

W. M. M.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CAUSE NUMBER 9 OF 2018

(Being civil cause number 1976 of 2017 before the First Grade Magistrate Court sitting at Blantyre)

BETWEEN

FALESI MUSSA

APPELLANT

AND

CHIMWEMWE MUSSA

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Mickeus, Counsel for the Appellant
Mputeni, Counsel for the Respondent
Mankhambera, Official Court Interpreter

JUDGMENT

1. The appellant appeals against the decision of the First Grade Magistrate Court sitting at Blantyre by which the lower court ordered that a house belonging to the parties to the matrilineal customary marriage that it had dissolved be valued, sold and the proceeds be shared by the parties.

2. The Respondent had sought the dissolution of his customary marriage to the appellant herein before the lower court. Both parties were unrepresented before the lower court. The lower court dissolved the said marriage and upon hearing the evidence in the course of the hearing for the dissolution of the marriage went ahead to distribute the matrimonial property, namely a house, by ordering that it be valued, sold and shared between the parties upon 'considering other circumstances surrounding the matter'.
3. As correctly submitted by the parties on this appeal, the lower court properly cited the relevant law on distribution of matrimonial property, namely, that on dissolution of a marriage, a woman is entitled to a fair distribution of matrimonial property jointly held during the marriage as provided in section 24 (1)(b)(i) of the Constitution and that all the circumstances of the case must be considered including the intention of the parties on acquisition of the property, as explained in the case of *Sikwese v Zubelu-Banda* MSCA civil appeal number 76 of 2017 (unreported).
4. The evidence with regard to the role the parties played on acquisition of the house during the subsistence of their marriage was that given during the hearing on dissolution of the marriage. No separate hearing was had to deal with ancillary matters on dissolution of the marriage.
5. However, the recommended practice in such matters is to hear evidence on why a marriage should be dissolved. Once the marriage is dissolved then a separate hearing should be had to deal with ancillary matters to the dissolution of the marriage which will often be matters on custody of children of the marriage, maintenance of the said children and the distribution of matrimonial property.
6. The evidence that the lower court heard relating to the matrimonial property was that the appellant wife bought the land herein. And that the respondent husband molded the bricks. He also said they built the house together. Then the appellant wife indicated that the husband who was working as a guard was not taking care of the family but mostly drunk which led her to get some money from her uncle with which she started a business and ended up buying the land on which they built the house. She indicated that she sponsored the respondent's travel to South Africa and that he never looked after the family.
7. It is against the preceding facts that the lower court cited the relevant law on distribution of matrimonial property and then determined that 'upon

considering other circumstances surrounding the matter the house be valued, sold and shared between the parties'. There was no indication as to the proportion in which the proceeds would be shared and the parties assumed that it is in equal share. And that is the basis on which the appeal was argued by both counsel on that aspect.

8. Being dissatisfied with the lower court's decision on distribution of the matrimonial property, the appellant filed this appeal and indicated three grounds of appeal as follows:

- 1) The learned trial Magistrate erred in law in ordering that the house should be sold and proceeds shared between the parties without establishing whether the respondent herein contributed anything towards the acquisition or construction of such a house and to what extent if any.
- 2) The learned trial Magistrate erred in law in distributing the property without considering contribution and intention of the parties in acquisition of the property.
- 3) The learned trial Magistrate erred in law in distributing the property in total disregard of principles of fairness and equity.

9. This Court wishes to state at the outset that, on hearing civil appeals, this Court has the following powers as provided in section 22 of the Courts Act:

In a civil appeal the High Court shall have power—

- (a) to dismiss the appeal;
- (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made, with directions to proceed to determine the case on its merits;
- (c) to resettle issues and finally to determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds;
- (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence;
- (e) to make any amendment or any consequential or incidental order that may be just and proper;
- (f) to confirm, reverse or vary the judgment against which the appeal is made;

(g) to order that a judgment shall be set aside and a new trial be had;

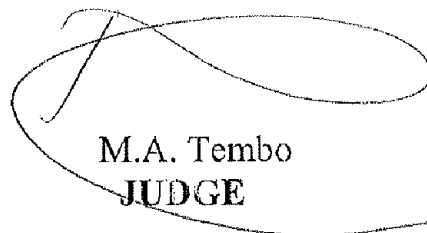
(h) to make such order as to costs in the High Court and in the subordinate court as may be just.

10. The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny.
11. The appellant decided to argue the grounds of appeal in one argument. She contended that the lower court cited the relevant law but failed to show how on the facts it had arrived at the decision on distribution of the matrimonial property. She added that it must also be borne in mind that the respondent was under an obligation, to be noted judicially, to build a house for her at custom which was not done. And that in the circumstances it was not fair on all the facts to order an equal sharing of the house between the parties. She in essence disputed that the respondent contributed beyond the bricks and contended that she contributed over 90% to the acquisition of the house and given her right to have a house built for her at custom, she ought to retain the house herein.
12. On the other hand, the respondent contended that he contributed the bricks as well as in the building process and that there is no evidence on the levels of contribution between the parties and that the lower court was right to order a distribution in equal shares as that would ensure that there is equity and equality as decided in *Kayambo v Kayambo* [1987-89] 12 MLR 408.
13. This Court observes that the lower court indeed cited the relevant law on distribution of matrimonial property. However, the lower court did not indicate how that law was applied to the facts for it to determine that the house is matrimonial property and that it should be shared between the parties. The proportion of the shares was also not indicated leading the parties to assume that it is to be in equal shares.
14. This Court therefore finds, in the circumstances, that the grounds of appeal are well made out considering that the lower court never explained why it determined that matrimonial property constituted the house and why the same should be shared equally.
15. This Court observes that it has power to determine the question on the distribution of the matrimonial property herein on the record as provided in section 22 of the Courts Act. However, the challenge that this Court has on the record is that the evidence on the question of the matrimonial property was

not exhaustively taken by the lower court from the unrepresented parties. The lower court did not guide the parties to explain on matters such as the value of the land in question. The value of the bricks. The cost of construction of the house and the proportion each party bore. All these facts are not available. It is not surprising to this Court that such is the case given that the correct practice was not followed by the lower court to conduct a dedicated hearing on the important question of distribution of matrimonial property upon dissolution of the marriage herein.

16. The lower court is guided accordingly to first hear the parties on dissolution of the marriage and once the marriage is dissolved to hear them on ancillary matters such as distribution of matrimonial property. Lumping all the issues in one hearing is not procedural and is likely to result in injustice. The lower court must also explain the reasons for its finding on why property is considered matrimonial property and why it has to be shared and the proportions of such shares.
17. This Court observes that it has wide powers on the appeals from the lower court as provided in section 22 of the Courts Act. And in exercise of those powers, in particular under section 22 (g) of the Courts Act, this Court sets aside the lower court decision and orders a re-trial of this matter before the Chief Resident Magistrate or a Resident Magistrate of her choice within thirty days of this Order being brought to her attention. This is to address the issue of evidence to be properly taken on the issue of distribution matrimonial property herein.
18. Each party shall bear its own costs on this appeal in the circumstances of this case where the appeal has succeeded due to the procedural error of the lower court.

Made in open court at Blantyre this 24th March 2021.



M.A. Tembo
JUDGE

