respondent's environment is not risky to the child but the same is friendly environment. The respondent feels that staying with the 14 | P a g e child is the best interest to be raised by the father. The Juvenile Court was correct to order custody to the respondent thus this ground has no merits. In rejoinder, Mr. Josephat Mbeba, advocate reiterated the submission in chief. It was added that mediation contained in Rule 69(2) (b) of the Juvenile Court Rules is which is done upon filing of the application for custody and access of the child not before. He reiterated that is what was elaborated in Neria Nuhu Mwanajimba's case that mediation is conducted prior to hearing of the case. It is posting filing of the application in Court. In Stephano Mbeba's case at page 10 the Court reiterated that the place of conducting mediation depends on circumstances whereby the court may allow the parties to look for mediators of their own choice to conduct mediation and report back to Court. Indeed, there are no court record that parties to this appeal underwent mediation process before hearing of the same. Also, the principle in Mbeba's case was not similar to the instant case. The issue there was who is the mediator. It is distinguishable case. The evidence of failure of mediation is a must before hearing of the case. 15 | P a g e On departure to the Social Inquiry Report, it was argued that reasons for departure are not valid reasons to allow departure from the solid recommendations contained in the Social Inquiry Report. On the use of Chamber Summons and affidavit, the appellant reiterated that the counsel for the respondent mislead himself as Rule 2 is a general provision of the law relating to application in totality. Rule 3 of Rules provides interpretation where application is defined in general terms. It does not apply to the application for custody or access of child for the reasons that there is a specific Rule for that aspect which is categorically state about the modality of institution of the application for custody. Rule 63(1) of the Juvenile Court Rules stated that for custody and access to child application then JCR Form No 8 in the schedule is the one applicable. Upon hearing thorough rival submissions of the parties this court is enjoined to determine validity or otherwise of the appeal. I have dispassionately considered the grounds of appeal in light of applicable legal principles and submissions made by the parties. 16 | P a g e In respect of the first ground of appeal relating to failure to comply with mediation processes before the hearing of the application, the parties are in concurrence that mediation is compulsory. The only disparities are that respondent argued

that parties underwent mediation prior to institution of the application for custody and access of the child. The appellant is of the view that mediation is compulsory upon institution of the case before the juvenile court. The law governing this aspect is Rules 69 and 71 of the Law of the Child (Juvenile Court Procedure) Rules, GN 182 of 2016 simply referred to as Juvenile Court Rules. For avoidance of doubts, Rule 69 (1) and (2) of the Juvenile Court Rules provides that: 69.-(1) The date for the first hearing of an application shall be not late than twenty-eight days after the application has been filed.

