JOHN NYAKUDANGA
versus
CHIPO HOVE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE; 24, 26 January & 16 February 2024

Urgent Chamber Application

Mr *S Mpofu*, for the applicant
Ms *F Ndou*, for the respondent

MUCHAWA J: This is an urgent chamber application in which the provisional order sought has the following terms: -

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. The applicant be and is hereby awarded custody of Tinotenda Nyakudanga born 6 May 2005, Nellia Nyakudanga born 4 April 2011, Nokutenda Nyakudanga born 4 August 2014 and Bothwell Nyakudanga born 4 June 2016.
> 2. Respondent be and is hereby awarded access to the minor children every alternating school holiday and public holidays. Respondent shall enjoy access to the children any other times not specifically mentioned herein in consultation with the applicant.
>
> INTERIM RELIEF GRANTED
> Pending determination of this matter, the applicant is granted the following:
> 1. Pending the return date, the respondent be and is hereby ordered to return Tinotenda Nyakudanga, Nellia Nyakudanga, Nokutenda Nyakudanga and Bothwell Nyakudanga to the custody of the applicant within 48 hours issuance of this order pending determination a final custody order by this court (sic).
> 2. The respondent be and is hereby ordered to return birth certificates belonging to Tinotenda Nyakudanga, Nellia Nyakudanga, Nokutenda Nyakudanga and Bothwell Nyakudanga to the applicant within 48 hours of issuance of this order pending determination a final custody order by this court (sic).
> 3. Failing which return the Sheriff of the High Court and or his authorized agent with the aid of the Zimbabwe Republic Police where necessary are authorized to take from the respondent Tinotenda Nyakudanga born 6 May 2005, Nellia Nyakudanga born 4 April 2011, Nokutenda Nyakudanga born 4 August 2014, Bothwell Nyakudanga born 4 June 2016 and birth certificates for handing over to the applicant.
> 4. Respondent shall pay costs of suit."

Background facts

The parties were married in an unregistered customary law union sometime in 2004. The union was blessed with the children whose custody is in issue and also Nenyasha Nyakudanga who was born on 1 August 2021.

The unregistered custody law union was duly dissolved and such dissolution was confirmed before the chief in October 2023.

The applicant's submissions

It is applicant's version that upon dissolution of the marriage, he retained custody of the four older children whilst the respondent had custody of the youngest child. He alleges that during the December 2023 festive season, the respondent requested to take the children to her home in Chivi for the holidays which request was granted. Upon the opening of school in January 2024 the children were not returned into the applicant's custody. He impugns her behaviour as fraudulent misrepresentation as she never discussed the variation of the custody arrangement with him. He claims that the children have been safe whilst in his custody and they were withdrawn from the schools they were attending without due process being followed. He fears that the children are not attending school.

The children had been enrolled at Mount Mary High School and Star Day Primary School. Due to fears of the children's non attendance at school, the applicant feels their right to education is being violated especially in light of the new learning syllabuses with the Continuous Assessment of Learning Activities (CALA).

Tinotenda, a boy,now aged 18 years is said to be due to write his A Level Exams at the end of the year and that he should not change schools at this late stage as this would negatively disrupt his learning. Further, it is averred that he cannot be separated from his siblings as the children are used to staying together. It is averred that he needs his father's guidance as he transitions into adulthood.

It is the applicant's position that the respondent is using the children as pawns in the fierce fight against him because of the divorce and she has no real interest in having custody of the children. Her aim is said to be to frustrate the applicant.

Furthermore, the applicant submits that the children are already traumatized by the divorce of their parents and the rushed transfer to Masvingo will exacerbate this especially as they are out

of school. The applicant states that the respondent's rural home is not accommodative enough of all five of his children.

It is averred that his sons require his love and nurturing as a father.

Nellia Nyakudanga who is a girl aged 13 years old and in Grade 7 and due to write her Zimsec exams end of this year is said to be adversely affected by the transfer as she is already registered with Star Day Primary School as an examination centre and a transfer would be cumbersome. Her learning would be disrupted and this would affect her grades especially with the CALA syllabus.

Nokutenda Nyakudanga is a girl aged 12 years old and enrolled at Star Day Primary School in grade 6. Her grades too would be affected, it is stated.

Bothwell Nyakudanga is a boy aged 7 years old and in grade 7. Separating him from his siblings is alleged to not be in his best interests as they need to guide each other in their schooling. He is said to have done his preparatory school at same environment would be good for him.

