IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE NUMBER 6 OF 2008

BETWEEN:
ANDREW KATIMBA ……..PLAINTIFF
AND
GERTRUDE KATIMBA ……..…… RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J.S. MANYUNGWA
Mr. Kasambara, of Counsel, for the Plaintiff
Mr. Alide, of Counsel for the defendant
Mrs. F. Siliya – Official Interpreter

J U D G E M E N T

Manyungwa, J

INTRODUCTION:

By his Originating summons, the plaintiff namely Andrew Katimba brought this action against the respondent Gertrude Katimba in which the sought the following declarations and orders from the court viz:-

1) A declaration that the plaintiff in the legal guardian of his son Kennedy Andrew Katimba
2) An order that the plaintiff do have legal custody of the said Kennedy Andrew Katimba**.**
3) An injunction requiring the defendant to deliver the said Kennedy Andrew Katimba to the plaintiff.
4) An injunction restraining the defendant from using the surname of
5) Katimba and holding out as the wife of the plaintiff.
6) Costs of this action.

The originating summons was issued by the court on 10th March, 2008. However, on 11th March, 2008, the plaintiff took out summons for the custody of the child under section 11 of the Courts Act and section 23 of the Constitution – The summons was returnable on 25th March, 2008. The summons is supported by two affidavits sworn by the plaintiff, Andrew Katimba and John Katimba, who is the plaintiff's uncle and also an ankhoswe or marriage advocate in the marriage of the plaintiff to the defendant, and there is also an affidavit in reply. The respondent opposes the summons for custody by the plaintiff and there is an affidavit in opposition sworn by Getrude Katimba, the respondent herein, and another Affidavit in opposition sworn by Jonathan Namwaza Banda, a brother to the respondent and also a marriage advocate for the respondent. There is also a supplementary affidavit in opposition sworn by the respondent.

In his affidavit in support the plaintiff deponed that he is employed as Finance Manager for Toyota Malawi ltd, and that he begun cohabiting with the respondent in May 1998. On 3rd May, 2008, the couple was blessed with a male child whom the named Kennedy Andrew Katimba, the subject of these proceedings. The couple cohabited up to July 2005, when they agreed to dissolve then union, and they further agreed that the child would remain with the plaintiff, and that the respondent would have access during weekends. That on 15th February, 2008, the child visited the respondent, and that the next thing the plaintiff heard was that the child would not come back.

The plaintiff further deponed that the defendant has not cooperated ever since and that the child's school attendance is at risk as he has at times missed classes due to lack of transport. The plaintiff states that he has stayed with Kennedy since July 2005 to 15th February 2008 without any problems and that he suspects that the respondent is using the child to find her way back to the plaintiff's house, and that the child is being held against.

his will. The plaintiff further depones that the child does not like staying at the respondent's two bedroomed house in Kanjedza township which is a high density township, and is overcrowded as the respondent stays with her niece, and a house – maid. The plaintiff therefore states that he needs legal custody of the child to ensure that he is not disturbed as a young boy and also that school attendance is maintained, since he is the biological father of the child, Kennedy, who was born on 3rd May, 1998 in the City of Blantyre and that he has been in physical custody of the child ever since at Top Mandala a low density area in a four bed-roomed house in the City of

Blantyre. The Plaintiff also deponed that he also stays with his 14 year old nephew who gets along very well with his son Kennedy such that the child is not lonely at all as opposed to when he goes to visit his mother. Further, it is stated by the plaintiff that the child goes to Phoenix Primary School, where the plaintiff pays MK220, 000. 00 per term and that the child is doing very well at school. The plaintiff further states that the respondent was threatening him that he would never have physical custody of the child if he did not reconcile with her. The plaintiff therefore contends that he is a fit and proper person and that the best interests of the child lie with him having its custody.

In his affidavit in support, John Katimba depones that he is the plaintiff's uncle and his ankhoswe in the plaintiff's marriage to the defendant. The deponent states that the plaintiff's marriage was not a very happy one and that on several occasions he, together with his counter-part Mr Kapatamoyo from Mponela were being summoned to intervene on salvaging the marriage and that the major complaint most of the times was the respondent's lack of care and supervision of the child, who was being abandoned to the maid. The deponent further state that the other complaint by the plaintiff was the respondent's frequent use of love portions, a thing which the respondent admitted and as a result the plaintiff felt very unsafe, so he divorced her, a move which the Ankhoswes agreed with. The deponet further states that in August 2005 he supervised the leaving of the respondent from the Matrimonial home and that Mr Jonathan Namwaza Banda who accompanied the responent stood for his counter-part Mr. Kapatamoyo**.** The plaintiff was asked to be away from fear of possible violence and that when he came back he had to be escorted to town to buy kitchen utensils as the respondent had taken everything. The deponent further depones that at the last meeting when they discussed and agreed that the marriage was over, they also discussed the custody of the child and that it was agreed that the child had to remain especially considering the conduct of the mother as regards taking care of the child. The respondent agreed with this decision, and this explains why the defendant left the child with the plaintiff and never made noise until now when the respondent thinks the plaintiff wants to marry another woman. The deponent contends that the respondent is using the child as a black mailing tool so that the plaintiff should reconcile with her.

