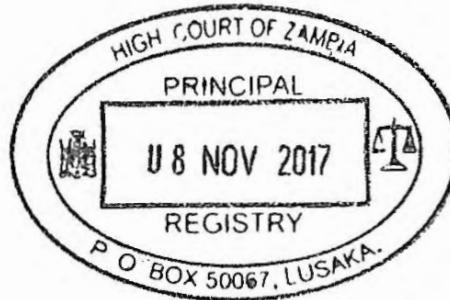


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2017/HP/0859

(Civil Jurisdiction)



BETWEEN:

HELLEN SINDABA

APPLICANT

AND

THE ATTORNEY-GENERAL

1ST RESPONDENT

THE EXAMINATION COUNCIL OF ZAMBIA

2ND RESPONDENT

Before: Hon. Judge Betty Majula-Mung'omba on this 8th day of November, 2017.

For the Applicant:

Mr. P. Songolo of Philsong and Partners

For the 1st Respondent:

Ms. Angelina Chisanga – State Advocate

For the 2nd Respondent:

Mr. A. J Shonga (SC) and Ms. S. Namusamba of Shamwana and Company

JUDGMENT

Cases referred to:

1. *Chikuta v Chipata Rural Council* (1974) Z.R. 51.
2. *New Plast Industries vs Commissioner of Lands and the Attorney-General* SCZ Judgment No.8 of 2001.
3. *Corbett vs Corbett* (1970) 2 All ER 33.

4. *Wong Chiou Yong vs Pendaftar Besar (2005) 1 MLJ 551.*
5. *Krista Chan vs Ketua Pengarah Jobatan Pendaftaran Negara (2013) 4 CLJ 627.*
6. *Acropolis Bakery Ltd vs Zambia Consolidated Copper Mines Ltd (1985) ZR 232 (SC)*

Legislation Referred to:

1. *Constitution of Zambia, Cap 1, Article 134 (a) of*
2. *High Court Act, Cap 27, Section 13*
3. *Births and Deaths Registration Act, Cap 51, Section 13*
4. *Examination Council of Zambia Act, Cap 137, Section 8(1)*
5. *Interpretation and General Provisions Act, Cap 2, Section 25*

Other works referred to:

1. *Bryan A. Garner (2009) Black's Law Dictionary, Ninth Edition, Thomson Reuters*
2. *Rules of the Supreme Court (White Book) 1999 Edition.*

Hellen Sindaba, the applicant in this matter has for several years now labored under the belief that she is a female. This is as a result of the fact that she was born with a defect known as disorder of sex development (DSD). As a result of this, all her records such as the birth record, certificates, driving license and educational certificates bear her as being that of a female.

Growing up in her community and indeed in her household, she was always treated as such female.

In her later years, like every girl of her age, she awaited the onset of puberty and the attendant consequences thereof. To her disappointment, she experienced no such physiological developments. This left her and her parents wondering what was amiss prompting her to seek medical assistance from Dr. Brown Kamanga who advised her to undergo a blood test to determine the structure of her genetic makeup. She obliged and following the test, it was revealed to her that her genetic makeup is, what in biological terms referred to as 46XY chromosomes, signifying that she is a male. Along with the blood test, Hellen also underwent a pelvic ultrasound which revealed that she does not have ovaries, a womb or any other female reproductive organs. This test also revealed that she has testicles that are trapped underneath the stomach and what appeared externally as a vagina is in fact blunt and unconnected to any reproductive organ.

Further examination revealed that what Hellen thought to be a clitoris on her genital area was in fact a mirco-penis which is capable of ejaculation.

The foregoing discovery has quite understandably aggrieved Hellen prompting her to present this action by way of originating summons and supporting affidavit. The latter documents contain Hellen's grievances as I have set them out in the foregoing paragraphs. She concludes by contending that biologically and genetically she is not a female and cannot continue living as such. In the event that I find for her she intends to acquire a new name

akin to her new found sex of Rick Sindaba Nkuba, by way of a deed poll. She persuades me further by contending that her plight is not a mental disorder but a medical condition and presents to me a psychiatric evaluation report.

