

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Divorce Jurisdiction)

2022/HPF/D365

BETWEEN:

EMMANUEL MBIYA

AND

WENZY MUZIYA MBIYA



PETITIONER

RESPONDENT

***Coram Honourable Justice Mrs. Bah Matandala in Chambers
On 5th day of September, 2024.***

For the Petitioner: Mrs. O. Sambo of Mwenya Mwitwa Legal Practitioners and Mr. C. Ngandwe of Messrs. Zambezi Chambers

For the Respondent: Mr. A Kearns and Mr. C. Chirwa of Messrs. Willa Mutofwe & Associates.

APPLICATION TO STRIKE OUT OR DISMISS AN ACTION FOR WANT OF JURISDICTION PURSUANT TO INTER ALIA SECTION 4(3)(a) and (b) OF THE LAWS OF ZAMBIA AS READ TOGETHER WITH ORDER 3 RULE 2 OF THE HIGH COURT (AMENDMENT) RULES 2020 CAP 27 OF THE LAWS OF ZAMBIA

Legislation Cited:

1. *Matrimonial Causes Act No. 20 of 2007*
2. *High Court (Amendment) Rules 2020 Chapter 27 of Laws of Zambia*

Case Law Referred To:

1. *Finance Bank Zambia Limited vs. Dimitrios Monokandilos and Filandria Kouri Appeal No 120 of 2020*
2. *Chick Master Limited and Another Vs. Investrust Bank Plc Appeal No. 74 of 2014*
3. *Lingson Chikoti vs. Zambian Railways Limited Appeal No. 158/2010*
4. *Banneret Development Corporation and Joritus Enterprises Limited Appeal No. 37 vs. 2011*
5. *Access Bank Limited vs. Group Five/ZCON Business Park and Joint Venture SCZ/ 8/2014*
6. *Hakainde Hichilema and 5 Others – The Government of the Republic of Zambia. Appeal No. 28 of 2017*
7. *AV -vs. WV case number 5881/17(unreported)*
8. *Sun Country Limited v. Charles Kearney; selected Judgment No. 20 of 2017, SCZ/ 8/ 265/ 2016, Appeal No. 7/2017*

9. *Finance Bank Ltd and the Officio Receiver Motion 8/2012/2019 and 2020*
10. *Zambia Consolidated Copper Mines Investment Holding Plc Vs. Mufalali & 141 Others Selected Judgment No. 14 OF 2017.*
11. *JCN Holdings Limited v Development Bank of Zambia (2013) 3 ZR, 299 H vs. H [2007 CILR 126]*
12. *Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited SCZ Appeal No. 02 of 2019*
13. *Shilling Bob Zinka v. The Attorney General (1990-92) Z.R 70,*
14. *H vs. H 2007 CILR 129*
15. *Lord v. Colvin (1859), 28 L.J. Ch. 361; 7 W.R. 250*
16. *Gulbenkian v. Gulbenkian (4) ([1937] 4 All E.R. at 62717:*
17. *Udny v Udny (1869), LR. 1 Sc. &C Div. 441:*
18. *Anuradha vs. Divyanshu Gautam CS No.564/2015.*
19. *Axiz Pty Limited v. Cloudtech Zambia Limited and Another Appeal No. 221 of 2020.*

Other Authorities Referred To:

1. *Supreme court of England and Wales (1999 Edition) Vol. 1 ('the White Book')*
2. *Bryan A Garner (2009) (11th Edn) Blacks' Law Dictionary. West Publishing Company*
3. *J.H.C Morris titled Conflict of Laws, Second Edition*
4. *Halsebury's laws of England/ Confidence and Information Privacy Conflict of Laws (Vol. 19) (2011). Lexis Nexis*

1.0 INTRODUCTION

- 1.1 This is a ruling on the Respondent's Application to strike out matter or dismiss action for want of Jurisdiction filed before this court on 11th August 2023.
- 1.2 The Application was made pursuant to Section 4(3)(a) and (b) of the Matrimonial Causes Act No. 20 of 2007 as read together with Order 3 rule 2 of the High Court (Amendment) Rules 2020 Chapter 27 of Laws of Zambia.

2.0 BACKGROUND

- 2.1 The background facts of this matter in so far as are relevant are that Mr. Emmanuel Mbiya (the 'Petitioner' herein) and Wenzy Muziya Mbiya (the 'Respondent' herein) were initially lawfully married under Customary law. The parties later divorced in 2005.
- 2.2 On 28th December 2007, the Petitioner and the Respondent lawfully remarried at the office of the Registrar of Marriages at the Lusaka District of the Republic of Zambia. Immediately, after the Marriage, the Petitioner and the Respondent lived together in Johannesburg Gauteng, South Africa.
- 2.3 On 9th December, the Petitioner filed a Petition against the Respondent before this Court, alleging that the marriage between the parties has broken down irretrievably on grounds of unreasonable behavior. The Petition shows that the Petitioner and the Respondent are currently living separately although both residing in South Africa.
- 2.4 The evidence on record disclosed that the Petitioner resides at Plot 25 Ventra Apartments, Fourways, Johannesburg,

Gauteng, South Africa while the Respondent resides at 103 Monagham Farm Estate, Lanseria, Johannesburg, South Africa.

- 2.5 It is against this backdrop that the Respondent has made the application to strike out or dismiss the Petitioner's action herein for want of jurisdiction.

