

ROBERT EDWARD KUIPERS
versus
KIRSTY LEIGH KUIPERS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 10 October and 11 December 2014

Opposed Application

C. Phiri, for the applicant
M. T. Majome, for the respondent

UCHENA J: The applicant was the respondent's husband. That relationship was terminated by a decree of divorce granted by this court on 22 March 2012. Their divorce was by consent facilitated by a consent paper which was made a part of the order granted.

The applicant, applied for a downward variation, of the children's maintenance clause, in the consent paper. The respondent opposed the application. The dispute between them is limited to how the applicant can spread the available resources. It is common cause that the children's school fees, was increased by US\$500-00 per month after the granting of the decree of divorce.

The applicant said his employer is due to economic hardships no longer able to pay him the annual bonus which he had factored in, when he offered the agreed maintenance of US\$625-00 per month per child. He lost the accommodation his employer was providing. He now pays rentals of US\$1700-00 per month. He has fallen into debts, which he is now failing to service due to his school fees, school expenses and maintenance obligations. He seeks a down ward variation of the children's maintenance from US\$625-00 per month per child to US\$250-00 per month per child. He in his founding affidavit said the respondent is the one benefitting from the children's maintenance as the children are boarders and only spend 96 days per year with the respondent. They spend the rest of the year at boarding school and with him at his expense. He questioned how the respondent uses the children's maintenance when they are not with her. He believes that the downward variation he is seeking will not adversely affect the best interests of the children.

The respondent while not seriously disputing the applicant's changed circumstances and admitting that the children's school fees has increased by US\$500-00 per month, suggested that the children be transferred to a day school. She in her affidavit said she pays rentals with the children's maintenance. Her rentals cost US\$1400-00 per month. She denied the applicant's allegation that she is herself depending on the children's maintenance as she is not working. She said she gets temporary and part time jobs from which she looks after herself.

Mr *Phiri* for the applicant submitted that the following changes warrant the variation of the children's maintenance;

- 1 That he no longer receives a bonus
- 2 That school fees has been increased by US\$500-00 per month.
- 3 That he has accumulated debts he is no longer able to pay while still under his current obligations.
- 4 That he lost the accommodation he had from his employer and is now paying rentals of US\$1700-00 per month.

Miss *Majome* for the respondent submitted that the applicant's application should be dismissed because respondent believes the applicant, has other sources of income he has not disclosed and even if he does not have he can solve his problems through transferring the children from boarding to day schools. She further submitted that the applicant came to court with dirty hands as he has not been paying additional maintenance in the form of cost of living adjustments and other school related expenses which she had to pay.

The applicant disputed being in arrears and the respondent did not state the amount in arrears. This issue was not properly ventilated and cannot be dealt with in these proceedings. If, there is merit in the respondent's claims she can raise them in separate proceedings. The issue of cost of living adjustments was also grossed over. It cannot be relied on in these proceedings.

Maintenance applications and applications for variation of maintenance depend, on two major considerations, the means of the responsible person and the needs of the dependant. The needs of the dependants are however subservient to the responsible persons means and the need for the other parent or dependant to work. The responsible person and his dependants must live within the responsible person's means. Section 6 (2) and 6 (4) provides for the above as follows;

“6 (2) A maintenance court shall not make an order in favour of a dependant unless it is satisfied that—

(a) the person against whom the order is sought is legally liable to maintain the dependant; and

(b) the person against whom the order is sought is able to contribute to the maintenance of the dependant; and

(c) the person against whom the order is sought fails or neglects to provide reasonable maintenance for the dependant.

(4) In making an order the maintenance court shall have regard to—

(a) the general standard of living of the responsible person and the dependant, including their social status;

(b) the means of the responsible person and the dependant;

(c) the number of persons to be supported;

(d) whether the dependant or any of his parents is able to work and, if so, whether it is desirable that he or she should do so.” (emphasis added)

In this case the applicant has given the court his means and obligations. I have no reason to doubt him. He told the court of the increased school fees, rentals, debts and none payment of bonuses. The respondent does not seriously, dispute these changes. Her response is “transfer the children from boarding school to day schools and leave their maintenance as it is” This seems to be a selfish suggestion aimed at her continued benefitting from the children’s maintenance. This case therefore calls for the serious assessment of the best interests of the children and their protection. The maintenance in issue is theirs. It should not be varied against their best interests. It should also not be sustained for either parent’s selfish interests. The court should be guided by the provisions of s 81 of the Constitution which in relevant parts, provides for the children’s best interests and protection as follows;

“81 (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—

(a) -----

(b) -----;

(c)-----;;

(d) to family or parental care, or to appropriate care when removed from the family environment;

(e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;

(f) to education, health care services, nutrition and shelter;

(g)-----;

(h)-----;

(i) -----;

(2) A child’s best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.”

