



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL CAUSE NO: 4 OF 2018**

BETWEEN:

RODSON CHABVUTA.....APPELLANT

AND

CATHERINE LOWE.....RESPONDENT

Corum: R.M CHINANGWA JUDGE

Salima Counsel for the Appellant

Soko Counsel for the Respondent

Nyirenda Court Clerk

JUDGEMENT

1. Introduction

This is an appeal against the decision of the First Grade Magistrate sitting in Lilongwe dated 25th May 2018. In its decision the lower court granted the petition for divorce and distributed the matrimonial property. The appeal is against the decision on distribution of matrimonial property. In its decision, the lower court awarded the respondent a house (47/3/296), 10 acre farm at Mpingu, sofa set, 22 bags soya seed, upright freezer, TV plasma set, 4 single beds and mattresses and half kitchen utensils. The appellant was awarded 7-acre farm at kanyerere, dinning set, 30 bags soya bean seed, deep freezer, cooker, 1 double bed and mattress, black and white TV, ½ kitchen utensils, a vehicle Isuzu twin Cab and 150 litre geyser. Below are the grounds of appeal.

2. Grounds of Appeal

The appellant has raised three grounds of appeal and these are:

- a. The lower court failed to distribute the matrimonial property correctly and principles of fair distribution of matrimonial property.
- b. The lower court failed to appreciate that some properties were solely owned by the appellant and therefore not subject to distribution.
- c. The lower court erred in giving the house on plot number Bwaila 47/3/296, Lilongwe to the respondent against the evidence that was adduced.

It is this court's view that the appellant is simply arguing that the distribution of the matrimonial property was not fair.

3. Issue for Determination

This court has to determine what would amount to a fair distribution of the matrimonial property in question. It is noted that on appeal the High Court subjects all the evidence in the lower court to a fresh scrutiny and makes the appropriate decision as provided under section 22 of the Courts Act. Below is the evidence.

4. Evidence

a) Respondents Evidence (being applicants evidence) in the Lower Court

The respondent being applicant in the lower court stated as follows: 'I am Catherine Lowe, P.O Box 1212, Lilongwe, C/O Area 47 sector 3 house N0. 296 the house was jointly acquired with the respondent. The respondent told me we should identify a house and we got this house in 2009 and we bought it through the bank. He was working just as good as myself, he was receiving K500,000.00 while I used to receive K386,000.00. We went to Standard Bank to present the pay slips. Loan approved we were given cash – K12,000,000.00. The one who did paper work was Isaac Nkhono Songeya, these are agreement forms. We were being deducted K200,000.00 monthly from the defendant's salary while my salary was catering other services at the house such as paying school fees for the children and also ration. I tender the documents as part of the evidence (Exhibit CPT 1).

Later we decided to raise figure of deducted cash from K200,000 to K500,000.00. The house was registered in the names of both of us. I got gratuity from World Agro Forestry Center from where I retired because I went to school. Part of the cash was invested into farming and part of it invested into the house and then the seed multiplied the cash. Each of us had participated into the purchasing of this garden. Respondent had a bank account where the cash had been banked. As of now the balance of this house still stands at K12,000,000.00 on reason that it

increased because the defendant wasn't paying for it hence the interests went up again up until after I resumed work then the house deductions also resumed. The title document is in the names of both of us. As regards my desire is that our children are 9 and 6 years and as such my desire is that the house should not be offered for sale but instead it should be used by the children since they are still too young while defendant's children from his first marriage are all working. My children are B. Chavuta 9 years, K. Chabvuta 6 years.

Respondent already has a house in Blantyre and somewhere else while I don't have anywhere to live with the children.

Apart of vehicle (3) it was bought from where the defendant worked, it was Isuzu KB he used to be deducted from salary of the defendant. I have been using this car all though 9 years up until the defendant also took it for himself.

On item 3 farm land at Mpingu was bought between 2010 – 2011 jointly. We had been jointly making use of the garden as of now or this year defendant had been going to the same piece of land with a different lady and I have not been interfering with the defendant.

Item 4 dimba at Kanyerere we had jointly acquired it and also had been using it together.