3.0 APPLICATION TO STRIKE OUT MATTER AND/OR DISMISS ACTION FOR WANT OF JURISDICTION

- 3.1 The Application to strike out matter and/or dismiss action for want of jurisdiction was made by Summons accompanied by an Affidavit and Skeleton Arguments.
- 3.2 The Affidavit in support was sworn by **Wenzy Muziya Mbiya** in her capacity as the Respondent. The Respondent deposed in the said Affidavit that the Petitioner and the Respondent have not stayed in Zambia for a period of twelve (12) months from a period of time either prior to the commencement of these proceedings or subsequent to the same. Rather, that the record will demonstrate that the matrimonial home and the domicile of the parties is South

Africa where the parties have for the past several years resided and have raised the children of the family.

3.3 She contended that in order for this Court to have jurisdiction in this matter, either party to these proceedings should have lived in Zambia for a period of 12 months from and/or prior to the time of commencement of these proceedings.

3.4 Premised on the above, the Respondent states that the proceedings herein are irregular and incompetently before this Court and as a consequence of such, the proceedings are an abuse of court process.

4.0 Skeleton Arguments in Support of the Application

4.1 In the Respondent's Skeleton Arguments in support of the Application to strike out the Petitioner's action, it was submitted at the outset that ***Order 2 rule 2 of the Rules of the Supreme court of England and Wales (1999 Edition) Vol. 1 (the white book)*** empowers the court to hear an application to set aside a matter or proceedings for irregularity, provided it is made within

reasonable time and before the party applying has taken any fresh steps after becoming aware of the irregularity.

4.2 Further, that the Court has the discretion under **Order 3 rule 2 of the High Court (Amendment) Rules 2020** to grant any Order whose purpose is the furtherance of dispensing and the doing of justice.

4.3 Moving on to the issue of whether or not this Court has the requisite jurisdiction to hear the proceedings herein, the gist of the Respondent's arguments was that the Petitioner's process does not comply with the provision of **section 4(3) (a) and (b) of the Matrimonial causes Act**, which gives jurisdiction to the court in proceedings of divorce. The said section 4(3)(a) and(b) states that the Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage;

(a) is domiciled in Zambia at the date of the commencement of the proceedings; or

(b) is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.

4.4 The Respondent reiterated that the Affidavit evidence clearly demonstrated that the parties herein were married outside Zambia and resided outside Zambia for some considerable time and are presently residing and domiciled in the republic of South Africa together with the children of the Family.

4.5 The Respondent stated that therefore the matter was procedurally flawed and incompetently before the court and that the only possible remedy was to strike out such process due to irregularity of the same as it amounts to an abuse of court process.

4.6 In support of the above assertion, reliance was placed on the decisions of **Finance Bank Zambia Limited vs. Dimitriios Monokandilos and Filandria Kouri**

Appeal No 120 of 2020¹ and **Chick Master Limited and Another Vs. Investrust Bank Plc Appeal No. 74 of 2014²** in which the term '**abuse of court process**' was defined to mean a claim that is vexatious, scurrilous or ill-founded.

- 4.7 The Court's attention was further drawn to the cases **Lingson Chikoti vs. Zambian Railways Limited Appeal No. 158/2010³** as well as the Supreme court decision of **Banneret Development Corporation and Joritus Enterprises Limited Appeal No. 37 vs. 2011⁴** where the Court stated *inter alia* that the Court has no jurisdiction to address or grant any relief in proceedings or process wrongly before the court.
- 4.8 In sum and to supplement the above position, the Respondent relying on the Supreme Court's Judgment of **Access Bank Limited vs. Group Five/ZCON Business Park and Joint Venture SCZ/ 8/2014⁵**, argued that rules of court are intended to assist the proper and orderly administration of justice and as such must be strictly followed.

4.9 It was submitted that the Petitioner's process herein has shown an apparent disregard for the rules of procedure of this Court by their failure to abide by section 4(3)(a) and(b) of the Matrimonial Causes Act. Consequently, the Respondent sought the following reliefs;

- i. An Order to strike out and/or set the Petitioner's process for want of jurisdiction;***
- ii. An Order for costs to be awarded to the Respondent in any event;***
- iii. An Order that the Petitioner's Advocates be condemned in costs for the said frivolous and vexatious process and for wasting this Honourable Court's time with an application that has no merit and ill conceived.***

5.0 Opposition to Application

- 5.1 On 29th November 2023, the Petitioner filed his Affidavit in Opposition to the Respondent's Application to strike out matter and/or dismiss action for want of Jurisdiction accompanied by Skeleton Arguments.
- 5.2 The Affidavit was sworn by **Emmanuel Mbiya** in his capacity as the Petitioner. In the said Affidavit in Opposition, the Petitioner deposed that as evidenced by the marriage certificate, the marriage between the Petitioner and the Respondent was celebrated on 28th December 2007 at the office of the Registrar of Marriages at Lusaka, in the Republic of Zambia.
- 5.3 The Petitioner further deposed that prior to the celebration of the marriage on 28th December 2007, he and the Respondent drove to Zambia from the Republic of South Africa for purposes of having their marriage solemnized in Zambia under the Zambian Laws that were applicable.
- 5.4 That the decision to get married to the Respondent in the Republic of Zambia was informed by the fact that

the Petitioner considered Zambia as his home although he was currently resided in South Africa.

5.5 The Petitioner averred that he is still a Zambian and has not renounced his citizenship and that in any event, Zambia is his home which he intends to return to at a later stage of his life. That although the Petitioner was currently resident in South Africa, he still considered the Republic of Zambia as his domicile.

5.6 The Petitioner thus contended that this Court has the requisite jurisdiction to determine the matter herein as the Petitioner has been domiciled in the Republic of Zambia and not South Africa as alleged by the Respondent.

