

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Family Jurisdiction)

2022/HPF/0612

IN THE MATTER OF: **ORDER 30 RULE 11 (e) OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**



IN THE MATTER OF: SECTION 141 OF THE CHILDREN'S CODE ACT NO. 12 OF 2022

IN THE MATTER OF: SECTION 143 OF THE CHILDREN'S CODE ACT NO. 12 OF 2022

IN THE MATTER OF: SECTION 147 OF THE CHILDREN'S CODE ACT NO. 12 OF 2022

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF CUSTODY FOR A CHILD

IN THE MATTER OF: ASHMI MAYANK PATEL A MINOR CHILD BORN ON THE 28TH OF DECEMBER 2012

BETWEEN:

MAYANKUMAR RAMANLAL PATEL

APPLICANT

AND

CHARULATA PATEL

1ST RESPONDENT

THE DIRECTOR OF SOCIAL WELFARE

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

Before the Hon. Mrs. Justice M.M. Bah-Matandala

On the 21st November, 2024.

For the Applicant:

Mr M. Phiri – Messrs. Sukwana Mweemba & Partners

For the 1st Respondent:

Mr. K. Wishimanga & Mrs. Martha Kaluba Mwansa -

Messrs. AMW & Co. Legal Practitioners

For the 2nd and 3rd Respondents: Mr. K. Sikashwa Messrs Attorney Chambers

JUDGMENT

Legislation Referred:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
3. *The Children's Code Act No. 12 of 2022*
4. *United Nations Convention on the Rights of the Child*

Cases Referred:

1. *J v C (1970) A.C 688*
2. *D v M (Minor Custody Appeal) 1982 3 All E.R 897*
3. *Harben v Harben (1957) 1 All E.R 397*
4. *Mary Louise Kakoma v Benson Chitonda Kakoma (1979) Z.R 17*
5. *Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)*

6. *Godfrey Miyanda v The High Court (1984) Z.R. 62 (S.C)*

Other Sources:

1. *Rayden's Law and Practice in Divorce and Family Matters 11th Edition, Butterworth London, 1971*
2. *Black's Law Dictionary 8th Edition*

1.0 Introduction

- 1.1 This is an application for custody of a child named Ashmi Mayank Patel made by the father Mayankumar Ramanlal Patel. The 1st Respondent herein, Charulata Patel is the mother of the child.

2.0 Background

- 2.1 The Applicant is a Zambian National residing in Zambia, while the 1st Respondent is an Indian National residing in the United States of America.
- 2.2 The Applicant and the 1st Respondent were lawfully married in the Republic of India on 21st May, 2009. The Applicant and the 1st Respondent had a daughter born from them in

2012, and now the child who is the subject of this custody application.

- 2.3 The Applicant and the 1st Respondent lived together here in the Republic of Zambia as a family with their daughter from 2013 until 2016, when the 1st Respondent left the country with the child after an argument with the Applicant and without the Applicants consent.
- 2.4 The 1st Respondent subsequently commenced an action for the dissolution of the marriage in the United States of America, and the marriage was eventually dissolved in 2018 by the DuPage County Court in Illinois.
- 2.5 The parties then entered into an Allocation Judgment and Agreed Parenting Plan which formed part of the Court's Judgment. Although custody of the child was primarily given to the 1st Respondent, the Applicant was allowed access to the child under the said agreement.
- 2.6 Sometime in 2022, the Applicant was allowed to travel with the child outside the United States of America. The Applicant travelled with the child to this country with the intention to permanently start living with the child in this country.

2.7 As a result of the Applicant's action, the 1st Respondent instituted proceedings for the return of the child to the United States of America. An order to that effect was issued by the DuPage County Court.

2.8 In turn, the Applicant commenced an application in this Court by way of Originating Summons dated 5th December, 2022, accompanied by an Affidavit and Skeleton Arguments of the same date seeking the following reliefs:

1) An order granting custody of Ashmi Mayank Patel to the Applicant;

2) An Interim order granting custody of Ashmi Mayank Patel to the Applicant;

3) An order that the 1st Respondent be granted supervised access by the Court on such terms as the Court might deem fit;

4) Costs; and

5) Any other relief the Court may deem necessary.

