



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

LAND CASE NO. 51 OF 2017

BETWEEN

JONES WILSON ZAMMIMBA.....CLAIMANT

-and-

MRS CHARITY ZAMMIMBA.....1<sup>ST</sup> DEFENDANT

MRS IRENE MALUNGA.....2<sup>ND</sup> DEFENDANT

MRS BEAUTY NDALAMA.....3<sup>RD</sup> DEFENDANT

MRS FANNY KALUNGA.....4<sup>TH</sup> DEFENDANT

Coram: Honourable Mr. Justice D.T.K. Madise

Mr. J. Nyambo Counsel for the Claimant

Mr. Malijani Counsel for the Defendant

Mr. M. Mbekeani Official Court Interpreter

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Madise, J

JUDGEMENT

## **1.0 Introduction**

- 1.1 On 24<sup>th</sup> November 2017 the Claimant in this matter took out a writ of summons against four defendants among them his former wife and three daughters claiming a matrimonial house the family built during the subsistence of his marriage. The claimant claims his daughters have chased him from the house and he wants seeks the aid of the court to claim it back.
- 1.2 The daughters have disputed the claim on the basis that, one of them who is physically disabled remained in the house. They have called on the claimant to prove his case. The particulars of the claim have been well articulated in the statement of case which was filled together with the summons. The defendants have denied the allegations levelled against them by the claimant. The denials are particularised in the statement of defence which has been filled in opposition.

## **2.0 The Facts**

- 2.1 The Claimant told the Court that while working for the Malawi government he started building a house and this was before 1982. It had four bedrooms situated in Chirimba. At that time, he was staying in Chitawira with his first wife Ella Mbite. He then started dating Nalesi Zam'mimba while she was staying at her parents's house in Chileka. When Ella Mbite died, he married Nalesi Zam'mimba. When he retired from government in 1982 the family moved to the new home in Chirimba.
- 2.2 In 1999 he moved out of the house due to misunderstandings with his wife and allocated to Bangwe township where he currently resides. The claimant told the Court that his wife Nalesi also moved out of the house and returned to her parent's home in Chileka.

- 2.3 The claimant however allowed his third born daughter to continue living in the matrimonial home due to her physical disability. She is small in size (dwarf) as compared to a fully grown up woman.
- 2.4 Due to misunderstandings with his daughters he decided to request the 1<sup>st</sup> defendant to move out of the house but she declined. The other daughters have since moved out of the house and have followed their husbands. To his surprise the first defendant together with the second, third and fourth defendants have teamed up and are claiming ownership of the house.
- 2.5 The claimant told the Court that the defendants have cut down his trees and have also demolished some structures at the homestead. The defendants have further denied the claimant access to the house every time the latter wants to do maintenance work. The claimant now wants the Court to order the 1<sup>st</sup> defendant to move out of the house as he single handily built the house before he retired from the civil service.
- 2.6 In defence Charity Zam'mimba told the Court that she lives in a house which was built by her parents to wit her father (claimant) and Nalesi her mother. That the family moved into the house in 1982. However in 1999 the claimant moved out of the house due to misunderstandings with his wife. He then married another woman the family's former maid and went to live in Bangwe. She stated that she remained in the house with her mother while her sisters moved out and followed their husbands.
- 2.7 She stated that up to now she lives in the house with her mother who only goes to Chileka to garden but returns to the family home. Charity told the Court that in 2011 her father secretly went to the Blantyre Land Registry and registered title of the land and started offering the property for sale. She denied blocking her father to do maintenance work at the house.

2.8 In conclusion she denied the fact that her father can claim sole ownership of the property since her mother and siblings provided financial and moral support in the construction of the house. She told the Court that she was born disabled and she is wholly dependent on her mother as she cannot work on her own to make a living.

2.9 Nalesi Zam'mimba, the mother to Charity told the Court that she still lives in the matrimonial house which she built together with the claimant. That they planted trees on the plot together before the house was built. She told the Court that she was selling groundnut powder (Nsinjiro) and she was earning enough money and supported her husband in the construction of the house. She denied moving out of the matrimonial house and stated that she only goes to Chileka her original house to tend to her gardens.

### **3.0 The Issues**

3.1 There are two main issues for determination before me;

1. Whether the claimant has sole ownership of the house?
2. Whether the daughter Charity and her mother have interests and rights in the property?

### **4.0 The Law**

4.1 The burden and standard of proof in civil matters is this: He/she who alleges must prove and the standard required by the civil law is on a balance of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than a positive.