As I have earlier stated, her remedy is presented by way of originating summons. She seeks the following questions to be determined:

- 1) *Whether or not she is male and not female as recorded at birth given the medical evidence now available;*
- 2) *In the event that the court finds that she is male based on medical evidence provided in the affidavit in support hereof, a declaration and or an order that the applicant is in fact male, entitled to file a deed poll changing her name to reflect the correct gender within 60 days of the order;*
- 3) *Pursuant to the finding and/or order in paragraph 2 above, an order directed to the Registrar General of Births and Deaths to amend the applicant's name, gender and or sex particulars on the applicant's birth record, birth certificate and national registration card to reflect the applicant's new names to be acquired and correct gender in accordance with the order in paragraph 2 above;*
- 4) *Pursuant to the findings and/or order in paragraph 2 above, an order directed to the Examinations Council of Zambia to amend the applicant's names and gender on all of their records and certificates to reflect the applicant's new names to*

be acquired and correct gender in accordance with the order in paragraph 2 above;

5) *Any other reliefs;*

6) *Costs.*

This was the novel case presented before me pursuant to which I conducted a hearing on 23rd June, 2017 at which Dr. Brown Kamanga testified on behalf of Hellen as PW1.

His evidence was that he has been attending to the applicant as a consultant physician and endocrinologist at the University Teaching Hospital (UTH) at Lusaka.

He explained that the applicant presented to him features that show outwardly that she has female genitals, a beard on the chin, no breasts and has no history of menstruation. The applicant also informed him that she feels she is more male than female and therefore wanted to understand exactly what was happening to her.

PW1 then conducted a physical examination on her and found that indeed she had dark coarse hair on the chin which is a beard. PW1 also found she did not have female type breasts but male type ones and also she had female type genitals. He observed that she had a vagina and what appears to be a very small penis but with no hole at the end of that penis.

PW1 further did an in-depth vagina examination and noted that the vagina was blind with no connection up.

PW1 went on to explain that he advised her to undergo a scan of her tummy and pelvic so that he could understand what the internal structure of the organs were. He also advised her to undergo a karyotype blood examination which would look at her genetic make up to show whether she was male or female.

The results of the karyotype revealed that she has 46 XY chromosomes which are for males, exhibit "HS4."

The results of the scan revealed that the structure and organs she has in her are those of a male in that she has a prostate, semino vesicles and testicles. He further narrated that the scan did not show any presence of ovaries or uterus. Based on these results, PW1 concluded that the applicant is a male person, but phenotypically female in terms of the external structure.

He also referred her to Chainama Mental Hospital for psychiatric evaluation in order to rule out any psychiatric illness. She was attended to by Dr. K. Mwansa-Mugamya who opined that she does not have any psychiatric illness as shown by his report at exhibit "HS6."

There was no cross-examination for this witness.

At the conclusion of the hearing the parties filed written submissions.

In his written submissions on behalf of the applicant, learned counsel Mr. Songolo submitted that the plaintiff is not pursuing a

sex change but that she is seeking to assume the correct gender as determined by medical and scientific evidence that was presented before this court.

Counsel posed the question for determination by this court as being whether or not the court has power under the current laws of Zambia to grant the plaintiff the reliefs sought of being declared as a male person.

Counsel observed that the evidence of the medical doctor for the plaintiff indicated that she was not only genetically male but that she was also of sound mind when she made the decision to change the name and to assume the correct gender as well as effect the necessary changes to all the vital documentation.

Mr. Songolo further posed the next question as being which law empowers this court to grant the reliefs sought by the plaintiff?

Mr. Songolo submitted that firstly Article 134 (a) of the Constitution confers upon this court original and unlimited jurisdiction to hear any matter of whatever nature. Reliance was also placed on Section 13 of the High Court Act to support his argument that a High Court Judge has power to grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which a party such as the plaintiff may appear to be entitled.

Mr. Songolo further contended that while Section 13 of the Births and Deaths Registration Act Cap 51 is the only provision

which empowers the Registrar General to make corrections in the Register of Births, the Registrar General has implied power to correct for any other reason particularly when ordered to do so by a court. Counsel argued that on the other hand Section 8(1) of the Examination Council of Zambia, Chapter 137 the Examinations Council has power to correct any information on the Certificate that has been awarded if it is found to be an error or mistake.

