



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
FAMILY AND PROBATE DIVISION
MATRIMONIAL APPEAL CAUSE NUMBER 13 OF 2022
(Being Civil Cause Number 34 of 2021)
(BEFORE JUSTICE J.R. KAYIRA)

BETWEEN:

OLIVE CHINKONO.....APPELLANT

AND

SIMPLEX CHINKONO.....RESPONDENT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Mr. Mbwana of Counsel for the Appellant

Counsel Mr. Wame of Counsel for the Respondent

Olive Chinkono Appellant (Represented)

Simplex Chinkono Respondent (Unrepresented)

Ms. Christina Kazembe Court Clerk and Official Interpreter

JUDGMENT ON APPEAL

Kayira J

BACKGROUND

This is an appeal on property distribution by the lower court following its judgment which was delivered on 23rd May, 2022. In that judgment, the court that the Respondent should compensate the Petitioner with a sum of K1, 000, 000 payable in three monthly instalments of K330, 000. The Appellants were dissatisfied with the decision and partly appealed against the decision of the lower court on three (3) grounds. I will now outline the grounds of appeal.

GROUND OF APPEAL

As already alluded to, the Appellant filed three grounds of appeal. In the grounds, the Appellant submits that the lower court erred in law and fact in sharing the house to the Respondent without considering the Appellant's contribution. The second ground is that the lower court erred in law and fact in ordering that the second and third motor vehicles belonged to the Respondent without considering the Appellant's contribution. The third and last ground is that the lower court erred in law and fact in ordering that the sum of K1, 000, 000 would justly compensate the Appellant.

RELIEFS

The Appellant seeks reversal of the lower court's decision on compensation and property distribution.

EVIDENCE

During the actual hearing of divorce the parties partly gave evidence relating to their properties. The evidence of the Petitioner is that they were constructing the matrimonial house whilst they were courting. They later occupied this house and used it as a matrimonial home. That they had been making things together and these were the house, car and gardening. On cross examination PW1 maintained that they constructed the house together between 2017 and 2018 which is prior to their marriage which was officiated on 2nd June, 2019. She firmly submitted that the workers at the construction site were employed by her. As for the land, it was purchased at K750, 000 and that the Respondent would take the Petitioner's money to construct the house as well as a contribution to buy the car. The lower court's record shows that there was no re-examination.

In his evidence in chief, the Respondent stated that he started constructing a house in 2017 before he married the Petitioner. It is in his firm evidence that the car he had was left to him by his uncle who stays in Zimbabwe. It is his further evidence that in the wake of the Covid 19 pandemic, the Petitioner asked him if they could move into the house. In response, the Respondent obtained a bank loan and fixed the house. This is when the couple moved into the house.

It is pertinent to mention that the lower court had a hearing on property ownership. In her evidence in chief, the Petitioner stated that she contributed a sum of K150, 000 towards the purchase of the car-EXP1. It is her further evidence that the Respondent bought a Corolla where the Petitioner topped up with the sum of K150, 000. The Respondent sold this car and bought another one where the Petitioner contributed a sum of K250, 000.00 which catered as contribution towards purchase price and service. In

terms of the house, she submitted that she contributed as well starting with the search of land which she found in Machinjiri. The land was worth K750, 000 and the Petitioner contributed a sum of K400, 000 which she went to pay together with the brother of the Respondent. The Respondent then paid the balance in this case the sum of K350, 000. After payment for the purchase of the land, the Petitioner identified a builder whom she deployed at the plot.

On cross examination, the Petitioner maintained that the land for the Machinjiri house was purchased at a total sum of K750, 000. In terms of the purchase of the land where the Machinjiri house is, she paid and the Respondent paid the balance later. She submitted that the two started cohabiting before their chinkhoswe because the Respondent wanted to formally divorce his wife. The two had their chinkhoswe in 2019. It was her firm evidence that the Respondent was staying with his brother before he got his children from the first marriage.

The Petitioner paraded two witnesses. The first one was contracted by the Petitioner to build a house. He met the Petitioner and the Respondent at the house the two of them showed him the plot. After construction, he stayed in the house for 2 years as a care taker. On cross examination, PW2 confirmed that at first the Petitioner was staying at Miseu 6 whilst the Respondent was staying at Area 8. However, the two started living together. In the course of constructing the house, the Respondent could bring materials and make payments whilst the Petitioner was also making payments as and when needed. It was the brother of the Respondent who was supervising the construction works. It was his firm evidence that the couple was doing things together.

PW3 was Steria Galeziyo and her evidence is that she was staying with the husband who was building the couple's house. On cross examination, she maintained that she knew that the parties herein were married but she does not know where they were staying. The two were doing things together as a couple. It was the Respondent who brought another caretaker of the house and they vacated.

The Respondent obtained a bank loan in the sum of K1.8million and started to look for land in 2017. He was successful and purchased the land from Mr. George at K500, 000-EXD1. He then moulded bricks starting in September, 2017. When the project started, the Respondent was paying the construction worker on his own and the construction works were supervised by Foster his brother. In 2018, the Respondent moved to Nancholi together with his brother and two daughters. After the chinkhoswe, the Petitioner and the Respondent started to live as a couple. In 2019, the builder and his wife vacated the house and the Respondent obtained an additional bank loan in the sum of K600, 000 which they used to plaster and floor the house. This time, they used a different builder and not Donald.

It was his firm evidence that the time he met the Petitioner he had a motor vehicle which his uncle bought for him. He sold this car and bought a pickup which they used for their wedding. He sold the pick-up and bought another car. It was his testimony that he borrowed money from the Petitioner but he paid it back.

On cross examination DW1 confirmed that in some instances he was searching for land alone and that there were times when the two of them could go together searching for land. The Respondent purchased the land at K500, 000 and he also purchased iron sheets and timber which were kept at his house and later at the Petitioner's house

DW2 was Raphael Chinkono and he confirmed that their uncle from Zimbabwe left a motor vehicle for use at the village. At the time the parties herein married, the Respondent had a pick-up. It is his evidence that Foster was supervisor at the construction site in Machinjiri. The construction project at some point stalled due to lack of finances. However, it restarted and this was during the subsistence of the marriage. On cross examination, DW2 stated that it was the Respondent who informed him that he will use the proceeds realised from the sale of the previous car to purchase a new one. Further, that he knew the Petitioner in 2018 but not when the house construction project started.

DW3 was Langison George and he is the one who sold the land in Machinjiri to the Respondent in 2017. In the same year, the house construction project started and the builder was identified by the Petitioner whilst she was a girlfriend to the Respondent. It was his further evidence that the Respondent was usually coming alone for the land transaction but on one instance, his brother Foster came with a lady in relation to the same land transaction. On cross examination, the witness maintained that the land transaction was with the Respondent alone and that the first payment was done by the Respondent and his brother. He also maintained that the builder at the project was found by the Petitioner. This witness confirmed that he knew the Respondent some time back and that he also knew that the Respondent was in a relationship with the Petitioner.

The last defence witness was William Kapinda who confirmed that their uncle who stays in Zimbabwe sent money in 2013 which they used to buy the first car and they appointed the Respondent to have custody of the said car. After selling that car, he purchased another one which was used during their engagement. This witness knew about the Petitioner in 2018. It was his final piece of evidence that the second car which the Respondent purchases was sold in 2019. On cross examination, he confirmed knowing the Petitioner as a girlfriend to the Respondent in 2018 and that at the time the Respondent purchased the land, the Petitioner was nowhere in the picture.

FACTS

It is a fact that in 2017, the two started courtship and at this time the Petitioner was staying at Miseu 6 in Machinjiri Township whilst the Respondent was staying in Makhetha. It is a fact that in some instances he was searching for land alone and that there were times when the two of them could go together searching for land. The Respondent found and purchased land from Mr. George Lang'ison in Machinjiri Township within the City of Blantyre in 2017 at the price of 500, 000.00. It is a fact that during the courtship period, Mr Gravazio Donald was the builder of the house in Machinjiri. He was identified by the Petitioner and was contracted to construct the house in Machinjiri. In 2018, the Respondent moved to Nancholi together with his brother and two daughters. It is also a fact that either of the couple was making payments for the construction works by Mr. Donald. However, Foster a brother to the Respondent was the supervisor at the construction site in Machinjiri. Actually, it was the parties herein who instructed Donald and his wife Steria to stay at the house as care-takers because they come from Dedza. This couple stayed in the house for two years.

It is a fact that the Petitioner and the Respondent had their chinkhoswe on 2nd June, 2019. The builder and his wife vacated the house at Machinjiri on instruction by the Respondent. During the subsistence of the marriage, the Petitioner intimated that they should occupy the Machinjiri house. In response, the Respondent obtained an additional bank loan in the sum of K600, 000 which they used to plaster and floor the house. This time, they used a different builder and not Donald. Until today, the house has not been occupied because it is incomplete.

In terms of the motor vehicle, it is a fact that the Respondent's uncle who stays in Zimbabwe sent money in 2013 which the clan used to buy the first car and they appointed the Respondent to have custody of the said car. The Respondent sold the car and used the proceeds to purchase another one (a pickup) which was used during their engagement/wedding. The Respondent sold the pick-up and bought another car (a Corolla) and the Petitioner contributed a sum of K150, 000 towards the purchase of the car-EXP1. These are the facts of this case in relation to property distribution and I will now deal with how this Court is seized of the matter.

JURISDICTION

Section 108 (1) of the Constitution empowers the High Court with unlimited original jurisdiction to deal with civil and criminal matters under any law. Further, Section 110 (1) of the same Constitution creates courts that are subordinate and whose decisions are appealable in the High Court. This Court is alive to

the fact that Section 20 (1) (a) of the Courts Act contextualizes one of the instances where decisions of the lower courts are handled by this Court. That provision states that an appeal shall lie to the High Court from a subordinate court from all final judgments. At this juncture, it is proper to note that the lower court made a decision in this case after full trial. In short, the decision being appealed against is a final judgment of a subordinate court. This Court then assumes jurisdiction over this appeal based on these legal provisions.

The three grounds of appeal will be analyzed and determined in the subsequent sections.

REASONED ANALYSIS OF THE COURT

As already alluded to, the Appellant filed three grounds of appeal. In the grounds, the Appellant submits that the lower court erred in law and fact in sharing the house to the Respondent without considering the Appellant's contribution. The second ground is that the lower court erred in law and fact in ordering that the second and third motor vehicles belonged to the Respondent without considering the Appellant's contribution. The third and last ground is that the lower court erred in law and fact in ordering that the sum of K1, 000, 000 would justly compensate the Appellant.

After making analysis of these three grounds of appeal, the Court will have recourse to Section 22 of the Courts Act which provides the powers of the High Court on appeal in the following manner;

'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.'

The first ground relates to ownership of a house. Section 24 (1)(b) of the Constitution states that women have the right to full and equal protection by the law. Further, they have the right not to be discriminated against on the basis of their gender or marital status. This includes the right on the dissolution of marriage,

howsoever entered into— (i) to a fair disposition of property that is held jointly 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.

The law is settled in terms of property ownership by a couple. It is not automatic that properties acquired during the subsistence of a marriage belong to both of them. The Court is under obligation to establish the intention of the parties. This is to ensure that all properties which were exclusively acquired by a party belong to him or her whilst properties which were acquired with express or implied intention to be for both parties should be shared between the couple upon dissolution of the marriage based on the financial and other contributions.

In this particular case, the Respondent would search for a piece of land alone and in some instances the two were going to do the search together. When the land was identified and found, the Respondent went and made part payment and on the second instance, the brother to the Respondent went with the Petitioner to the land owner. It is abundantly clear that after the land was purchased in 2017, it was the Petitioner who identified and engaged the services of the builder-PW2 to construct the house. It is this builder's evidence that the Respondent showed him the piece of land where he started to construct a house in Machinjiri. The couple was purchasing construction materials for the house and supplying to the builder periodically. The Builder was then instructed by the couple to stay in the incomplete house by the parties herein. It was his firm evidence that payments of the construction works were done by both of the parties. In my considered view, the parties herein had an intention to have a property which belonged to both of them.

On cross examination the Respondent firmly submitted that he purchased the land at K500, 000. Subsequently, he purchased iron sheets and timber which were kept at his house and later at the Petitioner's house. Actually, when the Petitioner intimated that they should relocate from Nancholi to Machinjiri, the Respondent made efforts by adjusting his bank loan upwards so as to make the house habitable and then they should move into the house. The consistent and continuous involvement of the Petitioner from the time the two were courting to the time they married and to the time that they now have divorced is a clear indication that they both have a property right or interest in the house. In short, this Court holds the firm view that the couple intended to own this house jointly. Therefore, this Court finds that the lower court was under duty to share the value of the house to both parties. The appeal under ground number one succeeds and I proceed to quash the lower court's decision.

Since contributions by either party matter, I have had time going through the record to ascertain how much each of the two contributed. However, there is no direct evidence as to the actual amounts contributed by each of the parties. Considering the fact that their contributions have not been ascertained in monetary terms, this Court holds that the totality of the evidence makes it safe to conclude that that the Respondent contributed towards the house construction project more than the Petitioner. Therefore, the house must be valued by an independent valuer chosen jointly by the couple. This must be done within 30 days from today. The cost of this exercise has to be shared equally by the parties. Once the house valuation is done, the Petitioner is entitled to one third of the value of the house whilst the Respondent is entitled to two-thirds of the value of the house. The parties have two options; the first one is to sell the house and share the proceeds or, the second option is that either party buys the other's portion or entitlement.

The second ground relates to purchase and ownership of a motor vehicle. It is clear that that genesis of this car dates back to 2013 when an uncle to the Respondent purchased a vehicle for the clan. The Respondent was only chosen as a custodian of the car. The said motor vehicle was sold and another car was purchased. This time the Respondent purchased a pick-up. The said pick up was sold and another car was purchased. This Court is alive to the amount that the Petitioner contributed towards the second car. The Court also notes that money loses value and cars depreciate. The Petitioner benefitted from using this motor vehicle. There is no evidence showing that she was being deprived using the car. That enjoyment of usage caters for the depreciation in terms of value of the car and the money she contributed towards the amount used to purchase the car. To therefore expect that the same value that was there in 2018 is also what the Petitioner wants would be against reason and logic. In that regard, the lower court's decision to grant ownership of the car to the Respondent alone is hereby upheld. This ground of appeal fails.

In terms of compensation, the Court is aware that the intention is to put a person to a position he or she would have been had it not been for the wrong of another person. In this case, the lower court ordered the Respondent to compensate the Petitioner with a sum of K1, 000, 000.00. On her part, the Petitioner finds this amount to be inadequate and too low because as a fuel Attendant, she needs to restart her life and she considers a sum of K3, 000, 000.00 as sufficiently compensating her for the time she has been with the Respondent. I am alive to the fact that any monetary order must take into account the means of the paying party so as not to totally cripple him or her. Further, that the amount ordered must be reflective of the loss suffered. In this case, the two started courting in 2017 and married on 2nd June, 2019.

The Petitioner lodged her petition for divorce in 2021 and they were formally divorced in 2022. In my considered view, the time for consideration is from 2017 to 2021. This is approximately 4 years which is 2 years of courtship and 2 years of marriage. Considering the levels of commitment shown by the parties during their 2 years of courtship which in my view are similar to what a couple officially married does, I find it safe to conclude that all the four years be considered using the same threshold. Bearing in mind the fact that the two were entrusting each other with valuable assets such as timber and iron sheets; they were involving each other in the construction processes, this Court holds that they created legitimate expectation between each other to an extent of investing not only time but also money. The timeframe and the level of investment is substantial such that this Court will take it into account when determining what the appropriate compensation should be in this case.

It is critical to determine if this manner of interaction then justifies an increase in the amount of compensation to be awarded to the Petitioner. The argument raised by the Petitioner about having children whom she provides for needs to be scrutinized properly. It has to be borne in mind that the responsibility towards a child rests on both biological parents and guardians. In this case, the Petitioner is the biological parent. The Respondent was just a foster parent or guardian by virtue of the marriage. Therefore, the only extent to which the submission relating to child provisions can operate on the mind of the court is that the money which she would have used towards the children was instead used to provide for the household whilst she was married to the Respondent. This means that the children were to some extent deprived of some amenities as the Petitioner tried to fulfil the other obligations. Thus far, I find that the sum of K1, 000, 000.00 is inadequate. I therefore uphold this ground of appeal. This Court proceeds to quash the order on compensation and order that the Respondent compensates the Respondent with a sum of K1, 500, 000.00. The amount should be paid in five equal instalments of K300, 000.00 starting from 30th May, 2023 up to 30th September, 2023.

SUMMARY

In line with the above analysis, this Court makes the following orders:

1. On the first ground, the Appellant submitted that the lower court erred in law and fact in awarding the house to the Respondent without considering the Appellant's contribution. The appeal on ground number one succeeds and I proceed to quash to lower court's decision. The Petitioner is entitled to one third of the value of the house whilst the Respondent is entitled to two-thirds of the value of the house.
2. The second ground is that the lower court erred in law and fact in ordering that the second and third motor vehicles belonged to the Respondent without considering the Appellant's contribution.

The appeal on the second ground fails and I uphold the decision of the lower court that the car belongs to the Respondent.

3. The third and last ground was that the lower court erred in law and fact in ordering that the sum of K1, 000, 000 would justly compensate the Appellant. I find that the sum of K1, 000, 000.00 is inadequate. I therefore uphold this ground of appeal. This Court proceeds to quash the order on compensation and order that the Respondent compensates the Respondent with a sum of K1, 500, 000.00. The amount should be paid in five equal instalments of K300, 000.00 starting from 30th May, 2023 up to 30th September, 2023.

Each party will bear his and her own costs of this appeal.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 24th APRIL, 2023@2PM



HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE