

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(Divorce Jurisdiction)

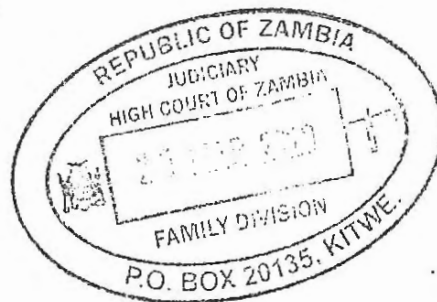
2019/HK/D.73

BETWEEN:

KINGSLEY CHABALA

AND

LUCY MUSOMPO



PETITIONER

RESPONDENT

Before the Hon. Mr. Justice E. Pengele in Chambers on 20th
March, 2020.

For the Petitioner: Mr. I.K. Mulenga of Messrs. Iven Mulenga & Co.

For the Respondent: In Person

R U L I N G

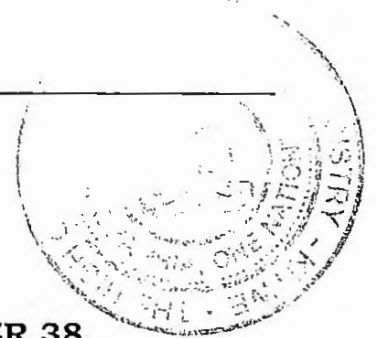
Cases referred to:

1. Re C (A) (an infant) C v. C, (1970) 1 ALL ER 309;
2. Coetzee V. Coetzee (1965) ZR 89; and
3. Anne Susan Dewar V. Peter Alexander Dewar (1971) ZR 38.

Legislation referred to:

- a. Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia; and
- b. Matrimonial Causes Act No. 20 of 2007.

This is a Ruling on an application by the Respondent for interim custody of a minor child. The said application was filed on 18th December, 2019, pursuant to section 15 of the **Affiliation and**



Maintenance of Children Act, Chapter 64 of the Laws of Zambia^a. The Respondent's application is supported by an Affidavit sworn by the Respondent herself.

In her Affidavit in Support, the Respondent has deposed that there is one male child of the family born to the Petitioner and the Respondent. The Respondent stated that the name of the child is Sean Chabala and that he was born on 11th October, 2017.

The Respondent went on to depose that before the Petitioner presented his Petition, he took the child and hid him from the Respondent and that he vowed that the Respondent would never see the child. She went on to point out that the Petitioner has denied her access to the child and that this is an issue of grave concern to her as a mother to the child in view of the child's tender age. She stated that she is concerned that the child is being deliberately deprived of the opportunity to see and be with her. The Respondent went on to state that the actions of the Petitioner amount to child abuse especially considering the age of the child. She deposed that it is for this reason that she is asking for custody and access to the child to enable her continue bonding with, and nurturing, the child.

On 10th February, 2020, the Petitioner filed an Affidavit in Opposition to the Respondent's Affidavit in Support of the application for custody. In that Affidavit, the Petitioner deposed that contrary to the claim by the Respondent, the Respondent has access to Sean Chabala following an agreed arrangement whereby

she gets the child over weekends, particularly on Fridays, and takes him back to the Petitioner on Sundays. According to the Petitioner, the said arrangement has been in place since October, 2019.

The Petitioner went on to state that on the basis of the aforesaid arrangement, the Respondent has been personally communicating with him and giving him specific instructions relating to when she would pick the child and when she would take back the child. In support of this, he exhibited some text messages marked "KC1-9". The Petitioner proceeded to swear that when the Respondent fails to get in touch with him through text messages, she uses WhatsApp to send messages to him. In this regard, the Petitioner exhibited WhatsApp messages marked "KC 10-12".

The Petitioner stated that it is shocking that the Respondent has deposed in her Affidavit that he has vowed not to let her see the child. In the Petitioner's opinion, this goes to show how unreliable and untrustworthy the Respondent is.

The Petitioner insisted that the Respondent has been having access to the child from the time she returned to Mufulira District after she had been away from the family from 20th October, 2019 to 26th October, 2019. The Petitioner deposed that after her return to Mufulira District, the Respondent only requested to see the child on 6th November, 2019 and that she was consequently given access to the child on 10th November, 2019. Further, that the Respondent took the child back to the Petitioner on the same 10th November, 2019.

The Petitioner alleged that the Respondent was away from the family from 20th October, 2019 to 26th October, 2019, only for the purpose of satisfying her selfish desires to be with one Andrew Ntambo, a workmate to the Respondent. He further alleged that the Respondent has been having an adulterous relationship with the said Andrew Ntambo.

The further deposition of the Petitioner was that what amounts to child abuse is what the Respondent did by leaving the child from 20th October, 2019 to 26th October, 2019, only for the Respondent to go and be with Andrew Ntambo in Samfya for a full week. According to the Petitioner, the Respondent had lied to him that she was going for a work related seminar when in fact not.