Geyser 150 litres was bought from Banda jointly with the defendant but as of now defendant told me he had offered it for sale, price was K450,000.00 but removed from the house.

Sofa set was bought at K248,000.00 also another sofa set of mahogany whose price I won't know, Deep freezer also jointly purchased and so we had 2 deep freezers. We maintained the upright freezer while the small one was given to defendant's relatives by defendant himself.

Dining set was jointly bought as well just as good as T/A sets.

Digital weighing scale all in all, everything on the list were jointly acquired. As regards to the house itself, its my desire that the house remains with me and the children because I have nowhere to stay. Also the balance on the house be settled by the respondent.

In cross examination the witness went on to state that: "This was an arrangement made between ourselves and so I would say I don't agree that everything was being deducted from the respondent. It was a direct payment by using defendant's bank account. All deposits are kept by the respondent. The cash enabled payment for the house, hence the title deed has both names. The house should not be offered for sale it should be for the children and I would be staying with the children. I am alive, I will be retiring in July next year, I would not allow any

other person to be in custody of the children while I am alive. I would be staying at Area 47 with the children. I am not using the children as a tool to possess the house. The house is already existing hence no need to offer the present house for sale and buy another one, I did not have another marriage before the present one. I never got married before, I have two children with defendant. The house was sold away jointly with the defendant and used the cash for school fees, it wasn't solely sold away by me but jointly then shared the proceeds.

As regards to the vehicle all relevant supporting documents were collected by the defendant, as a family thing were jointly being done, I made the contribution towards its purchase.

Farm land at Mpingu was bought from Richard K350,000.00; K400,000.00; K400,000.00; and K500,000.00 per acre. The geyser K450,000.00 I would not specify how much I had contributed. It was 2 years ago when the farm was purchased. For the sofa, I wouldn't know how much I personally contributed towards it just like respondent himself would not specify.

In re-examination the witness stated as follows: "I do confirm that I want to continue staying at Area 47 with the children. I don't have any other place to stay apart from the house at Area 47 from where the defendant deserted us for another lady. In Manja Blantyre, the defendant has a house. He is no longer renting. He also has a house at Area 25 in Lilongwe. I do confirm we used to jointly contribute towards the purchase of the properties. Currently I don't have a legal document of the custody of the children, but I am a full custodian of my biological children. Issue of children was referred to Child Justice Court.

b) Appellants Evidence (being defendants evidence) in the lower court

The appellant being defendant in the lower court stated as follows: 'I am Rodson Chavuta from Kumtumanji Village, T/A Kumtumanji, Zomba District. I am employed by Malawi Leaf Company a subsidiary of Auction Holdings. I am also a part time farmer. I am a Manager of Green Logistics. I know the applicant as my former wife. I got married in 2007 and we divorced on 09/01/2019. I have two children with the applicant in the names of B. Chabvuta 9 years; K. Chabvuta 6 years. These children are staying in our matrimonial house at Area 47, Lilongwe.

As regard to the matrimonial properties jointly acquired would be house at Area 47/3/296 which was bought for purposes of catering as a matrimonial house i.e 2 children born with applicant and 4 children from my former wife. It was acquired through a loan from New Building Society as a mortgage loan. It was applied bearing both names of applicant and

myself up until death. The loan has always been serviced by myself – salary, gratuity from my employers. The applicant never contributed to the mortgage loan, it was my mortgage loan. All documents in that folder belong to me, the offer was done by me, an acceptance letter was done by me, title deed was for both of us but all documents were done by me. However, repayments were from my salary. No any receipt being a payment by the applicant (Exhibit D1). The current status of this loan is that the house has a demand letter from NBS that within the prescribed period we should honour the outstanding bill, hence I decided that it be offered for sale so that we share the proceeds with a view that we set off the outstanding bill and balance be shared between applicant. There is a demand letter from NBS Bank, I tender it (Exhibit D2). It is on record that the applicant's previous house was sold away whose proceeds were used on school fees of the children that wasn't correct but rather the proceeds were used on air ticket. I was the one who facilitated the purchase of the ticket. It is relevant to the present case in a sense that what the applicant said would not be true that the house should be used for the children but that she would misuse it. The balance as of now for the house would be about K10,000,000.00 plus some interest which I would not manage as of now. I also have some loan which I had been paying while I was with the applicant which would make it too difficult for me to manage the present house loan. I tender it as part of the evidence (Exhibit D3 and D4). The present house my proposal is that the house be offered for sale whose proceeds should be used to settle the balance, balance be shared to each of us. The proportion be in halves even though I was entitled to a bigger percentage. The estimated value of the house was at K65 million by last year in January.

Isuzu Twin Cab was acquired by me before I married the applicant. I was working at Limbe Leaf Company when I joined the company. I wish this vehicle to be left in my custody for my usage and the children.

Farm land at Mpingu 12 acres is that I should be settled on this piece of land but since marriage has been terminated, it would be used by the 6 children. The applicant's home is nearby and she would be able to monitor it. I would settle at Mpingu hence a dimba land would be used by me to plant bananas for the benefit of the children. Mpingu and Chiwoko I financed it myself, hence item 3 and 4 be left for the respondent's 6 children. The documents Exhibit D5 are for the farm land at Mpingu bought at a price of K540,000.00.

Applicant never contributed to the payment of the 5 hectares of Khobwe and 4 hectares for Mtedza. 52 bags were collected from my sweat as regards to soya seeds. The applicant never contributed, hence she would not claim anything from the proceeds.

150litres geyser was bought from someone at a price of K250,000.00. It was meant to be used at Area 47 having been acquired in the year of 2005. She would not have an interest with it as it was meant for my plot.

Digital weighing scale was bought by me using the resources I had hence it be left to me so that I use it for farming.

Item 7 parts of kitchen unit were meant to be used at area 25, item 8 and 9 would be shared in between.

Item 10 – 20, 21, 23, 25 would be collected by applicant. I don't have problems with them, item 22 and 24 is a motor for the gate which if given to me item 24 are garden tools would not be claimed by the applicant. Item 19(b) the applicant left for RSA I gave the applicant K1,000,000.00 (32 cartons of cooking oil of which I never had any benefit out of them hence would require a share out of them. I prepared this list of jointly owned properties, it has a summary on it, I want it be adopted as part of the evidence. It is my prayer that having heard my evidence I strongly stress that the house be offered for sale and share the proceeds which would be dealt with by each of us. The rest of the items is what I have said already.

In cross examination the appellant responded as follows: 'I do understand the distribution of matrimonial property. Yes, I wouldn't be in a position to decide the way distribution is to be made. My interest is on the house at area 47. There are indeed arrears to be paid on this house. I am not interested to settle the bill because I am incapable financially hence reason to suggest the offering of the house for sale so that proceeds be shared between ourselves. I wouldn't be happy if someone redeems it since in the past it was myself who used to be deducted from the salary to pay the mortgage. The bank is at the point of offering it for sale indeed. If the marriage existed, I would have settled the bill of the mortgage but I stopped because we quarrelled between ourselves. It's the duty of the court to decide what fairness it would come up with. Mine was a proposal as to how the distribution be done. I never build the house for the applicant but this house in question was meant to be our home.

5. Issues for Determination

This court has to determine whether a) the property in question is matrimonial property and subject to distribution and b) fairly distribute the matrimonial property. As earlier stated the evidence in the lower court is subjected to a fresh scrutiny but ‘does not mean that witnesses are heard afresh.: **National Bank of Malawi v Cane Products** [2012] MLR 301 (SCA). After the court considers the evidence, the appellate court makes an appropriate order as provided in **Section 22 of the Courts Act**.

6. Analysis of Law and Evidence

a) Which of the property in issue is matrimonial property?

Matrimonial property ‘refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.’ as per Lord Denning in *Wachtel v Wachtel* [1973] Fam 72, at 90 quoted in **Lorraine B Khamisa v Shabir Charles Khamisa** [2012] MLR 241 (HC). In this case the parties have attempted to explain who acquired the property in question and the intention of acquiring the said property. This court notes that the evidence sums up into the appellants’ word against the respondent’s word without tangible proof of the same. As was held in the Khamisa case cited above, “there being no clear intention expressed by the parties that they would own property separately, it has to be assumed that the property and businesses were acquired and established for the benefit of the family and children’ In this regard this court finds that all the property acquired during the subsistence of the marriage is matrimonial property and is subject to distribution.

b) What is a fair distribution of the property in question?

