

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

CIVIL APPEAL NO. 47 OF 2005

BETWEEN

JOHN GOMANI PETITIONER

AND

ELISHA CHITENJE RESPONDENT

CORAM : HON. JUSTICE MZIKAMANDA
: , Counsel for the Appellant
: , Counsel for the Defendant
: Mr. Kaferaanthu – Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is an appeal from the decision of the Second Grade Magistrate sitting at Lilongwe. The appeal is opposed. There is a cross-appeal.

The background to the matter is that the Respondent petitioned for divorce on the grounds that the Appellant was no longer interested in her, the parties having

been married at custom for fourteen years. The parties reside in Area 25 A where the Respondent does some business of selling flour. There is a block of a building rented out by the parties. For four years prior to the petition being made the Appellant never slept in her house and at times used to come to the house and beat her up. She lost some teeth, one time fainted as a result of the beatings. The Applicant has another wife with whom he lives. The matters had been discussed by marriage advocates and there was police intervention at times but the Appellant never changed his behavior. The Appellant had been trying to chase her away from the matrimonial home but she could not leave because she had no where to go to.

On his part the Appellant said that he suspected that his wife was unfaithful to him and he beat her up. He was reported to police and was jailed for six months by the court. He later agreed with her that they should return home in Machinga but when the day came she refused to go. Instead the Respondent and her son agreed to beat up the Appellant. He ran away but was pursued by many shouting thief! thief! He was kicked down and he got injured. He said that the Respondent never allowed him back into the matrimonial home as he went to live with his first wife. He said that the first wife had developed a dimba which the Respondent took over. Marriage advocates had failed to resolve the marriage problems between the parties.

The lower court found that the marriage had irretrievably broken down, a fact blamed on the Appellant. The marriage was dissolved. The Appellant was ordered to compensate the Respondent with K15,060.00 to be paid in

installments. The court also granted the custody of the two children of the marriage to the Respondent. The Appellant was to provide financial and material support for the maintenance and education of the children. The court also ordered the Appellant to pay K8,000.00 to the Respondent her sugarcanes damaged by children of the Appellant's first wife. The house was professionally valued at K290,000.00 and the court found that it was jointly owned by the parties. The court therefore ordered that the house be sold and the proceeds shared between the parties equally. In the alternative a party interested in keeping the house should give the other K145,000.00.

The grounds of appeal all relate to the orders the court made after granting the divorce. The cross-petition relates to failure of the court in not ordering the Appellant to build a house for the Respondent. Although the grounds of appeal are nine in numbered paragraphs they can conveniently be summarized into three namely:

1. That the learned magistrate erred in law in holding that there was joint ownership of the matrimonial house to which they were entitled to equal share.
2. That the learned magistrate erred in law in ordering the Appellant to compensate the Respondent for sugarcane's damaged by the Appellant's children with the first wife.

3. That the lower court erred in granting custody of the children of the marriage to the Respondent.
4. There was a supplementary ground of appeal being that the lower court lacked jurisdiction to deal with title to land (See Section 39(1) of the Courts Act).

As to the first ground of appeal it was argued that the matrimonial house was built by the Appellant with his first wife before the Appellant married the Respondent. There is therefore no joint ownership of the house (See Kambuwa v Kambuwa Civil Cause No. J-1 of 2000. (See also Malinki v Malinki 9 MLR 441). Where there is joint ownership the court has the task to ascertain the degree or percentage of ownership so that none of the parties should have an unfair advantage over the other. It was argued that the Respondent had no interest in the matrimonial home and therefore was not entitled to a share.

I must say that the lower court gave detailed consideration of the question of joint ownership of the matrimonial home. The lower court found that the matrimonial home was built with the contribution of the Respondent. She facilitated the supply of water to the construction of the matrimonial home. This in my view takes this property out of the category of property acquired before the marriage as in Ng'ong'ola v Kabambe 1964-66 ALR (Mal) 139 or the case of Malinki v Malinki 9 MLR 441 on the principle that a wife has no interest in the matrimonial home bought by the husband unless she directly or indirectly contribute to the purchase. This is not the case of a home being purchased. This is a case of a

home being constructed and the Respondent direct contribution is stated as supply of water. This does not and should not rule out indirect contribution, including the Respondent's encouragement and support to the Applicant during the period of construction.

