

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
MATRIMONIAL CAUSE NO. 9 OF 2002**

**BETWEEN:**

**DREW BROWN.....APPLICANT**

**-and-**

**CAROLINE ANGELLA BROWN.....RESPONDENT**

**CORAM: HON. JUSTICE A.C. CHIPETA**

**Mumba, of Counsel for the Plaintiff**

**Ngwira, of Counsel for the Defendant**

**Mzungu (Miss), Official Interpreter**

**RULING**

By Originating Summons the Applicant, Drew Brown, seeks an order from this court under Section 8(1) of the Divorce Act (Cap 25:04) of the Laws of Malawi that he be at liberty to file a petition for the dissolution of his marriage with the Respondent, Caroline Angella Brown, notwithstanding that three years have not passed since the date of their marriage, on grounds that he has suffered exceptional hardship. The Originating Summons is supported by an affidavit to which is exhibited the proposed divorce petition. The exceptional hardship complained of has been particularized as consisting in persistent adultery and late night outings between the Respondent and Co-respondent as well as a battering of the Applicant by a third party on 5th April, 2002 at the instance of the Respondent.

Through an affidavit entitled as one in support of an application, although she has not filed any application, the Respondent has opposed the Applicant's Originating Summons. This she has done on two fronts. First she suggests that the Applicant is not domiciled in Malawi and that therefore this court has no jurisdiction to entertain his proposed petition for divorce. Secondly she argues in effect that the Applicant has not suffered any exceptional hardship to qualify for the filing of an early petition for divorce as she is denying the commission of all the matrimonial offences levelled against her. At the hearing of the Originating Summons on request of learned Counsel for the Respondent, the Applicant was available for cross-examination and he was duly cross-examined on the subject of his domicile.

It is indeed the law in Malawi that a party seeking a divorce under the Divorce Act cannot

present a petition therefor in this court before the marriage in question has been in existence for a minimum of three years, unless he/she obtains advance leave of the court in this regard. Per the proviso to Section 8(1) of the Act the only recognized grounds for granting such leave are that either the intended petitioner has suffered exceptional hardship, which is the ground raised by the Applicant in this Originating Summons, or that the case is one of exceptional depravity on the part of the Respondent.

Before I can go into an examination of whether indeed in this case the Applicant has raised a case of exceptional hardship on his part, the question whether or not this court has jurisdiction to entertain a divorce petition from him, as raised in the Respondent's ill-titled affidavit, has to take priority and to be answered as a preliminary issue.

I must say that Section 2 of the Divorce Act is plain beyond debate on the point that this court can only entertain divorce proceedings instituted by petitioners who are domiciled in Malawi at the time of the presentation of their petitions. If therefore at the stage of seeking leave to petition for divorce before expiry of the three years set by law a question is raised, as is the case here, concerning the Applicant's qualification for the jurisdiction of the court on account of domicile, it becomes imperative to there and then determine it in order to avoid the futility of the possibility of granting an Applicant the leave he/she seeks only to reject the petition he/she subsequently brings up on the ground that in the light of his domicile as determined at that time the court has no power to adjudicate on the petition. In the present case, therefore, I can only meaningfully tackle the question whether the Applicant is entitled to leave under Section 8(1) if I am satisfied that jurisdictionwise the court will be in a position to deal with his petition if presented.

It came to light during the time the Applicant was being cross-examined that the Applicant is not a Malawian and that he was not born in Malawi. Although it did not clearly come out where exactly he was born, it was sufficiently apparent that he was born somewhere in England. It also emerged during the hearing of this Originating Summons that contrary to the Applicants's deposition in paragraph 3 of his affidavit in support, which is to the effect that there have been no previous applications for leave, this happens to be the Applicant's second application this year for leave to present a petition for divorce within the first three years of marriage.

In the affidavit of the Respondent the Applicant's first application has been referred to as having been made in Civil Cause No. 1506 of 1902. In the presentations this previous application was however referred to as having been made in Civil Cause No. 1506 of 2002. From the presentations of Counsel for both parties it appears that application was withdrawn on 27th May, 2002. In his evidence on oath the Applicant affected not to recall whether an earlier application like this one had been initially filed in court and later withdrawn and as for paragraph 3 of his present affidavit which represents this as his first application, while conceding

that he swore the affidavit the Applicant claimed not to be too sure about the contents of that paragraph.

The Respondent has alleged in her affidavit and in the presentation made on her behalf

that in the said first application for leave it was the Applicant's affidavit evidence that he was domiciled in England. She thus wondered how a person who swore thus only in May, 2002 can only a month or so later claim that he is domiciled in Malawi by seeking leave to petition for divorce in this court.

On this allegation although I can have recourse to the material court record as and when I want, I really would have expected that the Respondent would have found it necessary to exhibit the Applicant's first affidavit in the previous case. The Applicant however appeared to concede the point raised and under cross-examination tried to explain away the anomaly by saying that initially he did not understand the meaning of the word "domicile." Actually the reaction of learned Counsel for the Applicant was one of surprise at why the Respondent's side was dwelling so much on an application that was withdrawn. In fact Counsel hereafter even ventured into the arena of giving testimony as he tried to explain the circumstances that led to the withdrawal of the first application which he said was filed by a different lawyer.

