

IN THE HIGH COURT FOR ZAMBIA

2014/HP/D/124

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



KATUTA CHILUFYA CHEWE

PETITIONER

AND

SHARON JUNE AKINYI OYOYO

RESPONDENT

**Before Hon. Mrs. J.Z. Mulongoti in Chambers on 10th July,
2014**

**For the Petitioner: Mrs. M.M. Muyambango of Dove
Chambers**

**For the Respondent: Mrs. R.P Bwalya of the National
Legal Aid Clinic for Women**

RULING

Cases referred to:

- 1. Shell and B.P. v Conidaris and Others (1975) ZR 174 (S.C)*
- 2. Turnkey Properties v Lusaka West Development Company Limited and Others (1984) ZR 85*
- 3. American Cynamid v Ethicon Limited (1975) AC 396*
- 4. Ndove v National Educational Company Limited (1980) ZR 184 (H.C)*
- 5. Gondwe v B.P. Zambia Limited (1997) S.J 1 (S.C)*
- 6. ZIMCO Properties v LAPCO Limited [1988 -1989] Z.R. 92, at 93*

Legislation referred to:

1. *Order XXVII of the High Court Rules, Chapter 27 of the Laws of Zambia*

This is the Petitioner's Application for an interim injunction pursuant to Order XXVII of the High Court Rules Chapter 27 of the Laws of Zambia. The Petitioner seeks an order restraining the Respondent from leaving jurisdiction with the child of the marriage, one Mupemba Nachizo Achieng Chewe, and that the said child should be treated as a ward of the court.

The brief background to this Application is that the Petitioner took out a Petition for Judicial Separation on 10th June, 2014 seeking, *inter alia*, an interim injunction restraining the Respondent from taking the child of the marriage out of jurisdiction or in the alternative, that the child be treated as a ward of the court. On 23rd June, 2013, I granted an *ex parte* order of interim injunction and set 10th July, 2014 as the return date for the *interparte* hearing, hence the application before me now.

This Application is made pursuant to Order XXVII of the High Court Rules Chapter 27 of the Laws of Zambia supported by an Affidavit dated 10th June, 2014 sworn by the Petitioner, Katuta Chilufya Chewe. He deposed, *inter alia*:

1. That the Respondent and I were married on 17th December, 2010, at the office of the Registrar of Marriages, Civic Centre, Lusaka District.
2. That our only daughter, Mupemba Nachizo Achieng Chewe was born on 26th August, 2011.
3. That a few months after the birth of our daughter, the Respondent started expressing her desire to go back to her home country, as she was not willing to settle in Zambia.
4. That prior to the marriage, the Respondent and I agreed to settle in Zambia after the marriage ceremony, because I have sickle cell anaemia and need to be close to my family in Zambia, who know how to respond to my condition.
5. That despite the arrangement made that we would live in Zambia, the Respondent has been insisting on us moving to Kenya, thereby causing stress and tension between us.
6. That since July, 2012, my relationship with the Respondent has been acrid, as the Respondent has constantly expressed her displeasure of being with me in Zambia by picking quarrels over petty issues and has constantly threatened to pack her bags and take our daughter with her to Kenya,

where I would not be able to locate them and access our daughter.

7. That the Respondent, knowing my attachment to my daughter, has made it a habit to threaten me each time she is unhappy on any matter that she would leave and take the child of the family with her to her place where I would not be able to locate them.
8. That the Respondent has been openly hostile towards me and has vented this venom in her statements each time we differ, that she would leave me and that will be the last time I will ever see my daughter.
9. That the Respondent who is in the possession of our child's passport, left the matrimonial home on 1st June, 2014 with our daughter, to an unknown place and I have not been able to locate them since that date.
10. That that there is an eminent risk that the Respondent may leave jurisdiction with the child of the marriage to my detriment.

The Respondent filed an Affidavit in Opposition to the Affidavit in Support of Summons for Interim Injunction above, deposed to by

the Respondent, **Sharon Jane Akinyi Oyoyo**. She deposed, inter alia, that:

1. I only proposed that the Petitioner and I move back to Kenya when his contract came to an end as the company the Petitioner worked for was still operational in Kenya
2. I have never threatened to deny the Petitioner access to our child and further that the Petitioner knows where my home is in Kenya
3. I left the matrimonial home following unresolved marital disputes and the Petitioner has never made an effort to know where the child of the family and I are staying despite various efforts I made to initiate communication between the Petitioner and I.
4. I will aver that in December 2013, I left the country with the child and I came back showing that I have no intentions of keeping the child of the family away from the Petitioner who is the father.
5. I will aver that there is no need to treat the child of the family as a ward of the court as I cannot leave the country without duly informing the Petitioner of the same, and the passport of the said child of the family should remain with

me as the mother as I cannot do anything to the detriment of the Petitioner as far as the child is the subject matter.