3.0 Affidavit in Support of Originating Summons

3.1 The Applicant's Affidavit in Support dated 5th December 2022, was sworn by Mayankumar Ramanlal Patel, the Applicant herein.

- 3.2 The Applicant deposed that he resided as a family with the 1st Respondent and the child here in the Republic of Zambia from 2013 to 2016 until the 1st Respondent left the country with their child without his consent wherein she travelled to India and then the United States of America.
- 3.3 Furthermore, the Applicant deposed that the marriage to the 1st Respondent was eventually dissolved by the DuPage County Court in the United States of America in the year 2018.
- 3.4 It was deposed that thereafter, the parties entered into an Allocation Judgment and Parenting Plan Agreement which was made part of the Judgment of the Court.
- 3.5 The Applicant averred further that the 1st Respondent undermined his parental authority and rights, prompting him to travel with the child to Zambia. In addition, the Applicant averred that he had found out that the 1st Respondent was not in gainful employment and had no consistent source of income.
- 3.6 The Applicant further deposed that when the 1st Respondent initially left the country with the child, when Zambia was not a signatory to the Hague Convention and as such no remedies were available to facilitate the return of the child

even when the Applicant made frantic effort to return the child at the time to Zambia.

3.7 Additionally, the Applicant averred that he is a Zambian National, domiciled in Zambia, and he believed that this was an appropriate Court to make a custody order.

3.8 The Applicant deposed that the child was currently enrolled in school here in Zambia and had access to healthcare, as well as a maid or babysitter, making it to be in the child's best interest to remain in Zambia.

4.0 Applicant's Arguments

4.1 At the hearing, the Applicant relied on the Affidavit and Skeleton Arguments filed on 5th December, 2022. The Applicant contended that this Court has the jurisdiction to determine the matter and grant the reliefs sought. Reference was made to the case of ***Harben v Harben***¹ where it was stated that:

“I doubt if I need say any more on the point of jurisdiction than to thank counsel for the wife for referring me to Ronalds v Ronalds (2), which to my mind makes it, by analogy, clear that jurisdiction exists to

deal with the present issues by virtue of S. 26 (1) of the Matrimonial Causes Act, 1950 (see now section 42 of the Matrimonial Causes Act, 1973) and to Hope v Hope (3), the leading authority on the inherent jurisdiction of the High Court to deal with the custody of any child who is a British subject whether by parentage or even (as exemplified by Re Willoughby (4), by virtue of having a British grandfather. This inherent jurisdiction exists even if the child is born out of allegiance, and it exists irrespective of where the child may be physically located at the relevant times.”

4.2 Further reference was made to the case of **Mary Louise Kakoma v Benson Chitondi Kakoma**², in which the Court stated the following:

“In the present case although the petitioner is a citizen of New Zealand, the respondent is a citizen of Zambia and the child of the family was born within the

jurisdiction. I am satisfied therefore as to my jurisdiction.”

4.3 The Applicant submitted that him and the child are Zambian citizens, thereby are entitled to the benefit of access to the constitutionally established Court in Zambia for purposes of determining this application. In this vein, the Court was referred to **Article 42 of the Constitution of Zambia**, which provides that:

“A citizen is entitled to – (a) the rights, privileges and benefits of citizenship as provided in this Constitution or as prescribed.”

4.4 Further the Applicant argued that the considerations that the Court should make when deciding whether or not a custody order is to be granted are found in Section 3(2) of the Children’s Code Act.

4.5 In addition, the Court’s attention was drawn to the Learned Authors of the ***Legal Treatise Raydens’ Law and Practice in Divorce and Family Matters*** who stated that:

“There is no settled rule that a child of tender years should remain in the custody

of the mother. In dealing with questions of custody or access the Court will have regard to the particular circumstances of each case, always bearing in mind that the benefit or interest of the child is the paramount consideration and not the punishment of the guilty spouse.”

