



**REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
FAMILY AND PROBATE DIVISION
LILONGWE DISTRICT REGISTRY**

MATRIMONIAL CAUSE NO. 08 OF 2021

BETWEEN

ARNO BOTHA PETITIONER

-AND-

**NATHALIE JANE SWART BOTHA..... RESPONDENT
PHILLIP BENCE CO-RESPONDENT**

**CORAM : THE HONOURABLE JUSTICE F.A. MWALE
: Chiwaya, for the Petitioner
: Nankhuni, for the Respondent
: Ntaya, Official Recorder
: Mpandaguta, Court Clerk**

JUDGMENT

1. The petitioner commenced the action for divorce on the ground of irreconcilable differences and adultery. The petitioner further prays for distribution of the property and joint custody of the child.
2. Further by Amended Petition, he added the co-respondent as a party to the proceedings on the ground of adultery. The co-respondent neither defended nor contested the matter.

3. The respondent filed an Answer, opposing the Petition and cross petitioned for divorce on the ground of cruelty and irretrievable breakdown of the marriage. She has also cross petitioned for custody and maintenance of the issue to the marriage and for property distribution to be done in accordance with a list that she has provided.
4. The petitioner filed neither an Answer nor a Reply to the Cross Petition, even after the Respondent filed an Amended Cross Petition and Answer to Petition for Divorce. The matter proceeded to trial and at the hearing the petitioner called 1 witness and the respondent called 5 witnesses. The trial was presided over by another judge on my behalf due to illness and I now resume jurisdiction.
5. Before delving into the substantive issues before me, I must determine two preliminary issues. The first is whether my court has subject matter jurisdiction over the marriage. This is easily satisfied as the parties were married at the District Commissioner's Office in Lilongwe and there is evidence before me of a marriage certificate of a civil marriage under the Marriage Divorce and Family Relations Act, which the court has jurisdiction over.
6. The second issue which I must satisfy myself is whether I have jurisdiction over the petitioner in accordance with Section 60(1)(a) of the Marriage Divorce and Family Relations Act. The said provision provides that:

(1) Nothing in this Act shall authorize –

(a) The making of any decree of a dissolution of marriage unless the petitioner is domiciled in Malawi at the time when the petition is presented; or ...

As was stated by the Honourable Justice Chipeta (as he was) then in the case of **Brown v Brown** Matrimonial Cause No. 9 of 2002, High Court, Principal Registry, the issue of jurisdiction over the petitioner,

“has to take priority and be answered as a preliminary issue.”

When the matter was first brought to court for hearing on 10th August 2021, I noted a number of issues that indicated that it was not trial ready. In granting the adjournment to enable all the necessary procedures to be followed I forewarned the parties that residence

is not to be equated with domicile which was assumed because the petitioner had resided in Malawi for a number of years.

7. The petitioner, who is of South African origin gave evidence by sworn statement that he is domiciled in Malawi which he sought to prove by producing copies of two Temporary Employment Permits one valid from 13th February 2019 expiring on 12th February 2021 and another issued on 21st August 2021 and expiring on 20th August 2023. The petitioner is therefore resident in Malawi for as long as he is able to renew his permits.
8. In the case of **Brown v Brown** cited above, the learned judge made important Pronouncement about the importance of establishing domicile as the emphasizing that the burden of proving it lies on the petitioner:

“As I have already earlier indicated Section 2 of the Divorce Act is clear beyond peradventure that jurisdiction in divorce proceedings is solely dependent on domicile. It must also be clear from what I have said above that domicile of origin cannot be assumed. By completely neglecting to address the question of domicile in the material affidavit in this case and simply dwelling on allegations that he has suffered exceptional depravity I take it that the Applicant, by implication wishes this court merely to assume that he is domiciled In Malawi. The burden I must say was throughout on the Applicant to satisfy the court on domicile and even if the Respondent did not request to cross-examine him, this requirement of s.2 could not have been wished away.” Emphasis supplied.

