

IN THE HIGH COURT FOR ZAMBIA
FAMILY AND CHILDRENS COURT DIVISION
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2023/HPF/658



B E T W E E N:

**IN THE MATTER OF: SECTIONS 141 OF THE CHILDREN'S
CODE ACT NO 12 OF 2022**

AND

**IN THE MATTER OF: JOINT CUSTODY OF THE CHILDREN
NAMED CHISHA MUSONDA, CHILESHE
MUSONDA AND EMMANUEL SAMPA
MUSONDA**

**IN THE MATTER OF: LEAVE TO TAKE THE CHILDREN
OUTSIDE JURISDICTION**

BETWEEN:

OLIVER MUSONDA

APPLICANT

REGINA GOMA

RESPONDENT

*Before the Hon. Mrs. Justice M.M. Bah-Matandala
On the 20th day of March, 2024.*

For the Applicant: Ms. Erica Mbulo- Messrs. Valerie & Partners

For the Respondent: Mrs. Mwenya Chikonde -Messrs. Katyamba & Company

J U D G M E N T

LEGISLATION REFERRED TO:

1. *The Children's Code Act No. 12 of 2022*

CASES REFERRED TO:

1. *Xirocostas Vs Yolanda Pome (2013) ZR 194 Vol 2*
2. *J v C (1970) AC 688*
3. *Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)*
4. *Musweu v Musweu*

1.0 INTRODUCTION

1.1 By way of Originating Summons supported by an Affidavit dated 17th November, 2023 the Applicant is seeking an order for Joint Custody of the Children namely; **Chisha Musonda, Chileshe Musonda And Emmanuel Sampa Musonda.**

1.2 The Application is made pursuant to **sections 141 of the Children's Code Act No. 12 of 2022** wherein the Applicant is seeking for the following reliefs;

- 1) *An order that the Applicant be granted an order for joint custody of the children named Chisha Musonda, Chileshe Musonda and Emmanuel Sampa Musonda.*
- 2) *An order that the Applicant be granted leave to take the children named Chisha Musonda, Chileshe Musonda and Emmanuel Sampa Musonda outside jurisdiction to the United States of America during school holidays*
- 3) *An order that the Applicant's sister Grace Musonda be allowed to accompany the children*

namely Chisha Musonda, Chileshe Musonda and Emmanuel Sampa Musonda on their travel to the United States of America during school holidays.

4) An order that in the alternative, the Applicant be granted an order to take the children Chisha Musonda, Chileshe Musonda and Emmanuel Sampa Musonda to the United States of America during school holidays.

5) Any other relief the court may deem fit.

6) Costs be in the cause.

2.0 APPLICANT'S CASE

2.1 In the Affidavit in Support dated 17th November, 2023, and deposed to by **Oliver Musonda** the Applicant herein, it was deposed that the children are aged 14, 12 and 10 respectively and that ever since the divorce by the Local Court on the 11th March, 2021 the children of the family herein have been in the primary custody of the Respondent, with the Applicant having access to the children.

- 2.2 The Applicant deposed that he is a Commissioned Senior Officer in the Zambia Army and currently in foreign service as Counsellor-Military(L) on tour for three (3) years at the Embassy of the Republic of Zambia in New York, United States of America as evidenced in the letter of appointment which was effective from 3rd of April, 2023.
- 2.3 The Applicant deposed that following the aforementioned appointment he ensured that he obtained American Visas valid for a period of 3 years for the children so that they could visit whenever they closed schools for the holidays.
- 2.4 Further that the Applicant's sister Grace Musonda, was also registered as the accompanying adult to travel with the children to the United States of America and back to Zambia. The said sister was also issued with a three (3) year Visa as well. And the said Visa for the sister and the children have been exhibited as evidence herein.
- 2.5 It has been deposed that the said children were scheduled to travel to visit the Applicant during the April, 2023 holidays but the Respondent refused to allow the eldest

child Chisha Musonda for being in an examination class, being grade 9.

2.6 The Applicant consequently sought permission from the child's school for Chisha Musonda, which he was granted and further he went to seek the intervention of the Department of Child Welfare, who then invited the parties for a meeting. The intervention resulted in the Respondent giving consent for the child Chisha Musonda to travel as well.

2.7 It was submitted that the child when consulted, agreed to travel to the United States of America to visit the Applicant accompanied by her auntie, being the Applicant's sister namely Grace Musonda.