6.0 Skeleton Arguments in Opposition

6.1 In his Skeleton Arguments, the Petitioner identified the following as the issue for this Court's determination:

Whether this Honourable Court has the Jurisdiction to hear and determine the Petitioner's Petition considering that both the Petitioner and the Respondent are

***currently not resident in the Republic of
Zambia***

- 6.2 In addressing the above issue and in response to the Respondent's Skeleton Arguments, it was the Petitioners' submission that the Respondent's reliance on ***Order 3 rule 2 of the High Court Rules*** makes the application herein irregular because the provision does not empower the Court to make final orders dismissing a matter and that the jurisdiction of the Court under Order 3 rule 2 is limited to making Interlocutory Orders.
- 6.3 In buttressing the above position, the Petitioner drew the Courts attention to the case of ***Hakainde Hichilema and 5 Others – The Government of the Republic of Zambia. Appeal No. 28 of 2017***⁶ in which the Court gave the import of Order 3 rule 2 of the High Court Rules, by stating that the wording of Order 3 rule 2 gives wide discretionary power to a court to make interlocutory orders even if the said orders are not expressly asked for in order to meet the ends of Justice.

However, that the said Order 3 rule 2 only applies to interlocutory orders and not final orders.

6.4 In light of the above authority, it was the Petitioner's submission that the Respondent's application herein should be dismissed for irregularity.

6.5 Furthermore, in response to the Respondent's reliance on the provisions of section 4(3)(a) and(b) of the Matrimonial Causes Act No. 10 of 2017 as the basis that this Court does not have jurisdiction to hear and determine this matter, it was the Petitioner's submission that a careful perusal of the said section 4(3)(a)(b) shows that in divorce or nullity proceedings, the High Court has jurisdiction in two (2) instances. Firstly, that the Court has jurisdiction where either party to the proceedings is domiciled in Zambia at the date of commencement of the proceedings and secondly, if either party to the proceedings is resident in Zambia at the date of the commencement of the proceedings and has been ordinarily so resident for a

period of not less than twelve (12) months immediately preceding that date.

6.6 The Petitioner conceded that the second instance does not apply to him considering that he has been resident in the Republic of South Africa but submits that this Court has jurisdiction to determine the Petition he has presented on account of the first instance under section 4(3)(a) of the Matrimonial Causes Act.

6.7 According to the Petitioner, under the said section 4(3)(a), for this Court to assume jurisdiction to determine this matter, it is a requirement that either party to the proceedings is domiciled in Zambia at the date of commencement of the Proceedings.

6.8 The Petitioner went on to define the term 'domicile' according to the ***Blacks' Law Dictionary 11th Edition at page 614*** in which the term domicile has been defined in the following terms:

“The place at which a person has been physically present and that the person regards as home; a person’s true, fixed,

principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.”

6.9 Further, that in the South African case of ***AV -vs. WV case number 5881/17(unreported)***⁷ the High Court cited with approval the following definitions of the word domicile in Willies Principles of South African Law 9th Edition by Francois Du Bois at page 152:

“Every person has what is called a “a domicile”. That is a legal home or a home for legal purpose.”

6.10 That the court further held that:

“Domicile is not necessarily the same as place of actual residence or a place where one eats, drinks and sleeps”

6.11 Relying on the above authorities, it was submitted that the terms ‘domicile’ and ‘residence’ do not mean the same thing and that the fact that an individual is

resident in a particular place does not imply that as the domicile of that individual.

6.12 It was argued that the distinction is seen in the instances under section 43(a) and(b) of the Matrimonial Causes Act and as a result creates room for the existence of both, that is, that where a party to divorce proceedings is not domiciled within the jurisdiction of the Court the law requires such a party to at the very least be resident within the jurisdiction of the Court.

6.13 The Petitioner went on to highlight the four (4) general principles relating to the determination of ones' domicile as espoused in the book by **J.H.C Morris titled Conflict of Laws, Second Edition**. Viz-

- i. No person can be without a domicile***
- ii. No person can at the same time have more than one domicile at any rate for the same purpose***
- iii. An existing domicile is presumed to continue until it is until it is proved that a new domicile has been acquired***

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iv. For the purposes of a rule of conflict of laws, domicile means domicile in the English sense

6.14 It was submitted in line with the above principles that where an individual has a domicile determined at birth, such a domicile is presumed to continue until it is proved that a new domicile has been acquired and the burden of proof rests on the party claiming that a new domicile has been acquired. That *in casu*, it was incumbent upon the Respondent to prove on a balance of probabilities as required in civil matters that the Petitioner has acquired a new domicile apart from that he acquired at birth.

6.15 However, that the Respondent has failed to discharge her burden of proving that in her claims.

6.16 In summation, the Petitioner reiterated that the domicile of a party to proceedings is not determined by his/her residence but rather determination by where such a party considers his home.

6.17 The Petitioner urged this Court to dismiss the Respondent's application in its entirety with costs of an incidental to the application to be awarded to the Petitioner

7.0 Reply

7.1 On 5th March 2024, the Respondent filed an Affidavit in reply to an Affidavit in Opposition to an Affidavit in support of a summons for an Order to strike out matter and/or dismiss an action for want of Jurisdiction.

7.2 The Respondent stated in the said Affidavit in reply that she lived in Zimbabwe for 7 years and was on a resident permit and that the first marriage certificate was executed and signed in Harare Zimbabwe on or about 8th June 2001.

7.3 That the couple only relocated to South Africa in October 2003 where they acquired their first home in Cedar Lakes Estate, Johannesburg. The Petitioner divorced the Respondent on or about 16th May 2005 in Zimbabwe when she was six months pregnant.

