



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL CASE NUMBER 18 OF 2020

(Being civil cause number 1264 of 2019 before the Third Grade Magistrate Court sitting at Blantyre)

BETWEEN

GEORGE DANIEL NYANYALE

APPELLANT

AND

EGLY NYANYALE (Nee CHITSEKO)

RESPONDENT

CORAM: JUSTICE M.A. TEMBO,

Kosamu, Counsel for the Appellant
Chijozi, Counsel for the Respondent
Mankhambera, Official Court Interpreter

JUDGMENT

1. This is the decision of this Court on the appellant's appeal against the decision of the Third Grade Magistrate Court sitting at Blantyre by which the lower court ordered that some property held by the parties as a matrimonial property be distributed to the parties to the customary marriage that it had dissolved.

2. The appellant had sought the dissolution of his customary marriage to the respondent herein before the lower court. The lower court dissolved the said marriage. It then heard both parties on the issue of distribution of the matrimonial property and made an order distributing the said property pursuant to its powers under section 39 (2) (e) of the Courts Act which grants jurisdiction to the lower court to dissolve customary marriages.
3. 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 lower court erred in assuming jurisdiction on matters clearly without her jurisdiction as spelt out in section 39 of the Courts Act. The lower court's decision is thus *ultra vires*.
 - 2) The lower court erred in disregarding the appellant's prayer to distribute the properties equally.
 - 3) The lower court erred in granting the bulk of the property to the respondent by solely looking at ownership and intention of the parties when they acquired the property, while disregarding the underlying factors to be applied on distribution of property upon dissolution of marriage as set out in section 74 of the Marriage, Divorce and Family Relations Act.
 - 4) The lower court erred in disregarding case law as set out in *Kamphoni v Kamphoni and Kishindo v Kishindo*. Being a subordinate court, the lower court was and is bound by these decisions.
 - 5) The lower court erred in simply considering ownership of the property when distributing without considering section 24 (1)(b)(i) of the Constitution.
 - 6) The lower court misdirected itself in holding that the appellant lived an independent life in Nchalo for 21 years and that the appellant did not know how the property was acquired or how the business was being run when in fact the evidence suggests otherwise.
 - 7) The lower court erred in law by holding that the intention of the respondent was to own and enjoy property in total exclusion of the appellant when in fact they were legally married at customary law.
 - 8) The lower court erred in fact and law by simply regarding monetary contributions to property when contribution clearly takes many forms. The lower court also erred by solely considering in whose name the property is when distributing some of the property.

- 9) The lower court erred in law by not considering the testimony of the appellant simply by reason of the appellant not being audible enough or confident enough when he was giving testimony.
- 10) The lower court erred in holding that the respondent toiled on her own with no contribution of the appellant when in fact the appellant had taken an active role in the business investments.
- 11) The lower court erred in fact and law by disregarding the direct and indirect contributions made by the appellant regarding distribution of property on dissolution of marriage as per the dictates of section 74 (1)(g) of the Marriage, Divorce and Family Relations Act.
- 12) The lower court erred in holding that the property cannot be subjected to the principle of equal sharing and that sharing equally would be unfair. The lower court misled itself as to the law on distribution of property upon dissolution of marriage.
- 13) The lower court failed to properly analyse the case before it reached its decision.

4. 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.

5. The appeal is by way of rehearing. That means this Court will subject the evidence before the lower court to a fresh scrutiny.
6. This Court sets out the evidence adduced before the lower court and the court's determination before it deals with each ground of appeal herein in light of the submissions by the parties on this appeal.
7. The evidence of the appellant before the lower court on distribution of matrimonial property was that he got married to the respondent at customary law in August, 1991. And that by then they had no property. Further that as the time went by, they were able to set up a stationery and a timber business from which they earned sufficient income enabling them to acquire various valuable property.
8. The appellant then explained how the stationery business was started. He indicated that around 2007 a certain Mr. Steyn, a depot Manager at Nchalo Unitrans, asked the appellant to look for reliable stationery suppliers because the appellant as controller of all stationery purchases there. He indicated that he sold the idea to the respondent and they agreed to the supply stationery themselves and run the business using their family capital. He added that they also decided they should not be involved in day to day activities of the intended business to avoid conflict of interest and so they employed some people.
9. He indicated that they managed to generate enough money due to the large stationery orders from Unitrans. He added that they used the name CAS Printers and not the name of their other business, Likuwa Investments, to avoid conflict of interest. He added further that whenever payment was received at CAS Printers they normally transferred the money to Likuwa investments account.
10. He then stated that, apart from Unitrans, they also had other clients who were unreliable and that around 2011 to 2012 Unitrans was their only client.
11. He then stated that in 2018 he directed that the directors of CAS Printers be changed to remove himself and the respondent and to have new directors. He however indicated that despite this change capital was still coming from Likuwa Investments.

