YEUKAI MAUTO nee KARENDA
versus
RESPECT KUDZAI MAUTO
and
THE MASTER OF HIGH COURT N.O
and
PHILEMON MUTUKWA N.O

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 14 March 2024, 9 May 2024

Opposed Matter

T Vhudzijena, for the applicant
M Ndebele, for the 1st respondent

MAXWELL J: This is an application for custody and sole guardianship of a minor child.

Applicant is the biological mother of three minor children subject of this matter. First respondent is the biological father. The minor children were born on 1 October 2009, 30 June 2012 and 1 May 2017, out of a marriage contracted on 3 August 2015. Applicant stated in the founding affidavit that the first respondent and herself started staying together as husband and wife in terms of an unregistered customary law union in 2008. Divorce proceedings are pending and the issue of the custody of the minor children is one of the issues to be determined by the divorce court. She further stated that the application was necessitated by the physical, emotional and psychological abuse on herself and the minor children perpetrated by the first respondent. She also indicated that she moved out of the matrimonial home with the children sometime in 2018 for her safety and also to protect the minor children.

Applicant stated that she rented a room in Dzivarasekwa where she stayed with the minor children and a maid. They had no bedding and were sharing the same blanket. They survived on the little they had and help from her family. First respondent caused the motor vehicle she was

using for school run to be towed away from the guarded car park where she kept it overnight. He put conditions on any provisions or payment of school fees.

In February 2023 she successfully applied for and was granted a Visa to the United Kingdom. She surrendered custody of the three minor children to the first respondent when she migrated to the United Kingdom. The two elder children are in boarding school but the youngest resides with the first respondent on a daily basis. Applicant stated that on 7 April 2023 she video called the youngest child. The child was crying and asking her to come and take her as she no longer wanted to stay with the first respondent. She noticed that the child was crying uncontrollably and had a red eye. On further inquiry she was advised that the child had been beaten by the first respondent. On confronting the first respondent he was not remorseful.

Applicant caused the abuse of the youngest minor child to be reported to the police. Applicant also alleged that the first respondent was not happy with the fact that a report to the police had been made. He vowed to kill applicant whenever she set foot in this country and also that the children would not live to be adults.

The youngest child was moved to a safe location by the social services Department. It also instructed the schools for the older children to release them to the safe house for vacation. First respondent abuses the oldest minor child through WhatsApp audios and messages using obscene, sexual innuendos and vulgar language. The report to the police resulted in first respondent being charged with three counts of ill-treatment and or neglect of the children in terms of the Children's Act [*Chapter 5:06*]. He therefore cannot continue to have custody of the minor children as such custody is not in the best interest of the minor children. Applicant prayed for the sole custody of the minor children.

In response to the application, first respondent raised points *in limine*. The first was that applicant ought not to have proceeded by way of application when it was envisaged that there would be material disputes of facts that cannot be resolved on papers. She ought to have proceeded by way of summons. The second issue was that he was not served with the report from third respondent as provided for by the law. The third issue was that the issue of custody of the children is pending in the divorce proceedings.

On the merits, he denied being abusive to the applicant but conceded that they have had differences. He opined that applicant has a tendency of approaching the courts and lying about

him when it suits her. At one time an application for maintenance was dismissed when he had proved that he was paying fees for the children in time contrary to her averments. First respondent also denied abusing the children. He confirmed refusing to have the children go to the United Kingdom as he had asked applicant to sort out decent accommodation first. He pointed out that if he had been insulting their daughter before applicant travelled, why would applicant leave the children in his custody. In his view the fact that she did is because there was no abuse in the first place. He pointed out that he cannot be stripped of the custody of the children on allegations that are not substantiated. He prayed for the dismissed of the application.

PRELIMINARY POINTS

1. *That the matter is now moot.*

In oral submissions, Mr *Ndebele* raised the first point as that the matter is now moot. He submitted that the Applicant relied on criminal proceedings that were pending where first respondent was facing charges of ill -treatment of the minor children. He submitted that the criminal proceedings went on appeal and the conviction was quashed by the appeal court. Further that after the quashing of the proceedings, first respondent regained custody of the minor children and social welfare surrendered the children to him on 1 March 2024. He stated that the matter is *res judicata*, it has already been decided in HCHCR 6043/23.

In response Mr *Vhudzijena* stated that no evidence on the new developments in the case was submitted. He further submitted that the requirements for *res judicata* were not met. He referred to the case of *Towers v Chitapa* 1996(2) ZLR 261 in which the requirement for *res judicate* are stated as

- The proceedings relied upon must have been between the same parties or their privies.
- The same issue must arise in the subsequent proceedings that was decided upon in the previous proceedings.

Mr *Vhudzijena* submitted that the parties in HCHCR 6043/23 are not the same as *in casu*, as applicant was not a party therein. He also submitted that the subject was not the same as criminal proceedings are not the same as civil proceedings in which custody is sought. Further that the relief sought is not the same as the issue of custody was not decided.

I do not find merit in the point that the matter is *res judicata*. As submitted for applicant, the applicant was not a party in the proceedings and, in addition, the issue of custody was not determined. The requirements for *res judicata* to apply were therefore not met.