4.6 Additional reference was made to **J v C** where it was stated thus:

“More than the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. The word denotes a process whereby when all relevant facts, relationships, 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 the most in the interest of the child’s welfare.”

4.7 Furthermore, the case of **D v M (Minor Custody Appeal)** was referred to, where it was stated that:

“It is generally accepted by those who are professionally concerned with children that, particularly in the early years, continuity of care a most important part of a child’s sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so.”

4.8 The Applicant’s submission was that it was not in the child’s best interest for the 1st Respondent to have custody of the child, as she has no gainful employment.

4.9 The Applicant contended that although money should not be the sole reason for custody considerations, the Court ought to take judicial notice of the fact that life in the United States of America is quite challenging for someone not earning an income.

4.10 The Applicant argued that continuity of the child’s care should be maintained as the child had established bonds in Zambia and was enrolled at a suitable school.

5.0 1st Respondent’s Affidavit in Opposition

5.1 The 1st Respondent’s Affidavit was deposed to by Charulata Patel, the 1st Respondent herein. The 1st Respondent averred

that she had initially left the Applicant the time she left the country with the child because he used to verbally and physically abuse her and had on numerous occasions told her to get out of his house when they were married, knowing that she had no relatives in Zambia.

- 5.2 The 1st Respondent deposed that she did not return to Zambia because she feared the Applicant, who she believed was having an extramarital affair at the time.
- 5.3 The 1st Respondent swore that the 1st Respondent and the Applicant had entered into a Settlement Agreement in which they agreed to have joint decision-making authority over child.
- 5.4 The 1st Respondent averred that she had not in any way undermined the Agreement, but that it was the Applicant who had abrogated the Agreement.
- 5.5 The 1st Respondent swore that she was financially capable of looking after the child, with the child having access to the best healthcare and schools. She averred that the Applicant had not demonstrated that he was financially capable of taking care of the child.

- 5.6 The 1st Respondent further averred that the parties had agreed not to modify their Agreement without the written consent of both parties, and that the DuPage County Court would have jurisdiction in case of any dispute.
- 5.7 Further, the 1st Respondent averred that the Applicant had not informed her that he was bringing the child to Zambia, but that he instead threatened to use his political connections to prevent her from seeing the child once they were in Zambia.
- 5.8 In addition, the 1st Respondent deposed that the DuPage County Court had issued an order for the return of the child which is enforceable, and that this Court had no jurisdiction to determine any matters to do with the custody of the child.
- 5.9 The 1st Respondent swore that the Applicant had restricted her access to the child, when she however used to grant him access the time the child when the child was in her custody.
- 5.10 Furthermore, the 1st Respondent averred that as per their Agreement, the Applicant was liable to pay her expenses herein, and that she had already incurred USD 15, 000.00 in legal fees.

6.0 1st Respondent's Arguments

- 6.1 At the hearing, the 1st Respondent relied on the Affidavit in Opposition and the Skeleton Arguments already filed on 22nd November, 2023. The 1st Respondent argued that this Court does not have the jurisdiction to determine this matter because Clause 6.5 of the Agreed Allocation Judgment and Parenting Plan stated that any issues arising would be dealt with under the jurisdiction of the DuPage County Court.
- 6.2 The 1st Respondent submitted that this Court's jurisdiction would only be limited to making an order to the effect that the Court with jurisdiction is the DuPage County Court.
- 6.3 The 1st Respondent argued that moreover, the issues before this Court had already been adjudicated upon because the Applicant had previously applied for an order of custody which was dismissed by the High Court and also on appeal.
- 6.4 It was the 1st Respondent's submission that the applicant was simply forum shopping with the intention of disadvantaging the 1st Respondent with the knowledge that she had no relatives in Zambia and could not afford international trips to attend court proceedings.
- 6.5 It was also asserted by the 1st Respondent that besides, the issues herein had already been determined by the DuPage

County Court, and that therefore, this Court ought to make an order to facilitate the enforcement of that judgment.

