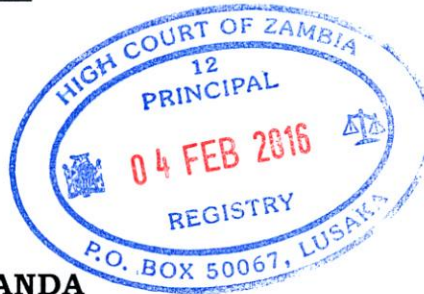


IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2015/HP/D.272

(Civil Jurisdiction)



BETWEEN:

NAWONGA KASISA MVULA CHANDA

PETITIONER

AND

JAPHETH CHANDA

RESPONDENT

Before the Hon. Mrs. Justice A. M. Sitali on the 4th day of February, 2016.

For the Petitioner* : *Mr F. Zulu of MSK Advocates

For the Respondent* : *Mr M. J. Katolo of Milner Katolo and Associates

R U L I N G

Legislation referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia, Order 27 rule 4.**
- 2. The Commissioner for Oaths Act, Chapter 33 of the Laws of Zambia; section 6.**

The Petitioner filed a petition for divorce on 15th October, 2015 seeking an order that her marriage to the respondent be dissolved. At the same time she filed an ex parte summons for a matrimonial injunction which was supported by an affidavit sworn by the petitioner. On 27th October 2015, the respondent filed an answer and cross petition. On 3rd November 2015 the respondent filed a notice to raise preliminary issues pursuant to Order 14A of the Rules of the Supreme Court, (White Book 1999 edition). The issues raised were as follows:

1. The application for an interim injunction is irregular and null and void ab initio as the affidavit in support of the application is not dated in the jurat contrary to the mandatory provisions of Order 5 rule 20 (g) of the High Court Rules read with section 6 of the Commissioner of Oaths Act, Chapter 33 of the Laws of Zambia (the "Commissioner for Oaths Act").
2. The petition for divorce is incompetently and irregularly before the Court as it was filed without the original certificate of marriage and without the leave of court to file the petition without the original certificate.

At the inter parte hearing of the petitioner's application for an injunction, Mr. Katolo, submitted that Order 5 rule 20(g) of the High Court Rules is couched in mandatory terms as it states that an affidavit shall state the date of the swearing and the place where it was sworn. Similarly section 6 of the Commissioner of Oaths Act also provides that the affidavit shall state the jurat, at what place and on what date the affidavit was made.

Counsel further submitted that the provisions of the Act which have been infringed are mandatory and not directory in nature. He therefore urged that the affidavit in support of the ex parte summons for an interlocutory injunction be expunged from the record and that the application be dismissed with costs as it has no leg to stand on.

With regard to the second preliminary issue, counsel submitted that the issue goes to the root of the action as the petition was filed without the leave of the court to use a substitute copy of the marriage certificate. As such, the court is deprived of jurisdiction to make any determination in this matter.

In opposing the application, Mr Zulu counsel for the petitioner submitted that he would first address the second issue. He went on to submit that the respondent has cross petitioned in this matter and that the cross petition can stand on its own. He submitted that since the respondent has the certificate of marriage, he should avail it to the court so that the matter can proceed. He

urged that the respondent be directed to bring the original marriage certificate before the court as evidence of the marriage in issue.

Regarding the first issue, counsel conceded that, Order 5 rule 20 (g) of the High Court Rules Chapter 27 of the Laws of Zambia and section 6 of the Commissioner of Oaths Act are couched in mandatory terms. Counsel submitted that however, in the interest of justice and pursuant to Order 3 rule 2 of the High Court Rules, this court can make an appropriate order as in counsel's view, expunging the affidavit from the record would do injustice to the petitioner. He therefore, prayed that the court does allow the affidavit to be corrected and remain on record in support of the application for an interim injunction.

In reply, Mr. Katolo submitted that the petitioner's submission that the original certificate of marriage be availed to the court does not retrospectively cure what was a nullity at commencement. With regard to the defective affidavit, counsel submitted that the court was being invited to invoke Order 3 rule 2 in the interest of justice. He submitted that the only person who can correct the error in the affidavit before this court is not the court, but the commissioner of oaths before whom it was sworn. Counsel proposed that the appropriate way to deal with it was to withdraw the affidavit and to have it properly done.

I have considered the preliminary issues raised by the respondent as well as the arguments in support and in opposition to the application. It is trite law that Order 5 rule 20 (g) of the High Court Rules, is couched in mandatory terms and does require that the deponent state the place at which and the date when the affidavit is sworn. In this case, the failure by the petitioner to state the date and place where the affidavit was made renders it defective and incapable in its current state of supporting the application for an injunction. I therefore, direct the petitioner to withdraw the affidavit and re-file a properly sworn affidavit in support of the application for an order of matrimonial injunction.

Regarding the failure by the petitioner to exhibit the original certificate of marriage or to seek leave of the court to file the petition with a photocopy, I hold that the petition is improperly before this court and that any application made in consequence of the filing of the petition cannot be entertained by the court. The petitioner should rectify the anomaly by filing the original certificate of marriage or by seeking leave of the court to file the petition on the basis of a photocopy.

The preliminary issues are upheld with costs to the respondent to be taxed in default of agreement. Leave to appeal is hereby granted.

Dated the 4th day of February 2016.



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A. M. SITALI
JUDGE