



REPUBLIC OF MALAWI

THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

FAMILY AND PROBATE DIVISION

MATRIMONIAL CAUSE NUMBER 28 OF 2021

BETWEEN:

ALFONSO MBIZA.....PETITIONER

AND

CHRISTINA CHAPOTERA.....RESPONDENT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Chibwana of Counsel for the Petitioner

Counsel Nyamwela of Counsel for the Respondent

Ms. Kazembe Court Clerk and Official Interpreter

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**ORDER ON DISTRIBUTION OF MATRIMONIAL PROPERTIES**

**Kayira J**

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**INTRODUCTION**

It has to be noted that the Respondent commenced a divorce case against the Petitioner under Matrimonial Cause Number 8 of 2020. There is no record explaining what transpired in that case. The subsequent year, the Petitioner herein commenced the present matter and on 13<sup>th</sup> July, 2023, this Court dissolved the present union considering that it had irretrievably broken down. The matter resumed for hearing on a number of times for hearing on ancillary issues mainly fair property distribution. On his part, the Petitioner testified and called two witnesses whilst the Respondent testified and called one witness. The matter was adjourned for an order on fair distribution of matrimonial properties. This is the order.

## EVIDENCE BY THE PARTIES

The Petitioner adopted his witness statement which was marked as EXP1 which was marked as EXP1. It is his evidence that he graduated from the University of Malawi, Chancellor College in 1990 with a Bachelor of Arts Degree in Public Administration. He then worked with the Ministry of Justice from 1991 to 1994 and with Customs and Excise Department from 1994 to 1999. It is in the course of working for Customs and Excise Department that he ventured into minibus business which grew so fast resulting in acquiring ten (10) minibuses within three years. From the minibus business, he managed to purchase a house from the Malawi Housing Corporation-MHC which is situated at Nyambadwe. It is in this house that the Petitioner lived with his family.

The Petitioner testified that MHC issued written offer of House Number NE/58 for sale to him on 30<sup>th</sup> July, 1999-ACM1. The MHC issued a valuation and calculation of costs for sale requiring payments of a sum of K1, 026, 940.75t on 30<sup>th</sup> July, 1999-ACM2. It is his deposition that he paid for the house in six instalments as per ACM3. By letter of 8<sup>th</sup> March, 2000, MHC confirmed to him that he had fully paid for the house number NE/58 Nyambadwe and that the Title Deed would be prepared in his favour-ACM4. A Lease of the property was issued on 24<sup>th</sup> February, 2000 as per ACM5. He then paid a sum of K10, 000.00 according to General Receipt Number 7542597 which is dated 5<sup>th</sup> April, 2020 being a charge for certificate of lease-ACM6. PW1 then embarked on extension of the said house which at the time of acquisition had two bedrooms only and he extended the house to have four (4) bedrooms and sitting room. However, the extension was not completed due to financial challenges since the minibus business collapsed but was habitable. Apart from the extension, PW1 constructed a fence for the house. His final deposition is that he purchased this house singlehandedly and his intention was to own it individually.

It is further deposition of the Petitioner that he constructed a house for the Respondent at her village and this house is still standing now. It is his further evidence that at the time of their marriage, the Respondent held a Diploma in Nursing and Certificate in Midwifery. During the subsistence of the marriage, he encouraged her to pursue a Degree in Nursing. Premised on that, the Respondent obtained her Degree at Kamuzu College of Nursing in Lilongwe within two years. During the time that she was in University, the Petitioner was taking care of their school going children namely Aggie and Alphonso Junior at home while the Respondent was studying. Additionally, the Respondent went to study in Scotland and the Petitioner avers that the qualifications are matrimonial property. As such, he is entitled to a share thereof to be assessed in monetary terms by the Court.

In cross examination, he stated that he married the Respondent in 1996. In the course of their marriage, he resigned and started to ran a minibus business called Alfonso Investment. Although the business used

his name, he accepted that it was a family business. In the said business, he was purchasing motor vehicles. It is his evidence that he purchased the first minibus together with another motor vehicle. It is this motor vehicle which was involved in a road traffic accident.

It is his further evidence that at the time of purchasing the house in Nyambadwe, he was already married to the Respondent and this was an idea for the family. Although this is so, the Petitioner made an application for the house in his name. It is his further evidence that the minibus business generated enough revenue which was used to purchase the house situated in Nyambadwe. It is the firm evidence of the Petitioner that the Respondent was not actively involved in the purchase of the house. It is at the same time his evidence that it is not correct that the Respondent paid the 3<sup>rd</sup> and 4<sup>th</sup> payments because at that time, the Petitioner was not around. As for the receipts, they are not specifically showing who exactly paid the money but they are only showing who received the money. It is his further evidence that the house was not extended to have four bedrooms.

PW1 stated that they demolished a structure which was in Mdeka and he constructed the house situated at Mdeka village for the mother to the Respondent and this was not just mere extension. As such, if anyone comes and says that the house was not constructed from the scratch but was renovated, that person will be wrong. The evidence under oath is that the first house which was at this place belonged to the family of the Respondent. However, the newly constructed house belongs to the Respondent but is occupied by the mother to the Respondent. In all this, the Petitioner did not tender any documentary evidence showing that the money for the construction of the house in Mdeka came solely from him.

As to the educational qualifications of the Respondent, it is his evidence that he encouraged her to upgrade herself and acquire a Degree. After the Degree, the Respondent went for further studies in Scotland. It is at this time that she left her ATM Card so that the Petitioner could use that money to pay her loan at the office, monthly allowance to her mother, providing for the house and paying school fees for their child who was at the University of Malawi-The Polytechnic. It is his firm evidence under oath that this child was never withdrawn due to lack of school fees.