The respondent in her affidavit in opposition, states that she is in the employ of Barloworld Equipment, working as an Assistant to the Costing Officer and currently living in a rented house in Kanjedza Township. She states that she begun going out with the plaintiff in July 1997 and fell pregnant in

August 1997 as a result of which the relatives from both sides met and formalized the union according to custom and the two were married at custom. Consequently, the respondent moved in and cohabited with the plaintiff in January 1998 and on 3rd May 1998 the couple was blessed with a male child whom they named Kennedy, the subject of this application. It is further stated that due to differences that arose between the plaintiff and the respondent, the couple separated on 13th August 2005 and the respondent together with the child went to stay with her sister. The respondent contends that the foregoing not withstanding, no customary formalities or any formality at all has been undertaken to dissolve the marriage and that she is still using the name of Mrs Katimba until the time that the marriage is formally dissolved, since she used to be called Mrs Katimba before the separation to the knowledge of all parties. In September 2005 after she had stayed 3 weeks with her sister, following discussions that were held between the plaintiff and the respondent, it was agreed that the child would be staying with the plaintiff but that the respondent would be visiting the child as often as she could, and that in the event that the plaintiff was going away then the child would be with the respondent until the plaintiff's return. The respondent contends that despite the separation above mentioned, she spent a holiday together with the plaintiff in Cape Town as a family and married couple. In March, 2007, the respondent states, that she begun to notice some restrictive measures from the plaintiff whenever she tried to visit and see the child, and that the plaintiff irregularly brought the child to her sister's house, in some cases two to three weeks would elapse without her seeing the child.

It is further stated by the respondent that in the ensuring months of May, August, September, October and November she was informed by the child that there was another woman who was frequenting the plaintiff's house, and that the plaintiff and the said woman would sometimes leave the house, thereby leaving the child and the plaintiff's nephew alone in the house. Further, the child also informed the respondent and she believed that the said woman had an affair with the plaintiff as she would at times accompany the plaintiff and the child on holidays to the lake, and that sometimes the plaintiff and the child could visit the said woman at her house. The respondent further states that the child informed her that he did not want the said woman to be her step-mother and that she was requested by the child to pass this message to the plaintiff, a thing she never did as she never wanted to be making up stories. As a consequence, in December 2007, the respondent informed the plaintiff that the child strongly felt that the love, care, and time were not there for the child but the other woman, a thing which the plaintiff admitted and pledged to talk to the child and revert to the

respondent. On 15th February, 2008 the child visited the respondent and informed her that the plaintiff had gone away on holiday. On 17th February, 2008, the respondent so depones, that the child refused to go to the plaintiff's house and instead suggested that his uncle, the plaintiff's brother, had to drop him at school and that thereafter he should be dropped at the respondent's house as the respondent had now moved from her sister's house to a rented house in Kanjedza. The respondent further states that she relayed these developments to the plaintiff and suggested that there was need for discussions concerning the child, to which the plaintiff said unpleasant things to the respondent and declared angrily that the child had to stay with her. On 18th February, 2008, the respondent stayed home with the child hoping that the plaintiff would come to pick up the child but he never did. On 19th February, 2008 the plaintiff informed the respondent that he was traveling to Lilongwe, whereupon the respondent suggested that the child had to stay with her until the plaintiff's return and that the plaintiff's brother should drop the child at school as was usually the case but the plaintiff refused. The respondent further contends that when she insisted that she needed to sit down and talk with the plaintiff after he came back from Lilongwe, the plaintiff replied that the child's behaviour was spoiled and that he did not need a spoiled kid in his house. Consequently the plaintiff dropped the child's clothes and uniform at the respondent's house but he forgot to bring the child's reading bag, school shoes and socks, food container and a drinking bottle which resulted in the child's failure to go to school on February, 20th, 2008. The respondent further depones that she visited the child's teacher, a Mrs Hellen Borner on the same date, and she noted that the child was one of the pupils who was not doing well in class. The said Mrs Broner advised the respondent that the child always seemed troubled, confused and emotionally and psychologically disturbed, things that the respondent believed and the teacher subsequently produced the child's school report, exhibit "GK1", issued by Phoenix International Primary School dated 18th February, 2008.

