

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ/08/061/2017

**IN THE MATTER OF: ORDER 30 RULE 11 OF THE HIGH COURT RULES
CHAPTER 27 OF THE LAWS OF ZAMBIA**

**AND IN THE MATTER OF: SECTION 15 OF THE AFFILIATION AND
MAINTENANCE ACT CAP 64 OF THE LAWS OF
ZAMBIA**

**AND IN THE MATTER OF: AN APPLICATION FOR CUSTODY OF A MINOR
CHILD - ASHMI MAYANK PATEL AGED 3 YEARS**

BETWEEN:

MAYANKUMAR RAMANLAL PATEL

APPELLANT

AND

CHARULATA MAYANKUMAR PATEL

RESPONDENT

**Before the Hon. Mrs. Justice J.Z. Mulongoti
In Chambers on the 27th day of July, 2017.**

*For the Appellant: Mr. M. Sitali of Milner and Paul, Legal Practitioners
For the Respondent: Mr. K. Wishimanga of A.M Wood & Company*

R U L I N G

Legislation referred to:

1. Court of Appeal Act, 2016, section 9

This is a ruling on a preliminary issue raised by the respondent. It is made by Notice of Motion for an order to determine a point of law and to dismiss the appellant's application for temporary visitation of the child of the family. The motion was filed pursuant to Order 14 A Rules 1 and 2 of the Rules of the Supreme Court 1999 edition (White Book) and Order VII Rules 1 and 2 and Order X Rule 2 of the Court of Appeal Rules (CAR).

The application was supported by an affidavit sworn by one Kebby Wishimanga, the advocate seized with conduct of the matter on behalf of the respondent. He deponed that in the Court below, the respondent applied to dismiss the application for custody filed by the appellant. The application was dismissed by the High Court and is now subject of the appeal before the Court of Appeal. Counsel deponed further that in the High Court, the respondent relied on her affidavit in support of the Notice of Motion to determine a point of law and to dismiss the application. The respondent further relied on the affidavit in reply. The said affidavits are produced and marked "KW1" and "KW2" respectively.

The respondent alleged that the appellant is an American Citizen and has been so for more than seven years and that the child of the family, Ashmi Mayankumar Patel ("Ashmi") was born on 28th December, 2012 in the

United States of America and as such is an American citizen. Furthermore, that none of the parties is Zambian.

It was further deponed that the court below never issued a maintenance order in respect of Ashmi which would have allowed the Appellant to rely on the provisions of section 15 of the Affiliation and Maintenance Act Chapter 64 of the laws of Zambia.

By a Ruling dated 13th February, 2017 (subject of the pending appeal) the lower court dismissed the appellant's application. Prior to the Ruling, the appellant made a similar application for temporal visitation "KW3" is a copy of the said application. The application was not determined by the lower court as it was said to be dependent on the determination of the Notice of Motion. Thus, the dismissal of the Notice of Motion invariably dismissed the application for temporary visitation.

In addition, counsel deponed that the current application for temporary visitation relies on the provisions of section 15 of the Affiliation and Maintenance Act, which provision is subject of the appeal. The appellant is therefore, seeking the same relief being sought in the appeal as such making the application before me as a single judge of the Court of Appeal, untenable.

The appellant, Mayankumar Ramanlal Patel filed an affidavit in opposition in which he deponed that he was an American citizen. Exhibit 'KW1' of the respondent's affidavit in support of the Notice of Motion was his expired British passport and not the American one as alleged. He further deponed that he never renounced his Zambian citizenship and was a Zambian citizen per copy of his current passport marked 'MRP3'. Furthermore, that the issue of his status is a subject of the appeal. Thus averments regarding his status as a Zambian by the respondent's counsel would render it an academic exercise.

Contrary to the assertion by counsel for the respondent particularly in paragraph 13 of the Affidavit in Support, that the application for temporary visitation is premised on the provisions of the CAR. Further, the application before me is for temporal visitation which application is distinct from the appeal before Court and the same can be evidenced by the memorandum of appeal exhibited 'MRP2'.

At the hearing, Mr. Wishimanga relied on the affidavit in support. Learned counsel for the appellant Mr. Sitali submitted, viva voce that the question the respondent is asking the Court to consider is whether or not this Court can hear the application before it as none of the parties to the

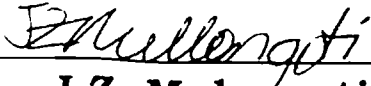
action is Zambian. And whether the application is tenable at law considering that it relies on the very issues that are subject of the appeal.

Learned counsel further submitted that the preliminary issues raised by the respondent are the same ones that are before the Court of Appeal in the pending appeal. Additionally, that the respondent has not adduced any evidence to show that the appellant is non Zambian through renunciation in compliance with section 28 of Act No. 33 of 2016 or the now repealed section 23 of the Citizenship Act No. 129 of the laws of Zambia. In reply Mr. Wishimanga contended that the appellant's counsel had actually buttressed his argument that proceeding with the application for temporary visitation would be tantamount to delivering issues on appeal.

I have considered the affidavit evidence and viva voce submissions by counsel. It is clear to me, that the application for temporary custody is misconceived as argued by the respondent's counsel in its Notice of Motion to raise preliminary issue. I am inclined to allow the preliminary issue on the basis that I would be tampering with the main appeal, if I entertain this application. The issues the application for temporary custody raises, are clearly the subject of the appeal. The Rules of the

Court are clear that a single Judge has no jurisdiction to hear matters involving the decision of an appeal see section 9 of the Court of Appeal Act, 2016. Accordingly, I uphold the preliminary issue. Costs in the cause.

Delivered at Lusaka this 27th day of July, 2017.



J.Z. Mulongoti
Court of Appeal Judge