



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NO 5 OF 2018

BETWEEN

THOKOZANI CHINSEU.....APPLICANT

-VS-

RASHID GAFFAR.....RESPONDENT

CORAM: The Hon. Mr. Justice D. Madise

Ms Jumbe, Counsel for the Applicant/Petitioner

Mr. N Chalamanda, Counsel for the Respondent

Mr. Mbekeani, Official Interpreter

Madise, J

RULING

1.0 Introduction

1.1 The Applicant in this matter filed a petition for divorce against the Respondent on several grounds including cruelty and adultery. Further details are particularized in the summons and supporting affidavit. The Appellant claims she was married to the Respondent as his second wife and that there are two issues of the alleged marriage. The Respondent has disputed this in his affidavit in opposition to the petition. The court has set the 26th of November, 2018 for the hearing of the petition. Meanwhile the Applicant has sought several interim orders from the Court pending the determination of the substantive matter.

2.0 Matrimonial Home

2.1 The Applicant/petitioner has moved the Court that she wants to return to the matrimonial home situated at Sunnyside in Blantyre. The Respondent told the Court that the Applicant was not chased from the home. That she moved out of her own volition. There is a dispute as to the status of the house. The Applicant stated that it was a matrimonial home while the Respondent stated in opposition that he provided the house for his children to live in. Whether this was a matrimonial home or not is the very question this Court must address at the conclusion of the substantive matter.

2.2 Secondly the Applicant stated that she was married to the Respondent and she is entitled to have access to the matrimonial home and the items she left in the house. The Respondent has stated that the parties were a mere boyfriend and girlfriend notwithstanding the two issues of the alleged union. The Respondent insist there was no valid marriage. Whether the parties were married or not is the very question we must answer at the conclusion of the trial.

2.3 However this court must take note of the fact that the Applicant was residing in this house before the parties apparently "separated". She is

currently living with her mother. This is not an ideal solution. The decision as to the status of the house will be determined at the conclusion of this trial. In these premises and as an interim measure I order that she must return to the house and have access to all her belonging pending the final determination of the within matter.

2.4 However it has been brought to the urgent attention of the Court through a supplementary affidavit sworn by the Respondent that the house was rented out. A copy of the tenancy/lease agreement has been attached. The Applicant has not responded to this narrative and the 7 days she was given to do so have elapsed. There is evidence however that there is another house at Namiwawa in Blantyre the parties have been using which apparently is in a bad state of repair. However at the last court appearance the Respondent undertook to repair the house and make it habitable in order to accommodate the Applicant as she awaits trial.

2.5 In the interest of justice, I make a temporary order that the Respondent must renovate the house in Namiwawa within 14 days to make it habitable and he must further provide all the necessary furniture. This will ensure that the Applicant is not disadvantaged while awaiting the final outcome of the trial.

3.0 Motor vehicles

3.1 There is a dispute as to own the two vehicles, a BMW and a Navara. Each party is claiming ownership/title. The Respondent has provided proof of title of the Nissan Navara. I have not received anything from the Applicant despite her assurances that copies of proof of title were going to be filed with the Court within 7 days. That period has long lapsed. However, the truth of the matter is that the Applicant was using these vehicles before the parties "separated" As to who owns those two cars will be determined when the Court is dealing with the issue of property the parties apparently owned.

3.2 But for how and in the interest of justice, I make an interim order that the Respondent should give the Applicant one vehicle for her convenience and mobility. This is to ensure that she is not disadvantaged as she awaits the final outcome of this trial.

4.0 Custody of children

4.1 The cardinal principle in deciding custody of children is the warfare of the children themselves. The court when deciding the issue of custody must determine what is in the best interest of the children. At the beginning of the trial I gave directions that the court will need a social report to be place before it, before deciding on the issue of custody. But most importantly, the views of the children will be pivotal in this regard. The court should be able to interface with the children and hear their views as to where they want to go and live.

4.2 But children are free to go either way. Now in the absence of a social report and a personal interface and or interview with the children it will be prejudicial and reckless to make an order for custody at this point.

4.3 But most importantly these children are not objects or pieces of furniture that should be moved around from house to house. We will achieve an injustice if I grant the Applicant custody now and only to reverse that order at the conclusion of the trial assuming the Applicant fails to satisfy the Court that she is better placed to have custody. The children themselves free as they are, will guide this Court as to whether they want to stay with their father or mother or indeed any other person. I therefore make no order for custody at this stage.

4.4 The original order where interim custody was granted to the Respondent due to the Applicant's own conduct still stands. The Applicant shall continue to have visitation rights from Friday afternoon to Monday morning and on public holidays. Any other special events where the presence of the children

will be required shall be agreed to by both parties through their legal representatives. Any disagreements will be referred to this Court for adjudication.

4.5. As for the other orders the Respondent has 14 days to comply. May I further warn the parties to desist from the use of inflammatory language when dealing with the within matter. The mother file is full of letters and interim applications of non compliance and what not and yet trial has not even started.

4.6 May I further urge the legal representatives for both parties to assist the Court to arrive a proper and just decision and not to inundate this Court with applications with the view to please their clients. The cardinal principle that substantive justice must be done without undue regard for technicality must be the guiding principle of legal practice at all times.

4.7 As officers of the court they have a duty to the law and to the court. From now onwards the parties shall only communicate through their legal representatives unless they convince me otherwise
Costs are in the cause.

I so order

Made in chambers at Blantyre in the Republic on 26th November, 2018.



Dingiswayo Madise
Judge