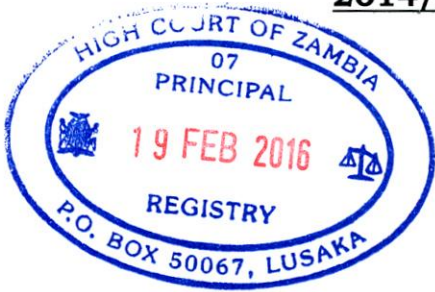


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**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Divorce Jurisdiction)*

**2014/HP/D. 277**



**BETWEEN:**

**RACHEL MUNJUNGA MARU**

**PETITIONER**

**AND**

**JOE MARU**

**RESPONDENT**

**Before the Hon. Mrs. Justice M.C. Kombe on the 19<sup>th</sup> day of February, 2016.**

***For the Petitioner: Mrs. N.M. Muma- Senior Legal Officer- National Legal Aid Clinic for Women***

***For the Respondent: Ms. M. Kalela- Legal Aid Counsel- Legal Aid Board***

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**R U L I N G**

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**Legislation referred to:**

- 1. The Matrimonial Causes Act No. 20 of 2007.***

This is the Petitioner’s application for interim custody of the children of the family pending the determination of the petition for the dissolution of the marriage. It is made by way of *ex parte* summons filed on 17<sup>th</sup> December, 2014 pursuant to Section 72(1) (a) of the Matrimonial Causes Act No. 20 of 2007 and it is supported by an affidavit sworn by the Petitioner **RACHEL MUNJUNGA MARU**.

In the affidavit, the Petitioner deposed that she had filed a petition for the dissolution of marriage against the Respondent **JOE MARU** on 18<sup>th</sup> November, 2014; that she had three children with the Respondent namely:

- (i) Margret Maru, female born on 24<sup>th</sup> October, 2002
- (ii) Wangari Maru, female born on 15<sup>th</sup> February, 2005
- (iii) Esneya Maru, female born on 22<sup>nd</sup> October, 2007

The Petitioner explained that due to the Respondent's constant threats and violence, she was forced to leave her matrimonial home prior to commencing divorce proceedings; that since she left home, the Respondent had made it impossible for her to have access to the children as he did not talk to her and that the relationship had broken down to such levels that there was no communication whatsoever; that the Respondent was a very violent person who lashed out at the children at any given opportunity and physically abused the children in the name of disciplining them; that throughout the marriage, she had lived under constant fear and intimidation.

The Petitioner's affidavit also revealed that the Respondent was not responsible enough to take care of the children; that he went out to drink almost on a daily basis leaving the children in the care of the tenants who were not well known to the children; that in his drunken state, the Respondent was in the habit of insulting on top of his voice and used foul language in the presence of the children.

I declined to grant the interim order for custody of the children *ex parte* and directed that the matter be heard *inter parte* on 9<sup>th</sup> June, 2015.

The Respondent opposed the application and filed an affidavit in opposition on 25<sup>th</sup> June, 2015. The Respondent disputed the contents of the Petitioner's affidavit and explained that the Petitioner left the matrimonial home on her



own and that he had not stopped her from seeing the children. He deposed that he was a responsible father who took care of the children and had been looking after them since the Petitioner left the matrimonial home.

When the matter came up for hearing on 29<sup>th</sup> June, 2015, the Petitioner's advocate on record then Mrs. M. Sakala-Silwimba requested for an adjournment to enable the Petitioner file an affidavit in reply and also to enable the parties explore an *ex curia* settlement. The application was granted.

The Petitioner filed a detailed affidavit in reply on 14<sup>th</sup> September, 2015. In brief, the Petitioner explained that she did not leave the matrimonial home for no apparent reason but that she left because the Respondent had threatened to beat her up; that she was stopped from seeing and talking to her children at church on two occasions and that when she went back to the matrimonial home to get the White book for the car, the Respondent told the maid not to allow the Petitioner to talk to the children; that she involved the Department of Social Welfare who also failed to get in touch with the Respondent for three days and that when the social welfare officers finally managed to go to the matrimonial home, they found her eldest child with the Respondent's tenants.