In re-examination, the Petitioner emphasised that he initially had a car, Ford, which he sold. It is the proceeds of this sale that he used to purchase a Corolla. Later on, he sold the Corolla the used the proceed to purchase a minibus and a family car as alluded to before. Since all the money was from him, he did not consider it wrong to use the name Alfonso Investments for his business.

PW2 was Reverend Father Lawrence Mbuna. He adopted his Witness Statement which was marked as EXP2. It is his evidence that on the instruction of PW1, he took Harry Mandala a builder to Nkhotakota where he built a house at Alphonso C. M'biza's village. Later, the Petitioner sent PW2 to deliver building

materials at his wife's village in Mdeka, Blantyre in 2001. On that trip, PW2 was accompanied by a driver, Mr. Harry Mandala the builder and Mr, Young Njunga a builder as well. It is his evidence that he left the builders who were assigned to build a house for the Respondent. PW2 stated that the builders spent two months at Mdeka to construct the house but he used to supervise the construction of the house despite not being a contractor and pay money to the builders whenever it was due. He deposed that the Petitioner was responsible for all the expenses incurred at the construction site. His final deposition is that at the time of this construction, the Petitioner was running a fleet of minibuses as a business.

On cross examination, PW2 confirmed that the Petitioner is his brother and that he lived with the couple herein during the subsistence of their marriage. For instance, in 2001, he was a student and he was living with the couple during holidays. It is his evidence that the Petitioner used to send him to Mdeka, Nkhotakota and Lilongwe for business purpose. PW2 admitted that he is not a contractor but he was going to Mdeka in order to look after the people who were employed by PW1 to construct a house. It is his evidence under oath that he only stayed in Mdeka for a week when he escorted the builders. It is his evidence that they found a dilapidated house at Mdeka and they demolished it and built a new one thereon. The materials that were used were not delivered by the parties in this case because on his way to Mdeka the parties herein were not there. This witness stated that he was not always in Mdeka which means that he cannot say whatever was happening during the construction project. He further testified that whenever he is in Mdeka, the Petitioner would send him money to pay the workers. Actually, the Petitioner was not telling PW2 where he was getting money for the house construction.

On re-examination, PW2 stated that the Petitioner would call him to assist in his business and he could come from Nkhotakota to Blantyre for either a week or two days. Whilst in Blantyre, PW2 would come to collect materials and money towards the project since there was a project in Mdeka.

The third witness was Harry Mandala Kalembo and he adopted his Witness Statement which was marked as EXP3. It is his evidence that he is a builder by profession and the Petitioner engaged him to extend the house in Nyambadwe and construction of a fence. Additionally, he contracted him to construct a house at the village of the Respondent in Mdeka. He built this house with the assistance of Mr. Young Njunga a fellow builder. This construction project was being supervised by Reverend Father Mbuna who was paying the dues on behalf of the Petitioner. It is his deposition that the Respondent never interacted with them and never supervise them in any manner.

On cross examination, he stated that he was seeing the parties living together when he was working for the Petitioner. As such, he was employed by the couple. It is his evidence that he went to Mdeka as a Foreman and they demolished the initial building before constructing a completely new house at the same

place. As a foreman, he went to the construction site with Mr. Njunga. It is his further evidence that on the first day, the construction materials were brought by the Petitioner to the construction site. His further evidence is that M'biza is the one he was staying with in Blantyre and he was the one paying him whenever he travels to Blantyre for the works done in Mdeka. In the event that PW3 was busy and could not travel to Blantyre to collect the payments, Mbuna was bringing the payments. The project was for 2 months and PW3 said that he does not remember the number of times that Mbuna delivered money to him as his payment. He remembers that Mbuna used to pay him using Airtel money. In re-examination, PW3 affirmed that the Petitioner hired him to do the works at Mdeka.

DW1 was Christina Chapotera the Respondent herein. She positively identified and tendered her Witness Statement in this Court as her evidence. Attached to this Witness Statement is an 'Offer of a Scholarship to the University which she marked as CC and a Tenancy Agreement which she marked as CC2. The three documents were marked as EXD1, EXD2 & EXD3 respectively. It is her evidence that during the subsistence of their marriage, they acquired twelve (12) minibuses, a house in Chileka, a plot in Kameza and a house in Nyambadwe where they lived as their matrimonial home. The Respondent further states that the Petitioner quit his employment in order to run the business of the minibuses. However, the business did not go as planned such that they struggled financially and she had to provide for the family.

As for the house in Nyambadwe, it is her evidence that they renovated it to make it have four bedrooms and also guest wings. It is her further evidence that they purchased items such as geysers, bathtubs and toilet cisterns for purposes of using these in extending the house in Nyambadwe. However, the Petitioner sold these items without her knowledge and consent. Worse still, he did not share the proceeds of the sale with her. Upon realizing the financial challenges, she went to pursue further studies whereby she attained a Degree in 2004 and two Master's Degrees which the government paid the tuition fees since she is serving the government as a Nurse. It is her further evidence that the other Master was sponsored by Rotary International as per CC1.

In terms of their children, it is her evidence that she raised them single-handedly and that one of the first born was withdrawn at the Polytechnic due to failure to pay school fees whilst the last born is still young and needs fatherly care and assistance. The withdrawal of their daughter from the University happened despite the fact that she left her ATM card with the Petitioner at the time that she went to do her Master's Degree. On return, she found the bank account empty and the children were suffering. In terms of the property at Kameza, the Petitioner sold them without the knowledge and authority of the Respondent. This is similar to the twelve minibuses that were used in the business. As for the house in Chileka, he has gone into a tenancy agreement with a tenant as demonstrated in CC2.

