



IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
FAMILY AND PROBATE DIVISION  
MATRIMONIAL CAUSE NUMBER 29 OF 2023

BETWEEN:

ROBERT KULINJI ..... PETITIONER

-AND-

IVY MLABOWA ..... RESPONDENT

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Mwale J.,

JUDGMENT ON DISTRIBUTION OF MATRIMONIAL PROPERTY

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CORAM : THE HONOURABLE JUSTICE F.A. MWALE  
: Gondwe/Dundwayo, counsels for the Petitioner  
: Mbizi, counsel for the Respondent  
: Kanyama, Official Reporter  
: Sikelo, Court Clerk.

**Introduction**

1. The petitioner and respondent's marriage were dissolved by this Court by order of *Decree Absolute* dated 1<sup>st</sup> July 2024. The respondent never sought custody and custody of the three issue to the dissolved marriage was therefore granted to the petitioner. They now further entreat the Court for distribution of matrimonial property.
2. The petitioner has been a career soldier for 17 years and was married to the respondent for 16 years. During the marriage, he was variously deployed on peacekeeping missions to Ivory Coast and the Democratic Republic of Congo (DRC), during which time the

respondent was responsible for the children. The respondent was a homemaker, she has never been gainfully employed during the subsistence of the marriage. She has only undertaken small scale businesses financed solely by the petitioner which no longer exist. She primarily took care of the three issue of the dissolved marriage and managed the household during the petitioner's absence.

3. The parties dispute the holding of specified property acquired during the marriage, which the petitioner contends was not intended to be matrimonial property. The contested properties include a house and shop in Zomba and a farming business which were acquired during the marriage. While the parties also had household properties, there is no substantial contest as to its distribution.
4. In view of the differences between the parties as to the holding of the property in dispute, the petitioner has proposed that a fair distribution of the property per the principles of distribution of matrimonial property which shall be discussed below, would follow what has been proposed in the below table;

ITEMS	QUANTITY AND/OR PARTY
Sofa Set (4 Piece)	Petitioner
Glass Coffee Table	Respondent
Wooden Coffee Table	Petitioner
Metal And Wooden TV Stand	Petitioner
Sony Radio (4 Piece)	Respondent
Wall Clock	Respondent
Samsung Smart Tv	Petitioner
Old Tv	Respondent
DSTV Decoders	1 for each party
Kiliyekiliye Decoder	Respondent
Wooden Stools	2 for each party
Free To Air Decoder (Strong)	Petitioner
Wooden Double Bed	1 for each party
Double Mattresses	1 for each party
Carpet	Respondent



Crates full of bottles	8 for each party
Cooker With 4 Plates	Petitioner
Display Cabinet	Respondent
Wooden Shoe Stands	1 for each party
Blue Plastic Chairs	4 for the Petitioner, 3 for the Respondent
Hot Plate	Respondent
Upright Fridge	Petitioner
Kitchen Utensils	Half for each party
Axe	Petitioner
Hoe	Respondent
Madza Demio	70 % Petitioner, 30% Respondent

5. The respondent opposes this distribution and argues instead that a fair distribution would demand that she be allocated the following properties:

- 2 sofa chairs
- All kitchen utensils
- Fridge
- 1 shoe stand
- TV stand
- Hot plate
- Iron
- Plasma
- 4 plastic chairs
- 1 wooden table with 6 stools
- 1 double bed
- 1 double mattress
- 9 crates of empty bottles
- 1 bicycle
- 1 Kiliye kiliye decoder
- Display
- Carpet
- House in Zomba

- 1 house door
- Generator

Alternatively, fairness demands that both parties receive 50% of the house, shop, motor vehicle, and itemized household properties.

6. Both parties led evidence in Court, the petitioner called three witnesses, including himself and the respondent was her own sole witness.

#### **Petitioner's Evidence**

7. Testimony of Robert Kulinji (PW1)- the petitioner as his first witness testified that was a soldier with the Malawi Defence Force and that the respondent was for the most part of their marriage a homemaker who had only run a tomato selling business around 2018 and second-hand clothes selling business in 2019. Both these businesses are now no longer viable. The petitioner was therefore the only breadwinner who provided for all financial needs while the respondent performed domestic duties. As far as he was concerned, the only properties he listed as matrimonial property were household items that he acquired for use by the family. With regard to the disputed properties, these were his views:

#### **The 3 Bedroomed House in Zomba**

8. During the course of the marriage, the petitioner was involved in several peacekeeping missions in the Democratic Republic of Congo and he received an allowance around MK9 million through his National Bank Account, evidence of which was exhibited. It was his testimony that he informed the respondent that he wanted to find another source of income so that he could pay for the children to go to private schools. He therefore identified and purchased a house for MK7,000,000 and exhibited a sale agreement to that effect. The house was used to run a hostel for university students for the benefit of the children. He conceded in cross-examination that there was no trust deed executed over the property nor was there a title deed for it.
9. The petitioner exhibited evidence of school fees payments as proof of the use of funds he acquired from the house for the children's school fees. He supplements the fees required with proceeds from his salary. He therefore believes that the house cannot be



Demio around 2021. The proceeds came from the farming business that was financed by the sale of the Toyota Corolla. It was his testimony in cross-examination that. The respondent did not help with the farming business until after harvest and her help was limited to processing. She supervised the casual labourers who did the actual processing, but not on a daily basis.

#### **Respondent's Evidence**

14. The respondent (RW1) as her sole witness. It was her evidence in chief that although the petitioner was granted physical custody over the children, he is yet to take possession of them and they are therefore still in her custody. She did not give any evidence as to why she did not apply for custody considering that the youngest child is eight years old.
15. It was further her evidence that she got pregnant with the first issue whilst at secondary school and proceeded to become a full time mother and homemaker, she thus never had an opportunity to complete her education. She therefore became financially dependent on the petitioner who subsequently joined the Malawi Defence Force. Although he benefitted from the marriage through a marriage allowance, he never accounted for it. She further denied that the petitioner financed her second-hand clothes business. She had at the time acquired a MK30,000 loan from a savings group to finance it.
16. Her contributions were in kind. She worked alongside farm workers, managing the farm operations for a full day each day and yet never received any of the proceeds. She also ran the home and took care of the children and also jointly assisted with acquisition and development of the properties, including supervising of building projects, ensuring accountability of workers and moral support. She however notably failed to provide any evidence for her claims of identifying the house and supervising the construction.
17. The respondent was inconsistent during cross examination. While she initially testified that she was supervising the construction of the shop in 2020 while her baby was 6 months old, she faltered when questioned when the baby was born and since the baby was born in 2016, this was not true.
18. When examined about her having access to the petitioner's bank account when he was

part of the matrimonial property. In cross-examination the petitioner confirmed the children attended private school post-2018 after acquiring the house. He further clarified that he earns a net income of MK917,000.00 per month, which includes a marriage allowance of MK 65,000.00 (he conceded that he is still receiving a marriage allowance from his employer despite the fact that he is no longer married). He bought the house in Zomba following his return from the DRC and intended it for the benefit of his children.

10. The petitioner's third witness was Josephy Maluwa (PW3) who acted as an agent connecting Robert to the house seller, Mrs. Beula. He confirmed that he had no interaction with the respondent in the transaction process.

#### **The Shop in Zomba**

11. The petitioner testified that he solely purchased the shop in Zomba in 2020. He originally testified that the respondent was only responsible for the part-time supervision of the shop because he was away in Salima for training. In cross-examination he changed his testimony and said that the respondent had never supervised construction and that all construction stopped when he was away for training. He never sent her money to pay for anything while he was away, and it was not true that he had requested the respondent to purchase cement.
12. The petitioner's second witness was Daniel Makaya (PW2) who was the construction foreman for the shop. It was his testimony that he never met the respondent during the construction of the shop. He further denied receiving any payments from the respondent for the construction. He confirmed in cross-examination that construction stopped when the petitioner was away. He further denied going with the respondent to the shop to buy cement for construction after a wall collapsed because no wall ever collapsed. He only knew the respondent because she was processing maize.

#### **The Farming Business**

13. The petitioner further testified that around 2019, he bought a motor vehicle, Toyota Corolla, with the remainder of the proceeds of his peacekeeping allowances. The motor vehicle was used by the household and later sold and the proceeds were used to finish the shop and for a farming business. He subsequently bought another vehicle, a Mazda



away on peacekeeping tours she admitted that she did have access to the account only until his return, and not there after. She maintained that the petitioner never gave her any money to call her own. He provided for what was needed and the only money she called her own and used to enter into the savings scheme was from doing piecework.

19. When asked why she didn't provide any evidence of the savings scheme from which she got the loan, her response was that the members were in Zomba and she had no money to pay for them to come to Lilongwe for court. Besides the money was not much and did not go very far.

