NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

October 22, 2020

Jack Maginnis, Esquire
MAGINNIS LAW
1717 K Street, NW, Suite 900
Washington, DC 20006
Jack.maginnis@gmail.com
Counsel for Simon Ochieng Lango

Razan Fayez, Esquire
FAYEZ GORIUP MCRAE PLLC
4084 University Drive, Suite 208
Fairfax, VA 22030
Razan@fgmfamilylaw.com
Counsel for Lydia Walome Lango

Re: *Simon Ochieng Lango v. Lydia Walome Lango*
Case No. CL–2019–13066

Dear Counsel:

The parties are married, agree they want a divorce, and each filed for divorce. Simon Lango ("Father") filed an "Amended Complaint for Absolute Divorce"; Lydia Lango ("Mother") filed a "Counter Complaint for Divorce." However, despite their mutual pleadings asserting and admitting that the Court has subject matter jurisdiction to award a divorce, each has argued during the trial—for the first time in this litigation—that the Court lacks subject matter jurisdiction over the other's complaint. The Court agrees.

The Court lacks subject matter jurisdiction over the parties' marriage in large part because the parties are in the United States on special nonimmigration visas reserved for foreign employees and spouses of international organizations while working in the U.S.—in this case the World Bank. This conditional basis for being in Virginia necessitates special effort to establish a domicile suitable to obtain a divorce here. The parties' actions have not overcome the *raison d'être* of their provisional presence in Virginia. Both the Complaint and Counterclaim for Divorce are dismissed.

OPINION LETTER

I. A VERY LONG SOJOURN.

The parties are Kenyan citizens. They married October 2, 2002, in Kenya and have three children, S.L. (born [redacted]), [redacted] (born [redacted]), and [redacted] (born [redacted]). They moved to South Africa in April 2004 and then to the U.S. in 2010. (Tr. Test. Mother.) They own real property in South Africa, and Father has title to real property in the U.S. where the family presently lives. (*Id.*)

The parties are lawfully in the United States on G-4 visas. A G-4 visa is a special nonimmigration visa issued to foreign employees of certain international organizations. (Tr. Test. Mother); *see also Adoteye v. Adoteye*, 32 Va. App. 221, 224 (2000) (citing 8 U.S.C. § 1101(a)(15)(G)(iv)). Father works for the World Bank and may stay in the United States on this visa so long as he works there. *Id.* Mother has the same visa. Foreign nationals working for the World Bank do not pay taxes to the U.S., consistent with their quasi-diplomatic status. (Def. Ex. 7 and 8.) ("[Father] is non-American . . . Most [World Bank] staff members are exempt from taxation on [World Bank] compensation . . . The most significant exception is for U.S. nationals, who are subject to taxes on [World Bank] income.") The parties did not pay U.S. taxes until Mother did so for 2019. (Tr. Test. Mother.) There was no evidence Father ever paid U.S. taxes.

At some time while the parties were in the U.S., Mother inquired about obtaining a "green card" immigrant visa for herself to permit her to work in the U.S. However, she never followed through when Father objected that the changed visa status could affect his World Bank employment. (Tr. Test. Mother.) She inquired about a green card again closer to the parties' separation.[1] However, her immigration lawyer advised her to wait until after the divorce. She was told it would be easier for her to convert a G-4 nonimmigrant visa to an immigrant visa after divorce. It would also be easier after her oldest child turned 21 years old. (Tr. Test. Mother.)

The parties separated on February 24, 2019 (according to Mother), or on April 22, 2019 (according to Father). They still live in the same house. Father filed for divorce on September 23, 2019; Mother filed a counterclaim for divorce on December 13, 2019.

The parties agreed to a Custody and Visitation Order in this Court, entered July 30, 2020. (Def. Ex. 13.) The younger children attend school in Prince William County, Virginia. (Def. Ex. 18.) The oldest child, now emancipated, attends Virginia Commonwealth University. (Pl. Ex. 8.)

At the conclusion of Father's case in the trial of this matter, Mother moved to strike his evidence on the basis that he failed to prove and corroborate Virginia jurisdiction over the marriage. Father failed to call a corroborating witness. Additionally, Father did not even testify as to his domicile or whether his separation from Mother was continuous and uninterrupted. The Court took this issue under advisement and Mother presented her counterclaim. At the

[1] Mother has been employed in the U.S. since at least January 20, 2019. (Def. Ex. 15 and 16.) It is not clear from the evidence whether she has immigration employment authorization for this employment.

conclusion of Mother's case, Father moved to strike her evidence on the basis that she failed to prove Virginia jurisdiction over the marriage. The Court took this issue under advisement as well.[2] Commenting on this unusual paradox wherein both parties filed for divorce and asserted the Court lacked jurisdiction over the other's complaint, despite both admitting the Court had jurisdiction in their pre-trial pleadings, the Court asked if either party wished to suffer a nonsuit, at which time Mother withdrew her motion to strike. The parties submitted the case for a decision.

