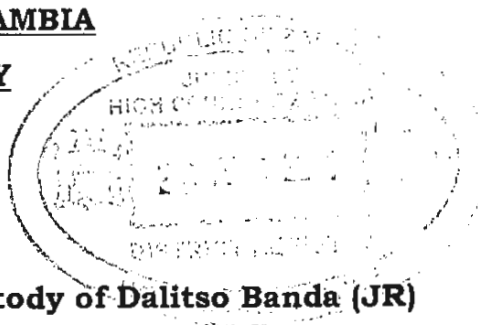


IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

2021/HK/45



IN THE MATTER OF: Custody of Dalitso Banda (JR)

AND

IN THE MATTER OF: Sections 15 of the Affiliation and Maintenance of children Act, Chapter 64 of the Laws of Zambia

AND

IN THE MATTER OF: The Legitimacy Act, Chapter 52 of the Laws of Zambia

AND

**IN THE MATTER OF : Article 3 of the Convention on the Rights
of the children of 2nd September, 1990 in
accordance with article 49**

BETWEEN:

Dalitso Banda

Applicant

And

Stephenie Basaka

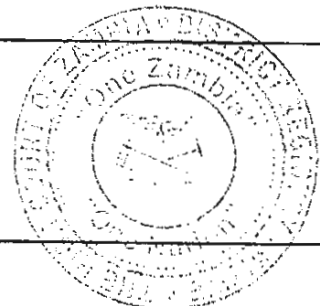
Respondent

Before the Hon. Lady Justice Abha Patel, SC.

For the Applicant: In person

For the Respondent: In person

JUDGMENT



Legislation referred to:

1. **Affiliation and Maintenance of children Act, Chapter 64 of the Laws of Zambia.**
1. **The Legitimacy Act, Chapter 52 of the Laws of Zambia Laws of Zambia**

Cases referred to:

1. **Megary J in Re: F (1969) 2 ALLER. 766 at 768**
2. **Re O (infants) (1971) 2ALLER. 744 at 746, Davies L.J**
3. **Reg.v Gyngall (1893) 2 Q.B. 232**

1. INTRODUCTION AND BACKGROUND

- 1.1 By Originating Summons dated 11th February, 2021, the Applicant, Dalitso Banda, commenced this action against the Respondent, Stephanie Kasaka. The Application was brought pursuant to section 15 of the Affiliation and Maintenance of Children's Act, Cap 4 of the Laws of Zambia as well as section 4 and 14 of the Legitimacy Act, Cap 52 of the Laws of Zambia and Article 3 of the Convention on the rights of children.
- 1.2 The brief background to this matter is that the Applicant is claiming custody of his son Dalitso Banda (JR) with reasonable access to the Respondent, the mother, during school holidays. He further seeks the following reliefs;

- i. *An order for custody of Dalitso Banda (JR) to the Applicant with reasonable access to the Respondent herein during school holidays,*
- ii. *An order for interim injunction restraining the Respondent from getting the said child of the family by force from the custody of the Applicant where they are currently living and/or abusing and abducting the said child until further order of this honorable court,*
- iii. *An order for maintenance of the said child of the family,*
- iv. *An order that the said child to continue being in the same school he was currently at, and*
- v. *Any other order the court shall consider fit and just.*

2. THE APPLICATION AND SUBMISSIONS OF THE PARTIES

2.1 In support of the application, the Applicant filed an affidavit in support, affidavit in reply and skeleton arguments. The Respondent's response was by way of an affidavit in opposition and skeleton arguments.

2.2 The affidavit in support and reply were sworn by the Applicant and revealed that; the Applicant was the biological father of DB (JR) born on 22nd December, 2013. The said child was born during the subsistence of the

Applicant's customary marriage to the Respondent, which was dissolved at the instance of the Respondent in 2017. When the marriage was dissolved, both parties agreed for the child to remain in the custody of the Applicant and his family while the Respondent would visit and take the child whenever she wanted.

2.3 However, on 6th December, 2020 the Respondent took the child for the holiday but later refused to take him back to the Applicant's parents where he was being kept. Even when the matter was reported to the victim support unit and the Respondent was ordered to return the child, she still refused to take the child back thereby creating a conflict between the parties. The Applicant also said that the Respondent was fully aware that the child was supposed to be sent back to the Applicant as there was no agreement for the child to live with her.