To buttress this position, my attention was also referred to the provisions of Section 25 of the Interpretation and General Provisions Act, Chapter 2 which provides as follows:

“Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person to do or enforce the “doing of the act or thing.”

Mr. Songolo wound up his submissions by stating that the plaintiff has discharged the burden of proof relating to the reliefs and that the court has the requisite power to grant the reliefs sought.

I will at this point turn to consider the questions for determination.

1. Whether the applicant is entitled to an order that she is male and not female given the medical evidence.

On behalf of the defendants Counsel for the 2nd respondent Mr. A. Shonga SC has submitted extensively on the jurisdiction of this

court and on whether the case before me has been properly commenced. I am in total agreement with the said submissions. It is indeed trite law that the High Court has unlimited and original jurisdiction in civil and criminal matters as provided for by Article 134(a) of the Constitution of Zambia Act of 2016 which enacts as follows:

“The High Court has, subject to Article 128:

(a) Unlimited and original jurisdiction in civil and criminal matters.”

I am alive to the fact that the unlimited jurisdiction that the High Court is vested with is however not limitless. This simply means that the exercise of the court’s jurisdiction must be in accordance with the law. Matters that are brought before the court must be properly commenced. The mode of commencement is generally provided by statute. The case of ***Chikuta v Chipata Rural Council***¹ called in aid has gone into detail in expounding on the mode of commencement of proceedings. Doyle C.J. as he then was on behalf the Supreme Court opined as follows:

“The matter was brought before the court by means of an originating summons. The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not fully comprehensive, by the English

¹ *Chikuta v Chipata Rural Council* (1974) ZR 51.

White Book. Under Order 5 of the English Rules of the Supreme Court, rule 2 lays down what proceedings must be begun by writ; rule 3, the proceedings which must be begun by originating summons; rule 4, the proceedings which may be begun either by writ or originating summons; and rule 5, proceedings that may be begun by motion or petition. The Zambian Rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. Chamber matters are set out in Order 30 of the High Court Rules. Counsel for the appellant was unable to show us where under the Order this matter could be begun by an originating summons. Paragraph (j) of rule 11 of Order 30 does refer to "such other matters as a Judge may think fit to dispose of in chambers."

In a more recent case of *New Plast Industries vs Commissioner of Lands and the Attorney-General*² it was held as follows:

“it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement is generally provided for by statute.”

The thrust of the foregoing was simply to the effect that this matter was properly commenced before me.

In light of what is stated in the preceding paragraphs it is clear that a matter such as the one at hand for a determination of whether or not the applicant is entitled to an order that she is male and not female based on medical evidence is properly commenced before this court by virtue of Article 134(a) of the Constitution which clothes me with the requisite jurisdiction and I so find. That being settled I now turn to the crucial issue for determination regarding the gender of the applicant.

I have walked through the judicial garden in this area of the law provided by the statute.

² *New Plast Industries vs Commissioner of Lands and the Attorney-General* SCZ Judgment No.8 of 2001.

This is the first case in Zambia that has entered through the court room doors. That is not to say that there are no people in Zambia who are similarly circumstanced like the applicant but who have not had the courage to approach the court. The reasons could be varied such as traditional beliefs, fear of ostracization among others. What is evident is that this is a novel matter and there are no reported cases in our jurisdiction and as such reliance shall be placed heavily on the medical evidence available and cases from other jurisdictions. I will proceed to consider the various decided cases regarding criteria for the sex determination.

The case of **Corbett vs Corbett**³ cited by Mr. Shonga (SC) is very insightful. I must at once state that this case dealt with gender re-assignment however it does delve into the criteria for assessing the sexual condition of an individual.

