

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
LUSAKA

2016/HP/D212

(Civil Jurisdiction)

BETWEEN:

NKULU NYAWA BANDA

AND

ANTHONY NSANGU SIMBEYE



PETITIONER

RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 17TH DAY OF
NOVEMBER, 2017**

APPEARANCES:

FOR THE PETITIONER : MS T. MARIATA OF SHARPE AND
HOWARD LEGAL PRACTITIONERS

FOR THE RESPONDENT : MR M. MUKUPA OF ISAAC AND PARTNERS

R U L I N G

LEGISLATION REFERRED TO:

1. SECTION 72 OF THE MATRIMONIAL CAUSES ACT NUMBER 20 OF 2007
2. SECTION 15(2) OF THE AFFILIATION AND MAINTENANCE OF CHILDREN ACT, CHAPTER, 64 OF THE LAWS OF ZAMBIA
3. SECTION 75(1) OF THE MATRIMONIAL CAUSES ACT
4. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

CASES AND BOOKS REFERRED TO:

1. LILIAN MUSHOTA, FAMILY LAW IN ZAMBIA 2005 UNIVERSITY OF ZAMBIA PRESS, LUSAKA

2. J V C (1970) AC 68
3. HALSBURY LAWS OF ENGLAND, FOURTH EDITION, VOLUME 13,
4. D V M (MINOR: CUSTODY APPEAL)(1982) 3 All ER 897
5. ELIZABETH NADINE SMITH WESSON V BRIAN SYDNEY STROUD SCJ NO. 35
OF 1998
6. ROSTRON V ROSTRON (1982) 3 FLR 270
7. RE K (RESIDENT ORDER) (1999) TIMES 8/1/99, CA
8. RE MCGRATH (INFANTS) 1895 ICH 148
9. WALKER V WALKER AND HARRISON (1981) NZ RECENT LAW 257
10. POUNTNEY V MORRIS (1984) FLR 38, 384

This is an application for custody of the child of the family under *Section 72 of the Matrimonial Causes Act Number 20 of 2007*. This application follows the grant of decree *nisi* for the dissolution of the marriage between the petitioner and the respondent granted on 30th August, 2016. The summons is supported by an affidavit deposed to by the respondent and filed into Court on 4th April, 2017. The petitioner filed an affidavit in opposition to the application on 10th April, 2017. An affidavit in reply was filed by the respondent on 26th June, 2017.

Hearing of the application was set for 27th June, 2017 but the parties agreed to proceed by way of written submissions and the application was accordingly granted.

The respondent in his affidavit in support of the custody application has deposed in paragraph 4 to 13 as follows:-

4. That there are two children of the family namely, **Noah Namwayi Nambeye**, born on 15th January, 2013 and **Tirzha Kuzipa Nambeye** born on 17th January, 2017.
5. That the children have been residing with the petitioner at Plot Number 3667 Kwacha Road, Olympia Lusaka which belongs to the petitioner's mother.
6. That the petitioner is unable to provide a conducive living environment for the children of the family as she uses insulting and abusive language in front of them.
7. That the petitioner has violent behaviour. On 22nd February, 2017 when the respondent went to visit the children she threw a plate at him which almost broke his motor vehicle.
8. That the petitioner falsely accused the respondent's brother of molesting one of the children when they have not been in contact with him and has brainwashed the child to believe this, which is detrimental to the child's psychological welfare.
9. That the respondent has been providing for financial and material needs of the children and he is of the belief that he is able to support and take care of them.
10. That in preparation for the children he has made arrangements for his mother who is in a position to assist him with taking care of them.

11. The respondent has also made arrangements to hire a live in maid to assist in taking care of the children.
12. That the petitioner has behaved unreasonably and not in the best interest of the children and prays that he be granted sole custody of the children.

In rebuttal to the respondent's affidavit evidence, the petitioner has denied the contents of paragraph 6 and states that she has always and continue to set the best possible example for the children, educating and providing for them in a nurturing and loving environment.

