IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA MISCELLANEOUS CIVIL APPEAL NO. 25 OF 2024

[Being Civil Appeal Number 6 of 2024 before The High Court of Malawi, Lilongwe Registry]

BETWEEN

RICARDO ANDRE TEIXEIRA ALMEIDA **APPELLANT**

AND

SHENAZ PETER BHAGWANJI ALMEIDA **RESPONDENT**

CORAM:

HON. JUSTICE L P CHIKOPA SC, DEPUTY CHIEF JUSTICE

Chilenga, M.[Mr.] of Counsel for the Appellant

Soko, K.[Mr.] of Counsel for the Respondent

Masiyano[Ms.], Clerk

RULING/ORDER

The respondent successfully petitioned the court below for a dissolution of her marriage to the applicant. This was way back in 2016.

In December 2022 a full bench of this court reversed the court below. It instead advised the parties to take the matter of their divorce and any issues arising therefrom to Portuguese courts. Malawian courts did not and still do not have the requisite jurisdiction.

They never went to Portugal. They instead went to the Child Justice Court in Lilongwe. They went to commence a squabble over the custody, access and visitation rights to a child of their marriage that subsists to date. That squabble has since been to the High Court, to this court and back to the Child Justice Court many times over. If the parties were not squabbling about custody, visitation and access to the child they were at each other about who should take it on holidays, where and when. They have even squabbled over which judicial officer[s] should or should not preside over their many appearances in these courts.

Last time the parties appeared before us we indicated our serious displeasure to their Counsels about how their matters in these courts were being handled. How they were taking up more than their fair share of our resources. We had hoped that the Counsels would impress it upon their clients that time was then that this matter was brought to a timeous and civilized end.

It is clear our exhortations were a monumental waste of time and effort. The parties are back in this court after yet another convoluted journey from the Child Justice Court via the Principal Resident Magistrates Court, the Chief Resident Magistrate[who recused himself] and the High Court.

In the midst of all this chaos we were, at some stage, inclined towards saying a bit more about the circumstances surrounding this case and the parties. We thought it would provide more context and explain some of the happenings in this case. We decided not to. Why? Firstly, because it soon became clear that some of the circumstances would not reflect very well on our parties. Courts, in our view, must always strive to treat their litigants with as much respect and in as civil a manner as is practicably possible their actual circumstances notwithstanding. It is in furtherance of such sentiments that we feel the least said at this stage about the parties, their circumstances and how this matter is where it is today the better.

Secondly, this case is about a child. The law obliges us, indeed all courts, to always act in its best interests. See section 23[1] of the Republican Constitution. It is, in our judgment, consistent with such obligation that we proceed in this case in a manner that casts the least aspersions, the actual circumstances notwithstanding, on any one of its parents or both.

Thirdly, this matter will soon be coming back to this court[hopefully for the last time]. It is important for purposes of that appearance that we, except where it is absolutely unavoidable, do not make wholesale findings of fact or take certain positions of law. We must not bind the full bench of this court in advance to certain facts, findings or conclusions. Or give the impression that this court has predetermined certain issues.

Having said the immediately above and without in any way trying to water down such sentiments we feel obliged to emphasize certain positions. If only to impart knowledge to those that litigate in our courts.

Firstly, it is a fact that our Republican Constitution confers on all persons, *inter alia*, the right not just to access the courts of this Republic but also to an effective remedy. See section 41[2] and [3] thereof.

Secondly, and following on the above, the courts mentioned in section 41 are not just any other court. It is and must always be courts that are **independent and impartial**. Courts that are **free from the direction and influence of any other person or authority** and those **whose decisions are premised only on prescriptions of law and legally relevant facts**[our emphasis]. See sections 9 and 103 of the Constitution and also the case of **Puma Energy Mlw Ltd v Bishop Abraham Simama & Simso Oil & Transport Ltd** MSCA Civil Appeal Number 71 of 2019[unreported].