6.6 Furthermore, the 1st Respondent contended that the Agreed Parenting Plan is enforceable by this Court because **Section 148 of the Children's Code Act** provides that a father and mother may enter into a custody agreement in respect of the child. The submission of the 1st Respondent was for this Court to enforce the agreement, because the parties had entered into it freely and voluntarily. To this end, reference was made to Clause 7A of their agreement which states as follows:

“The Marital Settlement and Allocation Judgment and Parenting Plan between the Petitioner and Respondent, dated February 1, 2018 are made part of this judgment for the Dissolution of Marriage; and all provisions of said Agreements are expressly ratified, confirmed, approved and adopted as the orders of this Court to the same extent and with the same force and effect as if the said provisions were in this paragraph set forth verbatim as the Judgment of this Court; each of the parties hereto shall perform under the terms of these Agreements.”

6.7 It was also further submitted that the DuPage County Court had stated that:

“Pursuant to the terms of the said Marital Settlement Agreement, and under the provisions of Section 502(f) of the Illinois Marriage and dissolution of Marriage Act, said Agreement shall not be modifiable by subsequent action of any court without the express written consent of the parties hereto.”

6.8 In addition, it was argued that the Judgment of the DuPage County Court expressly restricted jurisdiction relating to custody of the child by stating that:

“The Court expressly retains jurisdiction of this cause for the purpose of enforcing all terms of this judgment for the Dissolution of Marriage, including all terms of the Marital Settlement Agreement and Allocation Judgment and Parenting Plan made in writing between the parties hereto

***dated 1st February, 2018 and
incorporated.”***

6.9 It was argued that the Applicant and the 1st Respondent had entered into an express agreement that was reduced into writing and therefore the parole evidence rule ought to apply, and the agreement enforced.

6.10 It was also contended that this Court ought to grant the 1st Respondent custody of the child similar to the Judgment of the DuPage County Court because:

- 1. The 1st Respondent is capable of financially providing for the child without any difficulty as evidenced in the affidavit in opposition;*
- 2. The Applicant has not made this application in good faith;*
- 3. The applicant has in the past exhibited abusive tendencies as he used to get violent towards the 1st Respondent which tendencies may be repeated in future;*

4. *The circuit Court of DuPage County issued and order for the return of the child which order is valid and enforceable;*
5. *The Applicant already has unrestricted access to the child as her father;*
6. *The child had access to the best medical care in the world in the United States of America and was attending a prestigious school while being a habitual resident in the United States of America.*

6.11 It was also argued that this Court should take into consideration the best interest of the child. In this regard, **Article 3 of the united Nations Convention on the Rights of the Child** and **Section 3 of the Children's Code Act** where cited as putting emphasis on considering the best interest of the child when dealing with custody. Stemming from the aforementioned provisions, it was submitted that this Court should consider the Judgment of the DuPage County Court, as it considered that it was in the best interest of the child to reside with the 1st Respondent.

6.12 Further, it was contended that the child in this case had been wrongly retained in Zambia in breach of the Judgment, and that the DuPage Court had since made an order for the return of the child to the United States of America, where she was habitually resident. **Section 282 (2) (a) of the Children's Code Act** was cited, and it states thus:

“(2) A child shall be considered to be wrongfully retained in the Republic where: -

(a) it is a breach of the rights of custody or the rights of access granted to the person, institution or other body over the child in the country in which the child was habitually resident immediately before the retention; and

(b) the right of custody or the rights of access to the child were exercised solely by that person, institution or other body or jointly with another

***person, institution or other body, or
would have been exercised if the child
had not been retained in the country.”***

6.13 Finally, it was contended that the Applicant was liable to pay the 1st Respondent’s expenses for breaching the Agreement in line with Clause 6.8 of the agreement.

