

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1953 OF 1994



BRIAN GRANTHAM BOWLER PLAINTIFF

Versus

TINA ARCARI DEFENDANT

CORAM: Chimasula Phiri, Acting J
Mr Tembenu, of Counsel for the Plaintiff
A Mkwepula, Official Interpreter



R U L I N G

This is an ex-parte originating Summons in which the plaintiff seeks declarations and orders as follows:-

- (i) that Brian Grantham Bowler is the father of Annabel Jane Arcari - Bowler
- (ii) Brian Grantham Bowler is, just like the defendant, entitled to contribute to the up-keep, maintenance and general welfare of Annabel Jane Arcari - Bowler
- (iii) that by reason of the plaintiff's cohabitation with the defendant for over four years and by reason of previous contribution to the Child's welfare and upkeep, the plaintiff has acquired parental rights over Annabel Jane Arcari-Bowler
- (iv) that the plaintiff has an obligation in terms of section 11 (a) (i) of the Courts Act to raise the said infant as well as in terms of section 23 (3) of the Constitution of the Republic of Malawi
- (v) that the exercise of his parental rights over Annabel Jane Arcari - Bowler have not been extinguished by the fact that she has been taken out of Malawi.

There is an affidavit of Brian Grantham Bowler in support of the Summons. I set it out hereunder.

AFFIDAVIT

1. **THAT** I am a British national permanently resident in Malawi and my place of abode is at Area 10 in the City of Lilongwe. My father is a British National whilst my mother is a Malawian; I was born in Malawi and I have grown up here.

2. **THAT** currently I am working for Napolo Ukana Breweries Limited as its Operations Director for the Central and Northern regions as well as being a shareholder in Napolo Ukana Limited's parent company, namely Bowler Investments Limited.
3. **THAT** I have for a period of over four years co-habited with Trina Jane Arcari, the defendant herein, and that out of that relationship was born Annabel Jane Arcari-Bowler (an infant) on 10th February, 1992. I exhibit hereto a photostat copy of the said birth certificate marked "BB1".
4. **THAT** the said Trina Jane Arcari is also a British national, who until the making of this application was still residing and cohabiting with me at Area 10 aforesaid. The defendant was brought to Malawi by myself in October 1990 and we have hitherto cohabited together as husband and wife at Area 10 aforesaid and I have been solely responsible for the defendant's welfare throughout the period of our co-habitation.
5. **THAT** the defendant has on various occasions and without my knowledge attempted to run away with the child.
6. **THAT** realising that the defendant might succeed in her attempts to take the child out of the country without my knowledge and consent, I instructed my lawyers to obtain an injunction order to restrain the defendant from taking the child out of the jurisdiction. The said injunction order was granted on the 13th October, 1994. However, when steps were taken to serve the injunction order on the defendant, she had already left the house. I exhibit hereto a copy of the said order marked "BB2".
7. **THAT** I have however managed to confirm with the immigration authorities that the defendant left the country for Europe on 18th October 1994. I exhibit hereto a letter of confirmation from the Controller of Immigration Services marked "BB3" by me.
8. **THAT** since the child was born I have been solely responsible for its up-keep and maintenance to the exclusion of anybody else. I exhibit hereto copies of receipts of payment for medical bills exhibited as one bunch and marked "BB4" by me.
9. **THAT** as the child is now about to reach the school going age, I would like to take proper control of the child's welfare as regards its education. I am however unable to do this as long as the mother of the child continues or is allowed to continue to keep the child away from me and hinder me from having access to the child.
10. **THAT** the defendant acknowledges the fact that I am responsible for the child's welfare and since her departure from my house, she has on divers occasions phoned me asking me to contribute to the child's maintenance expenses.
11. **THAT** I have, since the child's birth willingly acknowledged my parental responsibilities towards the said infant and I am desirous of continuing to exercise such responsibilities towards the child's maintenance, up-keep and education in spite of the fact that she has been taken out of my reach for the time being.

