

ROY NYABVURE
versus
HILDA KIRIMI

AND

HILDA KIRIMI
versus
ROY NYABVURE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 30 January 2015 and 11 February 2015

CONSOLIDATED URGENT CHAMBER APPLICATIONS

S Rugwaro, for the applicant
B Marowa, for the respondent

TAGU J: These are Consolidated Urgent Chamber Applications. In the case of *Roy Nyabvure v Hilda Kirimi* HC 778/15 the applicant, (respondent in HC 795) is seeking a provisional order in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms.

That the Respondent be and is hereby directed to, forthwith and on every school day punctually take the children TADIWANASHE NYABVURE, TAPIWANASHE NYABVURE and TENDEKAI NYABVURE to Avondale Primary School for their lessons.

That the Respondent pays the costs of this Application

INTERIM RELIEF GRANTED

Pending the return date of this matter the Applicant is granted the following relief;

That the respondent is hereby ordered and directed to forthwith and on every subsequent school day take the minor children namely, TAPIWASNASHENYABVURE, TADIWANASHENYABVURE and TENDEKAI NYABVURE to Avondale Primary school for their lessons.

SERVICE OF PROVISIONAL ORDER

Service of this provisional order is to be effected by the Sheriff of HARARE”

On the other hand, in the case of *Hilda Kirimi v Roy Nyabvure* HC 795/15 the applicant, (respondent in HC 778/15) is seeking a provisional order in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court, if any, why a final order should not be made in the following terms:-

1. The Respondent shall continue to pay termly school fees at Twin Rivers Primary School for the two minor children namely Tapiwanshe and TadiwanasheNyabvure until both of them complete their primary education.
2. The Respondent shall continue to pay termly school fees at Elite Academy for TendekaiNyabvure until she completes her early childhood development course and thereafter Respondent shall pay school fees for Tendekai at any Primary School chosen by Applicant.
3. The alleged enrolment of the two minor children at Avondale Primary School from January 2015 be and is hereby declared null and void and of no legal consequence.
4. Respondent shall pay the costs of this Application at the rate of Attorney and client scale.

INTERIM RELIEF GRANTED

It is hereby ordered that:-

Pending confirmation of the Final Order Sought, Applicant is granted the following relief:-

1. The Respondent be and is hereby ordered to pay school fees for the minor children at Twin Rivers Primary School and Elite Academy within 48 hours of this order.
2. The Respondent be and is hereby interdicted with immediate effect from interfering with or obstructing the minor children's class attendance at Twin Rivers Primary School and Elite Academy.
3. The Respondent be and is hereby ordered with immediate effect to withdraw the notice to transfer the minor children from Twin Rivers Primary School.
4. Respondent be interdicted from removing the minor children from class at Twin Rivers Primary School and Elite Academy without Applicant's written consent.
5. Respondent shall pay the costs of this application at Attorney and client scale.

SERVICE

1. Service of this Provisional Order shall be effected by the Sheriff of Zimbabwe, or an Additional Sheriff or any member of the Zimbabwe Republic Police or by the Applicant's legal practitioners upon the Respondent.”

The undisputed facts in these applications are that the parties lived as husband and wife in an unregistered customary law union since December 2000. The union was blessed with three minor children namely, Tapiwanashe aged 10 years, Tadiwanashe aged 7 years and TendekaiNyabvure aged 4 years. The parties separated in 2011. On separation the minor children remained in the custody of the mother, Hilda Kirimi. The mother obtained a maintenance order which directed the father (Roy Nyabvure) to pay a monthly sum of \$ 300.00 and school fees for Tapiwanashe and Tadiwanashe who were enrolled at Twin Rivers Private School. The minor Tendekai Nyabvure was then not at school. Currently Tapiwanashe

is in grade 5M whilst Tadiwanashe is in grade 3N at Twin Rivers Primary School. Tendekai is now enrolled at Elite Academy Nursery School.

At the time of the lodging of these applications which were filed simultaneously, without the knowledge of the other, on 28 January 2015, none of the children were attending school. Each party is blaming the other for the non- attendance.