The petitioner asserts that contrary to what has been alleged by the respondent, the correct date of birth of the child Tirzah Kuzipa Nambeye is 17th January, 2015 and not 17th January, 2017.

That the contents of paragraph 7 are an exaggeration of facts, the petitioner states that what in fact did occur on the date complained of by the respondent is that during his scheduled visitation of the children at her home, the respondent began insulting her in the presence of the children. When asked to leave, the respondent refused which prompted the petitioner to threaten to dent his car knowing that would be the only way she could get him off her premises. The respondent eventually left with his car intact.

The petitioner also objects to the contents of paragraph 8 and avers that as a loving and caring mother her primary concern remains the wellbeing of her minor daughter who she could never hurt nor influence in the manner alleged by the respondent.

The petitioner has further stated that the 'accusations' referred to in paragraph 8 by the respondent in fact stem out of the following:-

That in July 2015 Noah Namwai Nambeye aged four years informed the petitioner that her cousins touched her genitals while she had been spending the day at the respondent's house. The respondent was immediately notified of the incident by the petitioner and advised not to let the children play unsupervised. The respondent got very upset and accused the petitioner of being perverse. The respondent plainly refuted the claims by their child.

In or about March, 2016, while watching television, Noah blurted out that the respondent's older brother, uncle Carson, had touched her genitals. The child further demonstrated how the uncle had touched her genitals.

Upon informing the respondent of the allegations advanced by the child, he accused the petitioner of indoctrinating the child with lies about his family. In turn the petitioner reminded the respondent of a recent event when he had gone over to her home with a friend to see the children but Noah

refused to emerge because she thought the friend was uncle Carson and the child said she was scared.

Following several discussions and a family meeting, it was agreed between the parties that the respondent would discuss the matter with his brother, however to date the respondent remains adamant that the alleged abuse was nothing but a figment of the child's imagination prompted by the petitioner's brainwashing. In support of her evidence the petitioner has produced the medical reports and the child's psychological assessment report marked as exhibits 'NB1' and 'NB2'.

The petitioner has further averred that the respondent's unwavering belief that his brother was telling the truth and that their daughter was a liar is in itself a very concerning fact and brings into question his capabilities as a parent who claims to love his children.

In response to the respondent's assertion that he has been providing for all the needs of the children, the petitioner states that it has been an uphill battle to get him to make any meaningful contribution towards the support of the children as he buys what he only considers to be necessary for them leaving out other vital essentials.

The petitioner also asserts that she does not believe that the respondent's mother is best placed to look after the children

because on occasions when Noah would spend time with the grandmother after the separation pending divorce, the child would return home not having been properly looked after and insufficiently fed.

The respondent's mother being old and frail, gets overwhelmed easily by caring for two energetic young children. She is almost 70 years of age and has several medical conditions, one of which affects her legs.

The respondent's mother does not believe that her son Carson touched Noah's private parts, as such the child cannot be sufficiently protected from further harm if she is left in the care and control of the grandmother.

That the respondent's mother has shown a deep dislike for the petitioner, which she fears could spill over to her children.

The petitioner has further averred that it would not be in the best interest of the children to have the respondent as their primary carer because he spends much time away from home. She asserts that the children need to be with their parents and not extended family or maids.

That she has managed to personally take care of the children and generally spends time with them throughout the day as she enjoys flexible working hours and works mainly from home.

That the respondent or indeed his mother or any external help cannot substitute the care, affection, stability and environment that the children has become accustomed to while in the petitioner's care.

The petitioner urged the Court to grant her sole custody, care and control of the children with supervised access to the respondent.

In reply, the respondent has averred that the petitioner abuses and insults him in front of the children during his scheduled visits with the children. That the incident has been reported to the Victim Support Unit of the Zambia Police.

That the petitioner has exhibited unreasonable behaviour towards the respondent and his relatives by denying them access to the children.

That attempts to hold family discussions and meetings have failed due to the petitioner's abusive and insulting conduct.

That the medical report produced by the petitioner is an afterthought and has only come about after she was threatened with a legal suit by the respondent's brother Carson Simbeye as shown in exhibit "**ANS1**" produced in the respondent's affidavit in reply.

