



JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 149 OF 2006

**IN THE MATTER OF SECTION 145 OF THE REGISTERED LAND
ACT**

**IN THE MATTER OF CASE STATED FROM THE LAND
REGISTRAR**

BETWEEN:

BLANTYRE LAND REGISTRAR.....APPLICANT

- AND -

ELLIOT MATOGA.....1ST RESPONDENT

- AND -

PATRICIA MATOGA2ND RESPONDENT

- AND -

CHRISTOPHER WAYA3RD RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Kalua, of Counsel for the 2nd respondent

Tembenu, of Counsel for the 1st respondent

Applicant – Absent

3rd Respondent – Absent
Mr Thewethe – Official Interpreter

ORDER

Manyungwa, J

INTRODUCTION:

This matter comes to this court by way of case stated following reference to this court by the Land Registrar at Blantyre Land Registry. Section 145 of the Registered Land Act¹ gives the power to the Land Registrar to state a case to the High Court whenever any question arises with regard to the exercise of any power or performance of any duty conferred or imposed upon him. The said section is in the following terms:-

S145 “Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the High Court; and thereupon the High Court shall give its Opinion thereon, which shall be binding upon the Registrar.”

The Land Registrar therefore has referred this matter to this court by way of case stated seeking direction or determination of the following question of law:

“Whether in terms of the Registered Land Act, the Land Registrar is obliged to defeat the property rights of Mr Elliot Matoga by removing him as co – owner on the basis of the property distribution order issued by the Magistrate

¹ Registered Land Act, Cap 58:01 of the Laws of Malawi

Court sitting at Blantyre in Matrimonial Cause Number 202
of 2004 on the 10th December, 2004.

HISTORICAL BACKGROUND:

The first and second respondents were husband and wife at customary law until their marriage was dissolved by the Senior Resident Magistrate Court sitting at Blantyre in Civil Cause No. 202 of 2004¹. Upon the dissolution of the marriage, the Senior Resident Magistrate made an order ancillary to the dissolution of the marriage and ordered that the parties ‘matrimonial home’ be granted to the 2nd respondent. The said house, Plot Number SW8/757/112 Title Number Soche East KS 1/225 situated at Nkolokosa was registered in the parties’ joint names, or was jointly owned. The said order *inter alia* read:

**IN THE RESIDENT MAGISTRATE COURT SITTING AT
BLANTYRE**

BETWEEN:

PATRICIA MATOGA (MRS).....PETITIONER

- AND -

ELLIOT MATOGARESPONDENT

ORDER DISSOLVING MARRIAGE

UPON HEARING BOTH PARTIES, herein in person and through their respective Counsel; **IT IS ORDERED** as follows:-

¹ *Patricia Matoga V Elliot Matoga* Matrimonial Civil Cause No. 202 of 2004 (unreported)

1. **THAT** the marriage between **PATRICIA MATOGA** and **ELLIOT MATOGA** which was celebrated on the 5th day of October, 1996 at St. Columbus CCAP Church in Blantyre is **HEREBY DISSOLVED**

...

4. **THAT** on the question of distribution of matrimonial property, it is a well established law that a husband has an obligation to provide a house on marriage – *Matimati V Chiwaula* 3MLR 34 and in this marriage the respondent did not provide the same. Consequently, the matrimonial home at KS112 be granted to the Petitioner on condition that the title deed be transferred to her and she refund all the money, the Respondent paid in buying the said house.

...

Dated 10th day of December, 2004

Signed

MAGISTRATE

TO: Mr Elliot Matoga
ADMARC
LIMBE

Meanwhile, as the matrimonial dispute between 1st and 2nd respondents was going on, the 1st Respondent, Mr Matoga purported to sell the house KS/112 to Mr Christopher Waya the 3rd respondent who is currently resident in the United Kingdom. The sale was conducted through a certain Mr Harvey Kalamula, an agent for the 3rd respondent. The 3rd respondent left the

country for the United Kingdom before the said sale was completed. The purchaser, namely the 3rd respondent proceeded to lodge a caution against the property known as Plot Number SW8/757/112, Title Number Soche East KS1/225.