II. ESTABLISHING VIRGINIA DOMICILE CAN BE A CHALLENGE FOR FOREIGN DIPLOMATS.

This Court may not award a divorce unless it has subject matter jurisdiction over the parties. Virginia Code § 20-97 grants this jurisdiction over a marriage where "one of the parties is and has been an actual bona fide resident and domiciliary of [Virginia] for at least six months preceding the commencement of the suit [for divorce] . . . ." "It is well established that domicile is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Harrison v. Harrison*, 58 Va. App. 90, 102 (2011).[3] Interpreting this jurisdiction statute, the Court of Appeals, in a case very similar to the present case, affirmed a trial court's determination that a party's G-4 nonimmigrant visa status did not indicate an intent to indefinitely be a resident and domiciliary of Virginia subject to divorce jurisdiction. *Adoteye*, 32 Va. App. at 227 (". . . a G-4 visa is inconsistent with intent to become a permanent, *bona fide* resident and domiciliary of Virginia.") (emphasis in original).

In *Adoteye*, the parties married in Ghana. They moved to Virginia, bought a home in Fairfax County, and bore all three of their children in Virginia. Both were World Bank employees. Ms. Adoteye had a G-4 visa "which is a non-immigrant visa issued to foreign nationals who live in the United States while working for certain international organizations, including the World Bank. The visa is conditioned upon [Ms. Adoteye's] World Bank employment and [would] expire if that employment ceases." *Id.* at 224. Nonetheless, they lived in Virginia for 12 years before the marriage failed. When it did fail, the parties entered a consent custody order in the Juvenile and Domestic Relations Court of Fairfax County, submitting to Virginia jurisdiction. *Id.* Ms. Adoteye supported her claim of being a Virginia resident and domiciliary based on her presence in Virginia for 12 years, her Fairfax County homeownership, her citizen-children's birth and entire lives being spent in Virginia, and her children's lack of language skills other than English. *Id.* at 226. She pointed to her Virginia driver's license, Virginia bank accounts, and Virginia-registered automobiles. *Id.* Ms. Adoteye only returned to Ghana for various six-week vacations. *Id.* She neither owned real property in Ghana nor paid taxes there. *Id.*

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[2] Both parties sought divorce based on fault grounds. Father alleged adultery and desertion; Mother alleged cruelty, constructive desertion, and adultery. Mother, alternatively, pled one-year separation as a no-fault ground.

[3] "Residence" and "domicile" are different concepts. "Residence" means a permanent abode in Virginia. *Hiles v. Hiles*, 164 Va. 131, 137 (1935). "Domicile" means presence in Virginia with the intent to live here indefinitely. *Howe v. Howe*, 179 Va. 111, 118 (1942).

The Court of Appeals acknowledged Ms. Adoteye presented a "persuasive package." However, it concluded those circumstances "are also consistent with a *transitory sojourn* in Virginia." *Id.* at 227 (emphasis supplied). The Court focused on Ms. Adoteye's G-4 nonimmigration visa and the fact that it was valid only so long as she worked for the World Bank. The Court wrote: "In the face of this situation, [Ms. Adoteye] has taken no step to secure citizenship or an immigration visa." It concluded a G-4 visa is "inconsistent with intent to become a permanent, *bona fide* resident and domiciliary of Virginia." *Id.* The Court of Appeals also highlighted Ms. Adoteye's choice to not pay taxes in the United States as being consistent with her election to be in Virginia only as an alien and not a resident and domiciliary. *Id.* Citing Virginia Code § 20-97 and *Hiles v. Hiles*, 164 Va. 131, 139 (1935), the Court affirmed the trial court's determination that neither of the parties was an actual bona fide resident of Virginia at least six-months prior to filing for the divorce. *Adoteye*, 32 Va. App. at 227.

