

RUDO ELIZABETH SIMANGO (nee MAKONI)
and
PAUL SIMANGO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 30 November, 3 & 13 December 2010

URGENT CHAMBER APPLICATION

H. Nkomo and *F.K. Maenzanise* for the applicant
T.K. Hove for the respondent

CHITAKUNYE J. The applicant is married to Nathan Simango in terms of the Marriages Act, [*Cap 5:11*]. The marriage still subsists. Their marriage was blessed with one child. The respondent is a blood brother to Nathan Simango.

It is common cause that the applicant and Nathan moved to the United States of America (hereinafter referred to as USA) about 9 years ago. Both were apparently employed. Nathan lost his employment and in the year 2008 he fell ill. He was alleged to be suffering from Alzheimer. As a result he sometimes had certain limitations in understanding and was no longer in full control of his mental faculties. It appeared not disputed that as a result of the illness he would at times wander away from home. The applicant did not deny that due to the illness she took Nathan to his other brother, Simon Simango, who is also in the United States of America.

Thereafter in February 2010 applicant came with Nathan to Zimbabwe. On her return to the United States of America she left Nathan behind, in circumstances the two parties are not agreed. It is nevertheless clear that Nathan was left in the custody of the respondent, Paul Simango. It also did not appear disputed that soon after arriving from the USA in February 2010, Nathan was taken to hospital by the respondent. Due to the state of his illness Nathan was admitted into hospital. Since then it is Paul who has been responsible for Nathan's medical care.

On 18 November 2010, applicant returned to Zimbabwe from the USA. Since then, she said, she had been trying to take custody of her husband Nathan to no avail.

The respondent in taking care of Nathan incurred financial expenses. His efforts to get assistance from rentals from Nathan's house here in Zimbabwe, which is rented out by applicant's sister met some resistance.

Though the house is said to be rented out at a sum of 1000 United States dollars per month, he was only given 300 United States dollars by applicant's sister after a struggle. He had to seek legal assistance to wrack out another 3 x 300 United States dollars payments after that. So for about 8 months only 1200 United States dollars was given to Paul to assist in Nathan's medical needs out of a total of \$8000 rentals received by applicant's sister.

Nathan as the registered owner of the property no longer had the mental capacity to administer his property so as to get funds for his own medical needs. His mental condition even as he left the United States of America for Zimbabwe was documented. Here in Zimbabwe it is not disputed that he has not recovered his mental faculties to be able to administer his property.

As a result of these difficulties Paul Simango applied to this court for appointment as *Curator bonis*. That application was granted on 8 October 2010.

A *curator bonis* is appointed by the court to assist someone who has full capacity to act but who, for some reason or another, such as physical or mental disability, is unable to administer his property. The rights and obligations of *curators* are *mutatis mutandis*, the same as those of guardians except, that they only relate to the property of the person under *curatorship* and not to his person. A *curator bonis* is expected to take custody and control of the property of the person under *curatorship*.

In a bid to take control of the rented house, as *curator bonis*, the respondent sought to evict tenants in the house as they were not accounting to him or to Nathan for monthly rentals, which rentals he badly needed to assist in attending to Nathan's medical needs.

The application for the eviction of applicant's sister Eleanor Mudede and all those claiming occupation through her was set down for the 12th November 2010 in the magistrates' court, Harare. It is then that apparently applicant arrived on 18 November 2010 and sought to reassert her rights over Nathan, as her husband.

In this urgent chamber application the applicant sought an interim relief that-

1. The respondent releases forthwith Nathan Simango into the Custody of the applicant together with Nathan Simango's personal belongings, identity, travel documents and return tickets.

2. that in the event of the respondent failing to fulfill (i) that the Zimbabwe Republic Police be granted authority to take Nathan Simango from the respondent's custody into the custody of the applicant.
3. The costs be costs in the cause.

The application was opposed by the respondent. The respondent's opposition was premised on the fact that Nathan Simango is still unwell, not able to speak and undergoing therapy. He felt that applicant should let Nathan recover.

He also alluded to the fact that he fears for Nathan Simango's health as applicant does not appear to have made any arrangements for her to adequately provide for Nathan.

In paragraph 36 of his opposing affidavit, respondent succinctly put it thus:-

“My request is that let the doctors finish the therapy and that Nathan recovers to such an extent that he can make decisions for himself. Applicant is not saying that she has returned to settle in Zimbabwe permanently. I believe it is in the best interest of Nathan that applicant and I do not fight but try to sit down and find the best way to assist each other so that Nathan recovers. Applicant can see Nathan anytime that she wants. But Nathan has to continue going for therapy and undergoing treatment. He needs a nurse.”

The issue one may pause is whether Nathan should be released into the custody of his wife, who has only come on a temporal visit and has to rush back to the USA to attend to the couple's child. In determining this issue it is important to realize that Nathan's medical state at the time he was brought by applicant in February 2010 as described by respondent has not been challenged or rebutted in any way. The medical reports filed of record by both parties and also at my instance clearly show that Nathan is still in need of proper medical attention.

Whilst a marriage institution has to be preserved, one cannot lose sight of what is in the best interest of a seriously ill spouse. Applicant did not seriously deny that at the time she brought Nathan; he weighed about 30 kilograms and was seriously ill such that he was immediately admitted into hospital. At the time she left he was still in hospital. She also did not deny that as a result of respondent's care and dedication to Nathan's healthy needs, Nathan has now gained weight to about 67kgs.

The various medical expenses incurred by respondent were not denied by applicant. She also did not deny that respondent faced numerous hurdles in trying to access money for rentals from their matrimonial home. As a result of applicant's sister's refusal with the rentals, respondent used his own resources to have Nathan receive medical treatment. To crown it all, applicant did not deny that Nathan's state of ill health was such that he could not administer

his estate on his own. Clearly therefore the appointment of someone to administer his estate cannot be faltered.

