

MALAWI
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NO. 3 OF 2004

BETWEEN:

KARAMTHODI GOVINDAN KUTTY..... PETITIONER

-and-

DELLIA KUTTY.....RESPONDENT

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

Khondiwa of Counsel for the Petitioner

Chisanga of Counsel for the Respondent
Mbewe, Court Clerk

Place and Date of hearing : Blanytre

9th May 2005

Date of Ruling:

16th May 2005

RULING

Kapanda, J:

Introduction

This court annulled a marriage between the Petitioner and the Respondent. On the same day the order of nullity was made the court further made an order that the Petitioner shall be paying the sum of MK 20,000 for the maintenance of the child borne out of the marriage.

The Petitioner has now taken out the Notice of Application herein where he wants a variation of the said order of maintenance. The Respondent, on the other hand, wants the order varied so that the quantum of maintenance is increased.

The Notice of Application

As stated earlier, in the Application before me the Petitioner is desirous of having the Order of Maintenance varied. In particular the Petitioner has applied for the variation of the maintenance Order of 12th day of October 2004 under which he was ordered to pay MK 20,000 per month for the benefit of Sheline Kutty an infant. For the purpose of clarity, the court will set out the relevant parts of the order that the Petitioner wants which is in the following manner viz.

“The Petitioner seeks variation of that order [i.e. the order of 12th October 2004] to the extent that the maintenance requirements (*of the infant*) should be secured by the transfer of the Petitioner’s interest Silver Shadow to SHELINE KUTTY so that she derives all her maintenance requirements therefrom and that the Respondent be appointed by the Court as Trustee for the said infant and to manage the shop and meet all expenses pertaining to the business..”

I wish to observe that the Petitioner has not indicated the relevant law under which this application has been taken. The court took issue with him in this regard and he purported to show that same could be dealt with under the inherent powers of the court. That was a dangerous path to take in view of the fact that we are dealing with issues of maintenance of a child. Surely, citation of a particular rule would have been most ideal. Counsel is advised not hide under some obscure powers of the court. I decided to proceed to hear the matter notwithstanding the shortcomings mentioned above. This was done since the matter involves the interest of an infant. However, this does not mean that this court condones the practice of counsel bringing an application that does not indicate the provision under which an application is made.

A narrative of the facts

The facts of this case are to be found in the affidavits that were filed with this court and exchanged between the parties. The other facts of the case are gathered from the Case Record. I shall attempt, as far as practicable, to set out the relevant facts as I found them. The following are the facts:

Order of Nullity of marriage and maintenance of a child

On 12th October 2004 the Court ordered that the marriage between the Petitioner and the Respondent was null and void *ab initio* on account that it was contracted when the Petitioner was already married to another person. At the time this order was made there was a child borne out of the marriage between the Petitioner and the Respondent. Accordingly, the Court further ordered that the Petitioner should be making monthly maintenance provision to the child in the sum of K20, 000 until a further order of the Court on behalf of the child.

Application for Variation

As I see it, the order for variation was an interim one liable to be varied on an application on behalf of the child. The Petitioner has taken out a Notice of Application for the variation of the said Maintenance Order of 12th October 2004. The said application was issued out of this Court on 7th March 2005. As mentioned earlier, the Petitioner seeks to vary the said Maintenance Order. The Petitioner avers that his business interest in Silver Shadow will provide for the maintenance of the infant child thus securing more money to her than the present arrangement whereby he is obliged to provide K20, 000 every month as maintenance to Shelline Kutty. I wish to observe that, on the face of it, the Notice of Application does not appear to show that the Petitioner has taken it out on behalf of the child. Suffice to put it here that the Petitioner asserts that he has an interest in a business that is currently being operated by the Respondent under the style and name of Silver Shadow. As proof of such interest the Petitioner has tendered in evidence a Certificate of Registration of the said business viz. Silver Shadow. The relevant parts of the said certificate show this:

“MALAWI GOVERNMENT

BUSINESS NAMES REGISTRATION ACT
(Cap. 46:02)
CERTIFICATE OF REGISTRATION

I hereby certify that ANGELINAH MUKAMUZANDU MAKOTO carrying on business as
“SILVER

SHADOW”

This 20th day of May 2002 have/has been duly registered pursuant to and in accordance with the provisions of the Business Names Registration Act (Cap. 46:02) and the Rules made thereunder, and have/has been entered under the number 60671 in the index of Registration.

ENDORSEMENT NO. 1

With effect from 11th day of March 2003 DELLIA KUTY has joined in the business as a partner.

