Library

HIGH COURT
LIBRARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Matrimonial Cause No. 12 of 2005

Between:

Mathews Chandiwira Mphande.....Petitioner

And

Peggy Chikafa.....Respondent

ATTACHED
HIGH COURT
LIBRARY

Coram: Honourable Justice A.C. Chipeta
Chayekha/Mwala, of Counsel for the Petitioner/ Respondent
Makwinja, of Counsel for the Respondent/Applicant
Matekenya (Mrs), Official Interpreter

RULING

The substantive proceedings between the parties herein are for Divorce, although the parties openly confess that they were neither married under Customary Law nor under Statutory Law. Be this as it may, there is an unresolved Petition dated, and filed, 8th August, 2005 on the subject of Divorce. From my examination of the material case file, there is no evidence of service of this Petition on the Respondent, just as there is no evidence of either an Acknowledgment of Service of the same, or of some other reaction to it. As it is, with the number of years that have gone past since its issue, the question whether the Petition is still valid, may be worth examining, should the matter survive the application I am currently dealing with.

Contemporaneously with the filing of the Petition, it appears the Petitioner filed an *ex-parte* Summons for an Order of Injunction. The late Honourable Justice Chimasula Phiri, as he then was, on the very same 8th August, 2005 directed that the said application for injunctive relief be brought *inter partes*. The record shows that, in this regard, the Petitioner next secured the 19th day of August, 2005 as the date of hearing for this application. He did not file any Affidavit of Service, but some endorsement on the

Summons, with the surprising date of 8th July, 2005, which is a date one month before this matter was commenced, tends to suggest that some service of the Summons for Injunction was either attempted, or effected. Unfortunately, there is no record of what might have transpired on 19th August, 2005.

On her part, the Respondent only appointed Legal Practitioners to act on her behalf three years after this matter had commenced. Notice of Appointment of M/S John M. Chirwa and Partners as Legal Practitioners for the Respondent was filed on 22nd August, 2008. Following this development, the Respondent took out her own Interlocutory Summons in the matter. This, she based on the inherent jurisdiction of the Court, and through it she sought an Order for the Custody of the minor children of her union with the Petitioner. That Summons was issued on 11th September, 2008 for hearing on 1st October, 2008. There is Proof of Service of this Summons along with its Supporting Affidavits on the Petitioner, and I notice it is also on the same 22nd August, 2008 that she reacted to the Petitioner's Summons for Injunction, by filing and serving an Affidavit in Opposition thereto. The Petitioner did respond to the Respondent's Summons for Custody with an Affidavit in Opposition, to which the Respondent replied with her own further Affidavit. Preliminary issues were raised at the time the Respondent's application was called for hearing, and Honourable Justice Manyungwa heard them and dismissed them. As of now, however, the Respondent has not taken steps to have her application for custody to be set down once again. Likewise the Petitioner's four years old application for Injunction is still hanging in the air.

My involvement in this matter comes *via* a very recent application. On 27th March, 2009 the Respondent took out a different application from the pending earlier one. Under Section 11 of the Courts Act (cap 3:02) of the Laws of Malawi, she has taken out a Summons to transfer Action and/or to Dismiss Action for Want of Prosecution. In the supporting Affidavit the Respondent contends that there has been inexcusable and inordinate delay by the Petitioner in the prosecution of his Petition, that as regards her own application for custody of the children of the union, she believes the same can be expeditiously dealt with by the Resident Magistrate's Court at Blantyre, and that it is therefore in the interests of justice that the matter be so transferred to the mentioned Court. In the alternative the Respondent prays that the Petitioner's action be dismissed for want of prosecution. This application has been opposed by Affidavit, and there are skeleton arguments filed by both the parties on this application.

Incidentally, I noticed some kind of departure from the Summons in the way the arguments of the Respondent, who is the Applicant, were presented at its hearing. I am not sure whether it was a slip of the tongue at work, or whether it was intended. Instead of the arguments supporting the position that either the Court should transfer the entire matter to the Magistrates' Court, or alternatively just dismiss the Action for want of Prosecution, I understood Mr Makwinja, of Counsel, to be arguing that either the Court should transfer the Respondent's application for custody of the children for disposal in the Magistrates' Court, or it should dismiss the Petitioner's case altogether. Now, in case I got it right that the Respondent would want only her application to be transferred, or

instead to have the substantive action dismissed, then I see practical problems attending the application.

I deliberately retraced the history of this application so that we can all easily distinguish what is substantive and what is interlocutory in this matter, considering it is of some antiquity. As I indicated at the outset, the main agenda of this case is for the Petitioner to secure a Divorce. Issues, therefore, of Custody or of Injunction, are either interlocutory or ancillary. Their existence as subject matters for the determination of the Court of necessity depends on the existence of the main action. As such, they are incapable of transfer independent of the main action. Indeed should the main action be dismissed, they too will have to die along with the Action, which is, as it were, their mother. I ought, therefore, to proceed with the application in the manner it was filed i.e. by considering whether there is justification for its transfer to a Subordinate Court, along with all its pending interlocutory applications, or for the dismissal of the Petition, again along with all the interlocutory applications it has offered foundation or sanctuary to.

As I also earlier indicated, there is no proof on the case file that the Originating Process in the form of a Petition was ever served or acknowledged. I know of no process in Civil Litigation that remains alive for four years if not served in time. It is for this reason that I have already expressed concern as to the validity of the Petition in this matter. It is, however, possible that the parties might just have been negligent in not filing with the Court all such documents as prove service of Petition and its acknowledgment. I will thus not digress into pronouncing the validity or otherwise of this Petition. All I will say, however, is that in case the Petition expired, it would be quite amiss for this Court to transfer invalid proceedings to one of its subordinate Courts. Thus, ascertaining whether these proceedings are still valid or not should be a priority for the parties, should I not in the alternative end up dismissing them.

In obiter, I should like to observe that since I have already held that it is not possible to transfer a case in parts, if a transfer were to be had in this case, it would have to be of the entire Divorce case. In that regard of material consequence is Section 39(2)(e) of the Courts Act, as amended in the year 2000, giving as it does to Magistrates Courts jurisdiction to deal with, try, or determine the validity or the dissolution of marriages *celebrated under Customary Law*. Obviously, this would be a stumbling block to the transfer of a matter where there is open confession that the intended Divorce concerns a marriage that was not contracted under any Customary Law.

Turning my focus to possible dismissal of the action, it is clear that the delays experienced in this case are gross and inordinate. While the Respondent blames the Petitioner for not prosecuting the Petition in time, I notice that the Petitioner argues that the blame should be shared by the parties. On my part, my concern is if it is still uncertain after almost four years whether the Petition was at all served, and, if so, whether it was acknowledged and responded to, and if the parties are talking of either transfer of the matter or its speedy disposal, how can all this take place in a case where the only available substantive process is the Petition whose validity is in question.

In my judgment, both parties have not taken this matter seriously. The Petition that was taken out was just taken out as insurance for the parties to launch whatever other applications they wanted to base upon it. Honestly, I do not see any basis for maintaining an Action where all the parties seem to be interested in are the results their interlocutory applications might bring them. I quite agree, therefore, that this is a matter that deserves to be dismissed for want of prosecution, and so I dismiss it for want of prosecution, if it did not earlier expire with the Petition. For the avoidance of any doubts, the dismissal of the petition includes all its baggage in the form of pending interlocutory applications. Considering, however, that both parties have been largely idle in this matter, I order that each party should bear its own costs of these proceedings.

Made in Chambers the 6th day of May, 2009 at Blantyre.

A.C. Chipeta
JUDGE