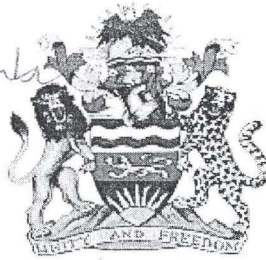


M/s. Temben & Masimba



JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MATRIMONIAL CAUSE No. 36 OF 2013

In the matter between:

HAYES THAKUR

PETITIONER

and

SHAMIM THAKUR

RESPONDENT

ORDER

nyaKaunda Kamanga, J.

The customary marriage between the petitioner and respondent was dissolved by the First Grade Magistrate sitting at Chiradzulu on 17 October 2013 after the parties had lived as husband and wife for eight years. The lower court dealt with the ancillary orders relating to custody of the children of the couple but remitted the record of the hearing to the High Court to determine the distribution of matrimonial property. The hearing failed to proceed on several occasions at the instance of the parties for varied reasons, including providing opportunity for attempt at out of court settlement. When the matter was finally heard on 14 February 2014 neither the petitioner nor his legal practitioner turned up for the hearing despite being duly served with the notice of hearing. Hence the hearing proceeded in the absence of the respondent. On 20 October 2014 the court also proceeded to issue an unless order for filing and serving submissions which none of parties has complied with to date.

The respondent requests this court that the matrimonial property be distributed equally between the parties, so that each party gets 50 per cent of the said property as the contribution of each spouse cannot be ascertained. The respondent relies on the s 24(1)(b)(i) of the Constitution of the Republic of Malawi which provides for fair distribution of matrimonial property. The

respondent refers to the case authority of *Kayambo v Kayambo*¹ which laid down a practical guide on how courts should approach the question of distribution of matrimonial property. The rule of the thumb is to discern from the facts what the intention of the parties was by drawing inferences from the party's conduct at the time the matrimonial assets due for distribution were being acquired. In some instances there may be an agreement express or implied that a spouse should have a share of the property should the marriage come to an end. The abovementioned case suggests that where the extent of the contributions by each spouse is certain then each spouse should get a share according to their ascertainable contribution. While in situations where the contributions by the spouses cannot be ascertained then the court will have to apply the maxim: 'equality is equity' and each spouse will have to get 50 per cent of the matrimonial property.

The respondent in her evidence she testified that the property which the parties acquired in the course of their eight years marriage appears on the marked /identified list that she filed in the lower court. These included:

1. a house in Njuli which she claimed she located the plot and they commenced construction in 2010;
2. two fridges which were bought in 2009;
3. two plasma flat screens which were bought together in 2011;
4. two beds from local carpenters;
5. cooker which was bought from Game stores;
6. Gas stove which was bought in Limbe;
7. dining set bought from Mapanga Furniture;
8. home theatre bought from Lilongwe;
9. glass coffee table bought from Mr. Aziz;
- 10.1 set of house curtains made from material bought from the Pound Shop;
- 11.a sofa set which respondent found it with the husband but worked on its maintenance;
- 12.office tables 4
- 13.Hoover carpet cleaners – 2
- 14.Digital cameras bought from Fashion World
- 15.DVD players, which she found them with the husband
- 16.Bicycles 2, bought in Limbe and meant for farm workers;
- 17.Floor carpets – 3
- 18.Treadmill
- 19.Galaxy weight lift
- 20.Home theatre speakers
- 21.Vegetable land in Nyungwe, which they bought together in 2005
- 22.Land at Njuli Trading
- 23.TV Stands which she found them with her husband
- 24.Car hoover cleaner

¹ [1987] 8 MLR 416.

- 25.Executive table for office
- 26.Coffee Table and 3 tools
- 27.Golf Apollo Saloon motor vehicle;
- 28.Mercedes Benz E20
- 29.ML Mercedes Benz
- 30.Peoguet
- 31.Audi
- 32.Golf wagon
- 33.Grader runner
- 34.Small grader
- 35.Forklift and runner
- 36.7 tonne truck
- 37.15 tonne truck
- 38.Farmer truck (2) non runners
- 39.Concrete mixer 4
- 40.Tar mix
- 41.Compressor / pressure
- 42.Household wear bought from Impex
- 43.a big generator
- 44.big welding machine.
- 45.water tank of 1,000
- 46.store rooms 2 and 1 medium boys quarter with 3 bedrooms.
- 47.lens for the VW
- 48.computer & law books which was used as a student

Having listed the property the respondent claimed and requested the court to give her the following property:

1. fridge 1
2. flat plasma screen 1
3. medium land at Njuli trading with title deeds
4. cooker 1
5. beds 2
6. home theatre 1
7. dining set 1
8. glass coffee table 1
9. set of house curtains
- 10.carpet cleaner, big one
- 11.digital camera 1
- 12.bicycle 1
- 13.treadmill
- 14.carpets 2
- 15.VW Apollo Golf car

16. peugot car
17. Audi car
18. office tables 1
19. hometheatre speakers
20. truck, 7 tonner runner
21. compressor pressure
22. lens lights 2
23. access phone 2

When the respondent was requested to clarify on what was her contribution, either in monetary or non monetary form she stated that she was supported her husband in his construction work as a wife and that she contributed to the family plans. She also claimed that while the husband was at his office at Njuli she was receiving different materials at any time. The respondents stated that she was looking after the children and she alleged that she worked for the applicant's construction company and was eight years ago promised to be paid K50,000 per month which she was not paid at all. The respondent also worked in the matrimonial home, taking care of the petitioner as his wife and of the two children of the marriage.

In regard to property that is supposed to have title she stated that all the things for the company were registered in the petitioner's name. These included a farm land in Nyungwe. That all motor vehicles and pieces of land were registered in the name of the petitioner and the documents were with the petitioner. The respondent did not come out very clear in clarifying the use the properties was put to.

The Decision

On the issue of distribution of property on dissolution of marriage, in the case of *Sikwese v Banda*² the Supreme Court of Appeal held that a claimant has to establish a proprietary interest that there was intention for joint ownership of matrimonial assets or that the claimant made some contribution towards the acquisition of the matrimonial property. The decision notes that section 24 of the Constitution gives statutory effect to the principle on disposition of property on dissolution of marriage set out in the case of *Kayambo v Kayambo* and broadens the consideration to be taken into account in the disposition of property on the dissolution of marriage. That under section 24(1)(b)(i) of the Constitution property which on dissolution of marriage is required to be disposed fairly is property that was held jointly during the subsistence of the marriage. The Supreme Court of Appeal reviewed several matrimonial decisions on the interpretation of the phrase held jointly and formed the view that

² MSCA Civil Appeal No. 76 of 2015 (2 February 2017).

‘for property to be “held jointly”, there must be an intention by the parties, either express or implied, that the property will be held jointly, or some contribution to the acquisition by the party claiming beneficial interest in the property.’ at page 14 of the judgment.

From the evidence of the respondent it is clear that she did not make any monetary contribution to towards the acquisition of the property that she lists. However, it does not come out clearly from the evidence that there was common intention to have the property that she lists and that she claims to be held jointly by the petitioner and respondent. However, the circumstances of the case would a reasonable court to conclude that the respondent as a home maker did make some non monetary contribution towards the acquisition of some of the property and must be entitled to some beneficial interest.

The respondent will not be awarded any property that belongs to the petitioner’s company because there is no evidence of her interest in the company. Her claim that she was promised to be paid but was never paid K50,000 per month for work in the company is really a labour related issue which should have been pursued in a different forum.

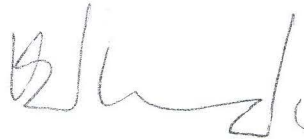
Having considered her request and the circumstances of this case as well as noting that the respondent did not come clearly on the owner and users of some of the property that she claimed, the respondent is awarded the following property for her use:

1. fridge 1
2. flat plasma screen 1
3. cooker 1
4. beds 2
5. home theatre 1
6. dining set 1
7. glass coffee table 1
8. half of the set of house curtains
9. carpet cleaner, big one
- 10.digital camera 1
- 11.treadmill
- 12.carpets 1
- 13.VW Apollo Golf car
- 14.office table 1
- 15.home theatre speakers
- 16.compressor pressure
- 17.lens lights 2
- 18.access phone 1
- 19.computer & law books which she used as a student
- 20.Half of the Household wear items that were bought from Impex

The petitioner must also give the respondent one of his pieces of land. The respondent had claimed some land at Njuli Trading Centre but in the absence of evidence of who owns it or who was using it- whether it was the company or the petitioner, it is difficult to come up with a firm decision. Hence, the general order that the petitioner decides which one of his pieces of land that he can part with and that is what will be awarded to the respondent. The petitioner must file and the service the respondent a notice indicating the decision that he has made in regard to the piece of land to be awarded to the respondent with 21 days of this order being served on him.

This being a matrimonial matter, each party will pay his or her own costs.

Delivered this 7th day of September 2018 at Chichiri, Blantyre.



Dorothy nyaKaunda Kamanga
JUDGE

Case information

Petitioner / Counsel

Mr. Salimu

Mr. Phiri / Ms. Million

:

:

:

:

served / absent.

Counsel for the respondent.

Court Clerks.