

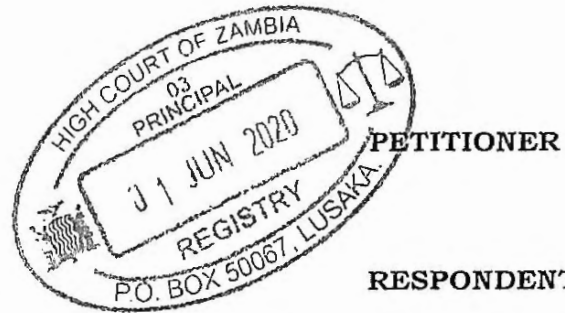
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)
BETWEEN:

2018/HPF/D/0014

JOSEPHINE MUBANGA MUMBA

AND

DENNIS MUMBA



RESPONDENT

Before Honourable Mr Justice M.D. Bowa on 1st of June 2020.

For the Petitioner: Mr H. Kabwe of Hobday Kabwe and Company

*For the Respondent: Mr C. Banda (SC) with Mrs Susan Hinji of Chifumu
Banda and Company.*

RULING

Cases Referred to

1. *RE O (Infants) 1971 2 ALL ER 744*
2. *Re- L (Infants) 1962 3 ALL ER*
3. *Stoyke v Stoyke SCZ appeal No. 67 of 1998*
4. *J v C (1969) 1 ALL ER 788*
5. *Zanetta Nyendwa vs. Kenneth Spooner (2013) 2 ZR 1*

Legislation referred to

1. *The Matrimonial Causes Act no 20 of 2007 section 75(1)*
2. *The Legitimacy Act Cap 52 of the Laws of Zambia. Section 14(2)*
3. *The Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia. Section 15 (2)*

Other material



1. Un Convention on the Rights of the Child Article 3.

This is the Petitioner's application for custody of the children of the family filed into court on the 12th of February 2019. By her affidavit in support of even date the Petitioner deposed that she was lawfully married to the Respondent from 6th January 2012 until 29th June 2018 when the marriage was dissolved by a decree nisi and order made absolute on 23rd August 2018. She averred that the Petitioner and Respondent last lived together as husband and wife at house No 21 Edison Crescent Sunning Hill Johannesburg South Africa.

She averred further that there are two children of the family named Tasha Mumba and Mukuma Mumba born on 29th July 2008 and 20th June 2011 respectively. The two children are both currently in the custody of the Respondent and residing at house number 21 Edison Crescent Sunning Hill South Africa. It was deposed further that the Petitioner currently resides with her brother at house number A1267 Meanwood Mutumbi Phase 1, Lusaka.

She believed that although the children were born in South Africa, it does not follow that they cannot live in Zambia. In fact that both parents are Zambians. Further that though the

Respondent claims to have a stable job in South Africa he would return to Zambia someday. He could thus use his job to sponsor the welfare of the children in Zambia.

She stated that it is true she is a cross boarder trader but this cannot make her fail to look after the children as she would not always be on the road. She is usually out of the country only once or twice in a month and much of the time she sells the merchandise she brings in from South Africa from her home.

The Petitioner averred that it was worth noting that there are good schools in Zambia which match the standard of the ones in South Africa. Further that the issue of emotional instability arising from the children's movement in the event of her being granted custody will not arise as it is common for the children to change from one school to another. She added that it would be best for the children to be with her as they are emotionally attached to her as their mother especially so for the girl child.

Finally it was her contention that even though she may be granted custody, the Respondent will still be expected to continue supporting the children financially to supplement what she will be able to provide.

The Respondent filed an affidavit in opposition dated 30th April 2019. He averred that he presently lives with both children in South Africa and they have never lived in Zambia in spite of both parents being Zambians. That the children are in fact South African citizens and he has been living with them in the absence of the Petitioner for 12 months at the date of affidavit was deposed. Consequently that the children had spent more time with him in this period.