Nenyasha Nyakudanga is a girl aged 3 years old and the applicant had consented to the respondent having custody due to her age.

The applicant prays for the provisional order set out above.

The respondent's submissions

The respondent questioned the urgency of this matter citing that she has always had custody of the children on account of case HCH 6813/23 in which the applicant had sued for property sharing, custody and maintenance of the same minor children which action she defended leading to the applicant withdrawing the matter.

She also stated that the applicant should approach the Magistrate's Court in seeking custody so that a proper inquiry is conducted instead of approaching this court on an urgent basis. It was prayed that the matter be dismissed with costs on a higher scale.

It is averred that Tinotenda Nyakudanga who is now 18 years old, is no longer a minor and should not be the subject of this application.

The respondent denies that upon their separation custody of the minor children ever vested in the applicant. She avers that upon separation, the applicant moved out of their matrimonial home and is now staying in Dzivarasekwa, Harare with another woman. According to her, she is the one who remained at the matrimonial home with all the children including the major Tinotenda who had been enrolled at boarding school.

The three other children enrolled at Star Day Primary School are said to have been attending school at Mutawatawa in Uzumba Maramba Pfungwe where a house was rented for them and they were in the care of the respondent's sister Tracy Hove. The matrimonial home was at Kufara business centre and the children would go there for holidays. It was the youngest child Nenyasha whom she stayed with at the matrimonial home.

The respondent states that the applicant is an abusive man who would harass her emotionally and physically. She denies the applicant's allegations that she stole from the shops upon separation though a report was made and a criminal matter is pending before the Mutawatawa Magistrates Court. She however, states that she had been barred from approaching the stores. Protection orders in her favour are attached to the opposing affidavit.

It is the applicant position that the children were always in her custody. She says in December all she did was tell the applicant that she was travelling with the children to Masvingo for the Christmas holidays and she did so with his blessing. Upon the opening of schools, she says she transferred the children to a day school named Rutedze Primary in Chivi where she is now staying after relocating from the matrimonial home at Kafura business centre.

According to the respondent, the applicant was neglecting the children at Mutawatawa as their school fees and rentals went unpaid. It is alleged too that the children were starving and she could not let her children go through this so she enrolled them at schools where she is now staying so that she can take care of them and monitor them since they are all very young. She too thinks that the applicant is using the children to settle scores with her and does not have their best interests at heart.

The respondent has attached proof of enrolment of the minor children at Rutedze Primary from the school authorities as well as enrolment of Tinotenda Nyakudanga at Mudadisi High School in Chivi.

Furthermore, the respondent has attached summons in case number HCH 6813/23 in which applicant was seeking custody of the minor children among other things. This matter was subsequently withdrawn.

Regarding the birth certificates, the respondent says that these have always been in her custody.

Due to the assertions of the respondent, the applicant is averred to be not a fit and proper person to cater for the best interests of the children. It is prayed that the application be dismissed with costs on a higher scale.

The applicant's answering affidavit

In the answering affidavit, the applicant insists that the matter is urgent.

The summons which was withdrawn which included a claim for custody are said to have been issued for the sake of confirming the already existing custodial arrangement. The withdrawal was said to have been because of non-compliance with some procedural requirements. Further, he claims that the parties had then settled the question of custody.

He reiterates that the respondent has grabbed custody of the children to use that as a leverage for the unresolved property distribution issue.

He says the children continued to reside at the matrimonial home whilst attending school.

On jurisdiction, it is stated that the High Court, as upper guardian of minor children has jurisdiction to deal with this matter. He also says that due to the cross jurisdictional implications of the matter, as the children are in Masvingo and he is in Mutawatawa, it is fitting for the High Court to deal with the matter.

The applicant insists that this court should deal with Tinotenda's custody as he is not self-sustaining yet.

He denies staying in Dzivarasekwa and abandoning his children. He denies barring the respondent from the shops. He persists with the claim that the respondent stole some goods from the shop leading to her prosecution for theft.

On the protection orders, the applicant dismisses these as a smokescreen to cast serious aspersions on his character and standing.

He insists that his children were removed without any consultation. He claims he never moved out of the matrimonial home where he is currently staying and operating the Nyakudanga shops whilst managing other shops.

The applicant called for the court to consider evidence from the children to establish, *interalia* that there were no school fees and school uniform arrears. A letter from the school is attached.