The Petitioner deposed further that it is not in the best interest of the child for the Respondent to be given custody of the child because, in the Petitioner's opinion, the Respondent's morals have deteriorated to a point where she is able to lie just for her to have self-gratification with a married man at the expense of the family, including the welfare of the child. In this regard, the Petitioner exhibited pictures marked "KC 16-26", supposedly being pictures of the Respondent with her alleged married lover in Samfya.

The Petitioner proceeded to state that the Respondent used to be a member of the Jehovah's Witness Organization but that, after having been found wanting in the affair with the aforesaid Andrew Ntambo, she has since been excommunicated. That, for this reason,

the Respondent may not be best suited to develop the child's spiritual and moral welfare.

The Petitioner urged me not to grant the interim order of custody asked for by the Respondent.

When the matter came up for hearing of the Respondent's application on 11th February, 2020, the Respondent made oral submissions. She submitted that from the time the Petitioner took the child on 26th October, 2019, he has shown unwillingness to share custody of the child. According to the Respondent, for her to see the child, she had to go through a number of channels. She added that the few times she has had the opportunity to see the child she had to get that access forcefully.

The Respondent lamented that since the child was taken away from her, she has only been able to see him on six to seven times. She further stated that the child is too young and that she hardly knows how he is doing. She stated that when she tries to force the Petitioner to allow her to see the child, she receives insults and other disrespectful words through text messages.

In response, the learned Counsel for the Petitioner, Mr. Mulenga, made oral submissions when the application came up for hearing. Counsel maintained that it is not true that the Petitioner took the child and vowed not to allow the Respondent to see him. In support of his submissions, Counsel referred me to the text messages exhibited in the Petitioner's Affidavit. Counsel contended that the

said messages show that the parties have been having joint custody of their son.

Counsel averred that it is trite law that, in considering the question of who should have custody of a child, the Court should look at the best interest of the child. He submitted that the best interest of the child entails the best moral development, the best spiritual development and the best wellbeing of the child. In Counsel's opinion, the normal development of the child would be at stake if custody is given to the Respondent. According to Counsel, the moral character of the Respondent is highly questionable. Counsel argued that the questionable moral character of the Respondent can negatively influence the development of the child.

Counsel went on to submit that he appreciates the importance of the mother/child bond. He, however, advanced the contention that in the absence of a Social Welfare Report to ascertain the suitability of the Respondent and also to give any disadvantages that the child may be exposed to if put in the custody of the Petitioner, it is very difficult for the Court to make such a huge decision which may affect the child's development.

Counsel argued that if the Respondent could leave her child to go and gratify herself with a married man, one would wonder if she has the best interest of the child. Counsel insisted that it is not in the best interest of the child for him to remain in the custody of the Respondent.

Counsel added that the excommunication of the Respondent from the Jehovah's Witness Organization would adversely affect the ability of the Respondent to help the child spiritually.

Counsel submitted that the text messages exhibited by the Petitioner in his Affidavit show that the child is well fed and that, occasionally, the Petitioner gives the Respondent updates in that regard. Further, that the Respondent has free access to the child. Counsel went on to contend that the text messages also show that there is no time when the Respondent complained about the welfare of the child. That, this gives the impression that all is well with the child.

Counsel, therefore, prayed that the child should remain in the custody of the Petitioner and that the Respondent should continue to have access to the child.

In reply to Counsel's submissions, the Respondent argued that the child's emotional attachment to her, as the child's mother, is being affected. She maintained that she should be given custody as the mother of the child as she knows the child very well.

On 18th February, 2020, the Respondent filed an Affidavit in Reply to the Petitioner's Affidavit in Opposition. The Respondent filed the said Affidavit after the hearing of her application, which was on 11th February, 2020. In that Affidavit in Reply, she deposed that she was only served with the Petitioner's Affidavit just before the parties appeared for the hearing. That she could not ask this Court to

adjourn the matter to another day because she is desperate to have the custody of her child.

A perusal of the record indeed establishes that the Petitioner's Affidavit was filed on 10th February, 2020, which was the day before the hearing. When the parties appeared before me, Mr. Mulenga, Counsel for the Petitioner, acknowledged that he only managed to serve the Affidavit on the Respondent the same morning when the application was coming up for hearing. In the circumstances, I hold the considered view that it would be in the interest of justice for this Court to take into account the Respondent's Affidavit in Reply.

I will, however, only take into account depositions that reply to the Petitioner's Affidavit. I will not take into consideration any new issues raised by the Respondent which are not replies to depositions in the Petitioner's Affidavit. Having read through the Affidavit in Reply, I have decided that I will not take into account paragraphs 6, 7, 8, and 13 thereof as they are not replies to any of the Petitioner's depositions in his Affidavit in Opposition but are totally new issues raised by the Respondent to which the Petitioner will not have chance to respond.