2.8 The Applicant stated that another time in May of 2023 the Respondent withdraw her consent to allow the children to travel out of jurisdiction to visit the Applicant. This was done through a letter to the Department of Child Welfare as evidenced in exhibit marked as "OM4".

2.9 The Applicant deposed that by all means to reason with the Respondent, he failed since the Respondent had

refused to allow the children to travel with the him during the December, 2023 holidays hence this application.

3.0 RESDONDENT'S CASE

3.1 The Affidavit in opposition was deposed to by **Regina Goma** the Respondent herein. She has admitted that the children herein are children of the family.

3.2 The Respondent has disputed paragraph 7 of the affidavit in support to the extent that Emmanuel Sampa Musonda had not yet attained the age of 10 years old as he was to attain the same on 25th December, 2023 and that Chileshe Musonda is 11 years old and was to attain 12 years old on the 3rd January, 2024.

3.3 Further the Respondent stated that she was not aware that the children had obtained Visas for the United States of America for a period of three (3) years and also stated she was not aware that the children were to travel with their auntie Grace Musonda.

3.4 The Respondent stated that she is not comfortable with the Applicant's decision of picking on Grace Musonda to

travel with the children without consulting her for the reason that;

- i) *The Respondent is not in talking terms with Grace Musonda. Therefore, this position will make it impossible for her to inquire from her or the Applicant on the wellbeing of the children when they are in the United States of America.*
- ii) *The children have informed the Applicant that they are not comfortable to be with Grace Musonda because of her uncontrollable temper which the said children have witnessed in person on various occasions, for example when she was seen beating her own children. This action was said to have traumatized the children.*
- iii) *The deponent states further that the children have complained that the said Grace Musonda was fond of asking about*

the Respondent which makes the Respondent uneasy due to the strained relationship between her and the Grace Musonda.

3.5 Further the Respondent submitted that she is not averse to the children travelling to the United States of America to visit the Applicant during school holidays even as early as April 2024 so long the Applicant meets the conditions set out by the Applicant as follows;

- a) At any given time during school holidays two of the children and not three can travel to the USA.*
- b) To allow Chisha Musonda to travel with any other child without an adult.*
- c) Alternatively, that any other member of the Applicants family who are in talking terms with the Respondent can travel with two of the children in consultation with the Respondent save for Grace Musonda.*

3.6 The Respondent's refusal to allow the children to travel to the United States of America is also anchored on the following conditions that;

- a) The Applicant should stop the habit of leaving the children alone at home and returning home late;*
- b) The Applicant should stop sleeping on the same bed with Chileshe Musonda for being a girl child.*
- c) The Applicant should attend to the children when they are sick.*

3.7 The Respondent further stated that Chisha Musonda cannot travel with her siblings to United States of America currently for the reason that she has had her menstrual cycle(s) start and as such the Respondent thinks the child will need some time to be observed, which will be for weeks before she can travel to the United States of America. Hence her proposal for the child to travel during the next school holiday in April of 2024.

3.8 The Respondent prays that the application for joint custody should be denied and leave to take the children out of the country denied until the Applicant attends to the highlighted issues.

4.0 SKELETON ARGUMENTS IN SUPPORT OF THE APPLICATION

4.1 In the Skeleton Arguments in Support of Originating Summons, it was submitted that when making decisions touching on the welfare of children, the paramount consideration is the best interest of the child. Reference was made to ***section 141(1) (a) and 2 (a), section 3 of the Children's Code Act No. 12 of 2022.***

4.2 The Applicant submits that this Court is vested with power and authority to grant or vary a custody order that advances the interests of the child/ren. The Applicant has exhibited the order marked as "OM1" granted by the Local Court which shows that custody was granted to the Respondent of the children herein and the Applicant was granted access during school holidays.

- 4.3 The Applicant further has submitted on the one hand that he now lives in New York in the United States of America where he has been seconded to work at the Zambian Embassy for a period of 3 years and now desires for the children to visit him during school holidays.
- 4.4 The Applicant submits that on the other hand, the Respondent has made it clear that she will not allow the children to visit the Applicant.
- 4.5 In response the Applicant submits that the refusal by the Respondent is contrary to the best interest of the children and reference was had to the decision in *Virginia Jane Sasse Evans vs Maric Stephen Evans* wherein it was stated that

"the best interest of the child must be considered when considering such applications. Each parent has parental responsibility over the children and it is settled law that every parent is entitled to access the children of the family. A child who is separated from one parent or both has the right to personal relations and direct

contact with both parents on a regular basis, except if it is contrary to the child's best interest. It must be noted that what is in issue is the best interest of the child and not the rights or interests of the parents."

