



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**MISCELLANEOUS MATRIMONIAL CAUSE NO. 24 OF 2015  
(Being Civil Cause No. 93 of 2015 before the Magistrate Court Sitting at  
Chikwawa)**

**BETWEEN:**

**GLADYS NDUNYA ..... APPLICANT**

**-AND-**

**GIFT NDUNYA ..... RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Hara, of Counsel, for the Applicant

Mr. Ulaya, of Counsel, for the Respondent

Ms. A. Mpasu, Court Clerk

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**ORDER**

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*Kenyatta Nyirenda, J.*

This is the Applicant's Inter-parte Application for distribution of Matrimonial Property and an Order for Maintenance [hereinafter referred to as the "Application"]. The Application is said to have been brought under section 24(1) (b) of the Constitution and pursuant to a referral by the Magistrate Court sitting at Chikwawa (lower court) in Civil Cause No. 93 of 2015.

The Applicant and the Respondent got married in 1998 under maternal system of marriage and they lived together as wife and husband until 19<sup>th</sup> June 2015 when the lower court dissolved the marriage.

Having dissolved the marriage, the lower court referred the matter to the High Court for distribution of the matrimonial property. For reasons which appear presently, it is necessary to reproduce the relevant part of the order of the lower court *in extenso*:

*“The distribution of property of family property is well settled. Section 24(1)(b)(i) of the Constitution is a starting point. I have gone through the lists of the property declared by the parties. According to both lists, the property declared exceeds MK1,500,000.00 the maximum property this court can share under section 39(1) of the Courts Act. I, therefore refer the matter to High Court for distribution of property.”*

The Respondent raised two preliminary objections, namely, that there is no action before this Court and that the lower court has no power under section 11 of the Courts Act to transfer a matter to the High Court. I think that it might be helpful to quote the preliminary objections in full:

*“...the application is misconceived as there is no action before the court. The respondent will argue that a summons is not one of the modes for commencing an action in the High Court under the applicable rules of procedure or any other law.*

*The respondent will further argue that under section 11(vii) of the Courts Act, it is the High Court that has power to transfer proceedings from a Magistrate Court to the High Court. Therefore, the fact that the magistrate referred the issue of distribution of property to the High Court did not absolve the applicant from commencing an action for distribution of property in the High Court as the referral was not an order transferring the proceedings to the High Court. The respondent will pray that the application be dismissed with costs”*

Counsel Ulaya submitted that the Applicant should first of all have commenced an action in the High Court in the usual way. He likened the approach taken by the Applicant as being similar to bringing an application for an interlocutory injunction without there being a main action. With regard to the referral by the lower court, he contended that the lower court has no power to transfer a civil matter from itself to the High Court.

In his response to the preliminary objections, Counsel Hara submitted that matters relating to distribution of matrimonial property have always been brought before the High Court as chamber applications. He cited section 17 of the Married Women’s Property Act 1882, section 4 of the Divorce Act, **Abeles v. Abeles (1990) 13 MLR 1** and **Kayambo v. Kayambo (1987-89) 12 MLR 408** to buttress his submission.

Section 17 of the Married Women’s Property Act is in the following terms:

*“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 in England or Ireland who may make such order with respect to the*

*property in dispute and as to the costs of and consequent on the application, as he thinks fit ...:*

It would appear Counsel Hara cited **Abeles v. Abeles**, supra, for the holding therein by Makuta CJ, as he then was, that the Married Women’s Property Act “is an Act of general application and it applies to this country by virtue of section 4 of the Divorce Act, Cap 25:04 of the Laws of Malawi”. Section 4 of the Divorce Act read:

*“Jurisdiction under this Act shall only be exercised by the High Court (hereinafter called the Court), and such jurisdiction shall, subject to this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England”*

I momentarily pause to observe that the procedure laid down in the section 17 of the Married Women’s Property Act was being applied in Malawi pursuant to section 4 of the Divorce Act. Section 114 of the Marriage, Divorce and Family Relations Act 1915 has since repealed the Divorce Act, thereby severing the umbilical cord that enabled the High Court, through section 17 of the Married Women’s Property Act, to decide in a summary manner as to the title or possession of “former” matrimonial property. In the premises **Abeles v. Abeles** and similar cases such as **Malinki v. Malinki 9 MLR 441(HC)**, **Kayambo v. Kayambo 12 MLR 408 (SCA)**, **Kamphoni v. Kamphoni, Matrimonial Cause No. 7 of 2012 (unreported)** do not appear to be any longer good authority on the question under consideration, that is, mode of commencing an application for distribution of matrimonial property.

