

**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**CIVIL CAUSE NO. 67 OF 2006**

**BETWEEN:**

PHILLIP MSINDO .....PETITIONER

- and -

CONSTANCE MSINDO ..... RESPONDENT

**CORAM : HON JUSTICE M. C. C. MKANDAWIRE**

Mr Masiku for Petitioner

(Ms) Wezi Mesikano for Respondent

Mrs Edith Malani, official interpreter

**JUDGMENT**

*Mkandawire J,*

**Matters in issue:** Petition for dissolution of marriage on grounds of cruelty and adultery.

In this matter, the Petitioner is Phillip Msindo and he prays to have his marriage to Constance Msindo, the Respondent, dissolved on grounds of cruelty and adultery.

The Respondent filed a response to the petition herein and also cross petitioned.

The Petitioner and the Respondent who are both Zimbabwe nationals were married under Zimbabwe Custom and subsequently married according to the Marriage Act (Chapter 37) of the Laws of Zimbabwe in 1994. After the celebration of their marriage both under Custom and Marriage Act, the two have lived and cohabited in divers places in Zimbabwe and Malawi. There are four children to this marriage in Malawi. The four children to this marriage are namely Tendai Msindo born on 1st November 1982, Vimbai Msindo born on 29th April 1988 and Vongai Msindo born on 24th April, 1992 and Yawukaya. As already pointed out, the Petitioner and Respondent first lived in Harare, Zimbabwe up to 1999 when the Petitioner was transferred to Blantyre, Malawi to take up a post of Managing Director of Dairy Board Malawi. Both the Petitioner and the Respondent have been resident in Malawi since then. I am satisfied on the evidence on record that there have been no previous proceedings in the High Court or any court in Malawi with reference to the marriage either by the Petitioner or the Respondent. I am also satisfied that there is no collusion between the two parties.

The Petitioner grounds his divorce on the grounds of cruelty and adultery. The evidence in support of the petition by the Petitioner is that their marriage could certainly not work. They had numerous disputes which usually culminated into serious fights, which affected even their children and their own lives. The Petitioner said that to put it in a nutshell, the Respondent is a person of ungovernable temper. He explained that as his job is very demanding, there came a time when he could come home late but the Respondent could mistreat him by literally throwing his things out of the house. There was a time in Harare when he found that the Respondent had hipped all his personal belongings outside their residential house. Whilst here in Malawi, the Respondent had the habit of going through his cellphone numbers. Once she found a lady's number, she could start phoning her. There was a time when things were so bad at the house that their visitor who happened to be a pastor had to leave. There was also a day in Malawi when the Respondent literally followed him to the office carrying a gun and threatening to shoot him whilst at the office. She threatened him that if he did not tell her the name of the girl, she would shoot him. It had to take the intervention of the financial controller. Thereafter, the Petitioner went to Zimbabwe for counselling.

On the ground of adultery, the Petitioner said that whilst he had transferred to Malawi from Zimbabwe, the Respondent remained in Zimbabwe before she could follow him. At that time, there were rumours going around that she was going about with certain men. She could be visited by men at their residence and one day a certain man came at night but she explained that this man had borrowed money from her and was just returning the money. She could also receive phone calls from men and even his own friends could call her. One day, a certain man phoned her even asking her if the Respondent was back. He found this very suspicious. The Petitioner also expressed great suspicious on their last born child. He said that there was a time when he transferred to Bulawayo from Chipinga. The Respondent however remained at Chipinga. Whilst at Chipinga, the Respondent fell ill. But she could not disclose to him about the admission.

Later on, it was the doctor who had to tell him that she was pregnant. This was very suspicious. The Petitioner then told this court about what finally broke their marriage here in Malawi which has led to their separation since July 2004. He told the court that on a certain day, he was travelling from Blantyre to Lilongwe on duty. Whilst on the way, the Respondent phoned him on his cellular phone. She told him not to proceed to Lilongwe or else, she would bring a man home and sleep with him. He could not stomach this and he called it enough is enough.

The Respondent told the court that there was indeed a very big problem between the two. The real problem was with the Petitioner due to the issue of girlfriends. Whilst in Zimbabwe, the Petitioner had several girl friends and he has two children out of wedlock. These children have been brought up by the Respondent. The Respondent said that she used to find a lot of messages on the cell phone of the Petitioner and these messages were from girls. She could find a message saying "***Are you coming to night?***"

The Respondent explained that for long, they have been disagreements in their family. The Petitioner could beat her saying that she was not caring for the children he had from these different women . At one point he sent her to Zimbabwe for counselling. He later on followed her for discussions with the marriage advocates. But he told her that he had gone to a witchdoctor who had disclosed to him that the last born was not his. The Petitioner later came

back to Malawi and when she came, she found that he had taken all her belongings out of the house and had kept them with Stuttafords Removals. He had also changed all the locks at the house.

On several occasions, she said that the Petitioner used to beat her up. On one occasion, he beat her up because she had refused to sleep with him because he came home late. Then on the other occasion, he beat her up because she had bought SOBO from the SOBO company which was their business competitor. The Respondent gave other examples of cruelty. For example, he wrote her boss to dismiss her from work.

With regard to adultery, she denied the allegation. Whilst she confessed that they were on separation at one point, but the Petitioner used to visit her and they used to have sex. When she fell ill, her boss phoned the Petitioner and drove to Chipinga. At first she suspected malaria but the doctor later on told her that she was pregnant. She concluded by saying that she has lived up with all these problems and the Petitioner is fond of committing adultery.

Having narrated the evidence on record this far let me now look at the fundamental points in relation to the issue of jurisdiction.

In his Petition, the Petitioner has completely neglected to make any comment, positive or negative, on the issue of domicile. The Respondent in her response to the Petition has also remained silent on this issue. She has done the same in her cross-petition. What is also vexing about this case is that both learned counsel have remained silent on this very important issue of domicile. I do not know whether such silence is due to ignorance of the provisions of the law or it was a calculated move by both sides so that they do take chances with this court.

As per Section 2 of the Divorce Act (Cap 25:04) of the Laws of Malawi, the jurisdiction of this court to entertain divorce petitions, such as the one before me, depends on whether indeed it can be said that the Petitioner is domiciled in Malawi. It is therefore very crucial that I should first address my mind towards this issue before I can conveniently proceed to analyse the evidence before me.

Let me put it on record lets we are engaged into a deliberate misunderstanding that I found the approach of both counsel very casual in this case not go give the question of domicile the serious scrutiny that it deserves. I observed that the way the parties had argued their case appeared as if they had given a foregone conclusion that these two Zimbabwean nationals are domiciled in Malawi. This is indeed very unfortunate and extremely unusual. It is therefore not amazing that when the petitioner commenced his testimony he went straight into cruising gear arguing the grounds he relies on for the court to grant him relief in the case and did not in the least seem to bother about first establishing the issue of domicile.

Similarly when the Respondent embarked on her defence she too went into cruise gear without being bothered with the question of domicile. She just went straight to start explaining about her husband's adultery. The concept of domicile does not require the two parties to silently consent and waive it. It actually requires proof in a court of law. It was therefore incumbent upon the petitioner to bring proof that he was now domiciled in Malawi. I therefore take it that despite the fact that these two parties had taken a very casual approach, it is the duty of this court to make a definite decision on the question whether the Petitioner and Respondent are domiciled in Malawi.

This is more so in light of Section 2 of the Divorce Act, which is quite plain and unequivocal on the subject who qualifies for the court's jurisdiction. If the Petitioner is domiciled in Malawi, I will certainly proceed to determine this case. If on the other hand I am not then I shall not proceed but throw it away. In the decision of Hon Justice Mead in the case of **Whitelock vs Whitelock** (1978 – 80) 9 MLR 43, there the question of domicile was taken up as a preliminary issue. The decision by Mead J is very relevant to the case before me because in that case, it was held that a court cannot assume jurisdiction even by consent of the parties where, by reason of the Petitioner's lack of a Malawian domicile, it otherwise has no jurisdiction. I therefore need to be independently satisfied about the true domicile of the Petitioner. Going by the evidence on the Petition and the one orally given, the Petitioner is a Zimbabwean citizen. The Respondent too is a Zimbabwean citizen. What has brought them to Malawi is employment whereby the Petitioner is the Managing Director of Dairy Board Malawi. In other words, if it

were not for this job, the Petitioner and the Respondent would not have been on the soils of this country.

Turning to the law, a person's domicile is a person's permanent home. On the onset therefore, I find that there is nothing else that connects the Petitioner to Malawi a part from employment. If he loses his job today, he goes back to Zimbabwe. I also take judicial notice of the fact that the company the Petitioner is working for is Zimbabwean controlled therefore all his allegiance is owed to Zimbabwe. With due respect to both parties including counsel, this is not a case whereby this court would assume jurisdiction. The Petitioner is not at all domiciled in Malawi. There is not even a scintilla of indication that he has made attempts to be domiciled in Malawi. One does not become domiciled in Malawi by mere working here. This is a case which was completely misconceived to be filed with this court.

It is now settled law from the cases of **Whitelock vs Whitelock** (earlier cited) **Bond vs Bond** (1984 – 86) 11 MLR 87 that a person's domicile of origin adheres to him unless and until there is satisfactory evidence to show that it has been displaced by a domicile of choice, which domicile is only acquired if it is affirmatively demonstrated that the propositus has formed a settled intention independent of any external pressures to indefinitely reside in that domicile of choice. This is not the case in this matter as nothing of that fact has been shown.

I therefore find that the Petitioner is not at all domiciled in Malawi as such, I cannot assume jurisdiction in this petition for divorce. From the evidence on record, it would appear that the parties herein easily go to their home of origin Zimbabwe. For example, it is on record that the Respondent has even been sent to Zimbabwe for counselling and the Petitioner later on followed. In that same vein, the Petitioner may as well file the case with the High Court of Zimbabwe, which has jurisdiction over them. Moreover, Harare is just a stone throw away from Blantyre. I therefore dismiss this petition without even going into the details of its merits for want of jurisdiction. I hereby do dismiss the Petitioner's petition with costs.

**PRONOUNCED** in open court this 14th day of November 2006 at Blantyre.

M. C. C. Mkandawire  
**JUDGE**