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GOVERNMENT OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MATRIMONIAL CIVIL APPEAL NUMBER 13 OF 2021

(Being Civil Cause No. 5 of 2018 before the Senior Resident Magistrates Court sitting at Midima)

BETWEEN

SANUDI MBULANJE.....APPELLANT

AND

ZIONE MSUME MBULANJE..... RESPONDENT

CORAM: JUSTICE A. KANTHAMBI

Petitioner	Absent (Unrepresented)
Defendant	Absent (Unrepresented).
Mrs. M. Chilemba	Official Court Interpreter

JUDGMENT

(Kanthambi, J, 11th April, 2022)

I must say from the outset that it is not very clear how this matter finds itself before this Court as it would seem that every process required to legally bring this matter to the attention of this Court was not followed. Going through the record of the Court below, it is not in dispute that the parties herein were before the Court of the Senior Resident Magistrate, sitting at Midima for divorce at the instance of the respondent herein. There is to that end a judgement of the said court dated 28th day of February 2018 in which the Court found that that the marriage between the parties herein had irretrievably broken down on account of which the Court granted a decree of divorce dissolving the marriage between the parties herein. In that same judgment, the Court made other ancillary orders on custody of children and distribution of matrimonial property.

The court below granted custody of the children to the mother of the children, being the respondent herein. The lower court also found that the parties had, during the subsistence of their marriage bought a plot together on which they built a house which the Court also found to be a matrimonial home, and that subsequently another small house was built adjoining the first one. The lower court also found that the parties had stayed in Blantyre much of their married life and that the appellant had not built a house for the respondent in her home village. Considering that custody of the

children had been granted to the respondent herein, the Court surmised that it would be absurd to order the appellant herein to build the respondent a house at the village and have the children be uprooted from their life in Blantyre the only home they know. Consequently, the lower Court awarded the house to the respondent herein and ordered that the defendant vacates the premises within 30 days of the order. The appellant was awarded all the household properties except kitchen utensils which the Court held were for the Plaintiff's enjoyment. The Appellant has not shown how this order was wrong, this Court can therefore not fault it. The judgment of the lower court shows the court had properly considered the information given in court, otherwise how would he know that there were two adjoining houses?

The record of the lower court does not contain any handwritten notes on divorce, custody of children and distribution of matrimonial property's hearings that took place in 2018, only the lower court's judgment dated 28th February 2018. The next document after this judgment is a notice of appointment of Legal Aid Bureau as the Appellants legal practitioners and is dated 26 August 2020. Following this process is a notice of adjournment dated 28th August 2020, setting the matter down for hearing on 3rd September 2020. On the same 3rd September 2020, there was filed with the lower court, an affidavit in opposition to a motion for contempt of court proceedings. Which lets us know of the kind of hearing scheduled for the 3rd September 2020. This also lets us know that there was prior process for the hearing of the contempt which put the appellant on alert and caused him to seek the legal assistance of Legal Aid Bureau.

The first ever handwritten record of the lower court's proceedings in this matter are dated 4th September 2020 concerning a motion for contempt of court against the appellant herein. During the hearing of the motion, the appellant was represented by his legal counsel while the respondent was unrepresented. The court heard both parties before the matter was adjourned to the 9th of September for the ruling thereon.

By a ruling dated 9th September 2020, the lower Court noted and found that for two years after the delivery of the Court order, the appellant herein had done nothing to comply with the court orders necessitating the respondent herein to move the court for contempt of court proceedings. The lower court further noted that the appellant's contention that they had intended to appeal was not substantiated as there was no document to that effect on file. The court further observed that even if such documents had been filed, without an order setting aside the earlier judgment of the court, the judgment still stood and had to be complied with. Since the judgment was still in effect, the lower court ordered the appellant to vacate the house as earlier ordered by the Court, and to do so within 30 days. The lower court further ordered that the house should be occupied by the petitioner and the children of the marriage. The court further ordered the defendant to be paying K30, 000.00 per month towards the maintenance of the children. Most importantly, the lower Court noted that the appellant had not been paying the child maintenance since February 2018 and had up to that point, fallen in arrears of MK900, 000.00. He was ordered to pay the sums immediately. Consequently, the appellant made just two payments in partial compliance to the order on maintenance. See copies of receipts exhibited as SM1 and SM2 dated 24 September 2020 and 8th October 2020 respectively.

