REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION

MATRIMONIAL APPEAL CAUSE NUMBER 19 OF 2022

(Being Civil Cause Number 355 of 2021)

(BEFORE JUSTICE J.R. KAYIRA]

BETWEEN:

NAOMI MKANDAWIRE.....1ST APPELLANT

GODWIN MKANDAWIRE.....2ND APPELLANT

AND

BENSON DYTON KHOBIRI.....RESPONDENT

CORAM: **HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA**
Counsel Mr. Tembo of Counsel for the Appellants
Naomi Mkandawire 1st Appellant (Represented)
Godwin Mkandawire 2nd Appellant (Represented)
Dr. Benson Dyton Khobidi Respondent (Unrepresented)
Ms. Christina Kazembe Court Clerk and Official Interpreter

JUDGMENT ON APPEAL

Kayira J

BACKGROUND

On 26th April, 2022, the Child Justice Court ordered the change of the name of the child for the 1st Appellant and the Respondent; the Respondent to find school for the child; the Respondent should be providing monthly maintenance of K40, 000 from 30th April, 2022. The Appellants were dissatisfied with the decision and partly appealed against the decision of the lower court on four (4) grounds. I will now outline the grounds of appeal.

GROUNDS OF APPEAL

There are four (4) grounds of appeal. In the first ground of appeal, the Appellants argue that the lower court errored in fact in making a finding that the first name of the child be changed when it was clear from the evidence that the child all along lived to be known by the current name. The second ground is that an order that the Respondent should be paying K40, 000.00 monthly for child maintenance is manifestly low and without justification on account of the means of the Respondent. The third ground is that the learned Magistrate errored in fact by making a finding that the Respondent was being barred access to his child when there was no evidence to prove that fact. Fourthly, that the finding of the court is against the weight of evidence. Looking at the fourth and last ground of appeal, one gets the impression that it is supporting the three grounds which are name, child maintenance and accessibility. Therefore, I will deal with the three grounds in this judgment on appeal.

RELIEFS SOUGHT

Pursuant to the three (3) grounds of appeal, the Appellants pray that an order of MK 40, 000.00 be quashed and be replaced with an appropriate order. Secondly, the Appellants pray that the child should continue to use the first name which she has been known with for all her life. This Court notes that there is no specific prayer regarding the third ground on accessibility of the child. However, this Court considers that as a fundamental issue when dealing with a child whose parents have divorced and will make directions accordingly.

HEARING OF THE APPEAL

In terms of the hearing of the present appeal, the Appellants filed skeleton arguments on appeal in addition to the grounds of appeal. On his part, the Respondent did not file any document but the Court invited him to make submissions in terms of his earnings considering that he never testified in the lower court on this aspect. I will address this point at a later stage when dealing with the ground of appeal on child maintenance. The parties closed their respective cases after making their written and oral submissions. The matter resumes today for delivery of judgment on appeal.

JURISDICTION

The first question to be determined is why is this appeal in this Court? First and foremost, the decision being appealed against is from the lower court specifically the Child Justice Court. This is lower Court established under Section 132 of the Child Care, Protection and Justice Act[1]. The said provision states

[1] Number 22 of 2010

that there shall be established child justice courts, which shall be subordinate to the High Court and shall exercise jurisdiction conferred on them by this Act or any other written law. In this case, the lower court made a decision after full trial. In short, the decision being appealed against is a final judgment. Therefore, this Court assumes jurisdiction under Section 20 (1) (a) of the Courts Act which states that an appeal shall lie to the High Court from a subordinate court from all final judgments.

EVIDENCE

It is trite law that appeals are by rehearing and the High Court has recourse to the record as submitted by the lower court. In this case, this Court summoned the Respondent to address it specifically on his means because the lower court's record has no such information regarding how he earns which is critical for purposes of dealing with the second ground which relates to child maintenance. I will now proceed to analysis of the issues.

APPLICABLE LAW & REASONED ANALYSIS OF THE COURT

All the issues raised on appeal fall squarely under Section 23 of the Constitution. I will therefore reproduce it for ease of reference:

> '(1) All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. (2) All children shall have the right to a given name and a family name and the right to a nationality. (3) Children have the right to know, and to be raised by, their parents. (4) All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance.'

I will now proceed to deal with the first ground of appeal which is on the name of the child.

