



REPUBLIC OF MALAWI
MALAWI JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL REVIEW NO. 03 OF 2022

(Being Civil Cause No. 815 of 2021 in the Third Grade Magistrate sitting at Salima)

BETWEEN

CHIPILIRO CHIWANDA COMPLAINANT

-AND-

IDAH ZAMPONDEKEZA RESPONDENT

CORAM : THE HONOURABLE JUSTICE F.A. MWALE
: Mpandaguta, Court Clerk

ORDER ON REVIEW

BACKGROUND

- 1 I am seized of this matter for the purposes of review by virtue of a memorandum from the Chief Resident Magistrate sitting at Lilongwe.
- 2 The background of the Memorandum is that the Chief Resident Magistrate was moved by the Senior Resident Magistrate sitting in Salima, upon noting irregularities in the civil case number 815 of 2021, before a third-grade magistrate which he perceived require the attention of the High Court. The Chief Resident Magistrate concludes that the orders were highly irregular and recommends that they should be set aside.

- 3 Perusal of the lower court record on the divorce matter indicates at page eleven (11) that the lower court called parties to list down their property as follows:

“I advise both parties to list down the property they acquired, file and address the court soon after this session”.

Thereafter, the record simply indicates that the lower court had received the lists of property from both parties but there is no endorsement the date and time when these were received and how they came to be recorded as evidence. The property was listed as follows:

Petitioner’s list

1. A house and 6 boys’ quarters on the same land
2. Deep Freezer
3. Mattress 5
4. Sofa Set
5. Bicycles 3
6. Television
7. Ducks 4
8. Kitchen Utensils
9. 2 Beds
10. Dressing mirror
11. Wall clock
12. Wheel barrow

Respondents’ list

1. House
2. Fridge
3. Chairs
4. Kitchen utensils
5. 2 beds
6. 3 Mattresses
7. Ducks

Further the lower court stated that it visited the house and found items which both parties agreed that the property belongs to them; -

1. House and 6 boys' quarters; 4 occupied where tenants are paying MK10,000 /month
2. Deep freezer
3. Sofa set
4. Mattress
5. 3 Bicycles
6. Television
7. 4 Ducks
8. Kitchen utensils
9. 2 Beds (1 double & $\frac{3}{4}$)
10. Wall clock
11. Wheelbarrow
12. Cooker
13. Genset

The court proceeded to distribute the property as follows;

For Petitioner

1. $\frac{3}{4}$ bed
2. Double mattress and $\frac{3}{4}$ new mattress
3. 2 Ducks
4. Kitchen utensils in Salima
5. Wheelbarrow
6. Wall clock
7. Deep freezer
8. 2 bicycles
9. Mirror

For Respondent

1. Sofa set
2. 1 mountain bike
3. All utensils in Lilongwe
4. Television set

5. Generator
6. Cooker
7. Double bed
8. 1 old ¾ mattress in Salima
9. 2 Ducks

The court then proceeded to order the parties to address the court with evidence regarding another piece of property as follows;

“As for the house, let both parties address the court with evidence regarding how the land was acquired considering that it is under contention by both parties. The matter shall be heard on 28/02/22 at 10am. As for the rentals, the petitioner should bring K20,000 to court once he collects the rentals.”

It is therefore clear that the lower court did not hold a hearing that allowed the parties to test each other's property lists so as to enable the court to make a determination as to whether the properties alleged to be matrimonial property were indeed that.

THE LAW

- 4 This Court has power to review cases pursuant to section 26 of the Courts Act which provides as follows:

(1) In addition to the powers conferred upon the High Court by this or any other Act, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts and may, in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record under subsection (1), the matter or proceeding in question shall be stayed in the subordinate court pending the further order of the High Court.

- 5 This Court is further guided, in making this review, by section 26 as read with section 28 of the Courts Act. Section 28 which permits the review without hearing the parties as follows;

No party shall have any right to be heard, either personally or by a legal practitioner, before the High Court when exercising its powers of review or supervision under sections 25 and 26:

Provided that no order shall be made to the prejudice of any person unless such person has had an opportunity of being so heard.

- 6 Distribution of matrimonial property is an ancillary order that is made after a marriage has been dissolved or parties have been separated. It is an order that requires a hearing to determine whether the property in question is matrimonial property and subject to distribution; and what would constitute the fair distribution of the property (**Chabyuta v. Lowe** Civil Appeal Cause No.4 of 2018, High Court, Lilongwe District Registry, MWHC 200 (11 February 2021)).

- 7 Section 74 of the Marriage Divorce and Family Relations Act provides for the things a court should consider for the equitable division of property upon dissolution of marriage as follows;

(a) the income of each spouse;

(b) the assets of each spouse;

(c) the financial needs of each spouse;

(d) the standard of living of the family

- 8 Further to consider is the principle laid down in **Sikwese v Banda** (MSCA Civil Appeal No. 76 of 2015) [2017] MWHC 37 (02 February, 2017) which established that where a property is jointly owned and where a party has made some contribution to a property but the extent of such contribution cannot be ascertained with any degree of specificity, the prudent approach is to award 50% share in the property.

- 9 In the case of **Specha v Specha** Civil Appeal No. 15 of 2019, High Court, Principal Registry, the High Court was faced with a similar situation where the distribution of matrimonial property in the lower court was made without a hearing as to what was matrimonial property and how the property should be distributed. Further, no order as to

maintenance was made, despite custody being granted to the appellant. There was therefore no evidence to support the appeal on the distribution of matrimonial property, which the Court held was a grave anomaly. The Court in that case therefore ordered a re-trial of the matter by a Resident Magistrate to be assigned by the Chief Resident Magistrate. The Court further ordered that the lower court should during re-trial direct the parties to testify and provide evidence on distribution of matrimonial property. The re-trial would also deal with the issue of maintenance of children.

COURT'S REASONED OPINION

- 10 The main issue for determination is whether the lower court's order for the distribution of matrimonial property was irregular. Since it is not possible from the perusal of the file to tell how the lower court came to its ruling on the property distribution when there is no record of any hearing on the matter, I must concur with the Chief Resident Magistrate who referred the matter that the order on property distribution by the lower court was in fact irregular.
- 11 From my reasoning above, I find that:
 - 11.1 The trial court proceeded to make an order on distribution of matrimonial property when there was no record of how the evidence of property was brought before the lower court whether the parties had an opportunity to test each other's evidence in cross examination.
 - 11.2 There was no hearing on the determination of whether the property was in fact matrimonial nor clear reasoning as to why the lower court found such property to be matrimonial property and therefore liable for distribution.
 - 11.3 Even if the distribution had been lawful, there is further no justification in the reasoning distribution of property was done in phases when it is clear from the case of **Chabvuta v Lowe** (cited above) that if a court requires a separate valuation in order to make a decision, that should have been one of the issues that should have been presented to the court together with the lists of property and should have been open to examination in the same way that evidence as to whether property is matrimonial or not, is subjected to.

ORDER

- 12 In consequence of my finding:

- 12.1 I hereby set aside the order of property distribution made by the lower court and order that the Chief Resident Magistrate transfer the matter to a Resident Magistrate for retrial and that such retrial should take place within 21 days of the order herein.
- 12.2 If the property was already distributed in terms of the order that has been set aside.
- 12.3 I further order that the parties each retain the property until the order of the court on retrial and that no party should dispose of or in any way deal with the property in a manner that would transfer the property rights to any other person.

MADE in chambers, in Lilongwe this 27th day of **May 2022**



Fiona Atupele Mwale

JUDGE