In response to the assertion by the Respondent that he was a good father who was taking care of the children properly, the Petitioner explained that the Respondent had not been taking care of the children properly in that the children had lost weight from the time she left the matrimonial home. She further explained that the Respondent had failed to provide decent shelter as he had moved from the main house where all the children had their own bedroom and was now staying in a one roomed structure attached to a wall fence where he had put a curtain as a demarcation between the area where he slept and where the children slept.

The Petitioner deposed that she was staying in Kalingalinga along Alick Nkhata Road in a two bedroomed self- contained house with electricity and running water; that as a mother she was not comfortable with the girls sharing the same room with their father and that even if the Respondent had not thought of acts of sexual abuse, it was inevitable for her not to contemplate such happenings in the light of rampant cases of sexual abuse of children even at the hands of their own parents. The Petitioner explained that the Respondent did not have any capacity to take care of the children and that she was the best person to do that; that if the court granted her custody of the children, she would not treat the Respondent in the manner that he had treated her but that she would allow him to freely interact with them and have reasonable access to them as their father.

At the hearing of the petition on 12<sup>th</sup> January, 2016, the Petitioner's advocate informed the court that the parties had failed to settle the issue of custody of the children. In this regard, the matter was adjourned to 3<sup>rd</sup> February, 2016 for the custody hearing. On that date, the Respondent did not attend court and the court was informed by counsel for the Respondent, Ms. Kalela that his sugar levels were high as he was a diabetic patient. The matter was therefore adjourned to 15<sup>th</sup> February, 2016. However, on that date, the Respondent was not present and Ms. Kalela informed the court that the Respondent was misinformed of the date of hearing but that he had indicated that the court could proceed with the application.

Having satisfied myself that the Respondent had been given more than sufficient time to attend court, I proceeded to hear the application since the Respondent was ably represented by counsel and there was an indication that the parties would rely on the affidavit evidence filed before court.

Learned counsel for the Petitioner Mrs. N.M. Muma relied entirely on the affidavit in support and affidavit in reply sworn by the Petitioner. On behalf of



the Respondent, Ms. Kalela also relied on the affidavit in opposition sworn by the Respondent.

By this application, the Petitioner seeks an order for interim custody of the children of the family on the grounds adduced in the affidavit evidence referred to above. The application has been brought pursuant to Section 72(1) (a) of the Matrimonial Causes Act No. 20 of 2007. The said section provides that:

***‘72. (1) The Court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of twenty-five-***

***(a) in any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree or at any time thereafter, whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute; ...’***

It is clear from the above cited provision that this Court is empowered to decide on the question of custody of the children of the family at this stage of the proceedings when the court is hearing the petition for dissolution of the marriage.

In making a determination therefore, I have considered the affidavit evidence adduced by the respective parties. Without delving into the main issues raised in the affidavits therein which are ordinarily considered when hearing the main custody application, however, I am alive to the fact that the welfare and the best interest of the children is of paramount importance when considering the question of custody of children.

In the present case, the children are minors as they are all under the age of sixteen (16), the oldest being thirteen (13) years old and the youngest nine (9) years old. I am of the view that their interests will be served if interim custody is granted to the Petitioner, their mother who is in a position at present to

provide an environment which is conducive for her children unlike the Respondent who is currently sharing a room with the three children. I therefore grant interim custody of the children of the family namely: Magret Maru, Wangari Maru and Esneya Maru to the Petitioner with reasonable access to the Respondent pending the final determination of the petition for dissolution of the marriage.

I make no order as to costs.

**Delivered at Lusaka this 19<sup>th</sup> day of February, 2016**



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**M.C. KOMBE**  
**JUDGE**