

C.T.S.

IN THE MALAWI SUPREME COURT OF APPEAL  
AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO.8 OF 1985  
(Being Civil Cause No.162 of 1983)

BETWEEN:

DERIAH KAYAMBO ..... APPELLANT

AND

DR. G.H. KAYAMBO ..... RESPONDENT

Before: The Honourable Mr. Justice Mtegha, J.A.  
The Honourable Mr. Justice Kalaila, J.A.  
The Honourable Mr. Justice Mkandawire, J.A.  
Msosa (Mrs), Chief Legal Aid Advocate, Counsel for  
the Appellant  
Mhango, Counsel for the Respondent  
Manda/Longwe, Court Reporters  
Kadyakale, Law Clerk

JUDGMENT

Mkandawire, J.A.

This is an appeal from the decision of the High Court dismissing the respondent's application for settlement of matrimonial property following the dissolution of her marriage with the petitioner. The application was dismissed on the basis that the Court had no powers to settle the property.

Attached to the application were two Appendices: Appendix 1 comprises household effects which were acquired while the couple was in West Germany and Appendix 2 comprises items that were acquired here at home. I think it would be prudent to set out these appendices in full.

APPENDIX 1

1. Mercedes Benz Saloon - CA 4847
2. VW Beetle - CA 4915
3. Display Cabinet (Mahogany)
4. One leather lounge suite
5. One pink lounge suite
6. One bluish lounge suite
7. Two sideboards (Mahogany)

8. One Marbel coffee table
9. Two small marble coffee tables
10. One glass coffee table
11. One wooden (convertible) coffee table
12. One garden chair
13. One Royal Blue China carpet
14. One Persian carpet (red)
15. One Tebris Red carpet
16. One Indian blue carpet
17. One Cashimir blue rug
18. A three piece set of gold rugs
19. Three assorted brown rugs
20. One bluish machine made rug
21. One persian rug (red)
22. Four bedding sets
23. Six pairs bedsheets
24. Five pillows with pillowcases
25. Four bathing towels
26. Twelve hand-towels
27. One washing machine
28. One cooker
29. One dish washer
30. One deep freezer
31. One refridgerator
32. One dinner set
33. One coffee set
34. One silver tea set/silver tray
35. One pink tea set
36. A set of a tray, tea-pot, coffee pot, milk jug, sugar dish (stainless steel)
37. Five assorted dishes, three assorted meat plates, seven assorted cups and side-plates, three assorted tea-pots, three dinner plates
38. One set Wasserlos pots comprising of 6 pots, a pan and a kettle with covers
39. Three assorted pots with covers
40. One big pan with cover
41. One fondue pot complete with folks



42. One Rumpot with cover
43. Forty pieces of assorted glasses (mostly crystal)
44. One set of bowls with 12 glasses
45. Two pairs beer stange
46. One set of dessert - one big dish and 6 small dishes (crystal)
47. Cutlery - 2 sets (each for 6 people complete with knives, folks, table-spoons and teaspoons (Raverna Cromargan)
48. Assorted knives, folks, spoons
49. A pair of roast beef cutlery, big knife and big folk
50. Three sets of cake folks (6 in each set)
51. One cake plate and cake holder
52. Ornamental assorted flower pots and vases made of porcelain, glass and silver (clear and coloured glass)
53. Assorted fruit bowls and plates
54. One 3-mixer 3000
55. One Sahne (cream) machine
56. One potato peeler
57. One egg cooker with 12 egg holders
58. One vacuum cleaner set
59. One handstand and two wash baskets
60. Personal jewellery: necklaces, bracelets, ear-rings, ear-clips and 2 wrist watches
61. One set of musical instruments comprising of One radio, record-player, townband, loudspeakers
62. One clock radio
63. Records, bands and cassettes
64. Books

#### APPENDIX 2

1. Nissan, a two-ton lorry
2. A bookshelf
3. One floral lounge suite
4. Two dining sets complete with eight chairs each
5. Seven single beds

6. One double-bed
7. Seven garden chairs
8. One refridgerator
9. Curtains for both houses (Lilongwe/Salima)
10. One radiogram
11. Three pots and two ordinary pans
12. One Trolley
13. Four baking tins
14. Farm implements - hoes, axes, sickles, panga knives, etc.