At page 44 of the **Corbett vs Corbett**³ judgment, Justice Ormrod stated this:

"I must now deal with the anatomical and physiological anomalies of the sex organs, although I think that this part of the evidence of marginal significance only in the present case. In other cases, it may be of cardinal importance. All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are:

³ *Corbett vs Corbett* (1970) 2 All ER 33

Chromosomal factors,

Gonadal factors (i.e. presence of or absence of testes or ovaries)

Genital factors (including internal sex organs)

Psychological factors

Some of the witnesses would add –

Hormonal factors or secondary sexual characteristics (such as distribution of hair, breasts development, physique etc. which are thought to reflect the balance between the male and female sex hormones in the body). It is important to note that these criteria have been evolved by doctors for the purposes of systematizing medical knowledge and assisting in the difficult task of deciding the best way of managing unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities.”

Justice Ormrod went further by quoting Professor Dewhurst who observed that:

“We do not determine sex in medicine we determine the sex in which it is best for the individual to live. These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination.”

Another illuminating case on the criteria for determining the sex of the child is that of **Wong Chiou Yong vs Pendaftar Besar** ⁴ from Malaysia. The Court observed as follows:

“The criteria for determining the sex of a child to be registered is not laid down in statute or in any regulation made thereunder. The practice of the Registrar-General is to apply exclusively the biological criteria, chromosomal, gonadal and genital sex as informed by the parents or guardian of the child. The fact that later in life the person’s psychological sex is at variance with its biological constituents cannot be considered to invoke statute so as to imply that the initial entry was a factual error. A change in the initial entry will be contemplated in the following circumstances, namely in cases of clerical error, error of fact or substance; wrong identification of the apparent and genital sex of the child at the birth; where the biological criteria are not congruent.”

The court guided in **Krista Chan vs Ketua Pengarah Jobatan Pendaftaran Negara** ⁵ on the same subject that if one wishes to obtain a declaration for change of gender they are required to adduce evidence from experts in Malaysia.

My application of the above authorities is that the criteria for determining the sex of the child is by biological, chromosomal,

⁴ *Wong Chiou Yong vs Pendaftar Besar* (2005) 1 MLJ 551

⁵ *Krista Chan vs Ketua Pengarah Jobatan Pendaftaran Negara* (2013) 4 CLJ 627.

gonadal and genital factors psychological and other secondary sexual factors. It is imperative that an expert adduces evidence to satisfy the court that based on the medical evidence such as the chromosomal make up that there is a legal basis of sex determination. Counsel for the respondent Mr. A. Shonga (SC) to his credit agrees with me in this respect. It is in fact him who drew my attention to the authorities that have led me to the foregoing conclusion.

It is important to note that Hellen is not seeking a sex change but is seeking to assume the correct gender as determined by irrefutable medical and scientific evidence.

The applicant in the case at hand did present expert evidence from the endocrinologist, Dr. Brown Kamanga who conducted various medical examinations on her. The documentary evidence on record reveals that she has a chromosomal make up of a man.

In light of the foregoing I come to the inescapable conclusion based on the medical evidence that the applicant is male and not female. The applicant has proved beyond a shred of doubt that she is entitled to the relief sought of being declared male and not female and I so order.

- 2. Whether or not the applicant is entitled to a declaration and or an order that she be at liberty to file a deed poll changing her name to reflect the correct gender.**

In the earlier part of this judgment I had alluded to the court's inherent original and unlimited jurisdiction as well as the mode of commencement of proceedings.

I will return to this a little later as I consider the point of departure in determining whether the reliefs prayed for ordering a change of name by deed poll can be entertained by this court in the manner it has been brought. I propose to firstly consider what a deed poll entails.

A deed poll by definition is a legal document binding only to a single person or several persons acting jointly to express an active intention. A deed poll has one generally accepted meaning and usage and that is for officially recognizing a change of name. The purpose of a deed poll is to enable proof to record holders that one has changed his or her name and provides one with documentary evidence of the name one wishes to be known. The applicant is desirous that this court orders or declares the change of name by deed poll. There is a procedure to be employed in effecting change of name by deed poll. This is by lodging documents and paying the prescribed fees in accordance with Statutory Instrument No.40 of 2014 of the Births and Deaths Registration (General) (Amendment) Rules, 2014.