As rightly observed by the lower Court, there was no document filed to show the Appellant's intention to appeal against the Judgment of the Court. The first intention to appeal was shown on the 12th of December 2022, three months after the order on contempt, when the Appellant filed an *inter partes* application to appeal out of time, stay of execution of judgment pending appeal and variation of the judgment. Following these proceedings, through Legal Aid Bureau on or about the 12th of December 2020, over two years after the decree of divorce, the Appellant herein filed an *inter partes* application for leave to appeal out of time, stay the execution of the judgment pending appeal and variation of the judgment. The process was not issued by the judicial officer, which lets

us know that there was no hearing in so far as the application in question was concerned.

Be that as it may, this Court found itself attending to the parties themselves on the dispute that brought them to the High Court. This is the Court's Ruling on the Appellant's appeal. The first, that the decision appealed against was made on or about the 28th day of February 2018 and the Appellant never appealed against the decision of the lower court and there is no order granting him leave to appeal out of time, as such the appeal herein is irregular and must be dismissed.

The Law

Appellate civil jurisdiction of the High Court is provided for under section 19 of the Courts Act Cap 3:01 of the Laws of Malawi. It provides that the appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided and such other appellate civil jurisdiction as may have been or may be conferred upon the High Court by any other law.

Section 20 of the Courts Act further provides as follows:

(1) An appeal shall lie to the High Court from a subordinate court in the following cases—

(a) from all final judgments;

(b) from all interlocutory judgments and orders made in the course of any civil action or matter

before a subordinate court:

Provided that no appeal shall lie, except with the leave of the subordinate court or of the High Court, from an order made ex parte, or by consent, or as to costs only.

(3) Subject to subsection (4), the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the subordinate court or by the High Court or prescribed by any rules of court made for that purpose.

(4) Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a subordinate court on any terms which it considers just.

Power of High Court in civil appeals are outlined in section 22 of the Courts Act as follows;

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.

Section 23 of the Courts Act provides that in civil matters, an appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the subordinate court or the High Court may otherwise order; and no intermediate act or proceeding shall be invalidated, except in so far as the High Court may direct.

An appeal is by the way of rehearing *i.e.* reviewing the evidence and the court's decision with the aim to determine whether the lower court arrived at a correct decision. An appeal is not a second attempt at one's luck in a claim. An appellant has to point out where a court went wrong. The appealing party has to file grounds of appeal citing where they feel he lower court erred in law.

On appeal, the Courts deal with issues that were in the trial court see *Mbvundula v Malito* [1968 - 1970] ALR Mal 146. See also *Produce Marketing Supplies Limited and Global Electrical and Agricultural Company Ltd v Packaging Industry (Malawi)* Ltd 11 MLR 104. Tambala JA, in *Steve Chingwalu and DHL International Ltd v Redson Chabuka and Hastings Mangirani* [2007] MLR 382 (SCA) at 388, said that the position of the law regarding appeals involving issues of fact is that this court is slow to interfere with findings of fact made by a tribunal properly mandated to make decisions on disputes of facts, unless there exists some misdirection or misreception of evidence or unless the decisions are of such a nature that, having regard to the evidence, no reasonable man could make such decisions: see *Wamwa v Kamwendo* 2 ALR (M) 565. The Court went on to say: Finally, we bear in mind that an appeal to this court is by way of rehearing which basically means that the appellate court considers the whole of the evidence given in the court below and the whole course of the trial; it is as a general rule a rehearing on the documents including the record of the evidence.

Apart from that, there are procedural rules have to comply with. See- Mwaungulu J-*Mwazangati Khoromana v Malifa Jumbe* Civil Appeal Cause No. 06 of 2013.

On the issue of distribution of matrimonial property at customary law, in Kishindo v Kishindo Civil Cause No 397 Of 2013, Mwaungulu J, as he then was stated as follows;

> *The application of customary law principles of fairness, reasonableness, comity, proportionality and solidarity, results in that property (other than the matrimonial home) is usually equally divided between husband and wife. "In distributing ... the court shall endeavour to achieve a semblance of equal sharing," per Potani, J, in Chingadza v Chingadza (2011) Matrimonial Cause No 97 (PR) (unreported). Similar results obtained in Botha v Botha (2010) Matrimonial C ause No 15 (LDR)(Unreported), per Chombo J; Ndalama v Jumbe (2006) Civil Appeal 145 (PR) (Unreported), per Chipeta J; Jusa v Jusa (2009)Matrimonial Civil Cause No 75 (PR)(Unreported, per Potani, J; Master v Kachingwe (2011) Civil Cause No 13 (PR)(Unreported), per Chirwa, J. The principles of fairness, reasonableness comity and proportionality, results in that the matrimonial home, on the principles of nurture, will be left to the spouse with legal custody of the children.*

Looking at the case that is before me, one can argue that the 'appeal' lacks grounds on which to start from. One can argue that the appellant is simply trying to relitigate his claim. There are no grounds of appeal on.