12. He then explained how properties in issue were acquired. He indicated that the timber business was started through the help of his brother Frank Nanjiwa who allowed him and the respondent to join him and start timber business involving pit sawing since they had no government licence then. He indicated that their business grew despite their lack of knowledge and experience but due to help from Mr. Nanjiwa. And that a year later, they obtained their own pit sawing licence at Viphya Plantation under Likuwa Investments.
13. He then asserted that the name Likuwa is a historical name from his village where he started school. He added that key staff of their timber business such as supervisor and accountant were from his home area in Mulanje due to their expertise in timber processing.
14. He indicated that in the period between 2009 and 2010 their business began to face financial difficulties. And that at that point, they agreed to withdraw his pension fund from Old Mutual to boost their collapsing business. He exhibited proof of payment of his pension benefits in the sum of K2 121 645.10 in October, 2010. He stated that this sum was pumped into their business enabling it to grow and produce substantial profits. He added that this helped them to begin buying all the property in issue except the Toyota Carina which he said was bought using proceeds from their stationery business.
15. He asserted that from the profits made under Likuwa Investments they were able to purchase the following property: two timber sawing machine (timber king machine model 1220 and a sharpener), freightliner truck with trailer in 2014, Toyota Hilux (after selling timber in Mozambique), Toyota Nadia (after exchanging timber), old Kanjedza house, Kanjedza forest house, Zingwangwa house and Machinjiri house.
16. He explained that the properties are registered in their different names depending on what was convenient at the time of registration. Further, that he was mostly based in Chikwawa due to his employment with Unitrans. And this resulted in him giving his wife authority to carry out some transactions even in his absence. He added that this enabled the respondent to register most of the other properties in her own name.
17. The appellant tendered in evidence what he termed notification of Likuwa Investment bank accounts balances in October 2019 indicating three bank

accounts with zero balance, K195 and US\$59 respectively. He indicated that this is from NBS Bank.

18. He then explained how the business contracts were obtained. He indicated that Illovo Sugar Ltd advertised in the newspaper. He added that he was assisted by a Mr Chirwa's auntie to get the relevant application forms. He indicated that he signed that contract and his witness was Charles Botolo.
19. Then he referred to a contract with Bakhresa which was secured through Mr. Aswan a manager on the Malawi-Nacala corridor. And the same was signed by him and witness by Charles Botolo.
20. He then referred to a contract with Premier Logistics from South Africa which he said was initiated by their driver Hendrix Dinyero. He explained that he spoke to the Manager of Premier Logistics and he got some relevant forms which he signed and were witnessed by Charles Botolo.
21. He then asserted that there was another contract with Reload Aquarius Shipping Company which was acquired through the respondent's friend in Lilongwe Mr. Mazinzwa who sent them forms. He added that he filled and signed the forms and the respondent signed as well and Charles Botolo signed as a witness.
22. He then referred to a contract with Cross Africa-South Africa was initiated through their driver Hendrix Dinyero who gave him contacts for the Logistics Manager with whom he entered a gentleman's agreement to operate whilst waiting for signing of a contract.
23. He then explained that he had not managed to get exact dates of some events or their undertakings because all documents relating to their businesses are in their matrimonial home in Blantyre and he is in Nchalo. He added that the respondent could not allow him to access some information due to their sour relationship.
24. He indicated that so far the respondent has been transacting on the bank accounts on her own because he had signed some cheques in advance. He noted that in September, 2019, Reload Aquarius Shipping made a transfer of US\$2 500 into their Foreign Currency Denominated Account. He tendered in evidence a copy of what he termed an email notification forwarded to him. Although the document shows a transfer to Likuwa Investments, it is not apparent that this was indeed an email notification. He then asserted that it is

clear from the notification of bank account balance that all this money has been used by the respondent alone.