It is her further evidence that ever since the subsistence of the marriage, she has tried a number of businesses to keep their finances going. Additionally, she was paying for their chicken farming business as well as clearing the minibuses that were bought as family business. She also cleared a truck from a mortgage and the house in Nyambadwe. All these were efforts to maintain the properties which the Petitioner was abusing to her exclusion.

The Respondent stated that the Petitioner did not construct a house for her in Mdeka but they helped her to renovate her mother's house that was already there and standing. He provided a contractor for the renovations who ended up stealing cement and most of the renovated walls fell within 6 months. It is her evidence that the parties went to deliver building materials in 2001 and these are the materials that were used for renovations of the house. It is also her evidence that she left her personal properties in the matrimonial house in Nyambadwe and that the same should be given to her. She therefore prayed for the Court to grant her the matrimonial house which is the only property left between the two of them.

On cross examination, DW1 admitted that she has no documentary evidence on acquisition of the house in Nyambadwe but they purchased the house together such that she has an explanation to the receipts that were tendered in this Court by the Petitioner which are all in his name. It is her evidence that they purchased the house in Nyambadwe together as a couple and she does not agree that she did not take any part in its acquisition. During the time that the Petitioner purchased the house in Nyambadwe, she was a wife who was working and contributing towards many things in the family. It is her further response that the Petitioner had been keeping the receipts and books relating to this house. That she asked why this is so but later on kept quiet since they purchased the house together. She admitted that she did not explain this version in terms of the house in Nyambadwe in her Witness Statement because she did not think that she is violating anything since they purchased together as a couple.

Although the documents for the house in Nyambadwe were always with the Petitioner, DW1 knows that the house was purchased in 1999. In terms of the children and when the house was purchased, it is the evidence of DW1 that her children were born in 1995, 1998 and 2007. As such, it is not four (4) years between the date for their first born child and the year that the house was purchased. It is her further evidence that the second born was born a year after the house was purchased. As for the last born, she was not born seven years after the house was bought. The Respondent further stated that the house and school fees are different things and school fees for the children started when they were at early child development-ECD level.

As for the motor vehicles, it is her evidence that the minibus and small car were purchased at the same time. The small car was involved in a road traffic accident whilst the minibus was driven home

successfully. Since the Respondent had money, she paid for the insurance of the minibus and facilitated that the minibus started operating. She did not actually go to the garage for fixing of the minibus but gave money to the Petitioner for that purpose. It is her further testimony that she has no evidence about these payments but what she knows is that the Petitioner sold all the minibuses without sharing any proceeds with her.

DW1 submitted that there was no house constructed for her at her village but they renovated the house which belonged to her mother. Since they were renovating the house in the village together as a family, DW1 informed the Petitioner that Mandala was stealing cement and her evidence is that this Mandala has been avoiding her since this incident. She admitted that the Witness Statement of Mandala did not have any information showing that he stole cement because he was not asked questions about this. In terms of her evidence, DW1 said that she mentioned the house in Nyambadwe as the only property that the couple has because they used to have other properties such as properties in Kameza and Chileka locations. However, the Petitioner sold all these properties to her total exclusion hence the statement under paragraph 6.21. It is her evidence that CC2 is a tenancy agreement which the Petitioner had with another person in relation to this property.

When DW1 read CC2, she admits that the tenancy agreement is referring to Alfonso M'biza and yet they were a couple and they were doing things together. Initially, she was told that the house was sold. However, she learnt later that the house was leased. As for the dates when the Chileka house was purchased, that is only known to him since he used to keep all the documents but it was purchased approximately in 2010. It is her firm evidence that when this house was bought, they went together to visit the plot on which this house was constructed. In terms of proof of evidence as to whether the property was purchased and registered in the names of the couple, DW1 said that she has no proof because the Petitioner is the one who keeps the documents to her total exclusion.

It is her further evidence that when she left to pursue her Master's Degree in the United Kingdom, she left her ATM Card with the Petitioner so that he could use the funds to pay school fees for their child. On the contrary, in terms of their first born child, it is her evidence that she was withdrawn at the Polytechnic where she was pursuing Business Management at the Management Centre on financial grounds since she was not paying her school fees. The daughter confirmed to the Respondent about her withdrawal and deregistration due to non-payment of school fees. Consequently, the daughter restarted her secondary education by enrolling at a night school.

As for her involvement in the purchase of the house at Nyambadwe, it is her firm evidence that she went to pay at the Malawi Housing Corporation and the receipts were in the name of the Petitioner who was

the account name. It is her firm testimony that she was working and was contributing towards the construction and extension of the house in Nyambadwe. As for the house in Chileka, it is her evidence under oath that they owned the same together such that they went to see the house upon purchase of the same but when they had financial challenges, he sold the house. This issue was discussed and the Petitioner apologised. In turn, the Respondent forgave him. It is her evidence that she could not do anything on the fact that the Petitioner was always traveling with documents relating to their properties and this was in a way to avoid any further conflicts with him. She however decided that she will explain when asked in Court.

DW2 is George Chapotera and he tendered his Witness Statement which was marked as EXD2. He first confirms that he lives in Mdeka his home village. It is his further evidence that his mother's house was constructed by his brother Frank Chapotera and late sister Emily Mtike. It is the evidence of DW2 that the Respondent shared with him the house plan for their mother and the renovations were to be done together with her husband. The second defence witness states that one day he left for Mdeka with the parties herein, Mandala the builder and another builder. The Foreman of the works at Mdeka was Mandala who took leading role of the whole work until finishing.