That the respondent is reasonably of the view that the child has never been abused as at all material time of the visitation she was

within his sight. That the petitioner has been fabricating stories and brainwashing the child into believing that she was abused which is not good for the welfare of the child.

That with the support from the domestic worker and the respondent, his mother can be competent to raise and take care of the children.

On behalf of the petitioner, Ms T. Mariata has submitted that in an application for custody of the children of the family the duty of the Court is to concern itself with the child's welfare whether the father's claim is superior to the mother or vice-versa. It has been advanced that according to the learned author of **Family Law in Zambia: Cases and Materials at page 377**¹ "Courts also should consider the age of the children, sex, and their health. Courts do not ignore the reality that where children are very young, the mother is often better placed to bring them up". Counsel has also drawn the attention of the Court to *Section 15(2) of the Affiliation and Maintenance of Children Act, Chapter, 64 of the Laws of Zambia* which states that:-

"In making any order for 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."

Counsel has further relied on the case of **J v C**² where the Court explained that:-

"The welfare of the child being paramount means more than the child's welfare being treated as the top item in the list of items being relevant to the matter in question. The words denote a process whereby when all relevant facts, relationship, 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 interest of the child's welfare. It is the paramount consideration because it rules upon or determines the course to be followed."

Ms Mariata has further submitted that **Halsbury Laws of England, Fourth Edition, Volume 13, at paragraph 932³** provides that:

"Where in any proceedings before any Court the custody or upbringing of a minor is in question, the Court, in deciding that question, must regard the welfare of the minor as the first and paramount consideration....."

It is Counsel's contention that the children of the family being minors aged four and two years respectively, their interest should be taken with great sensitivity and consideration. She asserts that if the two minors were to be left in the custody of the respondent, they would likely suffer emotional and psychological hardship as they might be exposed to third parties.

Counsel has also cited the case of **D v M (Minor: Custody Appeal)**⁴ where the Court of Appeal reversed the decision of the divisional Court and awarded custody to the mother stating that

the first instance justices gave too little weight to three important considerations namely:

- i. Continuity of care was the most important in the upbringing of a child and the disruption of established bonds was to be avoided.
- ii. The child would be looked after by hired help if custody was awarded to the father, whereas the mother looked after him herself.
- iii. The father was less co-operative than the mother in terms of allowing access. This was likely to lead to "... the ousting of the mother if he had custody...."

Counsel contends that in the matter before me, it would do no justice at all to the children to be raised by the respondent's elderly mother and a hired maid. Reliance is also placed on the case of **Elizabeth Nadine Smith Wesson v Brian Sydney Stroud**⁵ where the Supreme Court had this to say:-

"We are satisfied that in the best interest of the child and considering that the child is of a tender age, we will allow this appeal and set aside the order for joint custody and we award custody and care and control to the mother, with access to the father on terms agreed by the parties failure to which terms will be ordered by the Court."

The attention of the Court is further drawn to the case of **Rostron v Rostron**⁶ where it has been elucidated that the benefit to be derived from disrupting children's lives is not equal to the risk of the emotional devastation to the said children. She winds up her submissions by urging the Court to consider the best interest of

the children and accordingly award an order for full custody to the petitioner, with supervised access to the respondent.

Mr. M. Mukupa on behalf of the respondent re-echoes that *Section 15(2) of the Affiliation and Maintenance of Children Act* sets down the criteria to be adopted in considering which parent should be granted custody of the child. Counsel has further cited *Section 75(1) of the Matrimonial Causes Act* which is couched in the following terms:-

“(1) In proceedings in which application has been with respect to the custody, guardianship, welfare, advancement or education of children of a marriage.

(a) The Court shall regard the interest of the children as the paramount consideration.”

It has been submitted that in regarding the interest of the child as being paramount, the Court will not base its decision on the superiority of the man or the woman. In doing so the Court will take into consideration the wishes of the various stakeholders to include the children, the parents, the children's best interest, comfort in the home and the mental and physical health of the child.