The procedure on appeal from the subordinate courts is governed by ORDER XXXIII of the subordinate Court rules, extensively quoted herein below;
Rule 1(1) of the aforestated rules states that appeals to the High Court shall be brought by giving notice of appeal in Form 26.
Sub Rule (2) states that the appellant may appeal from the whole or any part of a judgment, and the Notice of Appeal shall state whether the whole or part only, and what part, of the judgment is complained of.

Sub rule (3) of the Order states that the Notice of Appeal **shall** be instituted and filed in the proceedings in which the judgment appealed from was pronounced, and **shall be filed within fourteen days from the day on which such judgment was pronounced.** At the same time the appellant shall pay the prescribed fee for such Notice.

Sub rule (4) provides that the Notice of Appeal shall be served by the appellant on all parties directly affected by the appeal or their legal practitioners respectively. It shall not be necessary to serve parties not so affected.

Rule 2(1) of Order 33 provides that when the appellant has complied with rule 1 the Court appealed from shall prepare the requisite number of copies of the record comprising the pleadings, the notes of evidence, the judgment appealed from, the documentary exhibits and any other relevant documents.
Rule 2 (2) states that as soon as the copies of the record are ready, the Court appealed from shall serve the appellant with a notice in Form 27.
Rule 2 (3) states that upon request by the appellant and upon payment by the appellant of the cost of preparing the record the Court shall supply the appellant with one copy thereof.
Rule 2 (4), which is of interest in this application, provides that within fourteen days from the service upon him of the notice referred to in sub rule (2) the appellant shall prepare a Memorandum in writing setting forth the grounds of appeal, and shall forward to the Court appealed from the number of copies of the Memorandum called for in the notice.

According to Rule 3, on receipt of the copies of the Memorandum of Appeal the Court appealed from shall prepare the Record of Appeal which shall consist of—
(a) the documents referred to in rule 2 (1); and
(b) the Memorandum of Appeal, and shall forward the appropriate number of copies of the Record of Appeal to the Registrar of the High Court.

In the event that an appellant is unable to abide by the provisions of Order 33 Rule 1(3) above, recourse can be had to Order 29 rule 7, which empowers a magistrate to lawfully entertain an application for leave to appeal out of time. Under the said Order 29 Rule 7 of the Subordinate Court Rules, the Court may extend or abridge the time limited for doing any act, upon such terms as may be just, and notwithstanding that the time originally limited has expired.

In the instant matter, there is no order, properly so called, in the Court file, from the lower court sitting at Midima permitting the appellant to appeal out of time. There is however, an *inter-parte* application before the Resident Magistrates Court at Midima, for leave to appeal out of time. This application was filed on the 12th of November 2020 as shown by the Court stamp on it. This application was neither issued nor scheduled to be heard on any given day. There is also no record of the said proceedings having taken place and There is also no record of the presiding magistrate having attended to the application on any given day. There is no endorsement on the application that the application was granted or not. There are no handwritten notes showing that the application was attended to on any other date thereafter, and there is no order granting or denying the said application.

The lower court had passed judgment which was never set aside nor stayed by any court, the purported appeal in this court was not properly brought before the court, as there is no order of the court permitting the appeal to be brought two years after the lower court made its judgment. The present matter was therefore wrongly brought before this court on appeal. on that ground alone this court should not entertain it.

On 22nd February 2021, the Respondent's Legal Counsel, Legal Aid Bureau discharged itself from representing he appellant herein. This notice too was filed in the lower Court and that was the last court document on file. No any other process followed this. The next thing that followed was a notice of hearing filed by the Appellant herein in the High Court on 15th April 2021. The matter was scheduled for hearing on the 29th of April 2021. The parties showed up on the return date unrepresented, whereupon the Court directed the Malawi Law Society to assist the parties to secure legal representation on pro bono basis. Unfortunately, this was not done and the parties continued before this Court unrepresented.