In addition, there is a cottage and a farm both situated in Salima. The respondent's prayer was that she wanted 50% of all the matrimonial property except the jewellery which is all hers.

The brief history of the matter is that the petitioner and the respondent got married in West Germany on 17th August, 1966. Thereafter the couple lived in West Germany for several years and then returned to Malawi in 1977. Here in Malawi, the parties first lived in Salima and then in Lilongwe. Their relations got sour and the respondent quit the matrimonial home on 9th June, 1983. The petitioner had then instituted divorce proceedings and the marriage was finally dissolved on 17th March, 1984 when the decree absolute was granted.

In her evidence the respondent testified that the properties itemised in Appendix 1 and Appendix 2 as well as the cottage and farm were acquired out of monies saved jointly by herself and the petitioner. She testified that she was able to contribute financially towards the purchase of the items because while in West Germany she twice took up paid employment from which she earned a salary ranging from DM900 - DM1,500 per month. She went on to say that when she was not in paid employment she did all the household chores such as cleaning the home, preparing meals, looking after the children and that the petitioner benefitted substantially and financially from these services as it would have been very expensive to employ a cook or a baby sitter. It was also her evidence that she had contributed financially to the purchase of the property acquired here in Malawi.

Turning to the cottage and farm in Salima, it was her testimony that while the couple was in West Germany, she used to send money out of their joint savings to the petitioner's uncle so as to start on the projects. When they finally returned home the respondent contributed financially in the purchase of the farm implements and she used to go to the farm to supervise. As for the cottage, she used to go there to do some work and supervise. She would help in the carrying of stones and bricks and she also cooked for the labourers. It was also her evidence that she planted ornamental trees and flowers.



The petitioner opposed the application on the basis that the respondent had not contributed anything significant in the acquisition of the properties.

The learned Judge in the Court below preferred the evidence of the respondent and observed as follows:

"Before I conclude I wish to observe that the respondent did impress me as a witness of truth. I was actually disposed to prefer her evidence to that given by the petitioner and his witnesses. I believe that she made some contribution towards the purchase of some of the items acquired in West Germany. I am further inclined to believe that she participated in the putting on of final touches to the cottage and the acquisition of farm implements."

Although the learned Judge had found it as a fact that the respondent had contributed to the acquisition of the matrimonial property he declined to settle or share the property on the basis that the Court had no power to do so. The respondent, now the appellant, has appealed to this Court and has filed a number of grounds of appeal as follows:

#### GROUND OF APPEAL

- (a) The learned Judge erred in law in failing to exercise inherent powers of Court which could have empowered him to settle the property following his finding of fact that the respondent contributed towards the acquisition of the property.
- (b) Other grounds to follow on receipt of record and judgment.

#### FURTHER GROUNDS OF APPEAL

1. The learned Judge erred in law in holding that the Court did not have power to direct settlement of property under Section 30 of the Divorce Act in Cap. 25:04.
2. The learned Judge erred in law in holding that there was no evidence of settlement or evidence upon which a settlement could be inferred to enable him to exercise the powers under s.29 of the Divorce Act in Cap. 25:04.
3. The learned Judge erred in law in failing to exercise his discretion to proceed to apply common law principles relating to matters of this nature.

The question which we have to determine is whether it was proper for the learned Judge not to settle the dispute between the parties when he had found it as fact that the respondent had contributed to the acquisition of the matrimonial property. In this regard Mrs. Msosa, learned Chief Legal Aid Advocate, strongly submitted that the learned Judge had wide powers to direct a settlement under Section 30 of the Divorce Act or alternatively the learned Judge could have proceeded under s.17 of the Married Women's Property Act, 1882. On the other hand the view taken by Mr. Mhango was that a settlement could not be directed as it cannot be said that the parties had intended a settlement and that there is no evidence from which a settlement could be inferred.

We hasten to point out that we agree with the learned Judge that a settlement could not be directed under s.30 of the Divorce Act. That section is closely tied with s.28 and s.29. Section 28 deals with the settlement of the wife's property while section 29 deals with the varying of existing settlement. We agree that it is only in circumstances outlined in s.28 that a court may direct a settlement under s.30. We feel, however, that it was within the powers of the Court to dispose of the dispute under the Married Women's Property Act, 1882. This is an Act of general application and it applies in this country vide section 4 of the Divorce Act, Cap. 25:04 of the Laws of Malawi. Omitting the immaterial words, section 17 of the Act provides as follows:

"In any question between husband and wife as to the title to or possession of property, either party..... may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice ..... and the Judge ..... may make such order with respect to the property in dispute .... as he thinks fit ...."

The property here was in dispute and we think that the dispute could have been resolved under the provision cited above. It was felt in the court below that the Married Women's Property Act, 1882 can only apply when an application is made before dissolution of the marriage. The learned Judge observed that as the marriage in the instant case had already been dissolved, the only course open to the respondent was an action at law. This was indeed throwing the respondent in the wilderness and leaving the dispute unresolved. It is certainly not correct that section 17 of the Married Women's Property Act, 1882 cannot apply after the marriage is dissolved. The position is made abundantly clear in Latey on Divorce, 15th Edition page 1486 paragraph 39:

"An application may be made to the High Court or county court under Section 17 of the Married Women's Property Act 1882 ..... by either of the parties to a marriage notwithstanding that their marriage has been dissolved or annulled so long as the application is made within the period of three years beginning with the date on which the marriage was dissolved or annulled ....."



The same proposition of law can be found in Rayden on Divorce 12th Edition page 669 paragraph 16. In the instant case the marriage was dissolved on 17th March 1984 when the decree absolute was granted and the application was made in May, 1985, well within the period of three years. Admittedly the application before the Court was brought under Section 30 of the Divorce Act but we are of the view that the Court had powers to resolve the application under Section 17 of the Married Women's Property Act, 1882 especially that most of Counsel's submissions and authorities fell squarely within the ambit of that Act. In the case of Mary Tracy Malinki vs. Louis Alex Horace Malinki Civil Cause No.129 of 1978 (unreported) Jere J. resolved the property dispute under Section 17 of the Married Women's Act, 1882 although the application was not brought under that provision. The reason for doing so was that all the arguments seemed to have in mind the provisions of the Act. In the instant case the respondent's counsel brought the application under Section 30 of the Divorce Act because it was felt that an application under the Married Women's Property Act, 1882 could not be maintained after the marriage was dissolved. From counsel's arguments and authorities cited it is clear however that counsel had in mind the provisions of the Married Women's Property Act, 1882.

Having found that the dispute could have been resolved under Section 17 of the Married Women's Property Act, 1882 we must now consider whether the respondent is entitled to a share of the properties listed in Appendices 1 and 2 as well as the cottage and the farm. We wish to start with a passage from Latey on Divorce 15th Edition page 1486 paragraph 37 which reads:

"It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or the proceedings of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be in that beneficial interest of such an extent as may have been agreed or in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

As has already been pointed out earlier in this judgment, the learned Judge in the court below found it as a fact that the wife had contributed both in money and money's worth to the acquisition of the matrimonial property now in dispute. As

a matter of fact her contribution was substantial and there can be no doubt whatsoever that she had a beneficial interest in the property. The property was acquired to make provision for the family as a whole.

In the case of Appleton v. Appleton (1965) 1 WLR, 25 a husband made an application under Section 17 of the Married Women's Property Act, 1882 for a share of the proceeds of the sale of his wife's property. The facts were that he had contributed to the improvement of the wife's property. The Registrar declined to give him a share on the basis that although he had contributed to the improvement of the property, there was no evidence of bargain or expressed intention as to the proceeds of sale. The matter went to the Court of Appeal and Lord Denning M.R. finding for the husband said:

"I think that was an erroneous direction in point of law. As the husband pointed out to us, when he was doing the work in the house, the matrimonial home, it was done for the sake of the family as a whole. None of them had any thought of separation at that time. There was no occasion for any bargain to be made as to what was to happen in case there was a separation, for it was a thing which no one contemplated at all. In those circumstances, it is not correct to look and see whether there was any bargain in the past, or any expressed intention. A judge can only do what is fair and reasonable in the circumstances. Sometimes this test has been put in the cases: What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as they never did think about it at all, I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before? I should have thought that, inasmuch as the Registrar found that the husband had done up to about one-half of the work of renovation, the husband should be entitled to something. He should get so much of the enhanced value of both of the properties as was due to his work and materials that he supplied. He should be given credit for a just proportion on any realisation of the house. A percentage of the proceeds ought to go to him commensurate to the enhancement due to his work in improving the properties and getting a better price on that account. So I think that the Registrar misdirected himself on that point. The husband is entitled to a percentage of the proceeds of sale, if and when the house is sold.

In point of law, there would be no difference whether one contributed to the improvement or acquisition of property. The question of determining the intention of parties is always a difficult one and a Judge can only draw inferences from the parties' conduct. Indeed it is unnecessary to show an agreement



express or implied that a wife or a husband should have a share of the property should a marriage go to grief. In the case of Re Roger's Question 1 All ER 328 Evershed L.J. said:

"In this, as in most similar cases, the difficulties of a judge are aggravated by the circumstances that the two contesting parties are now extremely hostile to each other and that the conditions of a broken marriage, which now subsist, were not fully appreciated by either party, even if, as the learned judge thought, they were not absent from the mind of one of the parties, when the transaction in question was entered into. When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less agree, what should happen to the house if the marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself."

In that case the wife contributed £100 and the husband contributed £900 towards the purchase of the matrimonial home. It was decided that the wife should have one tenth and the husband nine tenths of the proceeds of sale. Again in the case of Grace Nyangulu vs. Daniel Nyangulu Civil Cause No.108 of 1982 Villiera J. said:

"In considering an application of this nature it is important to ascertain wherever possible what the parties' intention was when a particular piece of property was acquired. An inference of joint ownership of property is not to be made from the mere fact of marriage. Admittedly, it may be difficult to ascertain what the parties' intentions were after the marriage has broken up because then the contending claims are coloured by bias. But as stated in Gissing v. Gissing (1970) 3 WLR at page 255, in determining whether there was a common intention regard can of course be had to the conduct of the parties."

Admittedly, in the instant case, there was no bargain or agreement implied or express that the wife should have a share should the marriage go sour. But as Lord Denning M.R. put it a judge can only do what is fair and reasonable in the circumstances. What were the circumstances of this case or rather what was the conduct of the parties? While in West Germany the petitioner and the respondent decided that one day they must go back home to Malawi. In 1971 they came to Malawi on holidays; they looked around in Blantyre and Lilongwe and then established what things they should bring home from West Germany. During the same period they also acquired land for

the farm and the cottage. When they returned to West Germany they started putting their resources together. They would sit down and discuss what items to buy and then adjusted their budget accordingly. As for the farm and the cottage, the respondent would send money to the petitioner's uncle who started on the projects. The respondent's explanation was that they were acquiring family property which would provide for the whole family. When they finally returned the respondent did physical work to the cottage and this is what she said:

"When the house was being built, I was often at the building site, literary working with my own hands. I would go with the truck, load in the truck bricks even in the rain together with the petitioner, sometimes I would go alone to supervise. The bush clearing, I used to handle the hoe to remove stumps, carrying heavy stones, to stop the waves of the rising lake in 1979 and we had suffered carrying heavy stones to save the house. I used to cook for the builders and ran all sorts of errands getting materials ..... but during the final touches I sent money on it paying labourers. The wall screening, clearing bush, making flower beds, it was me with my hands and labourers and I was paying those labourers put blocks as well as planting grass, making lawns. We used to get them from the Catholic Mission and some from Chitala Agricultural Experimental Station, but if I were to value the work on my labour there, it would be more than I had contributed financially."

What would be the inferences to be drawn from the conduct of the parties as outlined above? We think that it can reasonably be inferred that their common intention was that the property be jointly owned. We are therefore of the view that the fairest and the most reasonable way of resolving the dispute is to give the wife a share of the property and we so order.

The next question to determine is what is the respondent's extent of the beneficial interest. In other words what is her share of the property. In the case of Agnes Fletcher v. Wilfred Fletcher Civil Cause No.653 of 1981 (unreported) Banda J. applied the maxim "equity is equality" and each party had 50%. Again in the Nyangulu case the property was shared equally. In those cases just as it is in the present case, it was not established what each party's contribution was. Here the respondent contributed both in money and money's worth and the value of her contribution as well as that of the petitioner is not known. When sharing family property, however, the trend leans towards equality unless it is clear from the evidence that the parties had intended to hold the property in definite shares. In the case of Rimmer v. Rimmer (1952) 2 All ER 863 husband and wife bought a house which served as a matrimonial home. They made different contributions but the amounts that each party put in were ascertainable. When the marriage went on the rocks, the wife put in an application under Section 17 of the Married Women's Property Act, 1882. The Registrar and the County Court held that the proceeds of sale of the house



be shared proportionately according to their contributions. The matter went to the Court of Appeal where the proceeds were shared equally. Denning, L.J. had this to say:

"It seems to me that when the parties, by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone or in the name of the wife alone, but, nevertheless, if it is bought with money saved by their joint efforts and it is impossible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them both jointly. That is the case. I agree with my Lord that the proper presumption in regard to this house was that it was held jointly and the beneficial interest should be divided equally between them."

In the same case Romer, L.J. went a step further and laid down some general principles thus:

"It seems to me that the only general principles which emerge from our decision are, first that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of the property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application."

Courts will do their best to discover the parties' intention. If there is a clear declaration as what extent each party's beneficial interest is going to be in the property, the courts will follow that. If there is none at all then it seems that the courts will go by the maxim equity is equality. Indeed as the learned author in Latey on Divorce 15th Edition page 320 paragraph 2.686 observed:

"In the absence of a clearly declared intention the court does not consider how much one party or the other contributes but decides on equality of division."

In the instant case, although the wife had made substantial contributions, the extent of the contributions made by each party are not known. What is clear, however, is that the wife contributed to the acquisition of the assets on the basis that those assets would make a continuing provision for the whole

family. Considering the wife's substantial contribution and on the authorities cited above we hold that she is entitled to half of the matrimonial properties.

Having found that the respondent is entitled to half of the properties, the question that immediately arises is the distribution itself. In the Nyangulu v. Nyangulu case the property involved only comprised personal property. It was ordered that the said property be sold and the proceeds thereof shared equally. In Fletcher v. Fletcher the property involved was both personal and real. It was ordered that the real property be sold while the personal property was shared. In the instant case the property is both personal and real. The real property comprises a cottage and a farm. The personal assets are itemised in Appendix 1 and Appendix 2.

We start with the cottage and farm. Their value is not known so that if it is ordered that the petitioner, the husband, should keep them it would be difficult to determine how much he should give to the wife. The other problem about such an order is that the husband may not be able to make a lump sum payment to the wife. It appears to us that it would be fair in the circumstances to order that the properties be sold and the proceeds shared equally. We wish to make certain observations about the cottage. Although, in the proceedings, it was at times described as a matrimonial home, we find that it was not really the matrimonial home. The parties were living in Lilongwe where they were working. Right now the petitioner is living in Lilongwe where he is working. The cottage was built mainly as a revenue-producing asset and indeed it has been rented out several times both to companies and individuals. The petitioner was given custody of the children of the marriage. We are making this observation about the cottage merely to show that if it is sold the petitioner and the children will not be left homeless. We therefore order that the cottage and the farm be sold by public auction. Either party is at liberty to bid at the auction. We further order that the proceeds of sale be paid into court and that after the costs of such sale have been met the net proceeds should be paid to the parties at the rate of 50 per cent each.

We now turn to the personal properties. We hasten to point out that it is not quite possible to come up with an exact half when it comes to the sharing of these properties. To come up with an exact half, the properties would have to be sold and the proceeds thereof distributed in equal shares. We do not think that selling the properties would be in the best interest of the parties. Most of these properties were bought in West Germany and so the parties may be attaching some sentimental value to some of the items. Besides, if the properties are sold, the parties may not be able to acquire similar items. We shall therefore do the best we can to come up with a most equitable distribution.



The respondent prepared Appendix 3 which gives a list of properties in the possession and control of the petitioner and those in the possession and control of the respondent. As the distribution will be based on this document, it is best to set it out in full.

### APPENDIX 3

#### Items under Petitioner's control

1. 3 bedroomed brick cottage with a sitting room, kitchen, bath and a big sitting khonde and a well developed garden.
2. Farm grown with maize and tobacco with house, store sheds and farm implements on it.
3. Nissan 2 ton lorry
4. Mercedes Benz 280 SE
5. Big mahogany display cabinet (cupboard) with 4 wooden and 2 glass compartments filled with silver ornaments, glass ornaments, porcelain ornaments, wooden ornaments; 3 sets of encyclopidia (Britannica encyclopidia, Americana encyclopidia and Junior encyclopidia); one set of classics in English literature. The ornaments are comprised of fancy vases, animal figures, plates, pots, cups and mugs and candle sticks.
6. 1 bookshelf full of books professional and casual
7. 1 side board complimentary to the cabinet display
8. 1 side board complimentary to the cabinet display
9. 1 dining set in Lilongwe
10. 1 dining set at the cottage
11. 1 set marble coffee tables comprising 1 big table and 2 smaller tables
12. 1 big coffee table made of tonned glass
13. 1 big wooden convertible coffee table at the cottage.
14. 7 single beds
15. 1 double bed
16. 7 garden chairs
17. 1 Royal blue china carpet
18. 1 red persian carpet
19. 1 tebris red carpet
20. 1 blue indian carpet at the cottage
21. 1 cashmir bluish rug (brucke)

22. 1 persian red rug (brucke)
23. A set of 3 golden-brown rugs for bedroom
24. 1 blue machine-made rug (bruecke)
25. A set of 3 brown rugs (bruecke)
26. 1 leather lounge suite
27. 1 pink mohair lounge suite
28. 1 bluish floral lounge suite at the cottage
29. 1 reddish floral lounge suite at the cottage
30. 4 blanket likes (plumos)
31. 6 pairs of beddings
32. 5 pillows
33. 6 table cloths
34. 4 bathing towels
35. 12 hand towels
36. 1 washing machine
37. 1 dish washer
38. 1 cooker at the cottage
39. 1 deep-freezer at the cottage
40. 1 refrigerator at the cottage
41. 1 refrigerator in Lilongwe
42. 1 set wasserlos pots comprising of 6 pots,  
a pan and a kettle complete with covers
43. 6 assorted pots with covers
44. 2 ordinary pans without covers
45. 1 big pan with cover
46. 1 fondue pot complete with folks
47. 1 Rumpot with cover
48. 5 assorted dishes, 3 assorted meat plates,  
7 assorted cups and side plates, 3 assorted  
tea pots, 3 dinner plates
49. Complete curtains both in Lilongwe and at the  
cottage
50. 1 silver tea set with silver tray
51. 1 pink tea set
52. A set of a tray, tea pot, coffee pot, milk jug  
and sugar dish all stainless steel
53. 40 pieces of assorted glasses many crystal
54. 1 set of bowls with 12 glasses
55. 1 liquor set - bottle with 6 small glasses



56. 2 pairs beer stange
57. 1 set of dessert - 1 big dish and 6 small dishes (crystal)
58. Cutlery: 2 sets each for 6 people complete with knives, folks, table spoons and tea spoons (Raverna Cromargan)
59. Assorted knives, folks, spoons for everyday use
60. A pair of roast beef cutlery; big knife and big folk
61. 3 sets of cake folks (6 in each set)
62. 1 cake plate with cake holder
63. Ornamental assorted flower pots and vases made of porcelain, glass and silver (clear and coloured glass)
64. Assorted fruit bowls and plates
65. One 3 mixer 3000
66. One sahne (cream) machine
67. One potato peeler
68. One egg cooker with 12 egg holders
69. One trolley
70. 1 vacuum cleaner set complete with different brushes
71. 1 handstand to dry clothes and one wash basket
72. Personal jewellery: necklaces, bracelets, earrings, earclips and wrist watches
73. 1 set of musical instruments comprising of one radio, record player, town band, all with amplifiers and loudspeakers
74. 1 clock radio
75. Radiogram at the cottage
76. Records, bands and cassettes
77. 4 baking tins

Items under Respondent's control

1. VW Beetle car - since sold; got on the 9th June, 1983
2. Small portable radio cassette got on 9/6/83
3. A blanket like with cover, 1 bed sheet and pillow got on 9/6/83
4. One wash basket got on 9/6/83
5. One dinner set given at a later date

6. One coffee set given at a later date
7. 1 beer cooler (fass) given at a later date
8. One garden chair given at a later date
9. One electric sewing machine
10. Rolex wrist watch
11. Bed and mattress for Phillip

The respondent will keep the items which she has under her control. What we are really concerned with is the long list of items under the petitioner's control. At the commencement of the hearing in the lower court counsel tried to agree on certain items but that proved impossible. However, the petitioner offered the respondent items 13, 23, 29, 36, 39, 45, 52, 62, 68 and 70. The respondent will therefore have these items. The Court was informed that of the remaining properties the respondent was interested to have a share of item 4 which is a Mercedes Benz motor vehicle. She also expressed interest in having part of items 5 and 73. She wants the whole of item 72. The other items she wants to have either in whole or in part are items 7 or 8, 11, 17, 20, 22, 26, 30 to 35, 38, 40 or 41, 42, 43, 47, 49, 53, 54, 55, 57, 58, 60, 61, 63, 76 and 77.

Item 72 is jewellery. The jewellery was certainly wholly hers. She will therefore have the whole of it. Item 4 is a Mercedes Benz motor vehicle and the respondent wants to have a share in it. The only way she can have a share in the car is to have it sold and share the proceeds. At one time the parties had three vehicles in the family. The Nissan lorry was sold in 1981 or 1982 when they were still husband and wife. When the respondent left the matrimonial home on 9th June, 1982 she got the VW Beetle car. She decided to sell it in July 1984. No doubt she kept all the proceeds. Would it now be fair and reasonable to order that the Mercedes Benz be sold? We think not. When the Nissan lorry was sold, there remained two vehicles in the family. The respondent decided to get the VW Beetle. So one would say that they had shared one car each. For reasons best known to her the respondent decided to sell her share. The Mercedes Benz may have been much more expensive but we think that it would not be fair and reasonable to have it sold. The petitioner would be left without means of transport. This would be tantamount to punishing him. It must not be forgotten that he has the custody of the children. They are used to easy life and selling the car would be doing great injustice to them. We therefore order that the petitioner will keep the Mercedes Benz.

The respondent also wants part of items 5 and 73. Item 5 is described as big mahogany display cabinet (cupboard) with 4 wooden and 2 glass compartments filled with silver ornaments, glass ornaments, porcelain ornaments and wooden ornaments. Certainly the cabinet cannot be split into halves and perhaps removing some of the ornaments may be destroying



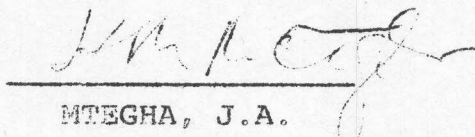
the beauty of the unit. It may not be the same thing if any of the components is removed. The petitioner will therefore keep the whole unit. It would be fair, however, to give the respondent some of the books. She will therefore have the American Encyclopidia and one set of classics in English Literature. Item 73 is one complete musical set and we do not see how it can be halved. The petitioner will therefore keep the entire set.

We now turn to the remaining items. As we have already observed, it is impossible to come up with an exact 50% either in the number of items or in money value. There is no evidence as to the value of each of these items. After very careful consideration we have come up with what we think represents an equitable distribution. The respondent will have items 8, 10, 11, 3 beds in item 14, 3 garden chairs in item 16, 17, 20, 22, 23, 26, 29, half of items 30 to 35, 36, 38, 39, 40, 42, 47, 49 - curtains at the cottage, half of items 53, 54, 58, 63 and 76. She will also have one set in item 61 and finally item 77. We further order that the Registrar should supervise the distribution of the properties.

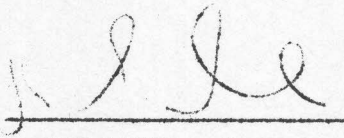
We now come to the question of costs. In the cases of Fletcher v. Fletcher and Nyangulu v. Nyangulu each party was ordered to pay his own costs on the basis that it could not be said that one party had succeeded or failed. In this case, however, it can safely be said that the respondent has succeeded in her application in that she wanted 50% and substantially that is what she has got. We therefore order that the petitioner will bear the costs of the appeal.

DELIVERED at Blantyre this 23rd day of November, 1989.

(Signed)

  
MTEGHA, J.A.

(Signed)

  
KALAILE, J.A.

(Signed)

  
MKANDAWIRE, J.A.