7.0 Reply

7.1 The Applicant filed his reply accompanied by Skeleton Arguments dated 31st May, 2024 denying the 1st Respondent’s assertions and insisting for custody of the child and I shall not endeavour to restate the said submissions at this point save to say that I have considered them

8.0 ANALYSIS AND DETERMINATION

8.1 I have considered the evidence, arguments and authorities cited by both parties. I am indebted to counsel for both parties for the spirited arguments.

8.2 I will begin by addressing the issue relating to the jurisdiction of this Court in this matter.

8.3 It was argued by the 1st Respondent that this Court lacks jurisdiction to determine the matter herein because the DuPage County Court had already presided over the issue of custody of the child, and the DuPage County Court as well as the parties themselves had restricted any disputes that would arise in relation to custody of the child herein to the sole purview of the DuPage county court.

8.4 However, in the case of **Godfrey Miyanda v The High Court**³, the Supreme Court defined the term jurisdiction as follows:

“The term “jurisdiction” should firstly be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court

has cognisance or to the area over which the jurisdiction stands, or both.

8.5 Additionally, in the case of **Donohue v Armco Inc and Others⁴**, it was held that:

“The foreign jurisdiction clause does not have the `effect of conferring jurisdiction on the chosen court but that the court retains a discretion to decline to exercise that jurisdiction based on an overriding consideration of forum conviniens.”

8.6 From the cited authorities, it is clear that this Court’s jurisdiction cannot be ousted by a foreign judgment or jurisdiction clause, but rather this Court’s jurisdiction can only be limited by legislation and or the Constitution.

8.7 Moreover, the High Court for Zambia is a Superior Court. According to **Black’s Law Dictionary 8th Edition**, a local court is defined as a court whose jurisdiction is limited to a particular territory such as a state, municipal or county court. Therefore, a county court, such as the DuPage County Court is equivalent to a local court herein. I therefore find that this Court has the jurisdiction to take cognisance of the

matter and determine it accordingly and as if being heard for the first time over the issue of custody.

8.8 Be that as it may, I must also mention that this Court has the ability to recognise foreign judgment as provided under **Section 86 (1) (a) of the Matrimonial Causes Act** provides that:

“A dissolution of marriage effected in accordance with the law of a foreign country shall be recognised as valid in Zambia where, at the date of institution of the proceedings that resulted in the dissolution or annulment of the marriage, the party at whose instance the dissolution or annulment was effected, or it was effected at the instance of both parties was:

(a) In the case of the dissolution of a marriage or the annulment of a voidable marriage, domiciled in that foreign country.”

8.9 The aforementioned provision of the law allows this Court to recognise the dissolution of the marriage between the Applicant and the 1st Respondent. Be that as it may, this provision does not include custody orders or agreements contained in foreign judgments.

8.10 It was submitted that the Children's Code Act recognises custody agreements. Indeed, I find that it does under Section 148 of the Children's Code Act which states as follows:

“(1) A father and mother of a child may enter into a custody agreement in respect of a child.

(2) A court shall not enforce a custody agreement if the court considers that the agreement is not in the best interest of the child.

8.11 While Section 148 (1) of the Children's Code Act provides that a father and mother of a child may enter into a custody agreement, Subsection (2) gives discretion to the Court on whether to enforce such agreements.

8.12 The Court must consider whether such an agreement is in the best interest of the child. This Court therefore has the power to determine what is in the best interest of the child, and to make an appropriate order in that regard.

8.13 Furthermore, in the case of **J v C**, Lord Mac Dermott aptly explained the meaning of the best interest of the child in the following terms:

“I think the words “shall regard the welfare of the infant as the first and paramount consideration” connote a process whereby, when all the relevant factors, 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 mostly in the interest of the child’s welfare... “

8.14 I have also considered the Supreme Court’s decision in the case of **Emmanuel Mponda v Mutale I. Mponda**⁵ where the court held that:

“it is generally accepted by those who are professionally concerned with children

that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so"

8.15 I note that in the current case, the child had established bonds while living with the mother in the United States of America, but then again, the child has since established other bonds the time she has been living here in Zambia, as was established from the inquiry interview and the social welfare report. Further it is on record that the child enjoys the school where she has been enrolled herein Zambia. The child indicated that she actually prefers the school herein in Zambia then the one in the United State of America. The child further intimated to the court her fears of the gun violence in the United States of America.

