

IN THE HIGH COURT FOR ZAMBIA
AT THE FAMILY REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)

2019/HP/F0121



**IN THE MATTER OF: SECTIONS 1 OF THE CHILDREN'S
ACT 1989 (UNITED KINGDOM)**

AND

**IN THE MATTER OF: SECTION 15 OF THE AFFILIATION
AND MAINTANANCE OF CHILDREN
ACT CAP 64 OF THE LAWS OF
ZAMBIA**

AND

**IN THE MATTER OF: RASHIDA BWALYA NELSON
(A MINOR)**

BETWEEN:

JANET PHIRI 1ST APPLICANT

SUSAN CHUNGWE GOSSAGE 2ND APPLICANT

AND

PAUL MUSENGE NELSON RESPONDENT

Before the Hon. Lady Justice C. Lombe Phiri in Chambers.

*For the Applicant: Mrs. S. P. Hinji - Messrs Chifumu Banda &
Associates*

*For the Respondents: Mrs L. Mushota -Messrs. Mushota &
Company*

JUDGMENT



CASES REFERRED TO:

- 1. Garlic v West Northfolk and Wishbech Area Health Authority and Aur 1986AC 112***

LEGISLATION REFERRED TO:

- 1. Section 1 (a) of The Children's Act 1989 (United Kingdom)***
- 2. Section 15 (2) and (3) of the Affiliation and Maintenance of Children Act Chapter 64 of the Laws of Zambia***
- 3. Article 3 (1) and (2) of the United Nations Convention on the Right of the Child***
- 4. R (an infant) (custody to non-parent) ALLER 1974 Vol. 1***

This matter commenced by way of Originating Summons pursuant to seeking the following declarations:

- 1. A joint or Full Custody Order*
- 2. Any other relief the Court may deem just and equitable in the circumstances.*

In the Affidavit in support of the Originating Summons filed on 18th April 2019 and sworn by the 1st Applicant, it was averred that the first and second Applicants are older half sisters to Rashida Bwalya (A minor) as they shared the same mother. It was further stated that prior to their mother's death in December, 2017, Rashida and the 1st and 2nd Applicants lived in the same house. Further that that since Rashida was 2 years old, the 2nd Applicant always sent monthly upkeep payments and extra money for Rashida's use. It was also averred that at the

time of filing of this matter, the 2nd Applicant was sending the said monthly upkeep for Rashida to the wife to their uncle who was taking care of Rashida. The 1st Applicant indicated that she was a Customer Relations Officer employed at Southern Cross Motors and lived in a good residential area with good schools. Further that the 2nd Applicant was a Model working and living in United Kingdom. Both payslips for the 1st and 2nd Applicant were exhibited. It was averred that the 1st and 2nd Applicants have been supportive of Rashida's wellbeing and want to have custody of her.

It was further averred that the Respondent has consequently denied Rashida to move to Lusaka and stay with the 1st Applicant. Further that after their mother's death, the Respondent did not take any action to place Rashida in a home. Also, that the Respondent was not married and lived with a younger brother and works night shift and that it was not conducive for the minor to be in an environment where there was no female figure. It was further averred that the Respondent has never lived with Rashida and only visited her once in a while for a few hours and returned to Solwezi.

It was averred by the Respondent, in the Affidavit in opposition that Rashida is the biological child of the Respondent. He further stated that he lived with the late Edina Kalunga and Rashida for a few months before the relationship ended due to irreconcilable differences. He narrated that when the relationship ended with Edina Kalunga and even after her demise, he continued rendering support to the minor morally, financially and

spiritually. He contended that he had never been abusive or negligent to the child as he provided upkeep money, school fees and other school related expenses before and after the demise of Rashida's mother. He reiterated the assertion by the Applicants that he did not place the child in a home after the death of the mother. According to the Respondent, he is the one who arranged for Rashida to be in custody of the deceased mother's cousin Castrol Chishala so that she could continue with her schooling without disruption and after her grade 7 examination he would take her to Solwezi where he lives, to live with her.

As regards the assertion by the Applicants that the Respondent signed a consent letter to allow the 1st Applicant to have custody of the child, it was contended that the purpose of the letter at that time was to facilitate Rashida's admission to a school in the United Kingdom where the 2nd Applicant lives and that it was in the best interest of the child. It was his further contention that owing to the fact that the intention to move the child did not materialize, the power of attorney in that letter is forthwith revoked. The Respondent further averred that he had no intention of placing his child in homes that are not conducive for his child's health living and development while he is still alive. As regards also the assertion by the Applicants that the environment was not conducive for the Respondent to have custody of a girl child, it was contended that the Respondent was living with his youngest daughter whose mother also passed away and that he had a maid who was a grown-up woman. He further stated that his brother Stanly Mubanga Nelson was in full time employment

and away from home most of the times. Further that the said brother was getting along with Rashida very well as they have lived together before, when Rashida's mother was alive. He further averred that the Applicants herein have no proper sources of income otherwise they would have exhibited latest pay slips. He retaliated that the income of the Applicants cannot be compared to his income as he was in permanent employment with Quantum Minerals Operations in Solwezi.