The children's current living arrangements are described as disheartening and troublesome. He claims that the children are staying at Madzivadondo growth point by themselves as it is closer to the schools they were transferred to. It is alleged that they have no school uniforms for the new schools and are still wearing those of the old school, have no stationery or basic food and sustenance.

There is proof from Rutedze Primary School that the children were enrolled without transfer letters from their prior school. He states he has established that the children are in the custody of their grandmother and respondent's brother. The children are said to have been enrolled on 15 January 2024. It is further alleged that the children are travelling long distances to get to school and should not remain staying at the growth point where all forms of violations can be perpetrated against them.

Whether the matter is urgent

At the hearing I dismissed the point *in limine* raised that the matter is not urgent on the basis of the matter of *Chiwenga* v *Mubaiwa* SC 86/20 at p 9 wherein it was held as follows:

> "It is common knowledge that minor children of persons under the special care of the High Court as their upper guardian. The same applies to spoliation a remedy designed to avert self help in a democratic civilized society. The remedy forbids the law of the jungle where survival of the fittest reigns supreme. Thus, the courts will quickly come to the aide of the vulnerable and weak to restore custody and possession where one is unlawfully deprived of the same by the strong and valiant."

Further, the case of *Document Support Centre* v *Mapuvire* 2000(1) ZLR 232 makes clear that in cases of the interests of minor children the court should act urgently. It was held as follows:

> "Some actions, by their very nature demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts acting shifty where such interests are concerned is in my view clear. Failure to act in these circumstances will result in the loss of life or liberty of individuals or the infliction of irreversible physical or psychological harm on children."

I found this matter to be urgent, therefore.

Whether the matter is properly before this court.

I drew the attention of the parties to the matter of *Chiwenga* v *Mubaiwa supra* and gave them an opportunity to make submissions on whether a matter relating to custody of minor children was property brought before the court by way of an urgent chamber application.

In that case it was held upon questioning the jurisdiction of the High Court to entertain the issue of custody given that s 5 of the Guardianship of Minors Act [*Chapter 5:08*] specifically confers jurisdiction on the children's court in matters of this nature; that the High Court as the upper guardian of all minors has overall jurisdiction at every stage during the child's minority. The provisions of the Guardianship of Minors Act were said not to expressly oust the jurisdiction on the High Court. The High Court retains its inherent jurisdiction to hear and determine such matters at its discretion.

The Honourable GWAUNZA DCJ, however, distinguished situations in which proceedings before a court would be a nullity and if so, it would be stripped of its jurisdiction over the matter. In such a case it cannot use the supremacy of the best interests of the children to found jurisdiction to grant spoliatory relief.

The point is made that children are not property that can be the subject of a spoilation order which is why the law maker has laid out elaborate laws and procedures for the regulation of issues to do with custody and guardianship of children where their parents begin to live apart. This was found in s 5 of the Guardianship of Minors Act. It was therefore held that there was no call for the respondent to reach beyond and outside this law in order to found a claim for custody of her children.

The claim for custody under spoliation was found to be misguided. The respondent's lawyers were said to have adopted a completely wrong procedure which rendered the proceedings nullity *ab initio*. The court even went on to say that the respondent, for no good reason and at the instance of her lawyers, claimed custody of her children under the non-existent and inapplicable law of "provisional" spoilation.

The applicant's counsel filed submissions on time on 25 of January 2024. There was no filing of same by the respondent's counsel on even date despite relentless follow up. By the time of starting the writing of this judgment, none had been filed. These were only filed on 9 February 2024. Such conduct is unacceptable especially when there is no attempt to communicate with the court.

It is only because this is a matter relating to the best interests of minor children and the point in issue had been drawn to the parties by the court, that I will consider these submissions.

The applicant's submissions went like this: that the *Chiwenga* v *Mubaiwa* case was decided before the amendment to the guardianship of Minors Act in 2022 and then the law gave the mother rights to remove the children with her or retain them in her custody. That s 3 provided as follows:

> "(1)Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section four of this section or by a superior court such as is referred to in subparagraph (ii) of ……."