In response, the Petitioner also filed an Affidavit in Reply dated 9th July, 2014 sworn by himself. He deposed, *inter alia*, that he had agreed with the Respondent prior to being married that they would settle in Zambia. Further, that he was not an employee of Indra Spain Limited, whose Africa office is situated in Nairobi Kenya, but sub-contracted to do certain works for them on a GRZ IFMIS project and when the project came to an end in March 2012, he could not go back to Nairobi Kenya, as the project for which he had been subcontracted had been concluded.

He also deposed that the Respondent has made it clear to him that she would leave with the child to go back to her home country Kenya and settle not at the Respondent's parents home, which he knows, but somewhere else in Kenya where he would not be able to locate them and have access to the child.

He stated that since the Respondent left the matrimonial home, and refused to inform him where she was moving to and, his access to the child has been on the Respondent's terms as she dictates when he can see the child. He also stated that it was

only on 8th July, 2014, when he called her mobile phone asking if he could see the child that she gave him directions to her house situated on Buluwe Road, Woodlands Extension, Lusaka, which he gathered is the place where the Respondent and the child are currently resident.

He further deposed that the Respondent informed him when she came back from Kenya in January, 2014 that the reason she had come back was because of her contractual obligations with her Employer, KPMG Zambia. In addition, the Respondent also informed him that she had requested her employer to secure her employment with KPMG, Kenya Office, but their response was that the Zambia office and the Kenya Office were separate entities.

At the hearing, Mrs. M.M. Muyambango argued the Application on behalf of the Petitioner stating that the Petitioner was relying on the Affidavit in Support and the Affidavit in Reply aforesaid.

She submitted that in applications relating to injunctions, the primary consideration is whether there is a serious question to be tried and where the balance of convenience lies and whether damages would be adequate as enunciated in **Shell and B.P.**

Zambia Limited v Conidaris and Others(1). She submitted that there is a serious question to be determined in that there is before court a Petition for Judicial Separation to the effect that the Petitioner feels that the Respondent has behaved in such a way that he cannot be expected to live with her.

She also submitted that in the Affidavits, it will be observed that the Respondent left the matrimonial home with the child and since then, the Petitioner's access to the child has been dictated by the Respondent as she decides when he can see the child and has been unwilling to let go of the child to be seen by the Petitioner. Further, as stated in Paragraph 8 of the Affidavit in Support, ever since the relationship between the parties became acrid the Respondent has indicated that she would like to leave jurisdiction and go back to Kenya with the Child. It would also be in the best interest of the child to be in a place where she has access to both parents.

She further submitted that the balance of convenience tilts more in favour of granting the injunction restraining the respondent from leaving the country with the child and maintaining the status quo.

It was Mrs. Muyambango's contention that damages would not be adequate to compensate the Petitioner as that would not atone for time he would lose for not accessing the child. The Respondent also has possession of the child's passport and if she continues keeping it, there is an eminent danger of her leaving the country with the child. Thus, the child should be treated as a ward of the court to be taken out with the court's permission and her passport surrendered to the court pending determination of the Judicial Review proceedings.

Mrs. R.P. Bwalya, counsel for the Respondent, opposed the Application and relied on the Affidavit in Opposition abovementioned. She submitted that the Respondent is currently resident in Zambia and the Petitioner is able to locate her at her place of work and her residence. She argued that the submission that the Petitioner has failed to have access can be remedied by applying for access not injunction.

Mrs. Bwalya submitted that the application falls short of showing real danger of the child being removed from jurisdiction. She referred the court to paragraph 7 of the Affidavit in Opposition and pointed out that the Respondent had travelled with the child and returned in December, 2013.

She also submitted that the child is of tender age and at this point she stays with the Respondent. As such, if the injunction is granted, it would affect the Respondent's movements as well. She also referred to the case of **Shell and B.P. Zambia Limited v Conidaris, supra**, to the effect that the burden of showing greater inconvenience is on the plaintiff. The Respondent has not shown what inconvenience he would suffer should the child move out of jurisdiction. Further, it is actually the Respondent who would suffer violation of her rights if the child is made a ward of the court.