NAME OF THE CHILD

One of the issues on appeal relates to the name that the child between the parties is using and this is under Section 23 (2) of the Constitution. For the avoidance of doubt, the said provision states that all children shall have the right to a given name and a family name and the right to a nationality. The Appellants argue that the lower court errored in fact in making a finding that the first name of the child be changed when it was clear from the evidence that the child has been all along lived to be known by the

current name. Article 7 (1) of the UNCRC says the child shall be registered **immediately after birth** and **shall have the right from birth to a name**, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. The rights to a name and nationality are also recognized in the Convention on the Elimination of all forms of Racial Discrimination-CERD, the Convention on the Elimination of All Forms of Discrimination Against Women-CEDAW and the Convention on the Rights of Persons with Disabilities-CRPD.

The Court found the preamble of the UNCRC relevant in this matter. The preamble provides that the States Parties to the present Convention, convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community; Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding; Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. In short, the intention of the State Parties is that a child who is already vulnerable by virtue of age must never be subjected to conditions and environment that is detrimental to his or her growth. I will bear this in mind throughout the determination.

Malawi is a party to the International Covenant on Civil and Political Rights-ICCPR 1966.The right to a name has also been specifically provided for in Article 24 of the ICCPR. The said Covenant states as follows:

> 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. Every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality.'

It is striking to note that the registration of a child is supposed to be immediately after birth. This is deliberate so that a child's identity is never unsettled even minutes or hours after their birth. Article 6 of the African Charter on the Rights and Welfare of the Child. The Article provides for the rights to a name, to birth registration and to acquire a nationality. By its very nature, this provision recognizes the importance and rights which accrue on one's birth which are the name given, the registration by the

national machinery and the right to nationality. I had recourse to *General Comment No. 2 on Article 6 of the African Charter on the Rights of a Child-ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality*[2]*."* The General Comment is clear that the rights under discussion are crucial to the establishment of a child's identity. The Committee considers a child's identity as one of the cornerstones to ensure his/her survival, development and protection. This is why the law demands civil registration of a child at birth in order to protect that child from different forms of abuses such as exploitation. It is also to ensure that the child confirms parentage and nationality in terms of territorial boundaries depending on where he or she is born. Like other children's rights, the rights to a name, to birth registration and to acquire a nationality cannot be fully implemented unless the cardinal principles of children's rights are carefully observed. The implementation of those rights requires taking into account the best interests of the child, non-discrimination principles, his/her survival, development and protection as well as his/her participation.

In my considered view, the rights under Article 6 are interlinked and interrelated because registration of a birth cannot be done without attaching a name. The name has special importance because it links the child to the parents and effectively the child's nationality. It is clear from the law that the name given to a child at birth is what the law recognizes. In this particular case, the name which the law recognizes is the one that the father of the child gave. As I consider this legal recognition, I am cognizant of the fact that a name has a number of functions in a society some of which are a means of identification, expression and communication. Additionally, a name serves both private and public purposes which is the main reason why the state regulates issues of identification.

Article 8 of the UNCRC places a legal duty on State Parties like Malawi to protect a child from unlawful interference with his or her name. The said Article provides that

> 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'

In other words, Court are duty bound to ensure that where issues relating to a child's name are raised, the Court must ensure that the name which is a fundamental part of the child is protected. This

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[2] 16th April,2014, ACERWC/GC/02(2014), available at: https://www.refworld.org/docid/54db21734.html [accessed1st April, 2023]

responsibility trickles down to the parent who has the primary and physical custody of the child. That parent has no powers to unilaterally make decisions without consent or input of the other parent.

In General Comment No. 2 on Article 6 of the ACRWC, the Committee is of the view that the attribution and change of the name as well as the regulation thereof should always conform to the best interests of the child. **In other words, naming practices which are not conducive to the best interests of the child must be avoided**. I find that in making such an observation, it is clear that the law is prohibiting names that are prejudicial to a person. In this case the name being used by the child and even the one given by the Respondent are not prejudicial. The Court only has to consider whether the prayer being made by the Appellant is in her best interest as per Section 8 of the Child Care, Protection and Justice Act. This Court notes that Article 8 of the UNCRC guarantees the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law **without unlawful interference**. This acknowledges the fact that a person can change a name using lawful means.

In Malawi, Section 6 (a) of the Change of Name (Restriction) Act[3] categorises the present child as a precluded person to change a name. The Act has not provided instances where change of names is lawful. This means that each case has to be handled according to its facts and/or circumstances. It is therefore pertinent that this Court determines what the best interest of the child in this particular case would mean.

The judgment of the lower court on the issue of the name of the child states as follows:

> 'Also as provided by the supreme law of the land of Malawi Constitution Section 23 (2) that all children shall have the right to a given name and a family which means no any other name but the name of the biological father. Therefore, the child in this case is entitled to the name of the biological father (the Defendant). The court orders a change of the name to the child accordingly.'