ISSUE(S) FOR DETERMINATION;

The main issue for the determination of this Court is whether the Land Registrar can remove the 1st respondent as a co – proprietor or co – owner of the land known as Title Number Soche East KS1/225 pursuant to the Senior Resident Magistrate’s Order dissolving the marriage made 10th December 2004.

THE LAW:

The starting point should be Section 39(2)(a) of the Courts Act¹ which provides as follows:

S39(2) “Notwithstanding sub – section 1 no subordinate court shall have jurisdiction to deal with, try or determine any civil matter:-

- a) Whenever the title to or ownership of land is in question save as provided by Section 156 of the Registered Land Act.”

Section 156 of the Registered Land Act² is in the following terms:-

S156 “Civil Suits and proceedings relating to the ownership or the possession of land, or to a lease or

¹ Courts Act, Chapter 3:01 of the Laws of Malawi

² Registered Land Act, Chapter 58:01 of the Laws of Malawi

charge, registered under this Act, or to any interest in any such land, lease or charge being an interest which is registered or registrable under this Act, or being an interest which is referred to in Section 27, shall notwithstanding the Courts Act, be tried by the High Court or where the value of the subject matter in dispute does not exceed £200, by the High court or a Subordinate Court held by a Resident Magistrate.”

The question therefore, is does a subordinate court have jurisdiction upon the proper construction of Section 39(2)(a) of the Courts Act to try or determine or indeed make a distribution order in a civil matter where title or ownership of land is in question as was the case, in the proceedings that were before the learned Senior Resident Magistrate in the lower court? In the case of ***Blantyre Sports Club V R. K. Banda & E. Mkangala***¹ my learned brother, Chimasula – Phiri J, on the rules of Construction of Statutes stated as follows:-

“The rules of construction of statutes is clearly stated in the case of ***Banda V Malawi Law Society***². Recently, this has been cited with approval in the Constitutional case of ***Eric Sabwera and Peoples Progressive Movement (PPM) V Attorney General***³ where it was stated as follows:-

‘The governing principle in the construction of a statute is accurately stated in ***Maxwell on Interpretation of statutes***⁴

¹ ***Blantyre Sports Club V R. K. Mkangala*** Civil Cause No. 61 of 2003

² ***Banda V Malawi Law Society*** 12 MLR 29

³ ***Eric Sabwera and Peoples Progressive Movement (PPM) V Attorney General*** Constitutional Case No. 1 of 2004

⁴ ***Maxwell on Interpretation of Statutes*** 11th Ed. Sweet and Maxwell 1962 at Par 1 - 2

‘A statute is the will of the legislature and the fundamental rule of interpretation, is that a statute is to be expounded ‘according to the intent of them that made it. See *Sussex V Peorage*¹. If the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words in themselves in such a case best declaring the intention of the legislature. See *Income tax V Pemsel*². The case of *Income Tax V Pemsel* is a well known authority for all those who aspire to an understanding of the interpretation of statutes. In other words, the first rule that a court has to consider when confronted with construing a statute is to give the statute the natural meaning of the words used. That is the court’s paramount duty Maxwell continues (op. cit at 4)

When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable, says Vettel, to interpret what has no need of interpretation. ‘*Absotula Sentential expositore non indigent*’...The underling principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from notions which may be entertained by the court as to what is just and expedient. See *New Playmounth Borough*

¹ *Sussex V Peorage* (1884) 11 CI & E, 143

² *Income Tax Commissioners V Pemsel* (1891) AC 534

*Council v Taranaki Electric Power*¹. The words can not be constructed, contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. See *Ornamental Woodwork Co. V Brown*². When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable but to expound it as it stands, according to the real sense of the words.”