It was averred further that the Petitioner has no stable accommodation as she currently lives in her brother's house. He added that he has provided a safe and stable environment for the children and has been fully responsible for their school fees and other expenses from their respective birth dates.

Both children attend school at Curro Rivonia Primary School in Johannesburg with the oldest being in grade 5 whilst the youngest is doing his 2nd grade. He averred further that he drops them off at school every morning and they get back home using private school transport. He added that he supervises the children as they do their homework and attends to their extra curricula activities which include school projects, interaction

with teachers to monitor progress in school and watches them play sports.

It was the Respondent's evidence that in spite being a cross boarder businesswoman, the Petitioner had not given any financial support to the children. He further disclosed that the children have been registered with the Discovery medical scheme from birth which gives them full access to various medical care facilities in South Africa.

He contended that he had demonstrated in the year he had been with the children that he is fully capable of looking after them. He thus believed that the best interest of the children would be served if they continued to go to the same school and lived in the same house they has always known. He proceeded to give proposals in paragraph 23 of the affidavit in opposition on what he believed would be an ideal parental plan going forward.

He averred that the Petitioner had shown no interest or even attended the children's school activities. He added that the children's grades had improved over the last 12 months that the Petitioner had been absent from the house. Exhibited "**DM3**" are the school grades and certificates of achievement as proof of such

performance. He therefore prayed that he be granted full custody of the children of the family.

There was no affidavit in reply filed.

At the hearing State Counsel Chifumu Banda applied to cross examine the Petitioner on her affidavit evidence. I allowed the application upon there being no objection on behalf of the Petitioner. When cross examined, the Petitioner stated that she resides in Chamba Valley Meanwood with her brother. She revealed that her brother is married and has 2 children. Further that the house is a 3 bedroomed house. The main bedroom is occupied by her brother and his wife, the second by the maid whilst she is the third bedroom. She added that the children are young and hence do not sleep on their own.

Cross examined further the Petitioner disclosed that she is no longer a cross boarder trader and stopped that line of business in December 2018. She has since partnered with someone in a new business. She agreed that she travelled to South Africa in December 2018 but did not see the children. She explained that this was because the Respondent would not allow her to.

She accepted that the Respondent is in a stable job in South Africa working as a civil engineer. She further accepted that he did have a 4 bedroomed house located in a good residential area. She agreed that the children go to a good school and that the Respondent pays the fees. She accepted that she had not paid the fees in spite being a businesswoman. She insisted that it was the responsibility of the Respondent as a father to do so.

Questioned further the Petitioner testified that she had not sent the children any money since the divorce. She maintained that this was because the Petitioner had not given her the opportunity to take care of the children and does most of the things himself.

When asked about the children's progression in school, the Petitioner testified that she was not aware they were doing very well in school. She was aware that the children enjoy sport and were doing well in it at school. She did not agree with the proposal for the Respondent to retain custody of the children and both parents to have the children on alternative holidays. She insisted that the children can attend school in Zambia.

She testified further that she does drive a vehicle registered in the names of Mr John Petulu her business partner. She disagreed

that she did not have the capacity to take care of the children. Asked about her present income, the Petitioner testified she earns about K8000 per month net pay. She testified further that she does not pay tax or make any Napsa contributions.

Cross examined further, it was the Petitioner's evidence that she would liken the school the children are attending to the Lusaka International School. She estimated the distance to the school from her present address to be about 10 km. She explained she would have to move from her brother's house as it was not her permanent address.

When re-examined, The Petitioner testified that she disagreed that the children remain in South Africa because they are attached to her as the mother and better off with her. She further disagreed with the Petitioner's proposals as they translated in him spending much more time with the children than her. It was the Petitioner's further evidence in clarification that she was in the process of arranging for her own accommodation as she recognises that the children cannot live in her brothers home. She maintained that she is capable of taking care of her children.

State counsel Banda sought leave to have the Respondent give viva voce evidence as well. I allowed the application. The Respondent testified as deposed in his affidavit that the Petitioner was his ex-wife with whom he shared 2 children both currently staying with him in South Africa. It was his evidence that before the divorce and for a period of about 2 years, the Petitioner spent more time in Lusaka than in Johannesburg and has been living in Lusaka since the dissolution of the marriage.