As Denning J., stated in Miller vs. Minister of Pensions [1947] 2 A II E.R.

372.

*If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not*

4.2 Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts.

4.3 Section 25 Registered land Act

*"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 in this Act and the land Act shall be held by the proprietor, free from all other interest and claims whatsoever"*

*But subject to:*

*a) To the lease, charges and other encumbrances of any shown in the register.*

4.4 Section 126 (1) Registered Land Act

*"Any person who claims any unregistrable interest whatsoever in land or a lease a charge, may lodge a caution with the registrar xxxxxx the registration disposition of the land, lease or charge concerned and the making of entries affecting the same."*

4.5 Section 127 (2) Registered Land Act

*"So long as a caution remains registered no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of court"*

4.6 Section 24 (1) (b) (i) Constitution;

*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,*

*b) (i) On dissolution of marriage to a fair disposition of property that is held jointly with the husband.*

**5.0 Determination**

5.1 There is no dispute that the claimant got married to Nalesi Zam'mimba. The couple had six children. There is no dispute that the couple got married while the claimant was living in Chitawira. As a family they moved together in 1982 to Chirimba where the family continued to live until 1999 when the claimant voluntarily moved out of the family house.

5.2 The claimant then moved to Bangwe where he married another woman. The claimant has a disabled daughter who still stays in the house. He now wants the daughter to move out of the house. The claimant registered the property at the Blantyre Land Registry. There is a caution against that registration which was filed by the defendants.

5.3 It is trite law that at divorce parties are entitled to a share of the matrimonial properties. However when entering the contract of marriage, ordinary people do not consider the consequences of a future separation or divorce. Ordinary people do not draw express agreements regarding their property at divorce. In Nyangulu vs. Nyangulu (1983) 10 MLR 433 Villiera, J was of the view that:

*"it could not be inferred from the mere fact of marriage that the property had been intended to be jointly owned; instead, it will be the duty of this court to give legal effect to what, in the changed circumstance, the parties would have taken as having intended had they given consideration to the matter at the point of entry into marriage.*

*It makes no much difference whether the petitioner had made financial contribution or merely worked to help construct the house. It is the duty of the court to look at the conduct of the parties."*

- 5.4 In the case of Re: Rogers' Question (1948) 1 All E.R. at 328-9 Evershed L.J., said;

*"In this as in most similar cases, the difficulties of a judge are aggravated by the circumstances that the two parties are now extremely hostile to each other and that The conditions of a broken marriage which now subsist were not fully appreciated by either party, even if as the learned judge thought, they were not absent from the mind of one of the parties, when the transaction in question was entered into.*

*When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less to agree, what should happen to the house if the marriage comes to a grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then*

*to make an order which the parties in the judge's finding must be taken to have intended at the time of the transaction itself."*

- 5.5 Many a times, people tend to have a novel view of the amount of contribution a house wife/husband makes to the overall properties a family owns. Many wrongly believe that the mere fact that a woman or man was not working puts him/her at a disadvantage or a weak position when it comes to sharing of property.
- 5.6 The general principle is that a house wife/husband is entitled to a good share of the property. His/her contribution can easily be quantified as cooking, washing, cleaning the house, working at the farm or plot and generally looking after the husband/wife and children all of which he/she does without being paid an allowance or salary.
- 5.7 In my considered view there is no dispute that the property was built by the claimant with money from his retire package. There is no evidence that the wife was doing a meaningful business to substantially contribute to the construction of the house.
- 5.8 However, that notwithstanding the wife also contributed to the construction but in a different way. The wife was cooking for the family, washing the claimant clothes, satisfying the Claimant sexually and generally looking after the house. All this contribution cannot go without attaching a percentage to the overall share of the property. The question is how much should be given to the wife?
- 5.9 I have gone through the evidence and the available law on the subject matter and on a balance of probabilities I am of the considered view that the claimant, his wife Nalesi and daughter Charity should all benefit from the house.



5.10 Unfortunately it will not be practical to divide the house in three. I therefore order that the property should be sold and the proceeds shared in the following manner,

Jones Zam'mimba 50%

Nalesi Zam'mimba 30%

Charity Zam'mimba 20%

5.11 An independent agent should value the house and an independent estate agent should sell the house. The proceeds shall be paid into court and the beneficiaries will then access the funds from the court.

#### **6.0 Cost**

6.1 Costs are awarded at the discretion of the court and I order each party to pay their own costs.

Pronounced in open Court at Blantyre in the Republic on 16<sup>th</sup> January 2019.

  
Dingiswayo Madise,

**Judge.**