It was argued that this was an automatic remedy at law which gave immediate and urgent relief and is the basis for the ratio decidendi in the *Chiwenga* v *Mubaiwa*. In that case it was held as follows:

> "Thus, the section automatically confers custody of the minor children on the respondent by operation of law when she began to live apart from the appellant. There is therefore no truth in respondent's averment in para 10.3 of her founding affidavit that she had no alternative remedy. Section 5 of the Act clearly provides a less onerous remedy heavily weighted in her favour. It was therefore remiss and the height of folly for counsel for the respondent to rely on the inappropriate law of "provisional" spoliation to claim custody of the minor children."

The case made is that the Supreme Court reached the above position because, then, there was immediate relief clearly spelt out giving the mother automatic custody. Where one had this remedy available as did Mubaiwa in *Chiwenga* v *Mubaiwa supra*, then the court was correct to call the application for a provisional spoliation to regain custody of children, inappropriate.

This relief, it is contended has been taken away by the amendment to the Guardianship of Minors Act which has now removed vesting of automatic custody in the mother and now provides as follows:

> "Where either of the parents of a minor leaves the other and such parents commence to live apart, either of the parents of that minor shall have sole custody of that minor until an order regulating the custody of that minor is made under section four of this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection 7."

Whilst noting the recourse in s 5(2) which provides that where the other parent removes the minor from the custody of the custodial parent or otherwise denies the custodial parent custody of the minor child one should approach the children's court for an order declaring that he or she has sole custody and ordering return of the child, the question is still posed about what should happen when a parent is deprived of custody. It is postulated that the recourse is to approach this

court as the upper guardian as it affords urgent relief and the question of custody itself will be dealt with on the return day.

Further, it is averred that the orders sought herein are not spoliatory. They simply seek compliance with the law-statute and so do not fall under common law.

It is further contended that this court should uphold the rule of law and stop vigilante justice, that is, having the respondent take the law into her own hands. The court was urged to do justice between man and man. It is suggested that the respondent can be ordered not to interfere with the exercise of custody rights of the applicant and to restore custody of the minor children to the applicant.

In her supplementary submissions, the respondent insists that the applicant is seeking restoration of custody which he never possessed in the first place upon separation of the parties. The order sought on an interim basis is impugned as a final order disguised as a provisional order whose effect, if granted would be to give custody to the applicant without a proper inquiry having been conducted as envisaged by the Guardianship of Minors Act.

This form of application is said to be unsuitable to fully explore the best interests of the minor children.

It is argued, in support of the *Chiwenga* v *Mubaiwa supra* case, that an application of this nature is no different from an application for a spoliation order where an applicant simply seeks to be restored possession of a thing he possesses after he has been deprived of same. Such a procedure is said to defeat the whole essence of delving into the best interests of the minor children.

Furthermore, it is averred, on the strength of *Chiwenga* v *Mubaiwa supra,* that an interdict cannot be founded on a "provisional" spoliation order as such an application becomes a nullity and is incapable of being dealt with on the papers and the proper procedure is to approach the children's court in terms of s 5 of the Guardianship of Minors Act so that a substantive determination is done on the merits after hearing evidence from both parties.

In resolving this matter, I wish to start off by dealing with an issue discussed in *Chiwenga* v *Mubaiwa supra*. The court went to great lengths to discuss that lawyers should not seek a final order disguised as a provisional order. Reference is made to the case of *Blue Ranges Estates (Pvt) Ltd* v *Muduvuri and Anor* 2009(1) ZLR 368. The applicable test is laid out as follows:

> "To determine the matter, one has to look at the nature of the order and its cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final

> determination on the issues between the parties in respect of which relief is sought from the court……For an order to have the effects of an interim relief, it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceedings,……..The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge."

In this case, if the applicant is granted the interim relief sought, he will certainly have the cause of action of custody of the children determined to finality. There will be no reason to reappear again to seek confirmation of what he already has. The interim relief sought is indeed the primary relief sought. The court itself will be *functus officio* once the primary relief sought is granted. See *Jamal Ahmed and 2 ors* v *Russel Goreraza and 2 ors* HH 402/17.

Though it was argued that what the applicant seeks is upholding of the law and not a spoliation order, the arguments advanced are self-defeating. This is because the same arguments advanced by the applicant fit like a glove for spoliation. See *Everton Masau* v *Sheila Mabasa and Anor* HH 393/17 where it was held that:

> "Spoliation is a possessory remedy. It is only possession of a party that is protected, the rationale being that no man is allowed to take the law into his own hands. To allow this would render this planet unliveable."

