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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CAUSE NUMBER 11 OF 2017

BETWEEN:

KONDWANI LOMANTHETI PHOYA

PETITIONER

AND

HENRY DAMA PHOYA

RESPONDENT

CHIMWEMWE NKHATA

PARTY CITED

CORAM: JUSTICE M.A. TEMBO,

Jere, Counsel for the Petitioner
Nampota and Mwala, Counsel for the Respondent
Mankhambera, Official Court Interpreter

ORDER

This is this court's order following a hearing of this matter on the respondent's application on the question of custody, maintenance of the respondent and her children and distribution of matrimonial property following the dissolution of the marriage between the parties herein.

The petitioner sought a dissolution of the marriage herein and the same was dissolved on 9th March 2018 without any contest from the respondent who was represented.

The ancillary matters to the dissolution of marriage were reserved for negotiation between the parties failing which the petitioner would file an application in relation to the same.

This Court directed the petitioner to file an application on the ancillary matters so that it forms the basis for the negotiations.

Consequently, on 27th April 2018, the petitioner filed an application for custody of a child, maintenance and distribution of matrimonial property. The application was set for hearing on 25th May 2018 in case the negotiations between the parties fell through.

On the 25th May 2018 the parties' lawyers appeared and it was indicated to this Court by the respondent's lawyer that the respondent was surprised to be served with a notice of hearing yet he was only expecting the petitioner's application to form the basis of negotiations.

This Court adjourned the application on 25th May 2018 on the respondent lawyer's undertaking that within seven days a meeting would be called for the parties to discuss the matters on the petitioner's application.

In fact, this Court gave the parties thirty days within which to negotiate and that they report to this Court on 28th June 2018.

No report of the negotiations was made on 28th June 2018. In fact no negotiations were had at all. Consequently, the petitioner took out a notice of further adjournment which was set for 8th November 2018. This Court believed that by then the parties would have negotiated the matter.

On 8th November 2018 the matter could not be heard because Counsel Nampota for the respondent was appearing in the Commercial Division of this Court. This matter was consequently adjourned to 10th December 2018.

On 10th December 2018 lawyers for both parties appeared again. The notice of hearing for 10th December 2018 indicated that no further adjournment would be entertained and if either lawyer was unable to attend then alternative arrangements should be made for legal representation of the party in question.

The terms of the adjournment were made deliberately clear in view of the long time the matter has been before this Court, namely, from April 2018 to December 2018. During which time the respondent did not agree to attend negotiations which he consistently asked for before this Court and resulted in postponement of the hearing of the petitioner's application herein.

On 10th December 2018 counsel for the petitioner indicated that he was ready to proceed with the application on behalf of the petitioner because no meeting was held to negotiate the matters in issue.

On the other hand, counsel Nampota indicated that the respondent wanted to see if there could be negotiations with a view to having an out of court settlement. And that he was therefore not ready to argue the application. Further, he indicated does not handle controversial applications like the instant one and that if the application were to be heard, his client ought to be given a chance to get a new lawyer.

Counsel Nampota also indicated that the respondent had informed him that he had called the petitioner and they agreed to give negotiations a chance.

Counsel Jere for the petitioner stated that he in fact called his client just before appearing before this Court. He stated that the petitioner informed him that the respondent called the petitioner and asked for discussions. He added that the petitioner informed him that the respondent said that in any event this matter would not be heard as he would ask his lawyer to cease acting and that he would get a new lawyer.

This Court stated that in view of the failure of negotiations due to the unwillingness of the respondent to meet the petitioner for negotiations and in view of the lapse of time this Court would proceed to hear the application.

The considered view of this Court is that the petitioner had been given a reasonable opportunity to be heard in this matter. He dragged his feet in relation to the negotiations and failed to appear to argue the application after many months.

This Court found no sincerity on the part of the respondent and would not allow itself to be held hostage and be stuck with this matter any longer. This Court observed that the petitioner was only interested in prolonging this matter for no good reason and was not interested in being heard.