Section 24(1)(b)(i) of the Malawi Constitution has provided principles for distributing matrimonial property. It states that there should be a fair disposition of property that is held jointly between the spouses. It was held in **Kishindo v Kishindo** (397 of 2013) [2015] MWHC 447 (08 October 2015) that ‘fairness depends on circumstances on each case. One cannot successfully list all the circumstances. Consequently, decisions of this should be understood as not laying general or broad principles. Each decision is the courts’ attempt to be fair in a particular situation’. The court further went on to stated that, ‘Under section 24 (1) (b) (ii) of the Constitution, once the court determines that property is jointly held with a husband, as we have seen, equal sharing follows as a matter of course unless, of course, from the wife’s evidence or the husband’s evidence, and the burden is on the husband, circumstances are

proved which make equal sharing unfair. The principle of equal sharing was also applied in **Sikwese v Banda** (MSCA Civil Appeal No. 76 of 2015) [2017] MWHC 37 (02 February 2017). It was held that where property is intended as jointly owned and where a party has made some contribution to the property but the extent of the contribution cannot be ascertained with any degree of specificity, the prudent approach is to award 50% share in the property. The property that was brought to the attention of and distributed by the lower court was:

- | | |
|---------------------------------|------------------------------|
| 1. 10 acre farm at Mpingu | 8. TV Plasma |
| 2. Cooker | 9. 1 double bed and mattress |
| 3. TV black and white | 10. Vehicle Isuzu Twin Cab |
| 4. 150 litre geyser | 11. Dinning set |
| 5. 7 acre Dimba at Kanyerere | 12. 52 bags soya beans |
| 6. Upright freezer | 13. Deep freezer |
| 7. 4 single beds and mattresses | 14. Kitchen utensils |

In this case there is no clear method of ascertaining the contributions of each party on the above properties. Both were working. Both explained in their own way how they contributed to the acquisition of the properties in question. In that regard a fair distribution would entail each party gets a 50% share of the property in question. All the properties are to be valued and shared. If the properties cannot practically be shared then the same should be sold and the proceeds shared. This means the parties get the following shares:

<i>Appellant</i>	<i>Respondent</i>
5 acre farm at Mpingu	5 acre farm at Mpingu
3.5 acre Dimba at Kanyerere	3.5 acre Dimba at Kanyerere
26 bags soya beans	26 bags soya beans
2 single beds and 2 single mattresses	2 single beds and 2 single mattress
Half kitchen utensils	Half kitchen utensils

For the remaining items (Upright freezer, Deep freezer, TV Plasma, Cooker, 1 double bed and mattress, TV black and white, Vehicle Isuzu Twin Cab, 150 litre geyser and Dinning set) since they cannot be practically shared in half they are to be valued and sold.

Regarding the Area 47 House Number 47/3/296 which seems to be of main interest to the parties, before it is subjected to matrimonial distribution, the bank under which the mortgage

was obtained is to first determine in consultation with the parties how the outstanding loan will be cleared as per the loan agreement. Thereafter, if redeemed, it will be subjected to fair distribution as explained above. The respondent has requested that she keep the house on account that the appellant has other houses. This court notes that evidence of the existence of the other house was not brought to the fore. A party who makes an assertion ought to prove the same in a civil matter. Secondly as explained above all matrimonial property is subject to equal sharing and the area 47 house cannot be exempted as doing so would make the distribution unfair. Where properties are to be sold the parties herein are first to be offered a chance to buy before third parties.

7. Finding

The lower courts decision is set aside and all property is to be shared equally upon being valued. The Area 47 house is to be first redeemed from the mortgage before it is subjected to distribution. Where there is a sale either party is to be offered to buy out the other party share first before third parties are offered.

Pronounced this 11th day of February 2021 at LILONGWE

R.M CHINANGWA

JUDGE