He testified further that he owns the house he lives in which he acquired through a loan obtained from FNB bank. He is presently servicing the loan. The house is a 4 bedroomed house, has a living room, kitchen and play room. Whilst he is away at work there is a full time nanny at the house who lives at the house and looks after the children.

He is responsible for the school fees for the children which he has been paying since they started school. He clarified that he pays about 9000 Rands per month for each child and also pays for school trips whenever they arise. He asserted that the children were born in South Africa and hold South Africa passports. Further that all their friends are in South Africa.

The Respondent testified further that there are good medical facilities right next to his house. The children are on a medical scheme and he is responsible for paying the medical insurance. He pays 7800 Rands for the whole family. He added that he has a family car used to drop off the children at school. He uses a Mercedes Benz and a Honda that are both at the children's disposal for this purpose.

It was the Respondent's further evidence that he earns 100,000 Rands and pays income tax of 40% leaving him a net pay of about 60,000 Rands per month money which is more than sufficient to meet the family's needs. He therefore prayed that the court grants him full custody of the children with liberal access to the Petitioner.

Explaining his proposals on parental care in paragraph 23 of his affidavit in opposition, the Respondent stated that the parties could spend alternate holidays with children. Further that each party will bear the cost of the travel for the children though he was willing to assist with the travel expenses.

When cross examined, the Respondent testified that the children did not have any major health challenges. Further that there is

no specialist treatment that they are undergoing. The children were previously enrolled at Curio Brayaston School and Michael Mount School respectively. He did not have any certificates of the children's performance at their previous school. He however maintained that the children were faring better at their present school.

He further maintained that the Petitioner had been spending more time away from home for about 2 years prior to the divorce. He however did not have her passport to prove that allegation. He acknowledged that this fact was not disclosed in the petition for divorce. He further agreed that he had not presented any document to confirm what he earns. He had further not brought any document to confirm his immigration status.

Cross examined further, the Respondent testified that the school has an aftercare service that looks after the children between 14:00 hours to 18:00 hours. He however agreed that the mother of the children could look after the children better than the aftercare service. He further agreed that the Respondent as mother can take better care of the children than the maid.

He was not in the position to tell if there are schools in Zambia that are just as good as the ones in South Africa. He had not heard of International School in Lusaka and only saw it on the way to court. Cross examined further, the Respondent acknowledged that Tasha the girl child was 11 years old and could thus hit puberty soon.

He did not find acceptable the proposal that joint custody be awarded with the children going to International School in Zambia and travelling to South Africa for holidays at the Respondent's expense. He maintained that the children would be disturbed if they moved in terms of academic life, health care and social life. He accepted that the move to Pentecostal church did not disturb the children nor did the switch back to the 7th church that he now takes them to.

He agreed that the children have cousins based in Zambia from the mother's side that they mingled with. Asked what he felt was wrong with the Zambian health system, the Respondent insisted that the South African Medical Scheme was better. Further that the children can be exposed a Malaria which is non-existent South African.

When re-examined, the Respondent testified that the children are on health insurance in South Africa. Further that most Zambians who fall sick are taken to the Sunning Hill hospital that is near his house and the same hospital his children go to .He maintained that he is a permanent resident in South Africa as stated in his affidavit.

The school syllabus is different so he believed the children's school would be disturbed if they moved to Zambia. Further that the medical facilities in South Africa are better than Zambia. He did not attach the pay slip but knows what his income and expenditure are.

The maid he has employed looks after the children well and is ~~in~~ a live in. He does not know International School or the standards it offers but could attest that the school his children attend is one of the good private schools in Johannesburg.

That was the case for the Respondent.