This Court heard the petitioner's application and reserved its decision in this matter.

While this Court was considering its decision in this matter, the respondent through his new lawyer Counsel Mwala, filed an application without notice asking this Court to suspend consideration of its decision and to give a chance to

the respondent to cross-examine the petitioner on her sworn statements in support of her application herein.

Essentially, the respondent contended that at the date of hearing of the petitioner's application his lawyer ceased acting for him. And that therefore the respondent was not heard for good reasons.

The respondent referred to the decisions stating that unless and until the Court has pronounced a judgment on merits or by consent it is to have power to revoke the expression of its coercive power where that has only been obtained by a failure to follow the rules. See *Evans v Bartlam* [1937] AC 473 cited with approval in *Chika Building Contractors v Gondwe* [1990] 13 MLR 104.

The respondent added that it is incorrect to expect that everyone, including lawyers, should know every rule of procedure and that while care is expected from legal practitioners an oversight should not deny the right to be heard to a litigant.

The considered view of this Court is that this is not a simple matter of the respondent failing to follow a rule of procedure that is addressed in the case of *Chika Building Contractors v Gondwe*. It concerns consistent and deliberate actions engaged in by the respondent aimed at delaying the dispensation of justice in this matter.

This Court has considered the history of this matter and does not agree that the respondent was not heard for good reasons to do with simple failure to follow a rule of procedure.

On the contrary, the respondent was allocated time to negotiate the matters in question with the petitioner and he did not agree to meet and negotiate. Then this Court indicated that should the negotiations fail again then the application would be heard in any event on a specified date.

Instead of preparing for the hearing, the respondent wanted to drag the matter further by failing to abide by the last notice of hearing which was in very clear terms. This was seven months since the matter was due for resolution by either negotiations or application before this Court.

This Court is therefore not convinced that it should suspend its determination of the petitioner's application to afford yet more opportunity to the respondent to be heard.

This Court is bound to deal with proceedings justly as per Order 1 rule 5 (1) Courts (High Court) (Civil Procedure) Rules by, among others, ensuring the parties are on an equal footing, dealing with proceedings expeditiously and fairly and allocating to a proceeding an appropriate share of the Court's resources while taking into account the need to allocate resources to other proceedings.

This Court's considered view is that to suspend the determination of this matter and allow the respondent yet more time will result in the proceedings not being dealt with justly in relation to the petitioner.

The respondent is a Senior Counsel. He has long experience at the bar. He has held important Government positions.

On the other hand, the petitioner is not in the same position. She is not a member of the bar. She is not within the legal profession.

If this Court allows itself to be seen to be playing to the wishes of the respondent, when the respondent has for months consistently and deliberately delayed progress in this matter, what it means is that the petitioner will be given the impression that this Court is unjust and favours the respondent on account of his position at the bar. That cannot be allowed.

This Court is bound to ensure that both parties herein must be on an equal footing. The only way that can be ensured is that the matter be dealt with expeditiously and fairly with regard to both sides without allowing one party too much leeway in terms of deliberate lengthy delay of these proceedings.

The respondent appears to be operating on the basis of the old rules of procedure which entrenched the obstructionist manner of proceeding by parties. That era when obstructionism was the order of the day is long gone with the coming into force of the current rules of procedure that have been alluded to by this Court earlier and which bind this Court and all parties to deal with matters justly. There is no justice in the prolonged delay of matters by one party at the expense of the other as was sought to be prolonged herein.

For the foregoing reasons, the application by the respondent to suspend the determination of the petitioner's application is declined.

With regard to the application herein. The petitioner's case is as follows.

She got married to the respondent on 24th December 1991. By then, the respondent was still a student at Chancellor College whilst the petitioner had started teaching at Chichiri Secondary School.

Upon completion of studies, the respondent joined the petitioner in her parent's house in Nyambadwe before they later moved into a flat in Nyambadwe.