One can then see that even the purported intention to appeal comes two years after the judgment on the lower court. In the mind of this court, there was no intention to appeal in the first place. And so it can be implied that the Respondent in the lower court had no problems with the judgment of the Court. There was also no intention to abide by the Court's judgment.

On distribution of matrimonial property, no other issue was raised except the issue of the house. He bases his appeal against the award of the house to the respondent on account of the fact that they had built the house together, yet he had built a house for the respondent. The truth of the matter is he had not built a house for the respondent in her home village. This court decided to invoke section 22 (d) of the Courts Act and called on additional evidence on the house in question. Whereas this Court also found that there were actually two semidetached houses built on the one plot of land in question. One of the rooms in the first house was sealed off to make a smaller and third two roomed structure in between. The lower had found that the Appellant had not built a house and this Court confirmed on appeal as it visited the respondent's home village and didn't find any house at the alleged place. He did not move out of the premises as ordered by the court claiming that he was discussing with the respondent on them getting back together. But the court finds it hard to believe this.

The first house to be built is the one that used to be the matrimonial home currently inhabited by the Respondent herein and some of the children. This house was extended and this extension was later sealed off resulting in a separate two roomed structure from the main house being created. If this one is taken into account, then there are three semidetached structures. When the court ordered that the Appellant vacates the matrimonial home, he moved into and now resides in this structure. He also uses it for his tailoring business. The respondent also contends and so this Court finds, that the structure which is in the middle was a part of the original house and so should be part of the house she occupies. The parties are practically neighbours, despite the Court's order to the appellant to vacate the premises. On account of the case of *Kishindo* supra, this Court does not find sufficient reasons to interfere with the findings of the lower Court.

Further, this Court is of the considered view that it would not be just and fair for the parties to continue staying that close together after the divorce herein. So the lower court's order on distribution of matrimonial property is hereby upheld.

The second ground of appeal is premised on the assertion that the appellant was told to pay the sum of MK30, 000.00 yet he was not asked how much income he was earning. On the issue of

maintenance of children, the appellant also defaulted from February 2018 to the time he was subjected to contempt of court proceedings. On appeal he informed this court that he could only manage to pay MK15, 000.00. This Court also finds that it would not be right and just to allow the appellant raise this ground at this point. For 2 years he just decided to just default and did not even attempt to make a small payment towards maintenance or better yet did not make the MK15, 000.00 payments he allegedly could afford. His only attempt to abide by the Court order only came after the contempt of Court proceedings, which took place over 2 years after the judgment was handed down. And he only paid MK10, 000.00 for just two months following the contempt proceedings. After that he never made any payments even on any small amount he could allegedly afford, just to show that he was willing to abide by the Court order, but just that he fell short. Therefore, from the year 2020, even after the contempt of court proceedings, to this date, there has been no attempt by the Appellant herein to make even the MK15, 000.00 payments. He continues to dishonor the Court order even when there is no reason or court order for him to suspend the payments, and yet expects the law to be on his side. He has come with dirty hands.

Even during contempt proceedings, he never raised the issue that he could not afford to pay the amount he was ordered to pay. He only alleged that he was staying with the children and that is why he was not paying. This Court found even this assertion that he was staying with the children not to be true. The lower Court had granted custody to the Respondent, that order still subsists and a visit to the matrimonial premises showed he was not staying with the children. They were staying with the respondent herein. On account of the foregoing, this Court finds that the appellant has not been a truthful witness who just seeks to relitigate the matter. He does not have any valid grounds on which to base his appeal. He has not satisfied this court that there is reason to interfere with the findings of the lower court. Litigation must come to an end. He cannot be allowed to relitigate the matter.

However, since he seeks to have the order on maintenance varied, it is open to him to approach the lower court and apply for variation, providing cogent reasons why the order on maintenance should be varied. Section 17 of the Child Care Protection and Justice Act provides that a child justice court may, if satisfied that the interests of the child will be better protected or will not be adversely affected, vary or discharge, as the case may be, a maintenance order on the application of the child, a parent, guardian, the person having custody of the child or any other person legally liable to maintain the child.

By the operation of this order, the Registrar of the High Court is to ensure a speedy remittance of the lower court's file back to the lower Court. The appellant, if he wishes to have the order on maintenance varied, then he should make an application to the lower court to vary the order, furnishing good reasons for the said application.

Costs are for the Respondent.

Pronounced in Open Court this 13th day of April, 2022 at Chichiri, Blantyre.

Anneline Kanthambi
JUDGE