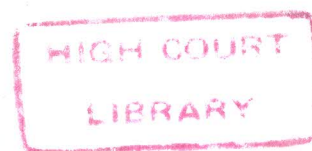




IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
REVIEW CAUSE NUMBER 02 OF 2019



EDWIN MWITHA **PETITIONER**
AND
LUCY MWITHA **DEFENDANT**

CORAM : **HON. JUSTICE F.A. MWALE.**
: Mpandaguta, Court Interpreter

Mwale, J.

RULING ON REVIEW

Introduction

1. I am seized of this matter by way of reference from the court of the Senior Resident Magistrate in Lilongwe for review pursuant section 26 of the Courts Act for the exercise of supervisory powers. The said section 26, provides as follows:

(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.

2. The matter, originally Civil Cause No. 1130 of 2018, is a matrimonial cause in which the petitioner filed for divorce on the ground of cruelty and loss of interest in him by the respondent. The marriage was duly dissolved after a full trial by the court of the First Grade Magistrate in Lilongwe which also dealt with the issues of property distribution. There is an appeal on property distribution pending before the High Court. The reason the matter has been forwarded for review is that the lower court also proceeded to determine custody of the two issue of marriage in favour of the respondent, with a correlative order for the petitioner to pay maintenance. The referring court submits that the court of the First Grade magistrate lacks the jurisdiction to determine child custody.

Determination

3. Since the enactment of the Child Care, Protection and Justice Act, jurisdiction over custody have been specifically conferred on child justice courts by virtue of Section 8(1) of that Act which provides as follows:

- (1) A parent, a family member or any other appropriate person may apply to a child justice court for custody of a child.

Child justice courts are established under section 132 of the Child Care, Protection and Justice Act and their composition is provided for under section 133. For the avoidance of any doubt, I will also reproduce the relevant parts of these provisions below:

132. There shall be established child justice courts, which shall be subordinate to the High Court and shall exercise jurisdiction conferred upon them by this Act or any other written law.

133. – (1) A child justice court shall be presided over by a professional magistrate or a magistrate of the first grade.

(2) The Chief Justice having been satisfied as to the competence of the presiding officer, may designate a court of magistrates of any grade to be a child justice court and shall publish a notice of designation in the *Gazette*.

(3) A presiding magistrate shall, before commencement of proceedings in a child justice court, ensure that a probation officer of sufficient competence relevant to the requirements of this Act is present throughout the proceedings.

Child justice courts were specifically created as specialized courts to deal with all matters concerning children, and as section 8 of the Child Care, Protection and Justice Act makes it expressly clear, custody is one such matter. In the matter before me, to

begin with, the lower court that determined the issue of custody is not a child justice court. It is clear from the court record that in determining custody the magistrate did not attempt to follow the procedural requirements of a child justice court set out in section 133(3) of the Child Care, Protection and Justice Act. But this is merely an academic observation as the lower court in question is not a designated child justice court. I must therefore agree with the referring magistrate that the lower court lacked the jurisdiction to make a determination on custody and the order made in that case is irregular and is hereby set aside for want of jurisdiction. I further order that the matter be referred to the child justice court in Lilongwe for a determination on the issue of custody within 14 days of the order herein.

MADE in Chambers this 3rd day of May 2019.

Fiona Atupele Mwale

JUDGE