The law recognizes the name that a child is given at birth. Reading the analysis and order of the lower court, I would assume that the lower court meant that the name given by the father is what is legally accepted and not that the law only entrusts the father of a child to name a child. Making such a determination contradicts what the law explicitly provides.

The evidence of **PW2** in the lower court is that before the child was born, they agreed to name the child as Ruth if it is a girl and the father said that if the child is a boy, he will be called Berry. After the birth of the child, the Respondent named her Asante Sana. During cross examination, there was no question relating to this piece of evidence. In re-examination, **PW2** said that she named the child Ruth after the

[3] (Cap. 04:02) of the Laws of Malawi

agreement which was made with the Respondent as the father of the child before the birth of the child. During the submissions at both courts, the Respondent accepts the name Ruth. However, he prefers that the child be named Ruth Dyton Khobidi because that is how all his children are known. The Birth Certificate of Madalitso Khobidi one the children for the Respondent does not bear the middle name Dyton. Actually, the Marriage Certificate for the current marriage shows the husband as Benson Khobidi. There is no Dyton at the middle of this name too. It is critical therefore that uniformity in terms of the names of the present child and the other biological children of the Respondent are similar. Since these are children of the same father, naming them differently would create unnecessary discrepancy and questions later between and/or amongst the children. **I will therefore not grant the Respondent's preference and prayer to insert the middle name of Dyton.**

The child is currently 7 years old. She was named Asante Sana Khobidi at birth. However, the mother changed the name after few months from her birth. She has been using the name Ruth Sam Khobidi. In her evidence, the mother submits that the name Ruth Sam is a name for the grandparent of the mother to the child. That does not justify the change of the name.

In my considered view, the time that she has been using the current name is critical because it informs the decision of whether the change of the name occasions disturbance or not. At the age of 7, a child fully understands the fact that the parties divorced. This Court is sure that the child has had to grapple with her life especially why she does not stay with both of her parents. Secondly, she has been wondering why she has never seen her father and the explanations given might have not made sense to her. I would consider the age of 7 as the age where she has accepted her current status and that includes her identity which is the name that she has been using. To therefore change her name again now that she has settled and accepted the name would in my view create unnecessary anxiety and emotional disturbance.

This Court holds that since the name Ruth was agreed by the parents before her birth, there is no reason justifying its change. The surname is Khobidi and this Court holds that it should be maintained. The name has already been used and established for a substantial period of time that this Court does not consider it in the best interest of the child to change the name again. **I therefore quash and set aside the decision of the lower court on this point and thus far, the appeal on the name of the child succeeds.**

I will deal with custody issue because it hinges on the ground of appeal on child maintenance.

CHILD CUSTODY

In the lower court, the Appellant sought that primary and physical custody of the child should be with her grandparents since the child has been under their custody and care since a year and months old. Further that she is attending a high school whose quality of education is good and not a public school as proposed by the Respondent in his submissions. She insists that her weekly visits in Blantyre are sufficient for the child. On the contrary, the Respondent argues that the child should stay with either of them because as parents they have the legal obligation to raise the child. He firmly submitted that he has no problems for the child to be in custody of the Appellant as a mother to the child because she is mentally stable and the child is still young. He was against the persistent submission that the child should be staying with her grandparents because that assumes that the two are not alive. He then submitted that if the mother is of the view that she cannot stay with the child because she has no means, then the child should be under his custody as a father. In the event that the court grants custody to the mother, since the mother stays in Lilongwe, then the child should be staying in Lilongwe with her mother.

Section 9 of the Child Care Protection and Justice Act is clear that child custody should be with parents unless they are exceptionally uncapable. The incapacity of the parents has to be proven through documentary evidence and the court must make a specific finding and order in that regard. In short, the emphasis is that parents must have primary and physical custody of a child. In the event of a divorce as is the case here, then either or both of them may have custody of their child. On the international scene, Article 7 of the UNCRC says that all children and young people have the right to a name and nationality, which they should be granted at birth. It also says that they have a right to as far as possible know and **be cared for by their parents**. The article is explicit as to who has the obligation for the development, growth, protection and the welfare of a child. In short, both parents are duty bound to care for the child.

