REPUBLIC OF MALAWI

IN THE SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO 51 OF 2013

(Being Civil Cause No 304 2010. High Court of Malawi, Lilongwe District Registry)

BETWEEN

EMILY MUSTAFA	APPELLANT
AND	
MARRIAM MUSTAFA	1ST RESPONDENT
AND	
LUCY MUSTAFA	2ND RESPONDENT
AND	
STELLA MUSTAFA	3RD RESPONDENT
AND	
FLORA MUSTAFA	4TH RESPONDENT

CORAM: JUSTICE E B TWEA SC, JA
JUSTICE Dr J M ANSAH SC, JA
JUSTICE D F MWAUNGULU SC, JA
Kadzakumanja, Legal Practitioner, for the appellant
Chidothe, Legal Practitioner, for the respondent
Chimtande, Court Clerk

Legislation considered

4969, Rev. Laws 1910,

Constitution, 1991 (Ghana,) Articles 22 (2), 22 (3)

Constitution, 1994 (Malawi); sections 4, 9, 11, 12, 16, 17, 18, 19, 20, 21, 22 (3), 24 (1) (a) (ii), 24 (1) (b) (i), 24 (1) (b) (ii), 24 (2 (c)), 25, 26, 27, 28 (1), 44, 45, 46 (2), 46 (3), 46 (4), 46 (5), 192, 196, 197, 200

Deceased Estates (Wills and Inheritance) Protection Act, 2011

Family Law (Scotland) Act 1985; section 10

General Interpretation Act

Marriage, Divorce and Family Relations Act, 2015; sections 2, 71, 74, 94, 114

Married Women Property Act, section 17

Matrimonial Proceedings and Property Act 1970

Part II of the Matrimonial Causes Act, 1973, Section 23, 24, 24A, 25.

Wills an Inheritance Act

Cases considered

AG Securities v Vaughan ([1990] 1 AC 417;

Allen v Allen [1961] 3 All ER 385

Appleton v Appleton [1965] 1 WLR 25

Bruce v Bruce, 141 Oki. 160, 285 P. 30, 36.

Brummund v Brummund's Estate 1993 2 SA 494 (NmHC) 498

Burton v Camden London Borough Council ([2000] 2 AC 339;

C.M.N v A.W.M [2013] eKLR.

Chimtedza v Chimtedza (2009) Matrimonial Cause No 97 (PR) (Unreported)

Chingadza v Chingadza (2011) Matrimonial Cause No 97 (PR) (unreported)

Chirwa v Karim and another (2016) Civil Appeal No 1 (MSCA) (unreported)

Cobb v Cobb [1955] 2 All ER 696

Corin v Patton ((1990) 169 CLR 540;

Dart v Dart [1996] 2 FLR 286,

Davis v Johnson ([1979] AC 264)

Director of Public Prosecutions v Kaunda (2014) Criminal Appeal No 26 (MSCA) (unreported)
Edelstein v Edelstein 1952 3 SA 1 (A) 10

Diswell v Farnes [1959] 2 All ER 379;

Evans v Bartlam [1937] 2 All ER 646

Gissing v Gissing [1970] UKHL 3]

Gomani and another v Republic

Haldane v Haldane

Hammersmith and Fulham London Borough City ([1992] AC 478)

HC Anang v. Tagoe [1989 -90] 2 GLR 8 HC,

Hine v Hine [1962] 3 All ER 345;

Kamcaca v Nkota (No 2) (1966-68] 4 ALR (Mal) 518;

Kamphoni v Kamphoni (2012) Matrimonial Cases No 7 (HC) (PR) (unreported

Kayambo v Kayambo ([1987-89] 12 MLR 408

Khoviwa v Republic (2017) Miscellaneous Criminal Appeal No 12(MSCA) (unreported)

Kishindo v Kishindo (2013) Civil Cause No 397 (HC) (PR) (Unreported

Mensah v Mensah (J4/20/2011) [2012] GHASC 8 (22 February 2012)

Mensah v Mensah [1998-99] SCGLR 350

Meyer v Riddick ((1990 60 P & CR 50;

Miller v Miller ([2006] UKHL 24

Munthali v Mitawa (2001) Civil Cause No 1584 (HC) (PR) (unreported)

National Provincial Bank Ltd v Ainsworth [1965] AC 1175

Newgrosh v Newgrosh [1950] 1 CLC 4557

O'Brien v. O'Brien, 66 N.Y.2d 576, 587, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985)

Pettitt v Pettitt [1970] AC 777

Porter v Porter [1969] 3 All ER 640,

Quartey v Martey [1959] G.LR 377

Reindorf v Reindorf [1974] 2 GLR 36

Republic v Brown [1975-77] 8 MLR 190;

Republic v Mhlanga 1966-68] 4 ALR 9Mal) 576;

Rimmer v Rimmer [1953] 1 QB 328;

Rogers' Question, Re [1948] 1 All ER 328,

Sikwese v Banda ((2015) Civ Appeal No 76 (MSCA) (unreported)

Sikwese v Banda, sub nomine ((2013) Matrimonial Cause No 34 (ZADR),

Silver v Silver [1958] 1 All ER 523;

Tobin v Tobin, 89 Okl. 12, 213P. 884

Wachtel v Wachtel [1973] Fam 72

White v White [2001] 1 AC 596

Wiseman v Simpson ([1988] 1 WLR 35;

Wright v Gibbons ((1949) 78 CLR 313;

Yeboah v. Yeboah [1974] 2 GLR 114

International Law

International Convention on the Elimination of All Forms of Discrimination against Women

Universal Declarations of Human Rights; Article 16

Protocol to the African Charter on Human and Peoples Rights; Article 7 (2)

Books and articles

'Default matrimonial property regimes and the principles of European family law –a European–South African comparison (part 2)," Madelene de Jong and Walter Pinters.

'Malawi Law Commission (2003) Overview and Issues of Gender-Based Law Reform in Malawi,' Limbe: Montfort Press)

Barratt: Law of Persons and the Family (2012) 279(Barratt (ed))

Chigawa, M, "Customary law and social development: De jure marriages vis a vis de facto marriages at customary law in Malawi (1987);

D.M Chirwa Human Rights under the Malawian Constitution 235-236;

Hahlo: 'The South African Law of Husband and Wife' (1985) 157, Hahlo

Ibik J, Restatement of African law: 3, Malawi I, The law of marriage and divorce (London: sweet and Maxwell, 1970;

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Property Division after Divorce: Unmasking the Court's Role in Perpetrating Power Imbalances between Spouses,' LLB (Honours) Dissertation; University of Malawi;

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Law Reform

The Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce of 26 June 2006

Family Law - Report on Financial Provision in Matrimonial Proceedings, Law Com no. 25

Words and phrases considered

Hold, own, jointly held

JUDGMENT

Twea, JA

I had the opportunity of reading the rather lengthy yet useful judgment that Justice Mwaungulu is going to read for the Court. Be it as it may, I will refrain from commenting on the decision of this Court in the case of Sikwese V. Banda Civil Appeal 76 of 2015. I would, also, give deference to section 3 of the Marriage Divorce and Family Relations Act and Section 2 of the Deceased Estate (Wills, Inheritance and Protection) Act, that they are not applicable to the present case. This notwithstanding, I also allow the appeal with costs for the reasons given by Justice Mwaungulu. The deceased did not leave intestate property. Most property was given *inter vivos.* Plots SAL/176 and 177, as Justice Mwaungulu, observes, vested in the appellant as joint owner as the survivor. The rights acquired by her in the property cannot be extinguished by the fact that her late husband brought his other wife to live on the property. On the proper application of Section 24 of the Constitution, sufferance, by the first spouse, does not create a right in the property that she and the husband acquired before the subsequent marriage.

Dr. Ansah, JA

I am, after reading the judgment we are to deliver, which I also read in advance, likeminded. The deceased had given most property to others before he died. Plots SAL/176 and 177 were acquired jointly and only by the deceased and the appellant. As Justice Mwaungulu, points out, correctly, in my judgment, Plots SAL/176 and 177, being jointly acquired during the course of marriage, inured to the appellant by survivorship. Under section 24 (2) (c) of the Constitution, as his Lordship points out, the Court must protect women from deprivation of property generally and property obtained through inheritance in particular. The appellant did not, therefore, need letters of administration to assert her rights.

Mwaungulu, JA

Précis

The appeal must be allowed. There was no intestacy. The deceased disposed most property *inter vivos.* Plots SAL/176 and 177 on the death of the deceased inured to the appellant as joint owner. However, this matter, complex on the facts, raises very fundamental issues under the Constitution, Deceased Estates (Wills and Inheritance) Protection Act and, now under the Marriage, Divorce and Family Relations Act in the countenance of rights to property for women during marriage under section 24 and 28 of the Constitution. The Constitution provides for the general right to any person (including women) to acquire property, the right of a woman to acquire property jointly with others (including a husband, the right to a fair disposal and maintenance of spouse and children at divorce and protection of women's property rights obtained by inheritance. These rights are distinct. They intersect. They certainly are not contradicting. They are not self-exclusive. They, in relation to marriage, have been considered in this Court and the Court below only in the context of divorce. Death and divorce are the real context on which matrimonial property and generally rights to parties in marriage intersect. Sections 24 (1) (b) (i), 24 (1) (b) (ii) and 24 (2) (c) of the Constitution, complemented by the Wills and Inheritance) Protection Act, 2011, and the Marriage, Divorce and Family Relations Act, 2015, respectively, address rights of spouses on both occasions.

Both the Deceased Estates (Wills and Inheritance Act, 2010, and the Marriage, Divorce and Marriage Relations Act, 2015, the development of the common and customary laws of Malawi, in tandem with sections 24 (1) (b) (ii), 24 (1) (b) (i) and 24 (2) (c) of the Constitution, address vestiges reminiscent of a male dominated social order premised on breadwinner, home maker and child minder paradigms that grossly undermine women's rights. Even very neutral laws (general property laws) work against women because of distinction based on concepts of bread winner,

home maker and family minder. Specifically, because men were bread winners and, therefore, acquired assets, laws based on who owned or acquired what were eschewed against women. This slant, until sections 24 of the Constitution, was more conspicuous in our laws on property after divorce and even more pronounced at inheritance until the Deceased Estates (Wills and Inheritance) Protection Act, 2015, as we see later in the judgment.

Kayambo ([1987-89] 12 MLR 408), affirmed as good law in *Sikwese v Banda* ((2015) Civ Appeal No 76 (MSCA) (unreported) *sub nomine Sikwese v Banda* ((2013) Matrimonial Cause No 34 (ZADR), based on the English Common law in *Rogers' Question, Re* [1948] 1 All ER 328, *Rimmer v Rimmer* [1953] 1 QB 328; and *Appleton v Appleton* [1965] 1 WLR 25 refined or, if not refined, reversed in the House of Lords, now the United Kingdom House of Lords, in *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1970] UKHL 3]. In *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, per Upjohn, LJ., the House of Lords thought that *Appleton v Appleton* was wrongly decided. Even without the House of Lord's decision, the Court of Appeal in *Cobb v Cobb* [1955] 2 All ER 696, extended the time of consideration had already extended the time from the time of purchase to beyond it. It is, however, in *Cobb v Cobb* where the Court of Appeal, through Lord Denning – and conceded this extra judicially – strengthened the concept of family assets alluded to in *Rimmer v Rimmer* that the Supreme Court relied on in *Kayambo v Kayambo.* Lord Hodson agreed with Lord Denning. Morris, LJ, thought that the division was based not on the power in section 17, which all agreed was only procedural and could not ruffle rights established in law. Lord Morris justified equal division on the principle of resulting trust based on contribution. Lord Denning's principle of family as a family asset was conspicuous assets in *Fribance v Fribance* and was underscored in *Silver v Silver* where Parker LJ remarked that 'in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary'. The family asset concept was twined to the beneficial interest concept in *Rimmer v Rimmer* with degrees of uncertainty and inconsistence in subsequent decisions of the Court of Appeals decisions until the House of Lord's decision in *National Province Bank Ltd v Ainsworth* that overruled the family asset concept. In *National Provincial Bank v Ainsworth* the House of Lords harbingered the importance of legislative intervention and invited a Royal Commission to offer clarity on property law between husband and wife. The House of Lords had settled against *Hines v Hines and Rimmer v Rimmer* in *Pettitt v Pettitt* and reaffirmed this position forcefully in *Gissing v Gissing.*

The Supreme Court of Appeal, pursuing the matter at common law, developed under the Constitution, must, in its decisions, as it must be, be informed and tested against the Constitution and section 24 in particular. Section 24 of the Constitution fundamentally aims, for women, disgorging, in relation to property, discrimination based on marital or other status at divorce and at inheritance.

There have been statutory inroads on these rights since the 1994 Constitution: the Decease Estates (Wills and Inheritance) Protection Act replaced the Wills and Inheritance Act. The common law essentially covers preliminary issues – essentially configuring who, in both statutes, is, where there is intestacy, eligible for letters of administration. One or two decisions in the Court below cover the actual process of disposition of property under the Deceased Estates (Wills and Inheritance) Act. This is the first time courts consider the synergy among the three or four constitutional rights. The Court below determined that the two distinct properties – a matrimonial home and a business building – were part of Mr. Selemani's deceased estate and, therefore, amenable to administration. The Court below, therefore, ordered the Administrator General

administer the whole estate for the benefit of the appellant, the 1st, 2nd, 3rd, 4th and all children of the three marriages. This decision, supported by the respondents, is heavily contested by the appellant. Resolution depends on understanding the rights – especially the property rights – created under section 24 of the Constitution and the legislation, the common law and the customary law and international law, if applicable.

The duty to ascertain facts

Under section 9 of the Constitution, a court must ascertain facts in a dispute before it. Under the general law, a court, must regard all relevant evidence – the inclusionary rule – and, under appropriate laws, exclude evidence inadmissible – the exclusionary rule. A court, as trier of fact, with or without a jury, must draw accurate facts from the evidence. Inaccurate facts breed injustice. More importantly, they result in wrong application of law to them that breeds injustice. A court, therefore, must make specific findings on facts, more especially, where there is conflicting testimony or evidence. With correct and accurate findings of fact, parties are more and better satisfied and assured that a court will correctly apply the law to the facts. Correct and accurate findings of fact not only assists a court of first instance in arriving at a correct outcome. A court on appeal, not having the benefit or opportunity to see witnesses, may not, like in this case, assess the demeanour – a rather imperfect guide, a useful guide nonetheless - of witnesses where a trier of fact does little to assist the appeal court on the demeanour of witnesses. A court of first instance and on appeal will readily and correctly apply the law – which must be ascertained – to accurate ascertained facts.

The duty to apply the law to correct facts

Section 9 of the Constitution requires a court apply law to ascertained facts. Consequently, a court must ascertain the law. There is no presumption that a court knows all the law. If a court does not know all the law, at least, judges, like Counsel, know where to find it. In *Evans v Bartlam* [1937] 2 All ER 646 at 649, Lord Atkins said:

> For my part, I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never had been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

The judge relies on Counsel on ascertainment of the law. The word "counsel" actually means advice or advisor. A court, when counsel is present, must be able to rely on counsel to provide advice on contemporary law. The judge knows laws; not all laws. A court has more to lose and less to gain if counsel does not rise up to the duty to ascertain the law applicable to a party's case. The court must rely on counsel's advice and, when necessary and as usually is the case, go beyond that advice.

The duty to start from the Constitution and inquire into all sources of law

In a legal system, much like ours, where the constitution, the primary law, bases on rights, the process, which should be followed adroitly and punctiliously, of ascertaining the law must start from the Constitution and the rights under it down to legislation, judicial precedent, practice

and authoritative works by scholars. There is, therefore, a higher duty, imposed by our Constitution, to ascertain the facts and the law.

In this case, the court below found that the will was invalid. The deceased, therefore, died intestate. The court thought, therefore, that there should be administration of the estate and ordered the Administrator General to administer the estate. The court below restricted, the jurisdiction of the Administrator General to two types of property, namely, a matrimonial home and a shop complex on plots numbers SA/176 and 177 at Salima District. The court below never considered the rights created under the Constitution concerning acquisition of property generally and women in particular and the Deceased Estates (Wills and Inheritance) Protection Act.

How an appeal court proceeds from decisions of courts of first instance

Matters on appeal from a court of trial of facts proceed by way of rehearing, that is to say, the court reviews all evidence, without the advantage of seeing witnesses, to ascertain whether facts were properly decided on and the law properly applied to those facts. An appeal court from a court of trial of facts can affect the factual finding and apply appropriate laws to the new facts. On appeal from a decision of trier of facts a court on appeal could apply the correct law to the fresh confirmed facts. It is fitting, therefore, to look at the evidence and facts before the Court below.

Facts

This is what we know so far. The action essentially concerns two pieces of property on plots SA 176 and 177 at Salima District town. The house built on one of the plots was matrimonial home for the appellant – Emily Mustafa, the second wife – the 4th respondent – Flora Mustafa, the third wife – with their husband, Selemani Mustafa, the deceased, in a polygynous marriage. The other property built on this plot was a rest house – a business property. Both wives are living, the first woman in a polygamous union died before the deceased died. The problems in this matter arise because Mr. Seleman Mustafa, the deceased, died around 2006. Before and when he died, the appellant run the rest house business. When Mr. Selemani died, the appellant evicted from the matrimonial home the 4th respondent and children living with the 4th respondent.

The first wife, Kotozia Kantaule, never lived in this matrimonial home at Salima District town. She had five children, the 1st, 2nd and 3rd respondents and two others now deceased. When the appellant married Selemani Mustafa in 1957, she lived in the same matrimonial home with Kotozia Kantaule in Nyanji village. After their house burnt in 1960, Kotozia Kantaule, with her children relocated to the husband's village – Mchoka, near Lifizi Trading Centre. The appellant and her children relocated to Butcheya Village where, from small businesses, she and her husband built a house.

In 1970, the appellant and her husband relocated to Salima District town where they continued operating small businesses. During this time, they acquired chunks of unmarked land on which they built a dwelling house and another building used for rest house business. The land was subdivided later by the Salima Town Council. Eventually, the 1st, 2nd, 3rd respondents and the other two children left their mother to live with the appellant and the deceased.

In 1984, 14 years later, Mr. Selemani married Flora Mustafa, the 4th respondent. The 4th respondent came to live in the matrimonial home built by the appellant and the deceased on the land the appellant acquired with Mr. Selemani. There were ten children born to the appellant and five children born to the 4th respondent.

In 1986, the appellant and the deceased resumed business at Butcheya Village and bought 9 plots of land there. In the same year, the deceased opened businesses at Butcheya Village for the fourth child – a son, now deceased - of Kotozia Kantaule in order to assist her sisters, the 1st, 2nd and 3rd respondents. The deceased asked this child to leave the matrimonial home and occupy one of the nine houses at Butcheya. He was later involved in the management of the business there.

The 1st, 2nd, 3rd and 4th respondents continued to live in the matrimonial home. The 1st respondent married before her mother Kotozia Kantaule died in 1988. The 2nd respondent married in 1994 to live with her husband. The 3rd respondent married in 1995, after a stint in South Africa. The 1st, 2nd and 3rd respondents, when they became older, married and left the house. The 4th respondent, Flora Mustafa, continued to live in the matrimonial home.

A huge dispute, resolved through the Salima District Commissioner, ensued. The 1st, 2nd and 3rd respondents wanted a share of their inheritance and participation in the businesses of the deceased. In desperation, the deceased gave the business operations at Butcheya village to the 1st, 2nd and 3rd respondents together with their brother, who eventually died.

Mr. Selemani eventually died in 2006. Problems began. The appellant evicted the 4th respondent and her dependents from the house in Salima and continued running the businesses on the premises. The 4th respondent went to live with her children at one of the places given to one of the children of the deceased. The appellant run the businesses and collected all proceeds from the business to the benefit of herself, her children and her issues.

This displeased the 4th respondent, her children, 1st, 2nd and 3rd respondents. All of them referred the matter to the District Commissioner who ordered that the appellant deposit all proceeds from the business with the District Commissioner. Meanwhile, a son to the appellant– the appellant could neither read nor write – found an envelope with a will. The deceased gave the envelope and a will to the appellant. Under that will, the deceased purportedly gives management of the estate to grandchildren. A similar will was deposited with the Salima District Commissioner. This discovery increased tension in the family. The appellant subsequently obtained an interim injunction against the District Commissioner to release funds to her. Eventually, the appellant commenced this action against the 1st, 2nd, 3rd, 4th (District Commissioner) and 4th defendants/respondents.

The action

In an amended statement of claim of 20 December 2011, insisting that she was solely in ownership of properties on Plots SAL/176 and 177, the appellant claimed for a permanent injunction to restrain collection of rentals from Plots No. SLA/176 and 177; a declaratory order that she is the lawful owner of properties Plot No's SAL/176 and 177; an order for disposition of property on several other plots assigned to the 1st, 2nd and 3rd respondents; and an order nullifying the proposed deceased person's will.