- 7.4 The Respondent averred that she and the Respondent simply travelled to Zambia to celebrate a re-marriage due to the fact that their relatives were residing in Zambia and wished them all to be part of their re-marriage celebrations.
- 7.5 That all official documentation appears to indicate South Africa to be the Petitioner's home and residence. The Respondent exhibited various documentation in order to demonstrate that the Petitioner's domicile and/or residence was South Africa.
- 7.6 The Respondent further averred that when she joined the Petitioner in South Africa on or about 27th January 2011, she was given a South African residency permit under ID No. 7308121230189.
- 7.7 The Respondent contended that the Petitioner has lived in South Africa for approximately the last 30 years and obtained his first permanent residency permit in 2010 under ID number 7104245654184 and his new residency permit under ID Number 7104245654085 and subsequently applied for and received his South

African Passport No. M00246718 which documents were exhibited before court. That therefore the Petitioner has a dual citizenship of South Africa and Zambia.

7.8 The Respondent further contended that for a non-national to apply for citizenship of the Republic of South Africa, they must be domiciled in South Africa.

8.0 The Hearing

8.1 The hearing of the application was held on 19th March 2024. During the said hearing, Counsel for the Petitioner raised issue as regards the form of the Affidavit in Support of Application filed on 11th August 2023 and the Affidavit in reply filed by the Respondent on 5th March 2024, on the basis that the said documents offended the rules of Court being **Order 5 of the High court Rules** which deals with the form an Affidavit is supposed to take.

8.2 It was argued that the said Order 5 requires that an Affidavit must be Commissioned before a Commissioner of Oaths and that if the Affidavit is executed outside this

jurisdiction for use before the Zambian Courts, such Affidavit must be notarised.

8.3 Further, it was argued that an Affidavit that is Commissioned or signed before a Notary public should be filed before Court in its original form and not as a copy. That in the event that a party files a copy, it has been a matter of procedure that such a party shall seek leave of Court to file a copy of such an affidavit.

8.4 Mr. Ngandwe also in opposing the Affidavits filed by the Respondent herein, argued that paragraph 10 of the Affidavit filed on 11th August 2023 contains prayers whereby the Respondent is asking the Court to make three pronouncements.

8.5 Further, with regards to the Respondent's Affidavit in reply dated 5th March 2024, it was argued that paragraph 21 makes legal arguments and conclusion and that at paragraph 22, the Respondent equally makes three (3) prayers on what she seeks the Court to do.

- 8.6 Counsel also drew the Courts attention to the authority cited by the Respondent in their list of authorities of 5th March 2024, particularly paragraph 3.6 where the Respondent quotes Order 5 rule 16 which clearly requires that only statement of facts and circumstances to which the witness deposes must be contained in the Affidavit.
- 8.7 In addition, Counsel referred to Order 5 rule 15 which rule forbids the inclusion of extraneous matters by way of objection, prayer, legal arguments or conclusion in an affidavit. Counsel also cited the case of ***Sun Country Limited v. Charles Kearney; selected Judgment No. 20 of 2017, SCZ/ 8/ 265/ 2016, Appeal No. 7/2017***⁸ where the Supreme Court guided on the difference between a defect in an Affidavit to do with the form with the content and that where the Affidavit contains defects to do with content to a particular paragraph that offends the rules it must be expunged from the record.
- 8.8 Counsel prayed that both the Affidavit in Support and the Affidavit in Reply must be expunged from the record

as they are not original. In the alternative, that if the Court feels that the Affidavits are properly before the Court, that the Court must expunge every cited paragraph and every other paragraph which shall be found to contain defects in form.

8.9 Responding to the issues raised by Counsel for the Petitioner, Mr. Kearns, Counsel for the Respondent argued that no law was referred to in support of the argument that an Affidavit must be in its original form. However, should the Court be of the view that Order 5 as amended is applicable in this matter, then the Affidavit of 29th November 2023 should equally be expunged as the Affidavit is a mere photocopy of the original. That therefore, if that limitation is correct at law then both affidavits will suffer the same effect of being expunged.

8.10 With regard to the argument that paragraph 10 of the Affidavit of 11th August 2023 contains a prayer, it was Counsel's argument that the definition of a prayer would not apply to this situation as the paragraph is

clearly a statement of information. Equally, that Paragraph 21 of the Affidavit in Reply of 5th March 2023, merely states an information as was advised by her lawyers which is permissible under the rules of Court.

8.11 In sum, Counsel posited that the paragraphs complained of are not defective in form or content and are not susceptible to be expunged.

8.12 Counsel further contended that where a deponent state something and states the source of information, the same does not amount to extraneous matter but it is a statement of fact which is allowed into evidence and does not fall short of Order 14/15(3) of the White book because it is a finding or explanation of what he is doing and is allowed.

8.13 Counsel prayed that the case be heard on its merits as it appeared that both parties may be wanting on the rules of Affidavit on the basis that both deponents are based in South Africa and copies may not have been served on the parties.

8.14 Counsel further submitted where a party intends to make an objection, they are to raise such objection at the 1st possible instance. However, that *in casu*, the Petitioner filed the process in opposition and never raised any issues as such slept on their rights.

8.15 Counsel urged the Court to focus on the issue of jurisdiction, stressing that jurisdiction is everything and without jurisdiction the Court cannot make any more steps. The case of ***Finance Bank Ltd and the Officio Receiver Motion 8/2012/2019 and 2020***⁹ was relied upon in support of this assertion and the Court was urged to follow section 8 and 9 of the Matrimonial Causes Act and dismiss the divorce proceedings for want of jurisdiction as the parties do not qualify to be before court. Counsel also sought costs.

