



**IN THE HIGH COURT OF MALAWI  
ZOMBA DISTRICT REGISTRY  
CIVIL REVIEW CASE NO. 3 OF 2021**

(Being Civil Case No. 173 in the First Grade Magistrate Court Sitting at Nanyumbu)

**BETWEEN**

**JOSEPH LIPENGA**

**PLAINTIFF**

**AND**

**ALINAFE KAPITO**

**DEFENDANT**

**REVIEW ORDER**

**Ntaba, J**

**1.0 BACKGROUND**

- 1.1 The Respondent with the assistance of FOYEDE, a civil society organization based in Machinga raised a complaint with the Assistant Registrar in relation to the case between herself and Joseph Lipenga. The said case was being handled by a First Grade Magistrate sitting at Nanyumbu. The complaint related to the judgment delivered on 13<sup>th</sup> July, 2021. In terms of the review, herein, the complaint related to the judgment delivered on 13<sup>th</sup> July, 2021 as well as an order delivered on 4<sup>th</sup> August, 2021 which resulted in an eviction of herself and children from the matrimonial property.
- 1.2 The case at the lower court related to divorce, whereby Mr. Joseph Lipenga was the Petitioner and the review complainant was Alinafe Kapito. The ground for divorce was 'ndikusudzuleni chifukwa simukundifuna banja'. The facts were that the two were married in 2009 under custom and have three (3) issues out of the marriage. The lower court dissolved the marriage and found for the Defendant. The lower court also made the following orders –
  - 1.2.1 that marriage counsellors should witness sharing process of matrimonial property;
  - 1.2.2 that the Petitioner should take care of his three children in providing food items, clothing and medication;
  - 1.2.3 that the Petitioner should educate the three children until each acquired first university education;
  - 1.2.4 that the Petitioner should compensate the Respondent with K450,000.00; and

1.2.5 that the piece of land they both purchased should be sold and proceeds be shared.

1.3 The lower court decision did not attach a time frame within which the order was to be complied with. Incidentally on 4<sup>th</sup> August 2021 the lower court granted a Protection Order to the Applicant, Joseph Lipenga in which the lower court indicated that the Respondent not to stay together with the former husband. She should therefore vacate the matrimonial house and relocate to the house the former husband built for her.

## **2.0 COURT'S DETERMINATION**

2.1 By law, under section 26 of the Courts Act, this Court is seized of this case for purposes of review. In reviewing, this Court is requested to examine the record of civil proceedings before any subordinate court. For the purpose of review the court record is called by the High Court which gives directions to the Subordinate Court as to the further conduct of the same as justice may require. In reviewing, the High Court shall satisfy itself as to the correctness, legality or propriety of any finding, decision or order recorded or passed, and as to the regularity of any proceedings before any such subordinate court.

2.2 This Court upon an examination of the lower court record decided to firstly address, the divorce issues. The Court has carefully reviewed the evidence which was admitted in the lower court and noted that in terms of the divorce, the Petitioner was found liable of ending the marriage due to his conduct including adultery. Further, it was noted that the Petitioner, attempted to have the marriage dissolved using the chief but the matter was referred to court. It was noted further from the evidence that the Petitioner deserted the matrimonial home for a number of months before bringing the petition herein. It is the finding of this Court, that the magistrate rightly applied the standard of burden of proof in a civil matter in terms of the evidence in this case. Additionally, the finding of liability by the lower court was also right in law.

2.3 Turning to the issue of distribution of property, the lower court's decision with regards to the division of property, this Court finds the lower court had proper justification for distributing the properties and that the Respondent was not prejudiced in any way. It is this Court's considered view that there is no good enough reason, to depart from the findings of the magistrate in terms of the law on an equity basis. The Court recognizes that the distribution of the said property was in line with the Constitutional provision of section 24 except for the issue of compensation and upon the perusal of the file, such was not proved as a customary issue. This in this Court's considered opinion looking at the finding of the lower Court is an issue that needs to be re-examined and this Court shall make an appropriate order on its handling.

2.4 The final issue for consideration under this review for that this Court to deal with is the issue of the protection order which resulted in the eviction of the Respondent from the house. It is imperative that at this point, it should be noted that the Magistrate's conduct in the handling of the complaint was



unprofessional. The magistrate was duly informed through Her Worship Kayira who had first received the complaint on the basis that the Complainant thought she was still Assistant Registrar for Zomba High Court. She duly informed Her Worship Chande and Her Honour Kachala on 26<sup>th</sup> July, 2021. The Magistrate was duly informed by 26<sup>th</sup> July, 2021 to send the file for review, however the same was not done despite reminders. The file was eventually sent to the High Court on 12<sup>th</sup> August, 2021 with the additional complaint on the protection order. The delay and lack of response from the Magistrate raises major concern for this Court especially where the issues were known to be of an urgent nature.

- 2.4 This Court after a careful examination of the court record especially in terms of the protection order, found the said order surprising and wrong in law. This was more so since the protection order and subsequent eviction of the Respondent pertains to a matter which the Magistrate had made a ruling on 13<sup>th</sup> July, 2021. It is evident from the record that the said protection firstly should have not been taken as an *ex parte* due to the fact that it related to matrimonial property that was being distributed. Furthermore, the lower court was very much aware that there were children who were resident in the said home and should have ensured that their best interests were served. Lastly, the protection was wrong in law because there seem to be no domestic violence issues raised in the application to have warranted the order being granted under the Prevention of Domestic Violence Act (hereinafter the 'PDVA'). The Order simply states that the Respondent should not live together with the former husband and further she should vacate and go to live in a house which was built for her. It is this Court's considered opinion that it is was the court that heard the divorce proceedings and was privy to all the parties' properties. It was therefore baffled this Court as to which property was being referred in the Order as no such property was mentioned in the divorce proceedings. Further, taking into account the orders it made on 13<sup>th</sup> July, 2021, the 4<sup>th</sup> August, 2021 order was reopening a matter that was closed.
- 2.5 This type of situations in this Court's considered view raises misconduct issues. Firstly, the inappropriateness and illegality of the Magistrate's conduct raises impartiality concerns. As judicial officers, impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. Notably the Tenth Schedule of the Conditions of Service provides the Code of Conduct for Judicial Officers puts impartiality as one of its values especially by stressing that we should perform our duties without favour, bias or prejudice as well as that our conduct both in and outside court should enhance the confidence of the public, legal profession and litigants in the impartiality of the judge and of the judiciary.
- 2.6 Additionally, this conduct also questions whether there was a fair trial conducted especially when you examine the handling of the PDVA application. The concept of a fair trial between the parties should be the court's paramount objective and such was lacking in the handling of the application. It is imperative that the judicial officers should do everything to favour the fair trial for all involved and extreme caution should be made so as to not cause injustice or deprive party that had already been successful of the fruits of the litigation.

Furthermore, a judicial officer should not deprive a litigant of the proper forum of jurisdiction which the magistrate did in this case. Furthermore, he took upon himself powers of an appellate court through the backdoor by handling the PDVA application to overturn his own earlier decision.

### 3.0 CONCLUSION

3.1 Accordingly, this Court therefore finds as follows –

- (a) the lower court order of divorce by the magistrate is hereby confirmed;
- (b) the lower courts' decision on distribution of property is hereby upheld however the following timeframes should be adhered to –
  - (i) distribution of household property to be done within 30 days of this Order; and
  - (ii) the sale of the land to be done where both parties agree in 3 terms of the buyer and the same to be done within 90 days;
- (c) the orders pertaining to the children are hereby confirmed; and

3.2 The lower court decision on compensation of K450,000 to the Petitioner to be assessed by the Chief Resident Magistrate or any Resident Magistrate duly assigned which takes into account the custom of the parties duly adduced and admitted into evidence by court. The said assessment to be done within 45 days of this Order.

3.3 This Court finds on review that there was a lot of impropriety in the way the lower court handled the PDVA application and hereby sets it aside and further orders that the Respondent and her 3 children can return to the said home. If the Petitioner decides to harass her whilst she is in the said house, the Respondent should apply for a protection order as well as commence contempt proceedings.

I order accordingly.

**Made in Chambers on 19<sup>th</sup> day of August, 2021 at Zomba.**



**Z. J. V. Ntaba  
JUDGE**