According to Roy Nyabvure, due to economic hardships and the fact that his employer, the City of Harare is erratic in payment of his salary he found himself in a position whereby he could not meet the fees obligations to the extent that he has always been in arrears. Each child's termly fees are \$1600.00 which is hardly enough after deducting the \$300.00 for maintenance. He found it necessary to remove the children from a private school to a public school whose facilities are comparable and fees affordable. He advised the mother to choose any other public school of her choice. The mother, through her lawyers objected to the idea citing that government schools are inferior to Twin Rivers Private School and asked him to obtain a court order. Without a court order he secured vacancies for Tapiwanashe and Tadiwanashe at Avondale Primary School. He further, secured a vacancy for Tendekai at Avondale Infant School for E.C.D. He advised the mother of the developments. Despite writing to the mother, and advising her of the fact that he had already paid fees at Avondale Primary School, the mother remained intransigent and refused to take the children to Avondale Primary School. His contention is that the educational welfare of the children is being affected by the ego of the mother. He argued further that the mother's actions are actuated by malice. As a result the children are no longer going to school. He has no other remedy hence he brought this application on an urgent basis to compel the mother to take the children to Avondale Primary School. In support of his application he produced correspondences, proof of payment of fees as well as past Grade 7 Results Analysis showing that Avondale Primary School is rated better than Twin Rivers Private School.

The mother, Hilda Kirimi, is of a contrary view. Her argument is that it was on 14 January 2015, a few days after school opening that the father, through his lawyers wrote to her advising her that the children had been enrolled at Avondale Primary School without her consent and knowledge. On 16 of January 2015 the father threatened to forcefully take the children from her and force them into a school which has no place open for them, an act which might cause prejudice, suffering and trauma to the minor children. On 22 January 2015, she received a letter from Avondale Primary School Head stating that Avondale had

places for Tapiwanashe and Tadiwanashe on condition that the father complied with certain requirements. The offer was open until Thursday 22 January 2015. The offer to accept the children at Avondale School has since lapsed. According to her the minor children have been sent out of class for failure by the father to pay school fees at their current school, Twin Rivers Primary and they are traumatised by this development. Further, she argued that in terms of Clause 13 of the Agreement between the two minor children and Twin Rivers School, the father should have given the school a full term's written notice of intention to withdraw the children from school or pay the term's fees in lieu of notice. Since no notice was given by her as the sole Custodian and Guardian parent in accordance with clause 13 the children are still enrolled at Twin Rivers Primary School. Her contention is that it is not in the best interests of the children to be transferred to Avondale Primary School from Twin Rivers Primary School. The youngest child Tendekai Nyabvure, should equally not be transferred from Elite Academy where she enrolled her to Avondale Infant School. She therefore approached this court on an urgent basis because the children's rights to education are being violated by the father who just wants to grab the children from their current schools to another school without meeting the required terms of a proper transfer and enrolment, and also without her consent as the sole Custodian and Guardian of the minor children. She feels that such a transfer would also not serve the best interests of the children.

To support her application she attached a copy of the contract she signed with Twin Rivers Primary School, letter from the Headmaster of Avondale Primary School, receipts from Elite Academy as well as other correspondences from the father's lawyers.

In *casu*, it is not in dispute that both applications are urgent. They are urgent because both applications concern the rights and interests of children. Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian. This is enshrined in the Constitution of Zimbabwe. The right that is at the centre of the dispute is the right to education. As we speak the children in question are not attending school. This reminds me of the proverbial saying that when two Elephants fight, it is the grass that suffers. In this case both parents opted for schools of their own choice for their own reasons. As the parents fight to take children to schools of their choice, the children dropped out of school. They are torn between the two choices. This resulted in a breach of their fundamental right as enshrined in the Constitution of Zimbabwe under s 81 (1) (f) which says-

“81 Rights of children

- (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –
 - (a).....
 - (b).....
 - (c).....
 - (d).....
 - (e).....
 - (f) to education, health care services, nutrition and shelter;
.....”

In trying to resolve the dispute in this case the court is empowered in terms of section 81(2) of the Constitution which says “a child’s best interests are paramount in every matter concerning the child.”

It is common cause that the three minor children in this case were born out wedlock. The parents separated four years ago. The children remained in the Custody of the mother. The position of the law in relation to the rights of the custodian parent is very clear. The mother of a child born out of wedlock has the sole rights of custody and guardianship. See *D v M* 1986 (1) ZLR 188, *Cruth v Manual* 1999 (1) ZLR 7(S) and *Katedza v Chunga* 2003 (1) ZLR 470 (H).

The mother in this case, as the custodian parent has certain rights and powers in the exercise of such custody. The rights of the custodian parent were clearly stated in the cases of *Hughson and Another v Greyling* 2000 (1) ZLR 434 (H) and *Makuni v Makuni* 2001 (1) ZLR 189 (H) quoted with approval in *Berens v Berens* HH 28-09. In the *Makuni v Makuni (supra)* the learned Judge, JUSTICE GOWORA, quoting from *Boberg Family Law* at p 191 had this to say:

“An award of custody to a mother entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary daily life of the child – shelter, nourishment and the training of the mind....The child ...passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body....A custodian parent has therefore the right to regulate the life of the child, determining with whom he should or should not associate, how he should be educated, what religious training he should receive and how his health should be cared for. The non- custodian parent has no right to interfere in these matters, though he may petition the court to do so if it appears that the custodian parent has exercised his discretion in a manner contrary to the interests of the child or in conflict with an order of court. Otherwise, he is confined to his right of access to the child”.