25. He then asserted that the respondent has also used up all the money that was deposited in the Likuwa Investments Account number 14373594. He noted that there have been regular payments into this account from Nampak for transportation fees. He tendered the relevant bank statement.
26. He indicated that they opened the bank accounts for use as a family. And that they bought the properties using money that came from their businesses. And that it was only fair that there be equal distribution of the properties according to the law.
27. On her part, the respondent indicated that at the time she got married to the appellant she was already working as a cook at the Polytechnic of the University of Malawi.
28. She indicated that the appellant worked for Unitrans from 1991 until 1994 when his contract was terminated. And that the appellant secured another contract of employment with Unitrans in 1996 in Nchalo where he has worked to date. She added that he visited her during weekends.
29. She asserted that during the two years that the appellant had no employment she tried to support him to start up an imports business but the same did not work.
30. She then explained that in 2001, whilst still working for the University of Malawi, she started a business selling cold drinks and assorted items with a capital of K5 000. She added that she asked the appellant for more capital but he declined. She then started a second hand clothes business.
31. She then elaborated on how the timber business started. She indicated that in 2005, whilst running her small businesses, she obtained a loan from her work in the sum of K42 000 as she had met Frank Nanjiwa whom she asked to incorporate her in his business of timber as he had a timber licence in Chikangawa Forest and he accepted. She tendered in evidence the loan offer.
32. She indicated that in January, 2006, Frank Nanjiwa informed her that it was time to go to the forest, but the appellant stopped her from going to Chikangawa as he was jealousy and afraid that she may engage in an affair with Frank Nanjiwa hence the appellant volunteered to go despite his past business failures.

33. The respondent then explained that the appellant returned from Chikangawa in February, 2006 but unfortunately he failed to provide an account of how he had spent money. She indicated that she felt betrayed hence wrote the appellant a letter expressing her disappointment dated 21st February, 2006 which she tendered in evidence. She asserted that from then on she took over and run the timber business alone without any assistance from the appellant.
34. She explained that in 2007, she obtained another loan from her work to boost her business in the sum of K80 000 which she injected into the timber business. She tendered evidence of the loan too. She indicated that she got timber from Chikangawa and sold it at Kudya in Blantyre.
35. She then stated that in 2009, she received her retrenchment package in the sum of K2 969 545. 43. She tendered evidence of her payment. She indicated that she decided to register the timber business. She elaborated that, out of respect for the appellant as husband, she and the appellant registered the timber business as Likuwa Investments in both their names although the appellant never contributed at all. She indicated that due to the new machines business sales improved. She produced evidence of sales.
36. She indicated that she used part of her retrenchment package to purchase a piece of land at Kanjedza for K444 000.
37. She indicated that in 2011, she bought another timber cutting machine. And that in 2012, she went to Chikangawa and bought some trees on credit and started making timber. In August the same year she rented a house there and moved there permanently. She indicated that the appellant never visited her indicating that it was very cold up there. She added that the appellant never made any monetary contribution to the timber business. She indicated further that the business went so well that she had sales which enabled her to buy several properties.
38. She then indicated that in 2010, the appellant got his pension in the sum of K2 121 645.10. and that the appellant only gave her K300 000 which was used to buy a cooker and a fridge.
39. She explained that the appellant invested the rest of his money in his business which he registered together with Alexander Conndonny styled Algeo Enterprise. She tendered evidence of the registration. She indicated that this business involved supplying of bricks to Speedys Limited. She indicated further that the appellant also ventured into timber business as well. She

- reiterated that she never benefitted from the appellant's business started using his pension money. She tendered evidence of some brick business records.
40. She indicated that in 2014, Chikangawa Forest was closed for business and she returned to Blantyre the same year.
41. She then elaborated on how the stationery business was operated. She explained that in 2006, the appellant was indeed asked by his office to find someone to supply stationery. She indicated that she introduced the appellant to Mr. Salimu Matondwe with whom she registered a stationery business called CAS Printers and Binding. She tendered the registration certificate in evidence. She then explained that they agreed to be giving the appellant 20 per cent of the proceeds as his commission for finding them business. She insisted that the appellant only acted as an agent for providing business.
42. She then asserted that the appellant used his 20 per cent commission for his own benefits. And that none of it was ever pumped into the timber business under Likuwa Investment. She indicated that CAS Printers and Binding was different and separate from Likuwa Investment.
43. She indicated that indeed in 2019, CAS Printers and Binding was handed over to other directors and the appellant still gets his 20 per cent commission as an agent.
44. She then explained about acquisition of properties. She indicated that she has acquired property mostly from profits from the timber business but that some were acquired from other sources.
45. She indicated that in 1998, she bought a plot of land in Namiyango after she had received compensation from the Government following an arrest during the 1992 multi-party demonstrations. She explained that, using a loan from the Polytechnic SACCO, she built a house on the plot by 2001 which was rented out. She added that she handed the house to her mother who received rentals until she passed on in 2010. She tendered in evidence her compensation payment, correspondence on the SACCO loan and a copy of her Namiyango plot allocation.
46. She then stated that, in 2009, she bought a piece of land in Kanjedza Township using part of the money she got from her retrenchment as earlier stated. She indicated that this was registered in her name and was later developed into a four-bedroomed house. She asserted that the appellant never assisted her in the construction of the house which did on her own using proceeds from the

timber and second-hand clothes business. She added that this house is let out and she receives rentals.