At the time of the writing of this ruling, only the Respondent had filed in his submissions. I have carefully considered the parties affidavits and filed submissions .Zambia is a State party to the

UN Convention on the Rights of the Child. Article 3 of the Convention provides;

“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”

Zambia has domesticated this provision through Section 75 (1) of the Matrimonial Causes Act No 20 of 2007 which provides that:

“(1) 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;

Further legislative expression of this principle is to be found in section 14(2) of the Legitimacy Act Cap 52 and section 15 (2) of the Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia.

From the above discourse, it's fair to say that “the best interest principle” is firmly entrenched in Zambian law and practice in dealing with applications to do with children. The Law goes further to provide that in considering such applications none of

the party's position is to be considered superior to the other. In other words the parties are to be put on an equal footing. Hence section 15 (2) of the Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia provides that:

“In making any order as to custody and access, the courts 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.”

Illustrating this point in the English decision in *RE O (Infants)*¹ the court held that:

“There is no rule that little children should be with their mother, any more than there is a rule that boys approaching adolescence should be with their father; it depends on what is proper in each individual case”

In *Re- L (Infants)*² the court was able to grant primary care and control to an unimpeachable father of two girls aged 5 and 3 years respectively. The court of appeal found that the mother could not as of right claim the children. The court took into account all the circumstances of the case and granted the care

and control of the children to the father with reasonable access to the mother.

What amounts to the best interest of the child and where it lies then becomes a matter of fact on a case by case basis. In *Stoyke v Stoyke*³ the Supreme Court held that in considering the welfare of children it is not the monetary or physically comfort that should be paramount but rather the moral and religious welfare of the children and their physical wellbeing. In *J v C*⁴ the court proposed a wider definition of what amounts to welfare of a minor to extend and not limited to the age and sex of the child.

In the case of *Zanetta Nyendwa vs. Kenneth Spooner*⁵ the Supreme Court held that in ascertaining where the best interest of the children lie it is also imperative to look at the whole background of the children's life and circumstances of each case

In the case before me, it is not in dispute that the children of the family reside with the Respondent and that he has provided a home for them, medical insurance for their health and pays for their education at a private school. The family history also shows the children were born and have been raised in South Africa up

to this point. The Respondent has demonstrated that he is in stable employment and has the ability to take care of the children whom he has been with in over a year now since the divorce.

The Petitioner on the other hand is not in gainful employment and by her own testimony is no longer in the cross border trade business. She informed the court she has partnered with someone in a company but was unable to convincingly state what her income was. She further acknowledged that she does not have a home of her own and presently lives with her brother and his family. Whilst she recognises that she would need to be in a home of her own to live with the children, she surprisingly states that she was waiting to dispose of the custody hearing before making the arrangements. The ability to provide shelter and to actually have shelter is an important consideration that the Petitioner has not paid due regard to when making this application.

I do not question her love and affection for the children nor her desire to be with them. The Petitioner has however not demonstrated her ability to provide a stable home environment, medical care and education that the Respondent is presently able to avail the children. It must be said that I am not entirely

persuaded by the argument that Zambia is devoid of facilities equating those in South Africa. Zambia has International Schools and private hospitals that cater for people who can afford such facilities. The Respondent admitted that the children do not have any illness that requires specialist treatment. The children would therefore be perfectly ok living in Zambia as well.


However, as stated above the Petitioner has not demonstrated her ability to provide for the children and I conclude that the best interest of the children at this point lie in sole custody being granted to the Respondent with reasonable access to the Petitioner. The children are to spend all the school holidays with the Petitioner. Reasonable access should also be granted to the Petitioner whenever she travels to South Africa provided such visit does not interfere with the children's school programme.

I do not find acceptable the proposal advanced by the Respondent for the children to spend alternate holidays between the parents as this will tilt in favour of the Respondent who will invariably spend much more time with the children than the Petitioner. The finer detail of the mode of travel, pickup and drop off of the children can be worked out by the parties themselves who in any event must co-operate in the best interest of the

children that they share. The order is subject to review in light of changed circumstances upon application by either party.

Each party will bear their own costs for this application.

Dated at Lusaka this 1st day of June 2020.


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JUDGE