- 4.6 It has been submitted that the best interest of the children *in casu* is to maintain a continuous relationship with the Applicant during the 3 years that he will be away in another jurisdiction and to advance the welfare of the children herein by allowing them to spend time during holidays with the Applicant in the United States of America.
- 4.7 The Applicant also referred regarding the best interest of the child to Lord Macdermott in ***J vs C cited in Andreas Xirocostas vs. Yolanda Pome***¹ where he explained what is really in the children's best interest in the circumstances of each case as follows:

"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, 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 mostly in the interest of the child's welfare has now been understood, it is of first importance and paramount consideration because it rules on or determines the course to be followed."

4.8 From the foregoing it was submitted that the children herein need to sustain a healthy relationship with both parents. It was submitted that this can only be achieved if joint custody is granted to both parents to enable them have an equal and fair opportunity to continue bonding with the children.

4.9 The Applicant prays that this Court should grants him joint custody in order to prevent the Respondent from denying him access to the children during the Applicant's stay in the United States of America and seeks leave to

take the children out of jurisdiction during school holidays for the time he will be in that aforesaid jurisdiction.

5.0 SKELETON ARGUMENTS IN OPPOSITION

5.1 In the Skeleton Arguments in Opposition to the Originating Summons, the Respondent has referred to the same sections in the Children's Code Act as that of the Applicant. Therefore, I shall not belabor the same save to say that her refusal was meant not in perpetuity but for only until the Applicant met the conditions which she has outlined in order for the children travel to the United States of America as early as the holidays for April, 2024.

5.2 The Respondent further states that her mere refusal to allow the children to travel to the United States of America is not sufficient enough to warrant this Court to review the Local Court's Custody Order which had granted the Respondent primary custody during school days and access to the Applicant during school holidays.

5.3 It was further submitted that the Applicant ought to have applied for a variation of the Order by the Local Court.

6.0 CONSIDERATIONS AND DECISION

6.1 I am indebted to Counsel for both parties for the spirited arguments and authorities supplied herein. I have further considered the submissions filed herein and the Affidavit evidence on record.

6.2 This Application hinges on **sections 141(1)(a), 2(a) and section 144 (2) (a) (b) (c) of the Children's Code Act No. 12 of 2022** which states as follows: Section 141 (1) (a)

"(1) A custody order may be made in respect of a—

(a) child;

(b) person who at the date of the order is under the age of twenty-five and is receiving instruction at an educational institution or undergoing training for a trade, profession or vocation, whether or not the person is in gainful employment; and

(c) person the court considers to have special circumstances which is desirable, in the

interest of that person, that this section should apply to.

6.3 The above provisions outline persons to whom a custody order may be made which includes a child, a person whom at the date of the order is under the age of twenty-five and is receiving instruction at an educational institution or undergoing training for a trade, profession or vocation, whether or not the person is in gainful employment. The third category is that of a person the Court considers to have special circumstances.

6.4 I have further looked at **Section 141 (2) (a) and (b) of the Children's Code Act (Supra)** which outlines persons to whom custody of a child may be granted and it provides as follows:

- (a) parent of the child;*
- (b) guardian*
- (a) a person who applies, with the consent of a parent or guardian of the child and has actual custody of the child for three*

months preceding the making of the application; or

(d) person who, while not falling within paragraphs (a), (b) or (c), can show cause why an order should be made awarding that person custody of the child.

6.5 As regards what to consider regarding whether or not to grant a custody order, **Section 144 2 (a) (b) and (c) of the Children's Code Act No. 12 of 2022** 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

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- (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;"*

6.6 In the case *in casu*, it is clear from the affidavit evidence that the person to whom the joint custody order is being sought are children; furthermore, the Applicant and the

Respondent are the father and mother to the children respectively.

6.7 The parents of the children are divorced and the Local Court at the time of the divorce proceedings dealt with custody wherein the primary custody was granted to Respondent with access to the Applicant during school holidays. This fact is undisputed.