47. She indicated that in 2001/2001, she built a house at her maternal home in Bangwe despite the fact that the appellant was required to do so at custom. She added that around 1994 and 1996, she made an initiative to build a house at the appellant's home in Mulanje.
48. She then asserted that in 2013, she bought a Toyota Hilux pickup by exchanging four trips of timber. The registration certificate shows this vehicle is owned by Likuwa Investments.
49. She explained that in 2013, she personally bought from Mr. Peter Baghwanji, a freightliner horse and trailer at US\$60 000. She indicated that the appellant did not contribute to this but that Mr. Baghwanji advised her to put the said horse in the name of the appellant out of respect as a husband. She pointed out that in 2019, after she discovered the appellant's infidelity she changed the ownership into her name. She tendered the registration and the seller's receipt of the purchase price in evidence.
50. She then stated that in December, 2013, her friend informed her of a house for sell in Zingwangwa. She asserted that she bought the house from Mr. Gangire for K7 500 000 and that she asked her friend Mrs. Kumwembe to help the appellant with the documentation as she was in Chikangawa by then. She tendered in evidence the sale agreement signed by the appellant and the deposit slip for the purchase price signed by herself.
51. She then indicated that in 2014, she the appellant a motor vehicle Toyota Nadia by exchanging with timber for him to use while at Nchalo given that the vehicle he was using was old.
52. She then indicated that in February, 2014, she bought a house at Machinjiri area 5 for K3 500 000 from Mr. Elliot Chiwale. She indicated that this house is rented out and she has been getting rentals ever since. She tendered the sale agreement in evidence.
53. She indicated that she also bought another piece of land in Machinjiri area 5 in November, 2015 and put the sale agreement in the appellant's name in the hope that he will take part in the development of the land. She noted that unfortunately the land remains undeveloped and threatened with repossession by Blantyre City.

54. She then asserted that in September, 2011, she applied for and acquired a plot of land at Kanjedza Forest from Ministry of Lands. She explained that this plot has recently been sold to cover her expenses including legal fees.
55. She then referred to a number of transport contracts. She pointed out that there was a contract with Illovo Sugar Company which was acquired but expired several years ago. There was another contract with Bakhresa but it also expired several years ago. So too a contract with Premier Logistics which expired three years before 2020. Another contract with Reload Aquarius International which was active. Another contract with NAMPAK secured in 2019.
56. She pointed out that some of the transport contracts involved other partners including Frank Mbeta and Chimwemwe Kajawa and others.
57. She indicated that following registration of Likuwa Investments several bank accounts were operated namely, Likuwa Investment 1 account number 14373586, Likuwa Investment 2 account number 14373594 and Likuwa Investment FCD account number 14235857. She indicated that these accounts were mostly active when the timber business was operational. And that the FCD account was also used for contracts with international companies whilst for local contracts the other Likuwa Investment 2 account was used.
58. She then pointed out that because other business partners were involved, not all funds passing through the accounts were for her benefit only. She added that some of the money was also used to cover expenses.
59. She then asserted that she tried to take care of the appellant as her husband as best as she could and looked after his three nieces from a young age until two of them graduated from college. She lamented that despite her efforts, the appellant showed no interest in their marriage. She asserted that the appellant forbade her from visiting Nchalo for 23 years as the appellant was involved with another woman there and lived an independent life for that duration. She indicated that having toiled on her own to do business it will be unfair for the property to be shared equally between her and the appellant.
60. Both parties were subjected to cross-examination.
61. Mrs. Kumwembe testified on the purchase of the Zingwangwa house from Mr. Gangile.
62. The lower court considered the evidence and noted that the Likuwa Investment was registered in the name of the parties herein although it was

started using the money of the respondent. It also found that the fact that relations of the appellant worked on the business that was not a contribution by the appellant since those relatives of his were being paid for doing their work. See *Sikwese v Banda* MSCA civil appeal number 76 of 2015 (unreported).

63. The lower court also found on the strength of the business records provided by the respondent, that the business did well during the period prior to the receipt of the pension by the appellant in November, 2010 such that it was not proved that the business was dwindling and that the appellant injected his pension money in the Likuwa investment business. The Court concluded that the appellant's evidence that he contributed capital to Likuwa Investments was not credible. The Court also observed the demeanor of the appellant who was murmuring and inaudible due to cross-examination.
64. The lower court concluded that the stationery business did not involve the appellant as he was not on the register for that business but also because he did not know how any of the business went as he was based in Nchalo for the 21 years of the parties' union.
65. The lower court observed that the evidence shows that the appellant left for Nchalo and thereafter the respondent worked hard and purchased the various properties in contention. Further, that some of the property was in the respondent's name and other in the appellant's name's though purchased by the respondent. The lower court concluded that there was no intention to hold property jointly. It cited as an example the fact that, for the Zingwangwa purchase, the respondent deposited the purchase price to the seller's bank account and the appellant put his name on the sale agreement.
66. The lower court reasoned that it had to consider all the circumstances of the case, including contribution of the parties and intention of the parties on acquisition of property, when determining the right of the respondent to a fair distribution of jointly held matrimonial property on dissolution of her marriage herein in terms of section 24 (1) (b) (i) of the Constitution as explained in the matter of *Sikwese v Banda* MSCA civil appeal number 76 of 2015 (unreported). Further, that marriage in itself is not indicating of joint holding of property. And in that connection, the lower court properly alluded to the discussion by the Supreme Court in *Sikwese v Banda* disagreeing with the High Court decisions on the subject in *Kamphoni v Kamphoni* Civil appeal

number 1 of 2010 (High Court) (unreported) and *Kishindo v Kishindo* Civil cause number 397 of 2013 (High Court) (unreported), and emphatically stating that where property is owned exclusively by one spouse, and the other cannot demonstrate any contribution to its acquisition or improvement, the other spouse cannot claim any share in that property.

67. The lower court then made the following order distributing the property:

- (a) Starting with the three businesses, Likuwa Investment, CAS Printers and Binding and Algeo Enterprise. As for Likuwa Investment this Court having established that this business started with the respondent's contribution alone with no contribution from the applicant and that since the business started to when it closed the applicant never took part in running the business or the operation the respondent had to toil alone day and night. I therefore award Likuwa Investment to the respondent together with all the instruments and machines used in the timber business.
- (b) CAS Printers and binding, this business was registered in the name of the respondent and another person not the applicant and it is on record that the parties herein are no longer directors hence not matrimonial property.
- (c) Algeo Enterprise, this business was registered in the applicant's name and another person and not the respondent hence not matrimonial property but applicant's property.
- (d) A house at Kanjedza Township is awarded to the respondent. The applicant has no interest since this is from proceeds of the respondent's retrenchment package. The applicant is still working meaning that when he retires he will not share his package with the respondent because they are no longer family.
- (e) As for the Kanjedza Forest house under construction according to the applicant, the respondent has submitted that the same was sold due to financial hardship due to closure of the Chikangawa Forest business. And the same was not refuted by the applicant and not even cross-examined on. As such, this Court will not belabor itself distributing a thing which does not exist as matrimonial property.
- (f) The house in Zingwangwa is awarded to the respondent since it is from proceeds of the timber business and she intended to own a house from Malawi Housing Corporation since 2009 when she got retrenched.
- (g) I also award the respondent the Machinjiri area 5 house as this is from proceeds of the timber business.
- (h) As for the semi-detached house in Namiyango, the same is not matrimonial property as it was handed to the respondent's mother and this was not disputed.
- (i) As for the house at the respondent's village in Bangwe that is hers.
- (j) For the house built at the applicant's village that is for the applicant since it is built on his customary land.

- (k) Undeveloped plot at Machinjiri, I award this to the applicant since the respondent bought it for him. This plot was bought in 2013 and has remained undeveloped which show shows that the applicant depended on the respondent to make investment for him.
- (l) Four motor vehicles acquired in the course of the marriage herein. as stated above, all valuable properties were bought by the respondent out of her effort and all that the applicant submitted is that we agreed, I and my wife and authorized her to go ahead. There is nothing saying I bought that or I told my wife to go and buy that or even I suggested/proposed to but that among the listed properties.
- (i) Toyota Hilux D4D, this car is under criminal proceedings in the Magistrate Court where the respondent was arrested for receiving stolen property and is now on bail and the same will remain in her hands on trust for the State.
 - (ii) A freightliner is awarded to the respondent bearing in mind that this is from proceeds of the timber business.
 - (iii) Toyota Nadia is awarded to the applicant for the reason of being in marriage with respondent for 30 years.
 - (iv) Toyota Carina is awarded to the respondent for the reason that this car was bought by the respondent to the applicant who used it until it broke down. And he took it back to the respondent and got another car. He failed to repair it and it remained unrepaired to date showing that he cannot manage to repair it but the respondent that is why he took that old car back to her because she is capable not him.
- (m) As for household items, the parties were not staying together since 1998 and applicant only visited on weekends. The items for distribution are those that were acquired between 1990 and 1998. And that there is nothing like acquiring household items between 1998 and 2019. So property for distribution is 20 years old and after that each party lived separately. The applicant whilst working and staying separately for 20 years at Nchalo must have a household which he forbade the applicant from seeing. Consequently, each party shall keep their separate household items as was had in the separate households in the past 20 years.

