



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION
MATRIMONIAL CAUSE NUMBER 20 OF 2022
(BEFORE JUSTICE J.R. KAYIRA)

BETWEEN:

PRECIOUS CHARLES KAMANGE.....PETITIONER

AND

PEACE MIREKU.....RESPONDENT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA
 Counsel Henry Chizimba of Counsel for the Petitioner
 Counsel Mrs. Pilirani Chuma of Counsel for the Respondent
 Ms. Christina Kazembe Court Clerk and Official Interpreter

ORDER ON APPLICATION TO SHOW CAUSE WHY THE PETITIONER SHOULD NOT BE CHARGED OF PERJURY

Kayira J

INTRODUCTION

The divorce proceedings in this case completed and the outstanding issues related to ancillary orders. The Court reserved its decision on the ancillary orders to 15th August, 2023. On 17th July, 2023 the Respondent file an application to show cause why the Petitioner should not be prosecuted for perjury under Section 108 of the Constitution and Section 12 of the Courts Act. This application was supported by a sworn statement of the Respondent and skeleton arguments. In response, the Petitioner filed a sworn statement in opposition to the application and skeleton arguments. On 15th August, 2023, this Court allowed the parties to address it orally and reserved its decision to today 18th August, 2023. This

Court is grateful for the arguments and context as provided by both parties. They have been of great assistance to the Court in terms of making this decision. I will not summarise the arguments as submitted by both parties but will have recourse to the same in the analysis. This is the ruling of the Court.

REASONED ANALYSIS OF THE COURT

The application to show cause why the Petitioner should not be prosecuted for perjury is under the inherent jurisdiction of this Court under Section 108 of the Constitution and 12 of the Courts Act. Section 108 of the Constitution states as follows:—

“(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. (2) The High Court shall have original jurisdiction to review any law, and any action or decision of the Government, for conformity with this Constitution, save as otherwise provided by this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

The Petitioner argues that Section 108 of the Constitution as well as Section 12 of the Courts Act do not provide for an application to show cause in a proceeding. The reading of the above constitutional provision is clear. This Court can handle both civil and criminal matters because its mandate, is unlimited in terms of jurisdiction. In terms of civil matters, the Courts Act provides detailed guidance as to how issues should be handled. In this case, Section 12 of the Courts Act is very relevant. That Section states that the High Court, if it appears that a person has been guilty of perjury in any proceedings before it, may order that he be tried by a court of a Resident Magistrate and bind any person by recognizance to give evidence at such trial. The Court is alive to the fact that the powers under Section 12 of the Courts Act has effects on the liberty of a person through punishment if found to be in the wrong. The only way that fairness is achieved is to allow that person before the Court makes a referral to the lower court to be informed about the process and that they should be accorded a chance to respond before the Court flexes its muscles. In short, the application herein affords the Petitioner an opportunity to explain himself before the Court orders trial on perjury charge before a Resident Magistrate. Therefore, the first preliminary objection is hereby dismissed.

The second preliminary objection is that the Court herein having heard evidence from both parties and having retired for judgment delivery, cannot re-open the case before it through an application to show cause. It is the argument of the Petitioner that this application is wrongly brought with an intention to re-

litigate issues of properties whilst the matter is pending judgment of the Court. Order 10 rule 1 of the Courts (High Court) (Civil Procedure) Rules of 2017 (CPR) provides that a party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4. Order 10 rule 3 of the CPR provides the time at which a party may make an application in a proceeding. For the avoidance of doubt, the said order states that a party may apply for an interlocutory order at any stage, namely; before a proceeding has started, during a proceeding, or after a proceeding has been dealt with, and whether or not the party mentioned the particular relief being sought in his summons or counterclaim. I consider the current application as within the law as per the above order.

The issues in this application are about re-opening before judgment. As such, Order 16 rule 7 (8) of the CPR is the relevant provision. In that order, it is provided that **the Court may, on application, order the re-opening of a proceeding after trial but before judgment** where the Court is satisfied that it is necessary to do so in the interests of justice. This order allows the Court to exercise its powers before it makes its final decision because once a final decision has been made, then the Court is precluded from making any orders altering the determination for being *functus officio*. As rightly noted by both parties, the Court has not delivered its order on the ancillary issues that were pending. This means that the application within a proceeding as provided for under Order 10 rule 1 of the CPR has been complied with. Since Section 12 of the Courts Act has not confined circumstances where this Court can make a referral of the perjury case to the Resident Magistrate, it is only right and reasonable to hold that upon an application as is the case here, the Court can exercise its power. In other words, the above legal provisions are complementary in terms of substance and procedure in allegations of perjury in civil proceedings. I must state that the submission from the Petitioner that the Court should on its own motion invoke this section is not right. The provision leaves the discretion to the Court in terms of when to make such a referral to the lower court for a perjury trial. In other words, the powers can be exercised either on its motion or on application by a party. The second objection to the application is dismissed.

The third issue raised by the Petitioner is that if any party feels that a party has committed perjury in civil proceedings, such a party ought to launch a complaint before the Police where the matter could be handled as a fresh complaint perjury being a criminal matter. This is wrong and I do not need to waste time explaining bearing in mind the clear provisions above. So, the third and last preliminary objection is dismissed.

Having dismissed all the three preliminary objections, I am mandated to consider the application before this Court. It is important that before this Court exercises its power examines if what is on the record on the balance of probabilities appears to be perjury on the part of the Petitioner. I must put it on record that

there have been several inconsistencies in terms of what the Petitioner submitted to this Court regarding properties. I will reproduce the relevant parts for contextualization.

"The notice to petition has information that is pertinent in this case. In paragraph 19 the Petitioner states that during the marriage between him and the Respondent herein, the parties have acquired a lot of matrimonial property together namely:- Motor vehicles; Toyota Vits Registration Number 8599 and Toyota Rush Registration Number PE 6094. Paragraph 20 states that the Respondent can have all the property except the land at Chikolongo Village Traditional Authority Kalembo Ulongwe Balaka with the farmhouse and the structures and the plot of land at Njewa in Lilongwe listed as (v) and (vi) herein. The Petitioner wants these properties.

In the prayer, the Petitioner prays as follows: The Petitioner marriage with the Respondent herein be dissolved; The Petitioner should have the properties listed as (v) and (vi) herein and the Respondent should have all the other properties including the motor vehicles; The Petitioner should be given joint custody of the 3 children herein; The Petitioner should support the children's education and upkeep. In the Petitioner's witness statement in support of fair distribution of matrimonial properties the Petitioner states that he bought this motor vehicle in 2014 using his personal injury claim compensation. However, the Respondent sold this motor vehicle without even consulting him and she never shared the proceeds with him. The car was entirely his. As such, he prays that the Court orders the Respondent to account for the proceeds of the sale of the motor vehicle herein and pay him the same as the motor vehicle was his.

This point is repeated in the skeleton argument in support for fair distribution of matrimonial properties. The Petitioner submits that he bought this motor vehicle in 2014 using money he got as compensation from his personal injury claim. The Respondent never contributed anything and there was no intention for joint ownership. The motor vehicle solely belongs to the Petitioner. The Respondent must pay the Petitioner proceeds of the sale of the car."

The inconsistencies are vividly clear in the statements above. The question for determination is whether this is tantamount to appearance of perjury such that the Court should refer the Petitioner to the lower court for trial?

The Petitioner submitted that the alleged lies are immaterial to the issue before the Court. It is their submission that even if the alleged lies were true, which the Petitioner denies, the said lies are not material as required under Section 101 of the Penal Code. As such, there is no basis for perjury. The issue of sharing or consultation are not material to the issue of the parties' respective contribution to the acquisition of the car. Similarly, the issue of registration of the Njewa land is immaterial to the question

"what was the parties' contribution to the acquisition of the Njewa land?' The mere bringing of the land to the family by registering it in both our names does not make the Njewa land matrimonial property as per the case of **Sikwese vs. Banda** MSCA Civil Appeal Cause Number 76 of 2015. I have reproduced the quoted paragraphs below

"8.3.6.5. We do not share the view that, on a close reading of Section 24 of the Constitution, all property, even if acquired independently, 'held by a husband and a wife is joint property and the wife is entitled to have it fairly shared;' nor do we share the view that such property can 'be considered as joint property, as long as it is brought into the marriage' such interpretation would defeat the principal purpose of Section 24 of the Constitution which is to accord women and by necessary implication men, the right to acquire and maintain property rights independently or in association with others. For property to be 'held jointly,' there must be an intention between the parties, either expressed or implied, that the property will be held jointly, or some contribution to the acquisition of the property by the party claiming a beneficial interest in the property.

8.3.6.5.1. Furthermore, we do not share the view that Section 24 (1)(b) (i) of the Constitution was intended to override the principles on disposition of property on dissolution of marriage set out in **Kayambo vs. Kayambo** as was suggested by Mwaungulu J in **Kamphoni vs. Kamphoni**. On the contrary, we are of the firm view that Section 24 of the Constitution gives statutory effect to the principles on disposition of property on dissolution of marriage set out in the **Kayambo vs. Kayambo**, and specifically clarifies the position vis-à-vis women's rights.

8.3.6.7. In our view, Tembo J, in **Ezerina Munthali vs. Michael Mitawa** correctly summarised the import of Section 24 of the Constitution when he observed as follows-

"The ... constitutional provision on the rights of women respecting the acquisition and maintenance of rights in property entail among other things, that a woman may acquire and maintain rights in property to the exclusion of her husband. So long as the circumstances may indicate that such is the case, a husband who claims any interest in the property in question ought to offer proof of the interest he claims to have to the satisfaction of the Court, on a balance of probabilities, that indeed he has such interest in the property as co-owner. If the husband is unable to provide such proof, the court will dismiss his claim and make an order thereby declaring the married woman to in fact be the sole and absolute owner of the property in question, notwithstanding the fact that the married woman acquired her interest in such property during the subsistence of the marriage. Case authorities are abound to the effect that a similar provision obtains in respect of a husband who acquires property during the subsistence of a marriage. A

married woman who seeks to claim any interest in such property ought to offer proof of her interest in the property in question.”

It is clear that the principles are intention and contribution. The contribution can be monetary or non-monetary such as performance of duties. As for intention is deduced from the conduct of the parties such as how the property is being used and how the property is disposed of. In my considered view, the Respondent is not relitigating matters but bringing to the attention of the Court information that is critical for a fair disposition of this matter. One thing is clear, the manner in which the motor vehicle was disposed of is relevant to a fair disposition of the same after divorce. The attachment to the present application confirms that a sum of K1, 600, 000 was transferred from the CDH Bank account for the Petitioner to the Respondent on 15th March, 2022. This is the same amount that was paid by the buyer of the Vitz. It logically follows that the testimony and deposition of the Petitioner contradicts this documentary evidence which confirms that the Petitioner handled the proceeds of the car sale. This means that the Petitioner lied under oath.

Similarly, the lease documents for land whose Title is Buli 19/2/22 is a transfer of lease from Lemiyoni Misi Bende to the parties herein. The registration of this land in the names of the two has a direct bearing on the principles enunciated in the **Sikwese** case above. The registration in addition to the manner in which the two handled this land and how their efforts in terms of developing this land is concerned showed that they never contemplated in excluding each other from the same. The Court will therefore be wrong to hold that the land belongs to the clan of the Petitioner. Apart from these findings, the Court had the task appreciating the attachments to the application. Having examined the same, and having fully appreciated the explanation from the Petitioner in the sworn statement in opposition to the present application, this Court is convinced on a balance of probabilities that there is an appearance of perjury on the part of the Petitioner. By this finding, the Court makes the following orders:

- i. The Court doubts his credibility and therefore the evidence adduced by him will be attached less weight.
- ii. The Court refers the appearance of perjury to the Resident Magistrate to try the Petitioner under Section 101 of the Penal Code.
- iii. The Chief Resident Magistrate for the Southern Region is directed to do the needful and send a report once all processes in the lower court are completed.

OBSERVATIONS:

In the sworn statement of the Petitioner, he is referring to the advice obtained from his Counsel. It is only proper that Counsel should not mislead his client. The principles applicable from the **Sikwese** case are clear and they were not supposed to be twisted in any way.

RIGHT OF APPEAL

Any party not satisfied with this ruling is at liberty to appeal to the Supreme Court of Appeal within 30 days from today.

PRONOUNCED IN CHAMBERS ON 18th AUGUST, 2023@11:00AM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE