

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2019/HPF/D248

(Divorce Jurisdiction)

BETWEEN:

NAOMI IMASIKU

AND

TENDAI MWAMBA CHAIWILA



APPLICANT

RESPONDENT

***BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN CHAMBERS, ON THE 11TH DAY OF FEBRUARY, 2020.***

For the Applicant: Ms. P. Chikwibu - Legal Aid Board

For the Respondent: N/A

RULING

CASES REFERRED TO:

1. *Allen vs. Allen* (1948) 2 ALL ER 4131;
2. *Jobsi Ulrich Stoyke vs. Cleotha Ilona Emily Stoyke* - Appeal No. 67 of 1998;
3. *Elvis Mtonga vs. Lungowe Lubasi* - Appeal No. 37 of 2003;
4. *J vs. C* (1970) AC 688;
5. *S vs. S and P* [1962] 2 All ER 1; and
6. *D v M (Minor Custody Appeal)* (1982) 3 All E.R. 897.

LEGISLATION REFERRED TO:

1. *The Marriage Act, Chapter 5 of the Laws of Zambia;*
2. *Matrimonial Causes Act No. 20 of 2007;*
3. *The United Nations Convention of Rights of a Child;*
4. *The African Charter on the Rights and Welfare of the Child; and*
5. *Rayden's Law and Practice in Divorce and Family Matters 11th Edition, Butterworths, London, 1971.*

1 BACKGROUND

- 1.1 On 30th October, 2019, a *decree nisi* was granted to the parties, in respect of their marriage solemnised on 1st November, 2015, under ***The Marriage Act***¹.
- 1.2 Subsequently, on 20th November, 2019, the Applicant applied for Custody of the two children of the family, namely ELI CHAIWILA and ANTHONY MWAMBA CHAIWILA, pursuant to ***Section 75 (1)*** of ***The Matrimonial Causes Act***².

2 AFFIDAVIT EVIDENCE

- 2.1 In support of the application, the Applicant filed herein an Affidavit, deposed to by the Applicant Naomi Imasiku, in which it is averred *inter alia*, that she is the mother of the children Eli Chaiwila, a boy born on 5th September, 2013, enrolled at Monique's Primary School in reception and Anthony Mwamba Chaiwila, a boy born on 15th July, 2016.
- 2.2 It is further averred that the said children are minors who are both below the age of seven years and require the Applicant's motherly care and custody.
- 2.3 It is also averred that during the period that the said children will be in the custody of the Applicant, she will require the Respondent to contribute financially every month to the welfare and upkeep of the children.

3 SUBMISSIONS

- 3.1 On the return date on 4th February, 2020, only the Applicant was in attendance. The Respondent was

absent, despite being aware of the hearing and no reason was advanced for his absence. Further the Respondent did not file any Affidavit in Opposition to the application. Based on the Affidavit of Service on record, I proceeded to hear the matter.

3.2 The Applicant relied entirely on the Summons and Affidavit in Support filed herein on 20th November, 2019, which she augmented with brief *viva voce* submissions. She submitted that the said children of the family are of tender age and need motherly care and support. It was also submitted that the Court must take into consideration, that the said children have been in the custody, care and control of the Applicant. She prayed that she be granted custody of the children of the family.

4 THE LAW

4.1 **Section 72 (1) (a)** of ***The Matrimonial Causes Act***² provides as follows: -

"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; ..." (Court's emphasis)

4.2 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 before a *decree absolute* is granted. It further empowers the Court to make such Orders as it thinks fit for the education of any child under the age of 25.

4.3 The application was made pursuant to **Section 75 (1)** of **The Matrimonial Causes Act²**, which provides as follows: -

"In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of marriage-

(a) the Court shall regard the interest of the children as the paramount consideration; and

(b) subject to paragraph (a) the Court may make such order in respect of those matters as it thinks proper."

4.4 According to **Section 75 (1)** cited above, in proceedings in respect of custody, welfare advancement or education of the children, Courts shall have regard to the interest of the children as the paramount consideration and may make orders which are deemed proper in the circumstances.

4.5 This is also in conformity with **Article 3** of **The Convention on the Rights of the Child³**. This Article calls upon the parents and legal guardians to think about how their decisions will affect the children. The Court is required to consider the following: -

"Who the father is, who the Mother is; What they are prepared to do, and all the circumstances of the case..."

4.6 The best interest of the child principle is also included in **Article 4** of **The African Charter on the Rights and Welfare of the Child**⁴ which provides that: -

"In all actions concerning the child, the best interest of the child shall be the primary consideration."

4.7 **Section 71 (6)** of **The Matrimonial Causes Act**² defines "Welfare" in relation to a child as including the custody, the education of the child and financial provision for the child.

4.8 As can be seen from above cited provisions of the law, the proper test to be applied is the welfare of the children, both moral and physical being paramount. The case of **Allen vs. Allen**¹, is also supportive of the above principles. Therein, it was held that the test to be applied is the welfare of the children.

4.9 The principle of the interest of children was further adopted in the case of **Jobsi Ulrich Stoyke vs. Cleotha Ilona Emily Stoyke**² where the Supreme Court had this to say: -

"The general principal regarding custody of children is that, the paramount consideration is the welfare of the child. It has been said that the welfare of the child is not to be measured by Money only nor by physical comfort, the moral and welfare of the child must be considered as well as his physical well being, nor can the times of affection be disregarded."

4.10 In a later Case of **Elvis Mtonga vs. Lungowe Lubasi**³, the Supreme Court acknowledged that the welfare of the child is of paramount consideration. In the case of

J vs. C⁴, Lord MacDermott explained that paramountcy of the child's welfare means: -

"...more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. The words denote a process whereby, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. It is the paramount consideration because it rules upon or determines the course to be followed."

