

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2019/HP/F/319

IN THE MATTER OF: AN APPLICATION FOR A MATRIMONIAL
INJUNCTION UNDER SECTION 101 (1) OF THE
MATRIMONIAL CAUSES ACT NO. 20 OF 2007

AND

IN THE MATTER OF: ORDER 27 RULE 7 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF
ZAMBIA

BETWEEN:

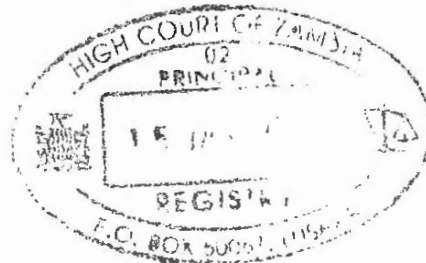
IVY SIMEZA NSHINDANO

APPLICANT

AND

KENNETH NSHINDANO

RESPONDENT



Before the Honourable Mrs. Justice Ruth Chibbabbuka on the 30th October, 2019

For the Applicant: Ms. C Lundu, Messrs Simeza Sangwa & Associates

For the Defendant: Mr. M Mulele, Messrs G.M Legal Practitioners

JUDGMENT

Cases referred to:

Owners of Cargo Lately Laden on Board the Siskina vs Distos Company Naviera SA [1979] A.C 210

Legislation referred to:

The High Court Act, Chapter 27 of the Laws of Zambia
The Matrimonial Causes Act No. 20 of 2007

Other works referred to:

Zambia Civil Procedure Commentary and Cases, Volume 1, Patrick Matibini, Lexis Nexis at page 759

Rayden and Jackson's Law on Divorce, 16th Edition, at page 883

This matter was commenced by way of Originating Summons filed of 12th September, 2019 for a matrimonial injunction made pursuant to *Section 101 Sub-section 1* of the *Matrimonial Causes Act No. 20 of 2007*, and, *Order 27 Rule 7* of the *High Court Rules, Chapter 27 of the Laws of Zambia*. In the application, the applicant is seeking, among others, the following reliefs;

- (i) That the respondent be forbidden (whether by himself or by instructing or encouraging any other person) from entering or remaining at Plot No. 6015, Riverside Phase IV C, Kitwe (the matrimonial home)
- (ii) That the applicant and the children of the family be allowed to enter and remain in the matrimonial home;
- (iii) That the respondent be forbidden (whether by himself or by instructing or encouraging any other person) from removing the applicant and the children of the family from the matrimonial home; and
- (iv) That the respondent (whether by himself or by instructing or encouraging any other person) be restrained from
 - a. Molesting, assaulting and/or harassing the applicant;
 - b. Dealing or otherwise disposing of the matrimonial home;
 - c. Disposing of or dealing with the contents of the matrimonial home.

In support of the application, the applicant filed an Affidavit of even date, deposed to by the applicant herein. She deposes that she lawfully married the respondent on 16th August, 2011 at the office of the Registrar in Chingola and that the couple has three children, name; Rabbecca, Elijah and Precious Nshindano born on 15th July, 2012, 19th July, 2015 and 12th July, 2018 respectively. She avers that since their marriage, the couple's matrimonial home has been Plot No. 6015, Riverside, Phase IV C, Kitwe, of which the respondent is the registered proprietor and which she avers was constructed during the subsistence of the marriage.

She avers further that on 15th July, 2019, the applicant, at the respondent's request, travelled to Lusaka to nurse the respondent's mother, who had fallen ill, and, that he requested the applicant to travel back to Kitwe with the respondent's mother, who declined to travel. She avers that on her return two weeks later, the respondent accused her of not caring for his mother. She avers that on 10th August, 2019, the respondent asked the applicant to leave the matrimonial home and when she declined, he attempted to physically remove the applicant from the house which forced the applicant to lock herself in the bedroom.

The applicant avers that the respondent called six (6) men from the streets and gave them steel bars to use to break down the bedroom door, which they did. She avers that following the breaking down of the bedroom door, the respondent slapped her and that with the help of the 6 men, forcibly removed her from

the matrimonial house. She further avers that as a result of the assault, she was left with bruises on her face, has suffered mental distress and she and the children have been traumatized.

The applicant avers that she and the 3 children have been forced to seek refuge at her uncle's house and that the respondent has only given the applicant K150.00 since leaving the matrimonial home. The deponent avers further that she, who is currently unemployed, and the children need to be in the matrimonial home as the children need to attend school, which is far from home where she and the children are now staying. She avers that since she left the house, the respondent has disposed of some household items and she fears more may be sold without her knowledge.