- (2) When informing the parties of the date of the first hearing, the court shall- 17 | P a g e
- (a) provide details of any mediation service that is available;
 - (b) inform the parties that they will be required to attempt to settle their dispute through mediation before the first hearing; and
 - (c) require the parties and any interested person who has been served to attend the hearing.
- The provision caters for two main aspects. First, that first hearing must be scheduled within 28 days of filing of the application. Second, the court on that very first hearing date inform the parties about the compulsory requirements of mediation processes before evidence of the parties is tendered. Indeed, the import of Rule 71(1) and (2) of the Juvenile Court Rules, GN No. 182 of 2016 on hearing of the matter on custody and access to children is to the effect that no hearing should proceed without proof that there was failure to resolve the matter through mediation. In particular, Rule 71(2) is lucid that: 18 | P a g e
- (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. It is lucid that hearing cannot proceed in absence of the proof of failure of mediation. The instant appeal, reveals that on 8th January 2024, both parties were present in Court and the appellant herein stated to have not been served with the application. The Court adjourned the matter to 5th February 2024 with orders for hearing and appearance of the parties. On 5th February 2024 both parties appeared and the hearing proceeded. These are reflected from pages 1-4 of the trial court's proceedings. There is nothing on record indicating compliance with the provisions of Rule 69(2) and 71(2) of the Juvenile Court Rules. The procedure adopted by the Juvenile Court is violative of mandatory provisions of the law. This position elaborated above was categorically reiterated in the case of Stephen Mbeba vs Hassan Maulid Mohamed (Civil Revision 2 19 | P a g e of 2019) [2020] TZHC 788 (18 May 2020) (TANZLII), at page 10, the High Court (Hon. Masaju, J.) reiterated on the procedure in the following words: 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. Also, in *Neria Nuhu Mwanajimba vs Harold Henry Masinde* (DC Civil Appeal No. 8236 of 2024) [2024] TZHC 7678 (29 August 2024) 20 | Page (TANZLII), at pages 17-18, the High Court illustrated on the two provisions that: Rules 69 and 71 of the Juvenile Court Rules GN No. 182 of 2016 are couched on mandatory terms. They apply use of word “shall” meaning that hearing of the parties is mandatory stage of the proceedings and it cannot be dispensed with. According to Section 53(2) of the Interpretation of Laws Act, Cap 1 R.E. 2022, the use of word shall imply that something must be performed or done. It states that: “53 (2) Where in a written law the word “shall” is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.” It is my finding that this ground is meritorious as the appellant has demonstrated fully that mediation is compulsory and in the instant case the same was not observed. In my view, this ground alone suffices to dispose the appeal as it goes to the root of the case. However, I shall analyse the rest of the grounds for clarity of the issues. 21 | Page On the failure to consider social inquiry report, the Court has illustrated in the case of *Rajab Shaban Bwanga vs Lilian Richard Haule* (Civil Appeal 54 of 2022) [2022] TZHC 13456 (11 July 2022) (TANZLII), at pages 15-16, that: ...the law also sets some procedural requirements to assist the Court in determining what will be in the interest of the child in proceedings involving children. Among the requirements, is to order social inquiry report provided under Rule 72(1) of the Juvenile Court Procedure Rules. A social investigation report may assist the Court to establish a number of issues that are important in ascertaining best interest of the child in a particular case. Ordinarily, the social inquiry report contains interviews of a number of persons who will be responsible with the child if custody will be granted to either parent and the child's choice if he is capable of making a meaningful choice. A detailed social inquiry report would have assisted the court to consider best interest of the child in determining his custody. 22 | Page Further, in *Jerry William Silaa vs Neema Alex* (Civil Appeal No. 13852 of 2024) [2024] TZHC 8609 (13 September 2024) (TANZLII), at page 12, the Court (Hon. Barthy, J.) reiterated the importance of the Social Inquiry Report in the following words: The social inquiry report aims to assist the court in obtaining all necessary information for determining custody and access rights to the child, in accordance to the requirement of the law. It is lucid that Social Inquiry Report is so fundamental in administration of justice where the interests of the child are involved. In the instant appeal, it is record that on 22nd February 2024, trial Court orders the Social Welfare Officer to file the Social Inquiry Report. It is on pages 16 -17 of the ruling of the trial Court where a summary of the Social Inquiry Report is articulated. The trial Court noted that Social Welfare officer recommended that the child in question be granted to the custody of the appellant. Reasons were that: First, environment is friendly 23 | Page and availability of supervision. Second, the respondent’s mother had stated categorically that respondent travels frequently thus a maid would be needed for the child to be placed in custody of the respondent. Third, at the appellant’s place the child would bond with his siblings while visiting his father. Despite all these factors, trial Court ordered that the child in question should be granted in custody of because it is preferable time to stay with his father as a baby boy. It was the trial court that a proper person to live with the child is the

