

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REIGSTRY
CIVIL APPEAL NO 23 OF 2007**

BETWEEN

YOHANE LUKA APPELLANT

AND

BETILINA MAGWERO RESPONDENT

CORAM : CHOMBO, J.

: Appellant, unrepresented, present
: Respondent, unrepresented, Absent
: Kabaghe, Court Reporter
: Njirayafa, Court Interpreter

JUDGMENT

This is an appeal after dissolution of marriage and distribution of property by the lower court. The appellant was not satisfied with the distribution of the property by the lower court, thus the appeal.

The respondent, according to the evidence on record, refused to accept service of the summons on 16 April 2008. She informed the appellant that she had no money to travel to court. The appellant therefore sent money to the respondent through a workmate, Milton Banda, but she sent back the money to the appellant and did not come to Court as required. The Court therefore granted the appellant's application to proceed in the absence of the respondent.

The three grounds of appeal, which were served on the respondent so she is fully aware of them.

The grounds of appeal, summarized, are as follows:

1. that the lower court erred in awarding the only two houses that the appellant built to the respondent.
2. that since the dissolution of the marriage with the appellant the respondent has remarried and her husband intends to sell the house and raise money to resettle in Botswana.
3. that as a result of the Court's decision to award both houses to the respondent the appellant has no where to stay.

The record shows that the house in dispute was allocated to the children born between the appellant and the respondent; and the appellant has no problems with that. The main contention about the house, from the evidence on record, is that another man is enjoying the fruits of his labour whilst he has nowhere to stay.

The appellant stated that his children are without support from his wife's new husband and that he continues to support them. His desire is that he should be allowed to occupy the house so that he can keep and look after his children under his own roof. The appellant submitted in Court that his children only get support when they visit him which is not often because their mother does not allow them to do so.

In considering the appeal, I also considered all the evidence on record. It was the evidence of Luka, the first born son, of the appellant that he is not going to school because he has no support. This evidence, though it corroborates the evidence of the appellant also says a lot about the appellant's conduct. One does not need to stay with one's children in order to send them to school. The appellant, if indeed he cared about his children he could have paid fees for them even though the children are still staying with their mother. This makes one wonder whether the need to ask for the house back is really motivated by having the children back so as to support them or so that he can get back to the house under the pretext of having the children back with him.

The appellant had expressed fear that the respondent's new husband is intending to transfer the title of the house into his name so that he can sell the house. Court allowed the appellant to bring the title deeds and submit to Court. The same was done and now I note that the said title is in the name of Chisomo Chibwana and not the appellant. There may be reasons for this that have not been explained to Court; obviously because of the way that the said document was submitted. Suffice to say that the lower court ordered that the house is for the benefit of the children. What this Court needs to look into now is how to assist the children so that they can get full benefit thereof; and also ensure that, as the appellant alleged, the respondent and her new husband do not sell the house thereby denying the children the right to benefit from it.

Probably the only way to secure the house is to have it registered in the respective names of the three children so that nobody will be able to sell it except the

children. And, for that matter, no one child can sell the house unless all three agree to sell the house together. Further, since it is on record that the children have no support it would be to the benefit of the three children to have the house rented out and the benefits given to them in equal shares. It would seem from the evidence of the respondent, from the lower court record that the respondent was or is failing to move from the house because of the property left in the house by the appellant. It was recorded that the respondent, then the defendant stated that (on the first page of the handwritten record):

“ I understand the reading of the claim. I admit the claim because the house is for children. But I am unable to move away because households which he was told to take he has not removed”.

It is not know whether the appellant has now removed his personal effects from this house to allow the respondent let out the house as desired. If this has not been done the appellant should do so now and allow the respondent let out the house for rent. The proceeds from the house should be used to assist the children with their needs. This, however does not preclude the appellant from assisting the children as and when need arises. Whatever happened between him and the respondent does not change the fact that he fathered these children and he has parental obligations over them. I would hesitate to remove the children from the respondent’s custody since at custom, within the Chewa and Ngoni customs, children belong to the woman’s side unless there are very good reasons for placing them under the man’s side, which grounds have not been shown in this court.

It is therefore ordered that the house be registered in the name of the three children and the money be used for the children's school fees and upkeep. The children are to continue staying with their mother but with freedom to visit their father at will, provided proper arrangements are made with the respondent about such visits. A further order is made that the respondent, or her new husband, cannot and must not sell the house of the children; house No. 22/7. This notice must also be served on the City of Lilongwe at the time of changing ownership of the house into that of the three children.

MADE in Court this 19th day of June 2008.

E.J. Chombo

J U D G E