The respondent further States that on 21st February, 2008 the child fell sick whilst at school and when the respondent went to check him at the school, the school nurse advised her that the child should not return to school until the 25th February, 2008. The respondent therefore contends that it is not correct that she has not been cooperative and that the agenda for discussions on 17th February, 2008 was not to force the plaintiff to reconcile with her. The respondent also contends that it is not true that she is using the child in order to get her way back to the plaintiff's house, and that it is equally untrue that the child is being held against his will, nor that he does not like

the environment in Kanjedza Township or that the plaintiff is threatening not to let the plaintiff ever have legal custody of the child if they do not reconcile. Further, the respondent contends that exhibit "GKI" is very clear that the child is not doing very well at school and as such he needs encouragement and concentration to excel in his studies. It is further contended by the respondent that the child has not been doing his homework because the plaintiff was not there for him, according to exhibit ''GKI'' Further, the respondent contends that she needs legal custody of the child as well as his maintenance to ensure that he is not troubled, emotionally and psychologically confused and that as she is a fit and proper person to have physical custody of the child, and that the child's best interest would better be served if the child stays with her. The respondent therefore prays that she be granted legal custody, that the plaintiff should provide maintenance, that she be allowed to continue using the name Katimba until the dissolution of the marriage and costs of these proceeding.

The second affidavit in opposition was sworn by Jonathan Namwaza Banda, who depones that he is the brother of the respondent and has been acting as a marriage advocate for the respondent in the marriage between the plaintiff and the respondent from the beginning until the couple separated. Mr Namwaza Banda states that the involvement of Mr. Kapatamoyo, mentioned in the affidavit of John Katimba, was only in supportive terms, as the deponent was fairly young at the time the plaintiff and the respondent were getting married, so the elders then thought that he needed the support of the said Mr Kapatamoyo was However, as time passed, the deponet was able to single handedly handle issues in the marriage. He further states that the involvement of Mr Kapatamoyo therefore very minimal as most of the issues were handled by the deponent since the said Mr Kapatamoyo stays in Mponela, and that it was the deponet who had been settling issues regarding the marriage between the plaintiff and the respondent here in Blantyre and that the deponent merely used to advise the said Mr Kapandamoyo accordingly. The deponent further states that during the course of the marriage the couple had differences and that each one of them had then weaknesses and that as marriage counselor the deponent and his counter-part used to bring them together to solve the same. The deponent states further that he recalls that in most cases the plaintiff and the defendant had differences mainly owing to the plaintiff's ungovernable jealousness which mostly led him to accuse the defendant of unsubstantiated claims which as marriage counselors they constantly mediated like the plaintiff not allowing the respondent to chat or talk with any male person including her work-mates as the plaintiff always suspected that the respondent was having an

affair and that this always led to untold quarrels in the marriage which as ankhoswe they used to mediate. The deponent further states that at no point in their mediation meetings did the plaintiff bring any allegation to do with the respondent's use of love portions as alleged in the affidavit of John Katimba nor did the marriage advocates discuss or mediate any issue to do with the respondent's lack of taking care of the child. The deponent states that he recalls that one day he met the plaintiff at Moth Club in Blantyre where the plaintiff told him that he suspected that the respondent was having an affair with a certain male co-worker, and upon hearing this the deponent took up the matter with the respondent who denied any knowledge of the alleged affair, and referred him to the person who had been accused of the same, and again when contacted this person denied the allegation. Further the deponent stated that at the said meeting at Moth Club, the plaintiff had suggested that he wanted a breather and wished that the respondent could move out and stay with him a request the deponent refused.

The deponent further stated that one day he received a call from the plaintiff asking him to go to his house to witness the moving out of the defendant, and that when the deponent went to the plaintiff's house, he met his counter-part Mr John Katimba. The deponent states that he was not accompanied by the respondent as deponed to in Mr John Katimba's affidavit but that he went there on the plaintiff's request, and that when he arrived there he found the respondent who was in tears because she had been beaten up by the plaintiff who had ordered her to leave the matrimonial house. The deponent states that he was informed by the respondent that the plaintiff had threatened her that he should not find her on his return, and that there was no violence from the respondent as deponed to in the affidavit of John Katimba. It is further stated that the deponent then picked up the defendant together with the child and that the defendant did not pick anything as claimed in Mr. John Katimba's affidavit but that she only got her personal possessions. The deponet states that he dropped the respondent off at his sister's place at Kanjedza. The deponent further depones that this was the last time that he met the said John Katimba and that no other meeting took place ever since between the deponet and Mr John Katimba or between Mr John Katimba and Mr. Kapatamoyo in respect of the marriage, as is evidenced by a letter, exhibit "JNB' written by the said Mr Kapatamoyo. The deponent contends that no discussion or any conclusion was reached by both parties regarding the divorce or custody of the child and that as far as he was concerned the couple was still on separation. The deponent further states that the respondent left the matrimonial home with the child and her personal possessions, and went to live with her aunt at

