



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Divorce Cause 10 of 2007

A.Z.A.....PETITIONER

VERSUS

M.C.A.....RESPONDENT

RULING

On the 24th day of October 2001 I heard both the applicant's and the respondent's counsel in respect of the chamber summons herein. At the end of it all, I struck out the petition and reserved my ruling. I now give the reasons but first the background.

By an application by way of chamber summons dated 8th October 2007, pursuant to the provisions of Order VI Rule 13(b) (c) and (d) of the Civil Procedure Rules the applicant seeks orders;

1. That the application be struck out
2. Costs of the application to be provided.

The application is predicated upon the grounds that:

1. The purported Notice to Appeal is defective, void and of no legal consequence howsoever by reason of the fact that the same did not issue from the registrar of this honourable court.
2. The verifying affidavit is void for failure to comply with Order XVIII rule 4 Civil Procedure Rules. The petition is therefore unsupported and it cannot stand alone.
3. The purported Notice to Appeal, the purported Petition and the purported verifying affidavit are void by reason of the fact that they fail to comply with Rule 8 of the Matrimonial Causes Rules.
4. The petition supporting affidavit is also void for failure to comply with the provisions of Order XVIII Rule 4 Civil Procedure Rules.
5. The chamber summons dated the 15th of August 2007 is incurably defective in that it does not comply with the provisions of Order L rule 3 of the Civil Procedure Rules.
6. The petitioner's claim is scandalous, vexatious and an abuse of the process of the court in that it

seeks the dissolution of the marriage of the petitioner to the respondent for reasons other than those set out under section 8 of the Matrimonial Causes Act.

7. The petitioner and the respondent are husband and wife having celebrated their marriage on the 15th of May 2002.
8. At time of purchase of the motor vehicle registration number KAU 970R the marriage between the petitioner and the respondent was subsisting and was valid. It is still valid to date.
9. When the motor vehicle was purchased, it was purchased for the benefit and use of the respondent.
10. There is no order issued under the Matrimonial Causes Act or the Marriage Women Property Act determining the respondent's interest in the motor vehicle subject matter of these proceedings.
11. The petitioner of his own volition abandoned the respondent in Mamburi where they lived as husband and wife when he refused to join her when the tenancy on the Kilimandogo house expired.
12. The petitioner has deliberately suppressed material facts.
13. The honourable court has no jurisdiction to make the orders and the declarations sought in relation to the suit property.

The application is supported by the annexed affidavit of **M.C.A** sworn on the 8th day of October 2007. The applicant relied on the grounds and the affidavit in support in addition to counsel's submissions. The application was served on the respondent who filed grounds of opposition on the day of the hearing contrary to the provisions of Order L Rule 16(3) of the Civil Procedure Rules. On application I struck out the grounds of opposition. The application thus proceeded **ex parte**.

On behalf of the applicant, it was argued *inter-alia* that the purported Notice to appear is fundamentally defective, void and of no legal consequence whatsoever by reason of the fact that the same did not issue under the hand of the Registrar of the honourable court.

It is clear to me that the notice to appear is under the hand of Okanga & Company Advocates. It was not issued under the hand of the Deputy Registrar of this honourable court. Moreover, the same was not sealed with the seal of the honourable court as required by law.

My view of the matter is that notice to appear is the equivalent of summons to enter appearance. The same must be issued by the court and sealed with the seal of the court and signed (See Form No. 3 at **page 45 of the Matrimonial Causes Act**).

Noncompliance with Form 3 of the Matrimonial Causes Act renders the whole application on which it is based defective. It does not have the force of law.

Moreover, the said Notice to Appear also offends the letter and spirit of Rule 8(1) of the Matrimonial Causes Act by reason of the fact that unless otherwise directed a certified copy of the Action should be served personally on the respondent. I find as a fact that a copy exhibited as "DXI" is not a certified copy of the petition. Hence the petition is not in accordance with the provisions of Rule 8(1)(c) of the Matrimonial Causes Rules.

These are the reasons why I struck out the petition.

DATED and Delivered at Malindi this 15th day of May 2007.

N. R. O. Ombija

JUDGE