



REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

MZUZU DISTRICT REGISTRY

CIVIL APPEAL CAUSE NO. 43 OF 2011

BETWEEN

JOSEPH SEME

APPELLANT

-AND-

**MARGRET NYIRENDA
RESPONDENT**

CORAM: HON MR JUSTICE D.T.K. MADISE

Mr. A. Siadi Counsel for the Appellant

Mr. C. Ghambi Counsel for the Respondent

Mr. I.Z. Bondo Official Interpreter

Mrs. J.N. Chirwa Court Reporter

Madise, J

JUDGMENT

Introduction

The parties in this matter were married in 2003 but there is no issue of the marriage. Due to disagreements which could not be resolved the parties got divorced at the Rumphu Magistrate Court on 18 July 2009. At divorce the court below ordered that the Appellant should pay the Respondent the sum of K50, 000 as compensation and K800, 000.00 as a share from a joint business. The court further ordered the Appellant to give her the following household items:

Television Screen
Double bed and mattress
Decoder
DVD player
Blankets and bed sheets
Glass table
Shoe rake
Dressing table
Fan
Curtains
Kitchen ware

The Appellant argue that the Respondent had already collected these items and that he also gave her a plot at St Dennis and a shop at Rumphu market. Being unsatisfied with the decision of the lower court he now appeals to this court against the orders made by the court below.

Appeals in this Court

I'm reminded that appeals in this Court are by way of rehearing. When this Court is considering an appeal from the court below, it proceeds by way of re-hearing of all the evidence that was before the court below, the findings of fact and the law applied and then consider in the light of all that took place

during trial whether the court below was within jurisdiction in coming to its conclusion.

Grounds of Appeal

The Appellant filed 6 grounds of appeal which we reproduce as filed.

1. The Subordinate Court erred in law in disregarding the Appellant's prayer to call witnesses.
2. The Subordinate Court erred in law in holding that the Appellant should pay the Respondent the sum of K800, 000 without considering the fact that the Appellant had already paid the Respondent K300, 000 which was demanded by the Respondent after the parties had failed to reconcile their marriage.
3. The said amount ordered by the Subordinate Court is excessive taking into account that the Respondent had already given K300, 000 after the parties had failed to reconcile.
4. The Subordinate Court erred in law and fact in ordering the Appellant to pay K500, 000 by the close of business the same day (13th June 2011) or else be committed to a civil prison.
5. The Subordinate Court erred in law in failing to consider the fact that the Respondent had already taken the said property from the Appellant's house such as a television screen, mattress, Sony radio, blankets, a complete set of free to air television, DVD player, home theatre, bed sheets, set of curtains and all kitchen ware which the Respondent was demanding again in court.
6. The Subordinate Court erred in law and fact in making an order to pay K800, 000 without inquiring into the means and capacity of the Appellant.

Cross Appeal

The Respondent crossed appeal and filed two grounds which are also reproduced as filed.

1. The trial court undervalued the value of the shops, resulting into unproportional share of K800, 000 for the Respondent.
2. Upon finding that the husband was responsible for the breakdown of marriage the court did not order any compensation for loss of marriage.

The Issues

There is basically one issue for determination before me. Whether the court below was justified in law when it made the order of compensation and distribution of property.

The Evidence

The evidence before the lower court and according to the Respondent was that at the time of marriage the parties were very poor. They had engaged in several businesses just to bring food on the table. Later in the years prosperity came and they open shops in Rumphi. Then in 2009 the marriage went soar. The Respondent claimed a share of the property.

The Respondent summoned Shame Nyirenda as her witness. He was the Respondent's brother. He confirmed that indeed one evening in 2009 the Appellant ordered the Respondent to close the two shops and hand over the keys to him. When confronted the Appellant stated that he was no longer interested in the Respondent.

The last witness was Mercy Kasambala, the Respondent's mother. She was called from Karonga to come and sort out the differences in the family. Upon arrival the Appellant disowned his wife in front of her. He alleged that the wife was very wasteful. He even challenged that he would share the shops and the house. He rejected the wife even when the church Bishop arrived.

The wife left and came back after some few days only to find another woman who was using her room. She was very disappointed and cried all night but the husband could not listen. Since that time the Respondent has been staying with her as a mother.

Defence

In his defence the Appellant said that he was a businessman dealing in kitchen ware and general distribution of assorted goods. He married the Respondent in 2003. She went away in November 2008 and in April 2009, or thereabout. According to the Appellant the Respondent was seen at Paris Motel and Bottle Store in Luwinda, Mzuzu. He followed and asked her to return home, but she refused. That she had demanded money from the Appellant to redeem her clothes from the Motel. He paid K42, 000, but still she refused to accompany him. She then went to Karonga. After two months she returned to Rumphi with a child and demanded her household items. She was allowed to choose.

She chose a mattress, screen, decoder, beddings and all kitchen utensils. She also got a plot at St Dennis. The marriage ended when she got the items. She declined to get the materials from the shop but wanted money amounting to K300, 000 which he paid in three lots; K50, 000; and K50, 000 and lastly K200, 000.