Kanjedza, and that the child was never left behind. It is further stated that during the time that the respondent was staying at Kanjedza, the plaintiff used to come and visit the respondent and the child, and that it was during one of those visits that the plaintiff and respondent agreed without the involvement of the marriage advocates that the child had to go and live with the plaintiff as school was about to open. Further, that it was agreed between the plaintiff and the respondent that the respondent had the liberty to go and see the child and that the plaintiff would also be dropping the child at the respondent's house during week-ends. This arrangement, according to the deponent, was not made by the marriage advocates, and that in pursuance of the said arrangement the respondent was visiting the plaintiff and the plaintiff was dropping the child at the respondent's sister's place without problems. The deponent contends that the respondent has not been using the child as a blackmailing tool and that the respondent had tried to reason with the plaintiff when he begun going against the agreement that had been reached between the two parties. Further, the deponent contends that the respondent has made the custody of the child an issue now because the plaintiff started refusing her access, and that instead of settling the matter amicably the plaintiff became unreasonable, rough and uncooperative and then applied to court to have custody of the child. As a matter of fact, the deponent further states that as a marriage advocate he was very surprised to learn that the plaintiff intend to marry another woman yet the issue of divorce has not been settled. The deponent also disputes the issue of violence, as at several occasions the marriage advocates had to come in to resolve matters that involved the plaintiff beating the respondent.

In her supplementary affidavit in opposition the respondent disputes that she never divorced with the plaintiff, but that they only separated and further that the marriage advocates had never sat down to discuss divorce, and that explains why the plaintiff was still paying for the respondent's MASM till 27th Mach, 2008. The respondent further states that during her entire stay with the plaintiff she never used any form of violence as averred in the affidavit of Mr John Katimba. As a matter of fact, the respondent so states that the marriage advocates had to come to the matrimonial house on several occasions as the plaintiff beat her up without any justifiable reason. The respondent further stated that the Plaintiff was usually unwilling to share things with her as a wife and that on many occasions when she was living with the plaintiff, the plaintiff snatched the car she was using from her, forcing her to either board mini-buses to work, or get lifts from wives of the plaintiff's friends. Further, the respondent contends that the plaintiff plainly told her that she had to be home by 17:30 hrs, and that if she did not give a

convincing explanation, then she would be in for a beating. The respondent further stated that the plaintiff was jealous and kept accusing the respondent of having affairs with workmates. The respondent also contended that neither the issue of love portions nor did the lack of care of the child arise at any point during the marriage as alleged in the affidavit of John Katimba as the marriage advocates never discussed this. The respondent further stated that before she moved out of the matrimonial house, the plaintiff advised her that she had to leave the house because the plaintiff wanted to have a breather, and when the respondent refused, the plaintiff actually gave her a deadline upon which she was supposed to move out. When the said deadline came, and the respondent refused to pack her things, the plaintiff beat her up, and so the plaintiff called the respondent's brother to the matrimonial home to come and pick her up. The plaintiff also called Mr John Katimba and he then left the house after threatening that he would deal with the respondent if he found her at the house. So the respondent then left the matrimonial home in the company of her brother, the marriage advocate, and that apart from her personal belongings and the child, she never took anything like kitchen utensils. The deponent explained that at that time the child was on holiday and was supposed to return to school in a fortnight. The respondent further contends that the plaintiff on several occasions came to see her and the child, and that during one such visit he asked her if she could let him go with the child as school was about to open, and that at the time it was difficult for the plaintiff as she had no transport with which to take the child to school on daily basis. The respondent only agreed with the proposal on the condition that she would be visiting him and also that the child had to be dropped at her sister's house on week-ends and whenever the plaintiff was away. The respondent states that the plaintiff lived up to the agreement and that prior to the respondent getting her own house, the plaintiff would come and dropped the child at the respondent's sister's place during the week-end and whenever he was going away. Further the respondent states whenever she visited the plaintiff's house, they used to make love, and that every time that the plaintiff would go out of town or out of the country, he used to phone her or at least send a text message. The respondent contends that everything was alright until the time the plaintiff begun to dishonour the agreement and started refusing the respondent access to the child. When the respondent complained that is when differences arose, and the plaintiff took the matter to court. The respondent denies using the child as a tool of blackmail as is alleged in the affidavit of John Katimba.

The plaintiff also filed his affidavit in reply in which he states, that after reading the affidavits of Gertude Katimba and Jonathan Namwaza that the

