

**MALAWI JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 290 OF 2014**

**BETWEEN:**

**TARIFA SULEMAN.....PLAINTIFF**

**AND**

**SULEMAN GAFFAR SULEMAN.....DEFENDANT**

**CORAM: THE HON. JUSTICE H.S.B. POTANI**

**Mr. Soko, Counsel for the Plaintiff**

**Mr. Chipembere, Counsel for the Defendant**

**Mr. Kanchiputu, Court Clerk**

**RULING**

The plaintiff and the defendant are an estranged couple their marriage being destined for a complete breakdown.

The action was commenced by an originating summons which has been amended several times. According to the case record, the last amended originating summons, prepared by Soko and Company, bears a court filing stamp dated December 8, 2015, and the date of issuance by the Registrar is indicated as January 21, 2015, which



appears to be an error, in so far as the year is concerned and should be January 21, **2016**. Mention should also be made, though not an important issue that along the way both sides to the case changed lawyers representing them. The plaintiff started with Ralph and Arnold Associates, then switched to Chidothe, Chidothe and Company and later enlisted Soko and Company who filed the last amended originating summons and argued the case for the plaintiff at the hearing. As for the defendant, he started with Ritz Attorneys at Law, changed to Gondwe and Attorneys and then went back to Ritz Attorneys at Law who argued his case at the hearing.

According the latest amended originating summons earlier alluded to, the plaintiff seeks the court's determination of the following questions:

- a) *Whether or not the divorce proceedings the Plaintiff and the Defendant underwent at the Limbe Islamic Jamaat under the Islamic rite of **talaq** were valid.*
- b) *Whether or not the Limbe Islamic Jamaat was competent to deal with the question of custody of children of the marriage between the Plaintiff and the Defendant as part of the divorce proceedings under the Islamic rite of **talaq**.*
- c) *Whether or not the Plaintiff is entitled to custody of (the children of) the dissolved marriage between the Plaintiff and the Defendant.*
- d) *Whether or not the defendant is under a legal obligation to maintain the children of the marriage herein.*
- e) *Whether the Plaintiff is entitled to a share in the matrimonial property herein*

#### **Reliefs sought**

- f) *A declaration that the divorce proceedings that the Plaintiff and the Defendant underwent at Limbe Islamic Jamaat under the Islamic rite of **talaq** were valid and that the parties are accordingly divorced.*
- g) *A declaration that the Limbe Islamic Jamaat was not competent to deal with the question of custody of the children of the marriage between the Plaintiff and the Defendant as part of the divorce proceedings under the Islamic rite of **talaq**.*

- h) An order granting the Plaintiff custody of the children of the marriage with the Defendant namely **ZAREEN AND SHAZIA SULEMAN**.*
- i) An order of distribution of matrimonial property in equal shares.*
- j) An order that the defendant be maintaining the said children of the marriage in the manner proposed herein.*
- k) An order that costs of the action be for the plaintiff.*
- l) Any other orders as the Court deems fit in favour of the Plaintiff.*

There is considerable contestation on the facts as evident from the several affidavits each side has filed, the fact that the plaintiff had to cross examine the defendant on his affidavits and even the defendant had initially intended to cross examine the plaintiff but later decided otherwise. The court has made every endeavor to isolate the pertinent facts for purposes of disposing of the plaintiff's originating summons.

The contentious nature of the facts alluded to earlier aside, when the case was called for the hearing counsel for the defendant informed the court that after some engagement with counsel for the plaintiff, it was agreed that the question whether or not the divorce proceedings the plaintiff and the defendant underwent at the Limbe Islamic Jamaat under the Islamic rite of **talaq** were valid as contained in paragraph (a) of the originating summons is not an issue at all as to require determination by the court the defendant having conceded that the proceedings and the resultant divorce were valid. This leaves the issues of custody and maintenance of the children and distribution of matrimonial property for determination by the court.

As regards the issue of custody, there are two children namely Zareen and Shazia aged 11 and 6 respectively as at the time of the commencement of the proceedings in August 2014. In so far as the law is concerned, section 23(1) of the Constitution is a good starting point and it provided as follows:



*All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.* [Emphasis supplied]

The position of the law under the supreme law of the land is therefore that in deciding on the issue of custody of the two children herein, the court is enjoined to give paramount consideration to the best interest of the children. This position is also echoed in at international level in Article 3(1) of the Convention on the Rights of Children [CRC] which is as follows:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*

There is a compendium of local decided cases in which the principle stipulated in the Constitution and the CRC has been applied. In essence what the law says is that as much as the interests and wishes of the parties have to be considered as well, the overriding consideration must be the welfare, interest and indeed happiness of the children. See **Kamangira v Kamangira**[2004] MLR 135 (HC). As rightly submitted by counsel for the plaintiff, the various decided cases point to the fact that in the case very young children, their best interest is better served if left under the care and custody of the mother unless in exceptional circumstances and **Chilingulo v Chilingulo and another** [1990] 13 MLR 110 (HC) is a case in point.

