



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL DIVISION
CIVIL APPEAL CASE NO. 113 OF 2017

[Being Civil Cause No. 4328/2016 in the Third Grade Court at Blantyre]

BETWEEN

ESTHER CHANZA.....APPELLANT

AND

FRANK CHANZA..... RESPONDENT

Coram: Hon Jack N’riva, Judge
Both parties present and unrepresented
Mrs. Mtegha Court Clerk and Official Interpreter

JUDGMENT

Introduction

This is an appeal against the decision of a Magistrate at Blantyre. The appellant being dissatisfied with the judgment of the Court, appealed to this court against the judgment.

The parties got married under custom in 1993 and have three children. The Complainant in the lower court was the respondent. He told the court that the parties are having marital problems therefore he did not want to continue with the marriage.

The trial Court after coming to the conclusion that the parties' marriage had indeed broken down, dissolved the marriage and made the following order:

- The Complainant [now respondent] should compensate the defendant [now appellant] a sum of K100, 000.00 to be paid in K20, 000.00 every month's installment.
- Joint custody of the children.
- Petitioner to continue supporting the children with school fees, clothes and food.
- Distribution of matrimonial property including sale of a plot with two houses so that the parties should share the proceeds.

Grounds of Appeal

The appellant raised the following grounds of her appeal:

- The lower court erred to order sale of the house since the respondent did not construct a customary house for the appellant as is required by law.
- The lower court did not order payment of maintenance and school fees.
- The compensation that the lower court ordered was not enough.

Sale of the Houses

Regarding the appellant's grievance that the respondent did not construct a house for her, evidence shows that the respondent constructed a house but it collapsed. Therefore, the question for consideration is whether the court erred to make the order to sell the houses in Soche-Manje. This question arises on whether the court took the issue into consideration. The court below heard the parties on the question of matrilineal matrimonial home. However, the court did not make a determination on that point.

In the court below, the respondent said he constructed a house for the appellant. The appellant said that that was not true. She said the respondent only made a small contribution.

In this court, the appellant said the respondent constructed a house for the appellant, but the house collapsed. However, the appellant's main concern is not that she wanted a house for her at her home. She was against the sale of the house in Chilobwe because the respondent had not constructed a house for her at her home village.

I do not find fault with that decision that the Court made on the distribution of the houses. However, as things have turned out, the parties, according to the respondent, have not sold the house. The respondent said he did not sell the houses for the sake of the children.

All this suggests that the house was meant and is meant for the use of the whole family. The house is not property that can be said to be property for exclusive ownership to one of the parties. It is matrimonial property. The house had been for the benefit of the whole family including the children. The respondent also concedes that the house is, at present, being used for the benefit of the children. Now that the children are with the appellant, fairness would dictate allocation of the houses to the appellant.

For that reason, and for the reason that the house in the appellant's home collapsed, I set aside the trial court's decision to sell the house. Instead, I order that the plot should remain with the appellant for her and the children's benefit.

This has to be appreciated from the angle of court's powers of post- marriage distribution of matrimonial property.

Section 24 (1)(b) of the Constitution recognises women's right to full and equal protection by the law and, among other rights, that on the dissolution of a marriage, they ought to be entitled to a fair disposition of property jointly held with the husband. On the other hand, section 74 of Marriage, Divorce and Family Relations Act provides that upon the dissolution of a marriage, the court has to equitably divide and re-allocate property.

The Constitution tackles the issue of matrimonial property from the general angle of women's rights and equal protection. The Marriage, Divorce and Family Relations Act looks at the instances that the courts ought to take into account in considering the division and reallocation of property. That law provides for the parameters of the circumstances that the courts ought to take into when distributing the property. These include

- (a) The income of each spouse;
- (b) The assets of each spouse;
- (c) The financial needs of each spouse;
- (d) The obligations of each spouse;
- (e) The standard of living of the family during the subsistence of the marriage;
- (f) The age and health of each spouse; or
- (g) The direct and indirect contributions made by either spouse, including through the performance of domestic duties.

It has been suggested that women are a vulnerable in issues of concerning the institution of marriage and, among other areas, distribution of matrimonial property. For that reason, the courts have to protect the rights of women in issues of distribution of matrimonial property. See, e.g., Chikopa, L. (2015). "Judicial activism and the protection of the rights of vulnerable groups in Malawi" in Southern African Litigation Centre, *Using the courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi, and Zambia*. Johannesburg: Southern African Litigation Centre.

Mwaungulu J, as he then was, in *Stewart Kamphoni v Violet Kamphoni* Matrimonial Cause No. 7 of 2012 discusses what amounts to fair disposition of property by saying that fairness is the hallmark and that fairness is wider than equality:

...achieving equality between the spouses would result in unfairness to a wife. For example, if the wife has custody of infant children, equal allocation of matrimonial property will not be fair.

In this matter, it is on record that the respondent is working. The appellant is not working. It is apparent that the appellant had no assets on her own. The appellant as, a matter of fact, has the custody of the children of the dissolved marriage. She was dependent on the respondent for her day-to-day survival. Further to that, she said she was not enjoying good health.

Taking into account all the circumstances of the case, I order that the houses should be with the appellant.

Failure to make an order of maintenance

I now move on to the ground of appeal regarding the failure of the court to order payment of maintenance. The evidence shows that the lower court ordered that the respondent should continue supporting the children with school fees, clothes and food. The Court left it to the respondent to be meeting the financial needs of the children.

I also do not find fault with that decision. Parents should be able to carry out their obligations towards their children without an order from anybody not even the courts.

The Court was mindful that it could make an order if the respondent failed to meet the obligations. There are quarrels as to whether the respondent is fulfilling the obligations towards the children.

On this point I order that the parties should appear before the trial court for an order of maintenance taking into account the respondent's means. The court should also take into account the fact that I have ordered the houses not to be sold and that there would be a collection of rentals from one house. The Court should set down the matter within fourteen days of this Judgment.

Inadequacy of Compensation

Regarding the last ground of appeal relating to compensation, it is common for courts dissolving customary marriages to make orders of compensation. Reasons for arriving at figures are usually at large. In the trial court, the reasons for making the order of compensation were that the respondent was cruel by sleeping out at his girlfriend's house. Further, the respondent brought a girlfriend to the matrimonial

home when the appellant was sick. The court found this to be evil and ordered the compensation.

In this court, the appellant brought in new issues. The issue is that she is sickly. She attributes her poor health to the acts of respondent. Be that as it may, there seems to be no basis on which to find that the court erred in arriving at the compensation. Therefore, I will not tamper with the lower court's order.

The appellant argued that she was not paid the compensation. The respondent had to comply with the trial Court's order.

I order the respondent to make the payment within the before the expiry of twenty-one (21) days of this order.

Conclusion

In conclusion, I order that the houses that were to be sold, should not be sold but should, instead, be in the custody of the appellant. Secondly, the lower court should assess and make a determination on the issue of maintenance of the children. Finally, this Court dismisses the appeal on the issue of compensation. The respondent is ordered to pay the compensation that the trial court ordered.

Costs

Each party shall meet their costs.

2nd June
PRONOUNCED in open court this 18th day of May, 2018 at Blantyre.

[Signature]
J N'RIVA

JUDGE