8.16 Mr. Sambo arguing on behalf of the Petitioner opposed the Respondent's application. It was Counsel's submission that the issue before court is very clearly provided for under section 4(3) of the Matrimonial Causes Act and that the said provision has stipulated

the two instances in relation to when the Court will have jurisdiction to determine divorce proceedings.

8.17 Counsel reiterated that the Petitioner is domiciled in Zambia and as a result qualifies under one of the instances stipulated in section 4(3) of the Matrimonial causes Act.

8.18 Counsel also argued that although the authorities cited in relation to domicile were of persuasive nature, it is clear that when a person is born, they are considered to take the domicile of their parents until such a time when they renounce such a domicile to select one of his own. As such that domicile is not the place where one is physically resident.

8.19 He added that the only person who determines what their domicile, is the individual based on which place they consider to be their home.

8.20 That the distinction is seen from the law which requires one to be resident or domiciled in Zambia, that is, that where a person does not consider Zambia as their home,

the law requires that person to be resident of Zambia for at least 12 months before filing the petition.

8.21 That *in casu*, the evidence on record shows that Respondent and the Petitioner had to travel to solemnize their marriage in Zambia, as a clear demonstration that the Petitioner considers Zambia to be his home. In support of this assertion, Counsel brought to the Court's attention paragraph 11 of the Affidavit in reply filed on 5th March 2024, where the Respondent affirmed that, that the Respondent and Petitioner travelled to Zambia to celebrate their marriage because their relatives were in Zambia.

8.22 In conclusion, Counsel submitted that it is not for the Respondent to determine the domicile of the Petitioner but for the Petitioner himself who attained the domicile of the Republic of Zambia at the time of his birth.

8.23 Lastly, that the Respondent has not produced any proof to show that the Petitioner renounced his domicile but has shown proof of the undisputed fact that the

Petitioner is resident in the Republic of Zambia which is a different case altogether.

8.24 Counsel prayed that the Respondent's application be dismissed for want of merit with costs to the Petitioner as he maintains that he is domiciled in Zambia and not the Republic of South Africa as alleged by the Respondent.

8.25 Mr. Kearns also submitted that the Court will note from the Petitioner's submissions that the Petitioner has stated that he is domiciled in South Africa and therefore that it can be seen that the domicile of choice for the Petitioner is South Africa as he has obtained residence in that country where the children were born and school there. Consequently, the Respondent prayed that the Court upholds their application.

9.0 Consideration of Application and Determination

9.1 I have considered the application by the Respondent and the arguments advanced by the Parties both for and against the application. I have also given due consideration to the oral submissions made by Counsel

at the hearing of this matter with regards to the application before Court as well as the issue raised by Counsel for the Petitioner regarding the form and content of the Respondent's Affidavit in support and reply dated 11th August, 2023 and 5th March, 2024 respectively, on the basis that the same do not comply with Order 5 of the High Court Rules which deals with the form an Affidavit is supposed to take.

9.2 I wish to state at the outset that the issue of jurisdiction is paramount in that where a Court lacks jurisdiction to hear and determine a matter; any decision it makes is a complete nullity at law and no appeal can lie against it on the merits. This position was stated in the Supreme court decision of ***Zambia Consolidated Copper Mines Investment Holding Plc Vs. Mufalali & 141 Others Selected Judgment No. 14 OF 2017***¹⁰.

9.3 Furthermore, in the case of ***JCN Holdings Limited v Development Bank of Zambia (2013) 3 ZR, 299***¹¹, the Supreme Court held that: ***"It is clear from the Chikuta and New Plast Industries Cases that if a***

court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter...

9.4 Additionally, in the case of ***Antonio Ventriglia and Manuela Ventriglia v Finsbury Investments Limited SCZ Appeal No. 02 of 2019***¹² the Supreme Court dealt with an issue of jurisdiction and held that: ***“out of nothing, comes nothing and that he gives nothing, who has nothing.”***

9.5 It is clear from the above authorities that the decision of a Court which purports to be exercised without jurisdiction which it does not have amounts to nothing. With that said, the issue that falls for this Court's determination is:

- i) ***Whether this court has the requisite jurisdiction to hear and deter the Petitioner's process in light of the provisions of section 4(3)(a) and(b) of the Matrimonial Causes Act No. 10 of 2007 of the Laws of Zambia***

9.6 The Respondent anchored her application on the provisions of Order 3 rule 2 of the High Court Amendment Rules as well as section 4(3)(a) and(b) of the Matrimonial Causes Act. The said provisions enact as follows:

“3 (2) Subject to any particular rules, the Court or Judge may in all causes and matters, make any interlocutory Order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

9.7 Section 4(3)(a) and(b) of the Matrimonial Causes Act further states that:

“4(3) The Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage –

- (a) *is domiciled in Zambia at the date of the commencement of the proceedings: or*
- (b) *is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.*

9.8 However, the Petitioner has argued that the Respondent's reliance on Order 3 rule 2 of the High Court Rules makes the Respondent's application irregular as the provision does not empower the Court to make final orders dismissing a matter and that the jurisdiction of the court is limited to making interlocutory orders.

9.9 Indeed, the import of Order 3 rule 2 of the High Court Rules has been given by the Supreme Court in a number of decisions including the case of **Hakainde**

Hichilema and 5 others vs. the Government of the Republic of Zambia cited by the Petitioner, wherein the Court guided that order only applies to interlocutory orders and not final orders.

9.10 However, I am cognizant of the guidance given by the Supreme court in the case of ***Shilling Bob Zinka v. The Attorney General (1990-92) Z.R 70¹³***, that an action is not invalidated by the use of a wrong provision of the law so long as the power to act is traceable to a legitimate source.

9.11 Section 4 of the Matrimonial Causes Act which the Respondent also referred to, clothes the High Court with jurisdiction in Matrimonial Causes. Thus, I am of a view that a challenge regarding the jurisdiction of this court in matrimonial causes is more appropriately brought pursuant to section 4 of the matrimonial causes Act.

9.12 Coming now to the substantive application before me, section 4(3)(a) and(b) of the Matrimonial Causes Act states as follows:

“4(3) The Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage –

(a) is domiciled in Zambia at the date of the commencement of the proceedings: or

(b) is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.

9.13 The Respondent relied on the above provision as a basis for the allegation that this Court does not have jurisdiction to hear and determine this matter as both the Petitioner and the Respondents are resident and/or domiciled outside the Republic of Zambia in the Republic of South Africa together with their children for

the past several years. Furthermore, that the provisions of section 4(3) of the Matrimonial Causes Act clearly precludes any proceedings to be commenced before Courts of Zambia to dissolve a marriage where either party resides outside Zambia.

9.14 The Petitioner on the other hand argued that the High Court in divorce or nullity proceedings has jurisdiction in two instances; firstly that the Court has jurisdiction where either party to the proceedings is domiciled in Zambia at the date of commencement of the proceedings and secondly, if either party to the proceedings is resident in Zambia at the date of commencement of the proceedings and has been ordinarily so resident for a period of not less than twelve (12) months immediately preceding that date.

9.15 The Petitioner conceded that the second instance does not apply to him, however, that this Court has jurisdiction to hear and determine his Petition on account of the 1st instance under section 4(3)(a) of the Matrimonial Causes Act which requires that either

party to the proceedings is domiciled in Zambia at the date of commencement of the Proceedings.

9.16 In determining this Court's jurisdiction to hear the Petitioner's action, it will be imperative to determine whether the Petitioner herein is domiciled in Zambia in light of Section 4(3)(a) of the Matrimonial Causes Act.

9.17 It is trite that the private legal status of a person is determined by the law of the country or place in which such a person is domiciled. This is known as the *lex domicilii*. The *lex domicilii* is of paramount importance as it determines which legal rules and Courts have authority over one's legal matters, ensuring fairness and orders, in situations involving multiple legal systems.

9.18 In this jurisdiction, the jurisdiction of the High Court to grant an order of divorce or nullity as per section 4(3)(a) is based on the fact that either party to a marriage is domiciled in Zambia at the date of the commencement of the proceedings. Therefore, a party must prove that

he or she was at the date of commencement of the proceedings domiciled in Zambia.

9.19 ***What then is Domicile?*** According to the **Blacks' Law Dictionary 11th Edition at Page 614**, the term 'Domicile' is defined as:

"The Place at which a person has been physically present and that the person regards as home; a person's true fixed, principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere"

9.20 Further, the **Halsebury's Laws of England/Conflict of Laws (Vol 19) (2011) at page 234** in explaining the Function and Meaning of Domicile states as follows as:

"The primary purpose of defining domicile is to identify this personal law by considering factors which connect the person to a territory with a distinctive legal system. Domicile defines the legal relationship between an individual and

that legal system which is invoked as his personal law...”

9.21 The authors go on to state that:

“A person is domiciled in that country in which he either has or is domiciled or is deemed by law to have his permanent home. Every individual is regarded as belonging, at every stage in his life to some community consisting of all persons domiciled a particular country; the legal rules as to domicile are such his legal idea may not correspond to social reality. Although a person may have more than one home but he can have only one domicile for any one purpose”

9.22 The meaning of the word ‘Domicile’ was also given in the case of **H vs. H 2007 CILR 129**¹⁴ wherein the court stated that:

“The domicile of a person is in general the place or country which is in fact his

permanent home, or is so deemed by operation of law, and it is not necessarily determined by his nationality. It is the place or country in which a person is resident animo manendi. The law of the country of a man's domicile applies to him. Every person is deemed to have a domicile. However, no one has more than one domicile at one time"

9.23 In describing domicile, the Halsebury's laws of England at page 235 distinguished the types of domicile by stating that:

"The law attributes to everyone at birth a domicile which is called a domicile of origin. This domicile may be changed and a new domicile which is called a domicile of choice acquired. The two kinds of domicile differ in the following respects:

- i. The domicile of origin is received by operation of law at birth while domicile of choice is acquired by an individual actually moving to another country and intending to remain there indefinitely;*
- ii. The domicile of origin is retained until the acquisition of a domicile of choice; it cannot be divested, although it remains in abeyance during the continuance of a domicile of choice; the domicile of choice is lost by abandonment whereupon the domicile of origin will revive unless some other domicile is acquired. The domicile of choice is destroyed once it is lost but may be acquired anew by fulfilling the same conditions as are required in the first instance*

iii. Domicile of Origin is more durable than that of choice, in the sense that the domicile is more difficult to establish a change of domicile

9.24 As can clearly be seen from the above, domicile of a person is a place where he has made his permanent home. Further it is clear that domicile may be acquired either by origin or by choice. While domicile of origin is determined at the time of ones' birth, domicile by choice is acquired by a person residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely.