The builders had an arrangement that they will be working from Monday to Friday. Thereafter, they were returning to Blantyre. He further said that Mr. Mbuna visited the place once when he came for inspection with Mr. Mbiza. In terms of the renovations, these did not go well because the builders were stealing cement to the extent that during the first time rains, the house was completely dilapidated. The renovation included an extension of the bathroom, kitchen and veranda all of which fell down. It is his final evidence that the house was never demolished but they renovated and extended the house with the Respondent as a family.

On cross examination, DW2 admits that paragraph 6.5. of his Witness Statement which talks about sharing of plans to renovate the house in Mdeka together with her husband and this could truly be in 2001. He states that he was the only one who was frequently and readily available at the house. As such, the Respondent who is his sister explained this aspect to him. When asked why a similar statement is not present in the Witness Statement of the Respondent, DW2 said that his sister would be better placed to know why she did not include this information in her evidence. As for paragraph 6.6 of EXD2, which talks about leaving for Mdeka on Mr. Mbiza's car whilst carrying building materials notably cement and iron sheets, DW2 admitted that they discussed this aspect with the Respondent. It is his evidence under oath that the use of the word 'we' refers to Mr. and Mrs. Mbiza, himself, Njunga, Sabao and Mandala. Although he expanded the information like this in Court, DW2 admitted that paragraph 6.7 of EXD2 does

not provide this information. It only mentions the parties herein, DW2, Mr. Mandala and another builder. However, he was certain that out of the names that he had mentioned, Mandala was the main builder whilst the rest specifically Sabao, were Assistants. On the same paragraph 6.7 of EXD2, DW2 stated that he mentioned that the parties herein went to Mdeka together with him, Sabao and Mandala. When asked how this statement was not provided in the evidence adduced by the Respondent, DW2 stated that the Respondent did not include this information in her Witness Statement because she might have forgotten. He testified that it is not true that Mandala went with Mr. Mbuna to Mdeka and he does not know why Mandala excluded Mbuna in his evidence as to those who went to Mdeka.

In terms of paragraph 6.9 of EXD2, DW2 submitted that they would go to Blantyre on Saturday to rest. Mbuna and Mandala found him at Mdeka when they went to inspect the rehabilitation project. It is his evidence that on the first day, he saw the people who went to Mdeka and amongst them, Mandala and Mbuna were not there. Additionally, Mandala and Mbuna did not bring any construction materials to the construction site. It is his further evidence that he informed the Respondent that the boys who were working on the house in Mdeka were stealing the cement which was meant for construction. It is the firm evidence of DW2 that Mandala performed a number of works one of which is renovation of the house in Nyambadwe. Since he did a lot of work, Mandala became family to them to an extent that DW2 knew Mandala very well. In terms of paragraph 6.11, the renovations did not go well because the builders were stealing some cement. As such after the work was completed, the house was left in a dilapidated state since the kitchen, sitting room, stores, veranda and the bathroom were damaged due to heavy rains. He emphasized that they did not construct the house but renovated it. In his final evidence DW2 admitted that he did not witness the payments given to the builders.

## **THE LAW ON DISTRIBUTION OF MATRIMONIAL PROPERTY**

In Malawi, property acquisition and ownership is a constitutional right provided under Section 28 of the Constitution. This right ensures that a person is not deprived of property arbitrarily or unjustifiably. This constitutional right allows a person to own or acquire property either as an individual or in association with others. In other words, a person is at liberty to exercise, control possession and use of a property to the total exclusion of other people or he or she can share beneficial interest in a property with others. In the case of those who are married, the law under Section 24 of the Constitution, allows them to either own the property alone or jointly. The joint ownership of property during the subsistence of a marriage is proven where the evidence clearly shows the levels of monetary contributions towards the acquisition and/or maintenance of the property by both parties. Additionally, the parties must satisfy the Court on a

balance of probabilities, that their intention was to hold the property jointly. Courts have acknowledged that an intention can be inferred either from conduct, usage and surrounding circumstances during the subsistence of the marriage.

Section 24 (1)(a)(ii) and Section (b)(iii) of the same Constitution provides for rights of women including at the dissolution of a marriage in the following manner:

'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, to be accorded the same rights as men in civil law, including equal capacity to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; on the dissolution of marriage, howsoever entered into, to a fair disposition of property that is held jointly with a husband.'

This provision has been properly determined by Courts and I have had recourse to the determinations. In the case of **G.T.S. vs. D.F.S.** Matrimonial Cause Number 22 of 2020 Justice Mwale acknowledged that the Supreme Court of Appeal approved the decision of **Ezerina Munthali vs. Michael Mitawa** in which Justice Tembo summarized the import of 24 of the Constitution when he observed as follows:

"The constitutional provision on the rights of women respecting the acquisition and maintenance of rights in property entail among other things, that a woman may acquire and maintain rights in property to the exclusion of her husband. So long as the circumstances may indicate that such is the case, a married woman may own property of any kind, including real property independent of her husband. In such a situation, a husband who claims any interest in the property in question ought to offer proof of the interest he claims any interest in the property in question ought to offer proof of the interest he claims to have to the satisfaction of the court, on a balance of probabilities, that indeed he has such interest in the property as co-owner. If the husband is unable to provide such proof, the court will dismiss his claim and make an order thereby declaring the married woman to in fact be the sole and absolute owner of the property in question, notwithstanding the fact that the married woman acquired her interest in such property during the subsistence of the marriage. Case authorities are abound to the effect that a similar provision obtains in respect of a husband who acquires property during the subsistence of a marriage. A married woman who seeks to claim any interest in such property ought to offer proof of her interest in the property in question."

As this Court considers the above provision, the Court agrees with the Supreme Court of Appeal in the **Sikwese vs. Banda** Being MSCA Civil Appeal Case Number 76 of 2017 matter where the reasoning of

Judge Potani (as he then was) in the **Chingadza** case as well as Judge Tembo in the **Munthali** case and **G.T.S. vs. D.F.S.** by Judge Mwale were confirmed that Section 24 of the Constitution essentially provides for same rights to women and men after dissolution of marriage. In other words, the standard applicable to a wife when it comes to joint ownership of property is similar to that applicable to a husband.

Having agreed with the principles as settled in these cases, it is critical to note the special emphasis and use of the word husband which connotes that the properties under consideration for distribution by the Court should be those acquired after a legally recognized valid marriage. In short therefore, the properties that are supposed to be shared after divorce as is the case here, are matrimonial properties acquired during the subsistence of the marriage. The Court does not lose sight of the fact that people may own properties jointly before a valid marriage. However, the mere fact that the parties eventually marry does not automatically translate the property as being jointly owned. Each of the two must demonstrate to the satisfaction of the Court that he or she contributed towards the acquisition of the property. In addition to the contribution, there must be a clear intention that the property in question will be owned jointly. In other words, before such property can be distributed, evidence must conclusively show that the properties were acquired jointly in full contemplation and during the subsistence of the marriage.

## **JOINTLY HELD PROPERTIES**

The question that needs to be answered relates to what it means when the law says that property was jointly held. Matrimonial properties are held to be jointly owned where both parties contributed towards acquisition and maintenance. There is need to consider the contribution of either party towards the acquired properties before the Court can distribute the matrimonial property. In **Masiye vs. Masiye** Matrimonial Cause Number 20 of 2013 the Court states that;

*'It is now established in civilised society and jurisdictions that there is more to contribution towards matrimonial property than hard cash...The determining factor in ascertaining the intention of the parties when they acquired family property, their conduct towards the acquisition and thereafter...Each case is to be determined on its facts. For example, in **Munthali vs. Munthali** a wife's contribution was her involvement in family business; in **Mkulichi vs. Mkulichi** Civil Cause Number 1062 of 2007 a wife's contribution was identifying a piece of land on which matrimonial property was built.'*

On the same point of how to distribute matrimonial properties fairly, this Court had recourse to sentiments by Villiera J in **Nyangulu v Nyangulu** [1981-83] 10 M.L.R.433 at page 435 which are that:

*"In considering an application of this nature, it is important to ascertain wherever possible what the parties' intention was when a particular piece of property was acquired. An inference of joint ownership of property is not to be made from the mere fact of marriage. Admittedly, it may be difficult to ascertain what the parties' intentions were after the marriage has broken up because then the contending claims are coloured by bias. But as was stated in **Gissing v Gissing (1)**, in determining whether there was a common intention, regard can of course be had to the conduct of the parties. If, for example, a wife or former wife provided part of the purchase price of a house either initially or subsequently by paying or sharing in the mortgage payments, a presumption, which is rebuttable, may well arise that it was a common intention that she should have an interest in the house."*

The sentiments of Mwale J in the case of **Sauti Phiri v Sauti Phiri**, Civil Appeal No.18 of 2020, High Court, Family and Probate Division, Lilongwe are informative. The Judge stated as follows:

*'However, in matrimonial cases where it is quite possible for the dominant spouse in power relations to register property in his or her name, evidence of registration is not necessarily evidence of intention to own the property exclusively. The Appellant has undoubtedly the rights of legal ownership, but this does not rule out the Respondent's ability to acquire a beneficial interest in the same property. What the Court must therefore be satisfied of, is whether the Respondent did acquire a beneficial interest in the property, either through contributions or through some other conduct of the parties. The fact that the conduct of the parties could manifest an intention that the property was to be held jointly was acknowledged in the case of **Sikwese v Banda**.'*

The Court in the case of **Sikwese vs. Banda** Being MSCA Civil Appeal Case Number 76 of 2017 held as follows:

*"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."*

In all these cases, it is critical to note that the intention of the parties is one the factors to be considered for holding that the property was jointly owned. The said intention can be inferred either from the parties' express and written agreement or through their conduct by examining all the surrounding circumstances. Additionally, the law requires that the Court should ascertain the levels of contribution towards the acquisition of the property in order to conclude that it was jointly held by the parties during the subsistence

of the marriage. This Court finds the exercise to ascertain contribution as factual and will consider the facts in this case in order to make a determination.

## **REASONED ANALYSIS OF THE COURT**

### **CREDIBILITY OF DW2 AS A WITNESS**

This Court listened attentively to the evidence adduced by DW2. He was honest in a number of instances admitting that the Respondent explained the information he deposed in his Witness Statement. In short, he admits that EXD2 has some information which is hearsay in nature. Apart from that, DW2 admitted on a number of instances that the deposition contains some information which was not adduced by the Respondent. Actually, it is striking to note the inconsistencies in his evidence. On the one hand, he testified that it is not true that Mandala went to Mdeka with Mbuna but Sabao. In his continued responses during cross examination, the same DW2 states that the Petitioner found him at Mdeka when he came to inspect the project with Mandala and Mbuna. This adversely affects the weight attached to his evidence.

### **THE HOUSE IN NYAMBADWE**

Section 24 (1)(a)(ii) and Section (b)(iii) of the same Constitution provides for rights of women including at the dissolution of a marriage in the following manner:

'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, to be accorded the same rights as men in civil law, including equal capacity to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; on the dissolution of marriage, howsoever entered into, to a fair disposition of property that is held jointly with a husband.'

This provision makes specific recognition of the existence of a marriage. In other words, the law has given special regard to acquisition of property during the subsistence of a validly recognised marriage. The first issue for determination is at what point was this house in Nyambadwe acquired. It is the evidence of PW1 that at the time of purchasing the house in Nyambadwe, he was already married to the Respondent and this was an idea for the family. This therefore means that this property satisfies one requirement in as far as determination of what a matrimonial property is. That is, that the property must be acquired during the subsistence of a valid marriage.

The second element that has to be established on a balance of probabilities is that the property was held jointly. To hold that, the Court has to be satisfied that the parties intended to own the property jointly.

Although the house was purchased during the subsistence of the marriage, it is evidently clear that the Petitioner made an application for the house in his name. This Court is alive to the fact that registration of a property in the name of one spouse is not conclusive evidence that the couple intended to exclude each other in terms of joint ownership of the property. It is for this reason that this Court has to examine the evidence in its entirety before making a conclusion. The sentiments of Mwale J in the case of **Sauti Phiri v Sauti Phiri**, Civil Appeal No.18 of 2020, High Court, Family and Probate Division, Lilongwe are informative. The Judge stated as follows:

*'However, in matrimonial cases where it is quite possible for the dominant spouse in power relations to register property in his or her name, evidence of registration is not necessarily evidence of intention to own the property exclusively. The Appellant has undoubtedly the rights of legal ownership, but this does not rule out the Respondent's ability to acquire a beneficial interest in the same property. What the Court must therefore be satisfied of, is whether the Respondent did acquire a beneficial interest in the property, either through contributions or through some other conduct of the parties. The fact that the conduct of the parties could manifest an intention that the property was to be held jointly was acknowledged in the case of **Sikwese v Banda.**'*

The Court in the case of **Sikwese vs. Banda** Being MSCA Civil Appeal Case Number 76 of 2017 held as follows:

*"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."*

In all these cases, it is critical to note that the intention of the parties is one the factors to be considered for holding that the property was jointly owned. The said intention can be inferred either from the parties' express and written agreement or through their conduct by examining all the surrounding circumstances. Additionally, the law requires that the Court should ascertain the levels of contribution towards the acquisition of the property in order to conclude that it was jointly held by the parties during the subsistence of the marriage. Having determined that the house was purchased during the existence of a marriage, it is imperative according to the applicable laws on joint ownership of property for a couple to determine the levels of contribution by each one of them. It is the evidence of the Petitioner that he purchased the house in Nyambadwe alone to the total exclusion of the Respondent. His further evidence was that the house was purchased for the benefit of the family as a matrimonial house.

This Court examined the evidence adduced by the Petitioner. It is clear that all the documentation relating to House Number NE/58 are in the name of the Petitioner. The said documents include an offer for sale dated 30<sup>th</sup> July, 1999-ACM1; a valuation and calculation of costs for sale requiring payments of a sum of K1, 026, 940.75t dated 30<sup>th</sup> July, 1999-ACM2; payment of the consideration for the house in six instalments as per ACM3, confirmation of payment and Title Deed dated 8<sup>th</sup> March, 2000 in relation to house number NE/58 Nyambadwe-ACM4; a Lease of the property issued on 24<sup>th</sup> February, 2000 as per ACM5; payment for a sum of K10, 000.00 according to General Receipt Number 7542597 which is dated 5<sup>th</sup> April, 2020 being a charge for certificate of lease-ACM6. This Court notes that this documentary evidence is clearly allocating the house in Nyambadwe to the Petitioner. However, the documentation is not conclusive evidence of how a property was acquired. It is therefore imperative that this Court examines the entire evidence in order to appreciate the levels of contributions towards the acquisition of the property by the Respondent. In other words, this Court has to ascertain the level of contribution from the Respondent towards this property.

The Respondent in her evidence maintains that she contributed towards the acquisition of the house in Nyambadwe. On cross examination, DW1 admitted that she has no documentary evidence on acquisition of the house in Nyambadwe but they purchased the house together such that she has an explanation to the receipts that were tendered in this Court by the Petitioner which are all in his name. It is her evidence that they purchased the house in Nyambadwe together as a couple and she does not agree that she did not take any part in its acquisition. During the time that the Petitioner purchased the house in Nyambadwe, she was a wife who was working and contributing towards many things in the family. It is her further response that the Petitioner had been keeping the receipts and books relating to this house. That she asked why this is so but later on kept quiet since they purchased the house together. She admitted that she did not explain this version in terms of the house in Nyambadwe in her Witness Statement because she did not think that she is violating anything since they purchased together as a couple.

As for her involvement in the purchase of the house at Nyambadwe, it is the Respondent's firm evidence that she went to pay at the Malawi Housing Corporation and the receipts were in the name of the Petitioner who was the account name. It is her firm testimony that she was working and was contributing towards the construction and extension of the house in Nyambadwe. Based on this evidence, the Court needs to determine as to the levels of contributions from the parties.

PW1 testified under oath that the minibus business generated enough revenue which was used to purchase the house situated in Nyambadwe. It is the firm evidence of the Petitioner that the Respondent was not actively involved in the purchase of the house. It is at the same time his evidence that it is not

correct that the Respondent paid the 3<sup>rd</sup> and 4<sup>th</sup> payments because at that time, the Petitioner was not around. As for the receipts, they are not specifically showing who exactly paid the money but they are only showing who received the money.

It is striking to note that there are no specific figures on the part of the Respondent as to how much she contributed at all levels regarding acquisition and renovations of the house in Nyambadwe. She is also uncertain as to what part of the house she contributed to. In short, the Respondent is uncertain as to how much contribution she made towards this house. This Court finds that the evidence of the Petitioner is different to that which was adduced by the Respondent. For instance, the Petitioner was able to explain with support of receipts as to how much he paid that MHC. Further, he explained what was done by who in the extension of the house. Actually, the Petitioner paraded the builder as his witness. So despite not tendering documentary evidence, he was able to adduce evidence supporting his engagement of Mr. Mandala in extending the house and also in terms of the payments that he made towards this house. In other words, the Petitioner ably gave figures and the activity that the amount catered for. The Court further notes that the one who renovated the house so that it should have four bedrooms was here and he ably confirmed that he was engaged by the Petitioner to work on the house and that he is the one who paid for their services. He is also the one who provided them with the materials.

It is PW1's further evidence that the house was not extended to have four bedrooms. The third witness was Harry Mandala Kalembo and he adopted his Witness Statement which was marked as EXP3. It is his evidence that he is a builder by profession and the Petitioner engaged him to extend the house in Nyambadwe and construction of a fence. DW2 actually confirmed that PW3 constructed extensions of the house in Nyambadwe having been engaged by the Petitioner to perform that work.

Considering all the factors in this case, this Court holds that the Petitioner contributed more to the acquisition and renovation of the house as compared to the Respondent. Therefore, the house in Nyambadwe is a matrimonial property which means that the parties herein are all entitled to benefit from the same. Considering the levels of contributions from the parties here, this Court orders that the Petitioner is entitled to 70% whilst the Respondent is entitled to 30%. Since the value of the said house is not known, this Court directs that the parties should value the same within 60 days from today which is by 13<sup>th</sup> October, 2024. Once that is done, each of the parties is at liberty to sell his or her percentage to the other spouse. If the parties decide to pursue this route, all processes facilitating the execution of the same must be done within 90 days after the valuation is done which is by 13<sup>th</sup> January, 2025. In the event that no party is able to buy the percentage of the other, then the house must be sold and each of

the parties will share both the costs of the sale and the actual revenue generated in the percentages as above.

### **CUSTOMARY DUTY TO CONSTRUCT A HOUSE FOR WIFE**

In her evidence under oath, DW1 submitted that there was no house constructed for her at her village but they renovated the house which belonged to her mother. This Court recognises that Section 200 of the Constitution provides custom as a source of law in Malawi as long as it is not inconsistent with the Constitution. In the present case, the Respondent argues that the Petitioner did not construct a house for her at the village during the subsistence of this marriage which means that he did not perform a customary obligation. This Court recognises that this customary obligation once proven is performed even after dissolution of a marriage. As is the case with other allegations in civil matters, he who alleges must prove in the affirmative what he is alleging. In other words, the Respondent is under obligation to prove on a balance of probabilities that there is a custom in her village where a husband constructs a house for the wife. This essentially means that construction of a house at the village of a wife is not automatic. This Court carefully examined the evidence adduced in this case. Apart from the claim raised by the Respondent, there is no evidence showing that this customary practice exists at her village or amongst her people. The failure to prove the existence of this cultural practice means that the claim is legally unsound. As such, it will be unreasonable for this Court to order the Petitioner to construct a house for the Respondent. This claim is therefore dismissed in its entirety.

### **THE HOUSE IN KAMEZA & MINIBUSES**

The Respondent specifically made lengthy submissions relating to the house, plot and minibuses. She totally admits that the properties were purchased by them as a couple. However, she has no document showing the names in which the house for instance which is in Chileka was registered in. Further, she did not have any further explanation as to how the plot was acquired. The question that needs to be answered in dealing with these three set of properties which are alleged to have been sold by the Petitioner relates to what it means when the law says that property was jointly held. Matrimonial properties are said to be jointly owned where both parties contributed towards acquisition and maintenance. There is need to consider the contribution of either party towards the acquired properties before the Court can distribute the matrimonial property. In **Masiye vs. Masiye** Matrimonial Cause Number 20 of 2013 the Court states that;

*'It is now established in civilised society and jurisdictions that there is more to contribution towards matrimonial property than hard cash...The determining factor in ascertaining the intention of the parties when they acquired family property, their conduct towards the acquisition and thereafter...Each case is to be determined on its facts. For example, in **Munthali vs. Munthali** a wife's contribution was her involvement in family business; in **Mkulichi vs. Mkulichi** Civil Cause Number 1062 of 2007 a wife's contribution was identifying a piece of land on which matrimonial property was built.'*

The Respondent testified under oath that as a couple they acquired properties together immediately after their marriage. As a couple, they acquired plot in Kameza, 12 minibuses and a house in Chileka. Since the minibus business did not go according to their plans. She was compelled to be providing for the family as they tried to work on the minibus business. On cross examination, the Respondent admitted that she does not have evidence showing that the Petitioner sold the 12 minibuses and never shared the proceeds of the sale. It is her further evidence that they purchased items such as geysers, bathtubs and toilet cisterns for purposes of using these in extending the house in Nyambadwe. However, the Petitioner sold these items without her knowledge and consent. Worse still, he did not share the proceeds of the sale with her.

This Court examined the entire evidence adduced in this Court. The Respondent has not explained how much he contributed in monetary terms either with precise figures or in approximation how much she contributed towards the acquisition of the plot in Kameza. All she was able to explain is that they owned this property as a couple. As for the house in Chileka, this Court noted that the Respondent confirmed traveling to the plot where this house is constructed and that they confirmed that the house belongs to them. She then tendered CC2 which is a tenancy agreement relating to the said house. The Respondent admits that the attachment CC2 is in the name of the Petitioner. The Respondent further testified that the house in Chileka was in both of their names. She however did not tender any documentary evidence showing that this is indeed the case. Actually, she was unable to say with precision as to when this property was purchased. Much as registration of a property in one's name is not conclusive evidence that a property is only by one spouse, this Court is at pains to hold that the Kameza and Chileka properties are jointly held properties. No single conduct by the parties satisfied the requirement of the parties' intention to jointly own the same.

The explanation regarding the minibus business has been proffered by the parties. Their story is that they started with a single minibus and the business eventually grew. The Petitioner testified that he resigned in civil service and ventured into business. The Respondent states that she continued to work

and when the business did not perform as expected she was responsible for providing for the family. Clearly, there is indication as to the level of involvement in the operations of the minibus business on the part of the Petitioner on the one hand. On the other hand, the Respondent has not explained how she was involved in this business. To therefore hold that she has a beneficial interest will be contrary to the law on joint ownership of properties for married persons. I therefore decline to make any order apportioning the value of the minibus business to the Respondent.

### **THE HOUSE IN MDEKA, BLANTYRE**

The evidence is clear that the parties herein supplied construction materials such as cement and iron sheets to Mdeka for the works done on the house belonging to the mother of the Respondent. The evidence is also clear that Mr. Mandala was the builder whilst Mr. Sabao was his assistant. In the course of the works, Mr. Mbuna went to Mdeka on instruction of the Petitioner to inspect the works. It is at this point that Mr. Mbuna and Mr. Mandala found DW2 at Mdeka which is his home.

This Court finds as a fact that the house in Mdeka was constructed on a place which had a house initially. Due to the dilapidated state of the house, that is destruction caused to the kitchen, sitting room, veranda, bathroom and stores by water. It is due to this destruction that the structure was demolished and another house constructed on the same place. It is a fact that the main builder was Mr. Madala. This is the person who was assisted by Sabao. The construction works were supervised by the parties herein as well as Mbuna. In terms of payments, the same were done either in Blantyre when the builder and his assistants travel there and through Mbuna where payments were transferred to him by the Petitioner. It is clear that the parties constructed a new house in Mdeka.

I have considered the evidence regarding the house in Mdeka. It is abundantly clear that the Petitioner played a critical and active role in the construction of this house. The evidence does not indicate how much was contributed by each of the parties. Thus far, this Court orders that the parties are entitled to the value of this house in 50% to 50% respectively. The approach in executing this percentage is similar to the one in the house in Nyambadwe.

### **ACADEMIC QUALIFICATIONS**

In terms of the academic qualifications, this Court notes the scholarship awarded to the Respondent and the financial support that she had from her employer. The fact that the Petitioner was taking care of the children is in my considered view not sufficient to entitle him to have beneficial interest in the

qualifications. He is a parent to the children and has a parental duty to provide care to the children for their best interest. In the considered view of this Court, performance of this task cannot be a basis on which a parent should claim beneficial interest in a qualification of a spouse because in any event, he or she was supposed to perform that task regardless of the absence of the other parent. The fact that the task will be doubled rather than when both parents are available has exercised the mind of this Court. However, this Court still finds the performance of the parental obligation as not a sole and conclusive basis for granting beneficial interest in the academic qualifications. Over and above performance of such duties. The spouse must demonstrate that he or she took active efforts to assist the other spouse. For instance, material, financial and/or research contributions. This has not been proven in the present case. This means that the levels of contributions towards the academic qualifications of the Respondent by the Petitioner are but negligible. It is therefore unreasonable to apportion any beneficial interest. In short, this prayer is hereby declined.

## **OTHER PROPERTIES**

In Malawi, property acquisition and ownership is a constitutional right provided under Section 28 of the Constitution. This right ensures that a person is not deprived of property arbitrarily or unjustifiably. This constitutional right allows a person to own or acquire property either as an individual or in association with others. In other words, a person is at liberty to exercise, control possession and use of a property to the total exclusion of other people or he or she can share beneficial interest in a property with others. In the case of those who are married, the law under Section 24 of the Constitution, allows them to either own the property alone or jointly. The joint ownership of property during the subsistence of a marriage is proven where the evidence clearly shows the levels of monetary contributions towards the acquisition and/or maintenance of the property by both parties. Additionally, the parties must satisfy the Court on a balance of probabilities, that their intention was to hold the property jointly. Courts have acknowledged that an intention can be inferred either from conduct, usage and surrounding circumstances during the subsistence of the marriage. The petition states that the TV the parties were using all along which was bought by her was moved to her bedroom. The petition further states that the Respondent purchased a Mazda Demio without the Petitioner's knowledge and she never disclosed the source of cash. This Court considered the evidence adduced in this case and finds that these properties were exclusively purchased by the Respondent. Therefore, she is entitled to enjoy usage of the same to the total exclusion of the Petitioner.

## **COSTS**

This Court is aware that costs are in the discretion of the Court. Considering the circumstances in this case, each party to bear own costs.

It is so ordered.

**PRONOUNCED IN CHAMBERS ON 12<sup>th</sup> AUGUST, 2024 @8:30AM.**

**HONORABLE (MRS.) JEAN ROSEMARY KAYIRA  
JUDGE**