### The Issues

20. It is clear from the evidence that the respondent lacked the means to make financial contributions to the purchase of the landed properties that she seeks to be declared matrimonial property. The respondent has also failed to prove any involvement in the acquisition beyond being the spouse at the time they were acquired. In view of the fact that for all intents and purposes she was a homemaker, not gainfully employed and hardly involved in any substantive business making venture, did her non-financial contributions in running the home and taking care of the children entitle her to a beneficial interest in the house in Zomba, the shop and the farming business? The petitioner does not deny her an interest in the motor vehicle the Mazda Demio.
21. If the respondent's in-kind contribution is to establish beneficial ownership for joint ownership, what constitutes fair distribution?

### The Law

1. Section 24 of the Constitution provides for the rights of women and property rights as follows:

*(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status, which includes the right-*

*(a) to be accorded the same rights as men in civil law, including equal capacity-*

*(i) to enter into contracts;*

*(ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;*

(b) on the dissolution of marriage, howsoever entered into-

(i) to a fair disposition of property that is held jointly with the husband;  
and

(ii) to fair maintenance, taking into consideration all the circumstances  
and, in particular, the means of the former husband and the needs of any  
children.

22. Section 23(1) recognizes the right of every person to acquire property alone or in association with others.

#### Case Law

23. As I noted in the case of *Kopa v Kopa* Civil Appeal Case No. 12 of 2023

17. In the quest to arrive at a determination as to whether any property between disputing ex-spouses was jointly owned or not, courts have developed two broad overriding principles to assist in the fact-finding process. These principles require the courts to inquire into (1) the intention of the parties to either own the property singularly or jointly and (2) any contribution (actual or perceived) of the parties towards the acquisition of the property (see *Rachel Sophie Sikwese v Gracian Zibelu Banda* MSCA Civil Appeal No. 76 of 2015). It is only upon evidence of either of the said intention or contribution that the courts find that property was jointly owned or not. The mere existence of marriage is thus not sufficient to enable any party to claim that the property was jointly owned and thus the necessity to lead evidence of intention or contribution (see *Rachel Sophie Sikwese v Gracian Zibelu Banda* cited above). ...



18. What constitutes evidence of intention or contribution will solely be dependent upon the circumstances of each and every case. The court tasked with making such a finding must consider the conduct of the parties as evidence to either that the property was intended to be held jointly or that there was contribution in the acquisition of the property. However, these two principles of intention and contribution become applicable only to marriages where both parties were actively engaged in various financial activities (see *Rachel Sophie Sikwese v Gracian Zibelu Banda* MSCA Civil Appeal No. 76 of 2015). It is therefore presumed that each of the parties if financially able, are capable of acquiring property for their own personal use and not to be owned jointly by the as a couple.

#### International Instruments

24. Malawi has ratified a number of international and regional human rights instruments, cited by counsel for the respondent, which mandate equitable sharing of joint property upon dissolution of marriage.
25. These instruments include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Malawi ratified in 1987, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was ratified in 2005.
26. Under article 16 of the CEDAW, States Parties are obligated to eliminate all forms of discrimination between men and women in marriage and family matters by ensuring that both men and women enjoy the same rights and responsibilities during marriage and its dissolution.
27. Further, article 7 of the Maputo Protocol, entitles women to an equitable share upon dissolution of a marriage. Thus, States Parties are called upon to enact appropriate legislation to ensure that women and men enjoy the same rights in cases of separation, divorce or annulment of marriage. Subsection (d) in particular states that they shall ensure that:  
*... in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.*
28. The African Commission on Human and Peoples' Rights in General Comment No 6 on

Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa defined "Equitable distribution" under Article 7(d) of the Maputo Protocol as:

*... the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.*

29. Thus, the notion of "equitable distribution" requires the Court to consider the substantive contributions made to the acquisition and development of the property during the marriage which are often non-monetary and difficult to quantify, rather than merely looking at the formal (often monetary) contributions.
30. Further, according to Comment No. 6 of the African Commission on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, a substantive approach recognises that equality can only be achieved when the context, social, economic religious and political, in which the parties exist is considered and given equal weight when distributing matrimonial property. This approach requires States to recognize that women are in an unequal position and implement special measures aim at ensuring their property rights during separation, divorce or annulment of marriage.
31. It is in application of principles based on such normative equality principles that in *White v White* {2000} UKHL 54, the House of Lords held that there should be more weight given to non-financial contributions and their contribution to the welfare of the family. They further stated that greater regard should be had to the fact that a wife may sacrifice and lose her opportunity to acquire and develop her own money-earning qualifications and skills by being home and having and looking after young children. These factors should be considered when determining the contribution made to the property by each party.
32. The substantive approach to equitable distribution of property upon dissolution of marriage fully considers the fact that women are often in an economically weaker position and are unable to contribute the same or any amount to the acquisition and development of property. It further considers, and gives equal weight to, the non-



monetary contributions such household duties and reproductive duties made by the woman during the marriage.

### Court's Reasoned Determination

33. The principle behind the Supreme Court of Appeal decision in *Rachel Sophie Sikwese v Gracian Zibelu Banda* (cited above) is very clear. Constitutional property rights of parties to marriage are to be protected to the full and such property should only be declared matrimonial property upon proof of intention of joint ownership or upon proof of contribution. This, however, only applies where both parties were gainfully employed and each capable of acquiring their own property.
34. It is therefore irrelevant on the current set of facts that the respondent was not involved in the identification of any of the properties she lays claim (which may have constituted evidence of intention that the property be jointly owned). It is equally irrelevant that she did not make any in cash contribution. I am grateful to counsel for the respondent who has cited relevant legal principles from the regional and international framework which enable a party in the position of the respondent to the property acquired during the marriage.
35. It was in evidence that the petitioner has always been the breadwinner. He was solely responsible for all purchases from his salary and from his allowances through missions outside the country in the line of duty. He was also entitled to a marriage allowance by virtue of being a married man which despite now being divorced, he is still getting. The respondent has never worked. She has embarked on very modest business ventures that can in no way be called a trade. The proceeds were consumed almost immediately. She has never worked because she did not go very far with her education because she got pregnant whilst at school. She then devoted herself to home management and childcare. The petitioner benefitted from her home management and childcare services while he went on to work full time in his career. He was away several times while she held fort at home. These contributions, though non-financial ought to be recognised as cited in the international and regional frameworks cited above. The respondent put herself to a detriment after she got pregnant, for the benefit of her family. The petitioner even benefitted through a marriage allowance at work because he was married to her. He was freed up to generate income while she kept things moving at home. She cannot at this

point be excluded from a distribution of the property acquired simply because she did not contribute financially, a situation which was not of her own making.

36. Just as the Kalembera J. as he was then in the case of *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020) found that the petitioner "housewife" had contributed to the marriage by cooking and contributing to the family's budget had earned a beneficial interest in a bachelor's degree earned by the respondent, "breadwinner", while the two were married so that he later became a teacher and lecturer, so too should the respondent homemaker in this case gain an interest in the property acquired during the marriage. Kalembera J., found that the petitioner was entitled to a share of the spouse's academic degrees and professional licenses which can be considered marital property when determining asset distribution during a divorce, as the potential future earnings derived from those qualifications contribute to the couple's shared economic well-being; essentially, the value of future income generated by a degree should be factored into the divorce settlement, even if the degree itself isn't tangible property.
37. I similarly find that the respondent has a beneficial interest in all the property acquired during the marriage because she sacrificed her own career prospects for his future earnings. She further contributed to the petitioner's financial prospects through her in kind contributions of home management and child care. Her reliability as a witness or her lack of financial contribution are of no relevance in this case for the reasons I have already given. Having reasoned thus, I hereby find that the respondent is entitled to a beneficial interest in the Zomba house, the shop in Zomba, the farming business and the Mazda Demio using the principle of "equality is equity". Both parties shall be entitled to a 50% share of these properties.
38. As for the household property distribution of which is not in dispute, the equal share proposed by the petitioner is confirmed and the property shall thus be distributed as follows:

ITEMS	QUANTITY AND/OR PARTY
Sofa Set (4 Piece)	Petitioner



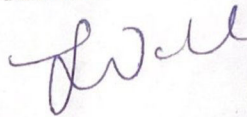
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Wooden Double Bed	1 for each party
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Blue Plastic Chairs	4 for the Petitioner, 3 for the Respondent
Hot Plate	Respondent
Upright Fridge	Petitioner
Kitchen Utensils	Half for each party
Axe	Petitioner
Hoe	Respondent

39. Since both parties now have equal distribution of the matrimonial property, there is no reason why only one party should be responsible for the children's school fees and

maintenance and the petitioner can apply to Court for an order for the maintenance of the children.

40. The parties are at liberty to have the property valued and buy each other out of their shares so that an equal distribution is achieved by whatever means practicable.

Made in Chambers this 11<sup>th</sup> day of March, 2025 in Chambers at the Lilongwe District Registry, in the Family and Probate Division, in the Republic of Malawi.



Honorable (Mrs.) Fiona Atupele Mwale  
JUDGE