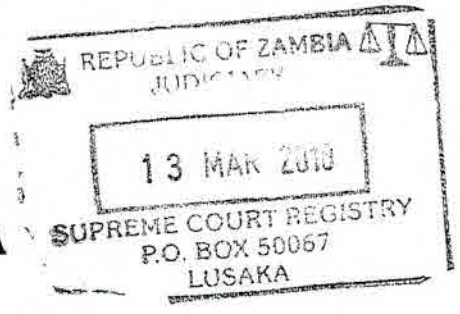
IN THE SUPREME COURT OF ZAMBIA APPEAL NO.199/2015

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

EMMANUEL MPONDA **APPELLANT**

AND

MUTALE I. CHISANGA MPONDA **RESPONDENT**

CORAM: Muyovwe, Musonda, Kabuka, JJS.

On 4th October, 2017 and 13th March, 2018.

FOR THE APPELLANT: In Person

FOR THE RESPONDENT: Mr D. Mazumba, Messrs Douglas & Partners

JUDGMENT

KABUKA, JS delivered the Judgment of the Court.

Cases referred to:

1. Jamas Milling Company Limited v Imex International (Pty) Limited (2002) Z.R. 79.
2. Elizabeth Nadine Smith Wesson v Brian Sydney Stroud SCZ No. 35 of 1998.

3. BP Zambia Plc v Interland Motors Limited (2001) ZR 37.
4. J v C (1970) AC 668.
5. D v M (Minor Custody Appeal) (1982) 3 All E.R. 897.
6. Kelvin Hangándu & Company (a firm) v Webby Mulubisha (2008) Z.R. 82.
7. Wilson Masauso Zulu v Avondale Housing Projects Limited (1982) Z.R. 194.
8. Ross-Taylor & Carson v Seldon (New Zealand Family Court, Wellington FP 085/286/95, 18 December 1995).

Legislation referred to:

Matrimonial Causes Act No. 20 0f 2007, section 72, 72(6) and 75 (1) (a).
The Supreme Court Practice (White Book) O.59 r 13.
The High Court Rules, Cap. 27 O.39 r 2.

In a ruling delivered by the High Court on 29th September, 2015, custody of the parties' two minor children was granted to their mother, the respondent in this appeal. Dissatisfied with that ruling, the appellant has now appealed to this Court.

The brief background to the matter is that the appellant and the respondent were lawfully married on 1st December, 2005. Two female children were born between them, Taonga Mponda and Isubilo Mponda, who at the material time of commencing divorce proceedings were aged 7 and 3, respectively. There were

two other older girls, Mwenzi Mponda aged 16 and Victoria Mponda 15 who were respectively, born from the respondent and appellant's previous relationships.

On 27th September, 2012, the appellant commenced proceedings for dissolution of the marriage and the court granted him a *decree nisi* of divorce on 19th December, 2012. The appellant was also granted physical custody of the children of the family with liberal access to the respondent. A month later, on 22nd January, 2013, the respondent took out an application seeking to vary the order for custody.

In a judgment rendered on that application dated 21st June, 2013, the parties were granted joint custody of the children by the court on the following conditions: (i) that the children would remain in the appellant's physical care and control and continue going to the same schools unless both parties agreed otherwise; ((ii) the parents were to decide in which school the infant child, Isubilo, was to be enrolled; (iii) the appellant was ordered to be paying school fees and other school requirements, whilst the respondent was to generally provide for the children's financial

and material needs; (iv) the respondent was to have weekend visitation rights every fortnight with the children required to return to the appellant's home by 14:30 hours on Sunday; (v) the children were also to spend every other school holiday with the respondent. Liberty to apply for variation was granted to the parties, in the event of what the judge termed, 'a drastic change' to the circumstances, as they were at the material time.

On 3rd July, 2013, the respondent made an application for review of this judgment on grounds that, the learned judge had misconstrued the facts of the case as regards the children. Her contention was that, since the two oldest children were not born from the appellant and herself and did not reside with them during the subsistence of their marriage, the issue of custody only affected the two minor children who were born from the marriage. The application for review was opposed by the appellant on the basis that, it was misconceived as the affidavit had not shown any circumstances that had drastically changed to warrant a review of the judgment; and was therefore, an abuse of court process.

In her ruling on the same, the learned trial judge agreed with counsel for the appellant that there was no fresh evidence to warrant any review and cited as authority, the case of **Jamas Milling Co. Ltd v Imex International (Pty) Limited.**[1] The judge also noted that, the respondent should have properly made the application under **section 72 (6) of the Matrimonial Causes Act, 2007** and not pursue it as a review under **Order 39 rule 2 of the High Court Rules** which was a wrong provision to use for such applications. Accordingly, the application for variation of the custody order was dismissed, with costs.

On 25th March, 2015, the respondent made her third application to vary the custody order made in the judgment of 21st June, 2013 on the grounds that there had been a drastic change in circumstances, as the appellant had been transferred to Lusaka. The respondent contended that it would be difficult and costly for her to have access to the children every fortnight. It was also her contention that whilst the appellant could be concerned about the welfare of the children, he had failed to pay their school fees as a result of which the children had missed classes. This prompted the respondent's advocates to request the

school for a report with regard to non-payment of fees for the two minor children. The respondent further claimed that the appellant would go out drinking after work and that he at times left the minor children in the care of a stranger only known as Uncle Joe.

In opposing the application, the appellant claimed that the court had no jurisdiction to review the custody order based on grounds that could have been raised by the respondent in the initial application. He claimed that the issue having already been determined by a judgment of the court, it was *res judicata*. That the application itself was misconceived, malicious and lacked merit as the respondent was only forum shopping.

In answer to these contentions, the argument by the respondent's advocates was to the effect that, **sections 72 (6) and 75 (1) (a) of the Matrimonial Causes Act** grant the court power, in the best interest of the child, to vary or discharge an order made by it previously, relating to such child's custody or education. He further relied on the case of **Elizabeth Nadine Smith Wesson v Brian Sydney Stroud**[2] in which this Court

varied a joint custody order relating to a child of a tender age, as a result of which the mother was given custody with access to the father. He submitted that the present case was suitable for such variation.

In his submission in response, the appellant who represented himself urged that, the issue raised in the affidavit in support by the respondent had already been considered by the court in the two previous decisions; and in the absence of a comprehensive social welfare report or school report disclosing that he was incapable of raising the children well, it would be unfair to alter the custody order. The appellant further argued to the effect that, the nature of his job as a Marketing representative was such that transfer to Lusaka should not be an issue, as the respondent had at all material times been aware of the possibility of such an eventuality. In his reply, counsel for the respondent asserted that the earlier order had been premised on the fact that both parties were living in Kitwe. That it was also not possible that the respondent could have anticipated the transfer to Lusaka two years in advance.