68. This Court now deals with the grounds of appeal in turn. On the first ground of appeal the appellant asserted that the lower court erred in assuming jurisdiction on matters clearly without her jurisdiction as spelt out in section 39 of the Courts Act. The lower court's decision is thus *ultra vires*.
69. In support of the above contention, the appellant relied on two decisions, namely, *Kishindo v Kishindo* and *Chabira v Chabira* Civil appeal number 8 of 2012 (High Court) (unreported) where the courts made obiter dicta statements to the effect that for jurisdictional reasons distribution of

matrimonial property by the lower court is subject to the limits set in section 39 of the Courts Act. section 39 of the Courts Act sets monetary limits in terms of jurisdiction in civil matters generally. The same section grants the lower court jurisdiction to dissolve customary marriages.

70. The appellant concedes that, as submitted by the respondent, the question of distribution of matrimonial property was determined by this Court and it was held that having been given jurisdiction to dissolve customary marriages it follows consequently that the Courts Act granted ancillary powers to the lower court to distribute matrimonial property thereafter regardless of the value of the said matrimonial property. See *Mvula v Mvula* Matrimonial cause number 6 of 2014 (High Court) (unreported).
71. The contention of the appellant is however that the *Chabira v Chabira* case is authoritative because it was decided later in time than the *Mvula v Mvula* case. The respondent's contention is that the views expressed in, *Kishindo v Kishindo* and *Chabira v Chabira* were obiter and therefore do not represent the law on the matter in issue.
72. This Court agrees with the respondent. This Court is not bound by decisions of the High Court where such decisions are not made on a persuasive basis. Further, this Court agrees that the views in, *Kishindo v Kishindo* and *Chabira v Chabira* were made obiter and were not made on the basis that the question of jurisdiction in fact arose.
73. This Court notes that in the case of, *Chabira v Chabira* the Court neither discussed nor gave reasons why it decided to depart from the decision in *Mvula v Mvula*, an earlier decision made precisely on the question of jurisdiction herein.
74. For the foregoing reasons, this Court is persuaded that the correct position is that stated in *Mvula v Mvula* and agrees with the lower court's decision to distribute the matrimonial property in this matter although the said property value exceeded the subject matter value for disputes in civil matters provided for the lower court under section 39 of the Courts Act. The reason is that distribution of matrimonial property is an ancillary relief to the main jurisdiction of dissolution of a customary marriage and is therefore not subject to the value limits as was elaborated at length in *Mvula v Mvula*.
75. The first ground of appeal therefore fails.

76. On ground number two, the appellant asserted that the lower court erred in disregarding the appellant's prayer to distribute the properties equally. This Court observes that, as correctly observed by the respondent, the lower court correctly appreciated the law on how it must approach the question of distribution of jointly held matrimonial property. The lower court correctly referred to the case of *Sikwese v Banda* in which the Supreme Court of Appeal set out that jointly held property will be ascertained by considering the intention of the parties in that regard and also contribution to acquisition of the said property creating a beneficial interest in the said property. Further, that all the circumstances of the case be considered in that regard.
77. This Court finds that, the lower court looked at all the circumstances of the case herein and was properly guided by the decision of the Supreme Court of Appeal in *Sikwese v Banda* in deciding that it should not distribute the property herein equally. The evidence was properly analyzed by the lower court and there is a plausible explanation why the property could not be distributed equally given the contribution of the parties to the businesses coupled with their intentions as manifested in the manner in which the various properties were dealt with on registration and subsequently. For instance, the respondent solely started and run her timber business to the exclusion of the appellant who never took part as he was stationed at Nchalo. This Court does not find fault with the reasoning of the lower court and agrees with the respondent that this ground of appeal must fail.
78. On ground number three, the appellant contended that the lower court erred in granting the bulk of the property to the respondent by solely looking at ownership and intention of the parties when they acquired the property, while disregarding the underlying factors to be applied on distribution of property upon dissolution of marriage as set out in section 74 of the Marriage, Divorce and Family Relations Act.
79. This Court observes that section 3 of the Marriage, Divorce and Family Relations Act provides that it applies to marriages entered into on or after the date it came into force but that Part IX of the said Act applies to all marriages regardless of the date they were celebrated.
80. The marriage herein was entered into before the coming into force of the Marriage, Divorce and Family Relations Act. Section 74 of the Marriage, Divorce and Family Relations Act is not in Part IX of the Marriage, Divorce