It is clear, in my view, when one reads the wording of Section 39(2)(a) of the Courts Act, that the intention of Parliament was to exclude the Subordinate Court from having or enjoying jurisdiction in cases dealing with ownership or title to land. In my most considered opinion, the wording of Section 39(2)(a) of the Courts Act is very clear and unambiguous. The subsection clearly removes the jurisdiction from the magistrate courts not only in trying or determining any civil matter, but even in dealing with any civil matter whenever the title or ownership of had is in question save as is provided in Section 156 of the Registered Land Act. This is the plain and unambiguous meaning of the Section. Now, Section 156 which I have already quoted above provides that the jurisdiction of Civil Suits and proceedings relating to ownership or possession of land or a to lease or charge, registered under the Registered Land Act or to any interest in such land, lease or charge, being an interest referred to in Section 27, shall not withstanding the Courts Act, lie with the High court except where the value

¹ *New Plymouth Borough Council V Taranaki Electric Power Bd* (1933) AC 680

² *Ornamental Woodwork Co V Brown* (1863) 2 H & C 63

of the subject matter in dispute does not exceed £200, then in that case jurisdiction will lie with the High Court or a subordinate court presided over by a Resident Magistrate. The effect of Section 156 of the Registered Land Act is to confer jurisdiction to the High Court, and only in those cases in which the subject matter does not exceed £200 will jurisdiction then lie concurrently with the High Court or a court of Resident Magistrate.

In the instant case, the value of the property in question was over MK600,000.00 when the current registered owners, namely the 1st and 2nd respondents purchased the same. The property was therefore more than the £200(MK400) that is provided for under Section 27 of the Registered Land Act, therefore in my considered view, the lower court, even if one were to argue that it had jurisdiction in the matter by virtue of Section 27 which it did not exceed its jurisdiction.

Mr Kalua who appeared for the 2nd respondent submitted that subordinate courts have jurisdiction to make ancillary orders upon dissolution of a customary marriage including orders touching on ownership of registered land. Mr Tembenu, for the 1st respondent on the other hand, submitted that while the subordinate courts have jurisdiction over customary law marriages regarding various issues, the same does not extend to determining property ownership or title whose value is more than £200, more so when the same is registered under the Registered Land Act. With all due respect to Counsel for the 1st respondent, in my judgement, that is not the correct position of the law. In the case of *Matimati V Chimwala*¹ the appellant, appealed against an order of the Mulanje Local Appeal Court which quashed a previous

¹ *Matimati V Chimwala* [1964 – 66] ALR Mal 34

maintenance order of the Milonde Local Court. The appellant and the respondent were married under customary law. At the time of the marriage, the respondent failed to carry out the customary duty to provide his wife a house and before the child of the marriage was born sent her back to her village. At first he made intermittent payments towards the maintenance of the child but then failed to do so for long periods. He then petitioned for divorce on the ground of the misconduct of his wife. A divorce was granted by the Milonde Local Court, and the respondent was ordered to pay the appellant a lump sum to build a house and to make monthly maintenance payments. On the respondent's appeal to the Mulanje Local Appeal Court, the court quashed this order and substituted another requiring him in general terms to care for his child.

The appellant appealed further against this order, seeking the restitution of the order of the Local Court. The High Court restored the order of the lower court except that instead of paying the appellant, Lizzie A Matrimonial £20, to build a house the respondent James A. Chimwala was ordered to pay £15. He was also ordered to pay £1 a month for the maintenance of the child until said child reached the age of 16 years. The court further held that under customary a man has an obligation to provide with a house when he marries, and if he divorces his wife before doing so this will not relieve him of the obligation. The learned Southworth, J had this to say at page 36.

