

MASIKE W MAZHOU
versus
MABIKA J NYARADZO

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 2 November 2022 & 22 February 2023

Opposed Application

R E Nyamayemombe, for the applicant
C Mutandwa, for the respondent

WAMAMBO J: The parties herein got divorced on 2 November 2019, under HC 3050/19. The applicant herein was the plaintiff while respondent herein was the defendant. The parties were agreed to a decree of divorce being granted and they filed a consent paper. Paragraph 2 of the divorce order reads as follows:

2. Custody of MAZHOU MALACHI MAITA (born on 30 July 2016) be and is hereby awarded to the defendant with plaintiff having reasonable access to the minor child on alternative school holidays and once every month from Friday evening to Sunday evening upon reasonable notice to the defendant.

It is para 2 above which is at the centre of this dispute. In this matter the applicant avers as follows in the founding affidavit.

He is a dual citizen of Zimbabwe and the United Kingdom and is ordinary resident in the United Kingdom.

Whenever he visits Zimbabwe, he exercises his access rights. He now wishes to exercise his access rights through the minor son visiting him in the United Kingdom. He requested respondent to accede to this proposal and she refused to sign the necessary documents to enable the minor son to travel to the United Kingdom to visit him.

When the consent paper was entered into respondent was aware of his residency in the United Kingdom and that his son would have to go to the United Kingdom on occasion.

He now seeks an order in the following terms:

IT IS ORDERED THAT:-

“1. The application for declaratory order be and is hereby granted.

2. It is declared that”

- a. the applicant’s access rights in terms of the decree of divorce granted on 21th of November 2019 includes the right to take the minor child namely, Mazhowu Malachi Maita (born on 30 July 2016) outside of Zimbabwe on alternate school holidays.
- b. That applicant in terms of the order in 1a above can exercise his access rights outside of Zimbabwe during school holidays.
- c. That respondent’s refusal for the applicant to take the minor child outside of Zimbabwe during school holidays is a violation of the applicant’s right to access of the minor child.
- d. That should applicant wish to take the child out of Zimbabwe to the United Kingdom during school holidays, the Respondent and the Registrar of the High Court shall be informed in writing.
- e. That applicant can assign any close family member or relative in Zimbabwe to have access to the minor child once every month from Friday evening to Sunday evening upon reasonable notice to the respondent.

3. each party to bear its own costs.”

Suffice it to say at the hearing applicant abandoned para 2(e) of the draft order which paragraph proposed that applicant could assign any family member to have access to the minor child upon reasonable notice to the respondent.

I note here that the concession was well made in the circumstances. The proposal in para 2(e) appears to have been made in a very broad manner and without due and proper consideration of the best interests of the minor child. Imagine some errant named uncle or aunt exercising access rights on the minor without any consideration of where they reside with whom and under what conditions among other considerations.

The respondent is opposed to the application.

In her opposing affidavit she avers as follows:-

The application is an application for a variation of the order made in HC 3050/19 disguised as an application for a declaratory order. Applicant used the wrong procedure.

The order in HC 3050/19 does not provide for the application to remove the child from Zimbabwe. She has previously signed an affidavit consenting to the minor child travelling to the United Kingdom and changed her mind upon realizing that applicant had bought a one way ticket and it struck her then that applicant may not return the child to Zimbabwe.

She has since discovered that the minor child has a British passport and has fears that the minor child may not return to Zimbabwe.

She disagrees with the justification proffered by applicant that the minor child needs to undergo a medical check up in the United Kingdom.

The applicant did not specify in his pleadings that he wanted to remove the minor child from Zimbabwe for purposes of exercising his access rights.

If the Order under HC 3050/19 had provided for the minor child to travel to the United Kingdom applicant would need to enforce it without need for an application for a declaratory order.

In deciding this matter uppermost in my mind is the best interests of the child. It is not the best interests of either parent that I should consider but those of the minor child.

I mentioned this because the first port of call is the situation and circumstances brought to the attention of the presiding Judge who rendered the order but consent under HC 3050/19.

Clearly the court in HC 3050/19 was not told of the full facts. It was not brought to its attention that applicant herein was then based in the United Kingdom. It follows that the court rendered an Order by consent without the very important information that not only was applicant based in the United Kingdom but that he also wanted to exercise his access rights in the United Kingdom.

I am cognizant that the High Court is the upper guardian of minor children. The court had it been fully informed of the intentions of the applicant would have had to ponder over the access rights being exercised outside Zimbabwe. Not only would the court have made enquiries in that regard especially considering the young and vulnerable age of the minor. The court would have wanted to know who would take care of the minor and other specific arrangements in order to protect the minor child.

We are talking here of a minor child being whisked to a foreign land without any tangible proof that his best interests would be catered for.

In the instant matter the applicant now gives the details of his dual citizenship, which were never placed before the court in HC 3050/19.

I am agreeable that a declarator is not the proper form in which the application should have come, I say so because for the just adjudication of the issue would need be considered after a proper enquiry.

Such enquiry would be under the Guardianship of Minors Act [*Chapter 5:08*] under s 6.

Not only would an enquiry be held but the record of the enquiry would be subject to a review by a Judge of the High Court as provided for in s 6(6) of the Guardianship of Minors Act [*Chapter 5:08*].

It follows therefore that an application for a declarator, as happened here is but a shortcut which does not and can not accord with the justice of the matter. Furthermore, it gives little information not consonant with the best interests of the minor child.

Applicant's counsel conceded that there was an oversight on the part of the legal practitioner who prepared the papers in HC 3055/99 who did not place it in the papers filed that applicant would be residing in the United Kingdom.

Where a legal practitioner does not aver in his pleadings that the plaintiff thereof resides in the United Kingdom and is desirous that he should exercise access outside the jurisdiction it becomes clear that there is a gap in his pleadings. That gap can not be closed in an application for a declarator as happened in this case.

I am mindful of the sentiments expressed by KUDYA J (as he then was) in *Justin Taonehama Samudzimu v Sithandiwe Miranda Ngwenya* HH 92/08 at p 7 where the Learned Judge said:

“The parties must realize that the Court cannot cover every foreseeable eventuality in its order. It expects the parties to be mature and reasonable in their approach. They should act in good faith and not in bad faith. They should respect the other parent's rights for bonding with the children. The consent order was made by the parties. It may not work that the two parents will be residing in two different countries. It is up to them to agree on the best way to make it work, bearing in mind that the children are still of a tender age. As they grow older and start primary school, the parties may arrange visitation rights that suit the age of the children.”

In this case not only did the applicant not act maturely and reasonably by placing all his cards on the table in HC 3055/99 he also used the wrong procedure by applying for a declarator as adverted to earlier.

My view is that applicant decided that he wants to exercise his access rights outside this jurisdiction after the order in HC 3055/99 or deliberately withheld information when he filed his

pleadings in HC 3055/99. Further, he erred by applying for a declarator in the circumstances of this case.

An interpretation of the order in HC 3055/99 does not speak to access rights being exercised outside the jurisdiction. I say so because the order simply doesn't say so and the pleadings do not at all advert to applicant being based outside Zimbabwe.

A consideration of the foregoing leads me to the conclusion that the application stands to be dismissed. Costs follow the result and I have found no reason not to follow that principle.

I order as follows:-

The application be and is hereby dismissed with costs.

M C Mukome, applicant's legal practitioners
Muchinga Mutandwa, respondent's legal practitioners