The present case is a close analogue to *Adoteye*. Mother lived in Virginia for 10 years on a G-4 visa before the marriage failed. When it did, the parties entered a custody order with this Court, submitting to its jurisdiction. The marital home is in Virginia (although Mother is not on the title). (Tr. Test. Mother.) There is no evidence as to the children's place of birth. She testified the children obtained "green cards" last year. (*Id.*) Mother has Virginia financial accounts and a Virginia driver's license. (*Id.*)

On these facts, Mother's "package" is similar, but in many ways even less persuasive than the one Ms. Adoteye unsuccessfully offered in *Adoteye*. For example, Mother owns real estate in South Africa, while Ms. Adoteye did not own property anywhere but in the U.S. Mother seeks to distinguish *Adoteye* in two key ways. First, Mother paid U.S. taxes for 2019; Ms. Adoteye did not pay any taxes here. Second, Mother met with an attorney and developed a plan to obtain immigration status other than a G-4 visa tied to Father's World Bank employment; Ms. Adoteye took no step to secure a nonimmigrant visa. *Adoteye*, 32 Va. App. at 227. Mother asserts that these combined efforts corroborate her claim that she intended to be in Virginia indefinitely and establishes her Virginia domicile.

Mother's 2019 tax payments do not help her effort to prove residency and domicile. She did not offer her 2019 tax return into evidence. However, even if she did, the return must show she filed it in 2020, after she filed her counterclaim for divorce. She filed her counterclaim on December 13, 2019, two weeks before the 2019 tax year even ended. It seems undeniable that Mother never filed a single tax return in the U.S. until after she filed her counterclaim for divorce. She did have U.S. and Virginia taxes withheld from her paycheck dating back to January 2019. (Def. Ex. 15.) However, there was no evidence she renounced her right to avoid U.S. taxes pursuant to her visa. She had until April 15, 2020, at least, to request a refund. With the limited information the Court has, it finds Mother did not intend to reside in Virginia indefinitely based on her 2019 taxes. If she really paid U.S. taxes to establish a Virginia domicile, she formed this intent after filing her counterclaim for divorce.

Similarly, Mother's efforts to change her visa status do not corroborate her domicile assertion and fail to meaningfully distinguish her case from *Adoteye*. Unlike Ms. Adoteye, Mother did take "a step" toward securing a nonimmigrant visa, however, this was a baby step at most. It led to nothing—she chose a course of pre-divorce inaction. She met an immigration attorney, FNU Urbanski, in August 2019, but took no action. Urbanski advised her to maintain her nonimmigrant G-4 visa until after the divorce. Apparently, doing this would make it easier for her to convert the G-4 to an immigrant "N" visa.[4] While it may be easier to convert a G-4 to an N visa if one waits until after being granted a divorce, it does little to help win the very divorce necessary to ease this transition by establishing a record of residency and domicile. Just as in *Adoteye*, Mother took full advantage of the benefits of the G-4 visa—tax free income for almost a decade and a favorable path to winning a U.S. immigrant visa—but at a cost. As the Court of Appeals wrote about this use of a G-4 visa, "[w]e respect [Mother's] right to make this election [of the benefits of the temporary, nonimmigrant visa]. However, continuation under a G-4 visa is inconsistent with intent to become a permanent, *bona fide* resident and domiciliary of Virginia." *Adoteye*, 32 Va. App. at 227. By approving the heavy weighting of the G-4 visa, the Court of Appeals clearly notes the incongruity of a party enjoying the status of being of a foreign country when it benefits her, and disclaiming that association when seeking a Virginia divorce while still maintaining the benefits of that status.

While the Court of Appeals in *Adoteye* held a G-4 visa is inconsistent with Virginia domicile, it is not, alone, dispositive of jurisdiction. "[D]omicile depends upon the intent of the party rather than the potential action of . . . the Immigration and Naturalization Service." *Hanano v. Alassar*, 2001 WL 876399 *4 (Va. Cir. Ct. Jan. 23, 2001). For this reason, undocumented, married, noncitizen couples lacking a legal presence in Virginia can establish domicile and divorce here. *Id.* (citing *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971)). Therefore, in addition to the aforementioned facts in this case, the Court also considered all the evidence presented at the trial, including Mother's corroborating witness, Carol Borden, and the testimony of Jean Owino, Maureen Solomons, and Sabra Busolo. They testified chiefly about the merits of the case—particularly, about Father's treatment toward Mother. There was little testimony as to Mother's domicile. In any event, while not dispositive on the issue of domicile, possession of a G-4 visa and a party's assumption of that visa's benefits is a factor a court must weigh. In its role as fact finder, this Court did not believe Mother was a bona fide domiciliary of Virginia in June 2019, six months before she filed her counterclaim for divorce on December 13, 2019.[5] She may be on a path to establish domicile in Virginia but, if so, she filed for divorce prematurely.