Currently, the mother stays in Lilongwe where she works and she visits the child on every weekend. On the other hand, the father stays in Nkhotakota where he is working temporarily to support his PhD program. His wife and children stay in Lilongwe and he visits them on weekends. In terms of primary and physical custody of a child, the law is clear that the parents have obligation towards the growth and proper development of their child. In that case, the law expects that custody of the child should be between the parents. The grandfather of the child started to stay with her at the age of 1 year and 4 months. Regardless of the reasons for leaving the child with the grandfather, the law does not allow that the legal obligation in terms of primary and physical custody of the child be delegated when the parents are alive and without any mental capacity issues. **Therefore, as rightly determined by the lower court, the primary and physical custody of the child should be with the mother and not the grandparents.**

SCHOOL FOR THE CHILD

The Appellants would want the child to remain at Nyasa Junior Academy in Blantyre for her education. On the other hand, the Respondent submits that his financial muscle cannot sustain the K630, 000 being school fees at this school. He submits that the child can either go to Bambino where her half siblings are or at Lilongwe International Academy because their school fees are on the lower side than at Nyasa. He then submitted that he will be paying school fees, uniform, transport, shoes, attire and stationery which means that the mother will not be struggling.

I have examined the submissions from both parties. Since custody has been granted to the mother who stays in Lilongwe, it follows that the child has to change school since Nyasa Academy is in Blantyre. Therefore, I hereby direct that the Appellants identify a school where the child will be attending classes. She can choose from the proposed two schools or any other school of her choice. Once the mother decides on the school, the details as to school fees, stationery, transport and attire should be furnished to the Respondent within 14 days. In turn the Respondent is directed to contribute school fees that is equivalent to the school fees being charged by Bambino Schools at each class of the child. The Petitioner is then under obligation depending on the type of school chosen to pay the balance if the Bambino equivalent amount of school fees contributed by the Respondent does not cover the entire school fees of the child. The Respondent is also under obligation to provide school transport costs and all school related costs for the child.

I take judicial notice that this year's academic calendar has not finished. It will not be right to abruptly change the child in the middle of the academic calendar and class. Therefore, the Appellant must facilitate proper transition of the child from Nyasa Academy to the next school of her choice.

In short, this ground of appeal on maintaining school in Blantyre for the child is dismissed.

CHILD MAINTENANCE

The other ground is that an order that the Respondent should be paying K40, 000.00 monthly for child maintenance is manifestly low and without justification on account of the means of the Respondent. The Appellants argued that the amount is unreasonable. The Court must take into account the 25% devaluation of the Malawi Kwacha and the fact that the Respondent is a person of means being a Medical Doctor. The mother of the child is a Primary School Teacher earning a monthly salary of K145, 000. The Appellants are therefore praying for monthly child maintenance of K150, 000 or any amount that this Court deems fit. On his part, the Respondent accepted that he wants to invest in his child. As a Medical Doctor working for Kamuzu Central Hospital, his salary was K314, 678.41t. However, he is pursuing his

PhD and has taken an unpaid leave for 2 years from 22nd October, 2022 to 2024 as per the communication dated 22nd October, 2022.

Currently, the Respondent is working at Illovo Sugar Malawi plc in Dwangwa, Nkhotakota. His 2 years contract is from 1st October, 2022 and is subject to extension depending on the need. He earns a monthly salary of K830, 000.00 and has an education allowance assistance of K802, 437.00 per term for four (4) of his bonafide children. He is also entitled to an Executive medical scheme for his spouse and three (3) of his children who are below 23 years old, and are still in school. The Respondent went further to submit that he has a spouse and two (2) children as well as relatives who depend on him. He does not want to make a commitment for an amount that he cannot afford. To therefore increase this amount means to cripple him financially. He therefore prayed that the Court should maintain the amount of K40, 000 per month.

Section 23 (4) of our Constitution provides the responsibility to maintain a child is for both parents. The same is clear in Section 3 of the Child Care, Protection and Justice Act and Section 50 of the Marriage, Divorce and Family Relations Act. This position of the law is crystallised under Section 19 of the Child Care Protection and Justice Act in the following manner;

> 'Unless the child justice court orders otherwise, the responsibility to maintain a child as between parents and guardians shall be joint and several.'

Article 18 of the UNCRC provides that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. It is therefore proper that the ground of appeal on child maintenance be considered in line with the above provisions and the prevailing facts.