12. **THAT** since the defendant left the country for the United Kingdom, we have conversed on the telephone on various occasions and the defendant has just lately informed me that the child is now being looked after by the defendant's mother in London.
13. **THAT** to the best of my knowledge and belief, the defendant does not dispute my paternity for the infant and she has herself acknowledged the fact that I am responsible for the child's welfare. I exhibit hereto a photostat copy of a facsimile transmission sent by the defendant to me after her discussion with my sister Brenda in the United Kingdom. It is marked "BB5".
14. **THAT** I verily believe that by reason of our co-habitation for a period of over four years and by reason of my express acknowledgment over the child's paternity as well as my subsequent support and maintenance for the child over the years since its birth, I have acquired parental responsibility which has not and cannot be diminished by the mere fact that the child has been taken out of the jurisdiction for the time being.
15. **THAT** I also verily believe that in terms of Section 23(3) of the Constitution of the Republic of Malawi I have an equal obligation with the defendant to raise the said infant.
16. **THAT** I am ready and willing to exercise my parental rights over the infant in association and in co-operation with the defendant as requested by her in her fax shown and exhibited hereinbefore as "BB5".

Section 11(a)(i) provides that "without prejudice to any jurisdiction conferred on it by any written law the High Court shall have jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants." Section 23 (3) of the Constitution provides that "Children have the right to know, and to be raised by their parents."

The issues which this court has to determine are mainly two. Firstly whether this court has jurisdiction under the above quoted provisions of law to hear this application. Secondly, whether the affidavit discloses sufficient facts on which the court would make the declarations and orders sought.

On the question of jurisdiction the counsel for the plaintiff relied on the practice in England in respect of guardianship and matrimonial jurisdiction laying down, regulating and defining what access the parent who does not have the custody of the child shall have. It was held in Pentony v Rennie & M L R 149 at P. 153 by Mead J that:

"It would, I think, be quite unworkable if in the guardianship jurisdiction of the court were limited to orders about access in this country alone. Such a result could, as in the present case, be contrary to the best interests of the child". The judge went further to consider section 11 (a) (i) of the Courts Act and said:

"Having considered the extent of jurisdiction conferred by Section 11 (a) (i) of the Courts Act, I am satisfied that

the court has a discretion to make an order for access out of the jurisdiction. That discretion must, of course, be exercised judicially. The Court's jurisdiction over infants is of a parental nature, and in exercising that jurisdiction the court follows the well - established principles that the paramount consideration is the welfare of the infant."

However, before the judge reached the conclusion quoted above he carefully analysed the basis of conferring that jurisdiction to the court in the following terms at page 152:-

"The application is brought under the provisions of the Courts Act. There is no evidence before the Court as to the nationality or domicile of Nicolle. There is no evidence to suggest Nicolle has Malawi nationality or domicile. Section 11(a)(i) of the Courts Act provides in general terms that the High Court shall have jurisdiction to appoint and control guardians of infants and generally over the persons and proper of infants. There is no provision that such jurisdiction shall be exercised only in respect of infants of Malawian nationality or domicile. Residence in Malawi is sufficient to invest the court with jurisdiction. Nicolle is resident in Malawi with the defendant."

Unlike Nicolle, Annabel Jane Arcari - Bowler was not at the time of the application and even now resident in Malawi. Her birth Certificate number 71255 of 31st January 1994 states that both her father and mother are British Nationals. Her connection with Malawi is that she was born at Malamulo Hospital, Blantyre and lived in Malawi probably until 18th October 1994. I have used the term "probably" because the letter from the immigration office does not state the name of the minor child who accompanied the defendant when she left Malawi Via Kamuzu International Airport. There is no evidence that Annabel Jane Arcari - Bowler was a national or citizen of Malawi by naturalisation or descent. I am aware that the plaintiff has stated in his affidavit that his mother is of Malawian origin. However, there is no dual citizenship or nationality under Malawi law for its citizens or nationals. I do not think that this Court has jurisdiction to make the declarations and orders affecting an infant not resident in Malawi. Even the constitutional provision does not in my view confer jurisdiction in rem. The children must be resident in Malawi.

I do not find it necessary to make any findings on whether or not the facts deponed in the affidavit of the plaintiff are sufficient to warrant the making of the orders sought.

I dismiss the application on the basis of lack of jurisdiction.

MADE in Chambers on 20th December 1994 at Blantyre.



G M Chimasula Phiri
ACTING JUDGE