In terms of s 81 (d) and (f) the children are entitled to parental care at home and at the boarding school where they are studying and to education, health care services, nutrition and shelter;. That care must be consistent with the responsible person's means and the standard of life they are used to. In this case there is no doubt that they are being afforded the appropriate standard of living at their school and at home when they are with either parent. Care must be taken to avoid unnecessary changes to the children's standard of living at school or at either of their parents' homes. The respondent's suggestion that they be transferred to a day school will result in a lowering of their standard of education. They are at an elite school, deemed appropriate by both parties before they divorced. The applicant who bears the burden of their education wants them to continue at that school despite his current financial limitations. That in my view is in the best interests of the children and should find favour with this court. Care should however be taken to avoid over burdening the applicant, and over straining the respondent's ability to adequately cater for them during the 96 days in a year she will be with them. Their standard of life at that home should not be allowed to drop drastically. The rented accommodation she is occupying should be preserved. The applicant should continue to pay the substantial part, of those rentals to argument the respondent's erratic and limited income. The respondent should on her part exert herself towards useful parenthood by improving her earning capacity as required by law in respect of each parent. The maintenance order granted by the court is for the children's benefit. She must therefore not lean heavily on it to the children's disadvantage in other areas of their lives by limiting the responsible person's ability to continue to look after them as he has been doing.

In terms of the relevant parts of s 81 (e) of the Constitution the children are entitled to the court's protection from "economic exploitation, neglect or any form of abuse; The use of their maintenance, by a parent for her own benefit would in my view amount to economic exploitation, neglect and abuse. The respondent should therefore not be left to benefit from the children's maintenance, or be allowed to lower their standard of education so that she continues to benefit from their maintenance.

After considering the above factors I am satisfied that the applicant's application should succeed to the extent that will not adversely affect the children's best interests which are paramount in every case concerning children. It is in their best interest to continue to attend school at Ruzawe Primary School. It is in their best interest to continue accessing their parents as agreed in the consent paper. It is in their best interest to be adequately catered for in respect of their health care services, nutrition and shelter; when they will be with the

respondent. I am however of the view that US\$625-00 per month per child during the periods when the children will be at school is an unnecessary expense on the applicant. The children will during those periods be given shelter and food by the school which the applicant pays for through school fees. It should however not be drastically reduced as the children come home to the respondent during every alternative weekend and half of each school holiday. There is need to preserve that accommodation for them. The respondent must however contribute towards her own accommodation as she confessed to being able to look after herself. See paragraphs 4 and 8 of her opposing affidavit. It is my considered view that a reduction of the children's maintenance from US\$625-00 per month per child to US\$300-00 per month per child will meet the justice of this case.

The applicant's request to be excused from meeting the costs of fuel, extra- mural activities and school uniforms cannot succeed as the above variation should enable him to meet these expenses which only occur at intervals. He must continue to meet those expenses.

Mr *Phiri* for the applicant submitted that the applicant should be granted custody of the ill child Andie, which respondent offered to him in her opposing affidavit. Miss *Majome* for the respondent submitted that custody should not be grossed over by being granted through emotional utterances of the parties in an unrelated application. I agree. Custody is a serious issue which call for proper ventilation before it can be granted. It should only be granted after a careful consideration of the child's best interest. The emotional exchanges, by the parties during an application for maintenance variation does not in my view satisfy that requirement.

Each party has partially been successful. I will therefore order that each party should bear his or her own costs.

I therefore make the following order;

1. That the consent paper concluded between the plaintiff and the defendant and filed of record in case number HC 909/12 be and is hereby amended by the deletion in paragraph 2 thereof of "six hundred and twenty five United States Dollars (US\$625-00)" and the substitution of "three hundred United States Dollars" (US\$300-00).
2. Each party shall bear his or her own costs.

Messrs Coghlan West & Guest, applicant's legal practitioners
Messrs Jessie Majome & Company, respondent's legal practitioners