never agreed with the respondent that she would be coming to his house to see h child, but that he agreed that he would drop the child at the respondent's residence, which he used to do. Further the plaintiff states that it is not correct to say that of late he had been restricting the respondent's access to his house since the respondent never visited the matrimonial house after she left the same. The plaintiff further disputes that he never spent with the respondent a holiday together in Cape Town South Africa, as the meeting was merely coincidental since the plaintiff was in Cape Town with the son and the respondent happened to be in Johannesburg on her way to Durban where she went to visit her relatives. Thus when the respondent called the plaintiff on his mobile and desired to talk to the child and the plaintiff informed her that the said child was not well, the respondent pleaded with the plaintiff that she be allowed to see the child. The plaintiff therefore states that he obliged and he bought her a return ticket from Johannesburg to Cape Town and that when she flew to Cape Town, she only spent one night and upon noticing that the child's condition was not as serious as she had thought and she proceeded to Durban. The plaintiff therefore contends that he never went on the same trip with the respondent to Cape Town and that then passport would evidently show that the plaintiff and the child went on a different date by air whilst the respondent went by bus to Johannesburg. The plaintiff further contends that he had never had discussions with the defendant over the way he relates to the child or his alleged lack of attention to the said child let alone ever admitted that he did not have the time, love and care for the said child. The plaintiff also contends that he has never alleged that the child is a spoilt child and further that the respondent has never raised the issue that the two needed to talk over the way the plaintiff was raising up the child. The plaintiff also stated that on several occasions, the respondent sent the said child to advise the plaintiff that the two needed to get back as a family and raise the child together. The plaintiff further stated he had evidence based on text messages that he used to receive from the respondent which show that the respondent's only interest was to reconcile with the plaintiff and that the child was only being used as a pawn in her plan. Further the plaintiff states that he held discussions with Ms Hellen Bonner over the respondent's allegations that the child was emotionally troubled, and that upon hearing this the said Ms Hellen Bonner was shocked by the respondent's affidavit and that she was ready to come to court should she be summoned and that she further informed the plaintiff that she never had the said discussions with the respondent. The said Ms Hellen Bonner further informed the plaintiff that the child's performance had not deteriorated but the said child was a slow learner and that this was not unusual for boys his age.

Further the plaintiff stated that in February 2008 he employed a teacher to assist the child with additional studies so that he did not slacken in his studies. The plaintiff therefore contends that the reality is that the child is not troubled, or emotionally and/or psychologically confused and that the issue of custody is coming up now because of the alleged fear on the part of the respondent and her relatives that the plaintiff intends to marry another woman, as is clearly evident from the affidavit of Jonathan Namwaza Banda filed on 16th April, 2008. The plaintiff therefore avers that instead it is the respondent who is using the child as a burgaining tool. Further the plaintiff contends that the issue of MASM has nothing to do with the so called marriage to the respondent as it is the plaintiff's employers who pays for his Medical cover and that of his dependents, and that it was an oversight on the part of the plaintiff's employers. The plaintiff said that when he learnt that the respondent was busy going about town boasting that she was still his wife and that they were going to wed in church soon, and that she was still on his medical scheme, he immediately instructed his employers to remove her name. Further, the plaintiff contended that the issues of violence, amity and jealous were all red-herrings raised by the respondent and further that John Namwaza Banda was never the respondent's marriage advocate, only that the meeting that dissolved the respondent's marriage took place at the said John Namwaza Banda's house.

ISSUE (S) FOR DETERMINATION:

The main issue (s) that I have to decide in this matter are:-

(i) whether the High Court has jurisdiction over this matter
(ii) Custody of the child namely Kennedy Andrew Katimba.

Further I wish to observe that there are some auxiliary issues that arose during the hearing which will require this court's determination when answering the main question before me. I propose to deal with the other issues as well. However, before I proceed to consider the issues let me acknowledge that both, Counsel addressed me at length and I must admit that I found their arguments lucid, impressive and enlightening. It will not however be possible to recite every argument advanced by either counsel in the course of this ruling. This will not be out of disrespect to counsel but because I found that some of the arguments were more to the issue relating to marriage than custody of the child. Be that as it may, it shall be in escapable to bear them in mind when deciding on the issues for the determination of this matter.

THE LAW:

The starting point in as far as the law is concerned is section 108 of the Constitution. The said section provides:

> S108 ''There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law''.

See also ***MTL VS MPTC Trade Union*** Civil Cause Number 2721 of 2001(HC) unreported.[1] Clearly therefore this court having unlimited original jurisdiction, can hear and determine this matter. Further, the rights of children have been recognised in section 23 of the Constitution. The said section is on the following terms:-

> S23(1) ''All children, regardless of the circumstances of then birth, are entitled to equal treatment before the law.
> (2) All children shall have the right to a given name and family name and the right to nationality.
> (3) Children have the right to know, and to be raised by their parents…''

The Constitution has actually recognised that children for their proper growth must be raised by their parents and this to me can only mean both parents, circumstances allowing, and this court must therefore, in interpreting this provision ensure that the children's rights under section 23 are realized. A child therefore not only does she or he have the right to know their parents, but also to be raised by both of them. Further, it must be noted that under the Courts Act[2], the court has power to determine issues relating to guardianship and custody of children. The relevant provision is section 11(a) (i) of the Act, which provides:-

> S11 ''without prejudice to any jurisdiction conferred on it by any other written law the High Court shall have
> a) Jurisdiction

[1] ***MTL V MPTC Trade Union*** Civil Cause Number 2721 of 2001 HC (unreported)
[2] The Courts Act Cap 3:02 of the Laws of Malawi

i. To appoint and control guardians of infants and generally over the person and property of infants''.