The statute allegedly relied on by applicant was not pointed to. The sum total of his averments is that he was in peaceful and undisturbed possession of the minor children when the respondent removed them with his consent just for the holidays but failed to return them upon schools opening. On the other hand, the respondent denies that applicant had custody of the children as he alleges. Such a dispute of fact is material and calls for resolution.

The Constitution of Zimbabwe in s 81(2) provides that a child's best interests are paramount in every matter concerning the child. Section 81(3) charges that children are entitled to adequate protection by the courts in particular by the High Court as their upper guardian.

Commenting on this in *Chiwenga* v *Mubaiwa,* Honourable GWAUNZA DCJ stated.

> "The issue concerning the custody of the three minor children however, calls for further comment. This is in view of the supremacy of the doctrine of the best interests of minor children *vis a vis* the incompetent procedure adopted by the respondent in seeking custody of her children."

The question put forward by the applicant in his submissions was this: "What must happen when a custodial parent (whether mother or father) has been deprived of such custody?"

The Legislature has aptly answered this question. Section 5 provides as follows:

> "(1) Where either of the parents of a minor leaves the other and such parents commence to live apart, either of the parents of that minor shall have custody of that minor until an order relating the custody of that minor is made under section four or this section or by a superior court such as referred to in subparagraph (ii) of paragraph (a) of subsection (7).
> (2) Where –
> (a) the parent of a minor ("the custodial parent") has the sole custody of that minor in terms of subsection (1) and (b) the other parent or some other person removes the minor from the custody of the custodial parent or otherwise denies the custodial parent the custody of the minor;
> The custodial parent may apply to the children's court for an order declaring that he or she has the sole custody of that minor in terms of subsection (1) and upon such application, the children's court may make an order declaring that the custodial parent has the sole custody of that minor and if necessary, directing the other parent or, as the case may be, the other person to return that minor to the custodial parent."

This provision is not affected at all by the amendment removing vesting of custody automatically in the mother, as happened in the past.

GWAUNZA DCJ'S comments are still apt, that the law maker has laid out elaborate laws and procedures for the regulation of issues to do with custody and guardianship of minors.

The procedure before the children's court is laid out in s 5 of the Children's Act [*Chapter 5:07*]. It is best suited to eliciting the best interests of any minor children as an inquiry is held. The court may permit evidence to be given to the court be way of affidavit or report and permit the child to express his views. It may also request a person to appear before the court and give oral evidence and be cross examined. Expert reports such as those of probation officers are also useful before that court.

Proceeding in the circumstances by way of an urgent application for spoliation relief would, in my opinion be a gross undercutting of a proper exploration of the principle of the best interests of the minor children. As regards the factors that a court should take into account in determining the meaning of "best interests" an almost exhaustive list is given in *Mcall* v *Mcall* 1994 (3) SA 201. They are listed as: -

> "(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
> (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
> (c) the ability of the parent to communicate with the child and the parents' insight into, understanding of, and sensitivity of the child's feelings;
> (d) the capacity and disposition of the parent to give the child the guidance which he requires;
> (e) the ability of the parent to provide for the basic physical needs of the child, the so called 'creature comforts' such as food, clothing, housing and the other material needs – generally speaking the provision of economic security;
> (f) The ability of the parent to provide for the educational well being and security of the child, both religious and secular;

(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
(h) The mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing, environment, having regard to the desirability of maintaining the *status quo*;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same sex matching;
(m) Any other factor which is relevant to the particular case with which the court is concerned."

I did ask to interview the children, which I did. This did not do much for a proper establishment of who is best suited to cater for the best interests of the children given how extensive the factors to be considered are and the varying versions of the parties. In the circumstances of this case where the relief sought is improper and the application therefore a nullity, and proper recourse being available before the children's court which ensures that the best interests of the children, as provided by the constitution are taken care of, I decline jurisdiction.

In declining jurisdiction, I believe that I am exercising my role as the upper guardian of the minor children so as to ensure that I am not confined to simply looking at the requirements for spoliation, but their best interests are fully considered.

As noted in *Chiwenga v Mubaiwa supra*, spoliation is a remedy to recover property and not human beings.

Costs follow the cause.

Accordingly, I order as follows.

1. The court declines jurisdiction to determine the matter.
2. The applicant to pay the costs of suit.

Munangati & Associates, applicant's legal practitioners
Maposa & Ndomene, respondent's legal practitioners