The petitioner and the respondent have lived in various locations over the years resting with a matrimonial home in Chigumula.

During the subsistence of their marriage the petitioner and the respondent have accumulated various property which for reasons best known to the respondent were mostly registered in his name.

At the time the respondent left the matrimonial home in 2013, the petitioner and the respondent had the following property, namely, the matrimonial home which is a house at Chigumula, a cottage at Nkuzi Bay, town houses in area 11 at plot number 54 in Lilongwe and several motor vehicles listed in the petitioner's sworn statements.

Since moving out of the matrimonial home in 2013, the respondent has either sold, disposed of or otherwise dealt with the property exclusively without regard to the interests of the petitioner.

Other than the fact that the petitioner is living in the matrimonial home in Chigumula number CG76, the respondent withdrew all the motor vehicles from her except BT9600 a Range Rover which is a non-runner.

Since the respondent moved out of the matrimonial home, the petitioner has continued to live with the three children of their marriage, the youngest one being aged 12 years.

The petitioner stated that other than paying for school fees inconsistently and providing transportation, the respondent has not maintained her and their 12 year old child as he does not provide for their food, clothing or medical aid among others.

The petitioner therefore seeks custody of the 12 year old child, and that the respondent maintain her and the child and that there be a fair distribution of the matrimonial property.

In terms of maintenance, the petitioner seeks the following, namely, medical aid preferably MASM VIP scheme, school fees for the 12 year old, clothes at K500 000/quarter, food K300, 000/quarter, utilities 261, 000 /month and transport at K150, 000/month.

The petitioner appears to seek maintenance of another 22 year old child by the respondent. This Court cannot make any orders with regard to that child as that one is an adult aged over 16 years. The age of 16 years is the cut off age in relation to rights of children and custody under section 23 (6) of the Constitution and section 2 of the Child Care, Justice and Protection Act respectively. The 22 year old is also aged over 18 years old which is the usual age of majority in any case.

In her submissions, the petitioner submitted as follows.

The petitioner submitted on whether she should be granted custody of the 12 year old child of her marriage to the respondent.

The petitioner correctly submitted that in terms of section 8 of the Child Care Justice and Protection Act, a parent may apply for custody of a child and on such an application the court shall consider the best interests of the child and the importance of the child, on account of age, being with the mother. The court may also consider the views of the child and any other matter the court considers relevant.

The petitioner also correctly submitted that where a father may be granted custody of a child as opposed to the mother the case must be strong that the mother is incapable of properly bringing up the child. See *In re Chitaukire* [1975-1977] 8 MLR 38.

She further submitted that in *Chilingulo v Chilingulo and another* [1990] 13 MLR 110 it was held that when deciding on custody of children it should be borne in mind that a step mother cannot take the place of the biological mother.

The petitioner submitted that she has demonstrated that she is capable of looking after the 12 year old child herein since she has lived with that child since 2013 when the respondent left the matrimonial home.

She added that the respondent started living with another woman before the marriage herein was dissolved. But that the new woman cannot provide the same love, care and attention to the 12 year old child like the petitioner can.

She submitted that it would therefore be in the best interests of the 12 year child that she be granted custody of the child.

This Court agrees with the petitioner that she has shown that she can properly take care of the 12 year child herein since the respondent left the matrimonial home in 2013.

The step mother to the 12 year old, who lives with the respondent, cannot show the same love, care and attention to the child herein as the petitioner can.

In the circumstances, this Court agrees that it is in the best interests of the 12 year child that the petitioner has custody of the said child. This is subject to visitation rights of the respondent as may be agreed by the parties failing which this Court would have to decide at the instance of the respondent.

The petitioner then submitted on whether the matrimonial property should be equally disposed between her and the respondent.

She submitted that according to section 24 (1)(b)(i) of the Constitution, on dissolution of marriage every woman is entitled to a fair disposition of property that is held jointly with a husband. That is matrimonial property.