It is clear that the intention of the parties at the time they constructed the house was for them to live in it as married persons.

The Argument that the Applicant built the house before he married the Respondent is without support both on the record from court below and in this court. The Appellant alleged that the lower court did not give him an opportunity to call witnesses to rebut the evidence of the Respondent on the acquisition of the house. That allegation is without support. In fact the Appellant spoke after the close of the Respondent's case and he was able to call at least one witness being his marriage advocate. Nowhere in the record is there an indication that the Appellant applied to the court to call additional witnesses and that that application was refused.

The Applicant also alleged that the court ruled on the matrimonial property when the same was not pleaded. That argument lacks merit. Divorce proceedings in the lower court are commenced in a very simple way which is user friendly to encourage easy access to court. Pleadings do not take a sophisticated form as is being suggested by the Appellant. Issues of distribution of matrimonial property and custody of children necessarily follow the dissolution of a marriage and these need not be specifically pleaded in divorce proceedings in the magistrate's court.

In the light of all the above, I am unable to see any merit in the first ground of appeal. The only aspect I would wish to disagree with the lower court is the level of proportion and the order of immediate sale. It is obvious from the material on record that the Appellant contributed substantially to the construction of the house in question. I think that the proper level of distribution should be $\frac{2}{3}$ (two-thirds) in favour of the Appellant and $\frac{1}{3}$ in favour of the Respondent. I order accordingly.

The order for immediate sale is set aside. If there is an immediate sale the Respondent will have nowhere to go to. She should continue to be on the plot until certain conditions are satisfied as I will put them below.

As to ground two of the appeal I am at pains to appreciate why the Appellant should be made to pay for the wrongs of his children of his first wife. The record of the lower court is not clear on the basis for such an order. The lower court was not sure about the extent of damage attributable to the said children. It is not clear how it arrived at K8,000.00. It is also not clear how K15,000.00 originally claimed was arrived at. The order for the Appellant to compensate the Respondent by K8,000.00 for damage to sugarcane is not supported by anything on record. It is quashed.

Regarding the granting of custody to the Respondent of the children of the marriage, there is nothing to show that the Respondent was not suitable to have the custody. The Appellant left the matrimonial home four years before and left

the children with the Respondent. The welfare of the children would best be taken care of by the Respondent. I find that custody was properly granted to the Respondent. (See also Somanje v Somanje Civil Cause No. 40 of 1983. In Re Chitaukire 8 MLR 38). Let me now deal with the supplementary ground of appeal.

The cross appeal is based on the ground that the lower court did not order the Appellant to build a house for the Respondent. This it is argued is an error.

It is indeed the position at customary law in Malawi that where a marriage is contracted under customary law of the matrilineal system, a husband is required to build a house for his wife at her village during the subsistence of the marriage. This is the position for any customary marriage contracted under matrimonial system regardless of which part of Malawi and regardless of minor differences in the various areas of the country. (See also Rose Magombo v Luka Magombo Court Appeal No. 23 of 2002). The purpose for the house being built at the home of wife emphasizes the “Chikamwini” system where the husband is expected to live in the village of the wife. However as we know customary law is as dynamic as society is. In recent times it has been recognized that a woman can choose to live away from her original home (See Section 39(1) of the Constitution). In those circumstances courts have accepted that the wife may choose where her house should be built, not necessarily being her home village.

The obligation for a husband to build a house for his wife subsists even after divorce and this is not meant to be punitive but to benefit the wife and children as a necessary consequence of the marriage. That obligation should not be shifted

to the wife even after divorce. It was therefore a serious omission that the lower court did not order the Appellant to build a house for the Respondent. I therefore allow the cross-appeal and order the Appellant to build a reasonable house for the Respondent at a place of her choice within one year. The house to be built is of reasonable but humble nature not too far removed from the one the Appellant would have built for the Respondent at her home, in as much as planning authorities would permit. This then means that the Respondent continues to live in the matrimonial home until the order to build a house for her is complied with. Upon the house being built the Respondent shall move to that house whereupon the court will make further order in relation to the matrimonial home. It is ordered accordingly.

PRONOUNCED this 7th day of July, 2009 at Lilongwe.

R.R. Mzikamanda

J U D G E