

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
MATRIMONIAL CAUSE NO. 7 OF 2005**

WILMA ANN ROSCOE LOSACCO PETITIONER

AND

RICARDO LOSACCO RESPONDENT

CORAM : Nyirenda J,

: Theu, Counsel for the Petitioner
: Katuya, Counsel for the Respondent
: Kafotokoza, Court Interpreter

RULING

On the 18th of January this year Chombo, J ruled in favour of the Respondent in an application for custody of two children of the marriage FH, a girl of nine years and RA, a boy of seven years.

This application by the Petitioner is for stay of execution of the custody order pending the hearing and determination of the appeal which the Petitioner was made following Justice Chombo's ruling in the main action for divorce.

A brief background will put the matter in perspective. The Petitioner filed for the dissolution of her marriage to the Respondent. The short story on that aspect of the matter is that the Learned Judge concluded that she had no jurisdiction to determine the matter on account of the parties not being domicile in Malawi. There could have been other considerations which for purposes of the present application need not be mentioned. Suffice to say that the Petitioner was dissatisfied with that decision and has since appealed to the Supreme Court.

While awaiting the appeal the Respondent applied for custody of the two children to be considered separately, because it would appear, the welfare of the children was already at stake and even more now that the parents have locked horns in divorce proceedings.

The custody fray was not mitigated to say the least. It was frantic and tempestuous, with a lot of hostile disclosure on either part. In the end the Judge found her way through and allowed the Respondent custody of the two children. The order of custody has several conditions, notably that the children will live in Malawi

and that the Petitioner has visitation rights. The Petitioner has since complied with the order and the two children are in the Respondent's custody.

Since the order of custody the discord between the Petitioner and the Respondent has not relented especially with regard to the welfare of the children. It is felt by the Petitioner that the order of custody has worsened the situation for the children and might result into irreparable harm to their well being if the situation is maintained until the determination of the appeal. It is for that reason that the Petitioner seeks stay of the custody order.

The application is firmly opposed by the Respondent who believes that the children are now happy together under his custody than be separated as was the case before when the boy was with the Petitioner while the girl was with the Respondent.

Stay of execution is a practice well established. It is also well established that neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. An appeal does not per se operate as a stay of execution. Courts do not make a practice of depriving a successful litigation the fruits of his litigation see *Monk v Bartram* [1891] *IQB* 346. The question whether or not to grant a stay is entirely in the discretion of the court (*Becker v Earl's Court Ltd* (1911) 56 *S.J.* 206. In the exercise of the discretion, a court should endeavor as far as possible to maintain a fair and proper balance between the needs of the successful litigant and those of the applicant.

Order 59/13/4 in child cases provides as follows:

To avoid the risk of a change of residence and a change back again, if the appeal is allowed, the usual practice of the court in the case of appeals against orders involving a change of residence [formerly custody] of a child, is to grant stay on the order, unless the appeal is very weak or hopeless, or the grant of the stay would be likely to expose the child to danger or give rise to other serious prejudice.

I have taken considerable time to go through the protracted proceedings before Justice Chombo. I have also carefully gone through the affidavits by the Petitioner and those of the Respondent in support of the present application. I can boldly say what comes out of them is a continuation of the feud that has always been there between the Petitioner and the Respondent. The feud might be getting worse but that does not make it any peculiar as to characterize it as a fresh development.

I have had occasion to carefully go through the ruling of Justice Chombo. The Learned Judge took a while to address the issues that emerged before her and determined as she did allowing for some flexibility in the custody order which as stated earlier also provided for visitation on part of the Petitioner.

What is more is that the two children are now with the Respondent, the Petitioner having complied with the court order which I must say is a commendable development. Unless I was convinced that the recent developments between the Petitioner and the Respondent are well beyond what emerged before Justice Chombo it is safe for me to be on the side of caution and avoid moving any of the children again. In accordance with Order 59/13/14, it is safe to avoid the risk of change of residence and a change back again depending on the outcome of the appeal. If the children have to be moved, that should be upon the outcome of the appeal because then they will have been moved once and for all. What is critical in my judgment is to move the appeal process quickly. The Registrar should see to it.

The application is therefore dismissed with costs to the Respondent.

MADE in Chambers at Lilongwe District Registry this 6th day of June 2007.

A.K.C. Nyirenda

J U D G E