

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

2023/HPF/531

IN THE MATTER OF:

**SECTION 14 (II) & 2 (A) OF THE
CHILDREN'S CODE ACT NO. 12 OF 2022
OF THE LAWS OF ZAMBIA**

IN THE MATTER OF:

**ORDER 30 RULE 11 AS READ TOGETHER
WITH ORDER 3 RULE 2 OF THE HIGH
COURT RULES CHAPTER 27 OF THE
LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

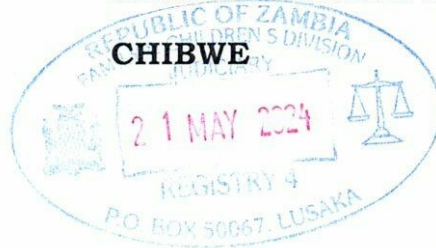
**AN APPLICATION FOR CUSTODY OF:
FLORENCE KALUBA CHIBWE, ANNA
MWANSA CHIBWE & BASTON MBULWE**

B E T W E E N:

ALEX CHIBWE

AND

AGNESS SIWALE



APPLICANT

RESPONDENT

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

On the 21st day of May, 2024.

For the Petitioner: In Person

For the Respondents: In Person

JUDGEMENT

LEGISLATION REFERRED TO:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*
2. *The Children's Code Act No. 12 of 2022*

WORKS REFERRED TO:

1. *J v C (1970) AC 688*
2. *Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)*

1.0 INTRODUCTION

1.1 By way of Originating Summons supported by an Affidavit dated 29th September, 2023, the Applicant is seeking an order for Sole Custody of the Children namely **Florence Kaluba Chibwe, Anna Mwansa Chibwe and Baston Mbulwe Chibwe.**

1.2 The Application is made pursuant to **section 14 and 2 (a) of the Children's Code Act NO. 12 of 2022 of the Laws of Zambia and order 30 rule 11 as read together with order 3 rule 2 of the High Court Rules chapter 27 of the Laws of Zambia.**

2.0 AFFIDAVIT IN SUPPORT OF APPLICATION

2.1 In the Affidavit in Support dated 29th September, 2023, and deposed to by **Alex Chibwe** the Applicant herein, it was deposed that the parties were lawfully married to the

until in the year 2022 when they got divorced. And it was stated that during the subsistence of the marriage they had three (3) children of the marriage namely **Florence Kaluba Chibwe, Anna Mwansa Chibwe and Baston Mbulwe Chibwe aged 8, 4 and 2 years respectively.**

- 2.2 It was further deposed that after the divorce the children have been in the custody of the Respondent.
- 2.3 The Applicant avers that the Respondent has lied that the child namely Florence has been going to school from January of 2023 when the Applicant had bought all the school requirements.
- 2.4 The Applicant further mentions that whenever he has inquired on the welfare of the children, the Respondent's father has been abusive towards him.
- 2.5 The Applicant wishes to take custody of the children in order to spend quality time with them on one on one so that they can bond and have a good relationship with them.
- 2.6 The Applicant avers that he has the means to support the children because he is in gainful employment. He stated

that he is able to personally train the children and impart good Christian morals in the children if granted custody.

2.7 In the circumstances the Applicant has beseeched the indulgency of this Court to grant him the order for custody of the children.

3.0 AFFIDAVIT IN OPPOSITION

3.1 The Respondent did not file an opposition although she admitted being served with the originating process.

4.0 SKELETON ARGUMENTS IN SUPPORT

4.1 In the Skeleton Arguments in Support of this Application, it was submitted that this Court is empowered to decide on the question of custody of children of the family pursuant to Order 3 rule 2 of the High Court Act chapter 27 of the Laws of Zambia.

4.2 Further the Applicant referred to Repealed Law being the Legitimacy Act which was repealed by the Children's Code Act No. 12 of 2022.

5.0 HEARING

5.1 The Applicant indicated that he would rely on the filed originating process. In augmenting, the Applicant

mentioned that the reason for seeking the sole custody of the children herein was for the reason that the Respondent has failed to ensure that the children go to school more especially Florence and Anna for no apparent reasons.

5.2 The Applicant informed the Court that he has provided for needs of the child Florence to go to school yet the Respondent has failed to take the child to school.

5.3 The Petitioner mentioned that he went with the Respondent to the Victim Support Unit at the police where he was told to find a school place for the child Florence but he stated that he instead commenced the matter herein.

5.4 The Applicant said he last sent money for the children in the year 2021 and that he stopped because of not having a good relationship with the Respondent. He said he used to send K1,200.00 per month the up keep of the children.

