

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

2017/HPF/D165



BETWEEN:

BARBARA KABIKA SIMBAYA**PETITIONER**

AND

YOKONIYA SIMBAYA**RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 6th DAY OF
FEBRUARY, 2018**

For the Petitioner : Mrs R.P. Bwalya, Lisutu Chambers

For the Respondent : In person

R U L I N G

CASES REFERRED TO:

1. **W V W 1963 3 ALL ER 408**
2. **Zanetta Nyendwa V Kenneth Spooner 2013 VOL 2 ZR 1**

LEGISLATION REFERRED TO:

1. **The Matrimonial Causes Act No 20 of 2007**

This is a ruling on an application made by the Respondent for an order of custody of the child of the family, Chimwemwe Simbaya, pursuant to Section 75 of the Matrimonial Causes Act No 20 of 2007. This follows the delivery of a judgment on 19th January, 2018, declaring that the marriage contracted by the parties was a nullity. At the hearing the Respondent relied on the affidavit filed in support of the application, and gave viva voce evidence, and called one witness. The Petitioner relied on the affidavit in opposition, and also gave viva voce evidence.

In his testimony, the Respondent told the court that he was applying for custody of Chimwemwe, adding that at the time he testified, he had been in the country for nineteen days, and had not seen him. It was further his evidence that he had been supporting the child and there were financial statements to that effect. However as they were bulky he had not exhibited them to his affidavit. The Respondent also told the court that the child is an American citizen who has access to health insurance there, and that the schools there are better than here.

He also testified that after the judgment in this matter was delivered, he had called the Petitioner so that he could see the child, but the Petitioner did not allow him to do so. His view was that the child was not being respected, and that the parties were fighting, and using the child in that fight. That even when he had sent his brother to take financial support for the child, the Petitioner had declined the support. He went on to state that the Petitioner knows where his sister is, so she knew where to find him.

As regards the finances that the business that he did with the Petitioner made, the Respondent testified that in the year 2015, the business made US\$22, 000, yet he paid the shop rentals, and provided maintenance for the family. He added that the business had closed, and they owed the Zambia Revenue Authority (ZRA) K50, 000.00. The Respondent also testified that the Petitioner hid the child in Ndola, and he had use the US embassy here to track her, and that is how she had brought the child back to Lusaka.

When cross examined, the Respondent testified that he was residing at 6 Jubilee Court, but that he does not live there. He stated that his friend lives at that address, and that his sister lives in Matero. The Respondent maintained that it was possible to find him. With regard to the address indicated on the affidavit in support of the application, the Respondent told the court that it is residential address, and not for an institution. When cross examined further, he testified that the address is an institution that has flats, and that he lives there.

As to when he last saw the child, the Respondent testified that it was when the child was three (3) years old, but that he had maintained contact with him over the phone. He agreed that the child is now eight (8) years old, but his evidence was that the child is traumatized as a result of being unable to be in touch with him. The Respondent denied that the child would be traumatized if he were allowed to take him to a foreign nation. It was the Respondent's testimony that he is a social worker by profession, and he works eight (8) hours in a day. He agreed that he lives alone, and he stated that when he would be at work, the child would be at school.

That after school the child would go for after care services at the YMCA until 19:00 hours, if need be. The Respondent disagreed that this would amount to institutions managing the child, stating that it is the care that is there. The Respondent also testified that when he left the country, the adopted child Theo was about fifteen years old, and is now twenty years old. That he was already an American citizen when he met the Petitioner, and she was raising Theo at the time. He could however not say whether Theo had been properly raised, but agreed that he is currently studying at university. His evidence was that the Petitioner had stopped him from communicating with Theo.

Over the incident where the Respondent had stated that he had involved the US Embassy in Zambia, it was his testimony that the Petitioner had gone there and explained that she had no phone. Whilst agreeing that he knew where the Petitioner lives, the Respondent stated that it was not possible for the clothes that he had brought for the children to be delivered there.

The Respondent's witness was his brother Wilson Simbaya. This witness explained to the court how he tried to communicate with the Petitioner so that he could go and see the child. That when he reached there the child had answered the phone saying he could go in, but the Petitioner got the phone and said he could not see the child. That thereafter he phoned the Petitioner's sister asking her to talk to the Petitioner so that he could be allowed to see the child, but she had told him that she was away in Livingstone, and would only return

after three months. That when the period elapsed, and he called her, she stated that she was away for a month and she would let him know when he could go there. However she would keep telling him that she was busy.

The Respondents witness testified that thereafter he phoned the Petitioner, asking to go and see the child, and she told him that they did not want to go and see the child, and declined. That even when he called the Petitioner saying that he had money for the child, she had complained that they had not paid school fees for the child, and insisted that he gives her the money and not pay it to the school. That the Petitioner refused to get the money saying she had been having sex with the Respondent in order to have the child, so he was the person who should go there.