That being the case it behooves me to state that the declaration or Order sought is outside the purview of this court to the extent that the mode of change of name by deed poll is provided for by Order 63 rule 10 of the Rules of the Supreme Court, White Book (1999) edition

and it is entirely up to the person seeking to change the name to trigger the process and it is not ancillary to the sex change.

This is having regard to the earlier discussion of mode of commencement of proceedings. The cases of *Chikuta vs Chipata Rural Council*¹ and *New Plast Industries vs Commissioner of Lands and The Attorney-General*² exhaustively deal with the issue.

In the *Chikuta* case, the Supreme Court pronounced itself on reliefs for a declaratory Order when it stated that:

"That clearly is not so wide as to allow a judge, carte blanche to hear any sort of action in Chambers, and clearly does not apply to an action for a declaration which depends on evidence being called on both sides. Even if the English practice could be prayed in aid, it would not help, as there an action for declaration is brought by writ."

It is against this backdrop that I find myself unable to grant the Order being sought. The recourse available to the applicant is to simply follow the process of applying to change his name by deed poll.

- 3. Whether or not the applicant is entitled to an order directing the Registrar General of Births and Deaths to amend the Applicant's name, gender and or sex particulars on the Applicant's birth record, birth certificate and national registration card to reflect the Applicant's new details.**

The Applicant has beseeched the court to grant her this relief and has sought refuge in the provisions of the Registration of Births and Deaths Act, Chapter 51 of the Laws of Zambia, in particular section 13.

Section 13 of the aforesaid Act provides as follows:

“The Registrar-General may, subject to any rules made under this Act, correct any error in any register, but correction shall be made without erasing the original entry and shall be authenticated by the signature of the Registrar General.”

I have no difficulty in stating that the legislature could not possibly have contemplated the scenario in the case at hand pertaining to mistaken gender identification. That notwithstanding I have scrutinized the development of the law in other jurisdictions.

Turning to Hellen, the basis upon which she was enrolled was the birth certificate in the various schools which at the time reflected sex as being female. Based on this information Hellen was enrolled for examination by the various schools by Examination Council of Zambia as female. The birth certificate is due to change from female to male, in view of the order I have made. Common sense therefore, dictates that everything that was based on that birth certificate which has since changed must also change. The law is dynamic and as a court I must be responsive to changing circumstances. I respectfully adopt the observations made by erstwhile Ngulube DCJ, (as he then was) when considering the approach to be taken in a novel matter.

In the case of **Acropolis Bakery Ltd vs Zambia Consolidated Copper Mines Ltd** ⁶ which was a novel matter on liability he said:

"We agree that the law should be responsive to changing circumstances. In a proper case we do not see why an established principle cannot be extended to cover a novel situation we would not hesitate to do justice on the merits of the case where new situation arises for which there is no precedent, but where it plainly appears that the legitimate rights of one person have been unfairly or wrongfully injured by another, since the recognition of those rights would presuppose the availability of remedies for their enforcement and protection." (underlining mine)

I cannot agree more with these sentiments and order that Examination Council of Zambia do change the applicant's certificates from that of female to male gender in order to meet the justice of the case.

The common sense position I have taken in the preceding paragraphs renders consideration of the legal arguments on interpretation otiose.

All in all I find that the applicant has discharged the burden of proof in a civil matter.

This matter is complex and as such I order as follows:

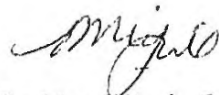
⁶ *Acropolis Bakery Ltd vs Zambia Consolidated Copper Mines Ltd* (1985) ZR 232 (SC)

1. In view of my findings that Doctors and parents were all mistaken as to the gender of Hellen, I order that the Registrar General of Births and Deaths should change her birth records, accordingly from that of a female to male.
2. The Examinations Council of Zambia in conjunction with the various schools she attended should change all her certificates in terms of gender reflected thereon from female to male.
3. I have already revealed my decision on the issue of deed poll, I shall not be repetitive and simply state the claim in that respect fails.

Since Hellen has substantially succeeded in her application. I order costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 8th day of November, 2017.



Judge Betty Majula-Mung'omba
HIGH COURT