5.5 The Applicant reiterated that the Respondent is not so concerned with the welfare of the children especially over their schools. The applicant said this was the case even before the couple were divorced.

5.6 The Respondent was allowed to raise ask questions to the Applicant in the interest of justice in order for the Court to be given sufficient facts over the case at hand since the parties were both in person. Further the Respondent was asked to file an affidavit in opposition on or before 8th January, 2024 yet at the time of this decision she had not done so.

5.7 The Respondent in summary indicated that she has had the custody of the children since the Local Court granted the same to her at the time of the divorce. She said the Applicant was told to find schools for children who were to start school being Florence and Anna yet he did not do so.

5.8 She also stated that the Applicant was not providing maintenance for the children as directed by the Local Court at the time of the divorce.

6.0 CONSIDERATION AND DECISION

6.1 I have considered the Affidavit evidence on record herein and the submissions made by both parties. It is common cause that;

- i) *The Petitioner and the Respondent were married until they were divorced by the local Court in the year 2022;*
- ii) *There are three (3) children of the marriage namely **Florence Kaluba Chibwe, Anna Mwansa Chibwe and Baston Mbulwe Chibwe aged 8, 4 and 2 years old respectively;***
- iii) *Following the dissolution of the marriage, the Respondent has had custody of the child herein;*

6.2 The Respondent at the hearing alleged that she has had custody since the divorce and therefore she better placed to provide primary custody for them with the support of the Applicant.

6.3 On the other hand, the Petitioner alleged that the Respondent has a history of neglecting the welfare of the children when it come to school of the first two children whom she has failed to enroll for school even after the

Applicant provided for all the necessitates the actions are said to be action detrimental to the children.

6.4 Let me begin by considering the allegation by the Applicant that the Respondent has neglected the welfare of the children's school as indicated at the hearing. To buttress this allegation the Applicant has mentioned that even after getting all the school needs for Florence and find a school place for the child the Respondent did not take the child to school.

6.5 The Respondent on the other hand has stated that the Applicant has not complied with the order of the local court since he did not find her and provide for the children. She states that the Applicant was the one who was to find the school for the children. She also alleged that the Applicant no longer provides for the children. She said she is better placed to look after the children and not a step-mother.

6.6 In determining this application, I have also looked at **Section 144 2 (a) (b) and (c) of the Children's Code Act No. 12 of 2022** 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;”*

6.7 In the case *in casu*, it is clear from the affidavit evidence that the persons to whom the custody order is being sought are children; furthermore, the Applicant and the Respondent are mother and father to the children respectively.

6.8 The Applicant seeks to have custody of the children and he has demonstrated that he has had more concern for the welfare of the children than the Respondent who has had the primary custody of the children since their divorce. On the other hand the facts reveal that the Applicant has not been providing for the children hence the difficulties faced by the Respondent in ensuring that the needs of the children are provided for.

6.9 Consequently, am of the considered view that the Applicant has not satisfied this court as to why he should have custody of the children, leaving the Respondent who has the custody of the children. The Respondent has demonstrated that she has had primary custody of the child herein since divorce and it was therefore necessary and in the interest of the children to maintain the status core. I agree with the Respondent, that what the children seem to need is the financial support from the Applicant who admittedly said had stopped providing for the children due conflict he had with the Respondent.

6.10 I found comfort by looking at the case of **J v C (1970) AC 688¹** 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... “

6.11 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)***² 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”

6.12 I have noted that in the current case the children have established bonds with the Respondent and without any contrary indication, it is my considered view that she continues having the primary custody of the child. This is also considering the ages of the children who are still needing motherly care.

6.13 From the above analysis, it is my considered view that the children's sense of security and maintenance of established bonds would be achieved if the Respondent is given primary custody with the Applicant having the right of access.

6.14 In sum, the Application fails to this extent and it is hereby ordered that sole custody BE and is hereby granted to the Respondent with the Applicant deserving the right of access to the children. I shall leave the arrangement on the right of access to the parties to agree.

6.15 Needless to state that the grant is as per the prevailing circumstances and each party is at liberty to apply for variation should the circumstances change.

6.16 As regards the request for maintenance, the same is sent to the Deputy Director for determination. The parties need to present evidence of their capacity to maintain and which has not been done here. It is therefore in the interest of justice and fairness that this be heard before the Deputy Director who shall satisfy himself on the capacity of the

parties regarding the maintenance claims by the Respondent.

7.0 I order no costs.

8.0 Leave to appeal is granted.

Dated at Lusaka, this 21st May 2024.



M.M. BAH-MATANDALA
HIGH COURT JUDGE

