



**IN THE HIGH COURT OF MALAWI  
FAMILY AND PROBATE DIVISION  
MATRIMONIAL CAUSE NO 09 OF 2019**

**BETWEEN**

**QUINEX WINTALAMU CHILUWE ..... PETITIONER**

**AND**

**PHALES NJUNGA CHILUWE ..... RESPONDENT**

**CORAM : MWALE, J.**

: Nyanda, of counsel for the Petitioner

: Ng'oma, of counsel for the Respondent

: ....., Court Reporter

: Mpandaguta/ Zude, Court Interpreter

---

**Mwale, J.**

**JUDGEMENT**

---

1. The Petitioner moved this court for the dissolution of his marriage with the Respondent on the grounds of cruelty and desertion.
2. By way of background, the marriage between the parties was officiated by the District Commissioner in Balaka under the now repealed Marriage Act. There are 3 issues to the marriage aged 10 years, 8 years and 1 ½ years. Both parties are Malawian nationals who

since the celebration of their marriage in 2010, have lived in diverse places in Malawi and in the Republic of South Africa.

3. In particularising the cruelty that the Petitioner has filed, he simply states in the petition that he has faced several forms of cruelty that have emotionally devastated him, amongst such acts of cruelty the feelings of being unloved and unappreciated as the Respondent does not avail herself physically or emotionally to the petitioner. The Petitioner also complains that the Respondent had denied him conjugal rights without justification and that she has on many occasions been hostile and aggressive towards him. With regard to desertion, it is the petitioner's claim that the Respondent abandoned him along with the children in their matrimonial home in Johannesburg and returned to Malawi. She has then refused to return home despite the Petitioner's efforts at reconciliation.
4. In consequence, the Petitioner seeks dissolution of the marriage, custody of the two older children with the Respondent getting visitation rights, and costs of this action.
5. The Petitioner is defended but there is no cross examination. In her response, the Respondent denies the allegations of cruelty and desertion. She is in agreement that the marriage be dissolved but has not pleaded any grounds as to why. She further prays that the court grants her custody of the children with the Petitioner getting visitation rights and has made no prayer as to costs.
6. The find duly of this court is to determine whether it has jurisdiction to dissolve the marriage as prayed in the petition only. Since there is no cross-petition. First, in terms of the type of marriage the parties entered to, this court must be satisfied that the marriage was contracted under the new repealed Marriage Act since the marriage was celebrated before the enactment of the Marriage Divorce and Family Relations Act. The Respondent has in her response stated that the marriage was officiated at Katoto Assemblies of God. This fact alone does not give any indication of the type of marriage in question. The Petitioner however, has in his witness statement exhibited the marriage certificate which conforms that true marriage celebrated under the Marriage Act by the District

Commissioner at Balaka. This is proof that this court has jurisdiction to dissolve the marriage

7. The applicable law for dissolving marriages contracted under the now repealed Marriage Act is the Divorce Act which set out other legal requirements that the court must be satisfied of in order to assume jurisdiction. Section 2 of the Divorce Act provides that:

*“(2) Nothing hereinafter contained shall authorise –*

*(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition was presented.”*

Both the Petitioner and Respondent are Malawian nationals and although the Petitioner was based in the Republic of South Africa at the time of filing the petition, there was no evidence that he had lost his domicile of origin. The evidence in the case is such that he was in the Republic of South Africa for studies. I stated in the case of **Giramata and Habimana, Matrimonial Cause Number 16 of 2020, High Court, Lilongwe District Registry (Unreported)**,

*“a person retains his domicile of origin unless and until he acquires a domicile of choice.”*

I am therefore satisfied that the jurisdictional requirements for this court dissolving the marriage have been met.

8. Further legal requirements that a court must be satisfied of before it can grant an order of dissolution of marriage are set out on section 7 of the Divorce Act which provides as follows:

*“7(1) on a petition for divorce it shall be the duty of the court to inquire, so far as it is reasonably can, into the facts alleged and whether there has been any connivance and condonation on the part of the Petitioner and whether any collusion exists between the parties and also to inquire into any counter-charge which is made against the Petitioner.*

*7(2) If court is satisfied an evidence that –*

- (a) where the ground for the petition is adultery, the petitioner has not in any manner been accessing to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and*
- (b) the petition is not presented or prosecuted in collision with the Respondent or ether of the Respondents;*

The court shall pronounce the decree nisi of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

9. The first of the legal requirements of which I must be satisfied is that there was no connivance or collusion. Connivance and collusion are a bar to granting an order of divorce because the parties agree to escape from solemn obligations of matrimony. Connivance, one party consents to other committing misconduct before the misconduct occurs. In collusion the parties agree to present the petitions based on fictitious causes (**see Giramata v Habimana cited above**). The facts of the present case borne out of the highly contentious evidence on both sides makes it clear that there was neither connivance nor collusion. The parties have exhibited such adverse positions as to be incapable of forming any common intention.
10. I now move to inquire whether, based on the evidence before me, the Petitioner has proved his case. With regard to the ground of cruelty, the Petitioner has listed a whole catalogue of woes that resulted in his feeling emotionally devastated. To begin with, while the Petitioner was undergoing his PhD studies, the Respondent stopped preparing him food and doing his laundry. It was his evidence that she would prepare food and leave him out. She was hostile and aggressive in front of the children and in addition, denied him conjugal rights for no reason. She would further chase the Petitioner's relations for no reason and accused the Petitioner and his mother of practicing witchcraft. On the specific occasion in November, 2020, the Respondent came to the Petitioner's house without consent and threatened him with violence such that he had to run away.
11. During cross examination the Petitioner confirmed that the Respondent did not speak to him kindly and would harass him even on the phone until he switched off his phone. She

took to calling him names he considered cruel such that he was cursed individual and a wizard. The Respondent did not impeach the Petitioner's evidence with regard to cruelty in any way under the circumstances, his evidence as the cruelty was unchallenged.