9.25 The definition for domicile was also espoused in the English case of **Lord v. Colvin (1859), 28 L.J. Ch. 361; 7 W.R. 250¹⁵**, Kindersley, V.-C. said at p366:

"I would venture to suggest that the definition of an acquired domicile might stand thus: 'That place is properly the domicile of a person, in which he has voluntarily fixed the habitation of himself

and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or uncertain) shall occur to induce him to adopt some other permanent home.” (emphasis added)

9.26 According to Halsebury’s Laws, the two tests for acquiring domicile by choice are ‘**residence**’ and the ‘**intention to remain**’. In terms of residence, in order to have acquired a domicile of choice in a country, the individual must have actually resided there. It is not sufficient that that he intended to reside there in the future nor that he actually set out on a journey to the new country, only to die on the way there.

9.27 That residence in this context means no more than personal presence in a country other than casually or as a traveler.

9.28 Regarding the test of intention to remain, **Halsebury’s Laws** states that the individual must have had a certain

state of mind he must have formed the intention of making his sole or principal home in a country of residence. In an instructive judgment, Langton, J. put the point very clearly in ***Gulbenkian v. Gulbenkian (4)*** ([1937] 4 All E.R. at 627¹⁶):

“The intention must be a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character.”

9.29 In the case of **H vs. H** supra, the test for intention to remain was expressed in the following terms:

“There must be a definite purpose to transfer one’s permanent home to another country and that there must be a residence in that country. In other words, a new domicile is acquired when there is an intention that has been carried out, for example, by actual residence there. A

*residence in pursuance of the intention,
however short, will establish a domicile....”*

9.30 The question whether or not a person has acquired a domicile of choice is not a question of law but of fact and has to be decided by the evidence in each particular case sufficient to satisfy the conscience of the Court.

9.31 The court in **H and H** considered factors that may evidence intention to change domicile. At pages 129-130, the Court stated inter alia that:

“Proof of intention to change domicile is very important and must be strong. The intention to change domicile may be evidenced in many ways. Although no general rules can be laid down as to the method of proof, there are several factors that can be looked at; There may be a declaration of intention, or supposed change of domicile in documents such as wills, letters, emails, etc.; or in the case of a man or woman who has a residence in

the United Kingdom, the fact that he or she now lives elsewhere and has not gone back to England except for a short period of time, and has applied for work permits elsewhere continuously; or where the employer has applied to Immigration for a permit to say that he is a key employee and should not be sent back under the immigration "roll over" policy; or where parties have purchased a grave in a country, or a home in the country; or parties have very few ties abroad and have lived elsewhere continuously for a period of five years..." (Emphasis added)

9.32 In this case, the husband petitioned for divorce on the ground that the marriage had irretrievably broken down. The husband, who was born in Kenya and educated in England, married the wife in London in 2001. The same year, they visited the Cayman Islands on a vacation and decided to live there. After the

breakdown of the marriage, the husband filed for divorce in Ceyman Islands, claiming to be “domiciled in the Islands” within the meaning of the Matrimonial Causes Law (2005 Revision), section 5. The wife applied to have the Petition struck out on the ground that the Court had no jurisdiction since the husband was not resident in the Cayman Islands but in the United Kingdom.

9.33 In dismissing the application, the Court held that the husband was “domiciled in the Islands” within the meaning of the Matrimonial Causes Law, section 5, and the Court had jurisdiction to hear the Petition. His six-year residence in Ceyman Islands, his links with the local community, his relationship with his employer and his declarations to witnesses, when taken together, provided persuasive evidence of a genuine intention to reside there permanently. These factors, together with his acquisition of a home there, were sufficient to establish residence...”

9.34 Turning now to the present case, whilst I acknowledge that the law under section 4(3) of the Matrimonial Causes Act, draws a distinction between the terms 'domicile' and 'residence', in determining whether or not domicile of choice has been acquired, residence of a person in a particular country, especially if it is continued for a long period of time, is evidence of intention to remain there and in the absence of other evidence, residence may support the inference that domicile of choice has been acquired.

9.35 Residence coupled with an intention to remain is what determines whether or not a party has acquired a domicile of choice.

9.36 A careful perusal of the evidence on record reveals the following facts:

- i) That both the Petitioner and the Respondent are residents of the Republic of South Africa and have been residents of South Africa for several years.***

ii) *The Petition for dissolution of marriage revealed that the Petitioner resides at Plot 25 Ventura Apartments, Fourways, Johannesburg Gauteng South Africa whereas the Respondent in her Affidavit in Reply confirmed her residence as 103 Monoghan Farm Estate Lanseria, Johannesburg South Africa.*

iii) *Further evidence shows that the Petitioner and the Respondent have four (4) children of the family two of whom were born in South Africa as evidenced by the children's birth certificates. These children are namely; Emmanuel Kangudia Mbiya (Male) born on 14th July 2005 and Gregory Mwenze Mbiya (Male) born on 23rd April 2002*

- iv) *The children of the family all reside in South Africa. Additionally, the evidence shows that Petitioner has two children from his previous marriage all of whom were born in South Africa.*
- v) *The Petitioner owns properties in South Africa including a Matrimonial home in Cedar Lakes Estate which was acquired in 2003.*
- vi) *Official documents reveal that the Petitioner enjoys permanent resident status in South Africa, having obtained a Permanent Resident Permit in 2010 while the Respondent obtained her South African Resident permit in 2011.*
- vii) *The Petitioner drove to Zambia from the Republic of Zambia for purposes of*

***having the marriage solemnized in
Zambia.***

9.37 The above facts which were not disputed by the Respondent, are in my view strong and persuasive of the fact that the Petitioner herein is a resident of South Africa and has come to regard South Africa as his home. I am guided by the following description of domicile of choice by Lord Westbury in ***Udny v Udny (1869), LR. 1 Sc. &C Div. 441***¹⁷: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time...***It must be a residence not for limited period or particular purpose, but general and indefinite in its future contemplation.***'

9.38 The Petitioner's continued residence in South Africa, the acquisition by the Petitioner of properties in South Africa including a matrimonial home as well as act of obtaining Permanent Resident Permit are all sufficient

to establish that the Petitioner though of Zambian Nationality intended to make South Africa his permanent home.