In the Skeleton arguments in support of Originating Summons for this application, it was submitted that the paramount consideration before granting custody of the child is the wellbeing of the child with respect to the environment where the child will be comfortable, happy and safe in the best manner possible among other things. The Court was referred to section 1 (a) of **The Children Act 1989 (United Kingdom)** which states that;

“(1) When a court determines any question with respect to—

(a)the upbringing of a child; or

(b)the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration”.

And **Section 15 (2) and (3) of the Affiliation and Mantainance of Childrens Act Chapter 64 of the Laws of Zambia** which provides that:

“15 (2) In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.

(3) If the court is satisfied that-

(a) the mother or father of a child is not a fit and proper person to have custody of the child”

It was further submitted that it was not in the best interest of Rashida to continue living where she was currently living as she was unhappy. Further that it was neither safe for Rashida to live with the father who is not married, only lives with his young brother and works night shifts nor conducive for her to be in an environment where she lives without a female figure in her life.

In the skeleton arguments filed for the Respondent, it was argued that a child is either a marital or non-marital child, i.e born to two parties in wedlock or out of wedlock. It was further submitted that where parties are not married, rights of care and custody are usually given to the mother, further that if the mother passes on, those responsibilities are given to the father. It was contended that there is no person who has a better right over either parent unless the court finds the parent unsuitable. The Court was referred to section 2 of **the Affiliation and Maintenance of Children’s Act, Principle 2 of the United Nations Convention on the Rights of Children,** on the principle of the best interest

of the child, As regards parental rights, the court was referred to the case of **Garlic v West Northfolk and Wishbech Area Health Authority and Aur 1986AC 112⁽¹⁾**

I have considered all the arguments by both parties and indebted to the legal provisions submitted.

The UNCRC consists of four guiding principles on children's rights. Guiding principle number 2 states as follows:

“The best interests of the (individual) child shall be a primary consideration”.

Furthermore, **Article 3 (1) and (2) of the UNCRC** provides as follows;

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures”.

The above provisions attest to the fact that in all actions concerning children, the best interest of the child shall be a primary consideration taking into account the rights and duties of the parents, Legal guardians or any other person legally responsible for the child.

As regards the issue of parental rights **Section 15 of the Affiliation and Maintenance of Childrens Act Chapter 64 of the Laws of Zambia** provides that:

“15(2) In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.

(3) If the court is satisfied that-

- (a) the mother or father of a child is not a fit and proper person to have custody of the child;*
- (b) the mother or father of a child has died or become of unsound mind or is serving a term of imprisonment of more than six months; or*
- (c) there are exceptional circumstances making it impracticable for the child to be entrusted to the custody of either of its parents;*

the court may, at the time of making a maintenance order or at any time thereafter,

appoint any other person as custodian of the child”.

It is clear from the legal provisions above that in considering the custody of a child regard must be had to the rights and duties of the parents. Only when there are circumstances as outlined in section 15 (2) and (3) of the **Affiliation and Maintenance of Childrens Act**, making it impracticable for the child to be entrusted to the custody of either of its parents.

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The court held that:

“The court may, on the application of the mother or father of a minor ... make such order regarding— (a) the custody of the minor; and (b) the right of access to the minor of his mother or father, as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.”

The court in the above case concluded that it was in the best interests of Julie to remain with her maternal great-aunt and to continue to receive the special care which the great-aunt was providing for her.

In casu, the Social Welfare has provided a report on the home environment of the Applicant and the Respondent. It is stated in the said report that the Applicant as well as the Respondent have homes with suitable environment for the upbringing of the minor

herein. I have considered that the Respondent in this matter who is the only surviving parent of the minor has a spacious home environment for the upbringing of the child. Further the Social Welfare report shows that the Respondent is keeping another girl child who is going on well with the child herein. There is no evidence of circumstances making it impracticable for the child to be entrusted to the custody of the father who is the only surviving parent. Furthermore, there is no evidence before this court to show that the child will receive the special care if custody is entrusted to the Applicants herein.

In conclusion therefore, it is my considered view that the father to the child herein having demonstrated that he is capable of looking after his child, carries a superior right over the child than a non- parent. To this extend, the application for custody by the applicants fails.

Delivered at Lusaka this 25th day of February, 2020



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C. LOMBE PHIRI
JUDGE