



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MATRIMONIAL CAUSE NUMBER 08 OF 2019**

**BETWEEN:**

**EM**

**PETITIONER**

**AND**

**UM**

**RESPONDENT**

**CORAM: JUSTICE M.A. TEMBO,**

Kaluwa, Counsel for the Petitioner  
Jumbe, Counsel for the Respondent  
Mankhambera, Official Court Interpreter

**ORDER**

1. This is the order of this Court on the petitioner's application for ancillary relief on dissolution of the marriage herein, namely, custody of children and for distribution of matrimonial property. The respondent contested the application.
2. The marriage herein was dissolved on 23<sup>rd</sup> April 2020 on the ground of the adultery of the respondent. The parties had previously married on 30<sup>th</sup> July 1999. They have two children, a boy born in 2003 and a girl born in 2010. The former is an issue of the adultery of the respondent.
3. The evidence of the petitioner is that he is currently fully taking care of the educational needs of both children even though he believes that he has no

obligation to take care of the first child due to the circumstances which led to the divorce in this cause.

4. He indicated that both he and the respondent, his former wife, are working and from their earnings acquired property in the course of marriage. He described the property that was acquired. There are a couple of cars. There is a Peugeot that he acquired and is in his own name. There is a Nissan X Trail that he co-financed with the respondent purchased at K7 500 000 to which he contributed K4 500 000 and is registered in the name of the respondent.
5. Then there is real property. There is a plot in Limbe East that he paid for at K4.3 million in November 2015 and is registered in the name of the respondent. There is a house at Area 47 in Lilongwe valued at K70 million which he purchased and which is in his name. There is a house at Namiwawa in Blantyre that he purchased and which was the matrimonial home and is in his name. There are two plots at Mpemba which he purchased and are in his name. There is a farm in Mangochi that he purchased and is in his name. There is also a Beach Plot in Mangochi that he purchased and is registered in his name. There is a plot at Area 46 in Lilongwe that he co-owns with his brother.
6. Then in the course of their marriage herein, the respondent inherited membership of a Dairy Association and with it entitlement to a hectare of land at Mpemba to conduct dairy farming. The parties jointly opened a Dairy farm business and he invested in the infrastructure and cattle to sustain membership of the association. The land is under the ministry of agriculture but there is potential it would be leased to the current farmers.
7. He asserted that in the course of their marriage, the respondent acquired a number of properties in her name mostly through inheritance some of which she jointly owns with her siblings including houses in Lilongwe.
8. With regard to the ancillary reliefs the parties agreed on joint custody and he agreed to take care of the educational and other needs of the children but they did not agree on what property was subject to be distributed as matrimonial property.
9. He stated that he believes that only the property that is in joint names or whose purchase and development was contributed to jointly is subject of distribution and in this case that would be the Nissan X-Trail in the respondent's name but co-financed by him and the respondent, the Limbe East plot in the respondents name and financed by him, as well as the Dairy

business. However, that the rest of the property financed by him and in his name remains his while the rest of the property in the respondent's name and financed by her or acquired by inheritance remains hers.

10. With regard to custody, he would prefer joint custody for the younger girl child only and that for the older boy he offers to sponsor his secondary school education but no joint custody.
11. With regard to maintenance of the children, he offers to cover fully the younger girl child's expenses until such a time that the respondent's situation is clearer. These expenses include homestead expenses, education expenses as well as medical expenses. Further, that in view of the fact that he will in the meantime continue to cover the educational and medical expenses for both children, and in view of his current earnings, he proposes a monthly living stipend of K150, 000 for the younger girl child's expenses when she is with the respondent.
12. On her part, the respondent asserted that recently the petitioner stated that he would not be responsible for the older child's education.
13. She then admitted that the petitioner indeed acquired some property in his name as alleged but that she contributed to the acquisition and maintenance of the said property. She asserted that she spent K300 000 on the Peugeot which was a non-runner to bring it into a running condition but has not claimed that sum of money. She added that the Nissan X Trail was co-financed with the petitioner but was registered in her name as a gift. She asserted that the petitioner co-financed the purchase of the Limbe East plot and registered it in her name as a gift.
14. With regard to the Area 47 house she asserted that she contributed by overseeing construction and also travelled to the Republic of South Africa to buy some tiles. She also paid school fees and provided moral support to the petitioner.
15. She asserted that the Namiwawa house was intended to be held jointly as it was the matrimonial home with rooms specially selected for each member of the family. She added that she also oversaw construction of this house and seeks that it be valued and distributed fairly.
16. With regard to the Mangochi Beach plot she asserted that it was registered in their son's name but surprisingly it is now in the name of the petitioner. She also noted that the petitioner refused, for no valid reason, to set up a trust to safeguard the future of the two children herein.

17. She then stated that with regard to the dairy business, there were already structures that she inherited from her father and that the petitioner was improving this business which was not only hers but also for her siblings such that any improvements were a gift and should not be subject to distribution as matrimonial property. And that the same applies to the various property that she acquired under the will of her father.
18. She then asserted that the proposed monthly maintenance of K150 000 does not cover water, electricity, transport, a housemaid, upkeep and clothes among others. She asserted further that the petitioner earns a monthly salary of USD30 000 and that in view of this the monthly expenditure that he must pay for the girl child's maintenance should be in the sum of K1 200 000 as follows: electricity K300 000, water K150 000, transport K200 000, housemaid K50 000, upkeep K400 000 and clothes K100 000.
19. She then asked that the matrimonial property be shared equally, that the petitioner pay monthly maintenance of K1 200 000 subject to annual review and that all property that she inherited not be part of the matrimonial property subject to distribution.
20. The petitioner replied as follows. He stated that he believes he has no obligation towards the older child who is not his child either biologically or by adoption. However, he undertakes to provide for his secondary education.
21. On the issue of property he asserted as follows: that he has no problem with the respondent sharing or being compensated for her purported contribution to maintenance of Peugeot. Such share being proportionate to her contribution. That he has no problem with the respondent retaining the Nissan X-Trail.
22. He asserted that it is not true that the respondent co-financed the purchase on Limbe East plot even though it is in her name. He reiterated that he fully financed its purchase after an offer in the respondent's name was made by the Malawi Housing Corporation.
23. He then asserted that it is not correct that the respondent contributed to the construction of the house at Area 47 in Lilongwe either as manageress of the project or otherwise. He reiterated that he entirely financed the purchase of the plot and construction of the house and oversaw the construction works. He pointed out that the claim that the respondent would even travel to South Africa to purchase construction materials is

completely without truth as there were no materials purchased from South Africa during the construction of this property. He added that it is also misleading for her to say she was paying school fees as he was constructing the house as this gives the impression that he was not paying school fees. He asserted that he has solely been responsible for and always paid the children's school fees throughout.

24. He then stated that he fully financed the construction of the Namiwawa house they were staying in at the time of the dissolution of their marriage while also paying school fees of the children and significantly contributing to household items and utilities. And that, in fact, they have always had a cook and maid whom he was paying for. Further, that he estimated to have spent over MK50-60 million in the construction of the property to date. He attached documents in the initial statement showing that he spent approximately MK30 Million between 2011 and 2014 in its construction. He insisted that it is entirely not correct that the respondent contributed to the construction of the Namiwawa house as a manageress or otherwise.
25. He asserted that the claim that the respondent would travel to South Africa to purchase construction materials is misleading. He pointed out that he once sponsored a vacation trip to South Africa and gave the respondent money to purchase some electrical equipment and mosaic tiles with support from his nephew who was staying there. Further, that if anything, the intangible contribution to this house by the respondent cannot be more than 10 percent. He indicated that he believes it would be unfair to him to have this house disposed of equally in view of such wholesome contribution from him just because they were staying in it.
26. He then asserted that it is not true to state that the Beach Plot in Mangochi was in the older child's name. He pointed out that the documents he exhibited clearly show that from the time of purchase of the said plot to the time the Government of Malawi granted a lease, the name has always been his.
27. He then claimed that it is not true that the dairy business they were running in Mpemba was meant as a gift to the respondent and her family. He pointed out that he would not have been involved in the business at all if that were the case.
28. He then noted that the respondent's claim that he has no right to claim any property in her name advanced to her in the course of their marriage from

her father's will is in fact consistent with his submission that individually owned property be left with the individuals.

29. He then observed that there is no property in his name to which the respondent financially contributed as his exhibited documents show.
30. He asserted that it is not true that he refused the respondent's suggestion of a trust with no valid reason. He pointed out that he told her that there is no relationship between him and her on which basis to create a trust. And that their daughter's needs and her future will be adequately taken care of as they have both moral and legal obligations as her parents to take care of her.
31. He then asserted that it is a blatant lie that he gets a monthly salary of USD30, 000. Further, that for the avoidance of doubt, as his most recent pay slip will show which he exhibited to his sworn statement, his regular basic gross salary is in fact K2, 698, 090 per month.
32. He pointed out that the respondent's claim of K1, 200, 000 maintenance for one child is preposterous for the following reasons:

- i. No one person uses K300, 000 for electricity let alone a household and the same goes for K150, 000 for water.
- ii. The claim for K200, 000 transport does not make sense to him. If it is transport for school, it obviously cannot be that high based on current going rates of a school bus from her current school. And, in any case, he already offered to handle her educational expenses personally.
- iii. The K400, 000 claim for upkeep does not make sense as well to him. He wondered if this is upkeep for school. And, how, even if that made sense, would a 10-year-old spend K400, 000 every month?
- iv. Clothes for a child cannot be a monthly expenditure.
- v. Her claims above are based on her unfounded and blatant lie that he gets USD30, 000 monthly which even if it were remotely true would not make the above claims reasonable expenses for a 10-year-old daughter.
- vi. The above claims are even more preposterous to him when it is factored in that he has to maintain his own household, pay for their daughter's educational expenses, pay for the older child's school fees all from his earnings stated above. He therefore maintains that K150, 000 per month for the daughter's expenses is sufficient and that during the time that she is staying with him, these costs should not be payable to the respondent. The Respondent has confirmed that she has some properties in her name and he believes she should be able to contribute to the daughter's expenses, but he has not taken that into consideration and decided to be fully responsible for the daughter.

33. This Court has to determine the question of distribution of matrimonial property that is jointly held by the former spouses herein, custody of the child of the marriage and maintenance of that child.
34. The parties agreed on joint custody of the younger girl child of their previous marriage. That agreement is accordingly recorded. This Court makes no custody order with respect to the other child whose parent is the respondent only but is not issue of the previous marriage herein by reason of the circumstances that led to the divorce herein.
35. The parties next filed arguments on the two remaining issues of distribution of matrimonial property that is jointly held by the former spouses herein and maintenance of the girl child.
36. The petitioner argued as follows. He observed that section 24 of the Constitution recognizes the right of women to be treated equal before the law. And that this includes the right to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. He observed further that this provision clearly enforces the idea that women, whether married or single, can acquire and own property either independently or in association with others, just like men.
37. He noted that it is clear from the foregoing that it is possible to acquire property independently even if one are married. And that this goes for both women and men. *Chingadza v Chingadza* Matrimonial Cause Number 43 of 2011 (High Court) (unreported) per Potani J and *Munthali v Mitawa* High Court Civil Appeal Number 1854 of 2001 per Tembo J (as he then was).
38. He also observed that section 24 of the Constitution also provides that women on the dissolution of marriage are entitled to a fair disposition of the matrimonial property that is jointly held with the husband. He pointed out that the phrase “jointly held” presupposes that there will be matrimonial property which is not jointly held. And that this is consistent in fact with the right above which is to be able to acquire and hold property independently, despite marital status. He added that this right to a fair disposition applies to women as much as it does to men. *Sikwese v Banda* MSCA Civil Appeal Number 76 of 2015 (unreported).
39. He added that section 24 of the Constitution also provides for the right to a fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