Counsel has reiterated that the respondent has demonstrated his capability to take care of the children and made contingency plans for the betterment of the welfare of the children. To buttress his submission he has cited the case of **Re K (Resident Order)**⁷ where

the father was given custody of a two year old child as he worked on a computer at home and earned an income whereas the mother did nothing. She was also deemed unavailable and untrustworthy.

I am indebted to both parties for their submissions and I have taken them into consideration in arriving at my decision.

It is a settled legal requirement that the child's welfare should be the Court's paramount consideration in making any custody or access order.

It must be observed that despite the welfare principle being stipulated in the *Affiliation and Maintenance of Children Act* the term "welfare" is not defined in the Act. The Courts have however defined the term welfare in a number of cases. In **Re McGrath (Infants)**⁸ Lindley LJ said:-

"The welfare of the child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its widest sense."

In another New Zealand case of **Walker v Walker and Harrison**⁹ "welfare" was aptly defined when Harrison J said:-

"Welfare" is an all -encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material

considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding, care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."

With regard to the application of the welfare principle, Bromley points out that there are no rules for determining who should be granted the right to look after the child beyond saying that the child's welfare is the first and paramount consideration. Also as Dunn LJ put it in **Pountney v Morris**¹⁰:-

"There is only one rule; that rule is that in a consideration of the future of the child the interests and welfare of the child are the first and paramount consideration. But within that rule, the circumstances of each individual case are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula, to try to resolve the difficult problem which arises on the facts of each individual case."

In line with the provisions of the *Affiliation and Maintenance of Children Act* each parent has parental responsibility over the children of the family. Further, it is also settled law that every parent is entitled to contact (access) with the children of the family. *Article 9 of the United Nations Convention on the Rights of the Child* provides that a child who is separated from one parent or both has a right to personal relations and direct contact with both parents on regular basis except if it is contrary to the child's best interest. It is material to note here that what is in issue is the best interest of the child and not the rights or interests of the parents.

The application for custody should therefore not be motivated by parents' desire to settle their scores. I must affirm that parents should endeavour to overcome the ruins of the end of their love relationship to enable them provide a balanced social life for the children. It would be contrary to the best interest of the children for any one parent to engage in odious practices such as inducing them to repudiate the other parent or to cause damage to their family ties. It goes without saying that the fundamental role of fathers and mothers that live apart must be to cooperate in preserving and sustaining the parental ties, affinity and affection that favour their children's socially integrated life.

In determining the application before me, I have taken into consideration the special nature of the care provided by a parent, as opposed to a nanny in assessing the appropriate parent to be awarded custody. The children of the family have been living with their mother since 30th May, 2014 when the parties went on separation.

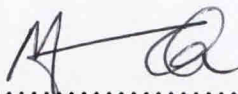
The children are very young, Noah Namwayi Nambeye is aged four years and Tirzha Kuzipa Nambeye is aged two years. It is my firm view that it would be unjustly distressing to the children and not in their best interest to uproot them from their current home to abruptly start living with their father, under the care and control of their grandmother with the help of a nanny. This would adversely affect the children's psychological wellbeing and unnecessarily disrupt their established bond. There is no doubt that given the tender age of the children, their mother's comfort as

well as constant presence is required to enable them thrive and lead well balanced lives. Thus the respondent's application for custody is accordingly declined and it is hereby ordered that:

- (i) The said children shall continue residing with the petitioner. This implies that custody care and control of the children is awarded to the mother.
- (ii) In light of the findings highlighted in the medical report dated 20th January, 2017 and the recommendations of the psychological assessment report of Noah Nambeye made on 25th March, 2017, the respondent is granted supervised access to the children thrice a month. The supervision shall be done by the social welfare officer or an independent family member to be agreed upon by the parties.
- (iii) The supervised access shall last until the parties are cable of having a civil dialogue with regard to the welfare of their children or upon the youngest child turning seven years of age.
- (iv) The financial responsibility of the children to be shared equally by the parties.

I make no order as to costs.

Dated at Lusaka this 17th day of November, 2017



.....
M. CHANDA
JUDGE