



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**CIVIL APPEAL NO 8 OF 2012**

**NAOMI CHABIRA ..... APPELLANT**

**and**

**SAMUEL CHABIRA ..... RESPONDENT**

**Coram:**

**Hon. Justice R. Mbvundula**  
Chibwana, Counsel for the Appellant  
Masiku, Counsel for the Respondent  
Gondwe, Official Interpreter

**JUDGMENT**

***Background***

The Midima Magistrate Court dissolved the parties' marriage and directed that since it was the appellant who was responsible for the breakdown of the marriage she would lose everything. The court further made an order granting the appellant custody of the child of the marriage, then seven years old, and that the respondent should nevertheless continue supporting the child.

Being dissatisfied with the judgment and orders of the court, the appellant appealed to this court on the following grounds:

1. That the court erred by not ordering the respondent to be paying money for the maintenance of the child.
2. That the court erred by not ordering the respondent to build a house for the appellant in accordance with matrilineal customary law.
3. That the court erred in law by omitting to distribute matrimonial and jointly owned real and personal property a list of which was made under this ground of appeal.

Consequently the appellant seeks the following reliefs:

1. An order for the maintenance of the child.
2. An order that the respondent should build a house for the appellant in accordance with matrilineal customary law.
3. An order for distribution of jointly acquired matrimonial property.

***The parties' arguments on appeal and the court's determination***

1. *On ground 1: That the court erred by not ordering the respondent to be paying money for the maintenance of the child.*

*a) Appellant's submissions*

The appellant's submission is that the court did not make a maintenance order because it simply said that the respondent should continue to support the child. As such this court should make an order specifying periodic amounts of money the respondent should be paying taking into consideration the fact that the child's interests or welfare are paramount regardless of which party was at fault or caused the divorce.

*b) Respondent's submissions*

On the respondent's part it is disputed that the lower court did not make a maintenance order, that the words "The plaintiff [the present respondent] should continue supporting the child", constitute a maintenance order. Counsel for the respondent went on to state that the respondent does not dispute his responsibility



to maintain the child and that he is fully responsible for her education as is necessary in accordance with his earnings. The lower court, according to counsel, and the record seems to confirm, did not, however, make an inquiry into the respondent's earnings as against his needs in order to come up with the amounts of maintenance. As in the case of the appellant the respondent, through counsel, prays that this court makes such an inquiry.

*c) The court's determination*

This court agrees with counsel for the respondent that the lower court's statement that the respondent (then plaintiff) should continue supporting the child, albeit without assigning specific amounts of such support, constitutes a maintenance order. The order in my understanding and opinion sufficiently binds the respondent to his pre-divorce obligations to the child and in the event that the respondent reneges on the same it is open for the appellant to apply to the lower court to enforce its order. Similarly if it is felt that specific orders such as relate to the nature of support which should be availed or, as regards monetary support, the relevant periodic payments, then the party concerned is at liberty to apply to the court to determine such matters. The lower court could not have made such determinations at the time of its judgment because the relevant facts were not before it, and after such delivery it was for any party concerned to move the court to consider the issues. That said I am of the certain view that such issues are for the court of first instance and should only come to this court on appeal if a party is not satisfied with the determination of that court of first instance.

2. *On ground 2: That the court erred by not ordering the respondent to build a house for the appellant in accordance with matrilineal customary law.*

*a) Appellant's submissions*

It is submitted for the appellant that the obligation for the respondent to build a house for the appellant arises because the parties were married under matrilineal customary law. Counsel stated in his submissions that the appellant is from Bvumbwe and a Yao and that by virtue of Yao customary law the husband is supposed to build a house at the end of the marriage. Later on however in reply to



the opposite party's submissions counsel for the appellant shifted goal posts and said that the obligation does not arise as a result of divorce but arises from day one of the marriage and is never extinguished up to the day of the end of the marriage. In this regard counsel cites the case of *Matimati v Matimati* 1964-66 ALR Mal. 34 at 37. This court specifically notes counsel's acknowledgment that customs must be proved as a matter of fact but that for customs that are so notorious as to require no proof courts take judicial notice thereof. No case authority is cited for this position.

*b) Respondent's submissions*

It is submitted firstly that customs must be proved as a matter of fact because under such customs it is not only a house but compensation that is offered to the wronged party and the house may come as part of the compensation. In this case, it is pointed out, the magistrate, after analysis of the evidence, found the appellant responsible for the breakdown of the marriage and, consequently, that she was not entitled to compensation, hence no order being made that the respondent should build a house for her. Counsel points out that the appellant does not contest the fact that she was in the wrong.

*c) The court's determination*

That the marriage was customary is supported by the evidence which was placed before the lower court to the effect that the parties underwent the traditional *chinkhoswe*, but that is all the information available. There was no evidence as to what customary law was applicable. There was no evidence as to the tribal affiliations of either or both parties. That the appellant is from Bvumbwe and of the Yao tribe was not put in evidence in the court below. This has only surfaced in the submissions of counsel for the appellant in this appeal. It is commonplace legal knowledge that such evidence cannot be led on appeal as the present and in any event not by counsel at the bar. Additionally counsel disagree on the precise customary practices that would apply here, in which case there had to be evidence from custodians of the relevant customs. In the premises this court is unable to accept the existence of any customary law or practice which requires that the respondent to build a house for the appellant.



1. *On ground 3: Regarding an order for distribution of jointly acquired matrimonial property.*

*a) The parties' submissions*

Both counsel have made submissions as to how they understand the law on the matter. I will not go into detail for the reasons I give below.

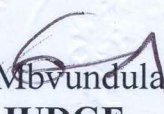
*b) The court's determination*

From the procedural point of view the issue raised under this ground is prematurely before this court as a subject of an appeal there having been no determination thereon in the lower court simply because it was not an issue there. The appellant, if minded to have the matter determined ought after the dissolution of the marriage, made an application in that court for the distribution of the matrimonial property, subject to the jurisdictional limits of that court. In the event the court's jurisdiction would be exceeded the practice is to make an application in this court to deal with the matter. One cannot appeal that which was not adjudicated against in the lower court. The third ground of appeal is therefore misplaced here.

***The result***

The final result is that all the three grounds of appeal fail and the whole appeal dismissed with costs.

Pronounced in open court at Blantyre this 20<sup>th</sup> day of May 2019.

  
**JUDGE**