He also testified that the Petitioner would say she had no phone, and that the Respondent's witness should call her sister. It was further his evidence that he had called the Petitioner to chart the way forward on the custody of the child after the judgment, but the Petitioner was not cooperative.

When cross examined, the Respondent's witness testified that he had wanted to give the child his own money. He agreed that the Petitioner told him that the child was not going to school, as there was no money. It was his testimony that he did not know if the Respondent had sent any money. That he was with the Respondent when they wanted to agree on the custody of the child. He stated that the Respondent's family members were not allowed to see the child, including their sister.

The Petitioner in response to the application testified that from the time the parties married, everything was okay as the Respondent was responsible financially for everything, and they communicated very well. However from August 2016, the communication broke down, and the business went down as the machine broke down in May, 2016, and was only fixed in December, 2016, as they were waiting for the Respondent to send the spare part. She stated that she was told that the business was being sold, and in December, 2016, rentals

were due. Then in January, 2017, the Respondent sent people to buy the business saying that she would be given K6, 500.00 to pay Chimwemwe's school fees, and that she should surrender all the documentation for the business.

The Petitioner testified that she did not agree that she should be paid after the business started operating. It was also her testimony that she had not received any support from August 2016, and that the children of the family Theo and Chimwemwe are both in school, with Theo at the Copperbelt University, and Chimwemwe is in grade 3. That the house they live in is hers, and her sister contributes rentals to the same, and that the Petitioner works.

She agreed that she had been refusing support for Chimwemwe, as when she first met the Respondent's witness, it was on the street, and he did not even recognize her. That after she approached him, she had told him to make an effort to see the child. The Petitioner still in her testimony stated that the next time the Respondent's witness had called, he was lost, and Chimwemwe had answered the phone. She explained that she had told the Respondent's witness that she would only see him if he brought the child's school fees and food. When she had explained that she had not communicated with the Respondent from August, 2016, the Respondent's witness had told her that there was no problem as she was still a wife, as she had not been divorced.

Her evidence was that the statement had angered her, as he was supposed to help solve the problem. She had told him that how could he bring money for the child when the father to the said child had been away for six years. She agreed that the Respondent's witness had called her sister who works at the Central Statistical Office, and is a field worker. However when her sister returned from work, the Respondent did not go there as he said that he was in Chongwe. On the communication from the Respondent's family, the Plaintiff testified that she communicates with the Respondent's sister, who used to visit them when they lived at the flats.

The Petitioner also agreed that the Respondent's witness had called her after the judgment, and that her sister had told him that there was no one at home, only the dogs, and not that she said that she would set the dogs on him if he went there. He position was that the respondent had not made any effort to see the child since he came, saying that he did not want to communicate with her. As to when the Respondent last had physical contact with Chimwemwe, the Petitioner testified that it was from 30th November, 2011 until 29th October, 2012 when he went back to the United States.

That he had initially left the country after the marriage, and he was therefore not around when the child was born, and she was in a wheelchair for three months after the child was born. She also testified that the Respondent stopped calling the child in August, 2016, and she asked that she be granted custody of the child, as she had lived with him since the time that he was born. She went on to state that she had been there for him spiritually, physically and emotionally and she was the person that he knows.

The Petitioner however stated that she would want the child to know his father and develop a relationship with him, but the Respondent had not been there for him. She proposed that she lives with the child until he is independent, then he could go and live with the Respondent. That when she had googled the address that the Respondent had indicated on the affidavit in support of his application for custody, she had found that it was an institution with apartments for the mentally challenged.

As regards the events surrounding the United States Embassy getting in touch with her, the Petitioner testified that the Consular had called her as she did not have a phone from January to May, 2017, and she was in Ndola working in order to raise money for upkeep. That Chimwemwe was in school at the time. That the Consular had in May, 2017 told her that she had stolen an American citizen, and had said that the child was not in school and was in bad health. However photographs taken of the child established otherwise, and she was advised to be communicating with the Respondent, and the Consular Officer

had even given her a list of lawyers that she could contact to help solve the problems she had with the Respondent.

It was the Petitioner's evidence in cross examination that the Respondent did not communicate with her from August, 2016 until January 2017, and that he would not respond to her text or whats up messages. Even when she told him that Chimwemwe was unwell in October, 2016 he did not respond, but would communicate with her sister in Ndola. She agreed that she did not tell him that she went to Ndola, but attributed this to the fact that he was not communicating her. She denied having blocked the Respondent on whats up.

She further agreed that she left the business saying it was because the Respondent had told her that it was being sold. That there was no money, and a job offer came up in Ndola. Her evidence as to why she was living with a Congolese man in the house was that he was the technician who was working on the machine, and after she had rented his accommodation for one week, she ran out of money, and he moved into the house. She denied that the Congolese man lived in the house for one year.