Thirdly, we must reiterate the fact that where a litigant is of the view that the court before whom they are appearing is not **sufficiently independent and/or impartial** or is not **free from the direction or influence of any other person or authority** they are at liberty to, subject to what we say hereinafter, petition for a recusal of that court from the matter in issue. Similarly, if they of the view that a court's decision is not premised on prescriptions of law and legally relevant facts, they are free to seek the intervention of a higher court by way of **appeal** or **review**. Against subject to what the law provides for.

And speaking about recusals they should, it is important to say, be distinguished from illicit attempts by litigants to either stop a particular court from sitting in their matter or to illicitly procure a court of their choice to sit in their matter. Or

worse still to, via fear or other undue influences, force a court to proceed in a preferred fashion or arrive only at certain decisions.

And if some might be wondering how applications for recusals are viewed and dealt with it is through the spectacles of a reasonable person. The tribunal tasked with deciding whether or not the application has merit will look at the application and the reasons advanced therefor and ask the question whether a reasonable person apprised of the facts and circumstances of that particular instance would grant the recusal. If the answer be in the positive the court will be obliged to recuse itself. Or ordered to recuse itself. If the answer be in the negative it will not and the matter will proceed in a manner provided for by the law.

The recent case of **Puma Energy Mlw Ltd v Bishop Simama & Simso Oil & Transport Ltd** MSCA Civil Appeal Number 71 of 2019 provides a good illustration of this point. Especially when dealing with allegations of bias. It approved the Constitutional Court's sentiments in **The State v The President of The Republic of Malawi, The Minister of Finance and The Secretary to The Treasury Ex Parter Malawi Law Society** Constitutional Case Number 6 of 2006 where the court cited with approval two other cases.

The first is **Metropolitan Properties Co[FGC] Ltd v Lannon** [1969] 1 QB at 577 where Lord Denning MR said:

> *'the court does not look to see if there was a real bias or likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people'.*

In **Walter Valente v Her Majesty the Queen**[1985] 2 SCR 673 the Canadian Supreme Court said:

> *'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons applying themselves to the question and facts obtaining thereon..... the test is 'what would an informed person, viewing the matter realistically and practically and having thought the matter through have concluded?'*

The above is the test that must be used in relation to applications for recusal. If a reasonable person would have concluded grounds for recusal the court should recuse itself. If, on the other hand a reasonable person would have concluded otherwise the application for recusal will be refused.

This court has also pronounced itself on reviews. In, **Yun Li Hua v R,** MSCA Criminal Application Number 21 of 2021[unreported] and **Henderson v R** MSCA Criminal Appeal Number 1 of 2023[unrep] we said reviews should only be resorted to when the interests of justice clearly demand one. And courts that have powers to review should, in our view, very seldomly review of their own volition. It brings such courts' impartiality/independence into question. Parties should instead appeal.

In the instant case a walk through its history shows how our litigants have fought over every step of the way from the Child Justice Court to this Court. They have fought over decisions of the Child Justice Court and the High Court. They have fought over who should preside over this matter in those courts. They have appealed. They have sought and been granted reviews to help their causes. They even sought the help of High Offices, politicians, organs of government, civic organizations and, sadly, some unsavory types.

It is clear in our judgment that the parties are not looking to appear before independent and impartial courts. Or Courts that are free from improper influence and/or directions. They are not even looking for effective remedies. They are instead looking for the type of court that will give them particular decisions. Decisions that will benefit them and no one else. Courts, in other words, that will decide only in their favour. Courts devoid of impartiality, independence and freedom from influence and authority. Courts that are the very antithesis of those envisaged in sections 9 and 103 of our Constitution.

Fortunately, these courts are well aware of their constitutional mandate. Both at a conceptual and practical level. They will, let there be no doubt, do all they can and more to be impartial, independent and free from the direction and influence of any person or authority. They will not pander to threats. To fear. To favours. They will not allow populism to triumph over right. They will decide only on the

basis of legally relevant facts and prescriptions of the law. They will dispense only what, in their most considered view, they deem to be effective remedies. These courts will do this while alive to the fact that not all will be satisfied with their decisions. That such court users will seek recourse to higher courts and/or tribunals. And that once in a while their decisions will be reviewed, reversed and tinkered with. And there will be nothing to gripe about.

Turning to the application before us the parties are actually husband and wife. The truth of the matter though is that they live separate lives. In those separate lives they each seek to have, if fact be said, very close to exclusive custody of the child of the marriage.

They appeared before the Child Justice Court in Lilongwe. That court decided on a custody and visitation/access scheme. It did not please the wife. She appealed to the High Court which in turn settled on a custody and visitation/scheme that did not satisfy the husband. He appealed to this court. This court also granted a stay of the custody and visitation/access scheme decided on by the High Court the stay to subsist until the appeal was heard. The objective was, whichever way the appeal went, to minimize disruption of the child's life.

While awaiting the hearing of the appeal there have been various proceedings about the child in the Child Justice Court, in the Chief Magistrate's Court, in the Principal Resident Magistrate's Court, in the High Court and in this court. We will not go into the details of these proceedings. Suffice it to say that it is fair to say that it is obvious that each party wants custody literally to the exclusion of the other.

Due to a change in her circumstances the mother wants to or is in the process of relocating to Portugal. She wants to take the child with her. She does not want to leave her here with the father. In her view the child is still young. Eleven or so years old. Soon going into her formative years. She should stay with her mother in Portugal. Her father will be allowed reasonable access to her.

The father on the other hand does not want the child to relocate to Portugal with her mother. He believes, because of what has transpired before, that that will be the last he will see of his child. Allowing the mother to relocate to Portugal with

the child is, in his view, a court sanctioned abduction of the child. The child should therefore stay with him. Visitation rights can be agreed to allow the mother access to the child.

To facilitate her relocation to Portugal and a Christmas holiday with the child the mother sought relevant orders from the Child Justice Court. When she did not have as much joy therefrom as she wanted, she escalated the matter to the High Court which sent the matter to the Chief Resident Magistrate [C] who in turn allocated the matter to the Principal Resident Magistrate.

To prevent what he considers a court sanctioned abduction the husband then run to this court. Effectively he wanted us to stop the holiday, stop the child relocating with her mother to Portugal and stop both the High Court and the Principal Resident Magistrate from dealing with this matter. His reasons? Apart from the alleged intended court sanctioned abduction the father is of the view that the appeal in this court and the stay granted in relation to the appeal should preclude any other court from deciding on any matter[s] regarding the child's custody/visitation regime until the said appeal is concluded. That to that extent any and all proceedings or orders in some or from other courts are null and void for want of jurisdiction.

Looking at the totality of this case certain things stand out. Firstly, there is a constitutional perspective to the matter. Children, including the child in issue in this matter, have the right, *inter alia*, to be raised by their parents. See section 23[3] of the Constitution. The reverse side to that provision is, in our view, that parents have the right to raise their children. Meaning, in the context of the instant case, that the parties herein have no legal basis for trying to effectively exclude each other from raising the child in issue. They should instead be looking for ways on how, their differences notwithstanding, they can together raise this child.

Secondly it should, once again, be made clear that these courts have no jurisdiction to hear the parties' divorce petition. The quicker the parties accepted that fact and started looking for the correct forum the better for everyone including these courts. In point of fact, it would not, but for the parties'

inexplicable tardiness, have been our business to deal with the parties' custody and visitation/access rights in relation to the child. It should have been that of the Portuguese courts. The only reason we are on it is because of the child's continued presence in Malawi. It makes her subject to protection under our laws and courts. But such protection can only be transient. A more permanent solution will be provided by those that will dissolve the marriage and make resultant orders.

Thirdly, and we think this obvious, the mother of the child does not require this court's, indeed any court's, permission to relocate to Portugal. Any application to that effect is superfluous. Maybe even, we are sad to say, disingenuous. It cannot therefore be true to suggest that this or any court is delaying her relocation to Portugal. In 2016 she came to Malawi from South Africa to kick off this saga. She did not require the permission of South African courts to do so. Only her husband's leave to bring the child to Malawi and return with it a few days later.

She is in an almost identical position today. This court pronounced itself in this matter in December 2022. The parties have since then been free to approach the Portuguese courts. One cannot help asking why she does not seem to be moving with due speed towards a divorce and, *inter alia*, a child custody order in the Portuguese courts.

Fourthly it is clear, whatever applications have been placed before these courts that there is only issue between the parties namely the custody of the child of their marriage. The appeal in this court is about custody and visitation/access schemes.

Much the same is true about the issue now before the Principal Resident Magistrate court in Lilongwe. It is also about custody and visitation/access rights. Now dressed up differently. The mother's situation has changed and she must relocate to Portugal. The father is still resident in Malawi. The question now is how should the custody and visitation/access regime change, if at all, to accommodate the new circumstance[s]?

Except for the geographical aspect these, in our view, are the very question that this court will be answering in the appeal already before us. In that regard we think it is an unjustifiable waste of treasury and time and certainly not in the best

interests of the child to let the parties continue fighting in various courts about custody, visitation and access in the context of the impending relocation all the way, via appeals, reviews to this court. The quicker, more efficient, more effective and certainly most humane manner of dealing with the issues between the parties is to look, within the framework of the appeal before us, at custody, visitation and access to the child from the widest possible perspective. We should look at custody etc. not just for parents who are in Malawi but also out of jurisdiction including in Portugal. The mother's intended relocation to Portugal will therefore be one of the facts to be considered by this court when deciding on what custody/visitation/access regime will best suit the child and therefore the parents now that they will not be both based in Malawi. That in our judgment will deal with the one and only issue between the parties once and for all. And because the decision will have come from this court the question of appeals, reviews and further applications will, at the very worst, be kept to the barest minimum.

During the hearing of the application from the father referred to above we put the above scheme to the parties. They agreed that it offered a better way of dealing with this matter to finality in the shortest time and at the least cost possible. Provided the full bench of this court was amenable to dealing with the matter in the fashion proposed.

We have subjected the above to further thought. And sought input from other members of this court. We have no doubt whatsoever that any and all issues around custody of the child, visitations rights or access can be resolved within the appeal already pending in this court between the parties. True it might require, due to changes in the parties' circumstances, that the appeals process be rebooted. That for instance fresh arguments and new responses done. Even that fresh evidence/opinions be introduced. A further set of directions/orders will issue to cater for any changed circumstances.

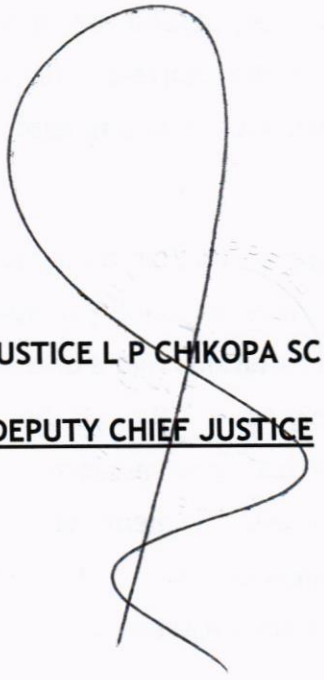
Accordingly, it is hereby ordered that the parties must within 14 days from this date appear before the Registrar of this court to finalize the record of appeal. During such attendance the parties will indicate what further steps, if any, need to be taken to ensure that all questions surrounding the issue between the parties are resolved to finality. If it be necessary that the parties take further steps to address

emerging circumstances, they shall outline such steps and indicate the timelines within which the steps will be effected. Timelines will be also be set for the parties to comply with all protocols applicable to appeals in this court. The parties will thereafter be allocated the nearest possible date for the hearing of the appeal herein.

In keeping with the above directions/orders all proceedings touching on this matter in any other court than this one, shall be stayed until the appeal herein is determined to finality.

Costs shall be in the cause.

Dated at Blantyre this February 3, 2025.



JUSTICE L P CHIKOPA SC

DEPUTY CHIEF JUSTICE