

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO 314 OF 2005

BETWEEN:

**MERCY KALUMA
PLAINTIFF**

and

**PETER
1ST DEFENDANT**

MANDALA

**MRS
2ND DEFENDANT**

MANDALA

**CORAM: Hon. Justice J. Katsala
Chankakala, of the Counsel for the Plaintiff
Mr Mwala, of the Counsel for the Defendants
Edith Malani, official interpreter**

RULING

Katsala J,

This is an application by Mercy Kaluma seeking an order of this court granting her the custody of her child Dalitso Mandala born of the first respondent, Peter Mandala. She has filed three affidavits in support of her application. Only the first respondent filed an affidavit opposing the application.

The facts of the case as I can make them out from the affidavits are that the applicant and the first respondent cohabited for some time. It is not clear from the affidavits when they started cohabiting but on 25th March 1998 the applicant gave birth to a baby boy whom they named Dalitso. At the time of giving birth the first respondent was in the Republic of South Africa undergoing medical treatment following an accident. The applicant was then staying with the second respondent who is the first respondent's mother. When the first respondent returned to Malawi, he took the applicant and the child to Lilongwe where he was and is still working. They lived in his house. After a year their relationship soured because the first respondent started sleeping with the applicant's sister as a result whereof the applicant's sister became pregnant and gave birth to a child. The applicant moved out of the house and went to live with the second respondent at Chitawira Township in the City of Blantyre. However, her stay was short-lived because there were also disagreements between her and the second respondent. These disagreements were really a spill over of her disagreement with the first respondent. The applicant then went to live with her parents within the same Township. Later, it is not clear when, the first respondent told the applicant to leave the child with his mother and that she should have access to the child only upon permission from the first respondent. It would appear that she obliged. At first she could see the child whenever she wanted. But later the situation changed. She was not allowed to see the child, hence this application.

It has been argued by the first respondent that for a greater part of his life the child has been under his custody and is therefore used to his way of life. And that it would not therefore be in the child's best interest to remove him from his custody. It has also been contended by the first respondent that both the applicant and her relations ill-treat the child to the extent that the child refuses to remain at the applicant's house whenever he and the child pay her a visit. It is also alleged that the applicant does not have a proper emotional balance as she has attempted suicide on two occasions. She is not a proper person to be entrusted with the welfare and the upbringing of a child, so it has been alleged. Finally, it has been contended by the first respondent that he married the applicant under custom in 1998 which marriage has not been dissolved, and that it is thus premature to talk of the custody of the child at this juncture.

On the other hand it has been contended by the applicant that the child is living a tough life at the second respondent's house. Among other things despite his tender age, he is required to work in the second respondent's garden and also to sell sugar canes. She also alleges that the second respondent refuses to accept whatever provisions she buys for the child. As a result the child is not receiving adequate financial and/or parental care despite the fact that they (the applicant and the first respondent) are both working. On the issue of marriage the applicant contends that there is no marriage subsisting between her and the first respondent. She says plans to contract a marriage between them were abandoned following the first respondent's affair with her sister.

The evidence before me shows that both the applicant and first respondent are employed and are in a position to look after the child. It also shows that though presently the first respondent has the custody of the child he does not live with the child. He lives in Lilongwe where he is working while the child lives in Blantyre with his mother, the

second respondent. No explanation has been given on why the first respondent is not living with the child.

Let me at this stage deal with the first respondent's contention that the court cannot determine the issue of the custody of a child before the marriage between the parties is dissolved. In my view this contention is grossly misconceived. If the parties are on separation the court can determine who between them should have the custody of the child. This is obvious since the child cannot stay with both parents at the same time. Further, even where a petition for divorce is pending, the court can also determine the issue of custody, see *Huwa v Huwa*, civil cause number 239 of 1987 (unreported). On the foregoing I do not find it necessary to rule on whether there is a marriage between the applicant and the first respondent, as it has no bearing on the application before the court.

On an application for the custody of a child it is the child's welfare which is the first and paramount consideration – *Somanje v Somanje*, civil cause number 40 of 1983 (unreported), *Kamanga v Kamanga* [1990] 13 MLR 165. I have given the matter much thought and it is my considered view that the first respondent is not a responsible person. He has demonstrated that he is unable to discharge his duties as a parent *vis a vis* his child. He has failed to live with his own child in his house. He has passed on his parental responsibilities to his mother, who stays many kilometres away from him. He only sees his child occasionally when he visits Blantyre. The evidence does not show how often he makes such visits. Let me say that no argument has been advanced by the first respondent to convince the court why it would be in the best interest of the child to be raised by his grand mother when both parents are around.

Section 23 (3) of the Constitution provides that children have the right to be raised by their parents. In ordinary English language 'parent' means the father or mother of a person - see Longman Dictionary of Contemporary English, 1978. This in my view is the meaning intended in this constitutional provision. I do not think that it includes a grand parent - a parent of the child's parent.

A child needs parental care for his proper growth and development. Such care in my view does not only entail the provision of material resources but also the provision of moral support, affection and guidance. It is therefore necessary that a child should grow in an environment which has these aspects of human life in sufficient levels especially during his formative years. And in my considered view a child's mother would by far be the proper person to provide all these to a child better than a grand mother or any other relative. The situation is even much better when the mother has an income of her own, as is the case in the instant case.

The evidence before the court seems to suggest that the child has been in the custody of the respondents for some considerable time. Ideally, all things being equal, in such circumstance it would be best to maintain the status quo in order not to disturb the child. But the circumstances of this case clearly show that the interest, welfare and happiness of the child can best be looked after by his mother, the applicant. I do not think that granting custody to the applicant can cause any serious disruption to the life of the child bearing in mind that the applicant and the child are in the same township. The child will probably not be required to change schools. He will probably have the same friends. However let

me say outright that even if the child were to be taken to another location I do not think that I would come to a different conclusion.

On the foregoing I therefore grant the custody of the child, Dalitso Mandala, to the applicant. The first respondent is to have reasonable access to the child. If this cannot be worked out by the parties then on application by either party the court will order specific times when the first respondent may have such access. No order for maintenance is sought for and therefore I make no such order. Costs are for the applicant.

Pronounced in chambers this day of February 2006 at Blantyre

J. KATSALA
JUDGE