The respondent herein deposed to an Affidavit in Opposition and filed the same into court on 28th October, 2019. He deposes that it is not true that the matrimonial home is registered in his name but that the registered owner is one Catherine Kawandami and that pursuant to a Court Judgment, the respondent is obligated to pay a sum of K150,000.00 to the said Catherine Kawandami, which monies the respondent alleges not to have paid yet as he is presently unemployed. He avers that nearly all the martial arguments have arisen from the disrespect that the applicant shows since the respondent lost his job.

He avers that he is not a violent man and that it is not true that he assaulted the applicant but that it was the applicant who assaulted him on two occasions which consequently forced him

to obtain medical reports on the 19th and 27th August, 2019. He avers that he is not a risk to the applicant and the children and therefore should not be removed from the matrimonial house. The deponent further avers that he is looking after his ailing mother from the house in question and has no resources to look for another place. He aver that his understanding of the applicant's leaving the matrimonial home was to receive counselling and that he has not sold any household goods as alleged by the applicant.

In response the applicant filed an Affidavit in Reply on the 29th October, 2019 wherein she deposes that the respondent is not obligated to settle the sum of K150,000.00 with one Catherine Kawandami but the sum of K60,000.00. She further avers that since the marriage, the matrimonial property has been registered in the name of the respondent. She further avers that she has not been disrespectful to the respondent and that it is the respondent's relationship with a female church member, who lived with the couple sometime in March, 2019, that has caused the respondent to develop resentment towards her.

She avers further that neither she nor the respondent have in the past been violent towards each other during the subsistence of the marriage save for the time when she was forcibly removed from the matrimonial house and in the process physically attacked, which attack forced her to defend herself and consequently seek medical attention. She avers that both parties reported the incident to Riverside Police Station where officers opted not to prosecute the matter as both parties had medical

reports. She further avers that the respondent's mother left the matrimonial home around the time she was removed and has since returned to Lusaka, to her daughter's house. She avers that while the respondent is indeed unemployed, he has always provided for the family from his various sources of income which include the following;

1. A 7 ton truck which he hires out for transportation;
2. A farm in Mkushi Tazara Corridor which is used to rear livestock and for farming activities;
3. A shop in Chisokone market which is rented out at K700.00 per month;
4. A house in Kamatipa area which is rented out at K300 per month and;
5. A plot in Garden house.

At the hearing, Counsel for the applicant placed reliance on the Affidavit in Support of the Originating Summons and further submitted that the dispute herein falls within the realm of *Section 101 of the Matrimonial Causes Act No. of 2007*. She reiterated the submissions contained in the Affidavit in Support, and, further submitted that the authors of the **16th edition of Rayden and Jackson's Law on Divorce** have stated as follows;

"An injunction or a mandamus may be granted where it is just or convenient and it is the practice of the court to enjoin in proper cases although no writ has been issued asking for an injunction and no reference to one appears in a petition."

Counsel further submitted that the respondent has not refuted throwing the applicant and children out of the matrimonial home but has merely spoken to the inconvenience the injunction will cause him. She submitted that prior to this altercation, the parties had never been violent towards each other but that now the applicant is fearful. Counsel submitted that this is a proper case for the grant of an injunction and beseeched the court to accordingly grant one.

In opposition, the respondent relied on the Affidavit in Opposition. He submitted that the applicant does concede to the fact that the parties have not had a history of violent behaviour in relation to the marriage, and, that the respondent was equally assaulted by the applicant and he is in possession of a medical report and that is why no action was taken against him. He submitted that it would be unjust to evict the respondent, who is unemployed, from the matrimonial home but still expect him to maintain the family when the existence of the sources of income alleged in the applicant's affidavit in reply have not been proved. He submitted that the applicant has not proved before court that the respondent poses a threat to her life and that of the children. He further submitted that it will be an injustice to grant an injunction in perpetuity when the applicant herein has not shown an intention of filing for dissolution of marriage or judicial separation. He prayed that the application be dismissed with costs.

In reply, Counsel for the applicant relied on the Affidavit in Reply.

I am indebted to Counsel for their arguments and submissions. I have prudently considered the same.

The application before me is made pursuant to Section 101 Sub-section 1 of the Matrimonial Causes Act No. 20 of 2007 and Order 27 Rule 7 of the High Court Rules, Chapter 27 of the Laws Zambia. Section 101 Sub-section 1 of the Matrimonial Causes Act No. 20 of 2007 provides as follows;

“Without prejudice to any other powers of the Court, the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for any other reliefs under this Act, grant an injunction or other order, as the case may be-

- (a) for the personal protection of a party to the marriage or of any child of the marriage;*
- (b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;*
- (c) restraining a party to the marriage from entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any child of the marriage;*

- (d) in relation to the property of a party to the marriage; or
- (e) relating to the use or occupancy of the matrimonial home.”