In *casu*, in his founding affidavit, the father, Mr Roy Nyabvure did not allege that the custodian parent did not exercise the right of control in the best interests of the children, warranting the intervention of this court. In fact, it is him who is interfering with the education of the children. It is him who is moving the children away from the educational environment which the children have been accustomed to for the past five years. He wants to move them to a new environment which they are not accustomed to. In deciding to move

them he is taking into account his own interests, that is to say, his inability to continue to pay fees. His failure, if ever it is there has nothing to do with the custodian parent. The only sin the custodian parent is accused of having committed is refusal to give in to his demands. He unilaterally removed the children from their present schools without the consent and knowledge of the custodian parent. To make matters worse he did not move them to any of the schools which he had initially suggested.

The question that this court has to decide is whether or not the removal of the children is in their best interest. The father raised two reasons. The first one being that the standard of education at Twin Rivers is lower than that at Avondale Primary School. One would wonder when he realised that when the eldest child has been at Twin Rivers for the past five years, and the second has been there for the past three years. As the record shows he is now staying with another wife elsewhere. Why did he not notice the substandard level of education when he was staying with the mother of the children? When he finally decided to move them why not get the consent of the custodian parent? As I outlined in the case authorities above his right is only limited to access only.

In my view, and on this point the mother's refusal to move the children cannot be said in any manner to be detrimental to the interests of the children. The other problem is that the father, as confirmed by the letter written by the Head of Avondale School, has not complied with the requirements for the acceptance of these children who are not even appearing in the School's registers at Avondale Primary School. He also has not secured transfer certificates from the schools he wants to remove them. What guarantee is there that the children will be accepted? If this court were to order the mother to take the children, it would be tantamount to forcing the releasing and accepting Schools to transfer and accept the children without transfer certificates.

The second issue raised by the father is that he cannot afford the fees. The basis being that his employer is erratic in payment of salary. What comes to mind is that nothing has really changed financially. What is not stable are the pay dates. When the pay date comes he gets his full salary. The reality on the ground is that even public employees who are employed by public institutions are experiencing the same erratic payment of salaries. There is nothing to stop him from paying as and when it comes. From the submission made on behalf of the mother the father is a senior employee of the City of Harare. He is a propertied person who has other means of earning extra income. If indeed he was in arrears as he wanted the court to

believe, surely he should have produced such evidence. The father, in these proceedings was duly represented by a lawyer. He is able to raise legal fees at the expense of his children, but claims cannot pay school fees. It has not been stated that the lawyer is working for charity. This is highly unreasonable.

In my view, the children are now in settled and comfortable circumstances at their respective schools. What is only required is for their fees to be paid forthwith so that they continue with their education where they are currently enrolled. Any further delay in the payment of fees would be a violation of their constitutional rights. If there is a need to transfer them this has to be done with the consent of the mother, and in an orderly manner. To move them to another school so abruptly would not be in their best interests.

It is accordingly ordered that:

1. The application in HC778/15, in light of the foregoing, is dismissed.
2. The applicant in HC 795/15, in my view, is entitled to the relief that she seeks on the following terms-

INTERIM RELIEF GRANTED

Pending confirmation of the Final Order Sought, Applicant is granted the following relief:-

1. The Respondent be and is hereby ordered to pay school fees for the minor children at Twin Rivers Primary School and Elite Academy within 48 hours of this order.
2. The respondent be is hereby interdicted with immediate effect, from interfering with or obstructing the minor children's class attendance at Twin Rivers Primary School and Elite Academy.
3. The Respondent be and is hereby ordered with immediate effect to withdraw the notice to transfer the minor children from Twin Rivers Primary School.
4. The respondent be interdicted from removing the minor children from class at Twin Rivers Primary School and Elite Academy without the applicant's written consent.
5. Respondent shall pay the costs of this application at Attorney and client scale.

SERVICE

1. Service of this Provisional Order shall be effected by the Sheriff of Zimbabwe, or an

Additional Sheriff or any member of the Zimbabwe Republic Police or by the Applicant's legal practitioners upon the Respondent.

S Rugwaro & Associates, applicant's legal practitioners
Mugwadi & Associates, respondent's legal practitioners