and Family Relations Act which provides for the rights and obligations of parties to a marriage, namely, to consortium, mutual marital confidences and duty to maintain family. The appellant cannot therefore rely on the Marriage, Divorce and Family Relations Act. On that basis alone ground number three fails.

81. This Court observes that, even if it were granted that the Marriage, Divorce and Family Relations Act applies to the marriage in this matter, in section 74 of the Marriage, Divorce and Family Relations Act, the direct and indirect contribution made by either spouse to the matrimonial property is one among many factors the court ought to take into account. As indicated in the immediately preceding ground of appeal, the lower court was properly guided as to what is matrimonial property and as to who should get what on the distribution of the same regard being had to all the circumstances of the case as guided by the Supreme Court of Appeal which looked at this issue bearing in mind the dictates of section 24 (1)(b) (i) of the Constitution. This Court therefore agrees with the respondent that the lower court cannot be said to have disregarded the dictates of section 74 Marriage, Divorce and Family Relations Act on distribution of matrimonial property.
82. On ground number four, the appellant asserted that the lower court erred in disregarding case law as set out in *Kamphoni v Kamphoni* and *Kishindo v Kishindo*. He pointed out that, in that regard, distribution of matrimonial property at customary law was held to be on the bases of principles of fairness, reasonableness, proportionality, comity, solidarity and proportionality. Further, that being a subordinate court, the lower court was and is bound by these decisions.
83. This ground of appeal must fail for the reason stated by the respondent, namely, that the Supreme Court of Appeal considered those two decisions of the High Court and concluded in *Sikwese v Banda* that they were wrongly decided in view of section 24 (1)(b) (i) of the Constitution which provides that upon dissolution of a marriage women are entitled to a fair distribution of jointly held matrimonial property. The point is that customary law is subject to the Constitution like any other law and the Constitution prevails.
84. On ground number five, the appellant asserted that the lower court erred in simply considering ownership of the property when distributing without considering section 24 (1)(b)(i) of the Constitution. This Court agrees with

the respondent that this ground of appeal must fail for the reason that the lower court in fact clearly discussed at length the applicable law as stated by the Supreme Court of Appeal in *Sikwese v Banda* and evaluated the evidence not only in terms of the ownership of the property but also in terms of what either party contributed to the same as well as regarding the parties' intentions. The lower court also looked at all the circumstances of the case, such as, the living arrangements of the parties and how either party behaved with regard to the businesses in issues. This ground of appeal is far from the truth and accordingly fails.

85. On ground of appeal number six, the appellant contended that the lower court misdirected itself in holding that the appellant lived an independent life in Nchalo for 21 years and that the appellant did not know how the property was acquired or how the business was being run when in fact the evidence suggests otherwise.

86. This Court has considered the evidence, and observes that the appellant indeed spent most of his time at Nchalo over the 20 years or so but that he visited the respondent over the weekends. However, with regard to the businesses in issue it is clear that in so far as the timber business was concerned the appellant was largely not aware how that business was run. This business was solely run by the respondent from Chikangawa in Mzimba and Kudya in Blantyre. The appellant however was involved in the stationery business as an agent as found by the lower court. To that extent, the lower court could not justifiably make a wholesale finding that the appellant was not aware how the businesses in question herein were run. The foregoing finding however does not materially affect the findings of the lower court on contribution of the appellant to the businesses and subsequent property acquisition since the lower court properly analyzed how the same happened. This ground of appeal therefore succeeds to that extent only.

87. On ground number seven, the appellant asserted that the lower court erred in law by holding that the intention of the respondent was to own and enjoy property in total exclusion of the appellant when in fact they were legally married at customary law.

88. This ground of appeal fails on account of the reason stated by the lower court, which was reiterated by the respondent on this appeal, that as far as distribution of matrimonial property is concerned the fact of marriage in itself

does not entail the intention to own property jointly. This is well stated authoritatively by the Supreme Court of Appeal in *Sikwese v Banda*. The lower court therefore never erred in law by holding that the intention of the respondent was to own and enjoy property in total exclusion of the appellant when in fact they were legally married at customary law.