9.39 I note that the Petitioner averred in his Affidavit in Opposition, that the decision to get married to the Respondent was informed by the fact that he considers Zambia as his home. However, no evidence was adduced to show that the Petitioner has kept ties with Zambia whilst in South Africa, neither was any evidence adduced to show that the Petitioner had ever returned to Zambia since his marriage in 2007. Thus, in the absence of any such evidence, the only logical conclusion that can be drawn is that the Petitioner only returned to Zambia for purposes of solemnizing his marriage with the Respondent and nothing more.

9.40 The English law requires that the intention be *bona fide* in the sense of being genuine and not pretended for some other purpose.

9.41 It is my considered view that the facts adduced by the Respondent have sufficiently satisfied this court that

the Petitioner, though of Zambian Nationality, acquired South Africa as his domicile of choice. This is in fact confirmed by the Petitioner himself who states in his petition at **paragraph 7** that:

"The Petitioner and the Respondent are both domiciled in South Africa"

9.42 Section 4(3)(a) of the Matrimonial Causes Act states that the Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage –

(a) is domiciled in Zambia at the date of commencement of the proceedings:

9.43 Having established that the Petitioner herein acquired South Africa as his domicile of choice, I find that the Petitioner was not at the time of commencement of these proceedings domiciled in Zambia. Therefore, contrary to the Petitioner's assertions, the provisions of section 4(3) (a) of the Matrimonial Causes Act do not apply to the Petitioner.

9.44 Furthermore, I am of the view that it would be imperative in determining the jurisdiction of this Court to hear the Petitioner's proceedings to also consider the doctrine of '*forum non conveniens*'.

9.45 The **Black's Law Dictionary** defines the doctrine of *forum non conveniens* as:

"The doctrine that an appropriate forum even though competent under the law may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."

9.46 In deciding on the choice of the appropriate forum, the Court generally gives preference to the Court where the matter was first instituted. Therefore, of principal consideration also is whether, looking at the facts and circumstances of the case, such as the location of the matrimonial home, interests of children to the marriage,

permanent residence of the parties and their domicile, the other forum is more appropriate.

9.47 In ***Anuradha v. Divyanshu Gautam***¹⁸ an Indian case, which I cite for its persuasive value, the parties were working and residing in Melbourne, Australia, where the divorce proceedings had been allegedly instituted by defendant. The Court in India had to consider whether the Indian Courts could be treated as an appropriate forum on the basis of principle of forum conveniens. The Court thus stated that;

“The choice of appropriate forum is to be made on the basis of factors designed to ensure, if possible, that action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage of one of the litigants at the expense of other in a jurisdiction that is otherwise inappropriate. While deciding which forum would be the appropriate forum to

decide the action, it is necessary to see where the justice can be done at substantially less in convenience and expense and where the action had most real and substantial connection such as availability of witnesses and the law governing the relevant transaction and the places where the parties respectively reside or carry on business. And unless the balance is strongly in favour of party seeking injunction, the choice of forum of opponent party should rarely be disturbed”

9.48 The Court of Appeal re-echoed these factors that fell for consideration under the doctrine of forum non conveniens in the case of *Axiz Pty Limited v. Cloudtech Zambia Limited and Another*¹⁹ when it held that;

“There must be consideration as to whether there is another forum which is more appropriate in which the action has

the most real and substantial connection such as convenience or expense.”

9.49 In my consideration of whether there is another forum more appropriate in this case, I have had regard to the fact that both the Petitioner and the Respondent are resident South Africa together with the children of the family.

9.50 The parties also have assets in South Africa that maybe subject to property settlement upon the dissolution of the Marriage between the Petitioner and the Respondent. Considering these facts, I have no difficulty in arriving at the conclusion that the parties have the most real and substantial connection to the Court in South Africa and not just to secure a juridical advantage for either of the parties.

9.51 In view of the doctrine of *forum non conveniens*, I find that the South African Court is a more appropriate forum to exercise jurisdiction over this matter.

10.0 Conclusion

10.1 In view of all that has been said above and for the avoidance of doubt, I find that this Court lacks the requisite jurisdiction to hear and determine the Petitioner's process filed before this Court on 9th December 2022 for the reasons stipulated above below:

- i) *That the Petitioner was not at the time of commencement of these proceedings domiciled in the Republic of Zambia to warrant the invocation of this court's jurisdiction under section 4(3)(a) of the Matrimonial Causes Act;*
- ii) *On the basis of the doctrine of forum non conveniens, the forum with the closest and most real substantial connection to the matter and the parties in this case is the South African Court and not the Zambian Court;*

10.2 The Respondent's application to strike out matter and/or dismiss the Petitioner's action for want of

jurisdiction has merit and is hereby granted, The
Petitioner's action is accordingly set aside for want of
Jurisdiction.

10.3 Based on the above findings, I find that the issue raised
by the Petitioner's Counsel regarding the form and
content of the Affidavit in support and reply is of no
consequence.

11.0 Costs are in the cause.


M.M. Bah-Matandala
HIGH COURT JUDGE