It was also her evidence that the Respondent stopped communicating with her when he went to South Africa in August, 2016. That during that period he sent clothes for Theo and Chimwemwe, but did not communicate with her. That Sam the person he had sent the clothes with had collected Chimwemwe from his school without the teacher's or authorities knowledge, and took him to the house where he lived, and Chimwemwe walked back to school alone from there. That the teacher when asked, stated that they did not see Chimwemwe being picked, which was risky, and the Petitioner stated that it was the reason that she did not allow anyone to go to his school.

I have considered the application. Section 72 (1) of the Matrimonial Causes Act, No 20 of 2007 empowers the court to make any orders for the custody and education of any children of the family aged under twenty five years old in any proceedings for divorce, nullity of marriage or judicial separation. Section 75 (1)

of the said Matrimonial Causes Act states that when making orders for custody of children, the court shall regard the best interests of the child as the primary consideration.

Therefore the question in this matter is what are the best interests of the child Chimwemwe Simbaya aged eight years, in making an order for his custody? The reasons advanced by the Respondent for making the application is that he has been denied access to the child. He testified that since he came into the country, he has not been allowed to see the child. That he has been providing financial support for the child, and that he had even been running a business with the Petitioner, which had since closed.

The Petitioner in objecting to the application testified that the Respondent has no relationship with the child, as he last saw him when he was two years old. That it would be traumatic to remove the child from him here, and take him to a foreign country by a person he does not know.

The responsibility of taking care of a child lies with both parents. In this case the Petitioner is domiciled here, while the Respondent is an American national living in that country. From the time the child Chimwemwe was born, he has lived with the Petitioner. In the case of **ZANETTA NYENDWA V KENNETH SPOONER 2013 VOL 2 ZR 1**, the Supreme Court reiterated that the best interests of the child is the primary consideration when granting orders for custody of children. In that case the court noted that the background of the children's life that is their sex and age, and the circumstances of the case, such as the character of the parents are paramount considerations that are taken into account when making such orders.

With regard to the sex of the children, the court agreed with the decision in the case of **W V W 1963 3 ALL ER 408** where it was held that ***"there is no principle in custody cases that a boy of eight years should, other things being equal, be with his father; in all cases the paramount consideration is the welfare of the infant and the court must look at the whole***

background to the infant's life, and all the circumstances of the case."

That this view was in the case of ***Re C (A) an infant C V C***.

Thus the question in this case is; taking into account the best interests of Chimwemwe, his background and the circumstances of the case, should he be placed in the Respondent's custody? As already seen the child has lived with his mother from the time that he was born, and he has known only the environment in Zambia, despite the fact that he is an American citizen. Having grown up with his mother he has bonded with her. However the child has a right to know his father and have a relationship with him.

The Respondent testified that he has been denied access to the child from the time he came, which fact was not disputed by the Petitioner. The evidence shows that from 2012 when the Respondent left Zambia, he was only communicating with the child over the phone, and the Petitioner's allegation was that this stopped in August, 2016 when the Respondent stopped communicating with her. The Respondent did not refute this allegation.

The evidence as a whole shows that after the relationship between the Petitioner and Respondent broke down in August, 2016, the acrimony between them has left them fighting over the child Chimwemwe. This has resulted in the Respondent not being in contact with him, there being no money at times for his support which has inevitably affected the child. This is a child of the parties, and in order to enhance his welfare, personal differences ought to be put aside.

Whilst it is true that America would provide better health and education for the child, the evidence as given by the Respondent is that the child would be at school and possibly in after care services once he knocks off from school, as the Respondent works and lives alone. This is not ideal for a child who is still young being aged only eight years, and needs parental guidance and control in order to shape him. It would therefore be in his best interests to remain with

his mother, as she has provided physical and emotional support to him since his birth.

Developing relationships takes time, and if the Respondent were to be allowed custody of the child and take him away immediately, this is likely to have an emotional effect on the child, especially that he last physically saw the Respondent when he was a baby, and could not be said to know him. Both parties are to blame for the failure of contact between Chimwemwe, and the Respondent since August 2016, as the Respondent is on record as having stopped communicating with the child from then, and the Petitioner has denied the Respondent access to the child since he came.

There is need to have a gradual process of reuniting the Respondent, and the child Chimwemwe, so that Chimwemwe's emotional well-being can be preserved. For that reason I order that the Respondent's application for custody of Chimwemwe shall fail. He shall remain in the custody of his mother, the Petitioner, but the Respondent shall have reasonable access to him, and will be at liberty to take him away when the child is on school holidays.

This order is subject to variation, taking into account the need for the child to access better education and health services, as well as his maturity to adjust to a new environment, and especially if the Petitioner will deny the Respondent access to the child. The Respondent shall continue to provide the educational needs of the child, Chimwemwe Simbaya. Each party shall bear their own costs of the proceedings.

DATED THE 6th DAY OF FEBRUARY, 2018

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**