When a question relating to the custody of the child arises, as has done in the present proceedings, the primary considerations is the welfare, happiness and interests of the child and in considering this question, the court must consider all the practical aspects or the circumstances of the case. In the case of ***Frank Vinkhumbo V J C Vinkhumbo***[1] Chief Justice Richard Banda as he then was said:-

> "The fundamental principle is the welfare and happiness of the children which must guide the court"

So too were similar sentiments made in the case of ***Irene Ndasowa v Ephraim Ndasowa***[2], in which the court said:

> "I direct myself that on any application for custody of any children, I must regard the welfare of the children as the first and paramount consideration. I must not take into account the consideration. I must not take into account the consideration whether the claim of the father or that of the mother Superior. It is the welfare, interest and happiness of the children which I must consider. The question of the guilty party does not arise…''

And in ***Re: F***[3] Megary J explained the Principal as follows:-

> "I do not think that one can express this matter in any arithmetical or quantitative way, saying that the welfare of the infant must, in relation to other matter, be given twice the weight or five times the weight, or any other figure. A 'points system' is in my judgement, neither possible nor desirable. What the court has to deal with are the lives of human beings, and all these can not be regulated by formulae. In my judgement I must take into account all the relevant matters, but in consideration their effect and with I must regard the welfare of the infant as being first and paramount".

[1] ***Frank Vinkhumbo V J.C. Vinkhumbo*** Matrimonial Cause No. 5 of 997 (unreported)
[2] ***Ireen Ndasowa V Ephraim Ndasowa*** Civil Cause No. 657 of 1979 (unreported)
[3] ***Re: F*** (1968) 2AllER 766 at 768

In the case of ***Chilingulo V Chilungulo and Another***[1] while a petition for divorce was pending between the parties, the wife brought an application before this court for the custody of the four minor children pending suit. The children ranged between 13 and four years in age and they ranged approximately nine years in infancy when the respondent left the matrimonial home. Within two years after departing to another area, where the respondent initially took up residence, with another lady – the co-respondent the children followed him there. Five months later, the petitioner came to stay with the respondent but she was asked to leave within a month thereafter. The children continued to stay with the father. Some time later, however they returned to the petitioner where they remained until the Christmas season of 1988 when they went once more to be with the respondent after which he apparently refused to let them go once more. In papers before the court the petitioner alleged that the respondent had lured the children away because he had a motor car, he had acquired a video recorder and, she alleged, he gave hem money to dissuade them from joining her. Although she was unemployed, she sold firewood, stitched dresses and sold crotchet work. She earned approximately MK300.00 per month. She did not deny that the children were also sent to the market place to sell firewood in order to augment her income from this source.

The respondent was a businessman. This from time to time necessitated that he was called away from home in Blantyre to South Africa and Mangochi. He stated that the business netted MK25, 000.00 personal profit in the proceeding six months. He denied ever attempting to hire the children to him, stating that they came of their own volition. It was not disputed that he was caring and good father. The court held that the paramount concern is the children's interest, welfare and happiness. No other consideration should be entertained above these and neither the interest of the parties to the dispute.

In delivering his judgement, Banda J. as he then was, had this to say at page 113:

> "I direct myself that in any application for custody of the children the paramount consideration that I must bear in mind in exercising my discretion is the welfare and happiness of the children. I must not take into consideration whether the claim of the father or that of the mother is superior. It is only the welfare, interest and happiness of the children which I must consider. And the issue of punishment of the guilty party does not arise and there can be no question of the guilty

[1] ***Chilingulo and Chilungulo and Another*** [1990] 13 MLR, 110

> party in the present application because he substantive issue of the dissolution of the marriage I yet to be resolved.
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> It is usual, although there is no settled rule of law, that a child of tender years should remain with the mother. The evidence I have before me is that the respondent I living with a co-respondent who has four children of her own from a previous marriage. There is no evidence as to the age of those children but it is important, in my view, always to hear I mind that a relative and still less a step mother, no matter how anxious or how best she may try to do for the children, can not take the place of the real parent. I had the opportunity of seeing the children and it is clear to me that Mwai is a very small child who became 4 years on 14th December, 1989".

In the instant case the facts so far show that Kennedy is now a little over 10 years of age and that he goes to Phoenix International Primary School in the city of Blantyre. The plaintiff and the respondent cohabited from May 1998 till August 2005 when the couple parted ways. The plaintiff argues that at that juncture the parties agreed to dissolve the marriage whilst the respondent on the other hand argues, that they merely separated. Whatever is the position, the determination of this question, in my view, falls outside the scope of this ruling. What is of significance or material interest, is that as he couple either separated or divorced, they subsequently agreed that the child would stay with the plaintiff and that the respondent would have visitation rights especially on week-ends on request. Further that whenever the plaintiff was going away from town, he would be leaving the child with the respondent until his return. The child has therefore lived with the plaintiff for three years until February, 2008 when this arrangement or agreement collapsed in circumstances that can best be described as unclear. The plaintiff argues that the respondent had hinted that the child needed his parents to reconcile and until that was done, he was advised not to go or send anybody to pick the child. The respondent on the other hand argues that she was informed by the child that the plaintiff was being visited by another woman, and that the plaintiff and the said woman would sometime leave the house, only to return after some time, thereby leaving the child and he plaintiff's nephew alone in the house. The respondent therefore intimated that she was informed by the child that he did not want this other woman to be his mum, and that the child therefore felt that the love, care and time on the part of the plaintiff was not there. As such when the child visited the respondent, on 15th February, 2008, he advised her that the plaintiff hand gone away for a holiday and so on 17th February, 2008 the