On the applicant's part I did not hear her to say that since leaving Nathan behind in February 2010, she ever sent any money for his medication. All she seemed to say was that her efforts to talk to Nathan over the phone were being blocked. But, one would ask: how could she even demand such when Nathan was not able to speak? Throughout her application and even from submissions made in chambers I did not hear applicant to say she had in any way made medical treatment for Nathan a priority in the use of rentals from their matrimonial house. If anything, she did not deny that only \$1200(USD) from at least \$8000(USD) realized from rentals went towards Nathan's medical bills, yet Paul expended over \$9000(USD) of his own money in that regard. That \$1200(USD) which went towards Nathan's treatment was not given to Paul voluntarily; he had to fight for it through legal steps.

It may also be noted that applicant was not clear on how she hoped to take care of Nathan upon assuming custody. She seemed unwilling to take court into her confidence regarding this issue.

It is my view that respondent in opposing the application raised valid concerns about applicant's ability to provide proper medical care for Nathan. The life that Nathan is fighting for is only lived once. As a concerned wife applicant should surely indicate what measures she has put in place. For instance, she could not be forthcoming on how long she intended to remain in Zimbabwe in light of the fact that she said their minor child she had left in the United States also needed her. Her assertion that she would make alternative arrangements was not convincing at all. Her suggestion that her ability to take care of Nathan here and in the United States of America should not be questioned is not borne out by the medical reports and bills she tendered. Those reports show that in the USA doctors were merely examining Nathan and no treatment had commenced for all that time Nathan was unwell in the USA. The bills show that applicant was having difficulties in paying for the medicals. For instance, to show that she took Nathan for medical attention she referred to annexure D1 and D2 to her founding affidavit. Annexure D1 shows that Nathan was attended to by a doctor on 29 May 2009 and a bill of \$72.50(USD) was raised. As at 30 June 2010, applicant had not yet paid that bill. Annexure D2 confirms that it was only on 13 July 2010 that applicant paid that debt incurred on 29 May 2009. If it took her over a year to pay a medical bill of 72.50 United States dollars only, surely respondent is justified to be concerned about applicant's ability to meet Nathan's

medical costs. It may be as stated by Paul that she had no medical insurance. It is the lack of medical insurance that she had herself used as an excuse for not having attended to Nathan when she brought him to Zimbabwe in February 2010.

In this case though the application was brought as being for the release of Nathan into the custody of applicant, clearly the applicant's is seeking to be granted custody of Nathan and not just his release.

Normally issues of custody pertain to children/minors. The person she seeks to be granted custody of is an adult. The question may be asked:

Does a marriage give one spouse custodian rights over the other?

If the application is restricted to one purely for the release of Nathan, I did not hear applicant to allege that Nathan is being held against his will or wishes such that a court order is necessary for his release. An order for his release is in my view not appropriate in the circumstances.

It may also be noted that the release of Nathan to applicant would not affect the duties and responsibilities of a *Curator bonis* bestowed on the respondent till such a time that the order is discharged or is set aside. Having Nathan released into her custody would not automatically thrust her as the administrator of Nathan's estate.

However as a wife, applicant is entitled to access to her husband whilst he receives medical treatment. If she really cares for Nathan, she should support respondent in every way possible to ensure that Nathan receives the best possible medical attention.

As respondent said, as soon as Nathan has recovered she will have him all to herself.

The contention that respondent's actions would amount to destroying a marriage was clearly misplaced. Applicant could not point at any action by respondent that was adverse to Nathan's medical needs or inimical to their marriage. On the other hand just what has happened to Nathan from the time she left him with respondent is evidence on its own that respondent is not there to destroy a marriage but to ensure that Nathan has the best medical care for his recovery so that the two can continue with their marriage.

As stated by Dr. Nhiwatiwa in his report after examining Nathan at my request-

"Nathan is ill, he barely says a word at times he smiles and at times he laughs out loud. There also appears to be squabbles between Nathan's family and his wife. This is most unfortunate as it adds more pressure on Nathan. All the people involved are important to him so it appears as if he is being pulled in all directions.

An EEG was ordered by a Doctor who saw him initially and shows he may have Temporal lobe epilepsy. His clinical picture today appears more serious than temporal lobe epilepsy. He is not communicating...”

In his conclusion Dr. Nhiwatiwa said that:-

“Nathan is suffering from an organic mental disorder. Its nature is to be determined after further investigation. I suggest that he sees a neurologist first. Depending on what they find, further admission to the Annexe for further evaluation maybe required. When it is said and done in the long term Nathan would benefit from going to the countries where there are better facilities....”

I am of the view that rather than continue with the squabbles, parties should do as suggested by the doctor, to be united. The respondent also said that he would prefer to sit down with applicant and assist each other to ensure that Nathan gets adequate medical attention.

At the end of the submissions and after perusing the three medical reports filed of record, I am of the view that if both parties are seriously concerned about Nathan’s health, they should cooperate and provide him with a conducive and not combative environment for his recovery.

The best interest of Nathan will not be served by releasing him to a person who is clearly not financially and materially able to provide him with basic medical needs, and is in any case, likely to leave for the USA at any time.

Accordingly only an interim order for access will be granted as follows:-

Pending the finalization of the matter:-

- (1) The applicant is hereby granted rights of access to Nathan Simango the said Nathan Simango shall continue to receive medical attention under the care of the respondent.
- (2) the respondent is hereby directed and ordered to ensure that applicant enjoys unhindered access rights as stipulated in paragraph 1 above;
- (3) Costs shall be costs in the cause.