



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NO 04 OF 2019

[Being Civil Cause No.55 of 2013 in the Third Grade Magistrate Court Sitting at Blantyre Central]

BETWEEN:

IREEN KAMWENDO AND ANDREW KAMWENDO (as Administrators of the Estate of Ben Kamwendo (Deceased)).....APPELLANTS

-AND-

MURIEL KAMWENDO.....RESPONDENT

Coram: Justice Jack N' riva

Mr. Ngunde of Counsel for the appellants

Mr. Chidothe of Counsel for the respondent

Ms. D. Mtegha Court Reporter

JUDGMENT

This is an appeal on the issue of distribution of matrimonial property. The marriage between the deceased and respondent was dissolved in the Third Grade Magistrates' Courts sitting at Blantyre Central. The appellants being dissatisfied with the lower court's decision, appealed to this Court.

The appellants are the administrators of the estate of the deceased. The deceased was married to the respondent and their marriage was dissolved on the 11th of November, 2013. The deceased died before the hearing on the distribution of the matrimonial property. The court below heard the evidence of the respondent and other witnesses who gave evidence regarding the matrimonial property.

The court delivered its judgment on the distribution of matrimonial property against which the appellants now appeal to this Court.

The grounds of appeal are as follows:

- a) The lower court erred in law and in fact in holding that the land in dispute be sold and shared between the deceased's and the respondent's children;
- b) The lower court erred in law and in fact in not holding that the land at Njuli belonged solely to the deceased and that it was not joint matrimonial property;
- c) The lower court erred in law and in fact in excluding the evidence of Andrew Kamwendo and that of the husband to the group village headman Chambwinja;
- d) The lower court's decision was against the weight of evidence.

In Court, counsel for the appellants made the following submissions:

- There was no analysis of evidence which the lower court relied on, *i.e.* the lower court did not indicate witness evidence presented by both parties.
- There was no summary evidence from either party hence the appellants are left wondering how the lower court came up with the judgment that was given.
- The lower court without good reasons excluded the evidence of Andrew Kamwendo and the husband to village headman Chambwinja on the pretext that it was false.
- The lower court did not state why it considered that evidence to be false.
- The appellants were of the view that the lower court's failure to give reasons substantially led the court to arrive at a wrong conclusion.
- The lower court did not consider all the evidence that was below it hence it ended up giving a judgment that was inconsistent.
- The appellants were of the view that a court should treat evidence holistically as was enunciated in the case of *Watson Kalonga v Stansfield Motors* Civil Appeal (IRC) No. 11 of 2014.
- The appellants were of the view that this Court should reverse the lower court's decision and make an order that the land where the house was built belonged to the deceased and that the respondent only contributed to its improvements hence the respondent should get a reimbursement proportionate to her contribution.

Counsel for the respondent argued that:

- The issue of whether the property in issue was jointly owned was conceded by the appellants when they stated that the respondent made contribution to the improvements of the building on the land.
- The Court had to be drawn to the position of the law as stated in *Sikwese v Banda*, MSCA Civil App 76 of 2015, where the Supreme Court of Appeal approved the position of law in *Kayambo v Kayambo* (1987-89) 12 MLR 408:
- “it makes no difference whether a party had contributed financially towards the purchase price [of the property] or had simply worked to improve the property once it has been purchased, and the court is entitled to look at the conduct of the parties in coming to its decision; and that where the contribution of a party is substantial, the court would infer an intention that the party would have a beneficial interest in the property”.
- The position of the law, therefore, is that the court does not only look at who acquired the property but also whether there were improvements made by the other party.
- In this case, the deceased acquired land alone before marrying the respondent. At that time there were no structures. After getting married, he decided to construct a house and he involved the respondent. The fact that the deceased allowed the respondent to make contributions towards the construction of the house is a clear indication that he had an intention to jointly own the property. Therefore, the respondent’s position is that the property was jointly owned.
- This Court should take note of the evidence given by the respondent in the lower court which was never contested as she clearly indicated the amounts she contributed towards the construction of the house.
- The lower court disregarded the evidence of Andrew Kamwendo and the husband to village headman Chambwinja because they were not involved in the construction of the house and neither did they know the intention of the deceased and/or if the property was jointly owned.
- On one part, the appellants are conceding that there were contributions by the respondent yet on the other part they are saying the property solely belonged to the deceased.
- Since neither the contributions made by the parties could be quantified nor the proportionality be made, this Court should take the legal position as enunciated in the *Kayambo v Kayambo* (1987-89) 12 MLR 408 using the maxim that *equality is equity* as the lower court did.

- The reimbursement as suggested by the appellants to the respondents was an admission that the property was jointly owned.
- The respondent prayed that the decision of the lower court should be maintained and the appeal should be dismissed in its entirety.

In his response, counsel for the appellants submitted that:

- The evidence given by the respondent in the lower court was given at the time the deceased was no more hence it could not be challenged.
- The position of the respondent is that the evidence of Andrew Kamwendo which was disregarded by the lower court was of more significance as he was involved in the construction of the house.

In *Sikwese v Banda*, 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 *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 '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.' [see *Thakur v Thakur* Matrimonial Cause No. 36 of 2013 (2018)].

Having said so, let me now turn to the grounds of appeal:

- A) The lower court erred in law and in fact in not holding that the land at Njuli belonged solely to the deceased and that it was not joint matrimonial property.

In the present matter it is not in dispute that the deceased acquired the land where the house is built. It is also not in dispute that the respondent made contributions towards the construction of the said house. The position of the law is clear as submitted by the respondent. *"It makes no difference whether a party had contributed financially towards the purchase price [of the property] or had simply worked to improve the property once it has been purchased, and the court is*

entitled to look at the conduct of the parties in coming to its decision; and that where the contribution of a party is substantial, the court would infer an intention that the party would have a beneficial interest in the property”.

I, therefore, am convinced that both the deceased and the respondent had intended to benefit from the matrimonial house.

Accordingly, the lower court did not err in law or in fact in deciding that the property was joint property. This ground of appeal fails.

B) The lower court erred in law and in fact in holding that the land in dispute be sold and shared between the deceased's and the respondent's children.

The law is clear as to what should happen when a man and a woman divorce. There must be distribution of properties. The court will normally take into account the contributions the parties made in acquiring the properties in issue. Depending on such contribution, a court will apportion a percentage to each one of them. But where the court is unable to apportion a percentage due to lack of evidence as it is in the present case then a 50% share to each will be made. [see *Yasin v Yasin* Matrimonial Cause No. 18 of 2015 (July 2018)].

This Court has come to the conclusion that the land in dispute was jointly owned by the deceased and the respondent. In *Kayambo v Kayambo* Mkandawire, J stated that where there is no way of discovering the parties' intentions and no fair way of distinguishing between their respective contributions, the maxim "equality is equity" would be applied. At times, equality achieves justice and in the present case the parties in the lower court should have benefited equally. The land should have been sold and the proceeds be shared between the deceased and the respondent. The deceased's share would have to go to his beneficiaries who are his immediate family according to section 17 of the Deceased Estates (Wills Inheritance and Protection) Act. In this case it should be his children.

The lower court therefore did not err in law or fact in deciding that the land in question should be sold and the proceeds be shared fairly between the deceased's children and the respondent. This ground must, likewise, fail.

C) The lower court erred in law and in fact in excluding the evidence of Andrew Kamwendo and that of the husband to the group village headman Chambwinja.

The appellants submitted that the lower court without any good reasons disregarded the evidence of Andrew Kamwendo and that of the husband to group village headman Chambwinja. The appellants submitted that Andrew Kamwendo's

evidence was more significant as he was involved in the construction of the house. Further that the evidence of the husband to group village headman Chambwinja was equally important as he was told by the deceased that the property that he acquired was for his children.

The lower concluded that the evidence of the two mentioned witnesses was false because in the court's view, when the parties were constructing their house or buying things, they were not consulting their relatives and/or children. Since the lower court gave a reason why it regarded the evidence to be false, the appellants' claim, that some evidence was excluded, cannot be sustained.

As prayed by the appellants, this Court has gone through the evidence given by the two in the lower court. The evidence of Andrew Kamwendo does not dispute the fact that construction of the house started when the deceased and the respondent got married. This Court wishes to point out that most of the evidence given by the husband to the village headman Chambwinja was hearsay and not much weight would be attached to it. This Court finds this ground as moot as well and fails too.

D) The lower court's decision was against the weight of evidence.

The appellants submitted that the lower court did not treat the evidence before it holistically, and therefore, ended up giving a judgment that was inconsistent. Having gone through the evidence adduced before the lower court, my determination is that the decision of the lower court cannot be faulted. The decision is not against the weight of the evidence. In this regard, this ground as well has to fail.

All in all, the appellants' claim could not be sustained in the court below and it must similarly fail in this Court.

I, accordingly, dismiss the appeal with costs.

Pronounced in open court this 26th day of June 2019 at Blantyre in the Republic of Malawi.



J N'RIVA

JUDGE