It is contended by the defendant as deposed in his affidavit in opposition filed on October 5, 2015, that he is best suited to have custody as, unlike the plaintiff, he has his own home and as at that point, he had lived with the children for close to a year without the plaintiff and that he loves the children and would like them to grow under his watch so as to ensure that they attend both Islamic [Madrassa] and formal education.

As earlier indicated, the children in 2014 when the action was commenced were aged 11 and 6 which means presently they are aged around 14 and 9. The court takes particular attention to the fact that they are both girls. The older one is in her puberty stage while the younger is on the onset of puberty. It is common knowledge that girls by the very nature of their gender have special physiological developments at puberty stage which need the special attention of a mother. Therefore, although the evidence in this case tends to show that the defendant is more financially sound than the plaintiff as such is better placed to attend to the financial demands attend to the raising of children, the facts of the case in totality tend to show that the best interest of the children will be served if they stay with the mother. As was held in the **Chilingulo** case cited earlier, the defendant being a loving and caring father as he alleges, he could still extend that love while the children are being cared for by their mother. It is accordingly ordered that the plaintiff should have custody of the two children and that the defendant should have visitation rights and reasonable access to them upon give the plaintiff reasonable notice. This order takes effect within 7 days upon being served on the defendant.

Moving on to the issue of maintenance of the children, the contention put forward by the defendant is that he cannot afford the K300,000.00 monthly maintenance sum demanded by the plaintiff as his business does not generate the monthly profits of between K700,000.00 and K800,000.00 alleged by the plaintiff. It is his argument that in order to mitigate the high maintenance sum the plaintiff is demanding, he should have custody of the children so as to take away those aspects of the demanded maintenance sum covering rentals, utility bills and transportation. In essence, the defendant does not dispute that he is obliged to maintain the children and the court having already granted custody to the plaintiff, what remains is for it to determine what would be a fair, just and adequate quantum of maintenance. As earlier



indicated, the defendant being a loving and caring father he professes to be, he can always extend and provide his care and love while the children stay with their, mother the plaintiff. The evidence shows that the defendant is still running the transport business he was running during the subsistence of the marriage. He is certainly man of means and not a destitute. The court is mindful though that an order of maintenance should not aim at punishing the party against whom the order is to be made. Therefore the order the court has to make must be one within the means of the party against whom it is made and must be such as to cover reasonable expenses of the beneficiary children. Having considered all the available evidence regarding the means of the defendant and bearing in mind the current cost of living it is the position of this court that for each one the two children a monthly maintenance sum of K130,000.00 would be reasonable but this sum does not include school fees which the defendant would have to be paying separately. In the end it is ordered that for each one of the two children the defendant to be providing a maintenance sum of K130,000.00 the first such payment to be made by 1<sup>st</sup> of March 2017 and the subsequent payments on the 1<sup>st</sup> day of each subsequent month subject to review and/or variation by the court from time to time until each of them attains the age of 24 or further order of the court. It is further ordered and directed that for easy management of the arrangement, a special account should be opened for each one of the children with any of the commercial banks within 7 days from the date of service of this order and by February 24 in any event.

Then there is the issue if distribution of matrimonial property. The plaintiff prays that the property be distributed equally. The defendant vehemently opposes to such a proportion of distribution and it is in his affidavit in opposition sworn on February 18, 2016 and filed on February 19, 2016, where he advances the facts in contestation to the prayer by the plaintiff.

The Constitution endows to every woman, upon dissolution of her marriage, the right to a fair share of the property jointly held with her husband. Section 24(1)(b)(i) of the Constitution provides:

*(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right—*

*(b) on the dissolution of marriage, howsoever entered into—*

*(i) to a fair disposition of property that is held jointly with a husband;*

The constitutional provision quoted above talks of fair disposition of property and it is the considered view of this court that what amounts to a fair disposition depends on the facts and circumstances of each case. In the present case, the property the plaintiff seeks an equal share of is contained in exhibit **TTS2** to her supplementary affidavit sworn on December 10, 2015, and filed on December 11. The list is as follows:

*5 Ford Buses (Runners), 3 Ford Buses ( Non Runners), 1ERF Truck (Runner), 1Man Diesel (Runner), 1Renault Scania Truck (Runner),1 Mercedes Benz Truck (Runner), 1 3Series BMW Sedan (Runner) ,1 3Tonne Ford Truck (Runner),1 Nissan Pickup (Runner), 1Land Rover Frelander (Non Runner), 1 5series BMW sedan (Non Runner), 1 L shaped Lounge suite, 3 Single Beds, 1 Double Bed, 1 ¾ Bed, 1 Glass Dinning Table, 1 TV screen including surround system, 1Coffee Table, 1 Microwave, 1 Coffee Machine, 1 Electric can Opener, 1Waffle Maker, 1Doughnut Maker, 1 Deep Fryer, 1 Pinini Press, 2 Defy Cooker (one is new), 1 food Processor, cutlery, Crockery, Linen, Curtains , Towels.*

In contesting the plaintiff's claim for equal distribution of the property, the defendant in his affidavit filed on February 19, 2016, allude to earlier has singled out the following property as being encumbered as there is a loan he is still repaying to Leasing and Finance Company which provided funds for its acquisition: **IERF**



*Truck (Runner), 1Man Diesel (Runner), 1Renault Scania Truck (Runner), 1 Mercedes Benz Truck (Runner) ,1 Nissan Pickup (Runner)*

It is also the defendant's assertion that the **Renault truck** belongs to his father, the **3 Series BMW Sedan** belongs to his sister, **the 3 Tonner Ford truck** and **Land Rover Freelander** belong to some people who left them with him for repairs, and **all the beds** were a gift from his sister.

Further the defendant disputes the existence of the **Ford buses (Non Runners)** as according to him there were only **3 non runner Ford Buses** which were being broken for spares.

Thus according to the defendant the property that can be the subject of distribution would be **1 5series BMW sedan (Non Runner), 1 L shaped Lounge suite, 1 Glass Dinning Table, 1 TV screen including surround system, 1Coffee Table, 1 Microwave, 1 Coffee Machine, 1 Electric can Opener, 1Waffle Maker, 1Doughnut Maker, 1 Deep Fryer, 1 Pinini Press, 2 Defy Cooker (one is new), 1 food Processor, cutlery, Crockery, Linen, Curtains, Towels.**

In the determination of the matter, the court notes with curiosity that with regard to those items the defendant asserts do not belong to the family, he has only produced evidence to that effect in relation to one car and that is exhibit **SGS 1** to his affidavit in opposition filed on February 19, 2016. That affidavit shows that one of the vehicles the subject of these proceedings being a **3 Series BMW** is owned by a person called M.G. Suleman who according to the evidence appears to be a sister to the defendant and it is that vehicle which is encumbered as the title holder is First Merchant Bank. Surely, if indeed some of the vehicles are encumbered in connection a loan obtained from Leasing and Finance Company, certainly the loan agreements were reduced in writing and one would have expected the defendant to exhibit such



agreement in order to render credence to his claims. Again, for the vehicles he says belong to his father or other people who left them with him for repairs, he needed to exhibit the Registration Certificates commonly known as blue book if the court were to believe his story.

The court will therefore proceed to distribute the property on the basis that it was all except the 3 Series BMW jointly held by them during the subsistence of their marriage. As there is no evidence as to how much each one of them contributed to its acquisition, the court will endeavour to share the property equally on the basis of the principle that equality is equity. Accordingly, it is ordered that the property be distributed as follows:

## **PLAINTIFF**

***5 Ford Buses (Runners)***

***1ERF Truck (Runner)***

***1Renault Scania Truck (Runner)***

***1 Nissan Pickup (Runner)***

***1 L shaped Lounge suite***

***3 Single Beds***

***1 ¾ Bed***

***1 Microwave***

***1 Coffee Machine***

***1 Electric can Opener***

***1Waffle Maker***

***1Doughnut Maker***

*1 Deep Fryer*

*1 Pinini Press*

*1 Defy Cooker (new one))*

*1 food Processor*

*cutlery,*

*Crockery*

*Linen, Curtains*

*Towels.*

## **DEFENDANT**

*3 Ford Buses ( Non Runners)*

*1Man Diesel (Runner)*

*1 Mercedes Benz Truck (Runner)*

*1 3Tonne Ford Truck (Runner)*

*1Land Rover Freelander (Non Runner)*

*1 Double Bed*

*1Defy Cooker*

*1 Glass Dinning Table*

*1 TV screen including surround system*


*1Coffee Table*



It is ordered that the actual physical distribution of the property should be done within 7 days from the date of service of this order in the presence of an officer of the court, if need be and that costs incidental thereto shall be borne by the defendant as he is in the one in possession of the property.

As for costs of these proceedings each party to bear its own costs.

**Made this day of February 7, 2017, at Blantyre in the Republic of Malawi.**



**H.S.B POTANI**  
**JUDGE**