Father's claim of residency and domicile is weaker than Mother's. His World Bank employment is the reason the family is in Virginia. He has a G-4 nonimmigrant visa, does not pay taxes in the United States, and has not even planned to seek an immigrant visa. He even discouraged Mother from seeking a nonimmigrant visa long prior to separation to protect his

[4] The Court suspects Mother misunderstood the legal advice, but this was her testimony.
[5] The Court also finds Mother was not a bona fide resident and domiciliary of Virginia six months prior to Father filing his Complaint.

employment and visa status. (Tr. Test. Mother.) While he holds title to the marital home in Fairfax, he also owns real estate with Mother in South Africa. The Court believes the evidence showed his presence in the U.S. is fully contingent on his continued employment with the World Bank. The Court did not believe he developed a bona fide intent to remain in Virginia indefinitely as of March 2019, six months before he filed his complaint for divorce on September 23, 2019.

One may argue the extra work necessary for a G-4 visa holder to establish domicile is unfair. However, there is logic to it. Foreign diplomats come to the U.S. precisely because they represent their home nations. For them to become U.S. domiciliaries would defeat their role as emissaries. They are intended to always be active citizens of their nation. Employees of international organizations, such as Father and Ms. Adoteye, are a step or two removed from ambassadors, but their role is similar. International organizations must have a base in some nation. It makes sense that international treaties permit member nations to staff these foreign bases with their citizens who truly remain domiciliaries of their home nation.

III. PARTIES MAY NOT AGREE TO SUBJECT MATTER JURISDICTION WHEN IT DOES NOT REALLY EXIST.

Father and Mother separately argued the other is estopped from contesting subject matter jurisdiction because each asserted he or she was a bona fide resident and domiciliary of Virginia and admitted to each other's claim in the pleadings. However, parties cannot confer subject matter jurisdiction on the Court by agreement when that jurisdiction does not really exist. The Supreme Court of Virginia has held that:

> "[S]ubject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies." *Earley v. Landsidle*, 257 Va. 365, 371 (1999) (citations omitted). Moreover, the parties cannot confer subject matter jurisdiction on the court by agreement. *See Morrison v. Bestler*, 239 Va. 166, 169–70 (1990) (citation omitted)."

McLellan v. McLellan, 33 Va. App. 376, 380 (2000) (internal parallel citations omitted); *see also* VA. CODE ANN. § 20-99 ("no divorce . . . shall be granted on the uncorroborated testimony of the parties or either of them."). Virginia Code § 20-97 does not grant this Court subject matter jurisdiction over a marriage where neither of the parties has been an actual bona fide resident and domiciliary of Virginia for at least six months prior to the commencement of the suit. Even if both parties want the Court to exercise jurisdiction, the Court may not award a divorce in the absence of Virginia residency and domicile.

IV. CONCLUSION.

For the reasons stated herein, the Court finds neither party was a bona fide resident and domiciliary of Virginia for at least six-months prior to each filing their complaint and counterclaim for divorce. The Court holds it lacks subject matter jurisdiction over the marriage

and, thus, cannot award a divorce to either party. The "Amended Complaint for Absolute Divorce" and "Counter Complaint for Divorce" are each dismissed.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SIMON OCHIENG LANGO	)	
	)	
v.	)	CL-2019-13066
	)	
LYDIA WALOME LANGO	)	

ORDER

This matter came before the Court October 5-6, 2020, for trial on Simon Lango's ("Father's") "Amended Complaint for Absolute Divorce" ("Complaint") and Lydia Lango's ("Mother's") "Counter Complaint for Divorce" ("Counterclaim"); and

CONSIDERING the reasons set forth in the Court's Opinion Letter dated October 22, 2020, which is incorporated by reference to this Order; it is

ORDERED Mother's Motion to Strike, previously taken under advisement, was withdrawn by counsel and is therefore DENIED;

ORDERED Father's Motion to Strike, previously taken under advisement, is DENIED as moot, or, alternatively, is DENIED on the merits because inferences drawn in the favor of the nonmovant, Mother, could have tended to support her claim of Virginia domicile and residence, requiring the Court to weigh evidence, which it subsequently did; and

ORDERED the Complaint and Counterclaim are DISMISSED due to the Court lacking subject matter jurisdiction.

THIS IS A FINAL ORDER.

[redacted]

Judge David A. Oblon

OCT 2 2 2020 [redacted]

Entered

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD OF THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA. ANY OBJECTIONS ARE DUE WITHIN 10 DAYS.