(Signed)

F.E. CHIBISA

ASST. REGISTRAR OF BUSINESS NAMES

ENDORSEMENT NO. 2

With effect from 25th day of March 2003 KARAMTHODI COVINDAN KUTTY has joined in the business as a partner.

(Signed)

F.E. CHIBISA

ASST. REGISTRAR OF BUSINESS NAMES"

Contrary to the assertions of the Petitioner the Certificate does not show the number of shares that the Petitioner holds in Silver Shadow. Further, the Certificate does not indicate that the Petitioner bought out Ms Angelina Mukamuzandu Makoto's interest in Silver Shadow. Indeed, there is no evidence that Ms Makoto no longer has an interest in Silver Shadow. As matters stand there are three people who have an interest in Silver Shadow. It follows, therefore, that each of these three people has an interest in the business. Further, in the absence of evidence of the shareholding in Silver Shadow, it may well be said that it is doubtful that the Petitioner has two thirds (2/3) interest in Silver Shadow.

Turning again to matters of fact in this matter, it is not in dispute that Silver Shadow is no longer a going concern. Further, it is common cause that the child of the marriage between the two parties herein had grown accustomed to a certain life style thereby necessitating that the maintenance money should be revised upwards. In essence the Respondent wants the maintenance money increased from the current sum of K20, 000 to

such a sum that this Court deems reasonable until the child reaches a majority age.

Determination

I will now turn to deal with the matters arising, and falling, to be determined in the Notice of Application.

For starters, it is to be observed that it is settled law that orders concerning child maintenance are never final. Thus, the variation of the maintenance order herein is not an extra-ordinary exercise.

The Petitioner wants this Court to make the interests of the infant to get maintenance dependent on the success of a partnership venture. I do not think that the suggestion by the Petitioner is in keeping with the provisions of Constitution and the Convention on the Protection of the Rights of the Child. As I understand it, Section 23 of the Constitution enjoins this Court to ensure that the interests of a child, no matter the circumstances of its birth, are protected under the law.¹ Subjecting the maintenance of a child on the obscure Petitioner's alleged interest in Silver Shadow will be dereliction of duty of the highest order on the part of this court. Further, the suggestion by the petitioner would have the undesirable consequence of abandoning this child and put her under the mercy of the success of a business. Moreover, this Court doubts that that would be protecting this child from a treatment that would not interfere with her education or to her physical, mental or social development. A child that was used to a good life should not be at the mercy of a business venture that has closed. Indeed, there is evidence to suggest that Silver Shadow is no longer a going business concern. Even if it were a going business concern it is highly speculative to say that the business generates more than MK 20, 000. In point of fact, no evidence was offered to show what income this business generates. Accordingly, it will be foolhardy on the part of this Court to vary the maintenance order as suggested by the Petitioner viz. that the maintenance of the infant should be secured by the transfer of the Petitioner's interest in Silver Shadow so that the infant derives her maintenance requirements therefrom.

¹ S.23 of the Constitution states, inter alia:

- (1) All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law---
- (4) Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is liberty to (a)--(b) interfere with their education (c) harmful to their health, or their physical mental or spiritual or social development

Further, and as rightly put by Counsel for the Respondent, the issue of Silver Shadow business is a subject matter of litigation between the two parties herein. The Court does not wish to bring that action into this matter. Indeed, the Petitioner's alleged shares in Silver Shadow have nothing to do with the maintenance of the infant. Actually, no Court has yet determined whether the Petitioner has any shares in Silver Shadow.

The Court accepts that the interests of this child would better be protected if indeed the maintenance order is varied so that the sum payable is increased considering the life style that she has grown accustomed to. The Respondent, had in its evidence suggested a figure in the region of the sum of K93, 905.00 but after taking into account the representations of the Petitioner I think it is indeed on the higher side. In making this observation the court is alive to the strong submission of Counsel for the Petitioner that the child has not yet started attending school at St. Andrews International High School. Further, I wish to note that this court does not accept the allegation of fact that the infant child would require to be bought clothing every month. There is, therefore, no reason why this court should take into consideration the element of fees at St. Andrews, and the requirement to buy clothing every month, in computing the quantum of maintenance. In my judgment, the figure of K75, 000.00 per month would be a reasonable one, and would adequately protect the interests of this child.

Conclusion

The application for variation of the maintenance order by the Petitioner is not successful and it is dismissed. Instead this court orders that the maintenance be, and is hereby, reviewed upwards to the sum of MK 75, 000. It is so ordered.

Pronounced in Chambers this 16th day of May 2005 at the Principal Registry, Blantyre.

F. E. Kapanda

JUDGE