It was Mrs. Bwalya's submission that in **Turnkey Properties v Lusaka West Development (2)**, it was stated that that the applicant should not use an injunction to create new conditions favourable to himself. The conditions herein as requested would favour the Petitioner as the parties are of different nationalities

In reply, Mrs. Muyambango submitted that the Petitioner has shown the danger there is in not granting the injunction. As already stated, the child would be deprived of the opportunity of being with both parents. It is in the child's best interest to be in a place where she can have access to both parents especially that she is of tender age. She reiterated that in **Shell and BP v**

Conidaris(1), it was stated that mere inconvenience is not enough. She further submitted that the primary consideration of the court is the best interest of the child which is to maintain the status quo for the child to continue living in Zambia since the Respondent is also resident here. She prayed that the interim injunction be confirmed and the child be made a ward of the court.

I have considered the affidavit evidence filed herein and also the submissions by both counsel. The principles upon which an interim injunction may be granted are well settled in this jurisdiction. The decision of the House of Lords in **American Cyanamid v Ethicon Limited(3)** cited with approval in many Zambian cases is renowned for the series of questions which have to be considered in deciding whether or not an interim injunction should be granted. These are: whether there is a serious question to be tried, whether damages would be an adequate remedy, where the balance of convenience lies and whether it is necessary to maintain the status quo.

Firstly, I have perused the Petition for Judicial Separation and the Respondent's Answer thereto. More particularly, in relation to the application before me, I note that both parties have prayed for

the grant of custody of the child of the marriage. I have observed from the Affidavit evidence and as the Respondent personally admitted, she has expressed her intention to go back to Kenya. Seeing as she has also admitted that the child is of tender age and restraining her from carrying the child would inevitably mean restraining her movements would mean that she has not contemplated moving to Kenya alone without the child. In the circumstances, I am inclined to agree with counsel for the Petitioner that there is a serious question to be determined at the hearing. As I have stated, in an application for an interlocutory injunction, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the applicant is entitled to relief. See **Ndove v National Educational Company Limited(4)** and **Gondwe v B.P. Zambia Limited(5)**.

Secondly, it is a fundamental principle of injunction law that an interim injunction should not be granted to restrain actionable wrongs for which damages are the proper or adequate remedy. Thus, if the claimant can be fully compensated by an award of damages, no injunction should be granted at all. In **Shell and B.P. Zambia Limited v Conidaris and Others** the Supreme

Court held that *“A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which can possibly be repaired.”*

I opine that the loss of time of access to a child by a parent is not loss that can be remedied by an award of damages. Therefore, I am also inclined to agree with Mrs. Muyambango’s submission that damages would not be adequate to compensate the Petitioner for the time he would have lost without having access to his child.

This brings me to the third question to be determined. Gardner, J.S., in **ZIMCO Properties v LAPCO Limited(6)**, explained lucidly that the balance of convenience arises if the harm done would be irreparable, and damages would not suffice to compensate an applicant for any harm which may be suffered as a result of the actions of the defendant.

Upon careful consideration of the issues raised in the Affidavits, I am of the view that there is a potential threat of the Respondent leaving jurisdiction with the child of the marriage which would deny the Petitioner his right to have access to the child since he is resident in Zambia and has shown no intention or prospect of relocating to Kenya. The child would also inevitably be denied the opportunity of being raised with both parents. The Respondent has not refuted the Petitioner's averment that the parties had a prior agreement to live in Zambia after the marriage.

On the other hand, the Respondent's concern is that the injunction if granted would restrict her movements since the child is of tender years although she is resident in Zambia and works here. I am of the considered view that the loss the Petitioner will suffer if the Respondent leaves jurisdiction with the child is much greater than the mere inconvenience the Respondent believes she would be put to. It is worth noting that the child would also be denied the right to have access to both parents and as rightly submitted by counsel for the Petitioner, it is trite that the best interest of the child is of primary concern. For these reasons, I accept that the balance of convenience lies with the Petitioner.

Further, it was submitted by Mrs. Muyambango that the injunction should be granted restraining the Respondent from leaving jurisdiction with the child of the marriage in order to maintain the status quo. In **Turnkey Properties Limited(2)** it was held, *inter alia*, that an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial.

Having found that there is a serious question to be determined, that damages would not be an adequate remedy if the injunction is not granted and that the balance of convenience lies with the Petitioner, I am fortified in granting the interim injunction in order to preserve the status quo.

For the foregoing, the Application is granted as prayed with costs in the cause. Leave to appeal is granted pending determination of the matter.

Delivered at Lusaka this 4th day of AUG 2014



J.Z. MULONGOTI

HIGH COURT JUDGE