

RUMBIDZAI GONONGONO

Versus

ANDREW KATIVU

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 25 OCTOBER 2023 AND 7 DECEMBER 2023

Opposed Matter

MOYO J: This is an application for a declaratur in terms of section 14 of the High Court Act wherein the applicant seeks an order as follows:-

It be and is hereby declared that:-

- (1) The order of the Magistrates Court sitting at Victoria Falls on the 31st of October 2018 awarding custody of the minor children namely, Praise Kativhu, a girl born 11th February 2011, and Prunella Kativhu a girl born on the 1st of May 2015 to respondent is invalid.
- (2) That consequential relief be granted as follows:-

The order of the High Court in HC 1341/16 is extant and that the Sheriff is ordered to recover the minor children named herein in clause 1 from the respondent and restore their possession to applicant forthwith.
- (3) Costs of suit at a higher scale.

The parties divorced by an order of this court which awarded custody to the applicant herein. Sometime around 2018, respondent brought fresh proceedings in the Victoria Falls Magistrates Court wherein he sued for the custody of the 2 minor children. An order was then issued in the applicant's absence in favour of respondent in that he was awarded custody rights over the 2 minor children by the Victoria Falls Magistrates Court.

Applicant then seeks a declaration that the Magistrates Court order is invalid and consequently that it be set aside.

Respondent opposes the order sought on the basis that applicant had abandoned the children and disappeared from her parents' home leaving the children with elderly parents who could not cater for them. That he was then asked to take the children as the applicant's parents had gone to the extent of filing a missing person's report on applicant.

Applicant's mother filed a supporting affidavit to applicant's answering affidavit refuting the allegations that applicant went missing and that they asked respondent to take the children. She alleges that respondent requested to have the children over the holidays to take them on a visit to Harare. He later called to say the children were not coming back and were to attend school in Harare.

Respondent has also filed a counter application seeking a variation of the order granted by this court in HC 1341/16 wherein he wants to be awarded custody of the children.

This matter in my view is straightforward in that the Juvenile Court did not have the power to vary a High Court order. Even the respondent agrees to this by conduct wherein he files a counter application because he obviously appreciates the predicament he finds himself in. Counsel for the respondent argued that just as the Maintenance Court can vary High Court orders for maintenance so the Juvenile Court should also have similar powers. Counsel for the applicant argued that the Juvenile Court is not empowered to vary High Court orders in the same manner that the Maintenance Court does as the Maintenance Court is empowered in terms of section 18 of the Maintenance Act Chapter 5:09 to register all orders including High Court orders and to vary same.

A perusal of the Guardianship of Minors Act Chapter 5:08 does not empower the Magistrates Court to vary custody or access orders issued at the High Court. This point is thus settled in that the Juvenile Court does not have such power. The order by the Victoria Falls Magistrates Court is therefore invalid and must be set aside.

The counter application by the respondent is limping for 2 reasons. The simple reason that respondent is in contempt of the order of this court. Even if he held the view that the order

by the Juvenile Court could stand, upon receipt of this application one would have expected him to at least return the children pending the determination of these applications in order to show that at least he respects the court and since his actions are being challenged, he would abide with the High Court order pending a deliberation of the issues between the parties. Again entertaining and granting the counter application, would set a bad precedent that the High Court condones the disobedience of its orders. The other problem is that if this court were to entertain the counter application and grant it, it would be encouraging litigants to disobey court orders, then come to court and make counter applications to maintain the *status quo*.

The children may have adapted to the environment with the respondent but he took them from an environment they were adapted to. Whilst these courts do not want to uproot children and disturb their flow of growth, that cannot be a justification to maintain illegality by the respondent. It cannot be in the interests of justice that a parent takes away children against a court order and then he benefits from the disobedience because the court would not want to uproot the children from their new environment. Just as the children adapted to the environment they are in now, with their father, nothing will stop them from re-adapting to the environment they lived in with their mother and grand parents. I will accordingly dismiss the counter application for the reasons given herein.

I accordingly make the following order.

- (1) The order issued by the Magistrates Court sitting at Victoria Falls on 31st October 2018 awarding the custody of the minor children namely:-
 - (a) Praise Kativhu a girl born on 11 February 2011.
 - (b) Prunella Kativhu a girl born on 1st May 2015.to respondent be and is hereby declared invalid.
- (2) The respondent is ordered to surrender the children mentioned in clause 1 above together with all their belongings to applicant within 7 days of service of this order on respondent's legal practitioners failing which the Sheriff is hereby authorized to restore the custody of the 2 minor children named in clause 1 above to the applicant.

- (3) That the counter application be and is hereby dismissed with costs.
- (4) That respondent bears the costs of suit.

Ncube Attorneys, applicant's legal practitioners
Messrs Mehluli Ndlovu and Partners, respondent's legal practitioners