2.4 In his affidavit, the Applicant insisted that the best place for the child to live was at his place since he has never lived with the Respondent for a long time. Further, the Applicant averred that the Respondent was not capable of looking after the child as she has never shown keen interest in the child even when it mattered most. But the Applicant has always dedicated his time to the child and has always been there for him.

- 2.5 The Respondent objected to the application. In her detailed affidavit filed on 26th March, 2021 she deposed that she was never married to the Applicant as the Applicant only paid damages amounting to K12,000 for the child and not lobola or bride price for the Respondent. The Respondent also averred that she had agreed with the Applicant and his parents for them to keep the said child because at that time both the Applicant and herself were not financially and physically stable as she was in school.
- 2.6 She denied being an irresponsible mother and deposed that ever since the child started school she has always contributed to his school fees and general wellbeing. She added that she has always made frequent trips to the Copperbelt to visit him and see how he was doing.
- 2.7 The affidavit also revealed that she had never ever taken the child without the Applicant's consent. During the holidays or weekends her mother would pick up the child so that she could spend time with him. But beginning of 2019 to date she's had issue with the Respondent regarding co-parenting and as such they both agreed to communicate through their respective parents.

- 2.8 She insisted that she took the child in December, 2020 with the Applicant's permission. At the end of the December holiday the Respondent's mother tried to engage the Applicant's parents to discuss the child's transition from their home to the Respondent's home but the Applicants parents refused to have any such discussion. Since that time all attempts to engage the Applicant's parents have proved futile.
- 2.9 Further, she deposed that as a registered nurse working for Zambian Breweries she was very much capable of taking care of the child who she has since enrolled at a Convent school in Lusaka. She concluded by urging this court not to deprive her of giving the child the much needed motherly love by returning him to the Applicant's custody.
- 2.10 In her heads of argument, the Respondent contended that it was not true that she had never taken care of the child since birth. She asserted that the Applicant's parents had been asking her for financial help since they were unemployed. She also said that she had a supportive husband who was willing to help her raise the child and provide a loving and caring home for the child. She cited a plethora of cases to support her arguments.

2.11 She also argued that the Applicant was hardly available for the child as he has shifted the responsibility of raising the child to his parents. To support the preceding argument the Respondent drew the court's attention to section **15(2)** of the **Affiliation and Maintenance Act, Chapter 64 of the Laws of Zambia** and also to page **467 – 478 of Bromleys Family Law, 10th Edition**.

2.12 Lastly, She submitted that granting the custody of the child to the Applicant's parents would not be in the best interest of the child as she wants to raise and carefully supervise the child herself now that she is able to do it.

2.13 When the matter came up for hearing on 8th July, 2021 both parties, who appeared in person, informed the Court that they would rely on their respective affidavits. The Applicant added that when the child was picked in December, 2020 by the Respondent's mother he was not worried as that was the way it had always been. But when the Respondent refused to send him back he begged her to return him as he was supposed to start tuition. However, the Respondent refused and instead enrolled him into school in Lusaka without his consent.

2.14 He retaliated what he averred in the affidavit in support that he married the Respondent under customary law. He

insisted that the way the Respondent uprooted the child from him was disruptive and detrimental to the child's progress, and that all he wanted was for the child to remain at his grandparent's house where he has always lived as that was what was best for him.

2.15 In addition to her Affidavit in Opposition and Heads of Arguments filed on 26th March, 2021, the Respondent repeated what she said in her affidavit that she was never married to the Applicant as no bride price was ever paid.

2.16 She explained that she decided to keep the child after the December, 2020 holiday because the child did not want to return to his grandparent's home in Kitwe. So she phoned the Applicant and suggested that they switch their roles, so that the child could stay with her during school days and visit the father during school holidays and added that she had no intention of separating the child from the Applicant.

2.17 But the Applicant was not agreeable and that's how this disagreement came about. The Applicant's response was "*that can never happen*". She then phoned the Applicant's father who advised her to go to his place to discuss the matter. But before she could travel the Applicant and his father reported her to victim support unit for kidnapping the child.

2.18 Later, her family tried to engage the Applicant's family but they were chased by the Applicant's father. After all her efforts for a meaningful discussion with the Applicant and his family failed she had no choice but to keep the child. She submitted that she missed out on seeing the child grow up and now she wants to take care of him, love him and give him the best education.