12. It now remains to determine whether the incidents the Petitioner cites as cruelty amount to cruelty under the law. In the case of **Shenaz Peter Bhagwanji Almeida v. Ricardo Andre Teixeira Almeida Matrimonial Cause Number 08 of 2016, High Court, Lilongwe District Registry (Unreported)** this court defines cruelty as follows:

*"the conduct complained as cruelty must be intentionally conduct by the Respondent of such a nature as to make continued cohabitation and exercise conjugal duties unbearable or impossible. Such conduct must be of such a serious nature as to go beyond mere incompatibility. In assessing the conduct, the particular attributes of the Petitioner must make him/her susceptible to introduce to intolerance of the conduct complained of must be considered.*

*The petitioner appears to take so kindly to not having his meals cooked for him or his laundry done, but such acts do not go beyond mere incompatibility. The denial of conjugal rights and name calling on the other hand are serious infractions to the marital contract and have every potential of making the exercise of conjugal rights impossible. The Petitioner, from the evidence, has not taken kindly to this conduct and the violent behaviour and lack of guilty towards to his family. Under the circumstances finds that the ground of cruelty has been made out. "*

13. The second ground of desertion, has in my opinion, not been made out in the facts. According to Section 5(b) of the Divorce Act:

*"5. A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent –*

*(a) ..... "*

*(b) has deserted the Petitioner without case for a period of atleast three years immediately preceding the presentation of the petition: .... "*

In order to prove such desertion, 4 elements must be proved to the satisfaction of the court:

- (1) as required by the law, that there has been separation of the parties for a period of not less than three years immediately preceding the presentation of the petition;*
- (2) there must be an intention, whether construed or direct, as the part of the deserting spouse to remain separated permanently;*
- (3) the said absence must be without the consent of the complaining spouse; and*
- (4) that the said desertion must be without reasonable cause on the part of the deserted spouse. (See **Da Silva v Da Silva, Matrimonial Cause No. 3 of 2005, High Court, Lilongwe District Registry (Unreported)**)*

14. The common law has further established that if the respondent's conduct towards his or her spouse is such that a reasonable person ought to have known that such conduct would result in the departure of the spouse from the matrimonial home, then in the absence of rebutting evidence, is sufficient proof of an intention to disrupt the home. Indeed, the spouse leave the matrimonial home as a result of such disruption, the fact that the respondent desired or requested the Petitioner not to leave does not rebut the intention to be inferred from his or her acts that he or she intended to drive the petitioner out making him or her guilty of constructive desertion (see **Chingolo v Chingolo, Matrimonial Cause No. 62 of 2009, High Court, Principal Registry (Unreported)**)

15. The evidence of Petitioner with regard to the ground of desertion is that he and the Respondent were on separation since 2017 and that since then he had been supporting her with rentals whenever possible as he was not gainfully employed. According to the Petitioner, the Respondent returned to Malawi at a time when his financial status had ..... It transpired during cross examination that the Respondent returned to Malawi with his consent as they had agreed that she should deliver their unborn baby in Malawi. The Petitioner continued to provide support after baby was born. The Petitioner also admitted in during cross- examination that he did not allow the Respondent to join him in South Africa after the delivery. His explanation was that since there was bad blood between them as she left, he felt it prudent that she only returns after they had discussions in an attempt at ironing out the issues. The Petitioner went on to state that he made every effort to

reconcile and this included flying out to Malawi from South Africa. The Respondent however referred to meet with him and informed him that none of her relatives would meet him either.

16. The separation begun in 2018 and the proceedings herein were filed in July 2019. This does not satisfy the requirement that the separation be for a period of no less than three years required under section 5(b) of the Divorce Act. Further, there is evidence that the separation begun with a consent of the Petitioner. There is no evidence that the Respondent intended the separation to be permanent. There is evidence, though, that the Petitioner's conduct contributed to the Respondent's failure to return. Based in the facts before me, I cannot return a finding of desertion.
17. For all I have reasoned above, I hereby grant a decree nisi of divorce on the ground only of cruelty prayed for in the petition. The case for desertion has not been made out. Any party wishing to show cause why the decree nisi may not be made absolute shall do so before the expiry of the said six weeks.
18. The parties have also entreated this court to make a determination of custody. Custody determinations must be in the best interests of the child and neither party has argued the case as to why, in whatever form should be granted to them. Further, the parties may also wish to address the court on issues of maintenance for the child should they so wish. It is of paramount importance that the parties also address the court on legal custody which assists in best interest's determinations. Both parties are ordered to address this court, in writing, on custody within 21 days of the order herein.
19. No order as to costs is made at this stage.

I so order,

**MADE** in the open court in Lilongwe in the Republic of Malawi this 19<sup>th</sup> day of May, 2021.

Chiluwe v Chiluwe

Mat Cause No. 09 of 2019

F.A. Mwale, J.

Fiona Atupele Mwale

**JUDGE**