The fact of the matter is that the income of the Respondent does not support the prayer for K150, 000.00 per month as child maintenance. I hold this bearing in mind the fact that he also has to provide for the child's educational and medical scheme needs. He is also having two children under his care who need educational support. Additionally, he has a wife to take care of. As for the other dependents, they are not minors, hence cannot demands monthly assistance. The mother of the child also earns and has an equal obligation towards the child. In this case, she will be providing accommodation, clothing and food to the child. She will also be paying shortfall of medical bill where applicable. I hold the view that a huge responsibility has already been taken by the Respondent. Therefore, the Court declines to revise the

monthly maintenance of K40, 000.00. This amount is reasonable in my considered view. **In short, I dismiss this ground of appeal.**

CHILD ACCESSIBILITY

The third ground is that the learned Magistrate errored in fact by making a finding that the Respondent was being barred access to his child when there was no evidence to prove that fact. It is striking to note that the Court record shows that the matter was adjourned on the date of hearing from the morning to 1:30PM to allow Counsel who appeared on brief to attend to another matter. At that point, all parties were available and agreed to the set time. The hearing of the matter resumed at 1:30PM and the Defendant was present. There was examination in chief, cross examination and re examination of the Applicants under oath. However, he never testified. All that is recorded on page 12 of the lower court's record is the communication that the court made to the parties in this manner;

> 'I have this to say. We had a chat with Defendant and he said he does not refuse responsibility of the child. He is the biological father. He will only submit his written reply and final submissions.'

To begin with, the word 'we' does not indicate who exactly was doing the chat. This Court holds the view that if the Applicants were part of the 'we', then they could have hinted about the discussions during their testimony. This therefore compels this Court to conclude that the 'we' excludes the Applicants. Secondly, this Court is unsure whether the Defendant expressed himself under oath as did the two Applicants. I am at pains to appreciate why the lower court made such a discriminatory approach towards the parties to a case. In my view, the Defendant should have made these comments under oath in the presence of the Applicants who could have chosen whether to cross examine to test the veracity and authenticity of the statements or not. The court should have just recorded the proceedings. Now that there is no such evidence, it is difficult for this Court to conclude that the Respondent discredited the evidence that he was not helping the child.

On accessibility, the Respondent submitted during the hearing on appeal that he should be allowed to visit the child because he has only seen the child thrice within her 7 years of life. He lamented that he cannot even take the child for shopping because he is refused to do so. Therefore, he prayed that the child should be visiting him during her holidays either for 12 days or just a week so that he can bond with her. In the lower court, the 2nd Applicant confirmed that the Respondent is a father of the child. However, after their divorce, the Respondent failed to provide for the said child. Since she had no means to provide for the child, she went and stayed with her father. She has only moved to Lilongwe because of her current employment. Looking at the entire record, this Court has difficulties to appreciate the submission by the

Respondent that he was being refused access to the child. There is no evidence to show that he made efforts to see the child through either the mother or the grandparents. Therefore, I hold that the Respondent made no efforts to have access to the child except when he came to court. I therefore find the conclusion by the lower court as unsubstantiated. **It is on this premise that I sustain the appeal on accessibility of the child.**

Now that the custody of the child is with the 1st Appellant, I order that she will be having one-week holiday with her father every holiday within the school calendar until she attains majority. The one week should be from the date that she closes school.

In summary, this Court holds as follows:

1. This Court holds that since the name Ruth was agreed by the parents before her birth, there is no reason justifying its change. The surname is Khobidi and this Court holds that it should be maintained. Actually, the time within which the name was used is already substantial. The name has already been used and established for a substantial period of time that this Court does not consider in the interest of the child to change the name again. **I therefore quash and set aside the decision of the lower court on this point and thus far, the appeal on the name of the child succeeds.**
2. Regardless of the reasons for leaving the child with the grandfather, the law does not allow that the legal obligation in terms of primary and physical custody of the child be delegated when the parents are alive and without any mental capacity issues. **Therefore, as rightly determined by the lower court, the primary and physical custody of the child should be with the mother and not the grandparents.**
3. Therefore, I hereby direct that the Appellants identify a school where the child will be attending classes. In turn the Respondent is directed to contribute school fees that is equivalent to the school fees being charged by Bambino Schools at each class of the child. The Petitioner is then under obligation depending on the type of school chosen to pay the balance if the Bambino equivalent amount of school fees contributed by the Respondent does not cover the entire school fees of the child. The Respondent is also under obligation to provide school transport costs and all school related costs for the child. **In short, this ground of appeal on maintaining school in Blantyre for the child is dismissed.**
4. This Court holds the view that a huge responsibility has already been taken by the Respondent. Therefore, the Court declines to revise the monthly maintenance of K40, 000.00. This amount is reasonable in my considered view. **In short, I dismiss this ground of appeal.**

5. This Court holds that the Respondent made no efforts to have access to the child except when he came to court. I therefore find the conclusion by the lower court as unsubstantiated. **It is on this premise that I sustain the appeal on accessibility of the child. Now that the custody of the child is with the 1st Appellant, I order that she will be having one-week holiday with her father every holiday within the school calendar until she attains majority. The one week should be from the date that she closes school.**

Each party will bear his and her own costs of this appeal.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 19th APRIL, 2023@2PM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE