



REPUBLIC OF MALAWI

IN THE HIGHCOURT OF MALAWI

FAMILY AND PROBATE DIVISION

LILONGWE DISTRICT REGISTRY

MATRIMONIAL CAUSE NO.10 OF 2018

BETWEEN:

CIDRECK WHITE..... PETITIONER

-AND-

FALESI WHITE..... RESPONDENT

CORAM : THE HONOURABLE JUSTICE F.A. MWALE
 : Salima, for the Petitioner
 : Katundu, for the Respondent
 : Ntaya, Official Recorder
 : Mpandaguta, Court Clerk

JUDGMENT ON DISTRIBUTION OF PROPERTY

1. The petitioner has moved this court for an order on distribution of matrimonial property upon this Court’s dissolution of the marriage between the parties on 19th May 2021. There

are two issue to the marriage, only one of whom is a child. It is the petitioner's prayer that the Court distribute the following properties:

1. A house situated on plot 49/3/1466 in Area 49, Lilongwe.
 2. Motor Vehicle Toyota Rush Jeep Registration number BT 3148.
2. Taking the properties in turn, I shall proceed to analyse the law and evidence first to determine which of the property listed amounts to matrimonial property and secondly, to fairly dispose of the property found to be matrimonial property.
 3. The pleadings refer to a second property, a house in Nachamba, Blantyre. The petitioner's evidence was that this house was built at the respondent's home village in Blantyre for the purpose that when the children went to the village to visit their grandparents, they should have decent accommodation to live in. Eventually the children stopped going to the village and the respondent's mother moved into the house until her demise and that he has no idea what use the house was put to ever since. The petitioner does not lay any claim to this house.

THE LAW

4. The principles governing the distribution of matrimonial property are derived from the Constitution. In particular, sections 24 and 28 of the Constitution in particular, which provide for the rights of women and property rights, respectively as follows:

"24(1) Women have right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender and marital status, which includes the right-

- a) *To be accorded the same rights as men in civil law, including equal capacity-*
 - (i) *to enter into contracts;*
 - (ii) *to acquire and maintain rights in property, independently or in association with others, regardless of the marital status;*
- b) *on dissolution of marriage, howsoever entered into-*
 - (i) *to a fair disposition both property that is jointly held with a husband; and*
 - (ii) *to fair maintenance, taking into consideration all the circumstances and in particular, the means of the former husband and the needs of any children"*

And section 28:

(1) Every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

5. Matrimonial Property is defined as the one acquired during marriage and that is subject to distribution or division at the time of marital dissolution. It is also called marital estate or community property. It includes property acquired after the date of marriage and before a spouse file for separation or divorce. (**Black's Law Dictionary** 9th ed. P. 1338).

6. The case of *Rachel Sikwese v. Gracian Zibelu Banda* (hereinafter "*Sikwese v Banda*"), the Supreme Court held that for property to be deemed matrimonial property and therefore eligible to fair distribution under section 24 of the Constitution, it must be held jointly. "Jointly held" property will be ascertained by considering the intention of the parties in that regard, as well as the contribution to acquisition of said property creating a beneficial interest in the property. The Supreme Court expressly stated that in relation to distribution of matrimonial property;

"8.3.6.8... Whether or not in any particular case property is held jointly is a matter of fact, and will depend on the circumstances of the case, including the conduct and intention of the parties in relation to the acquisition of the property; it is not a mere conclusion to be drawn from the existence of a marriage"

THE HOUSE ON PLOT 49/3/1466

7. The petitioner's evidence was to the effect that this property is matrimonial property. He based his assertion on the basis that it was he who identified the plot and organized to finish the house although he conceded that it was the respondent who paid for it. The petitioner has relied on what he called a 'strategic plan' that he and the respondent formulated to buy an unfinished plot using her salary while his money would be used to sustain the family. During cross-examination however, the petitioner stated that it was difficult for him to produce evidence of the strategic plan' for it was merely a discussion between the parties.

8. The Petitioner, produced a letter of regularization of the plot in question from the Lilongwe City Council, the petitioner's evidence was that he had secured the services of an agent to regularize the plot, which alludes that he was involved in the early stages of acquiring the property. It is also worth noting that the plot was identified when the respondent was away on peace-keeping duties in Darfur.
9. With regard to his contribution to the house, the petitioner's evidence is that he contributed more than just money but also time. He actually went further to expend time and resources to meet with an agent and expend time and other resources to finish the house. His evidence was that he finished construction of the brick fence, septic tank, fitting of the ceiling, plumbing as well as other finishing touches such as the drainage system, painting and facing. He tendered in court what he called proof of expenditure which upon cross examination were revealed to be invoices and not actual receipts. His explanation was that because he was dealing with contractors who were not registered with MRA, they could not tender MRA receipts.
10. It was his evidence that the house was purchased for the benefit of the family as a whole because both parties made adjustments to finally buy and finish the house. The petitioner further prayed to this Court that his preference was that this house should not be sold so that the parties' two children have a comfortable living environment and this position, he has argued, means that the house should be matrimonial property.
11. The respondent's evidence was very different. She denied there having been a strategic plan for her to save her money whilst the petitioner spent on household expenses. Her evidence was in fact to the contrary that she used to pay for certain household expenses and she would pay for the rest. Payment of school fees was shared between them. She further denied the knowledge of the items on the purported receipts tendered by the petitioner as having been delivered to the plot when it was under construction.
12. Further, it was her evidence that the plot was registered in her name intentionally because she did not want the petitioner to have any part in it. It was her personal project and she told the petitioner as such but there was no record of the conversation. She denied that the petitioner

made any contribution and stressed that she would supervise the project when she came from Darfur on holidays during which she would spend two weeks at a time in Malawi. The sources of the money for the purchase according to her evidence, were her dues from her mission in Darfur, proceeds from farming which she engaged in whilst on separation from the petitioner and savings from her salary.

13. To support her claim, the respondent called 3 other witnesses. The second witness (RW2) for the respondent, who testified after the respondent had testified as her own witness was Austin Njala, the builder who constructed the house. He denied knowing the petitioner at the time the house was being constructed and even denied having authored the quotations the respondent tendered on as evidence of expenditure. He also denied that the petitioner ever bought the work men food during construction as it was the parties' son and sister who would bring food.
14. The petitioner's assertion that he was the sole provider and the respondent's money was kept to accumulate was also challenged by the respondent's third witness who was the parties' son. RW3 testified to the effect that both parents contributed to his school fees.
15. The fourth witness for the respondent, RW4, was Richfold Duncan Banda a plumber who did plumbing works on the house. He identified the petitioner as the husband of respondent and referred to the respondent as his employer. He did not know why the petitioner used to come around to the plot nor did he have any business interaction with him there.
16. The final witness, RW5 was an electrician who worked on the house, Adnan Sabao Malunga. He denied knowing the petitioner and a Richfold Banda, he instead knew a Duncan Banda with whom he worked on the wiring at the site, Banda being a plumber. He identified the respondent as his employer and stated that it was she who frequented the plot with her son. Whilst he may have been confused about names, I do not find his inconsistency as material to his credibility.
17. From the evidence I find it very difficult to find in favour of the petitioner as to his contribution to the acquisition and construction of the property on plot 40/3/1466. The decision in this

respect when each of the parties puts forward testimony that is diametrically opposite to the other, turns on who among the two was more credible. The petitioner provided purported receipts and relied on an agreement which the respondent disputed. The respondent then went on to call witness who substantiated her position that she bought the plot alone, registered it her name deliberately to the exclusion of the petitioner and then went on to finance the construction during holidays from service in Darfur. It was RW2's evidence that the project would stall for periods indicating that while the respondent was away, works would stop.

18. RW2 denied knowledge of a quotation that the petitioner tendered as proof of contribution. RW2 as a builder denied ever having interacted with the petitioner during the construction. Whatever contribution the petitioner must have made, it must go beyond a certain threshold if it is to entitle him to proprietary rights following the Supreme Court of Appeal Decision in the case of *Sikwese v Banda* (cited above). The scheme of the law in that case requires that in order for a spousal contribution to give rise to a beneficial interest, such contribution must go beyond simply doing 'do-it-yourself' jobs. It has been established that some jobs are so menial and routine that one spouse does not get a share in the house simply because he or she cleans or works in the garden or helps his or her spouse with painting or decorating. According to Lord Denning in *Button v Button* [1968] 1 WLR 457, those are the sort of things which 'a wife does without getting title to, or interest in, the property'. That is the current position of the law; which I am bound by. There is no evidence of contribution in this case and there is further no evidence of any works that would entitle the petitioner an interest in the property.

TOYOTA RUSH JEEP REGISTRATION NUMBER BT 3148

19. According to the petitioner's evidence, the respondent paid for the purchase of the vehicle, however it was agreed between them that it was to be used as a family car. The vehicle was insured by NICO General Insurance and the registration indicates the names of both parties. He tendered as evidence a copy of the vehicle's private proposal form. No original of this form was shown to the court. The reference to the petitioner comes under the question, "state the name of the person who will be the main user of the car". The respondent's name is endorsed on the dotted line and the petitioner's name appears below it. This being a photocopy,

there is no assurance that the second name was not added on after the document had been presented to the insurers. However, this doubt aside, it cannot be concluded that adding a person as a user in an insurance document is evidence of intention that the property in question was intended to be jointly owned.

20. Just as with the property on plot 49/3/1466, the petitioner's claim is that the respondent only paid for the vehicle because the parties, as a family had agreed on a 'strategic plan' under which they agreed that respondent's money was to be used for the purchase of the incomplete house at area 49 and the vehicle in question. The respondent's evidence was that just like the plot she purchased the vehicle with dues that she received from her peace keeping duties in Darfur, proceeds from farming and savings from her salary. She again reiterated that there was never any prior agreement that the vehicle be jointly owned and she denied that her money was exclusively for saving whilst the petitioner's money was expended for family use.
21. The respondent testified that even when she was in Sudan she continued to contribute substantially towards the family's expenses and with the supporting evidence of RW 3, the parties' son that the respondent did in fact contribute to his school fees.
22. According to the evidence, the vehicle is registered in the name of the respondent. I am fully alive to the fact that registration alone in the name of one party is not conclusive proof that the other party cannot acquire a beneficial interest in that property. As I reasoned in the case of **Sauti Phiri v Sauti Phiri, Civil Appeal No.18 of 2020, High Court, Family and Probate Division, Lilongwe:**

However, in matrimonial cases where it is quite possible for the dominant spouse in power relations to register property in his or her name, evidence of registration is not necessarily evidence of intention to own the property exclusively. The Appellants has undoubtedly the rights of legal ownership, but this does not rule out the Respondent's ability to acquire a beneficial interest in the same property. What the Court must therefore be satisfied of, is whether the Respondent did acquire a beneficial interest in the property, either through contributions or through some other conduct of the parties. The fact that the conduct of

the parties could manifest an intention that the property was to be held jointly was acknowledged in the case of Sikwese v Banda (cited above).

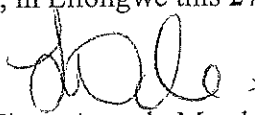
I have scoured through the evidence for any indication that there was an intention by the respondent that the petitioner should acquire a beneficial interest in the property, and have failed to find any. As the parties provided contradictory evidence, I have found the respondent to have more consistent and to have provided support for claims. In material respects, the testimony of the respondent has not stood up to cross examination and the respondent has emerged as the more credible of the two.

23. For all I have reasoned above, I hereby find that none of the two pieces in property in dispute may be deemed matrimonial property, all evidence leading to the conclusion that they were intended to be owned exclusively by the respondent and were so owned. The property was not jointly owned and the question of a fair distribution of property that was jointly owned does not arise.

24. The appeal is dismissed and although costs normally follow the cause, each party is to bear its own costs.

I so order.

MADE in open court, in Lilongwe this 27th day of May, 2022


Fiona Atupele Mwale

JUDGE