

IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE**MSCA MISCELLANEOUS CIVIL APPEAL NO. 25 OF 2024****BETWEEN****RICARDO ANDRE TEIXEIRA ALMEIDA****APPLICANT/APPELLANT****AND****SHENAZ PETER BHAGWANJI ALMEIDA****RESPONDENT****CORAM: THE HON. JUSTICE L P CHIKOPA SC, DEPUTY CHIEF JUSTICE**

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

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

Minikwa[Ms.], Clerk

RULING/ORDER

Our parties have been around these courts for a while. Since 2016 actually. They have been squabbling [we cannot describe it otherwise] about the dissolution of a 'marriage' and custody/visitation rights to a child born out of their association. The application necessitating this ruling/order must therefore be considered in context.

In Civil Appeal Number 11 of 2022 a full bench of this Court declined to dissolve the parties' marriage. It was our considered view that this Court had, on the basis of the parties' want of a Malawian domicile, no jurisdiction to dissolve the said marriage. This Court accordingly set aside the orders of the court below dissolving the 'marriage' and granting custody of the child of the 'marriage' to the respondent and visitation rights to the appellant. About the child the parties were

instead advised to approach the Child Justice Court for an appropriate order. This was in December of 2022.

They did. And on March 28, 2023 the Child Justice Court sitting in Lilongwe made an order about the parties' custody and visitation rights in relation to the child. We will not go into the details of the order. Suffice it to say that the respondent was aggrieved by the same. She appealed to the High Court. Successfully. And by an order pronounced on April 2, 2024 in Matrimonial Appeal Case Number 6 of 2023 the order from the Child Justice Court was varied.

Again, we will not go into the specifics of the new order. It will suffice that the variations from the High Court aggrieved the applicant. He appealed against that order in this court and simultaneously filed for a stay of the said order pending the hearing/determination of the appeal.

We granted the stay on an *ex parte* application on May 2, 2024. The application was then set for an *inter parties* hearing on May 17, 2024. Then rescheduled to June 26, 2024.

In between we were made aware of the respondent's intention to migrate to Portugal in pursuance of which she was seeking leave to take along with her the child in issue herein.

On June 26, 2024 the matter of the stay could not proceed. The parties agreed with our suggestion that serious attempts be made to resolve the matter of the child out of court. This, it was further agreed, would be attempted within the next 14 days on the express understanding that the parties would be at liberty to come back to court if the attempts to so resolve the squabbling bore no desired fruits which seems to now be the case seeing as there is now a notice of adjournment in that application.

We now have a new application before us. From the father of the child in issue herein namely the applicant. He tells us that by an order dated July 11, 2024 he was granted authority by the Child Justice Court in Lilongwe to, between July 22 and August 5, 2024, travel with the child in issue herein to Portugal on holiday and surrender her back to the said court on August 7, 2024.

We are further told that when attempts were made to collect the child's passports from Court the applicant was told by an Assistant Registrar of the Court below that the release should pend the directions of the Court below which later on advised via email that:

'In exercising the powers that this court has under section 26 of the Courts Act, I hereby direct that the file in the lower court at the Child Justice Court Lilongwe be brought for review purposes'[Sic]

The review has not been done. The child's passport has not been released. The applicant is fearful that the holiday might be adversely affected by the events in the Court below and is therefore *ex parte* asking this Court for an order staying the proceedings in the Court below in the hope that the passport can then be given to him in order to facilitate the holiday to Portugal. The application is supported by an affidavit sworn by the applicant.

Like we have said above the parties have been before these courts since June 2016. Time and again they have called upon these courts to hear a myriad applications for myriad orders that do not for some reason resolve the issues between them. In point of fact the parties have always somehow found a way to use whatever orders/rulings/judgments these Courts have given to create even more litigation. Elsewhere we are sure they would have been described as a cantankerous pair of time wasters. We will not. This is a Court of law. The fact is that when they appeared before us on June 26, 2024, we, through their respective Counsels, called upon the parties to seriously consider the manner they have chosen to fight over the custody of the child in issue herein. To similarly consider whether it would not be beneficial to all, including the child they profess to so dearly love, if they heeded our advice to take their squabbles to the appropriate jurisdiction where both the matter of the 'marriage' and that of the custody and of visitation rights can be resolved finality.

Coming back to the application there is need in our view to proceed with extreme caution. There is an order granted by a court whose jurisdiction has not been called into question. That order has not been set aside. Maybe only stayed by operation of law i.e. via section 26[2] of the Courts Act depending on how one

reads and understands the email from the Court below quoted above. There is equally no appeal against such order even though it was open to the respondent to proceed as such. There is not even an application for review from the respondent. On the other hand, we have parts of this matter in this Court pending hearing/appeal. Others in the court below pending review and a hearing. It is an untidy situation to say the very least. One that militates against good case management and the expeditious disposal that this matter is obviously crying out for.

At the same time, we cannot overlook what this Court and the law have said about the issue before us i.e. reviews. In *Lin Yun Hua v Republic MSCA* miscellaneous Criminal Application Number 2 of 2023[unreported] and *Prince Handerson v Republic MSCA* Criminal Appeal Number 1 of 2023[unreported] this very Court discussed at length the question of reviews under section 26 of the Courts Act. This Court is not the greatest fan of reviews. In its view reviews should be resorted to very sparingly. Only in cases where there is a clear and obvious wrong to be righted. Parties should therefore not be allowed to hide behind reviews when what they want is an appeal. Similarly, courts should be very slow to, at their own instance, resort to reviews again unless there is a clear and obvious wrong to be righted. Otherwise, they will be deemed to be appealing on behalf of this or that party. Indeed, give the impression that they have taken sides in a matter at hand or that they are an aggrieved party. Courts must allow appeals to be what they have always been. Another look at the matter at the behest of an aggrieved party.

Then there are sections 27 and 28 of the Courts Act. Their provisions are clear enough in our view.

Section 27

'Where an appeal lies from any judgment in any civil matter and no appeal is brought, no proceedings by way of review shall be entertained at the instance of the party who could have appealed'

The respondent in the instant case could have appealed against the order from the Child Justice Court. Maybe she even can. She has not. Should she be getting a

review at the behest of the Court? Would it not be said, rightly or wrongly, that she is getting via the backdoor what she did not want to have via the front door?

Section 28

'No party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision under sections 25 and 26.

Provided that no order shall be made to the prejudice of any person unless such person has had an opportunity of being heard'

Our justice system is premised on parties being heard. On contestation. In a matter as contentious as this one it appears to us less than proper that a party's right to be heard should be taken away in the name of a review especially at the instance of a court. The very guardian angel of such right and many more. A right that will invariably be enjoyed in an appeal. In our most considered view, it does not dovetail with values that underlie an open and democratic society as mentioned in section 11[2][a] or with the right of access to courts spoken of in section 41[2] of the Constitution.

When we look at all of the above and the history of this case it appears to us the legally correct, fair and equitable thing to do in this case is to order that the Court below's exercise of the powers of review contained in section 26 of the Courts Act be stayed pending an appeal against the same. Let the said Court's action on the order granted by the Child Justice Court be at the instance of either party rather than that of the Court below. Quite apart from everything else it will, in our opinion, allow this very long outstanding matter to move with a little more speed.

We so order. And we make no order as to costs.

Dated at Blantyre this 24th day of July, 2024.

HON L P CHIKOPA SC

DEPUTY CHIEF JUSTICE