(2) *That there are material disputes of facts.*

First respondent pointed out that he vehemently denies being abusive and disputes that applicant was the one taking care of the children in question alone. In response, applicant indicated that first respondent had not disputed the authenticity of the attached picture showing a swollen eye and has not attached any receipts to show that he was either paying school fees or buying groceries. In *Supra Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009(2) ZLR 132 it is stated that a material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. First respondent pointed out that he has always taken care of the children, even when applicant left for the United Kingdom and also that he was paying school fees. I am satisfied that a dispute of fact exists. Applicant did not attach any receipts to show that she was the one paying school fees for the children and meeting their welfare needs. Coupled with the fact what applicant was content to leave the children in the first respondent's custody when she went to the United Kingdom, I am not clear as to whether first respondent was neglecting the children or not. Moreover, applicant did not respond to the issue that an application for maintenance she had made in the lower court was dismissed after the court was satisfied that he has been paying fees in time. In my view, applicant ought to have proceeded by way of summons. The second point *in limine* has merit and I uphold it.

(*3) That the application is irregular and improperly before the court.*

First respondent argued that there is no report from the curator *ad litem* as required by the law. This point lacks merit when regard is had to the record before the court. The curator *ad litem* was appointed by order of court dated 27 September 2023. The order stated that the *curator* would be required to lodge his report with the court seven days after the filing of an application for custody and guardianship. The application was filed on 27 September 2023. The curator *ad litem's* report was received by the Registrar of this court on 3 October 2023. The first respondent's notice of opposition was received by the Registrar on 16 October 2023. By the time he said the curator

ad litem's report was not there, it was already part of the record. I therefore find no merit in this point and dismiss it.

On the basis of the second point *in limine* that I upheld, the application is improperly before the court and is therefore struck off the roll.

I am inclined to point out that even if the application was properly before the court, it would not succeed. It is trite that in dealing with matters involving minor children, both the Guardianship of Minors Act [*Chapter 5:03*] and s 81(2) of the Constitution provide for the supremacy of the best interests of the minor children.

In casu, there are issues raised by the first respondent which applicant, her counsel and the curator *ad litem* did not address. In para 5 of her heads of argument, applicant stated as follows

> "5. In February 2023, the applicant successfully applied and was granted a visa to the United Kingdom. The applicant and first respondent entered into an arrangement that applicant would leave the children with first respondent, establish and setup in the United Kingdom and thereafter take the children to the United Kingdom……"

By agreement, applicant was to take the children to the United Kingdom after she had established and setup in the United Kingdom. I understand that to mean that applicant would first put in place an environment that is conducive to her living with the minor children. Nowhere in her application does she address the issue. She does not say she has now prepared an environment for her to live with the minor children as per agreement. What she does is to shift the basis for wanting custody of the children to the first respondent's character. That does not help her in circumstances where in the first place she surrendered custody to him. Moreover, the alleged abuse and violent tendencies did not start after her departure to the United Kingdom. In her founding affidavit, she stated that the reason she left the matrimonial home was first respondent's behaviour. In para 7.4 she stated that first respondent had been physically, emotionally and psychologically abusive to her and the minor children and this is the reason for the irretrievable breakdown of their marriage, resulting in her issuing out summons for divorce. In para 9.1 she opines that she anticipated that first respondent would follow to the United Kingdom with the children hoping to make it up and thinking that a change of environment would change him. Despite his character, she was content to leave the children in first respondent's custody.

On the other hand, first respondent stated in para 33-34 of his heads of argument.

> "33. The first respondent asked applicant to first sort out decent accommodation. Applicant wants it her way and thus fabricated issues against the first respondent. Under no circumstances should

> the children be allowed to suffer for applicant parent's egocentric interests. The applicant is simply irked that first respondent has put conditions and safeguards on the travel of the children. First respondent wants to ensure that they go to the United Kingdom protected.
> 34. The first respondent raised the following issues that, the applicant will work long hours and at times at night. Who will be with the children when she handles her long shift hours? Who will the children be with overnight when she is away? How will the children spend their weekends if the applicant is at work? The youngest is five (5) years old and needs attention."

The questions asked by the first respondent, if answered, would have answered whether applicant had "established and set up" in the United Kingdom. The answer was to come from either applicant herself or the curator *ad litem*. Applicant having not addressed that issue, the *curator ad litem* ought to have addressed it in his report. From the report, it is apparent that the *curator ad litem* simply analyzed the application and the supporting documentary evidence. In my view, that falls short of what *curator ad litem* is expected to do. His report is supposed to be an investigative one, where he states the factual findings that assist the court to make an informed decision. See in *Re Alice Maenzanise* HH 39/20. Rule 61(4) of SI 202/21 is clear that after *curator ad litem* is appointed and served with a chamber application in relation to a minor child, he is to conduct such investigation as may be necessary and prepare a report. There is no reference to an investigation having been done. There are no factual findings pertaining to applicant and first respondent's living conditions.

Considering that the issue of custody is one of the issues to be determined in the divorce action, I am of the view that the issues not addressed in this application will be canvassed therein. It is therefore in the interest of justice that the issue be left for determination by the divorce court.

The following order is therefore appropriate.

The application be and is hereby struck off the roll with costs.

Mtetwa Nyambirai, applicant's legal practitioners
Muchengeti & Company, first respondent's legal practitioners