Now while learned Counsel for both the parties herein did confirm to me the withdrawal of the first application and I duly accept their word that it is not still pending, I think the attempt by Counsel for the Applicant to shut out any detailed reference to it was not justified. Withdrawal of the application, to my mind, does not have the effect of obliterating the fact that such an application actually existed. Going by the Applicant's deposition in paragraph 3 of his present affidavit, the Applicant would have me believe on the oath he took that he never made any like application before and yet this is false, because he did. This falsehood assumes great significance when it is revealed that in the Application he is so anxious to have buried and forgotten he on a different oath declared possessing an English domicile which would automatically cut him out of benefitting from the jurisdiction of this court.

I think it is only fair and indeed in the interests of justice that the Respondent has exposed the application the Applicant wants hushed up so that the present application is determined from its full and true context rather than from a falsified context. Thus in examining such further evidence as was presented in this case regarding the current domicile of the Applicant I will throughout bear in mind that a month ago or thereabouts there was filed in this court an affidavit sworn by this very Applicant to the effect that he was domiciled in England. In so doing I take it that it is the professional duty of every Counsel acting on instructions from a client to be candid and thorough with his client in explaining the law and its terms of art as they bear upon the client's case. At the same time I maintain my reverence for the sanctity and sanction of the oath and my lamentation when deponents think they can take an oath in vain without fully appreciating what they are swearing to.

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).

I am grateful to both learned Counsel in this matter for, in the course of their arguments, presenting me with a wealth of case authorities, both Malawian and foreign, which have proved quite useful in the determination of this case. 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.

Reverting to the case at hand, my first observation is that by his affidavit in this Originating Summons the Applicant completely left out any reference to the question of his domicile as at present. Coming as we are from a background where only in May, 2002 he deponed in a different affidavit to the effect that he was domiciled in England, that application having been withdrawn, I am at a loss as to how the Applicant sought his current silence on that point to be construed in his current affidavit.

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, especially for a person who is not Malawian or who did not have Malawi as his 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.

From evidence extracted from the Applicant as a result of opportunity of cross-examination and its consequent re-examination it has come to light that the Applicant came to Malawi in 1993 to work. He has throughout been on Temporary Employment Permit. He has investments in a brick making company in the region of K1-2 million and has for a year or so with the help of Knight and Frank, a real estate company, been trying to purchase a home. He says since he came to Malawi he has only been out of the country

twice and that he has no investments in any other country. He added that to date Malawi is his main home.

On the evidence available, both oral and through affidavits, notwithstanding the shortfalls I have already pointed out, I believe I cannot be accused of drawing a far fetched conclusion if I hold that the Applicant's domicile of origin is or was England. I accordingly do find it as a fact that the Applicant's domicile of origin was/is English. Bearing in mind the stand of the law as I have ventured to discuss in this ruling, if the Applicant has since abandoned his domicile of origin and adopted Malawi as his domicile of choice, the onus was throughout on him to demonstrate de animo et facto that this is the case. The question I must now answer is whether the Applicant has discharged his onus.

As observed earlier the Applicant has come to court in this Originating Summons initially with a misrepresentation that it is his first application ever on the subject, when only in May, 2002 he had another like application filed by a different lawyer. As also already earlier observed in the said first application the Applicant on oath indicated that his domicile is England, which meant that going by that deposition this court had no jurisdiction as at the time of that application over the dissolution of his marriage.

Further as also already observed, the Applicant in his present application has been silent on the subject of domicile and has so coached his application as if his domicile is a matter of foregone conclusion or as if the question of domicile is of no relevance to his application. 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.

In trying to answer the question whether the Applicant has in this case indeed established that he has abandoned his domicile of origin and in its place acquired a domicile of choice in Malawi I have subjected the Applicant's entire conduct in the case as above discussed to the legal tests I have earlier alluded to on change of domicile. I have thus finally asked myself whether in the circumstances revealed by and in this Originating Summons I can say that the Applicant has shown to this court a clear, unequivocal, and fixed intention of permanently abandoning England as a home and permanently adopting Malawi as his new home.

At this point I find the dictum of Lord Westbury in *Udny -vs- Udny* (1869)L.R. 1 Sc and Div. 441 particularly significant and I proceed to quote from the learned judge as follows:

“A domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time... It must be a residence not for a limited period or particular purpose, but general and indefinite in its future contemplation.” at p. 458.

After all this exercise I am afraid I do not find myself convinced by the evidence that the propositus Drew Brown has amply shown me that he has acquired a Malawian domicile in place of his English domicile. As such, per S. 2 of the Divorce Act, this court would have no jurisdiction to entertain a petition from him for divorce even if it otherwise qualified for presentation under the S. 8(1) test of exceptional hardship. Accordingly on account of that lack of jurisdiction I cannot grant him the leave he seeks to file a divorce petition in this court. The Originating Summons thus stands dismissed and I so dismiss it with costs.

Made in Chambers this 18th day of July, 2002 at Blantyre.

**A.C. Chipeta**

JUDGE