89. On ground of appeal number eight, the appellant contended that the lower court erred in fact and law by simply regarding monetary contributions to property when contribution clearly takes many forms. The lower court also erred by solely considering in whose name the property is when distributing some of the property.
90. This Court agrees with the respondent that the lower court in fact considered all the factors of the case including the contribution of the parties to the acquisition of the properties. The lower court properly considered the evidence and found that the appellant never contributed to the timber business whether in monetary form or otherwise. It is not clear from the appellant what sort of contribution he allegedly made to the timber business. There is no evidence in that regard in so far as the timber business is concerned. With regard to the stationery business, the lower court properly analyzed the evidence and found that the appellant got his share upon finding orders for stationery supply.
91. With regard to lower court allegedly erring by solely considering in whose name the property is when distributing some of the property this Court observes that this is vague since it is not stated in the submissions which property is in question in this regard. That notwithstanding, it is clear on the evidence that the lower court in fact considered registration of the property such as Likuwa business but went ahead to analyze the evidence and determined the ownership of the property in question by considering factors beyond the mere registration. This Court therefore agrees with the respondent and is unable to agree with this ground of appeal. Ground of appeal number eight therefore fails.
92. On the ninth ground of appeal the appellant asserted that the lower court erred in law by not considering the testimony of the appellant simply by reason of the appellant not being audible enough or confident enough when he was giving testimony.

93. This is an aspect that the lower court was entitled to comment on and consider in assessing the evidence of the witnesses before it, in this case the appellant himself. Any court is entitled to determine whether a witness has been shaken during cross-examination in addition to importantly considering the consistency of the testimony of such a witness. This Court has considered the evidence on record and concludes that the lower court considered many other factors in its determination. It looked at testimony of other witnesses which included documents. It is therefore not correct that the lower court erred in law by not considering the testimony of the appellant simply by reason of the appellant not being audible enough or confident enough when he was giving testimony. This ground of appeal therefore fails.
94. On ground of appeal number 10, the appellant contended that the lower court erred in holding that the respondent toiled on her own with no contribution of the appellant when in fact the appellant had taken an active role in the business investments.
95. The respondent correctly submitted, on the evidence, that the lower court properly analyzed the conduct of the parties with regard to the timber and stationery businesses and concluded that the appellant never took an active role in the same. It is clear on the record that the appellant never took part in the timber business. And that for the stationery business, the appellant got a share as an agent finding stationery supply contracts. The ground of appeal advanced in this regard accordingly fails.
96. On ground of appeal number eleven, the appellant asserted that the lower court erred in fact and law by disregarding the direct and indirect contributions made by the appellant regarding distribution of property on dissolution of marriage as per the dictates of section 74 (1)(g) of the Marriage, Divorce and Family Relations Act.
97. As earlier determined by this Court, with regard to ground of appeal number three, the Marriage, Divorce and Family Relations Act is inapplicable to this matter. For that reason alone, this ground of appeal fails. Further, in any event, the record shows that the lower court properly considered the contributions of the parties herein in arriving at the determination of the distribution of the matrimonial property.
98. On ground of appeal number twelve, the appellant contended that the lower court erred in holding that the property cannot be subjected to the principle of

equal sharing and that sharing equally would be unfair. The lower court misled itself as to the law on distribution of property upon dissolution of marriage.

99. This Court agrees with the respondent, that the lower court properly directed itself on the applicable law as authoritatively stated by the Malawi Supreme Court of Appeal in the case of *Sikwese v Banda* in which the implications of section 24 (1) (b) (i) of the Constitution on women's right to a fair distribution of jointly held matrimonial property upon dissolution of marriage were explained. As has been found earlier, the lower court also properly analyzed the evidence and justified the decision why the property herein cannot be subjected to the principle of equal sharing and that sharing equally would be unfair in the circumstances. The lower court looked at the intention of the parties and how the property was acquired in view of the history of the businesses in issue herein. Ground of appeal number 12 therefore fails.

100. On the last ground of appeal, the appellant asserted that the lower court failed to properly analyze the case before it reached its decision.

101. From what this Court has determined above, this Court is unable to agree that the lower court failed to properly analyze the case before it reached its decision. The last ground of appeal therefore also fails.

102. In the final analysis, the appeal herein fails in its entirety and the decision of the lower court is upheld with costs to the successful respondent.

Made in open court at Blantyre this 14th June 2021.

M.A. Tembo
JUDGE