“The three assessors advise the court that under the law and custom of their people, the respondent had an obligation to provide for his wife with a house when he married her. They express dismay that he should have failed to

discharge this duty for a period of more than two and half years before the present case came up between him and his wife and that he should so callously have neglected his duty to make proper provision for his child. The assessors agree that since the latter half of 1963 the appellant has had good cause to divorce his wife. In view of this past conduct, however, all three of them emphatically say that the granting of divorce at this late stage can not relieve him of his obligation to provide his wife and child with a house in which to live. If he had carried out his duty to provide her with a house at due time, as they point out, the house would not have been pulled down when three years later her husband divorced her. So too as has been recognised both by the local court and by the local appeal court, the respondent had a continuing responsibility for the maintenance of his child. In view of his inattention to this obligation in the past it can not be regarded satisfactory merely to direct him in general terms to carry out his duty.”

I am in full agreement with Counsel for the 2nd respondents here, that whilst subordinate courts have jurisdiction over customary law marriages regarding various issues and that they can make ancillary orders regarding property, it is very clear however that where the value of the property in question exceeds £200, then by virtue of Section 156 of the Registered Land Act, such subordinate courts lose their jurisdiction. In such a case, jurisdiction lies with the High Court.

Furthermore, the property in question was Registered Land, and in my view, had the Senior Resident Magistrate been a little cautious, it would not have

ordered the way it did. Section 24 of the Registered Land Act provides as follows:-

- S24 “Subject to this Act,
- a. The registration of a person as the proprietor of private land shall confer on that person the rights of owner of that land as private land.
 - b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, subject to all implied and expressed agreements liabilities and incidents of the lease.”

And Section 25 of the Registered Land Act provides:-

- S25 “The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall be rights not liable to be defeated except as provided for under this Act and the Land Act and shall be held by the proprietor, free from all other interest and claims whatsoever
...”

In the instant case, it is very clear that the registered owners of the property in question are the 1st and 2nd respondents notwithstanding the fact that it is the 1st respondent who paid consideration for the said property. According to the provisions of Section 24, the key word is ‘registration’, and not

consideration. Once a person is registered as a proprietor of private land, then the registration in question confers on that person ownership rights of that particular property as private land. The 1st and 2nd respondents were therefore joint owners of the said propriety.

As regards the caution that was entered on behalf of the 3rd respondent, the provisions of Section 126 (1)(a) of the Registered Land Act are clear. The said section provides:-

S126 “Any person who

- a. Claims any unregistrable interest whatsoever, in land, or a lease or a charge
May lodge a caution with the Registrar forbidding the registration of the land lease or charge concerned and the making of entries affecting the same.”

Thus a caution is entered to protect the cautioner’s interest in the land but does not defeat the interests of the proprietor except indeed for restricting his or her power of disposal or in any way dealing with the property in a manner which is inconsistent with the cautioner’s interest or claim. According to the case of ***Smith V Morrison***¹ a caution confers on the cautioner a right to be heard in opposition to an application to register dealing.

In the instant case, the third respondent Mr Waya claims to have acquired rights over the property after paying valuable consideration to the 1st

¹ ***Smith V Morrison*** (1974) 1AllER 957 at 978

respondent Mr Elliot Matoga. There is indeed evidence that he paid such consideration.

CONCLUSION:

In these circumstances and by reason of the foregoing, it is my finding that the lower court exceeded its jurisdiction when it ordered that the house, a subject of these proceedings be given to the 2nd respondent, when the same was jointly owned. The lower court should have referred this aspect of the distribution of the matrimonial property to the High Court. As such I order that the order that was made by the lower court regarding the house be set aside and I further order that the caution that was entered by the 3rd respondent should be allowed to stand, pending determination of the matter or further order as regards the rights of the parties herein.

The Land Registrar is accordingly directed not to remove the caution on the basis of the order of the lower court, which has been set aside herein.

As to costs, I order that each party do bear its own costs.

Pronounced in Chambers at Principal Registry this 14th day of March, 2008.

Joseph S Manyungwa

JUDGE