I now wish to examine the issue of the lower court’s purported referral of the distribution of the matrimonial property to the High Court and, in this regard, sections 46, 40, 41 and 26 of the Courts Act are relevant.

Section 46 of the Courts Act deals with transfer of proceedings and it reads:

- “(1) Subject to any written law, a subordinate court may—
- (a) transfer any proceedings before itself to a subordinate court of a lesser grade;
  - (b) transfer any proceedings before itself to any subordinate court of a higher grade with the consent of such court; and
  - (c) direct the transfer to itself of any proceedings before any subordinate court of a lesser grade.

(2) *A subordinate court shall comply with any direction given to it under subsection (1)."*

It is evidently clear that section 46 of the Act allows a subordinate court to transfer proceedings to another subordinate court. This section does not empower a subordinate court to transfer proceedings from itself to the High Court.

Section 40 makes provision regarding counterclaims in subordinate courts and it is in the following terms:

*"(1) Where, in any action or suit of a civil nature before a subordinate court, any defence or counterclaim of the defendant involves matters beyond the jurisdiction of such subordinate court, such defence or matter shall not affect the competence or the duty of the subordinate court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the subordinate court has jurisdiction to award shall be given to the defendant upon such counterclaim.*

*(2) In any such case the High Court may, if it thinks fit, on the application of any party order that the action or suit be transferred to the High Court and the action or suit shall then be proceeded with as if such action or suit had been originally instituted therein."*

It will be observed that section 40 of the Courts Act allows the High Court, and not the subordinate court itself, to transfer a case from a subordinate court where a counterclaim exceeds the jurisdiction of the subordinate court.

Section 26 of the Courts Act vests the High Court with general supervisory and revisionary jurisdiction over all subordinate courts. In this regard, the High Court may if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

Section 41 of the Courts Act provides that a plaintiff may relinquish any portion of his claim in order to bring the action or suit within the jurisdiction of a subordinate

court, but he shall not afterwards sue in respect of the portion so relinquished. It is noteworthy that this section does not in any way empower the subordinate court to transfer such an action to the High Court.

What comes out of the analysis of the above-mentioned sections is that the framers of the Courts Act went out of their way to spell out in clear and express terms that a subordinate court can only transfer proceedings to another subordinate court and not to the High Court. The Courts Act also puts the matter in quite unambiguous

language that it is the High Court that can transfer to itself a case from a subordinate court. Neither the Courts Act nor the Subordinate Court Rules empowers a magistrate court to “refer” or “defer” a matter to the High Court.

In this regard, I agree with Counsel Ulaya that the order by the lower court was ultra vires. A magistrate court, whose jurisdiction is essentially statutory, cannot under the Courts Act refer or transfer a case to the High Court for want of jurisdiction. I am fortified in my decision by the Latin maxim “expression unius est exclusion alterius”, that is, the expression of one thing is the exclusion of another. Under this maxim, the mention of one thing within a statute, contract, will and the like implies the exclusion of another thing not so mentioned. The maxim, though not a rule of law, is an aid to construction. According to Baron’s Law Dictionary, 9<sup>th</sup> Edition, the maxim has application when:

*“in the natural association of ideas, that which is expressed is so set over by way of contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment. Thus a statute granting certain rights to “police, fire, and sanitation employees” would be interpreted to exclude other public officers not enumerated in the statute. This is based on presumed legislative intent. As such, a court is free to draw a different conclusion where for some reason this intent cannot be reasonably inferred.”*

The maxim has been repeatedly applied by our courts. For example, in the case of the **Registered Trustees of the Public Affairs Committee v. Attorney General and the Speaker of the National Assembly and the Malawi Human Rights Commission, HC/PR Civil Cause 1861 of 2003(unreported)**, Justice Chipeta used the maxim to arrive at the decision that amendment of section 65 of the Constitution does not require prior referendum:

*“Section 196, as read with the schedule to the Constitution, is very clear on the provisions it directs to be amended after first referring the proposed amendment to a referendum. It very clearly covers amendments to Sections 32 and 40, among others, but it also very clearly does not cover Section 65 of the Constitution. I thus understand this provision to mean that where Parliament wants to amend Section 32 or Section 40*

*directly, it has no option but to comply with the requirement of a prior referendum, unless it is otherwise proceeding by virtue of Section 196(3).*

*There is, it is to be noted, nothing in this provision extending the referendum requirement to amendments that indirectly affect rights arising from the provisions listed in the schedule. On this point I find the argument advanced on behalf of the defendants based on the maxim *expressio unius est exclusio alterius* i.e. the specific mention of one thing is the exclusion of the other, quite compelling and appropriate.”*

In the matter under consideration, I am satisfied that the maxim applies to sections 46, 40, 41 and 26 of the Courts Act. I am unable to find reasons for holding otherwise.

Having determined that the lower court has no power to transfer a case to this Court, the all-important question to consider is, to my mind, whether or not this Court can lawfully be seised of applications for ancillary orders in respect of a matter that was substantially dealt with by the lower court. In other words, or to put the question differently, can a magistrate court dissolve a marriage and leave ancillary orders in relation to the dissolved marriage to be made by the High Court?

Authorities on this question are many and, until recently, they were by no means easy to reconcile or understand. These authorities included the cases of **Mzenzo v. Mzenzo, HC/PR Matrimonial Cause No. 7 of 2009 (unreported)** and **Thomotho v. Thomotho HC/PR Matrimonial Cause No. 8 of 2008 (unreported)** but I am absolved from a consideration of these authorities by the fact that in an erudite and lucid judgment in the case of **Mathias Kalumpha v. Eliza Kalumpha, HC/PR Civil Appeal No. 1 of 2010 (unreported)**, Justice Mwaungulu, as he then was, exhaustively reviewed and analysed the earlier authorities, and laid down, in terms which are highly persuasive upon me, what the law applicable to the question under consideration is.

I do not want to lengthen this judgment by extensive citations from the judgment in **Mathias Kalumpha v. Eliza Kalumpha**, supra, but there are one or two passages therein from which I should quote. At page 6, Justice Mwaungulu, as he then was, said:

*“On dissolution of marriage, orders as to custody of children and matrimonial property are ancillary and do not go to jurisdiction. A court that has primary jurisdiction to dissolve marriage must have jurisdiction to make ancillary orders unless, of course, a statute removes or limits in some way that court’s jurisdiction.*

*There is no statute, however, that limits the magistrate court’s jurisdiction to make ancillary orders generally or ancillary orders as to matrimonial property or custody of children for marriage.”*

Justice Mwaungulu, as he then was, continues with the same theme at page 8 where I find the following passage particularly apposite:

*“Jurisdiction may be concurrent; it is, however, indivisible. A court cannot have jurisdiction on one part and have the other part in the jurisdiction of another. A court can have jurisdiction or have no jurisdiction. Once it is established that a magistrate court has jurisdiction to dissolve a marriage, it has jurisdiction to make ancillary orders attending the primary jurisdiction. The suggestion that a magistrate court can dissolve a marriage and leave ancillary orders to a higher court where the value of matrimonial property is higher than its monetary jurisdiction cannot be right because a subordinate court has no power to transfer proceedings from itself to the High Court.”*

Justice Mwaungulu, as he then was, concludes by holding that *“once it is established that a magistrate court has jurisdiction to dissolve a marriage, it has jurisdiction to make ancillary orders attending the primary jurisdiction”*.

On the basis of the foregoing considerations and in exercise of this Court’s general supervisory and revisionary jurisdiction over subordinate courts, I determine that it would be in the interest of justice that the lower court should conclude the determination of Civil Cause No. 93 of 2015 by making the necessary ancillary orders with respect to distribution of the matrimonial property and maintenance within 30 days hereof. I so order.

Pronounced in Chambers this 10<sup>th</sup> day of February 2016 at Blantyre in the Republic of Malawi.

**Kenyatta Nyirenda**  
**JUDGE**