IN THE SUPREME COURT OF APPEAL SITTING AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 11 OF 2022

[Being Matrimonial Case Number 2 of 2017 at the High Court, Lilongwe Registry]

BETWEEN

RICARDO ANDRE TEIXEIRA ALMEIDA — APPELLANT

AND

SHENAZ PETER BHAGWANJI ALMEIDA — RESPONDENT

CORAM: THE HON. CHIEF JUSTICE

HON. JUSTICE L P CHIKOPA SC JA

HON. JUSTICE F E KAPANDA SC JA

HON. JUSTICE H POTANI JA

HON. JUSTICE J KATSALA JA

HON. JUSTICE I C KAMANGA JA

HON. JUSTICE M C C MKANDAWIRE

Chilenga, M.[Mr.] of Counsel for the Appellant

Soko, K.[Mr.] of Counsel for the Respondent

Masiyano[Ms.], Clerk

JUDGMENT /ORDER

The respondent is a Malawian citizen. The appellant is a Portuguese citizen. Subject to what we say hereinafter they are husband and wife. They have been husband and wife for upwards of seven years in the course of which they have resided in several countries *inter alia* Malawi, Portugal, South Africa, Angola and Venezuela. There is one child out of this marriage. Her name is Sureya Tillman Bhagwanji Almeida.

The story as told by the parties is that their marriage was celebrated three times. First in Portugal on April 14, 2009. Then at the District Commissioner's office in Lilongwe on July 13, 2009 and finally at Maula Catholic parish on July 25, 2009.

The story continues that on June 21, 2016 the respondent arrived in Malawi with the child of the marriage. According to an affidavit sworn by the appellant, whose contents in that regard are not in dispute, she had come to Malawi to sort out the said child's immigration papers. She came with the appellant's consent. According to the terms of such consent the respondent and the child were meant to be back in South Africa on June 24, 2016.

It was not to be. It turns out that the respondent had, filed on her behalf on June 16, 2016 i.e., before she and the child were in Malawi, a petition for the dissolution of her marriage to the appellant. She premised the petition on the appellant's alleged cruelty to her and the fact that the marriage had, in her view, irretrievably broken down.

On June 25, 2016 she got interim relief namely an order granting her temporary custody of the child until the divorce proceedings were determined and an injunction restraining the appellant from taking the child out of Malawi. For the record the order of injunction was vacated on July 29, 2016 while the custody order subsisted until this Court's pronouncements thereon on December 20, 2022.

Above we have spoken of the parties having had three celebrations of their marriage. It must be said however that in her divorce petition the respondent specifically sought the dissolution of her marriage to the appellant celebrated at the District Commissioner's office in Lilongwe on July 13, 2009 and the custody of

the child of the marriage mentioned hereinabove. The other two marriages i.e., the ones celebrated in Portugal and at Maula Parish, were never made the subject of these proceedings.

The appellant opposed the petition. On the one hand he contended that no marriage took place between the parties in Malawi. The one at the DC's office on July 13, 2009 was a sham. It was gone through for the mere purpose of satisfying the respondent's parent's religious inclinations. But more than that it was a ceremony tainted with fraud and illegality. Bribes were used to facilitate its celebration. Bans were published in his absence. Crucially he contended/contends that it was celebrated after the parties had already lawfully celebrated a marriage between them in Portugal on April 14, 2009. That they therefore had, on July 13, 2009, no capacity to enter into another marriage. It was consequently his concluding argument that the proceedings in the court below were themselves a sham. There was no marriage to dissolve.

On the other hand, the appellant contended that the only valid marriage entered into between the parties was the one celebrated in Portugal. That in relation thereto the courts in Malawi, including the court below, had no jurisdiction to hear and determine a petition to dissolve such marriage and make ancillary orders about it. The foregoing because the parties have a Portuguese domicile. The appellant as a domicile of origin and the respondent as an acquired domicile courtesy of her marrying the appellant.