2.19 She concluded by saying that the child was at a community school in Kitwe and his performance was poor. She also added that the Applicant was being unfair to her by denying her the opportunity to keep the child in a stable home instead of him staying with his grandparents without both parents.

2.20 In reply, the Applicant said that the child has always stayed with his parents who have an income as they are not retired. He explained that he is the one who picks the child from school and spends time with him. According to him, the Respondent was not stable and may keep the child from him as a form of punishment.

3. ISSUE IN CONTENTION

3.1 The Applicant is seeking an order of custody of the child, JB (JR), with reasonable access to the Respondent during

holidays. He also seeks an order for maintenance of the said child.

4. THE LAW AND ANALYSIS

4.1 I have considered the affidavits and heads of arguments filed by the parties as well as their respective viva voce arguments. Arising from that I find the following to be undisputed facts, the Applicant and the Respondent were in an intimate relationship and out of that relationship one child was born on 22nd December, 2013. When the child was about a year old, the couple agreed for the child to stay with the Applicant's parents and he has been under their care since.

4.2 The issue for determination before me is whether from the facts before court the Applicant should be granted custody of the child with reasonable access to the Respondent.

4.3 I now turn to consider the position of law as regards custody issues. This application is pursuant to **Section 15 of the Affiliation and Maintenance Act, Chapter 64 of the Laws of Zambia**. Section 15(2) provides that:

"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."

- 4.4 The wording of the above section clearly shows that the paramount consideration in custody cases is that of the welfare of the child. Although there was a presumption that a young child, particularly a little girl, would be expected to be with the mother, what is paramount is to consider the best interest of the child's welfare. This principle was well articulated by Megarry J in **Re: F (1969) 2 ALLER. 766 at 768** when he said that:

"I do not think that one can express this matter in any arithmetical or quantitative way, saying that the welfare of the infant must, in relation to other matter, be given thrice the weight or five times the weight, or any other figure. A 'points system' is in my judgment, neither possible nor desirable. What the court has to deal with are the lives of human beings, and all these cannot be regulated by formulae. In my judgment I must take into account all the relevant matters; but in considering their effect and weight I must regard the welfare of the infant as being first and paramount."

- 4.5 Further in **Re O (infants) (1971) 2ALLER. 744 at 746, Davies L.J** said:

"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."

- 4.6 Also Lord MacDermott in **J v C (1970) A.C. 668 at p. 705** quoted the dictum of Lord Esher M.R, in **Reg.v Gyngall (1893) 2 Q.B. 232** where he said at page. **243**:

"That the Court has to consider, therefore, the whole of the circumstances of the case, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child."

5. FINDINGS

- 5.1 As alluded to above, it is not in dispute that the child has been in the custody of his grandparents, the Applicant's parents. The Applicant in his own words said that the child lives with his grandparents and he only spends time with him after he picks him from school. In his affidavit in support of the application, the Applicant did not indicate

whether he had plans to start living with the child, he appeared to want to maintain the status quo of the child remaining in his parents' custody.

5.2 On the other hand, the Respondent wants to be granted custody because she wants the child to live with her and her family. According to her, she has a stable home with a supportive husband willing to help her look after the child. She has shown that she wants to care and give the child the best education.

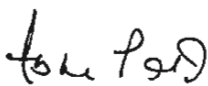
5.3 The Applicant insisted for the child to remain with the grandparents because, according to him, that is the best place for the child. However, after considering the facts in this case in light of the authorities alluded to above I come to the inescapable conclusion that the best thing to do is to let the child stay with the Respondent.

5.4 The Respondent has satisfied me on the balance of probability that it is in the best interest of the child for him to be with one of his parents. In arriving at this decision I am guided by section **15(2) of Chapter 64** (*supra*) and what was said by **Davies L.J** in **Re O (infants) (1971) 2ALLER. 744 at 746** considered above.

5.5 Moreover, the Respondent has demonstrated that she is financially able to look after the child. As Lord Esher. M.R said in ***Reg. v Gyngall (supra)***, the Court has to consider the whole circumstances of the case in arriving at the proper decision. Having considered the whole circumstances, I make an order for the sole custody of the child to the Respondent with reasonable access to the Applicant.

5.6 I make no order for costs.

Delivered at Kitwe, this²⁶ day of August, 2021


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Mrs. Abha N. Patel, S.C.

HIGH COURT JUDGE