

IN THE SUBORDINATE COURT OF THE FIRST CLASS 2017/CRMP/MO/29

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN :

UNALA NAMBEYE

APPLICANT

AND

GOODSON TOLOPA

RESPONDENT

FOR THE APPLICANT : In Person

FOR THE RESPONDENT : In Person

JUDGMENT

CASES REFERRED TO:

- Re L (Infants) [1962] 3 ALL ER 1
- Brixey v. Lynas [1996] 2 FLR 499, HL

STATUTES REFERRED TO:

- Subordinate court Act chapter 28 of the laws of Zambia
- Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia

The Applicant filed a complaint in this court for Maintenance of two marital children.

In this matter, only the applicant was heard. The respondent did not file an affidavit in opposition. He made appearance but abandoned the proceedings after the matter was adjourned for a consent order.

The applicant in her affidavit in support of the complaint filed on 30th May 2017 avers that she is lawfully married to the respondent and they have been on separation since May 2015. They are two children between them namely Racheal and Taizya Tolopa born on 3rd January 2013 and 9th January 2016 respectively. She exhibited birth records marked "AC1" and "AC2". She also avers that there has been no proceedings in any courts in Zambia or elsewhere in respect of the same children. Further that Racheal is in school and the respondent has willfully neglected to contribute sums which are sufficient for reasonable maintenance and support of the children. Her efforts alone are not sufficient. She also avers that the respondent works for Maina Soko Hospital under the Ministry of Defence and he has a house on rent in Matero Compound which was built during the marriage. She believes that this is a proper case for maintenance.

When the matter came up for hearing, the applicant averred that she was being assisted by her parents to take care of the children and her sister was the one paying school fees for the child in school. The applicant gives her K200.00 when she persists and the school fees are K500.00 per term. He neither buys clothing nor pay medical bills for the children. She wanted maintenance of K700.00 per month for the two children.

The Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia provides that:

11. (1) It shall be the duty of the court before making any maintenance order to have regard to all the circumstances of the child concerned. Matters for consideration when making maintenance order

(2) Without limiting the generality of subsection (1), the court shall have regard to the following matters:

(a) the welfare of the child while an infant, including any preliminary expenses;

(b) the income, earning capacity, property and other financial resources which each interested person has, or is likely to have, in the foreseeable future, including, in the case of earning capacity, any increase in that capacity which it would, in the opinion of the court, be reasonable to expect a person to take steps to acquire;

(c) the financial needs, obligations and responsibilities which each interested person has or is likely to have in the foreseeable future;

(d) the standard of living enjoyed by the family before the breakdown of the marriage, in the case of persons who are divorcing;

(e) the age of the child and of each interested person;

(f) any physical or mental disability of the child;

(g) the contributions which each person has made, or is likely in the foreseeable future to make, to the welfare of the child, including any contribution made or to be made by looking after the home or caring for the child;

- (h) the financial needs of the child;
- (i) the income, earning capacity, property and other financial resources, if any, of the child; and
- (j) the manner in which the child was being, and in which its parents expected it to be, educated or trained.

15(1) Where the court makes a maintenance order in respect of a child, the court shall also have power to make whatever order it thinks fit with respect to the custody of the child, and the right of access thereto of either parent, but the power conferred by this subsection and any order made in exercise of that power shall have effect only during any period while the maintenance order is in force.

(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.

I warn myself from the outset that, in Civil matters, the standard of proof is on the balance of probabilities and he who asserts must prove his claim.

From the birth records, it is clear that the children in question are the respondent's and according to the applicant, they are marital children. These are children below the age of 18 years who should be maintained by their parents. As the father of the children, the respondent is under obligation to maintain them. More so that he is the one in employment and has a house on rent. These are children of tender years that need a number of things to survive. It is therefore prudent that the

respondent provides the needs of the children according to their stations in life.

Suffice to state that children of tender years are better placed with their mother. It is natural for young children to be with their mother as per **Re L (Infants) [1962] 3 ALL ER 1**.

In **Brixey v. Lynas [1996] 2 FLR 499, HL**, Lord Jauncey explained that:

'The advantage of a very young child being with its mother is a consideration which should be taken into consideration when deciding where its best interest lies. It is neither a presumption nor principle but rather recognition of widely held belief based on practical experience and the working of nature.'

As I have already stated, the children herein are of tender years. They are therefore better placed with the applicant who is their mother and in the absence of reasons as to why they should not be in her custody, I have no reason for interfering with custody.

For the forgoing and with the guidance of the law above, I order as follows:

1. The respondent to maintain the children at K800.00 per month and the money to be paid in court on or before the 5th of every month beginning the month of August 2017
2. The respondent to pay school fees for the children and incidentals thereto;
3. The respondent to pay Medical bills and buy clothing for the children
4. The children to continue being in the applicant's custody and the respondent to have reasonable access

The orders are subject to review

I make no order as to costs

IRA 30 days and I order Security for costs in the sum of
K2,000.00.

Delivered in chambers this.....day of2017

SYLVIA MUNDINYA OROH (MRS)

RESIDENT MAGISTRATE