In her Affidavit in Reply, the Respondent has deposed that the Petitioner does not have the moral right to allege that her associations are adulterous as he has no proof to support such claims. According to her, the Petitioner is only jealous of her associations with her male work colleagues. She stated that if the Petitioner thinks that she has an adulterous affair, it would have

been fair for him to sue Andrew Ntambo as a Co-Respondent. She pointed out that the Petitioner has failed to sue Andrew Ntambo as a Co-Respondent. She maintained that the photographs and the messages that have been exhibited by the Petitioner are not proof of adultery but are only intended to give a skewed view of the real issues as to which party should be granted the custody of the child.

The Respondent claimed that the Petitioner does not want her to have access to the child. In this regard, she exhibited text messages marked collectively as "LM1". She prayed that custody of the child be given to her.

I have carefully considered the application by the Respondent for the custody of the party's child, Sean Chabala, pending the hearing and determination of the Petition. I have also taken into account the opposition by the Petitioner and the respective submissions of the parties when they appeared before me for hearing.

The broad question for my determination is whether or not I should grant custody of the child of the family, Sean Chabala, to the Respondent, pending the hearing and determination of the Petition. The Respondent has insisted that she would be better placed to have custody of the child. Conversely, the Petitioner has maintained that the Respondent is not a suitable and proper person to have the custody of the child because the Respondent's moral character is questionable.

Section 72 (1) (a) of the **Matrimonial Causes Act No. 20 of 2007**^b (hereinafter referred to as "the Act") empowers the Court to make an

order of custody of a child under the age of twenty- five pending the determination of a Petition for dissolution of a marriage. When considering an application for custody of a child, section 75 (1) (a) of the Act enjoins the Court to regard the interest of the child as the paramount consideration.

In deciding on which of the two parents is better placed to have the interim custody of Sean, I will, therefore, take into account the interest of Sean as a paramount consideration. The view advanced on behalf of the Petitioner is that it would not be in the interest of the child to be put in the custody of his mother, the Respondent. The summary of the factors that the Petitioner has advanced to argue against the suitability of the Respondent can be briefly stated. The Petitioner has contended that it would not be in the best interest of the child for him to be placed in the custody of the Respondent because the Respondent's morals have deteriorated to a point where she is able to lie just to have self- gratification with a married man at the expense of the family, including the welfare of the child. This contention is based on the alleged adulterous relationship that the Respondent is said to have with one Andrew Ntambo.

A comprehensive perusal of the Petitioner's objection to the suitability of the Respondent establishes that the Petitioner's contest of the Respondent's suitability is based purely on the alleged adulterous relationship. This is because even the excommunication of the Respondent from the Jehovah's Witness

Organization is said to have emanated from the alleged adulterous relationship.

The issue that has exercised my mind, therefore, is whether I can deny the Respondent the custody of her child on the basis of the alleged adulterous relationship she is said to have with Andrew Ntambo. I must state that it is clear from the documents so far placed before me that, apart from that alleged adulterous relationship, the Petitioner has not pointed me to anything that would make me conclude that the Respondent may not have been a good mother to her child prior to the alleged incident of an adulterous relationship. It is not in dispute that the child is now only about 2 years and 5 months, having been born on 11th October, 2017. The Petitioner has not pointed me to anything that would make me conclude that the Respondent had been a bad mother to Sean in the period of about 2 years that she mothered Sean, from the time he was born to the time of the alleged adulterous affair.

In my view, for me to deny Sean the advantages of being with his mother, I must be satisfied that the mother is not a fit and proper person to have custody of Sean and that the father is, instead, in a better position to provide a better home and better upbringing for the child. I have thoughtfully taken into account the fact that, at the age of 2 years and 5 months, Sean is still a baby.

In considering the custody of a child, one of the many factors that the Court is required to take into account is the age of the child. I

must be quick to mention, however, that there is no strict provision of the law or settled rule or principle of law that binds a Court to invariably give custody of a child of very tender age to that child's mother. This means that it does not follow *ipso facto* that just because a child is a baby or is very young, he or she should be put in the custody of the mother. The Court is required to take into account all necessary factors that would help the Court to arrive at a decision that would uphold the best interest of the child. There is, therefore, no strict principle that a baby should, as a matter of course, be put under the custody of his or her mother. Each application for custody must be considered and decided on the basis of its own peculiar facts.

In the case of Re C (A) (an infant) C v. C¹, at page 313, Edmund Davies, LJ stated the following:

“If W v. W and C is to be regarded as authority for the proposition that there is a principle that a boy of eight should, all other things being equal, always be left in the custody of his father, then that is a view with which, with profound respect, I cannot agree. The decision must depend on who the father is, who the mother is, what they are prepared to do, and all the circumstances of the case. There is no such ‘principle’, in my judgment; the age and sex of the child are but part of the considerations to be borne in mind.”