Defence

Between 4th and 10th January 2012, the 1st, 2nd, 3rd and 4th respondents filed defenses and counterclaims. They claimed variously that there be an inquiry as to the extent of the beneficial interest for the plaintiff and herself in the estate; a declaration as to the extent of that benefit; an account of all monies the appellant received; an order that they were entitled to a share of the estate; and such further orders as the court thought fit.

The judgment of the Court below

In its judgment, the court below determined, properly in my judgment, for the appellants that the will was invalid. The court, therefore, decided that there was intestacy. The court below, however, excluding other properties, ordered that the estate, apparently thinking that the property only belonged to the deceased, ordered that the estate be administered. The court below, therefore, ordered the Administrator General to administer the estate. The appeal is against that judgment.

Reasoning

There are facts which are determinant of the legal outcome. There are two dates. There are different acquisitions of property SAL/176 and 177. The evidence shows that, in fact, the appellant and the deceased, Selemani Mustafa, migrated to Salima District Township, and to another village before that, alone. The first wife, Kotozia Kantaule, mother to the 1st, 2nd and 3rd respondents, continued to live at the farm in the deceased's village with her children. The appellant and the deceased, therefore, created a different locality for their marriage and matrimonial home. They, without the first wife, acquired Plots SAL/176 and 177 together. The first wife was not involved. The appellant and Mr. Selemani Mustafa, albeit later registered in the name of Selemani Mustafa, developed the property jointly. Several witnesses confirm the appellant's rendition as to acquisition and developments on the plots. The respondents never really contradicted the overwhelming evidence on this. The appellant's evidence is incontrovertible. This initial finding is critical because of women's rights sections 24 (1) (b) (i), 24 (1) (b) (ii) and 24 (2) of the Constitution on divorce or death of a husband.

Start from the Constitution – with rights

The 1994 Constitution, itself the primary law, requires, like in everything thing else, courts, like everybody else, start from nowhere else but the Constitution. Beyond itself and within itself, the Constitution contains no other laws. Laws, previous or after the Constitution, are, because of section 200 of the Constitution, created under the Constitution. The Constitution, however, provides and entrenches our rights. Consequently, all laws – statutes and common, customary and international laws – are subservient and cohere to rights under the Constitution. The Constitution envisages that most rights will be limited and protected by laws and that rights will aid interpretation of the Constitution and laws made under it.

Constitutional Framework on Rights

The rights constitutional framework categorizes into 5: protection and enforcement (section 15); the body of rights (sections 16 to 43); limitation of rights (section 44); the categorization of rights and state of emergency (sections 45); insular provisions (sections 46 to 47; and the repealing and amendment provisions (sections 196 and 197). Their enjoyment base on the sanctity of life (Preamble) and the inviolability of the right to life – the mother of all rights (*Khoviwa v Republic* (2017). Miscellaneous Criminal Appeal No 12(MSCA) (unreported); section 16 of the Constitution.

Section 15 of the Constitution is not necessarily a locus standi provision and must be distinguished from section 46 (2) to (5) of the Constitution which is, for purposes of court proceedings, the locus standi provision. If section 15 is a locus standi provision, then, its real purpose must be to broaden and blossom the scope of locus standi as is ordinarily and commonly known or understood. For if one's rights are violated, it should be surprising that the Constitution

should require of one, for enforcement of one's rights, to have a sufficient interest in the "promotion, protection and enforcement of rights." The section, however, has a curious pedigree.

Prior to 1994, for almost three decades, one could be detained without trial, killed without due process or just disappear. Despite including the Universal Declaration of Human Rights, 1947, in section 6 the 1996 Constitution and habeas corpus provision in the Statute Law (Miscellaneous Provisions) Act, 1967, once detained, killed or detained by the state and political machinery, one and any other, could not recourse to the courts – the only institution to enforce those rights. Section 15 of the Constitution was a direct response. First, it broadened the number of others beyond oneself to enforce violation. Secondly, it increased, beyond the courts, fora for addressing the problem: the Human Rights Commission and the Ombudsman. It opened the gate so that rights – more profound than those in the Human Rights Declaration – in sections 16 to 43 of the Constitution are more available and accessible and enforceable.

In sections 16 to 43 the Constitution lays down the rights, starting with the right to life. Section 16 is sequel to the preamble. Sections 16 to 43 covers rights more robust and pervasive beyond rights in the Human Rights Declaration. The 1994 Constitution, then classifies these rights in term of their intensity and amenability to legal inroads.

Section 44 covers how to limit rights. First, limitations must be by law – legislation and international, common and customary laws. Limitations must comply with international human rights standards – not law (*Director of Public Prosecutions v Kaunda* (2014) Criminal Appeal No 26 (MSCA) (unreported). Limitations must be necessary in an open democratic society – which Malawi is. More importantly, the limitation must not negate the essence of the right.

The Constitution, therefore, classifies those rights where there can be and cannot be legal inroads in all circumstances (section 45). The Constitution provides a further limitation on limitation of rights. Non-derogable rights cannot as in never be subjected to any legal innovation or exposure. The Constitution then provides how limitations can be made to those rights.

Section 46 (1) is very pervasive to prevent all organs of government from initiating and implementing any legislation abolishing and abridging rights. The section prohibits the National Assembly from initiating, debating and passing any legislation that abolishes or abridges these rights. *Per force* such legislation is passed by a recalcitrant or inadvertent legislature, the section enjoins all executing agencies not to implement or, otherwise, act on that legislation. It is void ab initio without any court order. The President cannot assent to it. Organs of government – including courts – cannot and should not implement it.

Section 46 (2) to 4 of the Constitution, then provide armoury to victims of violation and empowers Courts to order appropriate and adequate remedies.

Section 46 (5) of the Constitution then authorizes the legislature to criminalize and penalize those who breach non- derogatory rights – including the right to life. Section 16, therefore, is not a penal provision and does not prescribe the death penalty. The death penalty, if permissible, will be provided by municipal law. The Constitution finally insures these rights by making their very removal or amendment more difficult (sections 196 and 197).

Section 24 of the Constitution Rights

This case essentially concerns three or four rights concerning women encapsulated in section 24 of the Constitution and the general right inuring to all citizens to property. These rights are considered in the rights given to women at divorce and at inheritance. There is now a unification of principles of dealing with property obtained or held during marriage and during inheritance – styled matrimonial property. It is logical, therefore, that the rights at divorce and at inheritance in section 24 of the Constitution are discussed together. Section 24 of the Constitution:

> **1.** Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or 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 their marital status; **iii.** to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and **iv.** to acquire and retain citizenship and nationality. **b.** 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.
> **2.** Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as— **a.** sexual abuse, harassment and violence; **b.** discrimination in work, business and public affairs; and **c.** deprivation of property, including property obtained by inheritance.

The overarching right(s), of course, pertain(s) to full and equal protection by the law and not to be discriminated against on the basis of gender or marital status. It is antithesis to this right that our laws should latently or patently manifest anything than according women full protection and equality before the law or protection against discrimination based on gender or marital status. Until the 1994 Constitution and despite inclusion of the Universal Declaration of Human Rights in the 1966 Constitution, the posture in the legal system overtly and clandestinely overlooked these considerations to the detriment of women.

For our purposes, three constitutional matters concerning women arise in this section. First, is the right to enter into contracts *feme solo* even as *feme covete*. The word 'contract refers' to commercial or business contracts and must be read generally as to include a contract of marriage under section 22 (3) of the Constitution (the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce of 26 June 2006). It includes the right to enter into contracts with anybody with capacity to marry. The upshot of the right connotes the right of a woman to enter into contract with a husband. This is the more important because of the right in section 24 (1) (a) (ii) of the Constitution of a woman to acquire property in association with others. The word association cannot be constricted either to corporate or non-corporate any other associations as to exclude association through marriage.

Marriage invariably results into acquisition or holding singly or jointly assets and liabilities, during marriage, becoming under the general concepts of matrimonial (the formulation in common law jurisdictions) or marital (the formulation in the United States) property. There is, therefore, no doubt, in law, as to the acquisition of property by marriage. The differences, in law, being how that property is treated on divorce or demise.

Matrimonial (marital) property is defined broadly as property acquired, jointly or solely, during marriage. Matrimonial property, "Also known as marital property. Generally speaking, all property acquired by the parties after the marriage ... unless it is non matrimonial property. Non matrimonial property is usually property inherited by a party or received by that party as a gift, as well as premarital property" (https://uk.practicallaw.thomsonreuters.com/2-537-9825?transitionType=Default&contextData=(sc.Default)&firstPage=true).

In *White v White* [2001] 1 AC 596, Lord Nicholl said:

> Typically, in countries where a detailed statutory code is in place, the legislation distinguishes between two classes of property: inherited property, and property owned before the marriage, on the one hand, and 'matrimonial property' on the other hand."

The rendition of the term in the United States of America is better illustrated in this passage;

> Marital property "is a U.S. state-level legal term that refers to property acquired during the course of a marriage. Property that an individual owns before a marriage is considered separate property, as are inheritances or third-party gifts given to an individual during a marriage. Marriage partners may choose to exclude certain property from marital property by signing a prenuptial or a postnuptial agreement ... Marital property includes real estate and other property a couple buys together during their marriage, such as a home or investment property, cars, boats, furniture, or artwork, when not acquired by either as separate property.[1] Bank accounts, pensions, securities, and retirement accounts are also included; even an Individual Retirement Account, which is individually owned by law, is marital property if earned income is contributed to it during the course of a marriage. This legal definition of marital property primarily exists to protect spousal rights. A couple's permanent legal residence—in either a common law property state or a community property state—determines which laws govern their marital property and how it can be divided if their marriage ends in divorce" (https://www.investopedia.com/terms/m/maritalproperty.asp).

How that property resolves during divorce or inheritance depends on the type of regime or legal system.

Two legal regimes about matrimonial or marital property

There are essentially two types of regimes and two variants on property acquired during marriage ('Marriage, Family and Property,' in 'A Practitioner's Toolkit on Women's Access to

Justice' (ohchr.org; the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce of 26 June 2006). The first and least common in common law jurisdictions is community ownership. Under this legal system, all property, including one acquired before marriage or as gifts to a party during marriage is considered matrimonial property. The system distinguishes between community property and separate property. Community property refers to all property acquired during marriage. Separate property refers to property acquired before marriage and gifts and property inherited before marriage. This regime – universal community of property – is the regime in South Africa by default ("Default matrimonial property regimes and the principles of European family law –a European–South African comparison (part 2)," Madelene de Jong and Walter Pinters (https://core.ac.uk/download/pdf/43178387.pdf). It is the default and primary system if none is chosen (Barratt (ed) Law of Persons and the Family (2012) 279. In *Edelstein v Edelstein* 1952 3 SA 1 (A) 10 referring to Voet 23 2 91; *Brummund v Brummund's Estate* 1993 2 SA 494 (NmHC) 498 quoting Hahlo, 'The South African Law of Husband and Wife' (1985) 157:"

> Where spouses get married in community of property their separate estates are merged into a single joint estate for the duration of the marriage. As the system entails a universal community of property, the spouses share everything – all their assets and all their debts. `
>
> As far as their assets are concerned, the spouses become tied co-owners in undivided and indivisible half-shares of all the assets they respectively have at the time of their marriage and all the assets which they acquire during the marriage. Transfer of ownership is automatic and no delivery of movable property, registration ("Default matrimonial property regimes and the principles of European family law –a European–South African comparison (part 2),"

Under this regime, at divorce, community property is for disposition; separate property is not. At inheritance, separate property is disposed according to the will or intestacy rules. Community property, as joint property, is governed by survivorship. There is, therefore, a fundamental difference with common law legal system.

Matrimonial Property

Under the common law legal system, matrimonial property refers only to property acquired during marriage whether jointly or separately. In *Miller v Miller,* per Nicholls, LJ:

> Is the 'matrimonial property' to consist of everything acquired during the marriage (which should probably include periods of pre-marital cohabitation and engagement) or might a distinction be drawn between 'family' and other assets? Family assets were described by Lord Denning in the landmark case of *Wachtel v Wachtel* [1973] Fam 72, at 90:
>
> > It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing

> provision for them and their children during their joint lives, and used for the benefit of the family as a whole.

Family assets of a capital nature were the family home and its contents, while the parties' earning capacities were assets of a revenue nature. Assets which were obviously acquired for use and benefit of the whole family - holiday homes, caravans, furniture, insurance policies and other family savings are family assets. Family businesses or joint ventures in which they both work are part - assets as fruits of the marital partnership. A party's efforts constitute a contribution to the acquisition of such assets *(ibid)*.

Family assets exclude prenuptial property whether or not it was by inheritance or acquisition. No rights in property, therefore, inure to property acquired before marriage or gifts and inheritance because of marriage. During divorce, only property acquired, solely or jointly, is up for disposition. At inheritance, property jointly or solely acquired during marriage, if, there is no will, rules of intestacy apply – subject to survivorship. The distinction between prenuptial and postnuptial becomes very important for common law regimes – during divorce or inheritance.

There is no doubt, therefore, that marriage results in acquisition of rights to property singly or jointly. There is also no doubt that the property acquired dates from the date of marriage up to termination of that marriage by death. That divorce occurs before death does not diminish the acquisition. That property was acquired by marriage is the reason why it is disposed at divorce. Divorce becomes the reason why there should be a sharing of property acquired by marriage. The right to property, however, inures until death. So much so that on divorce, the question cannot be, as is the case where there are no provisions for principles of disposition of assets during divorce, what was the intention of the parties when acquiring the property – as we will see shortly the question must be, were a spouse to die intestate, where would the property revert? With the result that if it would have reverted to the other spouse, the property is property acquired jointly during marriage, whatever the intentions of the parties.

'*Held jointly*'

This is very important for understanding the right of a woman to fair disposition of "property held jointly during marriage" in section 24 (1) (b) (i) of the Constitution and equitable disposition at divorce under section 74 of the Marriage, Divorce and Family Relations Act, 2017. The words "held jointly during marriage" are technical words and are not amenable to ordinary interpretation to the extent justified. Besides Lord Denning's definition in *Wachtel v Wachtel,* Black's Law Dictionary, H.C. Black, Revised Fourth Edition, defines "joint acquired property" as property accumulated by joint industry of husband and wife during marriage. The dictionary cites *Tobin v Tobin,* 89 Okl. 12, 213P. 884 and *Bruce v Bruce*, 141 Oki. 160, 285 P. 30, 36.

In *Tobin v Tobin,* section 4969, Rev. Laws 1910, much like section 24 (1) (a) (ii) of the Constitution, provided:

> As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of

said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof.

The Supreme Court of Oklahoma, on this provision, said:

> This division of the section contemplates and requires that, whether the divorce is granted to the husband or the wife, the property jointly acquired by them during the marriage, whether it be in the name of the husband or the wife or both, shall be divided between them in a manner just and reasonable, taking into consideration all the facts and circumstances surrounding the life of the parties, and the efforts of each to accumulate the same.
>
> The third division of the statute deals with the property situation only in cases where the husband is granted the divorce on account of the wrong of the wife, and it is required for the benefit of the children of the marriage to provide for them out of the separate property of the wife. The separate property or estate of the wife referred to in this provision of this section of the statute has reference to her separate property other than that accumulated by the joint industry of the husband and wife during the marriage.
>
> The above quoted subdivision 2 of said section 4969, Rev. Laws 1910, is that provision of the statute on which the authority of the district court to deal with this property in question is based, and the statute in effect is nothing more nor less than a direction to the court to divide the jointly acquired property, or the property acquired during marriage by the joint industry and efforts of the husband and the wife, in a manner as may appear just and reasonable, either by setting it apart in kind, or if it is not advisable to do that, setting all of the property aside to one of the parties and requiring the other to pay in money such sum as may be just and proper to bring about an equitable division thereof.

In *Bruce v Bruce* the Oklahoma Supreme Court:

> In the case of Tobin v. Tobin, 89 Okla. 12, 213 P. 884, this court held: " 'Jointly acquired property,' within the meaning of Rev. Laws 1910, sec. 4969 (Comp. Stat. 1921, sec. 508), is that accumulated by the joint industry of the husband and wife during the marriage; and, if a divorce is granted to either, an equitable division thereof should be made."

The words "jointly held" in section 24 (3) (a) (i) of the Constitution, therefore, render themselves to this meaning. The context, of this formulation bases precisely on that marriage is a contract which a woman has a right to enter and be a basis of acquiring property under sections 22 (4) and 24 respectively. Marriage is a partnership with ramifications better described in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 587, 489 N.E.2d 712, 717, 498 N.Y.S.2d 743, 748 (1985):

> [T]he function of equitable disposition is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.

In *Dyer v. Tsapis*, 162 W. Va. 289, 291-92, 249 S.E.2d 509, 511 (1978), the Court expressed almost similarly:

> At the root of this problem is society's changing view of marriage. Many people can remember a time when [162 W.Va. 291] divorce was rare and almost any divorce implied a social stigma. Today, however, for better or worse, divorce is more common and more socially acceptable. The law has not been insensitive to this change, as evidenced by the fact that while formerly the law of divorce, although entirely equitable, proceeded on principles similar to tort law, it has come more and more to resemble contract law, largely as a result of statutory changes. [3] Once all divorces, like all tort actions, were predicated upon a legal wrong; alimony, like tort damages, served both punitive and compensatory purposes. Now, increasingly, divorces are awarded on no-fault grounds and awards of alimony, like contract damages, increasingly emphasize restitution to the exclusion of punishment. [4] The law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership. [162 W.Va. 292] [5] As might be expected in the midst of such change, there is tension between the old and new approaches. On the one hand there is a powerful incentive to punish a wrongdoer and an even more powerful aversion to rewarding one. On the other hand, there is an appreciation of the value of a wife's sacrifice of the opportunity to obtain skills, advancement, and retirement benefits. [6] [162 W.Va. 293] In addition, a woman of advanced age is likely to experience difficulty in finding another suitable partner.

Prenuptial and postnuptial

Generally, prenuptial property in common law systems is not subject to inheritance or divorce property laws except to the extent that different laws apply and that it is not amenable for disposition through divorce or inheritance. Specifically, prenuptial property may turn into matrimonial property in a variety of circumstances. Where it does, the general principles at inheritance and divorce law apply.

At divorce now all assets from either side are disposed on the principle of fairness irrespective of legal ownership of a spouse

During divorce, the principle, now, is fairness on all assets of either spouse– at common law, customary law or legislation or international law – underpinned by section 24 (2) (b) (i) of the Constitution. The development is more conspicuous may be in Ghanaian law – before we consider developments under English and in Malawian laws. Ghanaian jurisprudence may be

apposite because, on property acquired during marriage, Article 22 of the Ghanaian Constitution is almost word for word section 24 (2) (b) (i) the Malawian Constitution and in Ghana, like Malawi, section 17 of the Married Women Property Act, until the Ghanaian Constitution, applied.

Developments under Ghanaian law – all assets are available for fair disposition at divorce

The pre-Ghanaian Constitution, 1991, position – akin ours before the 1994 Constitution – reflects developments in English common law and equity. The chronological development on property at divorce is consonant with ours up to the 1994 Constitution. For Ghanaian common law, in tandem with ours, has developed, based on wording similar in the two Constitutions. For both the Malawi and Ghanaian Constitution have almost the same words – "property jointly acquired through marriage," under Article 22 (2) and (3) of the Ghanaian Constitution, and property "jointly held" under section 24 (1) (b) (i) of the Constitution of Malawi. The Ghanaian Constitution provides:

> Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses" and ... [w]ith a view to achieving the full realization of the rights referred to in clause (2) of this article
>
> (a) Spouses shall have equal access to property jointly acquired during marriage.
>
> (b) Assets which are jointly acquired during marriage shall be disposed equitably between the spouses upon dissolution of the marriage.

Once upon time, states Christopher Albert Fynn, 'The Ownership of Matrimonial Property in Ghana, n50/50 or Nay, "November 25, 2016, when, citing *Quartey v Martey* [1959] G.LR 377,378, wrote, the law was that "whatever a husband acquired with or without the assistance of his wife belonged solely to the husband." In *Reindorf v Reindorf* [1974] 2 GLR 36, the law developed to the substantial contribution phenomenon. If, therefore, there was substantial contribution, in money or kind, the property became 'joint property." In *Yeboah v. Yeboah [1974] 2 GLR 114 HC*, Hayfron-Benjamin J (as he then was) stated:

> The current position of the law regarding joint property is that substantial contribution by a spouse to the acquisition of property during the subsistence of the marriage would entitle that spouse to an interest in the property.

The Court rejected the percentage computations – about property jointly owned, when it said:

> The wife was a joint owner of the house with the husband because, judging from the factors attending the acquisition of the house and the conduct of the parties subsequent to the acquisition, it was clear that they intended to own jointly the matrimonial home. Where the matrimonial home was held to be held jointly by

husband and wife as joint owners, it would be improper to treat the property as a subject of mathematical division of the supposed value of the house.

The Court in *Anang v. Tagoe [1989 -90] 2 GLR 8 HC*, said:

> [W]here a wife made contributions towards the requirements of a matrimonial home in the belief that the contribution was to assist in the joint acquisition of property, the court of equity would take steps to ensure that belief materialised. That would prevent husbands from unjustly enriching themselves at the expense of innocent wives, particularly where there was evidence of some agreement for joint acquisition of property.

In the earlier case *Mensah v Mensah* [1998-99] SCGLR 350, 355, the Supreme Courts said:

> [T]the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage.

The Supreme Court of Ghana, post article 22, considered the matter in *Mensah v Mensah* (J4/20/2011) [2012] GHASC 8 (22 February 2012), where all cases were reviewed. First, the Ghana Supreme Court asked and answered a rhetoric question:

> Why did the framers of the Constitution envisage a situation where spouses shall have equal access to property jointly acquired during marriage and also the principle of equitable disposition of assets acquired during marriage upon the dissolution of the marriage?
>
> We believe that common sense and principles of general fundamental human rights requires that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the disposition of properties acquired during the marriage when the marriage is dissolved.

The Court put to bed the contributory principle that dominated the Ghanaian common law and equity – mostly borrowed from English common law and equity - for a decade or so – in favour of the constitutional principle:

> In such circumstances, it will not only be inequitable, but also unconstitutional as we have just discussed to state that because of the principle of substantial contribution which had been the principle used to determine the disposition of marital property upon dissolution of marriage in the earlier cases decided by the

law courts, then the spouse will be denied any share in marital property, when it is ascertained that he or she did not make any substantial contributions thereof.

It was because of the inequalities in the older judicial decisions that, we believe, informed the Consultative Assembly to include article 22 in the Constitution of the 4th Republic.

These decisions in the Ghanaian Supreme Court demonstrate clearly that property acquired during marriage is joint property for all purposes and purposes of article 22 of the Ghanaian Constitution which is in par materia with our section 24 (1) (b) (ii) of the Constitution. They demonstrate that property obtained during marriage is matrimonial property – acquired by spouses by and through marriage. The property inures from the date of marriage to termination of marriage by divorce or death. These conclusions cohere with the definition of matrimonial property at divorce. The property – being matrimonial property – is property jointly acquired.

What is the more important, though from this decision, is that Article 22 of the Ghanaian Constitution, worded exactly like our section 24 (1) (b) (ii) of the Constitution, was considered threshold and as trumping all statutory, common and customary laws previous stating differently. Section 10 (2) of the Constitution enjoins us that in the interpretation of the Constitution we must regard, where appropriate, comparative foreign decided cases. In this respect, *Mensah v Mensah*, on interpreting a Article 22 of the Ghanaian Constitution that is *in pari materia* with our section 24 of the Constitution, must properly inform the interpretation of 'property held during marriage' in section 24 of the Constitution. Over all, section 24 of the Constitution was salutary and transforming of the law before – rather than a confirmation of it.

There is, however, a difference in one respect between the Malawi Constitution and the Ghanaian Constitution. The Ghanaian Constitution provided that the State, by legislation, provide. It fell short, compared to Malawi, in not creating it, as the Malawi Constitution does, as a direct right. Statutory developments, however, occur under English law – common law and statutory – albeit not by the way of the Constitution, but by legislation.

Developments under English law

Equally, under English law, the position has changed considerably since *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1970] UKHL 3], from *Kayambo v Kayambo* ([1987-89] 12 MLR 408) affirmed as good law in *Sikwese v Banda* ((2015) Civ Appeal No 76 (MSCA) (unreported) *sub nomine Sikwese v Banda* ((2013) Matrimonial Cause No 34 (ZADR), because of the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973. Under this legislation, just like under our Marriage, Divorce and Family Relations Act, 2015, the common law position, chiefly on applications under section 17 of the Married Women Property Act, 1882, has changed in favour of looking at the assets, whether of the husband or wife, as property available on which courts can, on the fairness principle, make orders and adjust property rights to meet the needs of parties and children after divorce. The Marriage, Divorce and Family Relations Act, has, in this respect, conformed, because of sections 135 (a) and the proviso to section 200 of the Constitution, complied with section 24 (1) (b) (ii) of the Constitution.

The Court below delivered judgment in *Sikwese v Banda* on 4 June 2014, before the Marriage, Divorce and Family Relations Act, 2015. The appeal to this Court was registered on 23 October 2015. This Court heard the case on 10 February, 2016. This Court delivered judgment on 2 July, 2017, after the Marriage, Divorce and Family Relations Act, 2015. This is important for the principles on which property disposes after divorce and the status of *Kayambo v Kayambo.* The Marriage, Divorce and Family Relations Act, 2017, cements the principle of the Constitution that all property held during marriage is amenable for disposition on divorce and on the fairness principle. It excludes the intention of the parties as a basis for disposition of wealth by establishing principles on which disposition should be made – overriding *Kayambo v Kayambo,* if it was binding authority, which it was not.

The Marriage, Divorce and Family Relations Act confirms all principles stated in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* (2013) Civil Cause No 397 (HC) (PR) (Unreported). The Marriage, Divorce and Family Relations Act, 2017, is the latest and binding interpretation of the words "held jointly during marriage" that there is. The Supreme Court decided *Sikwese v Banda* – on the principles in *Kayambo v Kayambo* – and a narrow interpretation of the constitutional provision in terms of what property is jointly acquired through marriage overruling the wider definition in *Kamphoni v Kamphoni*. The Supreme Court never acknowledging significant changes brought by the Marriage, Divorce and Family Relations Act let alone the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce which harbingered the Marriage, Divorce and Family Relations Act. The Supreme Court of Appeal was never referred to the change of law at the time of the appeal and at the time of hearing the case.

The National Assembly passed the Marriage, Divorce and Family Relations Bill, 2015 on 12 February, 2015. The President assented to the Bill on 10 April, 2015. The legislation was entered into the Government Gazette on 17 April, 2015 effective on a date to be put on a date put into the Government Gazette. The effective date was 3 July, 2015. The Act, however, could not on matters themselves, could not be applied to *Sikwese v Banda* because of section 4 of the Act; the marriage was contracted before the commencement date. The legislation, however, vide section 4 of the General Interpretation Act would aid the interpretation of section 24 (1) (b) (i) of the Constitution.

The Marriage, Divorce and Family Relations Act defines matrimonial property as to include a) a matrimonial home or homes; b) household property in matrimonial home or homes; c) any other property, whether movable or immovable, acquired during the subsistence of the marriage which by express or implied agreement between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property (section 2). The Act also defines "non-monetary contribution as meaning a contribution made by a spouse for the maintenance, welfare or advancement of the family other than the payment of money and includes (a) domestic work and management of the home; (b) childcare; (c) companionship; (d) the endurance of the marriage and (e) or any matter or form of contribution as the court may consider appropriate (section 2).

Section 74 of the Marriage, Divorce and Family Relations Act, 2017 is the critical provision on disposition of property after divorce:

A court shall equitably divide and re-allocate property upon the dissolution of a marriage taking into account (a) the income of each spouse; (b) the assets of each spouse; (c) the financial needs of each spouse; (d) the obligations of each spouse; (e) the standard of living of the family during the subsistence of the marriage; (f) the age and health of each spouse; or (g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

Section 74 of the Marriage, Divorce and Family Relations Act adopts the principle of fairness – albeit it uses the word "equitable" – in section 24 (1) (b) (ii) of the Constitution. It refers to "property." It does not refer to disposition of "matrimonial property" as it does in section 71 (4) of the Marriage, Divorce and Family Relations Act covering maintenance from property during a judicial separation:

(4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders; (a) an order to make provision for the disposition of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse; (b) an order prohibiting alienation or disposition of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or disposition; and (c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

Even section 71 dealing with judicial separation refers to property generally – not necessarily matrimonial property. Section 71 (1) to (4) of the Marriage, Divorce and Family Relations Act considers property separate or belonging to an individual spouse only for property acquired after judicial separation. *A fortiori* property acquired during marriage is not separate property:

(1) Where a judicial separation has been decreed under this Act, the spouses shall, from the date of the decree, and whilst the separation continues, be considered unmarried with respect to any property which each spouse may acquire individually during the period of separation and such property may be disposed of by each spouse individually in all respects as if he or she was not married to the other.

(2) Where one of the parties dies intestate during the subsistence of a decree of judicial separation, the property owned individually by the deceased shall devolve as if the parties were not married to each other.

(3) Subject to an agreement evidenced in writing or otherwise, where the parties to the marriage who were under judicial separation cohabit again with each other, all property to which either party acquired individually during the judicial separation shall be held to be separate ownership of that party.

(4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders_(a) an order to make provision for the disposition of any or all of the matrimonial property as may be necessary to prevent undue hardship to either

> spouse; (b) an order prohibiting alienation or disposition of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or disposition; and (c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

It is clear, however, that all property – as the Court below held in *Kamphoni v Kamphoni* – held by either or both spouses is up to disposition irrespective of what the parties intended at the time of purchase. The Marriage, Divorce and Family Relations Act requires that the Court looks at "the income of each spouse" and "the assets of each spouse." The Court may make an order to make provision for the "disposition," under section 71 (4) (a); or an order "prohibiting alienation or disposition, under section 71 (4) (b) of the Marriage, Divorce and Family Relations Act.

Section 94 of the Marriage, Divorce and Family Relations Act considers prenuptial and postnuptial property and subjects such property too for division and re-allocation after divorce proceedings:

> Subject to subsection (2), after a decree absolute of divorce or nullity of marriage, a court may inquire into the existence of ante-nuptial or post-nuptial settlements made by the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property, whether for the benefit of the husband or wife or of the children, if any, or of both children and the parties, as the court considers appropriate.
> (2) No order for the benefit of the parties, or either of them, shall be made at the expense of the children.

The starting point is the Married Women Property Act, 1882 – a statute of general application to Malawi. Section 17 provided:

> 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 important judicial pronouncements on this provision are from three Court of Appeal (now the England and Wales Court of Appeal) decisions the Supreme Court cites in *Kayambo v Kayambo*: *Rogers' Question, Re* [1948] 1 All ER 328, *Rimmer v Rimmer* [1953] 1 QB 328; and *Appleton v Appleton* [1965] 1 WLR 25. It is unnecessary to consider all principles the Court of Appeals stated in these cases and the subsequent cases before *Pettitt v Pettitt v Pettitt* and *Gissing v Gissing*, namely, (*Cobb v Cobb* [1955] 2 All ER 696; *Fribance v Fribance* [1957] 1 All ER 357; *Hine v Hine* [1962] 3 All ER 345; *Silver v Silver* [1958] 1 All ER 523; *Diswell v Farnes* [1959] 2 All ER 379; *Allen v Allen* [1961] 3 All ER 385; *Appleton v Appleton* [1965] 1 All ER 44).

In *Rogers,* Re, the Court of Appeal espoused the two principles that would direct the Court of Appeals. The Court of Appeal held that, without much consideration of section 17 of the Married Women Property Act, that matrimonial property redisposition could be had on the principle of fairness property depending on what the parties intended at the time of acquisition and whether there was, therefore, a beneficial interest. *Rogers, Re* was followed in *Rimmer v Rimmer.* The Court of Appeal, for the first time, following *Newgrosh v Newgrosh* [1950] 1 CLC 4557, stated that under section 17 of the Married Women Property Act, the Court had wide powers to do "palm tree justice." Lord Denning, MR, accepted that under English law there was no law for disposition of property. He thought, however, that married property were family assets and anything which did not override equitable or legal rights. Lord Denning affirmed the concept of family assets in *Cobb v Cobb.* The Court of Appeal, however, stated that a common beneficial interest could be made after parties had acquired the property. In *Fribance v Fribance* the Court of Appeals opined that a court would act on the principle justice and fairness.

It is in *Hine v Hine,* however, where the Court of Appeal thought that the power in section 17 of the Married women Property Act was more – giving courts a wide discretion to dispose property acquired during marriage. Lord Denning said:

> [E]ntirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such orders as it thinks fit, This means, as I understand it, the court is entitled to make such orders as appears to be fair and just in all circumstances of the case.

Lord Denning in *Appleton v Appleton* said:

> Sometimes the test has been put in the cases: What term is to be implied? What would the parties have stipulated had they thought about it? This is one way of putting it. But, as the parties never did think about it at all, I prefer to take the simplest test: What is reasonable and fair in the circumstances as they have developed, seeing that the circumstances which no one contemplated before?

The first case before the House of Lords was, of course, *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. The House of Lords held that a woman's occupation of a matrimonial home was personal and gave no rights in property binding on third parties. On section 17 of the Married women Property Act and *Hine v* Hine and *Appleton v Appleton,* Upjohn, LJ, said:

> Apart from this, however, I cannot understand how a purely procedural section such as section 17 can confer any new substantive rights on either of the spouses. The section provides a very useful summary method of determining between husband and wife questions of title and the right to possession of property. With all respect to the learned Master of the Rolls I am of opinion that he has put a far too wide construction upon this section. In *H.* v. *H.* [1963] T.L.R. 645 he said in reference to the ambit of section 17—" The judge should have a free hand to do what is just." In the recent case of *Hine* v. *Hine* [1962] 1 W.L.R. 1124 he said of the section: "Its discretion transcends all rights, legal or equitable." I prefer the approach of Devlin L.J. in *Short* v. *Short (supra)* at 849.The powers of the Court under section 17, as the

learned Lord Justice said, are substantially the same as in any other proceeding where the ownership or possession of property is in question. The discretion of the Court is no wider and no narrower than the ordinary discretion of the Court in such cases.

Lord Upjohn approved the statement by Romer, LJ, in *Cobb* v. *Cobb*:

> I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the court cannot, in my opinion, under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair."

He then said:

> Title must be decided as a matter of fact and law; but there will be many cases where after years of happy married life frequently with banking account to which both contribute and no one taking much heed as to who pays for what the ownership of property has become so inextricably entangled or become legally incapable of solution that an equitable knife must be used to sever the Gordian knot; *In re Rogers' Question* ...and *Rimmer* v *Rimmer* ... are typical examples. But when once the relevant document has been construed or the rights as to title determined by judicial decision on the available evidence, as must be necessary (if possible) in the first place, no further question of discretion on questions of title arise. Questions of possession must of course still be determined having regard to the mutual matrimonial duties of the spouses.

He then overruled *Hine v Hine* and *Appleton v Appleton*

> Depending as they do on a wider construction of section 17 than it should have in my opinion, I would not myself regard the recent cases of *Hine* v. *Hine* [1962] 1 W.L.R. 1124 and *Appleton v. Appleton* [1965]1W.L.R. 25 as correctly decided. In the former case the intention of the parties was clear assuming the learned County Court judge correctly interpreted the legal effect of the discussion as to avoiding estate duty (and I have no reason to doubt that he did); in the latter case the husband could have no claim on property which he knew to be his wife's by doing work on it, in the absence of some agreement.

In *Pettitt v Pettitt* the House of Lords also disagreed with the concept of family assets excited by the Court of Appeals. Lord Reid said:

> We must first have in mind or decide how far it is proper for the Courts to go in adapting or adding to existing law. Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the Courts in

> appropriate cases to develop *or* adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with "lawyer's law" and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the Courts to proceed on their view of public policy for that would be to encroach on the province of Parliament. I would therefore refuse to consider whether property belonging to either spouse ought to be regarded as family property for that would be introducing a new conception into English law and not merely developing existing principles. There are systems of law which recognise joint family property or *communio bonorum.* I am not sure that those principles are very highly regarded in countries where they are in force, but in any case it would be going far beyond the functions of the Court to attempt to give effect to them here.

In *Gissing v Gissing* all the Justices agreed with all in *Pettitt v Pettitt* and Lord Justice Diplock, who earlier supported Lord Denning on family assets, retracted:

> But although, as a matter of decision, *Pettitt v. Pettitt* does not govern the instant appeal, it entailed for the first time a survey by your Lordships of numerous decisions of the Court of Appeal during the past 20 years in which the beneficial interests of spouses in a former matrimonial home had been the subject of consideration not only in applications under section 17 of the Married Women's Property Act, 1882, but also in other kinds of proceedings. In the cases examined the practice had developed of using the expression "family asset" to describe the kind of property about which disputes arose between spouses as to their respective beneficial interests in it. I myself [1970] AC 777, 819A, adopted the expression as a convenient one to denote "property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use or enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels" but without intending any connotation as to how the beneficial proprietary interest in any particular family asset was held. I did, however, differ from the majority of the members of your Lordships' House who were parties to the decision in *Pettitt v. Pettitt* in that I saw no reason in law why the fact that the spouses had not applied their minds at all to the question of how the beneficial interest in a family asset should be held at the time when it was acquired should prevent the court from giving effect to a common intention on this matter which it was satisfied that they would have formed as reasonable persons if they had actually thought about it at that time. I must now accept the majority decision that, put in this form at any rate, this is not the law.

The House of Lords, in *Pettitt v Pettitt*, however, reaffirmed that a court, in property in marriage, must establish a beneficial interest – stressing that the beneficial interest can be established at the time of acquisition or later. Lord Diplock:

In all the previous cases about the beneficial interests of spouses in the matrimonial home the arguments and judgments have been directed to the question whether or not an agreement between the parties as to their respective interests can be established on the available evidence. This approach to the legal problem involved is in most cases adequate, but it passes over the first stage in the analysis of the problem, viz., the role of the agreement itself in the creation of an equitable estate in real property. In the instant appeal, I think it is desirable to start at the first stage.

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts." Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53 (1) of the Law of Property Act, 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.

A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it — notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed *sub silentio* that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to

> the purchase price or to the deposit or the mortgage installments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.
>
> An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment upon the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust.

In *Gissing v Gissing* and *Pettitt v Pettitt*, just like in *National Provincial Bank v Ainsworth*, recommended a Royal Commission on an otherwise unsatisfactory law. Section 17 of the Married Women Property Act, 1882, was inadequate to divide property between spouses and could not create rights. The solution at common law and equity was by way of resulting trust which must be determined first based on express or implied intention to share the property formed during or after acquisition of property. The Courts could not allot property rights based on family assets.

The Matrimonial Causes Act, 1970, England and Wales

On the recommendation of the Royal Law Commission, the English and Wales Parliament passed the Matrimonial Causes Act, 1970. This was well before our 1994 Constitution and the Marriage, Divorce and Family Relations Act, 2015. The legislation on which the House of Lords decided *Pettitt v Pettitt* and *Gissing v Gissing* is caricatured by Lord Justice Nicholls in *White v white*:

> The court's powers to make financial provision on divorce derive from statute. In 1970 the statutory provisions were outdated and inadequate. They were primarily concerned with income for the maintenance of spouses and children. The property adjustment provisions were limited. They were first enacted in the middle of the 19th century, and so they reflected the values of male-dominated Victorian society. Essentially, the property adjustment provisions comprised power to order property to be settled on the other spouse and the children, and power to vary ante-nuptial and post-nuptial settlements. The power to order a settlement dated back to the Matrimonial Causes Act 1857, the statute which supplanted the jurisdiction of the old ecclesiastical courts and set up the new Court for Divorce and Matrimonial Causes. The power was exercisable against a wife whose adultery, cruelty or desertion had founded the divorce. It was seldom used. There was no power to make a corresponding order against a husband. This power was augmented in 1963 by

power to order payment of a lump sum by either spouse. This power also was not much used.

The power to vary settlements originated in the Matrimonial Causes Act 1859. The courts did their best to stretch this power to accommodate modern needs, but there is a limit to judicial creativity. The courts did not confine 'settlement' to formal trust deeds. The expression was taken to include any property acquired by the husband and wife except property acquired by one of them alone under an out-and-out disposition. This produced the striking anomaly that if the matrimonial home was bought in joint names there was a settlement which could be varied, but not if the house was owned by one of them alone.

Indeed, there is a limit to what Courts can do. The precarious position that had its zenith in *Pettitt v Pettitt and Gissing v Gissing* was, as it should be, is scrutinized by the Law Reform Commission. Lord Justice Nicholls comments on the Law Commission:

These and other problems were considered in a report of the Law Commission prepared in 1969 under the chairmanship of Scarman J: see *Family Law - Report on Financial Provision in Matrimonial Proceedings*, Law Com no. 25. An overall rationalisation of the court's powers was needed urgently.

The new pieces of legislation were a breath of fresh air. Lord Nicholls, once again:

The Matrimonial Proceedings and Property Act 1970 made a fresh start. The powers of the court were greatly extended. The relevant provisions in the 1970 Act were re-enacted in substantially similar terms in Part II of the Matrimonial Causes Act 1973. Sections 23 and 24 of the Matrimonial Causes Act 1973 empower the court, on granting a decree of divorce and in certain other circumstances, to make financial provision orders and property adjustment orders. Financial provision orders, under section 23, include orders that one party to the marriage shall make payments to the other party. The payments may be periodical, either secured or unsecured, or lump sums. Property adjustment orders, under section 24, include orders that one party to the marriage shall transfer property to the other party. Section 24A empowers the court to make ancillary orders for the sale of property.

The underlying principle in all this legislation and indeed any other law is fairness. Fairness, however, does not comport equality. A fair disposition, considering all the circumstances, variables and factors, almost invariably never results in equality. Equality, however, can be a rough indicator of fairness. Lord Nicholls again:

Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal

application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): '. . . the contribution which each has made or is likely . . . to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer. There are cases, of which the Court of Appeal decision in *Page v Page* (1981) 2 FLR 198 is perhaps an instance, where the court may have lost sight of this principle.

A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.

This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognise and respond to developments of this sort. These wide powers enable the courts to make financial provision orders in tune with current perceptions of fairness. Today there is greater awareness of the value of non-financial contributions to the welfare of the family. There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her own money-earning qualifications and skills. In *Porter v Porter* [1969] 3 All ER 640, 643-644, Sachs LJ observed that discretionary powers

enable the court to take into account 'the human outlook of the period in which they make their decisions'. In the exercise of these discretions 'the law is a living thing moving with the times and not a creature of dead or moribund ways of thought.'

Despite these changes, a presumption of equal division would go beyond the permissible bounds of interpretation of section 25. In this regard section 25 differs from the applicable law in Scotland. Section 10 of the Family Law (Scotland) Act 1985 provides that the net value of matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances. Unlike section 10 of the Family Law (Scotland) Act 1985, section 25 of the 1973 Act makes no mention of an equal sharing of the parties' assets, even their marriage-related assets. A presumption of equal division would be an impermissible judicial gloss on the statutory provision. That would be so, even though the presumption would be rebuttable. Whether there should be such a presumption in England and Wales, and in respect of what assets, is a matter for Parliament.

It is largely for this reason that I do not accept Mr. Turner's invitation to enunciate a principle that in every case the 'starting point' in relation to a division of the assets of the husband and wife should be equality. He sought to draw a distinction between a presumption and a starting point. But a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption, with formal consequences regarding the burden of proof. In contrast, it should be possible to use equality as a form of check for the valuable purpose already described without this being treated as a legal presumption of equal division.

The Matrimonial Causes Act, 1970, was regarded by the courts and academics as epochal and a departure from the vagaries of equity and law that had closed with the House of Lords decisions in *Pettitt v Pettitt* and *Gissing v Gissing* based on the power in section 17 of the Married Women Property Act, 2017.

Our Marriage and Divorce Act, 2015, the law when the Supreme Court decided *Sikwese v Banda,* incorporates, much like sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution, most aspects of the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973. Sections 23 and 24 of the Matrimonial Causes Act 1973, a court, on granting a decree of divorce and in certain other circumstances, makes financial provision orders and property adjustment orders. Under section 23, financial provision orders involve orders to pay money to the other party. Sections 24 and 24A enable orders of property transfer or sale. English legislation does not specifically, as our and Ghanaian and our Constitutions, provide for equitable and fair, respectively, of property upon divorce.

Instead, legislation lays down a set of principles and considerations concerning matrimonial property. Fairness, however, is implied. Lord Justice Nicholls in *White v White* said:

> [T]he legislation does not state explicitly what is to be the aim of the courts when exercising these wide powers. Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses: see Thorpe LJ in *Dart v Dart* [1996] 2 FLR 286, 294. The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children.

The jettisoning of the common law and equity that underpinned the eon before the Acts is elucidated by Lord Justice Hale in a glorious surmise in *Miller v Miller* ([2006] UKHL 24, at paragraph 123

> English law starts from the principle of separate property during marriage. Each spouse is legally in control of his or her own property while the marriage lasts. But in real life most couples' finances become ever-more inter-linked and inter-dependent. Most couples now choose to share the ownership of much of their most significant property, in particular their matrimonial home and its contents. They also owe one another duties of support, so that what starts as individual income is used for the benefit of the whole family. There are many different ways of doing this, from pooling their whole incomes, to pooling a proportion for household purposes, to one making an allowance to the other, to one handing over the whole wage packet to the other (see Jan Pahl, *Money and Marriage*, 1989). Some couples adopt one or other of these systems and retain it throughout their marriage. But as the gender roles also become more flexible within the marriage, with bread-winning and home-making responsibilities being shared and changing over time, so too their financial arrangements may also become more flexible and change over time. It also becomes less and less relevant to ask who technically is the owner of what?

In paragraph 124 she underscores the thrust of the legislation that debunks differentiation based on ownership of property in the marriage and extols the power of the Court to dispose property after divorce.

> When the marriage comes to an end, the court's powers are also flexible. They are no longer based upon the assumption that there is one male breadwinner to whom all or most of the resources belong and one female home-maker in need of his support (and entitled to it only as long as she remains deserving). The court is directed to take into account all of their resources from every source. It is then given a wide range of powers to reallocate all those resources, be they property, capital or income. It is directed to take account of all the circumstances, and in particular the checklist of factors listed in section 25(2).

Lord Justice Nicholls, who gave the lead judgment, refers to a broad principle which he describes as of being universal application. At paragraph 1, he says:

> These two appeals concern that most intractable of problems: how to achieve fairness in the division of property following a divorce. In *White v White* [2001] 1

> AC 596 your Lordships' House sought to assist judges who have the difficult task of exercising the wide discretionary powers conferred on the court by Part II of the Matrimonial Causes Act 1973. In particular the House emphasised that in seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties' contributions to the family there should be no bias in favour of the money-earner and against the home-maker and the child-carer. This is a principle of universal application. It is applicable to all marriages.

It is probably in *White v White* ([2001] AC 596 where Lord Justice Nicholls underpins the underlying approach in the legislation in 1970 after the decisions in *Gissing v Gissing and Pettitt v Pettitt* disposition of property. It is fairness through and though:

> Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.

Contrasting with the New Zealand legislation, Lord Nicholls stresses the flexibility of the United Kingdom approach. The powers are exercised on all property of husband and wife irrespective of origin:

> So what is the best method of seeking to achieve a generally accepted standard of fairness? Different countries have adopted different solutions. Each solution has its own advantages and disadvantages. One approach is for the legislature to prescribe in detail how property shall be divided, with scope for the exercise of judicial discretion added on. A system along these lines has been preferred by the New Zealand legislature, in the Matrimonial Property Act 1976. Another approach is for the legislature to leave it all to the judges. The courts are given a wide discretion, largely unrestricted by statutory provisions. That is the route followed in this country. The Matrimonial Causes Act 1973 confers wide discretionary powers on the courts over all the property of the husband and the wife.

Sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution, just as Article 22 (2) and (3) of the Ghanaian Constitution, is epochal and a threshold in property held during marriage. The interpretation of similar provisions like ours is in *Mensah v Mensah.* Section 11 (2) (c) of the Constitution enjoins Courts, when interpreting it, to regard international precedents. sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution of the Constitution must be understood as comporting that all property held during marriage is, upon divorce, up for disposition and, for women, creates a right.

In the case of Ghana, there is a specific mandate concerning this right that legislation promulgate to recognise the change. Our Constitution, more progressive, creates it as a specific and direct right. In Ghana, legislation on the Constitution not promulgated notwithstanding, Courts understood that legislation as supplanting or replacing the precarious and uncertain law – essentially common law and customary law – that bedeviled matrimonial property after *Pettitt v Pettitt* and *Gissing v Gissing.* In English property law, *Pettitt v Pettitt* and *Gissing v Gissing,* decided a year before, were overtaken by the Matrimonial Causes Act, 1970, as amended by the Matrimonial Causes Act 1973. The consequences of the Matrimonial Causes Act, 1970, are better if not best captured by academia:

> Following a lengthy process of consultation by the newly established Law Commission, the Matrimonial Proceedings and Property Act 1970 was passed, granting the courts 'a new armoury of powers' applicable upon the breakdown of marriage. These powers enabled a court to transfer property to the other spouse, order financial provision between the parties and declare what interest was acquired by a spouse who made improvements to the property in led a court to transfer property to the other spouse, order financial provision between the parties and declare dispute. It is important to note that *Pettitt* and also *Gissing* were decided prior to the commencement of this statute (A P Hayward, 'Judicial Discretion in Ownership Disputes over the Family Home, ETHESES).

Developments under Malawi law.

Under Malawi law, except under customary law, which will be considered later, there was no power to dispose property after dissolution of marriage except to the limited extent the Matrimonial Causes Act 1857 and the Matrimonial Causes Act 1859, which were statutes of general application before 1902. The law applicable to Malawi was, therefore, section 17 of the Married Women Property Act, 1882. Consequently, decisions of English courts have influenced the Malawian common law and equity. In Malawi, therefore, it has been understood for a long time that section 17 of the Married Women Property Act is a procedural provision and does not affect substantive rights.

Kayambo v Kayambo

Developments in Malawi follow the same pattern. The precarious law before the 1994 Constitution was epitomized in the Supreme Court of Appeal decision in *Kayambo v Kayambo* decided in 1989 – well after the Matrimonial Causes Act 1973. The Supreme Court relied on decisions – made almost two decades and for some more than two decades before – of the Court of Appeals in *Rogers' Question, Re* [1948] 1 All ER 328, *Rimmer v Rimmer* [1953] 1 QB 328; and *Appleton v Appleton* [1965] 1 WLR 25. The Supreme Court decided *Kayambo v Kayambo* on ... 1989. Counsel never referred this Court to *Pettitt v Pettitt* and *Gissing v Gissing,* decisions of the House of Lords decided almost two decades after. Certainly, the Supreme Court does not refer to them in the judgment. The upshot of *Pettitt v Pettitt* and *Gissing v Gissing* varied or overruled most propositions of in *Rogers' Question, Re* [1948] 1 All ER 328, *Rimmer v Rimmer* [1953] 1 QB 328; and *Appleton v Appleton* [1965] 1 WLR 25 the Supreme Court relied on in *Kayambo v Kayambo.*

First, in *Pettitt v Pettitt* and *Gissing v Gissing,* the House of Lords, on a matter well conceded in *Kayambo v Kayambo,* determined that section 17 of the Women Property Act, 1822, was laying only and only a procedure for women to use about matrimonial property. It was not empowering courts to affect established rights. The section:

> 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 Act provided no power to courts to affect property rights –let alone dispose it. Under English law, there was no community of property due to marriage. In marriage parties own property – including a matrimonial home – separately. Secondly, section 17 of the Women Property Act could not create any rights. Thirdly, consequently, a court had no power under section 17 of the Women Property Act to affect individual rights in property. Fourthly, the court rejected the concept of family assets – suggested by Lord Denning in *Rimmer v Rimmer* and affirmed in *Cobb v Cobb.* Fifthly, a court could not make such an inroad until Parliament legislates. Sixthly, the only way a party could have an interest – where a legal interest was only in one spouse – was demonstrating a beneficial interest. Seventhly, after confusion about whether the trust was constructive or resulting, the House of Lords settled that there must be a resulting trust. Eighthly, the trust could be proved by agreement or conduct forming of a common intention. Ninthly, a common intention could be express or implied. The intention was not the intention to have the title to oneself. The intention was the intention – a common, shared intention – to jointly own. Tenthly, the common intention could be inferred from conduct before, during or after acquisition of the property. This was a clear rejection of the intention at the time of purchase. The common law was thus settled after different directions and positions that characterized the Court of Appeals – now the England and Wales Court of Appeals. The House of Lords was unprepared to introduce the concept of family assets or matrimonial property and left it to Parliament to intervene.

The Royal Commission reviewed the law described, noting the precarious position of the law characterized with uncertainty and inadequate powers. The solution was to introduce vast immense powers to courts over all assets of the husband and wife and courts to make financial orders on set principles.

So much so that, when *Kayambo v Kayambo* was decided, this Court countenanced principles abandoned in the common law and equity of England. No doubt, decisions of jurisdictions other than our own are only persuasive in our courts. As among decisions within the jurisdiction, persuasion depends on relative jurisdictions in the domestic courts. Consequently, decisions of the superior courts are more persuasive. Where a court is persuaded by decisions of lower jurisdiction of courts other than our own, the court must be satisfied that there is no counter position in the superior courts of that jurisdiction and where there is a counter position demonstrate why the opinion of a superior court is discarded. Both principles on which the Supreme Court decided *Kayambo v Kayambo* are not dominant in English common law. The correct common law up to 1970 – before the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973 were determined in the House of Lords in the two decisions both passed in 1970. There is no explanation of why this Court decided, in 1989, to rely on decisions

of the Court of Appeals in the presence of binding decisions of the House of Lords on the Court of Appeals.

All decisions up to the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973 in England and Wales and the 1994 Constitution proceeded under section 17 of the Married Women Property Act, 1882. Section 17 of the Matrimonial Causes Act was incapable of creating or transferring rights at dissolution of marriage. The Courts, therefore, resorted to the law of trusts to resolve family property issues where a trust created beneficial interests. Powers under section 17 of the Married Women Property Act, a statute of general application, were muted. *Kayambo v Kayambo,* purporting to dispose of matrimonial property, was, therefore, based on *National Provincial Bank Ltd v Ainsworth, Pettit v Pettit* and *Gissing v* Gissing, bad law Courts, unless legislation intervened, had no power to order disposal of property at divorce. In Malawi, the immediate reaction when *Kayambo v Kayambo,* purporting to, without any legislation, to divide property, was that Parliament, by an Act, hastily made, overturned *Kayambo v Kayambo.* The effect of this was that Courts in Malawi have, correctly, went to *Gissing v Gissing* and *Pettitt v Pettitt* in subsequent cases. The law, therefore, before the 1994 Constitution was exactly as it was in *Gissing v Gissing and Pettit v Pettit* – that courts, not even under the guise of section 17 of the Married Women Property Act, had power to divide power and matrimonial property, like other property, was governed by property law at dissolution of marriage.

Section 24 of the Constitution of 1994

The law, therefore, stalled at that women's rights at marriage were a result of whether there was a common agreement that resulted in a resulting trust and that section 17 of the Married Women Property Act could be prayed in aid to determine those rights. The Act gave no power to courts – at divorce – to dispose of property. For Malawi, the major intervention was the 1994 Constitution.

Section 24 of the Constitution

The rights the Constitution creates in sections 24 (1) (b) (i), 24 (1) (b) (ii) of the Constitution and 24 (2) (c) are very pervasive than first perceived. Their understanding bases on correct interpretation of the sections by Courts in section 11 of the Constitution and other rules of interpretation courts devise. It is, therefore, defeatist to argue from that the right is confirming what the law was. The Constitution cannot do that. Section 135 (a) of the Constitution entails laws must conform to the Constitution. The converse is not true. Section 200 of the Constitution provides specifically that all laws previous or current were made under it. Previous laws, therefore, cannot make the Constitution. Such an attitude robs the Court's power to interpret the Constitution and restricts meaningful of constitutional provisions. Constitutional provisions, more especially of Chapter IV, must be interpreted robustly, generally, generously and liberally. Since rights are central to our whole constitutional arrangements, interpretation must recognise that rights are expressed as minima not as maximum. Interpretation, must, therefore, protect, expound and expand rights.

Section 24 (1) (b) (i) of the Constitution – the right of women to a fair disposal of property at divorce

Section 24 (1) (b) (i) of the Constitution provides for the first time the right to fair disposition of property after divorce; section 24 (2) (c) of the Constitution provides for the first time the right to protection of property after inheritance. Starting with the right to fair disposition of property after divorce.

The section must be probed about the right it creates. The critical right is fair disposition – not necessary the subject matter. The framers are not presumptuous about existence of the right previously. As we have seen, courts, up to 1994, had no statutes based on which they divided or disposition of property. They, however, could make certain financial orders and, to that end, settle title. Section 24 (1) (b) (i) provides this right for the first time. The right is specific – fair disposition. This power, as a standalone, without the subject matter of disposition, is novel and far reaching. Up to this point, there is careful avoidance of use of the words "distribution of property." The word "disposal" is used advisedly. Section 17 of the Married Women Property Act neither gives jurisdiction per se to distribute property nor power to dispose of property. The section gave power to courts to determine rights of women in property in disputes between husbands and wife. The power to distribute property – not existent in legislation, common law or equity – existed at customary law. This aspect is overlooked when considering *Kayambo v Kayambo.* The Kayambos married under the Marriage Act – now repealed by section 114 of the Marriage, Divorce and Family Relations Act, 2015. The marriage was, therefore, not amenable to customary law. The property of marriage, supposedly, was, therefore, governed by the Married Women Property Act 1882 the common law and equity. Under those, a court had no jurisdiction to dispose or distribute property.

At customary law, however, at divorce, property of the marriage – except for land – was distributed on the principle of fairness. Land issues were already fixed by customary law. In the lobola system, the woman moved to stay at a man's locality on land given and owned by the husband. In the chikamwini system the woman went to live at the wife's locality on land given and owned by the wife. At divorce, therefore, land was unaffected as its ownership was determined at marriage. In both customary law systems, maintenance of children was pre-determined. The one with legal custody was responsible primarily for maintenance. Courts exercising customary law jurisdiction, therefore, could dispose of matrimonial property based on the principle of fairness. *Kayambo v Kayambo,* therefore, never applied to customary law marriages.

Section 24 (1) (b) (i) of the Constitution was an overarching novel constitutional intervention over all manners of disposal – customary, statutory and common law. It introduces the principle of fairness. Fairness is synonymous with justice. Fairness, however, is more practical than justice – an ideal. Practically, fairness comports that a judgment or decision must be made based on consideration of all circumstances of a situation. The output – the decision or judgment – must be such that, to ordinary and reasonable women and men, is fair, reasonable and logical. Such output is only possible if all facts are considered and accounted for without exaggerating the minor and undermining the major. It is this concept of fairness that is important in understanding the meaning of "property held jointly" in the provision.

Characteristically, section 24 (1) (b) (i) provides for a right to disposal. This is not a power to distribute. The right is to have property disposed of. It comports the right to have property acted on as if owner – only the owner has dispositive rights. Disposition is wider than distribution. A woman, therefore, has, on dissolution of marriage by divorce, a right – enforceable by the courts as of right – to have property disposed of and disposed of fairly, after taking into account all

circumstances, including ownership or holding. In other words, ownership or holding, is one of, but not the only one, of the circumstances to be considered. It is only in this regard that there is a right to fair disposal.

Consequently, the words "held jointly" in section 24 (1) (b) (i) cannot be interpreted narrowly as to exclude other property not 'held jointly' in the narrow sense. The tendency is to interpret these words as meaning property agreed by parties to be joint property. The fact of agreement is absent in the provision and cannot, therefore, be read into the section. If the legislature had intended it the word 'agreement' or words of similar effect would have been deployed. That the words 'held jointly' refer to ownership jointly is gainsaid by the use of the words "disposal" and "fairness."

As we have seen, the word disposal is broader. To the courts, for the first time, courts are given the power to make orders of disposal. If the words "held jointly" refer to property actually jointly owned in the narrow sense, the section would be saying something, but certainly, very little. For property held jointly would comport either that the property be shared equally or in relation to share or contribution to its acquisition. But that would follow as a matter of common sense. There is no dispositive power there. That is what the law and common sense demands. No right, therefore, is created thereby. The narrow construction would have a fit problem.

Constricting the interpretation of section 24 (1) (b) (iii) of the Constitution would have a fit problem – a serious fit problem with the right to disposal. First, it would leave the right to disposal unavailable for property not jointly owned in the narrow sense – and in a majority of cases this is probably 90%. It would mean that at divorce there are two regimes for disposing property acquired in marriage, one for a small proportion of property held jointly and another for property – the largest – not jointly heard. The fit problem is more pronounced when fairness is introduced. Property held jointly in the narrow sense would be subject to principles of fairness and a bulk of other property would be left out of the fairness principle and left to arbitrariness and chaos reminiscent in the common law, statutes and equity just discussed. The framers of the Constitution and the legislature are neither architects nor specialist in absurdity or confusion.

Such a construction would be very complicated and wasteful as to compound and increase legal costs. Spouses are not as pedantic and perspicacious as to apportion property into joint or non-joint. In a majority of cases, as was pointed out in *Kamphoni v Kamphoni*, one spouse buys one property and another buys another to benefit the marriage. One buys a car to help with errands another buys a house for accommodation. A car has a short life span. Legal costs would be unbearable as lawyers painstakingly pan out what property belongs to what category and what principle applies.

The section then provides for the subject matter "property held jointly." Now, there is a narrow and wide interpretation of this phraseology. The narrow one is that the framers were creating a right to fair contribution of property, subject to the right of women to acquire property individually, in fact and in law, held jointly. In this respect, the property will be disposed fairly according to the proportion of contribution. If this is all section 24 (1) (b) (i) of the Constitution intended to achieve, then either it was saying nothing or very little. For, under the general law, law subservient to the Constitution, this is a matter of law. Joint or common ownership is treated that way and, in that regard, it is fair disposition of property held jointly. There is, however, the wider and general meaning. The expression "held jointly" refers to property held jointly – as between husband and wife. In this regard, the right is wider, novel and not tautological. Understood that

way, it is a wide power affording women – and men – a fair disposition over property, however introduced, over property held jointly during marriage. There was no judicial interpretation of the section in this Court or the Court below up to the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce of 26 June 2006.

The Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce

It is unnecessary to introduce the entire report for, as we see shortly, all the Law Reform Commission's recommendations materialised in the legislation proposed under section 17 of the Law Reform Act. Certain general comments are important to see what the position is as at now. This is because, under section 3 of the Marriage, Divorce and Family Relations Act, the Act, except for Chapter IX, the rest of the Chapters, including Chapter XI, dealing with disposal of property, apply to marriages after the Act. There will, therefore, be a bulk of marriages where the Marriage, Divorce and Family Relations Act, does not apply to and that will be governed by the law previous the Marriage, Divorce and Family Relations Act. The Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce is probably the widest authoritative work on the law generally and on disposal of property acquired during marriage. Its commentary is, therefore, important to understanding the law at the time of the review and the direction the law was going to take. Its thrust is aptly surmised:

> The core statutes on marriage and divorce were enacted in pre-independence Malawi and the scheme of the law is colonialist in its agenda. A number of critical constitutional developments have taken place in Malawi with the coming into force of the Republican Constitution of 1994. The country has since evolved from a legal system based on parliamentary supremacy to one based on constitutional supremacy with an entrenched bill of rights. Such a paradigm shift has consequences on the rights and obligations of persons, let alone parties in a marriage contract. It is critical therefore that these constitutional developments are eloquently articulated in the scheme of the laws on marriage and divorce. Further, Malawi has an obligation to meet international legal standards in its municipal laws. The laws on marriage and divorce are no exception from that perspective.

The Law Commission acknowledges the impact of the Constitution on previous laws for which the Constitution is Tsunami. On disposal of property acquired during marriage paragraph 7.5.2.11 of the report is as proselyte, albeit, there is no attempt, in the absence of any judicial interpretation, to interpret section 24 (1) (b) (i) of the Constitution. The report on this aspect states:

> The question of property ownership or entitlement to matrimonial property usually arises when a marriage is dissolved as a consequence of divorce. At present, there is no statutory law that provides for the division of matrimonial assets upon the dissolution of marriage. This aspect has been left entirely to the common law where courts exercise unfettered discretion.

The Statement is probably not very accurate. The concept of matrimonial property is, as in 2006, a remote consideration. It was rejected in *Pettit v Pettit* and *Gissing v Gissing.* The statement is probably true for marriages under the Marriage Act. So much so that, at the time of the report, the concept of matrimonial assets was alien to our law. Of course, there was no statute. There was,

however, in 2006 section 24 of the Constitution that dealt with property of marriage at divorce and inheritance. For the first time the concept of division of property is introduced. At common law, there was no concept of division of matrimonial property. As seen previously, the principal Acts up to the 1994 Constitution was the Married Women Property Act. The Act never provided for division of property. It dealt with disputes about rights to property during marriage. It was more a statute setting procedure to deal with disputes about property ownership – not division of property. The common law and equity were used to ascertain ownership and entitlement – not dividing the property. The Court was not exercising any discretion at all. The report continued:

> This state of affairs has led to the perpetuation of injustices especially upon women as the decisions of the courts fail to appreciate the power imbalances between divorced spouses.

The situation, seen away from the vista of section 24 of the Constitution, is probably correct. The resulting trust – a branch of equity – was the only way a spouse or indeed any spouse could, based on contribution, have a share in matrimonial property. The Royal Commission came to a similar conclusion that equity was not answering to modern trends in matrimonial property at divorce. No such problem, arose, during intestacy. The cause of the situation was, however, not because courts had discretion in the matter. The common law and equity never gave discretion on the matter. After contrasting, the community system and common law entitlement to property after divorce (and inheritance), the Report said:

> In jurisdictions where ownership of property is easily established through the concept of "community of property,"168 the settlement or distribution of matrimonial property after dissolution is less onerous as it is done on a fifty-fifty basis. Basically, under community of property, each spouse owns an undivided one-half interest in property acquired during the marriage in the absence of a matrimonial agreement or contract to the contrary.

In jurisdictions where there is a community of property, disposal of property, rather than distribution of property covers more than property acquired during marriage. It generally includes property brought into the marriage except gifts or bequests after marriage. The Report continues, as follows:

> In Malawi, on the other hand, as is the case in other common law jurisdictions, the ascertainment of ownership of matrimonial property is not as straightforward.

In common law jurisdictions there is no concept of matrimonial property as such. They start from separate ownership of property. Ownership, therefore, is actually determined by general law of contract, inheritance and equity. The problem, therefore, is not peculiar to matrimonial property. Ownership of property depends on a number of principles which a court has to consider. The Report then proceeds to consider principles applicable to property during marriage:

> The application of these principles has tended to be patriarchal.169 Common law in the area of ownership of matrimonial property reveals these principles to be—
> (a) Common Intention Each party to the marriage is deemed to own the property

> that he or she bought unless at the time of the acquisition of property there was a common intention (for which evidence by express agreement or implied by words or conduct is required) to own the property jointly and either spouse has acted to his or her detriment in reliance of that common intention,170 then the property will be declared to be jointly owned. Forgoing a monthly salary from outside employment in order to manage the family business without pay may be an example of such detriment. (b) Contribution Any party to the marriage wishing to prove that he or she is entitled to a share in any object of property must prove that he or she contributed to it.171 This contribution has to be a direct financial contribution.172 Therefore, an indirect contribution such as housekeeping, childcare or maintaining the property, is not sufficient to entitle a party to the marriage to a share of the matrimonial property. (c) Registration in both names. If the parties to the marriage are registered as joint owners to the title of the property, they will be deemed joint owners unless there is clear evidence that the name of one spouse was merely added for expediency or convenience.

This position was the law as it was in 1989, as this Court decided *Kayambo v Kayambo* and before the 1994, when our Constitution passed. In 1994 the Constitution in section 24 changed the law. Section 24 (1) (b) (i) of the Constitution changed all this in introducing the rights to a fair disposal of property held jointly during marriage.. The Law Commission, which acknowledged the 1994 Constitution as changer, turned the Constitution for criticism based on not interpreting the constitutional provision or thinking that the Constitution had not changed the law. The Commission said:

> As there are no strict guidelines to determine to what extent, if at all, any of these principles apply to any particular case on division of marital assets, the Commission recommends that the new law should specifically lay down extensive guidelines to guard against abuse of discretion by the courts.

There was no such discretion or power under section 17 of the Married Women Property Act, 1882. The Court were only ascertaining property rights for women after divorce. The principles espoused by courts were principles of property law at equity and law. There was no dividing, distribution or disposal of property. The principle of disposal remained only at customary law. The Report continued:

> This approach will prevent weaker family members, invariably women, from suffering loss. Ultimately, despite the increase of women in the employment and business sector, women in Malawi remain largely relegated to the home in performance of domestic chores. Their contributions, though not financial, are significant and the Commission finds it untenable that the established corpus of Malawi law fails to recognize such contributions in the division of property.

These problems do not emanate from the law as such but from that the Malawi legal system is a common law regime which stresses separate property during marriage. Indeed the Constitution provides a general right for all – including women to acquire property – and a specific right for women to acquire property independently or in association with others. So until section 24 (1) (b) (i) of the Constitution, the general law on property remained the same in and out in marriage and premised on statutes, the common law, equity and customary law. The Commission recognises the

right to property in section 24 (1) (b) (i) of the Constitution but has, without mentioning it, a serious criticism of section 24 (1) (b) (i) of the Constitution. Read with me:

> The Constitution offers little assistance in determining how property is to be distributed. Subparagraph (i) of subsection (1) (b) of section 24 of the Constitution accords women the right to full and equal protection by the law and the right to a fair distribution of property that is owned jointly with a spouse. In view of the manner in which property is deemed to be owned by married couples in Malawi, the Commission found this constitutional provision inherently unfair and ultimately discriminatory against women. As with the common law position, the Commission decried the fact that in the ordinary course of events, women do not directly contribute (as much as men do) financially towards acquisition of property and therefore there is very little, if any, property that they can be deemed to jointly own through the principle of contribution.

The Constitution is a superior law and expressed in form of broad form like conventions. It is not supposed to provide the detail of law. On the contrary, it allocates the detail of law to legislation, customary, common and, where applicable, international law. The Constitution could, therefore, have not provided for how property should be distributed. The Constitution, moreover, provided broadly the right at divorce – the right to disposal of property – and the manner and principle – fairness – on which property should be disposed of during divorce. The Commission, however, said:

> The Constitution offers little assistance in determining how property is to be distributed. Subparagraph (i) of subsection (1) (b) of section 24 of the Constitution accords women the right to full and equal protection by the law and the right to a fair distribution of property that is owned jointly with a spouse. In view of the manner in which property is deemed to be owned by married couples in Malawi, the Commission found this constitutional provision inherently unfair and ultimately discriminatory against women.

The Constitution does not provide for distribution of property – it provides a right to disposal of property at divorce. It is a broader right. Clearly, however, the Law Commission, in the absence of judicial interpretation, was committed to an understanding of section 24 (1) (b) (ii) of the Constitution without attempting to interpret the provision. The Law Commission, based on this understanding, questions the constitutional provision unfair and discriminatory. A constitutional provision – the foundational law – cannot be unfair as discriminatory. If there is unfairness or discrimination, which there is none, it is sanctioned by the Constitution. The unfairness, therefore, lay in the laws made under the Constitution, not the Constitution. The Law Commission concedes as much:

> As with the common law position, the Commission decried the fact that in the ordinary course of events, women do not directly contribute (as much as men do) financially towards acquisition of property and, therefore, there is very little, if any, property that they can be deemed to jointly own through the principle of contribution. The Commission was also aware that it is very rare for men (who in most cases possess the purchasing power) to either declare an intention that the property shall be owned jointly or to register property in the joint names of the spouses. The Commission found that husbands were more likely to register

property bought by them individually in their own names or in the names of children of the marriage. It is also highly unlikely that the wife being the weaker spouse will ask, during the subsistence of the marriage, for a share in each and every asset that is acquired as such kind of behaviour leads to distrust.174 There is therefore very little property in a marriage that a couple can call jointly owned and therefore the constitutional provision does nothing to improve the plight of women who are disadvantaged by not being accorded the right to a fair distribution since only property that is jointly owned can be the subject of a fair distribution.

The conclusion of this discourse, however, is salutary to the correct interpretation of section 24 (1) (b) (i) of the Constitution. The Law Commission concludes that the framers of the Constitution could not have intended section 24 (1) (b) (i) to be detrimental to women:

> As the Constitution could not have intended to make the provision to the detriment of women (and in fact the Constitution has a provision relating to equality175), the Commission resolved that the Constitution, in section 24, sets a minimum standard for the fair distribution of matrimonial property and that it was left to enabling legislation to expand upon this minimum standard. The Commission recommends that a provision must be incorporated into the proposed new law which equitably distributes matrimonial property based upon such factors as need, custody of children, earning capacity and other responsibilities and obligations of the spouses after divorce. This principle of distribution is not based on ownership or title as is presently the case. However, the Commission recommends that only matrimonial property or property that is clearly intended for use and enjoyment by the family must be distributed this way. In order to give effect to the constitutional provision of a fair distribution, the Commission recommends that all the factors surrounding the dissolution should be taken into account. The distribution need not be an equal one as long as it is fair. The emphasis on fairness rather than equality as a basis for distribution is necessary to ensure that the spouse that has the custody of the children is not disadvantaged by having to support the children on his or her half of the property.177 A regular income should also be included as property that is subject to a fair distribution upon dissolution of the marriage.

The Law Commission raises three very cardinal points. First, it opines, correctly, in my judgment, that the right under section 24 (1) (b) (i) of the Constitution are minima expression of the right. I would only add that they are broader and convention-like expression of an otherwise broader right that Courts must interpret liberally so as to disclose the full essence and flavour of the right. Secondly, the Law Commission recognises, again correctly, in my judgment, that subsidiary law will properly and adequately provide much, more and better expression of the law. Thirdly, and more importantly, the Law Commission underpins, again correctly, that the constitutional provision will influence, as it should, inform the formulation, interpretation and development of legislation, the common law and customary law. It is these considerations that underline the importance of interpreting section 24 (1) (b) (i) broadly as creating a right to a fair disposal of property held jointly in the marriage. Section 24 (1) (b) (ii) of the Constitution, however, provides just that. It guarantees that the means of the husband are available for disposal, after factoring the needs of children. All was in sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution.

The Law Commission, however, sticks to its conceptualization that the Court is distributing property. The Constitution, even if section 24 (1) (b) (i) is construed narrowly, is talking about disposal of property at divorce. The power includes power to order sale of property and allocating the proceeds, power to transfer title for sale or settlement. Said the Law Commission:

> The Commission recognized that a fair distribution of the property upon dissolution will depend upon a full and frank disclosure of all the matrimonial property, whether owned jointly, severally or enjoyed in common by the parties to the marriage. The Commission therefore recommends that any willful or intentional failure to disclose this information, fully and frankly, shall be made a criminal offence.

Although, the Law Commission employs the word "distribute" in its report, the word is absent in the proposed legislation. This is in recognition of the dispositive right at divorce that can be enforced, not as a discretion, but as of right, in a court of law. For effectiveness, the Commission recommends full disclosure of assets at the peril of criminality. The recommendation on customary land, however, is not thought through. Said the Commission:

> The Commission recognized that in cases of customary land, a fair distribution might not always be possible as the rights to such land are usufruct only and ownership of property on such land as well as the land itself cannot be alienated or transferred to a former spouse as the land is intended for the use of a particular clan. The Commission therefore recommends that in cases of divorce the interest in customary land must be transferred to the children of the marriage.

In passing, this Court in *Chirwa v Karim and another* (2016) Civil Appeal No 1 (MSCA) (unreported) decided that customary land rights are not, in fact or law, usufruct. Customary land title is title sui generis and inadequately defined by conceptions alien to customary law. The order to distribute or dispose of customary land to children is not because the land belongs to the clan. The clan actually subdivides land to individuals who own it as customary land. So much so that the only reason why customary land is not distributed or disposed of at divorce is that the title to land in marriage is fixed by ownership prior to marriage. In the lobola system the land belongs to the man at his locality. Ownership, therefore, does not inure to the wife because of marriage. Conversely, in the Chikamwini system, the land belongs to the wife and is provided by the family for use in marriage. The husband acquires no title to the land by marriage. As was stated in *National Provincial Bank Ltd v Ainsworth,* a spouse who does not own the home, is only entitled to residence in a matrimonial home. No rights are created by marriage viz-a-viz the customary land. Under section 17 of the Deceased Estates (Wills and Inheritance) Protection Act, at intestacy, the land goes to the children based on customary law inheritance and succession laws.

The overarching omission in the Law Reform Commission Report is interpreting section 24 (1) (b) (i) of the Constitution. The Law Commission settles for a narrow understanding of the section with no interpretation of the section. The Law Commission Report, together with other important authoritative scholarly works, not necessary to discuss in the judgment, become the fulcrum of the Marriage, Divorce and Family Relations Act, 2015 which, in its entirety, recognises the change brought by the Constitution in section 24 concerning disposition of property at divorce. These works can only be acknowledged in this judgment: 'Property Division after

Divorce: Unmasking the Court's Role in Perpetrating Power Imbalances between Spouses,' LLB (Honours) Dissertation; University of Malawi; and 'Malawi Law Commission (2003) Overview and Issues of Gender-Based Law Reform in Malawi,' Limbe: Montfort Press). G S Kamchedzera, Access to property, The Social Trust and the Rights of the Child, (PhD Dissertation, Cambridge, 1996) 149; The Royal Commission on Marriage and Divorce (1956) Cmnd. 9678, para 652 at p. 178 that first raised the problem of legal recognition if a housewife domestic services. See also The Seven Pillars of Divorce Reform; (1965) 62 Law Society Gazette at p. 345 - cited in Wachtel v. Wachtel (1973) I All E.R. 831 at p. 837. D.M Chirwa Human Rights under the Malawian Constitution 235-236; Ibik J, Restatement of African law: 3, Malawi I, The law of marriage and divorce (London: sweet and Maxwell, 1970; M.Chigawa, customary law and social development: De jure marriages vis a vis de facto marriages at customary law in Malawi (1987); Women and Law in Southern Africa Research and Educational Trust-Malawi (WLSA-Malawi): "Women's Rights to Land and Property under Malawian National Law ("The Global Initiative for Economic, Social and Cultural Rights, joint report the Human Rights Committee:), Just as they informed the Commission, they have helped in this judgment – as a source of law on this subject. The Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce ,as said many times, culminated in the Marriage, Divorce and Family Relations Act and hinges on section 24 (1) (b) (i) of the Constitution. Before the Act became law, there were two judicial pronouncements in the Court below on section 24 (1) (b) (i) of the Constitution.

Judicial Pronouncements on section 24 (1) (b) (i) of the Constitution.

Kamphoni v Kamphoni

Kamphoni v Kamphoni, a decision of the Court below is, probably, the more comprehensive consideration of section 24 of the Constitution and where many judicial decisions after the Constitution were considered. The earlier case, of course, was the decision of the Court below in *Chingadza v Chingadza* (2011) Matrimonial Cause No 97 (PR) (unreported). One issue raised in *Chingadza v Chingadza* in the course of the judgment is in this statement:

> From the reading of section 24[1][b][i] above the property that is distributable between a couple on dissolution of a marriage is that held jointly or owned by the parties. This means that the constitution recognizes that a party in a marriage relationship can have property which he or she solely hold or owns and such property would not be amenable to distribution on dissolution of the marriage."

The statement raised three issues. First was the interchange of the words "own" or "owned" not used in section 24 (1) (b) (i) of the Constitution. for the word "held." In *Kamphoni v Kamphoni,* the Court below perceived the word "hold" to be wider. Consequently, the word "own," if used to explain the right in section 24 of the Constitution would be narrowing the right. In *Kamphoni v Kamphoni,* therefore, the word "held" was interpreted broadly as to encompass more than ownership. Secondly, the statement, correctly in my judgment, recognised property spouses could actually own independently and separately. The third point relates to holding that property independently owned or acquired is not up for distribution under section 24 because it was not jointly owned.

The Court below in *Kamphoni v Kamphoni* thought differently. It held that the words "held jointly", on proper interpretation and reading the section as a whole included property

independently or separately acquired. In fact, in *Chingadza v Chingadza,* the Court "distributed" the property irrespective of proof of who actually owned what – opting for equal distribution:

> In distributing ... the court shall endeavour to achieve a semblance of equal sharing.

In *Kamphoni v Kamphoni,* the Court below decided that property separately or independently acquired was amenable for disposal for two reasons. First, the words "held jointly" were, based on international law and internationally decided cases interpreted very broadly. Said the Court:

> The same result is arrived by considering sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution. Section24 (1) (b) (i) of the Constitution, as seen earlier, refers to property held jointly. The word 'hold' does not entail ownership or possession. There is no basis for restricting the word 'held' to the two aspects. In interpreting the word 'held' in section (24 (1) (b) (i) of the Constitution, we must recourse, where it is necessary (under section 11 (2) (c), norms of international law and foreign case law. The cases of White v White, Haldane v Haldane and *Miller v: Miller: McFarlane v McFarlane* are such cases. Under norms of international law, the word 'held' in section 24 (1) (b) (i) of the Constitution must refer to all matters in Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women: "ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration." Section 24 (1) (b) (ii) of the Constitution requires courts on dissolution of marriage to afford a wife fair maintenance after considering the means of the husband. Those means must be property bequeathed to, received by or acquired by the spouse. Bequeathal, acquisition or receiving of the property by the husband, even in the husband's own name, does not protect such property from the powers of the court on dissolution of the marriage. It is, therefore, irrelevant, except on fairness consideration, to consider contribution by the spouse to the property, whether realty or personal, more especially for the wife.

Section 24 (1) (b) (ii) of the Constitution

Secondly, the Court below in *Kamphoni v Kamphoni* reasoned that under section 24 (1) (b) (ii) of the Constitution, a woman, after considering maintenance of children of the marriage, is entitled to maintenance. The section requires examining all the circumstances and the means of the husband. The Court below, therefore, concluded that the disposal power required a court to visit the property of the husband to afford maintenance for the children and wife. To such a disposal ownership by the husband is no defence to the court's disposal of property at divorce:

> The other notable exception arises from section 24 (1) (b) (ii) of the Constitution. This section now requires the Court to order maintenance for a wife, after consideration of the means of the husband and welfare of children:
>
> > Women have the right to full and equal protection by the law, and have the right ...on the dissolution of marriage, howsoever entered into— 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 means of the husband may include personalty and, as we shall see later, realty that the husband acquired after and before the marriage. The effect of section 24 (1) (b) (ii) is that all that property must be brought into the fore so that there is reasonable maintenance of the wife on dissolution of marriage. The equality formulas will, most likely, collapse, with or without the fairness principle where one spouse has the custody of children.

So much so that, after the Constitution of 1994, the Report of the Law Commission on Marriage and Divorce and before the Marriage, Divorce and Family Relations Act, 2015, the law was that all property "deriving" from marriage was up a fair disposal as of right to a woman for her maintenance. Ownership is irrelevant. This is how the right in section 24 (1) (b) (ii) of the Constitution is understood under international human right law. Said the Court in *Kamphoni v Kamphoni*:

> Indeed fairness is the dominant theme of international law that, as must be under section 11 (2) (c), inform the interpretation of the section. Malawi is a signatory to many such statutes. "Married Women of full age without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution" (Article 16 (1) of the Universal Declarations of Human Rights). "In case of Separation, divorce or annulment of marriage, women and men shall have the right to and equitable sharing of the property deriving from the marriage,"(Article 7 (d), Protocol to the African Charter on Human and Peoples Rights) "To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration,"(Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women). These provisions have been understood to comport equality of disposition *Kayambo v Kayambo, (Chimtedza v Chimtedza* (2009) Matrimonial Cause No 97 (PR) (Unreported); *C.M.N v A.W.M* [2013] eKLR. Our sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution talk about fairness. Fairness is not equality; equality is not fairness.

The Marriage, Divorce and Family Relations Act now affirms the constitutional position as understood in *Kamphoni v Kamphoni,* decided 2 years earlier. There is, however, a decision of this Court after the passing of the Act. That decision never considered the Marriage, Divorce and Family Relations Act, 2015.

The Marriage, Divorce and Family Relations Act

The Court below in *Sikwese v Banda* delivered its judgment on 4 June 2014, before the Marriage, Divorce and Family Relations Act, 2015. The appeal to this Court was registered on 23 October 2015. This Court heard the case on 10 February, 2016. This Court delivered judgment on 2 July, 2017. The chronology of events is important for the principles on which courts now must use on disposing property at divorce and the status of *Kayambo v Kayambo.* The Marriage, Divorce

and Family Relations Act, 2017, cements the principle of the Constitution that all property held during marriage is amenable for disposition on divorce and on the fairness principle and all property, irrespective of who owns it, is available for maintenance of spouses and children . It excludes the intention of the parties as a basis for disposition of wealth by establishing principles on which disposition should be made – overriding *Kayambo v Kayambo,* if it was binding authority, which it was not. The Marriage, Divorce and Family Relations Act confirms all principles stated in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* (2013) Civil Cause No 397 (HC) (PR) (Unreported). The Marriage, Divorce and Family Relations Act, 2017, is the latest and binding interpretation of the words "held jointly during marriage" that there is. The Supreme Court decided *Sikwese v Banda* – on the principles in *Kayambo v Kayambo* – and a narrow interpretation. The Supreme Court never considered significant changes brought by the Marriage, Divorce and Family Relations Act let alone the report of the Law Reform Commission which harbingered the Marriage, Divorce and Family Relations Act. The Supreme Court of Appeal was never referred to the change of law at the time of the appeal and at the time of hearing the case.

The National Assembly passed the Marriage, Divorce and Family Relations Bill, 2015 on 12 February, 2015. The President assented to the Bill on 10 April, 2015. The legislation was entered into the Government Gazette on 17 April, 2015 effective on a date to be put on a date put into the Government Gazette. The effective date was 3 July, 2015. The Act, however, could not in terms of the matters themselves, could not be applied to *Sikwese v Banda* because of section 4 of the Act; the marriage was contracted before the commencement date. The legislation, however, vide section 4 of the General Interpretation Act would aid the interpretation of section 24 (1) (b) (i) of the Constitution.

The Marriage, Divorce and Family Relations Act defines matrimonial property as to include a) a matrimonial home or homes; b) household property in matrimonial home or homes; c) any other property, whether movable or immovable, acquired during the subsistence of the marriage which by express or implied agreement between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property (section 2). The Act also defines "non-monetary contribution as meaning a contribution made by a spouse for the maintenance, welfare or advancement of the family other than the payment of money and includes (a) domestic work and management of the home; (b) childcare; (c) companionship; (d) the endurance of the marriage and (e) or any matter or form of contribution as the court may consider appropriate (section 2).

Section 74 of the Marriage, Divorce and Family Relations Act, 2017 is the critical provision on disposition of property after divorce:

> A court shall equitably divide and re-allocate property upon the dissolution of a marriage taking into account – (a) the income of each spouse; (b) the assets of each spouse; (c) the financial needs of each spouse; (d) the obligations of each spouse; (e) the standard of living of the family during the subsistence of the marriage; (f) the age and health of each spouse; or (g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

Section 74 of the Marriage, Divorce and Family Relations Act adopts the principle of fairness – albeit it uses the word "equitable" – in section 24 (1) (b) (i) of the Constitution. It refers to "property." It does not refer to disposition of "matrimonial property" as it does in section 71 (4)

of the Marriage, Divorce and Family Relations Act covering maintenance from property during a judicial separation:

> (4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders – (a) an order to make provision for the disposition of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse; (b) an order prohibiting alienation or disposition of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or disposition; and (c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

The omission of the words "matrimonial property" in section 74 of the Marriage, Divorce and Family Relations Act and using the general word "property" means that all property – including matrimonial property, as defined – is up for disposal under the section. So much so that, although on judicial separation under section 71 (4) of the Marriage, Divorce and Family Relations Act, matrimonial property, as defined, is subject to division and allocation, property, other than matrimonial property is not available at judicial separation. Even section 71 dealing with judicial separation refers to property generally – not necessarily matrimonial property. Section 71 (1) to (4) of the Marriage, Divorce and Family Relations Act considers property separate or belonging to an individual spouse only for property acquired after judicial separation. *A fortiori* property acquired during marriage is not separate property:

> (1) Where a judicial separation has been decreed under this Act, the spouses shall, from the date of the decree, and whilst the separation continues, be considered unmarried with respect to any property which each spouse may acquire individually during the period of separation and such property may be disposed of by each spouse individually in all respects as if he or she was not married to the other.
>
> (2) Where one of the parties dies intestate during the subsistence of a decree of judicial separation, the property owned individually by the deceased shall devolve as if the parties were not married to each other.
>
> (3) Subject to an agreement evidenced in writing or otherwise, where the parties to the marriage who were under judicial separation cohabit again with each other, all property to which either party acquired individually during the judicial separation shall be held to be separate ownership of that party.
>
> (4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders__

The Marriage, Divorce and Family Relations Act defines matrimonial property as to include a) a matrimonial home or homes; b) household property in matrimonial home or homes; c) any other property, whether movable or immovable, acquired during the subsistence of the marriage which by express or implied agreement between the spouses or by their conduct is used, treated or otherwise regarded as matrimonial property (section 2). The Act also defines "non-

monetary contribution as meaning a contribution made by a spouse for the maintenance, welfare or advancement of the family other than the payment of money and includes (a) domestic work and management of the home; (b) childcare; (c) companionship; (d) the endurance of the marriage and (e) or any matter or form of contribution as the court may consider appropriate (section 2).

Section 74 of the Marriage, Divorce and Family Relations Act, 2017 is the critical provision on disposition of property after divorce:

> A court shall equitably divide and re-allocate property upon the dissolution of a marriage taking into account – (a) the income of each spouse; (b) the assets of each spouse; (c) the financial needs of each spouse; (d) the obligations of each spouse; (e) the standard of living of the family during the subsistence of the marriage; (f) the age and health of each spouse; or (g) the direct and indirect contributions made by either spouse, including through the performance of domestic duties.

Section 74 of the Marriage, Divorce and Family Relations Act adopts the principle of fairness – albeit it uses the word "equitable" – in section 24 (1) (b) (i) of the Constitution. It refers to "property." It does not refer to disposition of "matrimonial property" as it does in section 71 (4) of the Marriage, Divorce and Family Relations Act covering maintenance from property during a judicial separation:

> (4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders – (a) an order to make provision for the disposition of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse; (b) an order prohibiting alienation or disposition of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or disposition; and (c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

Even section 71 dealing with judicial separation refers to property generally – not necessarily matrimonial property. Section 71 (1) to (4) of the Marriage, Divorce and Family Relations Act considers property separate or belonging to an individual spouse only for property acquired after judicial separation. *A fortiori* all property acquired during marriage is available for purposes of section 74 of the Marriage, Divorce and Family Relations Act:

> (1) Where a judicial separation has been decreed under this Act, the spouses shall, from the date of the decree, and whilst the separation continues, be considered unmarried with respect to any property which each spouse may acquire individually during the period of separation and such property may be disposed of by each spouse individually in all respects as if he or she was not married to the other.
>
> (2) Where one of the parties dies intestate during the subsistence of a decree of judicial separation, the property owned individually by the deceased shall devolve as if the parties were not married to each other.
>
> (3) Subject to an agreement evidenced in writing or otherwise, where the parties to the marriage who were under judicial separation cohabit again with each other, all

property to which either party acquired individually during the judicial separation shall be held to be separate ownership of that party.

(4) Subject to subsections (5) and (6), where a court grants a decree for judicial separation, the court may, in addition, make any one or more of the following orders – (a) an order to make provision for the disposition of any or all of the matrimonial property as may be necessary to prevent undue hardship to either spouse; (b) an order prohibiting alienation or disposition of the matrimonial property to any third party unless there is evidence of a mutual agreement between the parties permitting such alienation or disposition; and (c) an order that either party shall pay to the other party a periodical payment or a lump sum or supply necessities in kind to the requisite cash value as may be specified in the order, either for the benefit of that other party or for the benefit of the children of the marriage.

It is clear, therefore, that all property – as the Court below held in *Kamphoni v Kamphoni* – held by either or both spouses is up to disposition irrespective of what the parties intended at the time of purchase. The Marriage, Divorce and Family Relations Act requires that the Court looks at "the income of each spouse" and "the assets of each spouse."

Section 94 of the Marriage, Divorce and Family Relations Act considers prenuptial and postnuptial property and subjects such property too for division and re-allocation after divorce proceedings:

Subject to subsection (2), after a decree absolute of divorce or nullity of marriage, a court may inquire into the existence of ante-nuptial or post-nuptial settlements made by the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property, whether for the benefit of the husband or wife or of the children, if any, or of both children and the parties, as the court considers appropriate.
(2) No order for the benefit of the parties, or either of them, shall be made at the expense of the children.

The Marriage, Divorce and Family Relations Act, therefore, in furtherance of right to acquire property and right to fair disposition of property after divorce for maintenance of spouses and children covers all property, prenuptial, nuptial or postnuptial. The Marriage, Divorce and Family Relations Act completely, in line with the Constitution, changes the law on property upon divorce from what it was at common law and prior legislation. It, influenced by the Constitution and Part 1V especially sets all property amenable to fair disposition upon divorce. It sets the principles underpinning fair disposition.

The Court, in disposing property after divorce in doing so fairly or equitably must consider the factors or principles in section 74 of the Marriage, Divorce and Family Relations Act, 2015. The intention of the parties at any point is not one of the factors or principles. *Kayambo v Kayambo,* as we have seen, was directly overruled by a legislation. The intention of the parties was, therefore, specifically excluded in the legislation. The principle is ... The intention of the parties is excluded as a consideration at disposition of property after divorce and precisely because it is irrelevant how the spouses acquired the property. If the spouses, before a decree absolute, fail to come up with a

financial arrangement of their own, the Act treats all property in one pot to address the financial needs of the spouses and the children. *Kayambo v Kayambo,* therefore, was bad law *in limine* and later because of the Marriage, Divorce and Family Relations Act, 2015.

The purpose of the Marriage, Divorce and Family Relations Act, 2015, cannot be clearer. It is in the preamble. It is an Act to make provision for marriage, divorce and family relations between spouses and between unmarried couples, their welfare and maintenance, and that of their children, and for connected matters. For the welfare and maintenance of the spouses and the children all property of the spouses are in the purview for disposition and reallocation as enshrined in sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution.

Putting all assets or incomes for fair disposition does not, as is the opinion of some, contradict or jettison the right of husband and wife – including women – under section 28 (1) or a wife under section 24 (1) (a) (ii) of the Constitution to acquire property on their own or in association with others. On the contrary, sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution exposes all property disposable at divorce, irrespective of who and how it was acquired, held or owned. In *Sikwese v Banda,* this Court, approving the case of *Munthali v Mitawa* (2001) Civil Cause No 1584 (HC) (PR) (unreported), thought that by pooling assets and incomes together upon divorce for disposal under sections 24 (1) (b) (i) and section 24 (b) (ii) of the Constitution, the right to acquire property is undermined. A few important general points should be made before considering in detail this Court's decision in *Sikwese v Banda.*

First, the Court below decided the cases of *Munthali v Mitawa, Chingadza v Chingadza and Kamphoni* relied on in this Court after the 1994 Constitution and before the Marriage, Divorce and Family Relations Act, 2015. Secondly, this Court decided *Sikwese v Banda* after the 1994 Constitution and after the Marriage, Divorce and Family Relations Act, 2015. Consequently, if, as this Court suggests in *Sikwese v Banda,* these decisions exclude the property acquired by the husband from disposal at divorce, *Munthali v Mitawa* and *Chingadza v Chingadza* are *per incuriam* section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution combined and section 24 (1) (b) (ii) of the Constitution specifically. The combined effect of the two sections is that the court will dispose of all property held jointly – according to the narrow definition of the words "held jointly – and the husbands properties when considering the means and circumstances of the husband. Conversely, the husband's property will be considered separately for disposal under section 24 (1) (b) (ii) of the Constitution. Consequently, on a similar principle, *Sikwese v Banda* would be *per incuriam* sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution and, additionally, sections 71, 74 and 94 of the Constitution. In *Sikwese v Banda* this Court said:

> 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 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.

The combined effect of section 24 (1) (b) (i) and section 24 (1) (b) (ii) is that property held jointly by husband and wife and the property of the husband are up for disposal. This is reinforced by sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015. Section 24 (1) (b) (ii) presupposes that the husbands property was acquired separately. It, is therefore, an irrelevant consideration at divorce. Consequently, section 24 (1) (b) (i) and section 24 (1) (b) (ii) do not undermine or question a woman's right to property. It brings the husband's means into the fray. This is reinforced by section 74 of the Constitution because the Court at divorce considers the assets of both the husband and wife into the kit for equitable disposition – not distribution.

This court in *Sikwese v Banda,* without seeing the combined effect of sections 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution opines defines the words "held jointly' in the former. Said this Court:

> For property to be "held jointly", there must be an intention by the parties, either express or implied, that the property will be held jointly, or some contribution to the acquisition by the party claiming a beneficial interest in the property.

This definition, as we have seen, is an abstraction of statements on the resulting trust and contract in *Pettit v Pettit* and *Gissing v Gissing.* It is not a definition of property "held jointly." The epithet "held jointly' in section 24 (1) (b) (i) should be interpreted in the context of the whole section, the Constitution, legislation, norms of public international law, comparative foreign decided cases. The words " held jointly,' from this vista or panorama, is that, as between husband and wife, at divorce, it includes property acquired during marriage through industry of the spouses and, therefore, amenable to fair distribution as now unfolded in sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015.

Kayambo v Kayambo, decided as it was before the 1994 Constitution and certainly more than a century ago before thee Marriage, Divorce and Family Relations Act, 2015 is no longer binding on the Courts, short of saying it was, shortly after delivery, it was bad law. This statement in *Sikwese v Banda* is not a reflection of the law on disposal of property after the 1994 Constitution and the Marriage, Divorce and Family Relations Act, 2015:

> Furthermore, we do not share the view that section
>
> 24 (I) (b) (i) of the Constitution was intended to override the principles on disposition of property on dissolution of marriage set out in Kayambo v Kayambo as was suggested ... in *Kamphoni v 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 Kayambo v Kayambo, and specifically clarifies the position vis-a-vis women's rights.

Kayambo v Kayambo, as we know, was overrun by the legislature within weeks of its delivery by this Court. The position after annulment was that courts had no power to divide or dispose of property after marriage. Courts, however, under section 17 of the Married Women Property Act, 1882. Parliament legislated against *Kayambo v Kayambo* because, based as it was on Court of Appeal decisions, long overruled by the House of Lords, it was creating disposal of

property after marriage that had legislative basis – certainly, not the Married Women Property Act, 1882. *Kayambo v Kayambo,* therefore, was never the law before, 1994. *Kayambo v Kayambo*, if ever it was law, was supplanted by sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution that, for the first time, created a right to fair disposal and maintenance of spouse and children. If, there was uncertainty, which there was not, section 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015, defraying that doubt, with clarity and alacrity, puts all property between husband and wife, after regarding the welfare of children, up for disposal on equitable principles. *Kayambo v Kayambo* is, therefore, no law or just bad law.

The effect of sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution and sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015 is that as from the passing of the latter, at divorce, who owns or holds the property is an irrelevant consideration except to the extent that it is a circumstance to consider when disposing of property of the marriage fairly or equitably. This Court in *Sikwese v Banda* is not the law now:

> We agree with, and we affirm, the view expressed ...in *Chingadza v Chingadza* that section 24 of the Constitution envisages that a party in a marriage relationship can have property which he or she holds or owns in his or her own right, and such property would not be amenable to distribution [in accordance with section 24 (1) (b) (i) of the Constitution] on dissolution of marriage.

The Court below decided *Chingadza v Chingadza* after the 1994 Constitution but before the Marriage, Divorce and Family Relations Act, 2015. Until the Act, therefore, *Chingadza v Chingadza,* was, if it purported to exclude a husband's property from disposal based on holding or ownership, was *per incuriam* section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution whose effect was to release the husband's property in the kit. *Chingadza v Chingadza* is, certainly, not now law because of sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015, the active legislation when this Court decided *Sikwese v Banda.*

The decision of the Court below in *Munthali v Mitawa* was not itself a decision on property after divorce. It was a decision under the Wills and Inheritance Act, now repealed by section 114 of the Deceased Estates (Wills and Inheritance) Protection Act. It is, therefore, distinguishable, on this core, on the points under consideration, namely, property after divorce. It was actually a decision on section 24 (2) (c) of the Constitution. Moreover, it was dealing with proof of ownership of property of the marriage. Ownership or acquisition of property. For purposes of section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution and sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015, who and how one owns, acquires or holds what is irrelevant to the question of the property available for disposal for financial needs of spouses and children after divorce. For under the Constitution and under the Marriage, Divorce and Family Relations Act, 2015, the property is put jointly for disposal on equitable or fairness principles. However, the Supreme Court, without considering section 24 (1) (b) (ii) and sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015, said:

> In our view ... Munthali v Michael Mitawa, correctly summarized the import of section 24 of the Constitution when he observed as follows"...

> In our view *Munthali v Mitawa*, correctly summarized the import of section 24 of the Constitution when he observed as follow 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 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 by the parties, either express or implied, that the property will be held jointly, or some contribution to the acquisition by the party claiming a beneficial interest in the property.

On the contrary, section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution just like sections 71, 74 and 76 of the Marriage, Divorce and Family Relations Act, 2015 presuppose that property that comes into marriage is – in exercise of the right to acquire property in sections 24 (1) (a) (ii) and 28 (1) (a) – already acquired. All that section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution and section 74 of the Marriage, Divorce and Family Relations Act do is to pool – irrespective of source – all assets and income for fair disposition to meet the financial needs of spouses and children.

Banda v Sikwese

Sikwese v Banda is the latest decision of this Court on disposing property after divorce the Marriage, Divorce and Marriage Relations Act, 2015. The Marriage, Divorce and Family Relations Act, 2015, except in the manner to be discussed, is legislation covering disposal of property in accordance with section 24 (1) (b) (i) and 24 (1) (ii) of the Constitution. This Court in *Sikwese v Banda* never mentions the Act – at least on this point. The Act is an important guide in interpreting section 24 (1) (i) of the Constitution. This Court, therefore, overlooks that, for sections 71, 74 and 94 0f the Marriage, Divorce and Family Relations Act, 2015, *Kayambo v Kayambo* is not law. Legislation, according to section 48 (2) of the Constitution, is superior to judicial precedent.

Under section 11 (2) (c) of the Constitution, interpretation of section 24 (1) (b) (i) of the Constitution must, when available, deploy current norms of public international law and comparable foreign decided cases. Under section 11 (2) (b) of the Constitution, Part IV must be used to interpret the Constitution. The Court reverted to common law and equity provisions and relied on a decision – *Kayambo v Kayambo* – that legislation overturned within days of its decision. More importantly, this Court proceeded on that, apart from section 24 (1) (b) (i) of the Constitution, the Court below had power to distribute or divide property of the marriage. There is, as the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce observes and *Pettitt v Pettit* and *Gissing v Gissing* decided, no such legislation. At customary law, however, courts had jurisdiction to divide property for customary law marriages. All these points will be considered in detail and seriatim. It may be useful, therefore, to examine the reasoning in *Sikwese v Banda.*

In the important part of the judgment in *Sikwese v Banda* this Court begins by suggesting that the words "held jointly" *Chingadza v Chingadza* were matters of judicial interpretation in the Court below. It contrasts statements the Court below made in *Chingadza v Chingadza* and

Kamphoni v Kamphoni. The Court below in *Chingadza v Chingadza* never defined the words "held jointly." It, however, equated "ownership" to "holding." That was not interpretation of the word "held" used in section 24 (1) (b) (ii) of the Constitution. It was this introduction of ownership into the section that attracted the comments in *Kamphoni v Kamphoni* that the Court in *Sikwese v Banda* cites. So much so that the Court below in *Chingadza v Chingadza* was not dealing with the words "jointly" held *per se*. In *Chingadza v Chingadza,* the Court below said:

> The same result is arrived by considering sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution. Section24 (1) (b) (i) of the Constitution, as seen earlier, refers to property jointly held. The word 'hold' does not entail ownership or possession. There is no basis for restricting the word 'held' to the two aspects. In interpreting the word 'held' in section (24 (1) (b) (i) of the Constitution, we must recourse, where it is necessary (under section 11 (2) (c) regard norms of international law and foreign case law. The cases of *White v White, Haldane v Haldane* and *Miller v: Miller: McFarlane v McFarlane* are such cases. Under norms of international law, the word 'held' in section 24 (1) (b) (i) of the Constitution must refer to all matters in Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women: "ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration." Section 24 (1) (b) (ii) of the Constitution requires courts on dissolution of marriage to afford a wife fair maintenance after considering the means of the husband. Those means must be property bequeathed to, received by or acquired by the spouse. Bequeathal, acquisition or receiving of the property by the husband, even in the husband's own name, does not protect such property from the powers of the court on dissolution of the marriage. It is, therefore, irrelevant, except on fairness consideration, to consider contribution by the spouse to the property, whether realty or personal, more especially for the wife.

In *Kamphoni v Kamphoni* the Court below was querying that the section does not use the word "own." It uses the word "held." The Court below, therefore, sought to define the word "hold." And, without interpreting the words "held jointly," concluded that the word "hold is more encompassing than the word "own." The word includes ownership, possession …:

> In case of Separation, divorce or annulment of marriage, women and men shall have the right to and equitable sharing of the property deriving from the marriage,"(Article 7 (d), Protocol to the African Charter on Human and Peoples Rights) "To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration,"(Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women). These provisions have been understood to comport equality of disposition *Kayambo v Kayambo, (Chimtedza v Chimtedza* (2009) Matrimonial Cause No 97 (PR) (Unreported); *C.M.N v A.W.M* [2013] eKLR. Our sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution talk about fairness. Fairness is not equality; equality is not fairness.

So much so that the *ratio decidendi* of *Kamphoni v Kamphoni* on this point is that the word held in section 24 (1) (b) (i) of the Constitution does not mean ownership. So much that spouses can hold property without necessarily owning it with the logical conclusion that it is a question of fact to prove holding. It is not a matter of interpretation and, therefore, property proven as so widely held could be amenable for disposal, not distribution, under section 24 (1) (b) (i) of the Constitution. The Supreme Court did not discuss this point. So much so that the Supreme Court in *Sikwese v Banda* never overruled *Kamphoni v Kamphoni* on this point. The Supreme Court, however, considered the main reason in *Kamphoni v Kamphoni* for holding that all property is disposable by a Court.

The Court below read section 24 (1) (b) (i), 24 (1) (b) (ii) and 24 (2) (c) together as covering disposal – not distribution – of property after marriage at divorce or death. Read that way, section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution provide that all property should be brought to the court for disposal. By combining disposal of property with maintenance of the wife and children, sections 24 (1) (b) (i) and sections 24 (1) (b) (ii) of the Constitution visit all circumstances and means of the husband. Shorn of other wording section 24 (1) (b) (i) and (ii) of the Constitution reads:

> Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right ... on the dissolution of marriage, howsoever entered into ... to a fair disposition of property that is held jointly with a husband; and to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

Section 24 (1) (b) (i) and (ii) of the Constitution creates two Siamese twin rights – the right to fair disposal and maintenance. A court, therefore, must, at divorce, straight from the constitutional right in section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution, consider the two inseparable rights. In doing that the court must consider all the circumstances of the case and the means of the husband. It is for this reason that the Court below in *Kamphoni v Kamphoni* concludes that all property is on the table at divorce. Said the Court:

> The other notable exception arises from section 24 (1) (b) (ii) of the Constitution. This section now requires the Court to order maintenance for a wife, after consideration of the means of the husband and welfare of children:
>
> > "Women have the right to full and equal protection by the law, and have the right ...on the dissolution of marriage, howsoever entered into— 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 means of the husband may include personalty and, as we shall see later, realty that the husband acquired after and before the marriage. The effect of section 24 (1) (b) (ii) is that all that property must be brought into the fore so that there is reasonable maintenance of the wife on dissolution of marriage. The equality formulas will, most likely, collapse, with or without the fairness principle where one spouse has the custody of children.

The Court below in *Kamphoni v Kamphoni* detected the synergy between section 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution. This Court in *Sikwese v Banda* never considered the synergy. The Court, therefore, never overruled this point. The Court below in *Kamphoni v Kamphoni*, therefore, never interpreted the words "held jointly." In both passages in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* the Court never suggested that property acquired independently is property "held jointly. Rather property held independently could be property held jointly "for purposes of section 24" of the Constitution. This comported, without defining property "held jointly," that property acquired independently is one among many that could fall in the definition.

So much so that the statement of the Court below in *Chingadza v Chingadza* was more a definition of independent ownership rather than joint ownership. The judgment used the words "held" and "owned" interchangeably. So up to this point, the Court below and this Court had had not defined the words "held jointly." So much so that the definition of "held jointly" in section 24 (1) (b) (i) offered by the Supreme Court is the one offered. "Held jointly" in section 24 (1) (b) (i) of the Constitution, according to *Sikwese v Sikwese* envisages an intention. Said this Court:

> For property to be "held jointly, there must be an intention by the parties, either express or implied, that the property, that the property would be held jointly, or some contribution to the acquisition by the party claiming a beneficial interest in the property.

As we have seen earlier this is just an extrapolation of the principles in *Pettit v Pettit* and *Gissing v Gissing* – in the law of trusts – and *Kayambo v Kayambo* with all the doubts earlier expressed. But we can still examine the implications and inadequacy of this definition and consider the point mentioned earlier in detail later. For starts, the word intention does not occur anywhere in the section. Secondly, by seeking for intention of the parties to agree for joint ownership means that property would not be joint property if other people donated jointly to the spouses. Moreover, by restricting the intention and contribution at the time of acquisition, future agreement or contribution are excluded. In any case, we fall back to the very problems that *Pettit v Pettit* and *Gissing v Gissing* are a constant reminder. More importantly, this Court was introducing by the backdoor the decision in *Kayambo v Kayambo* that was no longer the law.

In *Kayambo v Kayambo,* as shown earlier, this Court relied on Court of Appeal decisions that were long overruled by the House of Lords. It required Parliament to reverse *Kayambo v Kayambo.* The House of Lords, but, perhaps, more importantly, determined, as confirmed in *Kayambo v Kayambo*, courts had no power, to dispose of property of marriage at divorce. Section 17 of the Married Women Property Act, was a procedure set up only to settle title disputes – an aspect caught in The Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce. For long, courts, had understood that provision that way until, of course, in the 1960s when the Court of Appeal, led by Lord Denning and others, thought that the section gave them more discretion in the matter. The House of Lords overruled all those decisions. The Malawi Parliament, therefore, intervened when, this Court, in *Kayambo v Kayambo*, following Court of Appeal decisions, without legislation gave courts power to order distribution of property. The legal position, therefore, until the 1994 Constitution, was that courts could not, in violation of

established rights in contract or equity, under section 17 of the Women Property Act, 1889. This did not affect customary law marriages.

At customary law, property of marriage was at divorce, divided between spouses to a marriage. I need not review all the cases on the matter. I just need to highlight the customary law angle to demonstrate that, if the section 24 (1) (b) (i) is as interpreted by this Court in *Sikwese v Banda*, it is a whole disrupt to customary law which, as we know, is, by the Constitution itself, sanctioned as law, just like legislation and common law. The Framers of the Constitution, just like legislators, work within the countenance of the legal system based on the knowledge of the laws of the system. Interpreting section 24 (1) (b) (i) of the Constitution as to transform customary law as not to divide property after marriage could not have crossed the legislators' minds. The attitude must be that of the Law Commission that section 24 (1) (b) (i), just like all sections in chapter IV of the Constitution, is just laying minimum legal standards for legislation and customary and common law to build on. This Court's definition is much more than overlooking customary law, it is preferring a legal position of equity and common law to customary law. There is, however, no legislation, until section 24 (1) (b) (i) and (ii), that authorized courts to distribute or divide property.

Consequently, just as in the United Kingdom and Ghana, the malaise, uncertainty and confusion on property of marriage, were ameliorated, respectively, by the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973, and Article 22 (2) and (3) of the Ghanaian Constitution, respectively. Section 24 (1) (b) (i) and (ii) of the Constitution, were the first provisions empowering courts to dispose of property after dissolution of marriage. In both legal systems, similar to ours, the Matrimonial Proceedings and Property Act 1970 and Part II of the Matrimonial Causes Act, 1973 and Article 22 (2) and (3) of the Ghanaian Constitution of the Ghanaian Constitution, which is almost word for word our Constitution, were interpreted broadly as to encompass all property acquired during marriage. In both cases, the developments were regarded epochal and transformative. These are comparative foreign decided cases which, according to section 11 (2) (c) of the Constitution, should have helped interpretation of rights under section 24 (1) (b) (i) and 2 (b) (ii) of the Constitution. It appears, Counsel never brought these cases to this Court.

This Court was instead given and relied on cases that never dealt with the right under section 24 (1) (b) (i) and (ii) – the right to fair disposal and maintenance of a spouse. *Kayambo v Kayambo,* relied on by this Court, was not a case of disposal of married property. *Kayambo v Kayambo,* like *Pettit v Pettit* and *Gissing v Gissing*, were decided when Courts in Malawi had no power to dispose property of marriage. They were cases based on the general law as to property. They were cases of pure contract law and trusts. So much so that, the principles expressed therein, just detailed general private law. They do not define joint ownership or joint holding of property. They illustrate more how one can acquire property and specifically how, when another party excludes another from a property, the other can establish entitlement to that property. That parties claim to own property together does not automatically mean that they hold the property jointly. Joint holding is not a common expression.

Property holding can be common or joint. In common holding, each party's right to a property, has as much of the property as to the share of contribution. Each party has a separate share. The property held in common, if not disposed *inter vivos* or by will, does not automatically transmute to the surviving party. It remains the property of the deceased and inures to the estate.

The result of the reasoning of the Court in *Sikwese v Banda* is that, matrimonial property is in fact held in common and not held jointly. This is not the case with joint holding or ownership.

In joint ownership, the parties own the whole of the property together and, unless disposed by will or *inter vivos,* the property, on intestacy, inures to the surviving spouse in full sure. So, under joint ownership, the test is not who owns the property. Rather, the question is, if there was intestacy, would the property inure to the surviving spouse? With the result, that if the answer is yes, the property is jointly owned.

This Court in *Sikwese v Banda,* even accepting, as the Court did, that there has to be an agreement that the property is owned jointly at the time of acquisition, never suggests whether the property in marriage was held in common or jointly. On the other hand, if it was common ownership, the spouses would be holding the property of the marriage in common and in separate shares. So much so that, if there is a dispute about the proportion of shares or what property is owned by what spouse, the result would be exactly what section 24 (1) (b) (i) states that the woman is entitled to a fair disposal to property held commonly. All property, irrespective of who acquired it or owned what, would be on the table, for the property to dispose of fairly. The result would be the same, if the property of the marriage was held to be held jointly. As we see shortly, under the Deceased Estates (Wills and Inheritance) Protection Act, 2011, just as in the repealed Wills and Inheritance Act, if a spouse dies intestate, the property, even if acquired by the husband, inures to the surviving spouse so much so that it can be stated without a shadow of doubt that, by definition, the property is jointly owned.

There can, therefore, be only common or joint ownership. It does not matter, therefore, whether the property is held in common – entailing separate ownership – or jointly – entailing that it belongs to the surviving spouse at intestacy. The effect of sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution is that, unless parties agree, all such property is on the table for fair disposal under section 24 (1) (b) (i) of the Constitution.

This Court in *Sikwese v Banda* overlooked the synergy in sections 24 (1) (b) (i) and 24 (1) (b) (ii). The sum total of these two sections is that, at divorce, the whole of the property derived from marriage is available, on the principle of fairness, for the betterment of the spouses and their children. Under section 11 (2) (b) of the Constitution, the Court is enjoined to use chapter 1V provisions to interpret the Constitution and, therefore, each other. Section 24 (1) (b) (ii) because of its pervasiveness requires the property of the husband to be drafted in so that the court must make appropriate maintenance orders. *A fortiori* all property of the husband, however acquired, even if singly, is up for disposal. Section should have aided the Court, together with international law and foreign cases, to interpret the right in section 24 (1) (b) (i) of the Constitution. The converse is also true

Talking about international law, the right to fair disposal at divorce, is expressed under international law to cover property "derived" from the marriage. So much so that, if these international provisions were considered, the court would have construed the words very differently. The Court below was in fact assisted by them. The Court of Appeal, never discussed them. In *Kamphoni v Kamphoni* the Court below, on this aspect, said, emphasis supplied:

> Indeed fairness is the dominant theme of international law that, as must be under section 11 (2) (c), inform the interpretation of the section. Malawi is a signatory to many such statutes. "Married Women of full age without any limitation due to race,

nationality or religion have the right to marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution" (Article 16 (1) of the Universal Declarations of Human Rights). "In case of Separation, divorce or annulment of marriage, women and men shall have the right to and equitable sharing **of the property deriving from the marriage**,"(Article 7 (d), Protocol to the African Charter on Human and Peoples Rights) "To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration,"(Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women).

It must be important, because of section 11 (2) (c), from now on, that Counsel of both parties, where interpretation of the Constitution occurs, that, apart from norms of public international law, brings as far as is possible, foreign decided cases bearing on a provision. In *Kamphoni v Kamphoni,* this Court alluded to the importance, where there is uncertainty, of referring to what transpired before and during the passing of the Constitution. For legislation, it is not what was actually said in the debates but what the Minister said was in the bill. It is very difficult and complex, however, for the Constitution which, as far, as we can recollect, was passed on the generalities rather than the specifics. Such recourse, however, can only swell costs. Such recourse, however, would be worthwhile where, especially in this case, human rights may be misunderstood or misinterpreted. In all other cases, it will be equally important for courts to avail foreign decided cases on a specific right.

From foreign decided cases, it is platitudinous that the words "held jointly" in section 24 (1) (i) of the Constitution cannot be confined to narrow description. The Ghana Court, using the purposive approach, determined that Article 22 (2) and (3) of the Ghanaian Constitution Article 22 (2) and (3) of the Ghanaian Constitution of the Ghanaian constitution, in pari materia and in pari passu with our section 24 (1) (b) (i) of the Constitution, covered all property and reversed previous uncertainty on relying on section 17 of the Women Property Act to extract equity and common law to deal with matrimonial property – as defined by Lord Denning. Going by that definition, matrimonial property would be property held jointly for purposes of section 24 (1) (1) (b) (i) of the Constitution. Consequently, confining the words "held jointly" to the common law (law of contract) and equity (resulting trust) is to confine the words "held jointly" to only one branch of law.

The concept of matrimonial property, if part of the law, would make such property "held jointly." The House of Lords, as seen, rejected the concept as part of the common law and could not be used to confer courts power to divide property contrary to law and equity. In England and Wales, it is Lord Denning's approach, rejected by the House of Lords, which resulted, on the recommendation of the Law Commission, which Parliament adopted. Curiously, the Report of the Law Reform Commission on the Review on the Laws on Marriage and Divorce adopted it and introduced it, to even a broader than Lord Denning's definition, in the Marriage, Divorce and Family Relations Act. The Marriage, Divorce and Family Relations Act defines matrimonial property as to include a) a matrimonial home or homes; b) household property in matrimonial home or homes; c) any other property, whether movable or immovable, acquired during the subsistence of the marriage which by express or implied agreement between the spouses or by

their conduct is used, treated or otherwise regarded as matrimonial property (section 2). This definition, broader than one adopted in *Sikwese v Banda,* if considered by this Court, would have informed the Court that, in relation to section 24 (1) (b) (i) and (ii), disposal of property of marriage is broader than just contract and equity.

Counsel never cited section 2 of the Marriage, Divorce and Family Relations Act, 2015; this Court never referred to this aspect in resolving the issue of joint ownership under section 24 (1) (i) of the Constitution. At the time of hearing the appeal, the Marriage, Divorce and Family Relations Act, 2015, was in situ. Most certainly, it would not have been applied to *Sikwese v Banda* because of section 3 of the Marriage, Divorce and Family Relations Act, 2015. Parties married before the Act. In the absence of the Act, parties had to be treated as under sections 24 (1) (b) (i) and (ii) of the Constitution where all property of the marriage is on the table for disposal and maintenance of the spouses and the children – with the same result as the Marriage, Divorce and Family Relations Act, 2015. The effect of the definition proferred in *Sikwese v Banda* on the Marriage, Divorce and Family Relations Act, 2015 were not analysed precisely because the Marriage, Divorce and Family Relations Act, 2015 was never cited to and considered by this Court.

Under section 24 (1) (b) (i) and (ii) of the Constitution and sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015 all property, irrespective of who and when acquired it, is on the table for disposal for both spouse and children. Under these broad provisions, the property in the family is disposed of irrespective of who owned or held it. The *Sikwese v Banda* definition would, for posterity, defeat the legislation and ultimately the Constitution. It is very clear from section 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution and sections 2, 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, 2015 that all property derived from the marriage was to be subjected to court orders. There was no intention to restrict it to separate ownership or holding as postulated in the Court below *Munthali v Mitawa* and in this Court in *Sikwese v Banda.*

While the Marriage, Divorce and Family Relations Act, 2015 is clearer, it is this clarity in legislation and definition of matrimonial property that should have informed the definition of "held jointly" in section 24 (1) (b) (i) of the Constitution. Section 4 of the General Interpretation Act provides:

> Where the interpretation of any word or expression is defined in this or any other written law, such definition shall extend, with necessary modifications. To the interpretation of the grammatical variations and cognate of such word or expression.

What was intended for disposal and maintenance in sections 24 (1) (b) (i) and (ii) of the Constitution was property of the marriage – matrimonial property, as defined in section2 of the the Marriage, Divorce and Family Relations Act, 2015. Matrimonial property is property 'jointly held' under section 24 (1) (b) (i) of the Constitution. This is for another reason. As we have seen, the expression akin to "held jointly' in a statute has been interpreted in *Tobin v. Tobin,* 89 Okl. 12, 213P. 884 and Bruce v. Bruce, 141 Oki. 160, 285 P. 30, 36) to mean all property acquired through the industry of spouses until dissolution. These decisions, with *Mensah v Mensah,* are comparable foreign decided cases that must aid interpretation of section 24 (1) (b) (i) and (ii) of the Constitution.

This formulation, is in many ways fair and even handed. By not concentrating on the source of the assets, men will feel that it is unfair, but precisely because, through tragedies of history, men have, by accident or design, been in placed on a social construct where, as bread earners, they are likely during marriage to acquire assets. But, that is the point of unfairness. Great unfairness accompanies women by denying women opportunities and resources and confining them accidentally and incidentally to traditional roles – home, family and child minders. Courts are now recognising this. In India in ... the court held that a woman's work in the home is more than that of a menial labourer. Equally, in Kenya, courts have held that work by women should be paid for like any other. This is precisely because, consigning them to home makers and baby minders, women miss opportunities to advance to improve their access to resources and opportunities now tilted disproportionately in favour of men. It is inherently unfair, therefore, when marriage terminates by divorce, that final allocation of assets, garnered during marriage, should, especially where women are denied access to opportunities and resources, hinge on how the property came for use into marriage. This interpretation is even handed.

A woman who, per force, earns or brings the same or more in the family during marriage is equally required to bring all into the kit during divorce for a husband who earns the same or less than a husband for fair disposition. Consequently, the right – to fair disposition - which, on the face of it, to be created for women, is a right that is, in fact and in law, unisex – fair to husbands and wives alike.

The right to fair disposition and maintenance of a wife and children in section 24 (1) (b) (i) and (ii) is a departure from the legalistic approach where disposition of property on divorce based on legal or equity postulations as to ownership of property. Now, under section 24 (1) (b) (i) and (ii) of the Constitution of the Constitution, abandoning the source of property, all property is in the pot to work out a win-win for spouses and children on the fairness principle. It is, not, as others may think, that the source of property is irrelevant. As legislation, after the 1994 Constitution, in case of Malawi, and after the precarious position in *Pettitt v Pettitt* and *Gissing v Gissing,* shows, acquisition of or contribution to property acquired after marriage, is, like other circumstances legislated, one, and not only one, among many factors in the matrix of fairness.

In Malawi, the effect of section of sections 24 (1) (b) and (ii) of the Constitution after 1994 was discussed at length in the Court below in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* the Supreme Court in *Sikwese v Sikwese* The Court below, in these case, correctly, in my judgment, held that sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution were epochal and created a right for women for disposal and maintenance of spouses and children over all property held during marriage. It determined that in the specific case *Kayambo v Kayambo* would not apply for two reasons. First, because *Kayambo v Kayambo* dealt with rights under the Marriage Act while marriages in a majority of cases in the Court below were appeals from lower courts on marriages under customary law disposition of which of matrimonial property was governed by customary law. The Court below, therefore, proceeded on the principle of fairness – not on the intention of the parties – over all properties. Secondly, the Court below in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* thought that *Kayambo v Kayambo,* if still law, was taken over by sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution. Under the Constitution, disposition of matrimonial property was to be governed on the principle of fairness – not on the intentions of the parties at the acquisition of the property as *Kayambo v Kayambo* stated in the Supreme Court.

Kayambo v Kayambo actually still remains in our law reports without a rider that this was a case – the first and probably the last – where the legislature intervened to overrule, by legislation, a decision of the Courts – in this case the Supreme Court of Appeal. So much so that *Kayambo v Kayambo* is not bad law – as the Supreme Court stated in *Sikwese v Banda.* It certainly, in view of the Constitution and the Marriage, Divorce and Family Relations Act, not law at all – on this point. The Court below in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* correctly decided, that *Kayambo v Kayambo,* if still law, which it was not, should be buried in the archives or limbo of lost causes. The general principle remaining is the one in section 24 (1) (b) (i) and 24 (1) (b) (ii of the Constitution – on divorce, just as during intestacy, all property held during marriage – jointly - is available for disposal and maintenance of spouses and children.

There is quite some subtle hubris in the suggestion that the Constitution was confirming or not confirming what the law – apart from the Constitution – was or was not. Such proposition could lead to the supposition that the Constitution, somehow, is subservient to laws other than itself. The Constitution does not say that about itself. It actually provides that laws prior – legislation or otherwise – were made under it. That puts previous laws in their correct position viz-a-viz the Constitution – subservient law.

This means that previous laws have to be tested for constitutionality: laws consistent with it survive; laws inconsistent with it are either void *ab initio* or upon declaration by courts. The former do not need a declaration by the Courts; they are unenforceable by the Courts at all. The latter, mostly affecting Part IV of the Constitution, have to pass through the constitutional muster. Sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution create almost derogable rights that can be limited by legislation and common and customary law. In that sense, the question is applying the test of the intention of the parties at the time of acquisition of the properties concomitant with fair disposition of property after the 1994 Constitution? The Court below, in *Kamphoni v Kamphoni* and *Kishindo v Kishindo* thought that it was not. It is unnecessary to discuss that now because of sections 71, 74 and 94 of the Marriage, Divorce and Family Relations Act, not considered at all by the Supreme Court in *Sikwese v Banda* on this point, that make all property of the spouses, prenuptial or postnuptial, available for disposition and maintenance of spouses and children and effectively overrunning *Kayambo v Kayambo* and all cases on this subject. In any event. *Kayambo v Kayambo* was overruled by Parliament within weeks of the Supreme Court decision. Sections 24 (1) (b) (i) and section 24 (1) (b) (ii) of the Constitution unify how property during marriage is treated as a right to fair disposal and maintenance of property acquired at divorce and at death.

The Deceased Estates (Wills and Inheritance) Protection Act

The situation at divorce was considered at length and in detail to demonstrate that, except for a few aspects, there is no difference between disposal of property by termination of marriage or by death where there is intestacy. Sections 24 (1) (a) (ii), 24 (1) (b) (i) , 24 (1) (b) (ii) and 24 (2) (c) of the Constitution, dealing with acquisition of property, disposal and maintenance at divorce and protection of property at inheritance must be read together to resolve the problems in this case. Marriage creates inuring property rights and rights that endure till death unless terminated by divorce. The principles of disposal are almost unified at termination by divorce or death on intestacy. The right in sections 24 (1) (a) (ii) and 28 (1) of the Constitution 24 (2) (c) of

the Constitution encompasses the right of women to property acquired during marriage. Sections 24 (1) (b) (i) and sections 24 (1) (b) (ii) of the Constitution preserves the right of women to property acquired during marriage after divorce. Section 24 (2) (c) preserves the right of a woman at inheritance. The Deceased Estates (Wills and Inheritance) Protection Act proceeds from section (24 (2) (c) of the Constitution.

In this matter, the deceased having died intestate, assuming he had any property in the estate, sections 16 to 17 of the Deceased Estates (Wills and Inheritance) Protection Act apply. Section 16 of the Deceased Estates (Wills and Inheritance) Protection Act provides:

> If a person dies without having left a will valid under section 6, there shall be an intestacy in respect of the property to which he or she was entitled at the date of his or her death: Provided that if the deceased person left a will which does not dispose of all his or her property there shall be an intestacy in respect of the property which is not disposed of by will.

Section sections 16 of the Deceased Estates (Wills and Inheritance) Protection Act must be read with sections 4 of the Deceased Estates (Wills and Inheritance) Protection Act:

> Except as provided for in this Act, no person shall be entitled under any other written law or under customary law to take by inheritance any of the property to which a deceased person was entitled at the date of his or her death

Beyond these provisions, however, is the Constitution generally and Part IV provisions of it specifically. The Constitution enjoins us to consider itself as final arbiter in all disputes. Specifically, the Constitution enjoins us, in the application and interpretation of it and any law, to be informed by it generally and Part IV of it specifically. In a legal arrangement based on rights, before considering anything else, it must always be important to start from rights and then consider how laws impact rights. Consequently, sections 4, 16 and 17, dealing with inheritance must commence from rights in the Constitution. Section 14 (2) of the Constitution, concerning women, specifically states:

> Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as ... deprivation of property, including property obtained by inheritance.

There must be a duty to protect women from deprivation of property – property obtained by inheritance. To this end, the Deceased Estates (Wills and Inheritance) Protection Act, not in name only, but by its preamble as well, is in tandem:

> An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the

public; the functions of courts in relation to deceased estates and for other connected matters.

Women, as spouses, on intestacy, inherit property as immediate persons and spouses under section 17 and 18 of the Deceased Estates (Wills and Inheritance) Protection Act. It might be useful, therefore, to appreciate the scope of section 17 and 18 of the Deceased Estates (Wills and Inheritance) Protection Act. Sections 17 of the Deceased Estates (Wills and Inheritance) Protection Act:

(1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependents of the intestate and their shares shall be ascertained upon the following principles of fair disposition -

(a) protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for disposition can provide such protection;

(b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;

(c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses and the children of the intestate;

(d)as between the surviving spouse or spouses and the children of the intestate their shares shall be determined in accordance with all the special circumstances including (i) any wishes expressed by the intestate in the presence of reliable witnesses; (ii) such assistance by way of education or other basic necessities any of the spouses or children may have received from the intestate during his or her lifetime; and (i) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate, and in this regard the surviving spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child, but in the absence of special circumstances the spouses and children shall, subject to subsection (3) be entitled to equal shares;

(e) as among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the
intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives:

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.
(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

Under section 3 of the Deceased Estates (Wills and Inheritance) Protection Act, unless context otherwise requires, "child" means, a child of the deceased person, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother ; "dependant," in relation to a deceased person means a person, other than a member of the immediate family, who was maintained by that deceased person immediately prior to his or her death and who was - (a) his or her parent; or (b) a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself; "hardship" in relation to any person means deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, and in the case of a minor includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live; "household belongings" means articles and effects of every description used in, and for the purpose, of maintaining and enjoying a home and family life; "inheritable property" includes all causes of action which survive the deceased, clothing and institutional money but does not include any property which passes to another person by right of survivorship; "intestate property" means property in respect of which there is an intestacy under section 16; "immediate family", in relation to any person, means that person's spouse and children; "minor" means a person who has not yet attained the age of eighteen years unless: (a) the person is lawfully married; (b) the person is heading a household and is not below the age of fourteen years; or (c) the person holds property in his or her own right in accordance with this Act or any other written law; "parent" includes an adoptive parent, foster parent or any other person acting in whatever way as parent; "spouse" means a person's husband or wife in relation to a marriage recognized under section 22(5) of the Constitution; and "will" means a legal declaration by a person of his or her wishes or intentions regarding the disposition of his or her property after his or her death.

A spouse, where the deceased left an estate without a will, therefore benefits, together with children and dependants as first circle. Dependants – parents and other minors – are only entitled to dependency. Once dependency, like for everyone in the first circle, is resolved, the remnant is inherited only by a spouse and children in equal shares. Dependants are not entitled to anything more or less than dependency. As protection of the estate, as long as a spouse, children are there, no other person, siblings or distant relations are entitled to the estate. Equally, the whole estate is inherited by the one remaining in the circle. The estate, in the absence of a circle, cascades as in sections 18 of the Deceased Estates (Wills and Inheritance) Protection Act:

> In the absence of the beneficiaries to the estate of an intestate referred to under section 17, the whole of such property comprising the estate of the intestate shall be distributed as follows
> (a) the grandchildren of the intestate shall, if they survive the intestate, be entitled in equal shares;
> (b) if none of the persons referred to in paragraph (a) survive the intestate, the brothers and sisters of the whole blood of the intestate shall, if they survive the intestate, be entitled in equal shares and failing any surviving brothers and sisters of the whole blood of the intestate, the brothers and sisters of the half blood of the intestate shall, if they survive the intestate, be entitled in equal shares;
> (c) if none of the persons referred to in paragraphs (a) and (b) survive the intestate, the grandparents of the intestate shall, if they survive the intestate, be entitled in equal shares;
> (d) if none of the persons referred to in paragraphs (a), (b) and (c) survive the intestate, the uncles, aunts, nephews and nieces of the intestate shall be entitled in equal shares;
> (e) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, other relatives who are in the nearest degree of consanguinity shall, if they survive the intestate, be entitled in equal shares;
> or (f) if none of the persons referred to in paragraphs (a), (b), (c) and survive the intestate, the Government shall be entitled to take title in the property comprising the estate of the intestate.

A spouse, where the deceased with more spouses has a remnant, is entitled to and only to all in property in the spouse's locality. Where spouses live in the same locality, under section 17 (3) of the Deceased Estates (Wills and Inheritance) Protection Act, inheritance depends on whether there was and, if there was, the amount of contribution to the estate.

There was no intestacy

In a majority of cases, the question becomes ascertaining whether the deceased has left an estate at all for disposition. Put differently, the question becomes, whether the specific property is part of the deceased person's estate. This is implicit in section 4 of the Deceased Estates (Wills and Inheritance) Protection Act. This depends on whether the property was owned jointly or commonly. This is implicit also in the definition of matrimonial property at common law – and now under statute. This arises, more often, where the property was acquired jointly – even if it be in the name of one spouse. For, as long as the four unities of ownership (*AG Securities v Vaughan* ([1990] 1 AC 417; *Corin v Patton* ((1990) 169 CLR 540; *Meyer v Riddick* ((1990 60 P & CR 50; *Wiseman v Simpson* ([1988] 1 WLR 35; *Davis v Johnson* ([1979] AC 264), the legal title matters less:

> Legal title is generally unimportant: it is a paper title that is held on trust, meaning that the legal title denotes the party with administrative and fiduciary responsibilities over the land, whereas the equitable title denotes the person who may benefit from the land ('Joint Tenancies v Tenancies in Common,' Teacher,

Law. (November 2018). Joint Tenancies v Tenancies In Common. Retrieved from https://www.lawteacher.net/lectures/land-law/co-ownership/joint-tenancy-v-tenancy-in-common/?vref=1

With joint ownership, as against common ownership, the principle is survival. On the death of a joint owner, the property devolves to the surviving owner automatically. This is because, unlike an owner in common, a joint owner does not have separate shares; the property as a whole belongs to owners jointly. Each owner is equally and "wholly entitled on the whole estate" (*Burton v Camden London Borough Council* ([2000] 2 AC 339; *Wright v Gibbons* ((1949) 78 CLR 313; *Hammersmith and Fulham London Borough City* ([1992] AC 478).

This case resolves by determining whether, in the absence of a will, there was intestacy and in respect of which property. On the first part, there was no intestacy under section 4 of the Deceased Estates (Wills and Inheritance) Protection Act in respect of all properties under consideration. In properties other than Plots SAL/176 and 177, the 1st appellant's own evidence, punctuated by evidence, the deceased gave them *inter vivos* to children. The gift was not *donation mortis causa*. The deceased divested property in them to the donees. There cannot, therefore, be any intestacy in relation to them. There was only one concern which, based on the evidence of the conduct of the 1st appellant, the appellant's own witnesses and the respondent's evidence, resolves in favour of the donee. If the appellant was, as is probably suggested, a joint owner to those properties, the gifts could be vitiated if, as is suggested, the deceased gave the gifts *inter vivos* without her knowledge and/or consent. On the evidence, as I have said, it looks like the 1st appellant, *compos mentis*, stood by, encouraged and approved the decisions of the deceased in relation to that property. There is, therefore, an estoppel. There cannot, therefore, be administration of those properties; there was no intestacy on them. Equally, there was no intestacy in relation to the land at Salima market.

Plots SAL/176 and 177, on the principle of survivorship viz-a-viz joint property, inured to the first appellant automatically and directly on the death of the deceased. There is enormous evidence, not contradicted at all, that the appellant and deceased on their own acquired the undivided Plots SAL/176 and 177 by themselves. They were, therefore, at law, joint owners of the property. They owned the whole plot wholly and indivisibly as one. All the four unities were met. Of course, the plots were in the deceased's name. That does not matter. They were joint owners all the same. Of course, the plots were subdivided later. That subdivision, on the evidence, did not result in separate parcels of land to the appellant and the deceased who enjoyed and used the two plots one as a home and another as a business venture with no limitation on one another on the land. There is just one complication which, on balance, I resolve in favour of the 1sappellant and against the 4th respondent.

The 1st appellants' and deceased persons allowed the 4th respondent, as the deceased's wife, to live in the house. As stated in *National Provincial Bank Ltd v Ainsworth,* using a premise as a matrimonial home and on the plot does not per se confer any title to the land or the house which, effectively, was owned by the appellant and the deceased and eventually automatically inured to the appellant on the death of the deceased. The appellant and the deceased only shared the house as a matrimonial home. A matrimonial home need not necessarily be owned by a spouse. In most cases, matrimonial homes are probably rented. Ownership of a rented property of another cannot be derived from that spouses rented the house of another as a matrimonial home. Obviously,

if there was a lease, a spouse can claim to remain in the house until expiry of the lease and a spouse, can, during divorce, claim maintenance from the resources of the marriage in accordance – now with section 74 of the Marriage, Divorce and Family Relations Act, where applicable, or under the fairness principle – not so during inheritance. The 4th appellant, therefore, secured no interest in the land or the matrimonial house. The result, assuming that the plots, bar joint ownership betwixt the appellant and the deceased, were not part of the deceased estate.

The 4th appellant never contributed to the plots or the buildings

The situation here is where a spouses, in a polygamy, where the man, not the woman, had multiple spouses – polygyny, as opposed to polyandry, a woman with multiple spouses – lived in the same locality. According to the Deceased Estates (Wills and Inheritance) Protection Act, disposition depends on contribution to the estate. The evidence in the Court below was crystal clear. The 4th respondent was not there and, therefore, contributed nothing to the plots or premises that turned out to be her matrimonial home many years after the appellant and the deceased acquired and developed properties the subject of contestation. Per force, the 4th respondent, was entitled to have a matrimonial home built at her house.

According to section 17 (1) (a) of the Deceased Estates (Wills and Inheritance) Protection Act, a spouse would claim accommodation from the deceased estate, on the dependency principle. If the marriage dissolved at divorce, at customary law, a court would order a husband to build a house for the deceased. The right, however, does not survive death. It survives, if at all, only as a disposition issue under dependency in section 17 (1) (a) of the Deceased Estates (Wills and Inheritance) Protection Act. Where, therefore, there is a remnant estate, all in the circle – including the appellant– are treated under section 17 of the Deceased Estates (Wills and Inheritance) Protection Act.

Reverting to the case at hand, the question as to who owned Plots SAL/176 and 177 at the death of Selemani Mustafa resolves on this principle. When the first wife died, she was not part of Plots SAL/176 and 177. Intestacy issues or inheritance questions generally never arose as between her and Plots SAL/176 and 177. Moreover, because of Section 17 (2) of the Wills and Inheritance Act and Section 17 (2) of the Deceased Estates (Wills and Inheritance) Protection Act, the first wife would not have been entitled to property in the locality of a different spouse. Consequently, her children, based on this, would not have inherited from anything connected with Plots SAL/176 and 177. Plots SLA/176 and 177, therefore, belonged and remained as property jointly acquired in the marriage between Emily Mustafa and Selemani Mustafa. The 1st appellant, therefore, inherited it to the exclusion of her children, adopted or not.

This acquisition is not undermined by that Flora Mustafa in 1986 was also married to Selemani Mustafa and actually lived in the house jointly acquired in the course of marriage of Emily Mustafa and Selemani Mustafa. In respect of Flora Mustafa, albeit she lived in the matrimonial home, Plots SAL/176 and 177 was, for legal purposes, prenuptial property. It was after all, a matrimonial home; and that is all it was.

Property does not arise or inure from just use of a matrimonial home. A matrimonial home, technically, means a place where husband and wife consummate and cohabit after marriage. A matrimonial home, may not be property owned by husband and wife. A matrimonial home could be leased or licensed property or residence. It need not be owned by the parties. Ownership of property depends on acquisition of it. Consequently, Flora Mustafa gained no title to Plots

SAL/176 and 177 just by using it as a matrimonial home. Equally, the children of the first wife, namely, the 1st, 2nd and 3rd appellants never acquired ownership by virtue of living in the house after their mother died. The property remained as property acquired jointly in marriage between Emily Mustafa and Selemani Mustafa. That position was not affected by the death of Mr. Selemani. The property in Plots SAL/176 and 177 in Salima District Town remained property jointly acquired between Emily Mustafa and Selemani Mustafa and, based on common and joint ownership at death and Section 17 (2) of the Deceased Estates (Wills and Inheritance) Protection Act, inured to Emily Mustafa by virtue of death. Since the property inured to Emily Mustafa as described, there is no need for it to be administered.

It is not, therefore, necessary for an administrator to be appointed for property jointly owned by Emily Mustafa and Selemani Mustafa. The court below, properly concluded that other disposals by Selemani Mustafa were gifts *inter vivos* they were not gifts *mortis causa.* They were, therefore, not subject to administration. In all, therefore, I allow the appeal and set aside all orders in the court below. I grant the injunction sought by the appellants. I, consequently, dismiss the defendant's counterclaims. The appellants are entitle costs for appeal here and the court below counterclaims.

Made this 6th day of June 2021.

E.B. Twea SC

JUSTICE OF APPEAL

Dr. J.M. Ansah SC

JUSTICE OF APPEAL

D.F. Mwaungulu SC

JUSTICE OF APPEAL