While Order 27 Rule 7 of the High Court Rules provides that;

- (1) “Without prejudice to the provisions of any other rule, the Court on an application by a party to a marriage shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely;
 - (a) a provision restraining the other party to a marriage from molesting the applicant; or
 - (b) a provision restraining the other party to a marriage from molesting a child living with the applicant whether or not any other relief is sought in the proceedings.
- (2) The provisions of sub-rule (1) shall apply to a man and woman who are living with each other in the same household as husband and wife as it applies to parties to a marriage and any reference to a marital home shall be construed accordingly.”

Honourable Justice Patrick Matibini, in his book **Zambia Civil Procedure Commentary and Cases** states that;

“An Injunction is an order of the Court either compelling a party to take a certain step or steps (mandatory injunction) or restraining a party from taking a specified step or steps (prohibitory injunctions)”

Generally, the Courts will not entertain an application for an injunction unless there is a substantive pre-existing cause of action before it. This was illustrated in the case of **Owners of Cargo Lately Laden on Board the Siskina vs Distos Company Naviera SA¹** where the Court held that the right to obtain an injunction is merely ancillary and incidental to a pre-existing cause of action against a defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. However, an application for an injunction under the *Matrimonial Causes Act No. 20 of 2007* and under *Order 27 Rule 7 sub-rule 1 (b)*, reproduced above, may be advanced without there being any substantive relief being sought.

For the Court to grant an injunction, there must be sufficient evidence presented before it at the time of the application that demonstrates that failure to grant an injunction will cause the applicant to suffer extensive prejudice. To demonstrate this in matrimonial injunctions, the applicant for an injunction may have to show that the other party to the marriage has been harassing, assaulting or molesting the applicant and that an injunction is necessary to prevent the offending party from continuing with the offensive behaviour. The applicant may even apply that the offending spouse be prevented from entering or remaining in the matrimonial home. In such an instance, the Court may grant an occupational order for sole occupancy of one party to the marriage after taking into consideration the needs of

the parties to the marriage and the children, the hardship either party may suffer if made to leave the home and violent acts, if any.

In the matter in *casu*, the applicant is seeking several reliefs from the respondent, which I have reproduced above. The first relief seeks to prevent the respondent from entering or remaining at the matrimonial home. The parties herein have belabored to argue on who is the rightful owner of Plot No. 6015 Riverside Kitwe, which is the matrimonial home. I must state that the ownership of the matrimonial home is irrelevant to the reliefs being sought herein.

To demonstrate the respondent's need to remain in the matrimonial property, he averred in his Affidavit in Opposition that he is unemployed and has no resources to look for accommodation elsewhere. The applicant responded by confirming that the respondent is indeed unemployed but however that he has several properties, including a house in Kamatipa area. I note that the applicant has not provided evidence of the assets that she claims the respondent has. Further, in her Affidavit in Reply, the applicant has stated that neither party has been violent towards each other during the subsistence of the marriage save for the physical assault allegedly occasioned when the respondent purportedly forcibly removed the applicant from the matrimonial home.

On the evidence illustrated in the preceding paragraph, I do not find sufficient evidence that warrants the exclusion of the

respondent from residing at the matrimonial home. The first relief accordingly fails.

The other reliefs being sought by the applicant herein are for an order restraining the respondent from removing the applicant and children of the family from the matrimonial home, molesting, assaulting and harassing the applicant and disposing of property in the matrimonial home. From the affidavit evidence of both parties, there was a violent altercation that occurred between the parties herein, which is evidenced by their respective medical reports. While the parties herein have given contradicting evidence as to the reason behind the applicant's vacating the matrimonial home, I am persuaded that the said violent altercation played a role.

In the premises, I hereby order that the respondent be restrained from molesting, assaulting and/or harassing the applicant. The respondent is further restrained, by himself or by instructing others, from removing the applicant and the children of the family from the matrimonial home. Further, neither party herein shall dispose of the matrimonial property, save with consent of the other party.

The upshot of the Judgment is that the 1st relief fails while the 2nd, 3rd and 4th reliefs succeed. It is hereby ordered as follows:


- (i) That the applicant and the children of the family be allowed to enter and remain in the matrimonial home;
- (v) That the respondent be forbidden (whether by himself or by instructing or encouraging any other person)

- from removing the applicant and the children of the family from the matrimonial home; and
- (vi) That the respondent (whether by himself or by instructing or encouraging any other person) be restrained from
- a. Molesting, assaulting and/or harassing the applicant;
 - b. Dealing or otherwise disposing of the matrimonial home;
 - c. Disposing of or dealing with the contents of the matrimonial home.

Each party to bear their own costs.

Leave to appeal is granted.

Dated the.....15th.....day of *January*.....2020



Ruth Chibbabbuka

JUDGE