It is evident from the case of Re C (A) (an infant) C v. C¹, that the decision of the Court on the custody of a child cannot be based entirely on the age of the child. The Court is required to take into account all the circumstances of the case. However, while the age of a child is just one of the factors that the Court should take into account, I am of the firm opinion, that it is a very important factor especially in a case, like in this one, where the child is very young and literally a baby. I am of the considered view, that at the age of 2 years and 5 months, the child should only be taken away from his mother if there are other overriding factors which show that the child would be better off in the custody of his father. If there are no factors that make the mother unsuitable to have custody of the child, ordinarily, the mother should be given custody of the child. In the case of Coetzee V. Coetzee², Baron, CJ (As he then was) opined that ordinarily a very young child should be put in the custody of the mother. His Lordship specifically said the following:

“The children are still very young; Kenneth is 9 and half years of age, Gail 5 and half and Clive not yet 4. Ordinarily the two younger children should be with their mother, and it may well be, if only to avoid separating them, the elder as well.”

Drawing inspiration from the Coetzee V. Coetzee² case, it is my considered view that a very young child should only be taken away from the custody of his or her mother when there are circumstances that make his or her mother unsuitable to provide for his or her well being, a good home and generally proper upbringing for him or

her; to put it another way; when there are factors that make the father better suited than the mother to provide for the well being, a better home and better upbringing for the child.

In the case before me, I am not satisfied that the Respondent is unsuitable to have custody of her child simply because she has been alleged to be involved in an adulterous relationship with Andrew Ntambo. In any case, the said allegation is a mere assertion which has not been proved by the Petitioner. In fact in her Affidavit in Reply, the Respondent has contested that allegation. She has advanced the position that the Petitioner's accusation might have been instigated by mere jealousy of her association with her male work colleagues.

I have, of course, taken a look at the pictures exhibited by the Petitioner in his Affidavit, which show the Respondent with a man said to be the same Andrew Ntambo. However, I am not prepared to hold, at this point, that the said pictures establish an adulterous relationship between the Respondent and Andrew Ntambo. I can only make such a sweeping and overarching holding after the respective positions of the parties have been tested through cross-examination as that is the only time when I can assess who is advancing the truthful position.

Even assuming that the allegation by the Petitioner, that the Respondent is engaged in an adulterous relationship with Andrew Ntambo, is true, I do not think that the said allegation, by itself, can form the basis of denying a 2 year 5 months old baby the benefit of

being with his mother and getting the motherly care and attention that he deserves. As I have said elsewhere in this Ruling, the Petitioner has not pointed me to any other evidence on which I can base a holding that the Respondent is not a fit and proper person to have custody of Sean. I, therefore, hold that an unproved allegation of an adulterous relationship, by itself, cannot be a proper basis for denying the mother the custody of her child; especially a child of very young age like Sean in the instant case. In so holding, I have taken a leaf from the case of Anne Susan Dewar V. Peter Alexander Dewar³, where Baron, J (as he then was) stated the following:

“Mr. Cobbett Tribe submitted that, because of the wife’s promiscuous tendencies, it would be better for the children to be with the father. This submission is based on the admitted adultery of the wife during the period March to August, 1966, and the general allegations of the provocativeness in the company of men, which were denied. The husband did not, however contend that the wife is not a fit and proper person to have the custody of the children, and I do not regard the adultery as ground for depriving the child of the positive advantages of being in their mother’s custody.”

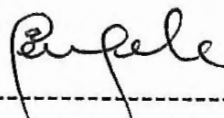
In addition to the foregoing, I do not accept the submission of Counsel for the Petitioner that, because the Respondent has been excommunicated from the Jehovah’s Witness Organization, this would adversely affect the Respondent’s ability to help the child

spiritually. I do not think that the Respondent can be held to be incapable or less capable of guiding the child spiritually merely because her Christian organization has excommunicated her. Other than the excommunication and the allegations that are said to have led to the excommunication, I have not seen anything from the documents before me which would make me think that the Respondent is not spiritually sound or that she would fail to guide her child spiritually.

On the basis of the foregoing, I hold the firm opinion that the Respondent's application for custody has merit. I, therefore, grant the Respondent custody of the parties' son, Sean Chabala, pending the hearing and determination of Petition. I order that the Petitioner must be afforded the fullest possible access to the child on weekends and public holidays.

In summary, the application by the Respondent for custody of Sean Chabala has succeeded. Custody is awarded to the Respondent and the Petitioner is given the fullest possible access to the child on weekends and public holidays. I make no order for costs.

Delivered at Kitwe this 20th day of the March, 2020.



E. PENGELE
HIGH COURT JUDGE