What the learned judge articulated in that case is instructive and cannot be put in better terms:

“Be this as it may I think it now timely to say something about the law as regards domicile. To begin with in simple terms a person's domicile is a person's permanent home. At birth a legitimate child acquires the domicile of his father. This is known as the domicile of origin. If his father dies before the child comes of age, the child takes on the domicile of the mother. On attainment of majority age such child assumes the legal capacity to change his domicile, should he so decide. See: Cheshire's Private International Law (8th ed) and Jack Hamawi, Family Law (1953 ed).

In a nutshell it is clearly the law as adumbrated by these authorities that a person retains his domicile of origin unless and until he acquires a domicile of choice. It is equally clear that the domicile of origin adheres to a person and prevails until it is plain de animo et facto that he has acquired a domicile of choice.

*As the cases put it, it requires nothing short of the strongest evidence to show that a domicile of origin has been replaced by a domicile of choice and the propositus, who bears the burden of proof when he asserts change of domicile, must not only manifest intention to acquire a new domicile, but he must also demonstrate that he has put that intention into execution by actually acquiring the intended new domicile. To put it more clearly the authorities suggest that for a court to accept that the propositus has changed domicile there must be shown a clear, unequivocal, and fixed intention to permanently abandon one domicile and to permanently adopt another. Among the many cases I have had recourse to, are the cases of *Winans -vs- Attorney General* (1904) A.C. 287, *Fuld (No. 3)* (1968) P. 675, *Coombe -vs- Coombe* (1923-60) 1 ALR Mal. 115, *Whitelock -vs- Whitelock* (1978-80) 9 MLR 43 and *Bond -vs- Bond* (1984-86) 11 MLR 87, among others." Emphasis supplied.*

9. It was the petitioner's evidence that he has "no intention whatsoever of leaving Malawi", and the permits prove his domicile. The circumstances of the present case are very similar to those in the case of **Brown v Brown** cited above, which I have quoted at length. The propositus in that case had been in Malawi for a period of 8 years or so at the time of the hearing of his application. Throughout his stay in Malawi, he has been on a Temporary Employment Permit, like the petitioner in this case. He had substantial investments in a brick making company and had for a year or so been attempting to buy a house in Malawi. He went as far as to state that at that time, Malawi was his main home. I must again quote from the Honourable Judge, as he was then, in that case to portray the incredulity with the Court viewed arguments similar to the ones put forward in this case:


"Lastly, as also already observed above, the Applicant has only come to court to discuss his domicile on prayer of the Respondent and on basis of his one year or so attempts to buy a home, his one investment in a company, and his twice or so renewed Temporary Employment Permit, he asks this court to believe that he is now domiciled in Malawi."

The Court in the case of **Brown v Brown**, cited above, therefore found no evidence that the propositus had displaced his domicile of origin and acquired domicile of choice in Malawi because he had failed to display an unequivocal and fixed intention of permanently abandoning England as a home and permanently adopting Malawi as his new home.

10. In view of the state of the law and the evidence before me, I must find that the petitioner has in this case failed to satisfy me that he has an unequivocal and fixed intention of permanently abandoning his domicile of origin. A Temporary Employment Permit which is only renewable at the discretion and pleasure of the State cannot evidence an intention to permanently remain. Further, the issue of domicile it should be remembered is a "connecting factor" or link between a person and the legal system or rules that will apply to him in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine whether, as regards such requirements as age and capacity, he or she may validly be married elsewhere and whether he or she may obtain a divorce that will be recognised elsewhere (see Irish Law Reform Commission, Domicile and Habitual Residence, Chapter 1: Introduction). There has been evidence in this Court that the petitioner has consistently refused to register the marriage in South Africa and so the birth certificate of the child records the parents as unmarried. This is proof that the petitioner's domicile is South Africa as his marriage and the birth registration of his child are bound by the laws of that country since the Malawi marriage is not recognized in that country.
11. Having thus reasoned, I find that this court has no jurisdiction over the petitioner and therefore dismiss the Petition. As the Cross-Petition is dependant on the Petition, it too falls away. The respondent is free to institute a fresh petition should she satisfy the requirement of domicile.

I so order.

MADE in chambers, in Lilongwe this 27th day of May 2022


Fiona Atupele Mwale
JUDGE