8.16 I am further guided by **Section 144 (2) (a) (b) and (c) of the Children's Code Act** which provides as follows:

"A court shall, in determining whether or not a custody order should be made in

respect of a child in favour of the applicant, have regard to —

- (a) the best interests of the child;***
- (b) the ascertainable wishes of the child;***
- (c) the conduct and wishes of the parent or guardian of the child;”***

8.17 In the case *in casu*, the Applicant seeks to have custody of the child herein for reason that he is better placed to look after the child, that the child is enrolled at a good school, has good healthcare and someone employed to look after the child, while also asserting that the mother does not have gainful employment.

8.18 On the other hand, the 1st Respondent argues that she is better placed to look after the child, that she has the ability to take care of the child and that the child has access to the best healthcare and schools in the world in the United States of America.

8.19 However, as outlined in the authorities cited, this Court ought to make a determination on what is currently in the best interest and welfare of the child. From the evidence before, as well as what I must consider according to the law, I find that it would not be in the best interest of the child to

be engaged in this back-and-forth movement between the Applicant and the 1st Respondent.

8.20 I therefore determine that it is on the top list item for me to take the best interest and welfare for the child to remain here in Zambia, having considered all relevant facts, relationships, wishes of the child herself, risks mentioned by the child if she went to the United States of America, the established bonds of which I have taken into account and weighed against the wishes and request of the 1st Respondent, I find that it will be in the best interest of the child and welfare for the child to remain here in Zambia with the Applicant.

8.21 Further the record will show that the 2nd and 3rd Defendants provided the social welfare report which has been duly considered herein. The Social Welfare report has been considered in determining the matter at hand. I further note that the 2nd and 3rd Respondent did not file into court anything further.

8.22 Therefore, from the foregoing, I order that physical custody is granted to the Applicant during school days and for the 1st Respondent to have physical access during holidays

which access is to be restricted to Zambia, given the history of this case.

8.23 Further, both parties shall have reasonable access to the child on such terms as shall be agreed by the parties at any given time.

8.24 Both the custody and access orders are subject to variation as and when the circumstances may so require and on formal application by either party.

8.25 I also think it necessary to address the contention that the child was wrongfully removed from the child's habitual place of residence. **Section 285 (1) of the Children's Code Act** provides thus:

“A person or central authority that claims that a child has been removed from the Republic or retained in the Republic in breach of custody rights shall apply to the central authority of the Republic or the child's habitual place of residence to secure the safe return of the child in the prescribed manner and form.”

8.26 Section 286 (2) of the Children's Code Act then states that:

“The Director of Social Welfare shall commence legal proceedings for the safe return of the child to the Republic or another State where the Director of Social Welfare is satisfied that an application under Section 285 is correctly before the central authority.”

8.27 Therefore, where a party claims that a child has been wrongfully removed from the place of habitual residence, the procedure to be followed ought to be as provided for in the cited provisions. Firstly, a person or central authority so claiming ought to apply to the central authority of the Republic where the child is retained or to the central authority of the child's habitual place of residence and a prescribed manner and form.

8.28 Secondly, it is the Director of Social Welfare to then commence legal proceedings where they are satisfied that the application is correctly before the central authority.

8.29 Lastly, the Court would then determine such a matter in accordance with **Subsections (2), (3), (4) and (5) of Section 286 of the Children's Code Act.**

9.0 Conclusion

9.1 The application succeeds. Sole custody is hereby granted to the Applicant with the 1st Respondent reserving the right of access to the child.

9.2 Parties are informed of their right to appeal.

9.3 Cost are awarded to the 1st Respondent.

Dated at Lusaka, this 21st day of November 2024.

M.M.Bah-Matandala
HIGH COURT JUDGE.