6.8 The Applicant seeks to have a joint custody of the children herein for the reason that he has believed that the Respondent is denying him access to the children unreasonably since he reallocated to the United States of America for work.

6.9 On the other hand, the Respondent argues that custody was already dealt with by the Local Court and in that case the Applicant ought to have applied for variation of the existing order and for leave of Court to take the children out of jurisdiction in order to have access to him.

6.10 Further, the Respondent has essentially consented to the application for leave to take the children out of jurisdiction on condition that;

- i) *That only two of the children at any given point ought to travel out of jurisdiction whilst on school holidays to visit the Applicant,*
- ii) *That Chisha Musonda be allowed to travel unaccompanied by an adult with one other child whilst on school holidays beginning from the April 2024 school holidays.*
- iii) *That the Applicant should stop sleeping on the same bed with Chisha Musonda since she is a girl who has grown.*
- iv) *That the sister to the Applicant named Grace Musonda should not travel with the children because she is not in talking terms with the Respondent but that any other family member can accompany them if it is done in consultation with Respondent to travel with them.*

good relationship with the children. The Applicant also said that the children are fond of his sister and have even requested to spend time with her at times when he was in Zambia and loved to be with their cousins. He has stated that this condition was just one made up by the Respondent to stop the children from visiting him.

7.4 And in relation to the concern relating to communication, it was stated the children each have their own phone and can be directly communicated to by Respondent.

7.5 In relation to the issue of the children sleeping on the same bed as Chisha Musonda a girl child, he stated that this does not happen. And in support of this, it was submitted that whilst in Zambia the children each had their own bedrooms and they each slept in their own respective rooms unlike at the Respondent's house wherein the house only has two bedrooms and the children share the bed in of the bedrooms with the Respondent.

7.6 Further the Applicant has revealed that the children live in Lusaka whilst the Respondent lives in Ndola on the Copperbelt. He therefore stated that he was in a better off

environment to be with the children than the Respondent. Further it was submitted that what he wants is for the children to be travelling during holidays to visit him in the United States of America.

7.7 Let me now address the assertion by the Respondent suggesting that the children should not travel with Grace Musonda because she is not in talking terms with the her and for that reason she may not be able to speak with the children when she wants to and also that the children are afraid of her.

7.8 The aforesaid assertion is mainly premised on the issue of communication with the children. Therefore, since the evidence on record, which is undisputed is that the children have their own phones and can still be communicated to by the Respondent whenever she would want to, the assertion is thus dismissed herein

7.9 On the other hand, I have looked critically at the record and noted that the Respondent has not provided evidence to show that there was any factual reason to judge Grace Musonda in the manner suggested by the Respondent in

order to support the assertion. I am therefore inclined to believe that the allegation is nothing but a mere speculation.

7.10 The issue of the Applicant sleeping on the same bed with eldest daughter Chisha Musonda has not been evidently submitted as to what exactly is the issue pertaining to the sleeping on the same bed as the Applicant. This assertion leaves the issue to speculation especially in light of the evidence by the Applicant that the children have their own bedrooms wherein they sleep when at the Applicants place.

7.11 The fact of the children having each their own bedrooms has not been disputed by the Respondent. Further the Applicant has indicated that his house in the United States of America has 7 bedrooms and so each child will have their own bedroom to sleep in. He indicated that each child will again have a bedroom to themselves. Therefore, I find that this assertion has no merit and is dismissed.

7.12 In dealing with the issue of Chisha Musonda travelling unaccompanied in relation to the submission by the Respondent in relation to the Applicant submission that

all the children are still young and needing to be accompanied, I am inclined with the submission of the Applicant because it is in the best interest of the children to travel accompanied on such a long journey unless there is no one to accompany them. Therefore, the assertion is dismissed.

7.13 Finally, in relation to the fact that the children have been living together as a family it would not be in the best interest of the children if they were to be separated on holidays and travel only in twos as asserted by the Respondent. The assertion is also dismissed for the reason that it is not in the best interest of the children if they do not travel together unless at the given time there is a reason that will preclude any one of them such as healthy and or school examinations to be undertaken coincides with the holidays when they are scheduled to travel. The assertion is thus dismissed.

7.14 Now let me come to the evidence on record regarding the undisputed Local Court Custody order which granted the Respondent custody of the children and the Applicant

access to the children during school holidays. I have scanned through the record and I find that the issue of custody and access are not in issue. I therefore will not temper with the existing order of the Local Court; therefore, the custody order will remain as it is.