40. He then submitted that, since it is possible for parties to a marriage to own property to the exclusion of the other party, whether or not property acquired during the subsistence of the marriage is jointly held is a question of fact. *Sikwese v Banda* (Supreme Court of Appeal).
41. He also observed that, where a party acquires property independently such property would not be held jointly unless there are compelling reasons to the contrary. And that this applies for both men and women. Additionally, that the party claiming interest in the said property must offer proof of that interest. *Munthali v Mitawa*
42. He pointed out that the main consideration in answering this question is for the Court to look at the intention of the parties in acquiring the property. *Sikwese v Banda* Civil Cause number 34 of 2013 (High Court) (unreported).
43. He then submitted that a fair disposition of property would be that which takes consideration of the circumstances of each particular case which will differ on a case by case basis. He noted however, that the conduct of the parties including the intention, and contribution must certainly be considered. *Sikwese v Banda* (Supreme Court of Appeal).
44. He then submitted that where the property is jointly held and the interest is ascertainable, each party should get a share according to the same proportions. But that where such interest is not ascertainable, the Courts follow the maxim of equality is equity and will award 50 % to either party. *Kayambo v Kayambo and Sikwese v Banda* (Supreme Court of Appeal).
45. He then pointed out that the fact that a party is granted custody of children is not reason to make the other party liable to build a house for the other one. *Sikwese v Banda* (Supreme Court of Appeal) and *Kambale v Nkhoswe* Civil Appeal Case Number 208 of 2016 (High Court) (unreported). He then noted that the marriage in issue herein was a civil marriage having been registered at the District Commissioner's office at Lilongwe evidence of which is available on the record. He submitted that the law is clear that customary law does not apply to marriages under the Marriage Act. *Sande v Sande* Matrimonial Cause Number 46 of 2008 (High Court) (Unreported).
46. He then submitted that the requirement for a husband to build a house for his wife is a *chikamwini* principle under customary law. And that, in any case, what is in issue in this matter is neither a *chitengwa* nor *chikamwini* marriage and that issue does not arise. And that, even if this were a



customary marriage under chikamwini, it would not make sense for the offending party, i.e. the party guilty of adultery, to be built a house.

47. He added that, in fact, if this were a customary marriage, what would follow is what is called *kusudzula* where the party at fault is asked to pay some token sum as compensation for having broken up the family, instead of being rewarded for her wrong and punishing the innocent party. *Phiri v Phiri* [2007] MWHC 8
48. He then observed that the maintenance of children is a responsibility of both parents. *Sikwese v Banda* (Supreme Court of Appeal and High Court). And that he is obliged to provide maintenance for his children either biological or adopted. And that, in this case, he only has one child due from the marriage. Further, that it is in respect of this child that custody and maintenance responsibilities must be shared with the mother.
49. He asserted that the respondent mother is an able person with sufficient educational qualifications and property to be on her own and contribute to child's maintenance.
50. He then stated that as per his evidence the following is jointly held property, namely, plot at Limbe East, the Nissan\_X-Trail motor vehicle and the dairy Business at Mpemba.
51. He then argued that not all property acquired during the subsistence of marriage is distributable. And that all property in his name remains his. Further that this includes the Namiwawa House which he fully financed independently per the evidence.
52. He observed that all property in the respondent's name is to remain hers except for the Limbe East Plot and the Nissan X-trail Motor vehicle to which he substantially contributed which must be shared on a 50:50 basis. He asserted that the dairy farm business at Mpemba must be valued and shared proportionally according to contribution.
53. He asserted that he is not liable to build the respondent a house. And that maintenance costs are supposed to be shared.
54. On her part, the respondent indicated that she is seeking the following orders, namely, that she be granted a monthly sum of K1 200 000 as maintenance as a periodical payments order in respect of herself and the children; that the matrimonial property be shared equally as in 50-50 including the matrimonial house in Namiwawa and that the petitioner be ordered to pay the costs of this application.

55. She agreed with the petitioner on the provisions of section 24 of the Constitution on the rights of women to own property and to fair distribution of matrimonial property and fair maintenance on dissolution of marriage.
56. The respondent then cited a couple of cases on the rights of a child and made some submissions thereon. However, that was not necessary given that the parties have agreed on joint custody of the girl child herein and that has been recorded as forming part of resolution of this matter.
57. She next agreed with the statement of the law on distribution of matrimonial property as indicated in the case of *Sikwese v Banda* (Supreme Court of Appeal).
58. She then submitted that what is most important is the intention of the parties, and that the Namiwawa house was a property meant to be jointly held as it was intended to be the matrimonial home. She reiterated that the rooms in the house were custom made, that is to say, they were specifically chosen for each and every member of the household and she was the manageress whilst the said property was being built as she was taking care of and overseeing the construction and would be involved in running around acquiring the materials and the colours of the said house. She submitted that this property should be valued by an independent valuer to be mutually agreed so that there is fair and equal distribution of the said property.
59. With regard to the Area 47 house she submitted that it be regarded as property jointly held. She admitted that the house was financed by the petitioner, however, she asserted that she was the manageress whilst the said property was being built and was taking care of and overseeing the construction and would be involved in running around acquiring the materials and the colours of the said house. She added that her contribution was partly financial as she was paying school fees for the child, provided physical and moral support and that her contributions should not be disregarded. She further asserted that she would even travel to the Republic of South Africa to buy things like tiles, paints, fittings etc. and would take time off from her workplace to make sure that the house was being built.
60. She restated her arguments, as asserted in her sworn statement, concerning the dairy business at Mpemba, the Nissan X-Trail, the Peugeot, the various property she inherited and the Limbe East Plot.
61. She then submitted that, since costs follow the event, in the event that this Court upholds her arguments the petitioner should be condemned in costs.

See *Karonga Manufacture Association v DEMATT* (MSCA Civil Appeal number 17 of 1997).

62. This Court agrees with the parties on the statement of the rights of women as provided for in section 24 of the Constitution. The parties correctly submitted that in terms of section 24(1) of the Constitution it is provided that

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 –

(a) To be accorded the same rights as men in civil law, including equal capacity-

ii. To acquire and maintain property, independently or in association with others, regardless of their marital status.

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

(i) to a fair disposition of property that is held jointly with the husband.

63. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women states that women also have the equal rights as men to the property that they get with their husbands while they are married.

64. Before the Court disposes property as matrimonial property it must be satisfied that the same was jointly held by the couple. And this Court is indeed bound by the decision of the Supreme Court of Appeal in the *Sikwese* case at para 8.3.6.8 where it stated that

In our view, whether or not in any particular case property is held jointly is a matter of fact, and will depend on the circumstances of the case, including the conduct and intention of the parties in relation to the acquisition of the property; it is not a mere conclusion to be drawn from the existence of marriage. There must be evidence that the property is held jointly. Thus, where a woman, in exercise of the right conferred by section 24 (1) (a) (ii) of the Constitution, acquires property independently, prima facie such property belongs to the woman, and such property would not be held jointly, unless there are compelling reasons to the contrary. Similarly, where a man, in exercise of the right conferred by section 24 (1) (a) (ii) of the Constitution, acquires property independently, such property belongs to the man, and such property would not be held jointly, unless there are compelling reasons to the

contrary. Consequently, what is distributable upon dissolution of marriage is only property that is held jointly by the spouses.

65. With regard to fair disposition, this Court is also bound by the decision of the Supreme Court of Appeal which stated in the *Sikwese* case at para 8.4.4 that

Thus although section 24 (1) (b) (i) of the Constitution requires "fair disposition of property" for women on the dissolution of marriage, when assessing what is fair in the circumstances of a particular case all the other circumstances of the case must be considered; and certainly the conduct of the parties' including their intentions when acquiring the property, and their respective contribution, if any, in the acquisition of the property ought to be considered.

66. This Court must therefore look at all the circumstances of the case to determine the matrimonial property that is amenable to distribution between the parties herein. This includes looking at the conduct of the parties.

67. The impression that this Court has on the evidence in this matter is indeed that only the property that is in joint names or whose purchase and development was contributed to jointly be subject of distribution.

68. This Court does not find evidence to suggest that the Limbe East plot was given as a gift to the respondent by the petitioner. He simply financed the same as it had been offered to the respondent. This was jointly held by the two of them.

69. This Court recognizes that whilst the respondent has indicated that she participated in managing the construction and therefore development of the properties acquired by the petitioner, namely, the Namiwawa house and the Area 47 house there is no clear proof of the extent of that aspect. In any event, the petitioner disputes that claim and asserted that the said contribution was not significant to warrant an equal distribution of these two properties. In the circumstances, this Court finds that it would not be a fair distribution to order that the respondent get 50 per cent share in such properties. There is no basis for making such a finding.

70. This Court however finds that considering the length of the marriage herein and the real possibility of the contribution by the respondent in the development of the properties at Namiwawa and Area 47 she have the Limbe East property entirely. This is also considering that the respondent

was offered the said plot by the Housing Corporation and had a property interest as a result.

71. What this means is that the rest of the property financed by the petitioner and in his name remains his while the rest of the property in the respondent's name and financed by her or acquired by inheritance remains hers. Except that for the dairy business it is not clear what developments were made by the petitioner. These developments whatever they are cannot be taken as a gift to the respondent's family. These developments shall be valued by a mutually agreed valuer and be split in half between the parties. The respondent shall pay out the petitioner his half of the said developments once valued given that the proportion of contributions is unknown. The valuer shall be agreed within 14 days of this order and valuation shall be done within 28 days of this order.
72. The petitioner indicated that he has no objection to the Nissan X-trail being retained by the respondent and this Court orders that she retains the Nissan X-Trail herein.
73. The Peugeot shall be retained by the petitioner but, as he has accepted, he shall pay the respondent her repair costs in the sum of K300 000.
74. In summary, the respondent shall retain the plot in Limbe East, the Nissan X-Trail and half of the developments at the dairy business as shall be evaluated. The properties the respondent inherited are not part of the matrimonial property herein.
75. The petitioner shall retain the house at Area 47 in Lilongwe and the house at Namiwawa.
76. The two plots at Mpemba, the farm in Mangochi, the beach Plot in Mangochi the acquisition and development of which never concerned the respondent and the plot at Area 46 in Lilongwe that the petitioner co-owns with his brother cannot be part of the matrimonial property. These remain the petitioner's.
77. This Court now considers the issue of maintenance of the girl child herein. This Court observes that the application at hand concerns maintenance of the said child and not the respondent. There is therefore no material on which this Court can make any determination concerning the maintenance of the respondent notwithstanding reference to such by the respondent in her arguments.
78. This Court agrees with the petitioner that a monthly sum of K1 200 000 for the maintenance of the single child appears exorbitant and not well

founded when one considers the monthly earnings as proved in evidence. Whilst there is a real possibility that the petitioner earns money beyond his basic pay in other forms there is no proof of the magnitude of the same. The alleged sum of US\$30 000 cannot therefore be accepted without proof as that may be highly prejudicial.

79. This Court has considered the circumstances of the petitioner in view of his earnings and property holdings as well as the means of the respondent who owns properties as well. This Court has noted that the petitioner will be taking care of the school and other expenses of the girl child herein. This Court therefore orders monthly maintenance payments to be made by the petitioner by the 28<sup>th</sup> day of each month in the sum of K300 000.00. The parties shall agree on the mode of payment.

80. This Court has considered the circumstances of this matter and orders each party to bear its own costs on this application.

Made in chambers at Blantyre this 23<sup>rd</sup> September 2020.

M.A. Tembo  
**JUDGE**