In response to the above arguments above domicile the respondent contended that her acquired domicile was unconstitutional for being discriminatory against women on the basis of sex. See section 20 of the Constitution of the Republic of Malawi. It forced women on getting married to acquire the domicile of their husbands while not demanding the same of marrying husbands thereby treating similarly positioned persons differently.

After a full and fiercely contested trial the court below found that the parties herein, most certainly the respondent, were domiciled in Malawi. She was therefore competent to file for divorce in Malawi and the court below, like all Malawian courts, had jurisdiction to hear and determine her divorce petition. In its

view the petitioner never lost her domicile of origin i.e., Malawian domicile. More than that she could never have lost it. The common law position that wives acquired the domicile of their husbands on marriage was indeed unconstitutional for discriminating against women on grounds of sex. The respondent at all material times, and whichever way you looked at it, kept her domicile of origin.

The court below also concluded not only that the appellant treated the respondent with cruelty but also that the marriage between our parties had irretrievably broken down. It therefore granted the divorce. It also granted, subject to a litany of conditions, custody of the child to the respondent. The appellant was granted visitation rights.

Not being happy with the judgment the appellant appealed. Many grounds of appeal were filed. Fifty actually. For purposes of this appeal and for reasons that will become obvious hereinafter it is enough to say that the appellant in the main faulted the trial judge's conclusions on jurisdiction and its understanding of cruelty. He also hotly contested the trial court's grant of custody of the marriage's child to the respondent and the nature and extent of the visitation rights granted to him.

In different circumstances we would have had a lot to say about the grounds of appeal. We would have found them too numerous and mostly crafted in blatant disregard of the guidelines for drafting grounds of appeal set out in **Dzinyemba t/a Tirza Enterprises v Total** MSCA Civil Appeal Number 6 of 2013 and **Dr. A P Mutharika & Another v S K Chilima & Another** MSCA Constitutional Appeal Number 1 of 2020**[The Elections Case]**. In point of fact, we would actually have had little difficulty in striking out most of them. We will however, again for reasons that will become obvious later herein, not go down that road.

Instead, we quickly remind ourselves that this is a divorce case. The respondent was/is seeking the dissolution of her marriage to the appellant and custody of the child of the marriage. And like in all divorce cases the first question that must be asked and answered is whether the trial court, in the instant case the court below, has the requisite jurisdiction to hear and determine the matter.

Whether or not a court has jurisdiction in a divorce matter depends on the parties' domicile. See **Bonhomme v Bonhomme & Another**[1999] MLR 45 and **Msindo v Msindo** [2006] MWHC 15. In the case under consideration the court below concluded, as a matter of law, that the respondent was at all material times domiciled in Malawi. It thus further concluded that it had jurisdiction to hear and determine this matter.

In this Court the appellant contends that the parties herein do not have a Malawian domicile. They both have a Portuguese domicile. Him because he has always had Portuguese domicile courtesy of Portugal being his country of birth and where he is permanently resident. The respondent following her marriage, in Portugal, to the appellant who, as we have said above, has Portuguese domicile. In his opinion Malawian courts, including the one below and therefore this court, do not have jurisdiction to hear and determine this matter.

His reasoning in relation to the above is simple enough. He believes it settled law that a married woman loses her domicile of origin upon marriage. She adopts that of her husband. He cited the cases of **Bonhomie v Bonhomie**[supra], **Chimasula v Chimasula**[2007] MWHC 15 and **Hilliard Kay v Norah Kay** High Court of Malawi, Matrimonial Cause Number 11 of 2015[unreported]. In the instant case the respondent was married to the appellant who had, at all material times, Portuguese domicile. The respondent, originally of Malawian domicile, in the appellant's view lost the same upon her marriage to the appellant and adopted her husband's. At the time of filing the divorce petition herein both the respondent and the appellant did not, in the further view of the appellant, have Malawian domicile. The Court below could not therefore have had jurisdiction to hear and determine this matter. Whatever happened in that court could only have been an exercise in futility.