5 ANALYSIS AND FINDINGS

- 5.1 I have considered the application together with the Affidavit on record and the *viva voce* submissions by the Applicant.
- 5.2 The issue for determination before this Court in the granting of the Custody Order is whether the Applicant is the best suited parent to serve the interests of children. As seen from the authorities cited above, in an application to the Court for custody, by either parent, the first and paramount consideration is the welfare of the children. The conduct and wishes of the parents are also factors to be considered. However, the dominant matter for the consideration of the Court is the welfare of the children, both moral and physical being paramount as was held in the case of **Allen vs. Allen**¹.

- 5.3 In considering the custody of child, mindful that its welfare is of paramount importance, a Court must consider the child's happiness and well-being, their social and educational influences, their psychological and physical well being, their physical and material surroundings, all of which go towards their true welfare. These must be considered along with the conduct of the parents, as they are influential in the life of the children and their welfare. However, the welfare of the children is the chief consideration and is not equal of any other consideration. All these other considerations are subordinate.
- 5.4 The evidence on record points to the fact that the children of the family, in respect of which this application is made, reside with the Applicant and have been living with the Applicant from the time that the parties separated.
- 5.5 The learned authors of ***Rayden's Law and Practice in Divorce and Family Matters***⁵, at **paragraph 28, page 891** opine as follows: -

"Where in any proceedings before any Court... the custody or upbringing of an infant is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody or upbringing is superior to that of the mother... the welfare of the infant, although the first and paramount

consideration, is not the sole consideration and the conduct of the parties is a matter to be taken into account."

5.6 They further opine as follows: -

"...There is no settled rule that a child of tender years should remain in the custody of the mother. In dealing with the questions of custody or access the Court will have regard to the particular circumstances of each case, always bearing in mind that the benefit or interest of the child is the paramount consideration, and not the punishment of the guilty spouse, though among other considerations the wishes of an impeachable parent stand first. The Court has a wide discretion in such matters."

5.7 In the case of **S v S and P⁵**, Wilmer LJ held as follows:-

"I agree with the view expressed by the commissioner that to deprive a mother altogether of access to her own children, particularly to two small daughters, is 'a very strong thing to do'. I should be disposed to go so far as to say that the court should not take that step unless satisfied that she is not a fit and proper person to be brought into contact with the children at all. Such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children, or something of that sort. To say of a woman that she is a bad wife or mother may be an excellent reason for not giving her care and control, but, in my view, is not sufficient ground for depriving her of any kind of access." (Court's emphasis)

- 5.8 The holding in the above cited case similarly applies to fathers. In *casu*, there is nothing, in the evidence placed before me, that suggest that the Respondent is not fit and proper to be brought into contact with the children of the family. In fact, in the Statement as to the arrangement of the children of the family, it was proposed that the Respondent be given reasonable access to the children of the family.
- 5.9 Being guided by the authorities cited above, in my considered view, the best place for small children such as the ones in *casu*, is with their mother. This is because these children have been living with their mother in an environment that they are accustomed to and deserve to be left in a home and surroundings, that they are used to, with their mother and not in their father's home. I am fortified by the case of ***D vs. M (Minor Custody Appeal)***⁶ where it was held as follows: -

"...it is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so." (Court's emphasis)

- 5.10 I have considered the evidence on record and find that the children have been residing with the Applicant since the parties separated. Removing these children who are of very tender years from an environment

where they have been transitioning from recovery of the effects on them, of their parents' divorce is certainly not in their best interest. Their living environment provides continuation of established bonds with their mother whose role in their lives had more or less continued as before, following the divorce. Thus, I further find and hold that, in order to maintain stability in the children's lives, the person to have the day to day care and control, is the Applicant, where the children have been living all along. Clearly, it is in the interest of these children to be in the custody of the Applicant.

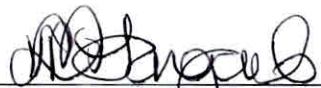
6 CONCLUSION

- 6.1 In my considered view this is a proper case in which the custody, care and control of the children should be vested in the mother. The father should have reasonable access and of course in future depending on how the situation goes, when circumstances may be different, the Order is always open to revision.
- 6.2 Having taken into account what is in the best interest of the children, custody is granted to the Applicant, who is their mother, with reasonable access to the Respondent who is their father, during weekends and holidays, in order for the children to maintain a relationship with their father. This will be in the best interest of the children, as the relationship developed with both parents prior to divorce will be continued and fostered.

- 6.3 Although I have powers to consider maintenance as provided in **Section 56** of **The Matrimonial Causes Act²**, the Applicant did not properly package the application in a manner that conforms with **The Matrimonial Causes Act²** and its applicable rules to enable this Court to arrive at a just and fair decision. However, I note from the record, that the Applicant has always been responsible for the maintenance and upkeep of the children of the family. In the circumstances of this matter, where the record reveals that the Applicant is a Statistician at ZESCO Limited and the Respondent a Financial Officer at International Organisation for Migration (IOM), I deem it proper and Order that the Respondent shall pay for the education of the children of the family, including paying for all school necessities and necessary medicals that the children will require, while the Applicant shall continue to be responsible for the children's daily upkeep.
- 6.4 In the event that the Respondent fails or neglects to do so, the Applicant shall be at liberty to apply to Court for the necessary Orders.
- 6.5 This Order for financial provision and education of the children has been necessitated for the security of the children of the family.
- 6.6 Each party shall bear its own costs.

6.7 Leave to Appeal is granted.

Delivered on the 11th day of February, 2020.



P. K. YANGAILO
HIGH COURT JUDGE