child refused to go to the plaintiff's house, and instead suggested that the plaintiff's brother should pick him to school and drop him afterwards. Further, it has been deponed by the plaintiff that pays Mk220, 000.00 per term school fees and that he resides in a four bedroomed house, in low a density area at Top Mandala as opposed to the respondent's two bedroomed house at Kanjdza Township a high density area which is overcrowded and that the child does not like staying there.

I wish to observe that 10 years is a young age and as has been stated in the ***Chilingulo case***, custody of a child of tender years should normally remain with its natural mother. What matters as we have seen is the welfare, interest and happiness of he child. Further, as the above case has shown, a relative and still less a step mother no matter how he or she can try can not take the place of a real mother. In my considered opinion, the plaintiff's nephew or this so called 'woman' therefore will be ill-equipped to handle the child. Besides it would also appear that the plaintiff relies on the fact that he stays in a low density area in a four bedroomed house, and further that he pays school fees for the child as his strongest factor. In my considered judgement. This factor alone as authorities do show is not enough: In ***Re: F T and F Chitaukire (Minors) V Chitaukire***[1], the applicant and the respondent were married in Rhodesia, where they lived for six years. They had two children, who at the time of the application were eight and five years respectively. The respondent who was a Malawian national left the applicant and returned to Malawi bringing the children with her. The applicant duly obtained a divorce in the District Commissioner's Court in Salisbury in the absence of the respondent and was awarded custody of the children. The applicant brought proceedings in the High Court of Malawi seeking the return of the children to his custody in Rhodesia. He submitted that the Malawian court should recognize and enforce the order of the Rhodesian Court and that if the respondent wished to question the decision, she should do so in the Courts Rhodesia. The respondent denied that the Malawian Court could be bound by the order of the Rhodesian Court, as it was merely a District Commissioner's Court, not a court of record, and therefore an inferior Court to the High Court of Malawi. Even if the decision could be recognized, she submitted, the Malawi Court could not be bound to enforce it without satisfying itself as to its propriety having paramount regard to the welfare of the children.

The applicant gave evidence that he had a good income and lived with his second wife and their children in Salisbury, with another house and a farm

[1] ***Re: F T and Chitaukire (Minors) V Chitaukire*** 8 MLR 38

outside the city. He wished to take the children whose custody he was seeking to live with his family; both children had been born in Salisbury, the older one retained memories of the locality and would be able to support and help the younger child. He submitted that the respondent should not be allowed to profit from her own wrong in deserting him and removing the children, and in any case was not a fit person to have the custody of the children, since she had not personally looked after them in Malawi, but had been content to allow them to be cared for by an aunt in another town. When the applicant had visited them, he had found them dirty and unkempt, having lost weight and being in generally poor health, as the respondent's aunt could not afford to feed them properly. The respondent had explained that her aunt in fact stood in the place of a mother to her, having brought her up from the age of five. It was true that she had been unable to care for the children herself, since she had at first been able only to obtain temporary nursing employment in another town and had not wished to move and disturb the children. To better her prospects, she had then succeeded in winning a place on an advanced training course in another part of the country – but this course would finish in two months and she would then be in a better position to get a permanent job with a better salary and would be able to settle down to live with the children. She claimed that the children would not be happy living with he applicant's other wife because the latter felt hostility towards the respondent and her children as the respondent had superseded her as the applicant's principal wife, and her resentment would be bound to show in her treatment of the children.

It was held by the court that the welfare of the children had to be the paramount consideration of the court and it was therefore necessary for the court to examine all the issues and give judgment on the merits of the case. It was further held that although the court must bear in mind the principal that the party at fault should not necessarily be allowed to profit from his own wrong and it appeared that the respondent had wrongfully removed the children from their father an their father's country, the children' welfare being the paramount consideration, required that the custody, be granted to the respondent. This was because the children had lived all their lives with the respondent or her elder relatives and were reasonably happy in their present environment. The children had over a period of 2 years adapted their lives to conditions in Malawi, including changing language to chichewa. The court further held that before custody of the children so young could be granted to their father as opposed to their mother, it would need to be shown that he mother was totally unsuitable to have custody, a fact that had not been established in that case. The respondent's failure to

live with the children continuously was not the result of her irresponsibility on her part but was due mainly to the circumstances of her employment an training. And that she visited them as regularly as her work allowed and sent them money and clothing when necessary. She had every intention of living with and caring for them in the immediate future when her financial circumstances permitted. The court further held that, in any case it would be wrong to over-emphasize the respective financial positions of the applicant and the respondent as they could not be determinative of the issue of children's overall welfare. Chatsika J, as he then was had this to say at page 47 of his judgement:

> ''Before custody of young children is granted to the father as opposed to the mother, the case against the mother must be so strong as to leave the court in no doubt that she is completely incapable of properly bringing up the children. In other words, she must be proved to be totally unsuitable to be granted custody of her own children. It is generally accepted that mothers are the most suitable people to be granted custody of young children. In the present case, I find myself unable to say that the respondent has been so irresponsible. This case has been made more difficult because, as I pointed out earlier, Mr Chitaukire, the applicant impressed me as being a responsible man who can properly bring up children. I have observed that the children appear to be reasonably happy where they are and although the means of the respondent and her relatives are lower than those of the applicant, the question of means alone is not the sole deciding factor as regards the welfare of children. Other matters must be taken into consideration. Having given the matter my most conscientious considerations, I have come to the decision that the welfare of children will best be served if custody is granted to the mother''. (emphasis supplied by me)

Thus, the case authorities clearly demonstrate, in my considered opinion, that financial status alone is not enough for the court to consider granting custody to the father as opposed the mother. In other words, there must be grounds, and I would dare say serious ground that show that the mother, unlike the respondent herein, is unsuitable to be granted custody of the child. The fact that the plaintiff in the instant case gets a better salary, lives in a low density area, in better accommodation than the respondent and also that he pays school fees for the child does not make it automatic, or entitle the plaintiff therefore that he gets custody. It must be shown, which in my considered judgment has not been, that the respondent is so irresponsible,

for which with all due respect, there is no such evidence before me. As one would say, there must be something more.

The Plaintiff also raised the issue that he should be granted custody of the child because, to put it simply, that would make it easier for preparations for school. As a matter of fact, the plaintiff deponed that he is responsible for school fees and that he picks the child to school and drops and after wards collects him using his motor vehicle, and that the best interests of the child lies with him. It is not disputed that the plaintiff has a responsibility as a parent to educate the child and this in my most humble view, can not be relied on by the plaintiff as a ground for him to be granted custody. Added to this is the fact that the plaintiff is now going out with a certain unnamed woman, who as I understand, the plaintiff is intending to marry and that the child feels unhappy and neglected as the love and care which ought be given to him has now been diverted to this so called woman. It is therefore difficult if not incomprehensible therefore, to imagine that the plaintiff's new woman in his life, would look after the child better than that the respondent. The child as young as he is needs not only constant supervision but maternal care and love of her mother, the respondent herein. Obviously, the plaintiff's new woman, if it comes to that, can not take the place of the respondent. ***See Chilingulo V Chilungulo and another*** (Supra). The respondent also raised the issue of the issue of violence, which was initially raised in the affidavit of John Katimba. The position of the law is that where it has been shown that the conduct of one parent would not be conducive to peace and proper upbringing of the child, then that parent may be refused custody. In ***Kamanga V Kamanga***[1] custody of the children was granted to the petitioner (the husband) after the court noted that the respondent took to heavy drinking and at times resorted to violence. In the instant case, the respondent has deponed that during her entire stay with the petitioner herein, she never used any form of violence. As a matter of fact, so the respondent states, that the marriage advocates had to be summoned to the matrimonial home on several occasions to pacify the situation because the plaintiff habitually beat up the respondent without any justifiable reason and that the respondent actually suffered repeated violence from the plaintiff. Although the plaintiff denies ever having resorted to violence against the respondent it must be noted that it is important to ensure that the child is brought up in an environment of love, and care so that he grows up to be a responsible boy, and that this is also good for his psychological and emotional development. In my most considered opinion, this love and care and peaceful environment

[1] ***Kamanga V Kamanga*** 13 MLR 165

considering the age of the child, can only be given by the mother, the respondent herein.

CONCLUSION:

In these circumstances and by reason of the foregoing, it is my judgement that custody of the child be and is hereby granted to the respondent. Secondly in terms of section 23 of the Constitution, Kennedy Andrew Katimba, the infant of the plaintiff and the defendant has a right to know and be raised by both the plaintiff and the defendant. Thirdly, in view of my analysis of the facts and the law, it is the order of this court that the welfare and interest of Kennedy Andrew Katimba, will best be served if custody is granted and I hereby order that custody of Kennedy Andrew Katimba be granted to the mother, the respondent herein with reasonable access to the plaintiff. For avoidance of doubt the child would stay with the respondent during school days and he should then spend week-ends and public holidays with the plaintiff. The plaintiff moreover should make the necessary provision for the child as regards his education and proper maintenance in terms of clothing, medical care and general up-keep.

As to the issue of costs, this exercised my mind, but in the circumstances of the case, I think it would be fair if each party were to pay for their own costs, and I so order.

Pronounced in Chambers at Principal Registry, this 27th day of June, 2008

Joselph S. Manyungwa
J U D G E