Beyond domicile and jurisdiction, the appellant also raised the question whether the marriage which the respondent wanted dissolved in the court below was a marriage at all. Whether it could therefore be the subject of a divorce petition. In his view the answer is negative in both respects. In the respondent's opinion the marriage celebrated at the District Commissioner's office on July 13, 2009 was a sham and thus incapable of dissolution. Why because on the date that it was

celebrated the parties did not have the capacity to marry. They were already husband and wife courtesy of a marriage celebrated in Portugal on April 14, 2009. It was his further view that if there was any marriage to be dissolved it was that celebrated in Portugal. Just that, and as has been argued above, Malawian courts have no jurisdiction in relation thereto the respondent and the appellant both being domiciled in Portugal.

The respondent holds views diametrically opposed to the appellant's. Firstly, she contends that she never celebrated a marriage with the appellant in Portugal. There was no evidence, and the appellant provided none in her view, that the parties celebrated a marriage in Portugal.

The respondent admits that the appellant placed before the court below and this Court documents intended to show that a marriage was celebrated between the parties herein on April 14, 2009 in Portugal. The said documents are, in her view, inadmissible for want of authentication and proper translation. They did not comply with section 12 of the Authentication of Documents Act. The section provides as follows:

> *'notwithstanding sections 11 and 12, a document signed in any country or place in which the Convention is in operation shall be sufficiently authenticated if authenticated by a certificate or 'apostille', in the form set out in the Second Schedule, signed by any person designated in that country or place for the purposes of the Convention as an authority competent to issue a certificate or 'apostille'*

She also cited two cases in support of her position. The first is **In the Matter of GM[a female infant] presently in the care of S. Kaw[nee M.] of C. Village, Lilongwe**, Adoption Case Number 09 of 2015 where the Court said:

> *'in order for the courts in Malawi to ensure the documents on which it places reliance are genuine and are executed by persons who indeed hold the office they claim to hold, it is important that only documents that are properly authenticated are tendered'.*

The other is that of **Laudon Chiputu v Lezina Mtambo & Others** MSCA Civil Appeal Number 34 of 2013 where this Court said:

> *'it has to be remembered that the language of the Courts in this country is English. Documents which are not in English have to be translated and authenticated. In criminal cases this is governed by section 164 of the Criminal Procedure and Evidence Code. In civil causes, in respect of proceedings in the High Court this is governed by section 29 of the Courts Act, which entails that we refer to the Rules of the Supreme Court 1999 for practice and procedure. In particular, for exhibits, regard must be had to Order 38 Rule 21 and Order 41 Rule 11 and 12 more particularly, rule 12/18 and section 6 of the Authentication of Documents Act on translation of documents in foreign language and certification thereof, see section 6. When this is not observed, as was in this case, the interpretation of the documents depends on an individual's understanding of the language: which is subjective. It is our view that the interpretation of the documents by the Judge in the Court below was subjective'.*

Applying the above to the instant case the respondent contends that the purported marriage certificate from Portugal was not authenticated in a manner by law provided. It was not the marriage certificate itself but a 'copy certificate' that was allegedly authenticated. To make matters worse the said certificate was not in English, the language of the Court. The purported certificate cannot therefore be received in evidence as it stands. It was also not officially translated in the manner set out in the **Chiputu** case. It is in those circumstances that the respondent urges this Court to find that there is no evidence establishing, on a balance of probabilities, that a marriage was celebrated between the parties herein in Portugal as alleged or at all. The marriage celebrated at the District Commissioner's office in Lilongwe on July 13, 2009 was therefore valid. She and the appellant both had capacity to contract the same. It is a marriage capable of being the business of the court below and capable of dissolution. And the said court proceeded properly when it dissolved it and made the ancillary orders.

Secondly and talking about domicile and therefore whether or not the Court below had jurisdiction to hear and determine this matter the respondent contends that

she has always had her domicile of origin i.e., Malawian domicile. That she never, her marriage to the appellant notwithstanding, lost the same in favour of that of her husband[i.e., the appellant]. The court below therefore had jurisdiction to hear and determine her divorce petition.

Beyond that and in response to the common law proposition that she lost her domicile of origin and assumed that of the appellant on her marriage to the appellant the respondent argues that such proposition is itself untenable for being unconstitutional. The common law relating to domicile as it stands and in so far as it, upon her marriage, costs a woman her domicile in favour of that of her husband is unconstitutional for being discriminatory against women. She could never therefore have lost her domicile of origin courtesy of such proposition despite being married to the appellant. The respondent therefore urges this court to conclude that at the time she filed the divorce petition herein she was as a matter of law still domiciled in Malawi and further that the Court below therefore had jurisdiction to hear and determine this matter.

Her arguments' starting point is the Constitution of Malawi's recognition of the equality of all before the law irrespective of their *inter alia* gender and secondly its abhorrence of discrimination on the basis of *inter alia* gender. See sections 13[a] and 20[1] of the Constitution. That to the extent therefore that the common law causes her to, on getting married, lose her domicile and assume that of her husband while not demanding the same of men the common law must be deemed to be discriminatory on the basis of gender against women and should, in tandem with section 5 of the Constitution, to that very extent be invalid.

Applying such argument to the instant case the respondent maintains that she has not lost her domicile of origin her marriage to the appellant notwithstanding. She was at the time she filed the petition herein still of Malawian domicile and the court below was competent to hear and determine the same.

We have carefully considered the arguments, the facts and the law relating to this appeal. We are of the collective view that this matter like all divorce proceedings revolves around a marriage and a party's or the parties' wish to dissolve the same. When a party approaches a court for divorce there is always the presumption that

there is a marriage to be dissolved. Then follows the next question which is whether the court before whom the petition has been placed has the power[jurisdiction] to hear and determine the petition. In practice it is the petitioning party that identifies the marriage to be dissolved and proves to the court *inter alia* that it has the requisite jurisdiction to hear and determine the matter.

Ordinarily there should be no doubt about the existence of a marriage to be dissolved. Occasions do however arise where the very existence of the marriage sought to be dissolved is called into question. In the instant case, and as we have said above, the petitioner i.e., the respondent identified the marriage to be dissolved as being that which was celebrated at the District Commissioner's office in Lilongwe on July 13, 2009. She in her evidence narrated how the same was contracted. Bans were published. Marriage counsellors were present. She even produced in the court below a certificate in relation to such marriage which this Court had the privilege to see. When the respondent thus talks of her being domiciled in Malawi and of the court below having had jurisdiction to hear and determine the divorce petition she speaks in relation to that marriage.

The appellant of course insists on the one hand that there was no valid marriage celebrated at the District Commissioner's office in Lilongwe on July 13, 2009 while on the other contending that the only valid marriage between the parties was that celebrated in Portugal on April 14, 2009.

Whichever way we look at this appeal it is obvious that the first question to be considered in this case is the valid existence of the marriage celebrated at the District Commissioner's office on July 13, 2009. We will not belabor the issues. In that regard we must reiterate the fact that we have we have had occasion to look at the arguments, the facts and the law relating to this case. It is our most considered view that there are facts which, notwithstanding the perspective from which one looks at them point to the fact that that there was indeed celebrated in Portugal a marriage between the parties herein on April 14, 2009. The respondent herself in correspondence with the appellant referred to such marriage ceremony. The appellant's mother[Maria Sampaio] did the same. The appellant's friend[Ricardo Costa Peixe] did the same. There is even a letter from the District

Commissioner Lilongwe District Assembly dated March 10, 2009 certifying the respondent's capacity to marry. The conclusion is inescapable. Even if one disregards the documents disputed by the respondent there is more than enough evidence to show, on a balance of probabilities, that a marriage was celebrated by the parties in Portugal on April 14, 2009.

Another conclusion is equally inescapable. The parties could not have validly contracted a marriage at the District Commissioner's office in Lilongwe on July 13, 2009. They clearly lacked the requisite capacity. They were already married courtesy of the marriage celebrated in Portugal on April 14, 2009. And the marriage of July 13, 2009 not having been in valid existence it is clear that the proceedings in the court below to dissolve it were an exercise in futility. A nonexistent marriage is incapable of dissolution. The discussions on domicile and jurisdiction in the court below were, in so far as they related to the marriage of July 13, 2009, irrelevant. If there was a marriage to be dissolved it is that which was celebrated on April 14, 2009 in Portugal. Unfortunately for the respondent that marriage was not before the court below and cannot be before this one.