biological father since the best interest caters far beyond financial ability since children need love, affection and care. I had an opportunity to thoroughly peruse the available evidence on record to verify if these aspects were part of the parties' evidence. In my view there is none to substantiate. The evidence of the respondent herein was limited to stating that the child in question is 14 years of age. Neither of all the factors considered by trial court were adduced by the parties. The respondent evidence in chief in pages 4 to 7 as well as rejoinder evidence on pages 11- 12 is silent on those aspects considered by trial Court. 24 | P a g e In the case Mwanaid Adam Mwanga Vs. Elisante Godson Kessy (Civil Appeal No. 12 of 2022) [2023] TZHC 265 (16 February 2023) (TANZLII), at pages 14-15, the High Court (Hon. Kilimi, J.) observed lucidly that: The above provisions establish the following principles; First, in applications for custody, the commissioning of social investigation whose primary aim is to assist the court to determine the interest of the child, is not mandatory. The court presiding over a contested custody application, may commission the investigation if it finds it necessary. Second, in conducting the investigation and drawing the report, the social welfare officer shall obtain the views of the parties to the proceedings, and the independent views of the child if he is of the age capable of forming an independent opinion taken separately or in the presence of the parents or other relevant persons. Third, in conducting the investigation, the social welfare 25 | P a g e officer shall assess the best interest of the child and provide recommendations. Fourth, when the investigation is conducted and a report thereto drawn and filed, it shall be mandatory for the court to consider the recommendations in its finding and give reasons for not accepting it. As the trial Court considered aspects that were not adduced by the parties in Court, I am certain that this was a clear error that extraneous factors were considered by the trial court in departing on the Social Inquiry Report. I shall proceed to uphold this ground of appeal for being meritorious. With regard to ascertainable wishes and feelings of the child, it is clear that Rule 73 (a) of the Juvenile Court Rules calls for the applicability of this criterion. The child in question was interrogated by the Court as revealed in pages 14-17 of the proceedings. Among other aspects this child stated categorically that it was her mother and grandmother who have been responsible for his upbringing and taking care of him. It was his statement 26 | P a g e that though he loves both parents yet he prefers to live with his mother and visit his father. It was his wish to stay at his mother's place as it is the place where he was brought up. Conclusion of the whole interview was that the child in question prefers to live with his mother. The Law of the Child Act requires that the best interest of the child should be given the first and foremost consideration. Expressing his views prior to determination of a matter affecting the life of such a child is enhancement and upholding of the best interest of the child. In Alice Mbekenga vs Respicious P. Mtumbala (Civil Appeal 68 of 2020) [2021] TZHC 3292 (26 May 2021) (TANZLII), at pages 5-6, the High Court (Hon. Masabo, J.) observed that: With regards to custody, Section 26 (1)(b) of this law enshrines the right of a child to live with the parent who, "in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child". Further, section 37(4) requires the courts when granting custody to that primarily consider the best interests of the child. In applications for custody, the best interest of the 27 | P a g e child is determined in consideration of such factors as the

age and sex of the child, the independent views of the child, the desirability to keep siblings together; continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see section 26, 39(2) of the Law of the Child Act and Rule 73 (a) to (i) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules). Indeed, the best interest of the child ought to have been considered seriously prior to issuance of an order that would significantly change the child's upbringing. Among the factors promoting the best interest of the child is his views regarding appropriate place for custody. It is on record that the child in question stated to prefer to live with his mother and visit his father. This opinion ought to have been considered by the Juvenile Court in this matter but it did not. 28 | Page It is pertinent that court should critically consider of the views of the child in question if s/he can express oneself. Given that in the instant appeal, the child was of age able to express his view and he did so. The trial court ought to have respected the ascertainable wishes of the child to live with his mother and visit his father thus granting the custody to the appellant. However, the trial court ignored these explicit ascertainable wishes of the child. It is settled view of this court that the trial court acted erroneously thus this ground is also meritorious and I am upholding it too. Closely related to the expression of wishes or ascertainable wishes of the child is the ground of failure to consider best interest of the child. This is one of the fundamental principles governing all persons and institutions dealing with the rights of the child. It forms indispensable pillar of the Law of the Child Act. In particular, Section 4(2) of the Law of the Child Act, Cap 13 R.E. 2022 requires that best interest of the child must be given a primary consideration. The law lucidly states that: 29 | Page

- (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. The wording is that best interests of the child must be observed in all the decisions that involves in any way such a child. This is therefore a compulsory legal requirement that decision makers are enjoined to uphold. The paramountcy of the principle of best interests of the child was elucidated in the case of Nacky Esther Nyange vs Mihayo Marijani Wilmore (Civil Appeal 169 of 2019) [2022] TZCA 507 (16 August 2022) (TANZLII), at pages 12-13, the Court of Appeal of Tanzania illustratively stated that: The principle of the best interest of the child is embodied in our laws. Section 125 (2) (a), (b) of LMA articulates that in deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant, and subject to this the court shall have regard to 30 | Page the wishes of the parent, the wishes of the infant, where he or she is of an age to express an independent opinion and the custom of the community to which the parties belong. In the LCA, section 4 (2) states: "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 bodied'. With regards to custody of children, section 26 (1)(b) of the LCA states: "live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child." Moreover, section 37 (4)

