

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2084 OF 1992

HEZRON NDANYI LIDEDE.....APPLICANT

VERSUS

MARGARET KAMUNYA EMONDE.....DEFENDANT

RULING

The suit on which this chamber summons application is based was started by a plaint and it is a declaratory suit seeking among other things this Court's declaration that no valid marriage or any marriage at all subsists between the plaintiff and the defendant. I will say no more about the suit itself but will revert to the application.

The application is brought under orders 39 rule 2 (1) of the Civil Procedure Rules and is supported by the applicant's affidavit. The main prayer is for an injunction restraining the defendant/ respondent by herself and/or her agents from interfering with or harassing the plaintiff in her alleged and purported capacity as the plaintiff's wife or in any other manner howsoever until the final determination of the suit or until further orders of the Court. Paragraph 8 of the applicant's affidavit states on numerous occasions during the month of April and May 1992 the defendant has harassed him at his place of work and in social places by insisting to him, his friends and other persons that a valid marriage subsists between her and the plaintiff. She has also harassed him through the Children's Officer Nairobi Area that he must maintain the defendant's children. As a result of these numerous instances of harassment and interference the plaintiff says he has been unable completely to sleep or concentrate on his clearing and forwarding consultancy and he wishes that therefore to have Court stop the defendant from doing so till the suit he has filed is determined.

The application is contested. There was grounds of objection filed and a replying affidavit sworn by the defendant/respondent. In the grounds of objection it is stated that the plaintiff has come to Court with dirty and soiled hands for an equitable remedy which he should not be given. He represented himself as having the capacity to contract a marriage and he should be stopped from the about turn he now seems poised to make the acts of harassment are otherwise denied in the respondent's affidavit what is deponed in both affidavit and in the respondent's affidavit are matters really should come up during the hearing of the substantive suit. What is required at this stage if the applicant is to get his prayer is for him to show that he has at the end of the day a *prima facie* case with a probability of success that if the respondent is not restrained by an injunction the damage he is likely to suffer would not be able to be compensated by an award of damages. If the Court is in doubt the matter will be decided on the balance of convenience. A person who is customarily married lacks capacity to contract a statutory marriage with another woman when that first marriage subsists unless he or she wishes to convert that customary marriage to a statutory one with the same spouse. If one is statutory married one is unable to contract a legal and valid customary marriage with another woman when that statutorily marriage has not been dissolved. These are but only basis and elementary facts about this troublesome area of our laws. This will be the issue for determination when the main suit comes up.

Having looked and scrutinized the contents of the two affidavits it appears to me that the respondent is going to have rather an uphill task but as I said I am not considering the main suit. Suffice it to say that my view as of now is that the applicant has established that he's entitled to the injunction to stop the respondent from harassing him on the basis that she is his wife until that issue is decided on so I grant prayers number 1 in the chamber summons dated 27th May 1992 and filed in the registry of this Court on the same date.

I direct that the costs of the application will be costs in the cause.

Dated and delivered at Nairobi this 11th day of June , 1992 .

J.A MANGO

JUDGE