7.15 Consequently, what remains as the issue for determination is the leave being sought to take the children out of jurisdiction to the United States of America in order for the Applicant to have access to the children in line with the custody order granted by the Local Court.

7.16 I have found as a fact that the Respondent has essentially consented to the children travelling out of jurisdiction save for the Applicant meeting the conditions she has stated herein. And the said conditions have all been addressed and dismissed herein before.

7.17 Therefore, with the above stated, my role now is to determine whether granting leave to the Applicant for the children to travel out of jurisdiction to the United States of America herein is in the best interest of the children as

guided by **section 144 of the Children's Code Act (supra)**.

7.18 I have further taken time to look at **section 39(1) of the Children's Code Act (supra)** which provides as follows:

"(1) A child's mother and father, whether married to each other or not, have a duty to protect and provide for the child.

(2) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other, the—

(a) mother shall have parental responsibility at the first instance,"

7.19 It is clear from the evidence on record that the parties have had joint custody of the children, since the Respondent has the primary custody and the Applicant has access to the children during school holidays. It would appear that all was well until the Applicant moved to work in the United States of America when he had sought the consent

of the Respondent for the children to travel out in order to visit him when issues started.

7.20 In light of the issues herein, I found comfort by looking at the case of **J v C (1970) AC 688**² where 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...”

7.15 I have further looked at the Supreme Court’s decision in the case of **Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)**³ 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"

7.16 I note that in the current case the children have established bonds with both the mother and the father. However, the fact that the Applicant has changed his residence to the United States of American ought not deprive the Applicant and or the children from access and visitation to the Applicant. The custody order is already in existence and it ought to be obeyed by both parties in the best interest of the children and with regard to the parents' concerns herein.

7.17 Further, in **Musweu v Musweu**⁴, the Court of Appeal guided that the Court should consider all circumstances and assess the suitability of the parties to look after the child, the home environment, the relationship of the child with members of its family, stability and continuity of care among other considerations.

7.18 I have also referred to authorities from other commonwealth jurisdictions which are of persuasive value in our jurisdiction. One of these is the English case of **Re McGrath (Infants)**⁵ where it was held that:

“The dominant matter for consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

7.19 From the above cited authorities, it is clear that in this matter, this Court is duty bound to make a decision that seeks to protect and promote the best interests of the children in issue by considering all the circumstances of the case.

7.20 Therefore, in applying the above principles to the current case, the question is: is it for the welfare or in the best

interests of the children in issue in the current case for this Court to grant leave to the Applicant so that the children can travel out of jurisdiction during school holidays?

7.21 In answering this question, this Court has considered the Applicant's undisputed affidavit evidence on record that the Respondent has custody of the children during school terms and the Applicant has access to the children during school holidays in compliant with the existing custody order granted by the Local Court.

7.22 Furthermore, both the parties have shown that they have the capability of providing care and financial support for the children and to provide a secure, healthy and happy home for them as well.

7.23 Consequently, the conclusion that I have come to is that it will be in the best interests of the children for leave to be granted to the Applicant for the children to travel to the United States of America in order to visit Applicant during school holidays effective from the April, 2024 school holidays until the Applicant returns to Zambia.

7.24 I, therefore, maintain the custody order granted by the Local Court which granted the Respondent custody of the children in issue and access to the Applicant.

7.25 I must hasten to mention that the joint custody order herein does not mean parties having equal physical time with the children but as determined already herein. Further, it means that the parties will consult and share equally in decision making with regard to the upbringing of the children, the rights, privileges and responsibilities relating to the children.

7.26 Consequently, on the totality of the evidence in this matter and considering the circumstances of the case, I order that the Respondent shall continue to have the physical time with the children during school days while the Applicant shall have physical time with the children during school holidays.

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

7.28 And I order that the children will travel accompanied by either the Applicant and or alternatively when the Applicant is unavailable to travel with Grace Musonda to and from the United States of America.

7.29 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.

7.30 Leave to allow the children to travel during school holidays to the United States of America is herein granted as prayed and the application succeeds to this extent.

8.0 I further order that each party shall bear their own costs.

9.0 Leave to appeal is granted.

Dated at Lusaka, this 20th day of March, 2024.


M.M. BAH-MATANDALA
HIGH COURT JUDGE