of the LCA requires the courts when granting custody to primarily consider the best interests of the child. In applications for custody, the best interest of the child is determined in consideration of such factors as; the age and sex of the child, the independent views of the child, the desirability to keep siblings 31 | P a g e together, continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see sections 26 and 39 (2) of the LCA and Rule 73 (a) to (i) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules). It is indeed lucid that both the Law of the Child Act, Cap 13 R.E. 2019 and its regulations/ Rules have explicitly enjoined the decision-making organs including courts of law to uphold the best interests of the child as the yardstick. It is on record that social investigation report dated 20th February 2024 stated as follows: First, the respondent's mother (child paternal grandmother) is very aged, precisely 70 years then. She stated that if the custody was to be granted to her son (respondent) there should be a house maid to assist and take care of the boy because she was old and ill. 32 | P a g e Second, the child shall be sleeping in the same room with his father as there are only two bedrooms at respondent's residence one being used by respondent's mother and the second one is used by the respondent. Third, the child will have to be transferred from Makole Secondary School to nearby secondary school in Kikuyu area. Fifth, at appellant's residence, the child sleeps in a room with other children of his age. Sixth, the applicant has not been providing maintenance – the upkeep and upbringing was the sole responsibilities of the appellant. Seventh, the respondent travels frequently on his daily work thus there is likely of lack of supervision of the child. Eighth, currently the child is studying near the residence of the appellant thus no disturbance if custody is granted to appellants herein. Ninth, during the interview with the child in question he stated that he prefers to stay with his mother. It was combination of all these factors that Social Investigation Report having considered the provisions of Sections 39(1), (2)(a), (d) and

- (f) of the LCA as well as Section 26 of the LCA, it concluded rightly that the custody of the child be granted to the mother (the appellant) and the respondent be granted access to the child. The reasons were explicit that 33 | P a g e at appellant's residence there is availability of friendly environment and supervision and the need to continue bonding with child siblings. Given the circumstances of this appeal, it is explicit that all the factors for upholding best interests of the child tilt towards granting the custody of the child to the appellant herein. There was nothing to suggest that it was in the best interests of the child in question to be granted custody in hands of the respondent. It can be noted that paternal grandmother of the child in question was explicit that there must be a house maid to take care and supervise the child in case the respondent is granted custody. It is lucid that placing the child in custody of the respondent would entail a lot of disturbance and changes on the child's affairs. These include need to change the school where he is studying by transferring him to another school nearby the respondent's residence, sleeping in the same room with his father, need for a house maid to help and assist in supervision of the child and so on. All

these in view of this court, do not 34 | P a g e uphold the explicit requirements of the Law of Child Act regarding primacy of the best interests of the child. I am in concurrence with the appellant's submission that granting the custody of the child to the respondent was against the principle of the best interests of the child. Such grant of custody of the child to respondent was against the ascertainable wishes of the child as reflected categorically in the Social Investigation Report as well as pages 16 to 17 of the proceedings of the trial Court. In summary, the child stated that though he loves both of his parents, he prefers living with his mother's side and he should be only visiting his father. He further asserted that it is in her mother's side where he was brought up and that is where he is more comfortable. The living environment of the respondent's residence where the child would be sleeping with his father in the same room does not appear to be favourable than that where the child would sleep with his siblings. In account of all the enumerated factors in the Social Investigation Report and the evidence on record, it is settled view of this court that 35 | P a g e granting custody of the child to the respondent was in violation of the best interests of the child in question as circumstances at the respondent were not uphold this fundamental principle. I shall therefore uphold the ground complaining on error of trial court to place the custody of the child to the respondent in violation of the best interest of the child. The remaining grounds relating to failure to call interested person as well as filing the application in a wrong format appear to be minor in terms of effect. They do not go to the root of the case. They are secondary issues which even if the same were violated in my view they do not impair the decision. Given the fact that the parties appeared before the trial Juvenile Court where each was afforded opportunity to be heard, the question of wrong format of the application would appear to be technicality that in my view does not vitiate the proceedings. Similarly, the question of failure to call an interested party though important, it does not go to the root of the case as all other necessary aspects were considered. In the circumstances, I shall disregard them as the prevailing overriding objective principle would require addressing with 36 | P a g e aspects that vitiate the whole of proceedings rendering the decision untenable in law. As a result, this appeal is meritorious as the trial court acted in contravention of explicit mandatory provisions whose adherence to is not an option. I shall therefore quash the whole of the proceedings and Ruling of the Juvenile Court of Dodoma in Miscellaneous Civil Application No 75 of 2023 dated 18th March 2024 for being void ab initio and set aside the Drawn Order thereto. It is so ordered. DATED at DODOMA this 7th day of November 2024 E.E. LONGOPA JUDGE 07/11/2024. 37 | P a g e

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Prepared on 14 October 2026 · Esheria