But even if the marriage of April 14, 2009 was before the Court below we are of the firm view that the said Court would not have had jurisdiction to hear and determine a divorce petition in relation thereto. Neither the appellant nor the respondent was domiciled in Malawi at the time the petition was filed. The appellant was domiciled in Portugal. He had always had Portuguese domicile. The respondent, in so far as the law presently stands, acquired Portuguese domicile upon marrying the respondent.

We of course take cognizance of the sentiments from the Court below and the respondent that the common law position about domicile specifically that married women take on the domicile of their husbands on marriage is unconstitutional for being discriminatory against women. We must say with the greatest respect however that such a discussion is otiose in view of the nonexistence of the marriage the respondent asked the Court below to dissolve.

Beyond that we should also restate the fact that there is a procedure to be followed when a court seeks to determine the constitutionality of any law. Key is

the need to empanel a Constitutional Court sitting of the High Court of Malawi. There is also the need to hear The Honorable the Attorney General's position on the law sought to be declared unconstitutional. See **Kafantayeni v Attorney General** Constitutional Case Number 12 of 2005[2007] MWHC 1. The foregoing not having been complied with in the court below we doubt whether the nullification of the common law position on domicile pronounced by the Court below would have withstood the scrutiny of this Court.

Coming back to the appeal before us and proceeding on our above debates it is our reasoned conclusion that the order pronounced by the court below dissolving the 'marriage' celebrated on July 13, 2009 between the parties has no leg to stand on. It is hereby set aside.

Similarly set aside is the order granting custody of the child of the marriage to the respondent and visitation rights to the appellant. It was based on an invalid order dissolving the 'marriage' between the parties herein.

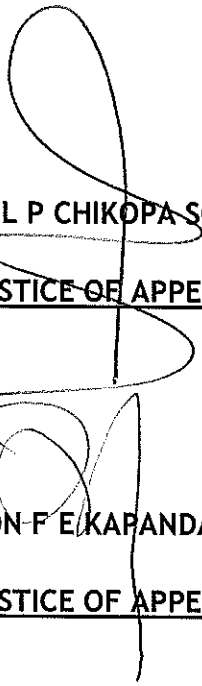
Having said the above, we are aware that this matter is as much about the 'marriage' between the said parties as it is about the custody of the child born out of such union. There is, in other words, the status of the union of the parties notwithstanding, a custody battle raging between them. In the absence of a court order the parties would ordinarily be at liberty to agree on a new regime about their respective access to the child. But, as seems to be the case, because they are unable to agree they are at liberty to approach the Child Justice Courts for an appropriate order. Or orders. Well knowing, we should emphasize, that a child is in terms of section 23[1] of the Constitution of the Republic of Malawi entitled to be brought up by both parents. In the same way, we must add, that a child's parents are entitled to bring up their child.

About costs these are always in the discretion of the court. It is the norm however that they follow the event. In the circumstances of this case, we see no valid reason why they should not. The appellant will therefore have the costs here and below.

Dated at Blantyre this 11th day of July, 2022.

HON R R MZIKAMANDA SC

CHIEF JUSTICE



HON L P CHIKOPA SC

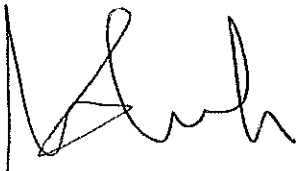
JUSTICE OF APPEAL

HON F E KAPANDA SC

JUSTICE OF APPEAL

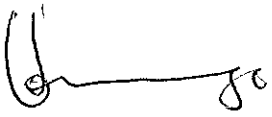
HON H POTANI

JUSTICE OF APPEAL



HON J KATSALA

JUSTICE OF APPEAL



HON I C KAMANGA

JUSTICE OF APPEAL

HON M C C MKANDAWIRE

JUSTICE OF APPEAL