She submitted that it is trite law that title to property is not conclusive proof of sole ownership of the property in question.

And that as such, on disposition of matrimonial property, courts must look at all the facts and circumstances of the case on how the property was acquired before deciding on how to distribute the said matrimonial property. See *Sikwese v Banda* MSCA civil appeal number 76 of 2015.

She submitted further that, in the *Sikwese* case, the Supreme Court also stated that financial contribution to the acquisition of the property is not the only factor to be considered on disposition of matrimonial property. And that the court also has to look at the couple's use of such property and the intention of the parties when acquiring the said property.

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 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.

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.

The uncontroverted evidence of the petitioner, and indeed her contention, is that the property herein, as indicated in her sworn statements, was acquired by her and the respondent for their use, enjoyment and benefit as a family.

The petitioner seeks an equal distribution of the property since the same has been in the exclusive control and use of the respondent thereby depriving the petitioner of the same. It is alleged that the respondent has also dissipated some of the property. It is not clear which property is available and which is not since 2013 when the respondent left the matrimonial property.

This Court has considered the fact that the property in question was acquired with the intention that it be for the use of the petitioner and the respondent as matrimonial property. Consequently, this Court determines that all the property listed in the petitioner's sworn statements is matrimonial property jointly held by the petitioner and respondent herein.

This Court therefore orders disposition of the said property as follows; that the petitioner shall have the house at Chigumula where she currently resides. The respondent shall have the property comprising the town houses at area 11 in Lilongwe.

With respect to the rest of the property, the same shall be valued and if any was disposed of by the respondent the value to prevail is the one at the time of such disposal. For property disposed by the respondent, if any, half the value of such property shall be due to the petitioner.

Then, the petitioner and the respondent shall each get half the aggregate value of all the property in question given that there is no evidence to ascertain the shares in which each party held the property. The property shall be sold through agents jointly appointed by the petitioner and respondent if they cannot mutually agree on which property is to comprise each party's half share of the aggregate.

The Registrar shall hold a hearing on the valuation of the property herein.

With regard to maintenance of the petitioner and her child, the petitioner submitted as follows.

She submitted that section 23 (4) of the Constitution provides that all children are entitled to reasonable maintenance from their parents whether married or divorced.

She submitted further that, on dissolution of marriage, women are entitled 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. See section 24 (1) (b) (ii) of the Constitution.

The petitioner then contended that in the circumstances of this matter it would be reasonable for this Court to order child maintenance in accordance with the resources and means and life that the respondent had accustomed the child to live by.

She also contended that she and the respondent held all the matrimonial property herein for their own benefit as a family. But that the respondent exposed the petitioner to a certain standard of life which is now lacking since the respondent has kept the matrimonial property to himself.

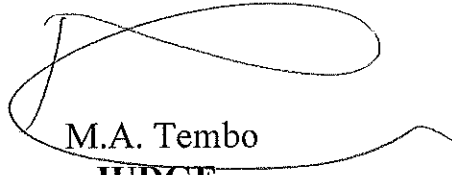
She then submitted that in the circumstances it would be reasonable for this Court to maintain the petitioner and the child of the marriage at such a standard as he permitted them to live and provide maintenance at fixed and regular intervals as this Court may deem fit and taking into account the prevalent economic conditions.

This Court entirely agrees that, in the circumstances of this matter, the respondent should maintain his child and the petitioner for the reasons given by the petitioner.

Consequently, this Court grants the prayer by the petitioner for maintenance at the level and intervals as prayed for by the petitioner, namely, medical aid preferably MASM VIP scheme, school fees for the 12 year old, clothes at K500 000/quarter, food K300, 000/quarter, utilities 261, 000 /month and transport at K150, 000/month.

Costs are for the successful petitioner.

Made in chambers at Blantyre this 6th March 2019.



M.A. Tembo
JUDGE

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