

SELESTINOS GWENHURE

Versus

FRANCISCA GWENHURE

and

MASTER OF THE HIGH COURT (NO)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 JUNE & 29 AUGUST 2019

Opposed Application

Ms V. Chikomo for the applicant
Respondent in person

MAKONESE J: This is an application for the variation of an order for custody in respect of three minor children. On the 10th of March 2016 this court granted the parties an order for a decree of divorce and other ancillary relief. The respondent was granted custody of the three minor children of the marriage by consent. Applicant was granted reasonable rights of access to the minor children.

Sometime in 2018, the applicant approached the Magistrates' Court seeking a variation of the custody order. In that application, applicant indicated that respondent was his former wife and that the parties had been divorced by order of this court in 2016. In terms of the divorce order custody of the three minor children was awarded to the respondent by consent. The basis upon which that application was launched was that the respondent was bringing different male persons to her residence, including her "lovers" and "spiritualists". The minor children gave applicant disturbing reports regarding their living conditions with the respondent. The children were not performing well in school. It was contended by the applicant that the moral, social and intellectual well being of the children was being adversely affected.

This application was strenuously opposed by the respondent who argued that the averments by the applicant were not substantiated and based on his mere say so. The court enlisted the assistance of a probation officer to make an assessment of the children's living conditions and well being. A detailed report was prepared for the benefit of the court. I shall refer to that report later in this judgment. The learned magistrate took the position that where the High Court has made an order for custody and a party desires to vary such order, the court that is clothed with jurisdiction to vary the order is the High Court which granted the order in the first instance. The learned magistrate reasoned that:

"... I do not believe that I have the jurisdiction to deal with this matter and the application should thus fail with this finding".

For some strange reason, the learned magistrate went on to deal with the merits of the case, and dismissed the application for variation. It is my view, that where the High Court has made an order regarding the custody of the children it is undesirable for the lower court to seek to entertain an application for variation of an order made by this court. The High Court is clearly empowered and has jurisdiction to vary and regulate its own orders. The order of the Magistrates' Court was irregular and incompetent at law.

I now turn to consider the application before me. The respondent contends that the applicant should have appealed to the Children's Court. The respondent argues that the magistrate disposed of the matter on the merits and that the order by the magistrate was competent at law. Further, the respondent contends that the applicant should have noted an appeal. In my view, there was nothing to appeal against as such order was erroneously granted.

The clear position of the law is that this court has the power to vary an order for custody where good cause has been shown by the applicant. The applicant is required to establish on a balance of probabilities that it is in the best interest of the children that the existing order be varied. In his founding affidavit that applicant contends that the respondent has bad parenting skills and is cruel to the children. The respondent, it is argued has denied the applicant access rights to the children amongst other things. The respondent, it is argued has cut-off ties between

the minor children and himself and has shown a desire to deprive the minor children of a relationship with their biological father. Further, the applicant complains that the respondent has exposed the minor children to different men, a situation that is not in the best interests of the children. A further ground upon which variation is sought is that the respondent comes home very late, often around midnight and that respondent has no time with the children. The applicant argues that this state of affairs is not in the best interests of the minor children who deserve motherly love. In support of his application, the applicant filed a detailed report by a probation officer who recommended that the best interests of the children would be served if custody was awarded to the applicant. In my view, a probation officer's report is important for a determination of this matter. Whilst the respondent chose to dismiss the findings of the probation officer, the probative value of such a report in custody matters is of immense significance. Our law provides that a judge may interview children in chambers privately to establish the best interest of the minor children. In certain instances, however, where a detailed probation officer's report exists, it is not always necessary to resort to interview the children in chambers. The applicant attached to the application for variation pictures of the children, and urged the court to make a finding on the basis of that evidence, indicating that the children were not happy with the respondent. In so far as the photographs are concerned, this court will not be swayed by these pictures, on the simple basis that there is no evidence to show the circumstances under which such photographs were taken.

The applicant contends that the performance of the children in school is deteriorating. He argues that if granted custody, he would be able to send the children to the best schools and monitor their performance. Applicant contends that he has a stable home and the environment is ideal for the upbringing of the minor children. The respondent denies that she has failed to look after the children as expected of any mother. Further, she contends that there is nothing that warrants her being deprived of the custody of the children. Respondent avers that the best interests of the children are served if she retains custody of the minor children.

The approach that this court in considering an application for variation of custody of minor children is well settled. See *Hackim v Hackim* 1988 (2) ZLR 61; *Makuni v Makuni* 2001 (1) ZLR 189.

The best interests of the children are paramount. As observed by DUMBUTSENA CJ in the *Hackim* case, in a case involving the custody of minor children, the court must approach the issue of *onus* from a broad and wider angle. The onus should be discharged if at the end of the day the court is satisfied that the best interests of the minor children dictate that it makes sense that the order should be granted. The learned judge cautioned against magnifying the onus on the parent seeking variation but maintained that the best interests of the child should be paramount.

In this matter, custody was awarded to the respondent by consent on the 10th of March 2016, upon the granting of a decree of divorce. The applicant is thus required to show on a balance of probabilities that circumstances have since changed to justify a variation of the custody order. It is sufficient for the purposes of such application, for the applicant seeking a variation of the custody order to establish by way of a probation officer's report supported by some other evidence that there is need for such variation. In her opposing affidavit the respondent does not dispute that she has other men in her life, or particularly that there are various men visiting her residence. The respondent does not specifically deny that she comes home late, a situation not in the best interests of the children. The respondent does not deny that the applicant has the means to look after the children in a better environment than hers. The applicant clearly discloses his domestic arrangements and observes that the children are better off with him. I do not believe that there is a heavy onus on the applicant to show on a preponderance of probabilities that there is need for a variation of the custody order.

On the basis of the foregoing, the applicant has shown that it is in the best interests of the children are better served if a variation of the custody order is granted. I do not consider that there is a magic formula to determine the best interests of the children. The court must adopt a pragmatic approach after weighing all the evidence before it.

In the result, the application succeeds and the following order is granted:

1. The application be and is hereby granted.
2. The custody order granted on 10th March 2016 be and is hereby varied.
3. The applicant be and is hereby awarded custody of the minor children, namely X (born on 6 September 2001), Y (born on 26 November 2007) and Z (born on 23 March 2012).
4. The respondent shall have reasonable rights of access to the minor children during the first two weeks of the school holidays and first weekend of each month.
5. There shall be no order as to costs.

Dube-Tachiona & Tsvangirai, applicant's legal practitioners