Law and Evidence

It is clear that on entering the contract of marriage the parties never considered the consequences of separation and there was no evidence of any express agreement regarding the property. In *Nyangulu vs. Nyangulu* (1983) 10 MLR 433 Villiera, J was of the view that:

“it could not be inferred from the mere fact of marriage that the property had been intended to be jointly owned; instead, it will be the duty of this court

to give legal effect to what, in the changed circumstance, the parties would have taken as having intended had they given consideration to the matter at the point of entry into marriage. It makes no much difference whether the petitioner had made financial contribution or merely worked to help construct the house. It is the duty of the court to look at the conduct of the parties.”

It is in evidence that the parties started very small as they were poor. Both were doing business in order to bring food on the table and further develop their businesses. In the course of the years prosperity came and the parties opened a big shop in Rumphu. There is no dispute that the other small shop belonged to the Appellant’s younger brother. It is clear in my mind that the Respondent’s contribution had been substantial both in terms of money and money’s worth and the court would therefore infer an intention that she would have a beneficial interest in the matrimonial property

In *Appleton vs. Appleton* (1965) 1 WLR 25 a husband appealed against an order made by the Registrar in response to an application by the wife for the sale of the matrimonial house which belonged to the wife. The husband sought a share of the proceeds of the sale on the ground that he had contributed to its improvement. The Registrar had declined to give him a share on the basis that although he had contributed to the improvement of the property, there was no evidence of any bargain or express intention as to the proceeds of sale. On appeal Lord Denning M.R. ([1965] 1 All. E.R. 44) said;

“I think that was an erroneous direction on point of law. As the husband pointed out to us, when he was doing the work in the house, the matrimonial home,

it was done for the sake of the family as a whole. None of them had any thought of separation at that time. There was no occasion for any bargain to be made as to what was to happen in case there was a separation, for it was a thing which no one contemplated at all."

It is the finding of this Court that ordinary people do not go into marriage while at the same time contemplating as to what will happen when they separate. Ordinary people do not keep receipts or figures as to how much they have invested in family property. Therefore it is the duty of this Court to put meaning to the intention of the parties and make an order as to how the property should be distributed. In the case of Re: Rogers' Question (1948) 1 All E.R. at 328-9 Evershed L.J., said;

"In this as in most similar cases, the difficulties of a judge are aggravated by the circumstances that the two parties are now extremely hostile to each other and that the conditions of a broken marriage which now subsist were not fully appreciated by either party, even if as the learned judge thought, they were not absent from the mind of one of the parties, when the transaction in question was entered into.

When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to enquire carefully, still less to agree, what should happen to the house if the marriage comes to a grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make

an order which the parties in the judge's finding must be taken to have intended at the time of the transaction itself."

Many a times, men tend to have a novel view of the amount of contribution a house wife makes to the overall properties a family holds. Many wrongly believe that the mere fact that a woman was not working puts her in a weak position when it comes to sharing property. The general principle is that a house wife is entitled to a good share of the property. Her contribution can easily be quantified as cooking, washing, cleaning the house, looking after the husband and children all of which she does without being paid a salary. The same applies to a jobless man *vis-à-vis* a working wife *mutatis mutandis*.

As earlier stated in the above cited authorities, it is trite law that at divorce parties are entitled to a share of the matrimonial properties. The ratios depend on the circumstances of each case and the contributions each party made. It is settled law that a party who simply assisted in organizing or arranging but never contributed money is equally entitled to a share of the matrimonial property. A party's non monetary contribution should therefore translate into shares which must be easy to calculate in my view.

This Court is therefore convinced that the Respondent had intended to benefit from the matrimonial house hence these proceedings. Unfortunately there is no evidence as to the extent of her contribution in the overall business the family owned. In the case of *Kayambo vs. Kayambo* (1987-89) 12 MLR at 408 Mkandawire, J stated that;

"In such circumstances where there is no way of discovering the parties' intentions and no fair way of distinguishing between their respective contributions, the maxim "equality is equity" would be applied. Accordingly the real property in the

present case would be ordered to be sold and the proceeds divided equally between the parties.”

Although *Kayambo vs. Kayambo* made a 50% distribution, this Court would divert a little from the above principle not as a display of disregard for persuasive precedent, but rather with the view to achieve the justice of this case. The lower court visited the shop and saw for itself the amount of goods which were in the shop. In its wisdom the lower court was of the view that the sum of K800, 000.00 was going to be an adequate share to the Respondent. The Appellant argue he had already paid her the sum of K300, 000.00. This was brought to the attention of the court below. However the court below still ordered the Appellant to pay the sum of K800, 000.00 based on the estimated value of the shop. I was not there and looking at the reasons the lower court gave, I see no error of law in the findings of the court below. The Appellant further argued that the Respondent had already collected her item. The lower did not believe this story. I also find it hard to believe that she collected her items.

I therefore order that all the orders that the lower court made must be complied with within 14 days. This appeal was an abuse of the court’s process and it is dismissed with costs. The cross appeal must also fail. I do not think the lower court undervalued her share when it ordered the Appellant to pay her K800, 000.00. The amount was reasonable and so I find. As to compensation after divorce, the lower court ordered the Appellant to pay K50, 000.00 which in my mind I find to be reasonable in the circumstances. To order otherwise will cause an injustice. The cross appeal was ill conceived. It must fail.

Pronounced in Open Court at Mzuzu in the Republic this 12th November, 2012.

Hon Justice D. Madise
JUDGE