



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

**PRINCIPAL REGISTRY**

CIVIL NO 397 OF 2013

BETWEEN

EMMA KISHINDO

APPLICANT

AND

PAUL A. KISHINDO

DEFENDANT

**CORAM:**

JUSTICE D.F. MWAUNGULU

Kainja, for the applicant

Respondent, absent, unrepresented

J. Chilimampunga, Official Interpreter

**Mwaungulu J**

**JUDGMENT**

Emma Kishindo, a wife, took out a summons on 11 October 2013 against Paul Kishindo, her husband, in which essentially, after the Msongandeu Magistrate Court on 8 February 2010 dissolved their marriage, she asks this Court to dispose of matrimonial property acquired, much of it, during marriage. All the children were at the time of the action, adults. The property comprises two houses in Old Naisi and Domasi and household items. For much of their later life, the Kishindos lived in the Old Naisi house, which is in Mrs. Kishindo's name. Mrs. Kishindo relocated to Lilongwe because of a new job which, according to Mrs. Kishindo, accounts for the two houses and most of the household items. Marriage difficulties meant that for much of that time Mr Kishindo has been using the Old Naisi house to Mrs. Kishindo's exclusion. Mr Kishindo, additionally, has virtual control and possession of the Domasi house. Mrs. Kishindo is here because of jurisdictional reasons relating to value, nature and location of the matrimonial property.

There is not much to distribution of household goods. The applicant, however, prays that she gets the Naisi house because of her husband's customary obligation to build a house for her under Chewa customary law; the

house is registered in her name; the husband gave it to her as a gift; and that her husband has another house which they built in Domasi. The applicant's Counsel relies on decisions of this Court and the Supreme Court of Appeal. The latter are binding on this Court, the former are only persuasive. In compliance with section 64 of the Courts Act, the applicant's Counsel never called evidence on customary law. He relied, and there is no reasonable objection to that, on authoritative writing. Such writing is a source of law in our courts, albeit that, unlike in civil law jurisdiction, Common law courts use this source less often where, especially, there are binding and persuasive judicial decisions. On the latter, Counsel also, in relying on legal authors, succinctly relies on judgments of the National Traditional Court of Appeal. Decisions of that court were assumed to be final. I have my doubts that this was the correct position. On the other hand, decisions of that Court could not bind the High Court or the Supreme Court of Appeal. The decisions, in my view, probably stand in the same position as that of authors and, therefore, the High Court and the Supreme Court cannot overlook them where, as will often be the case, the High Court and Supreme Court seek, under or in spite of, section 64 of the Courts Act, customary law has to be established by evidence and the High Court and the Supreme Court will create a binding precedent on customary law. Both the works of authors and the National Traditional Court of Appeal, however, are subservient to judicial pronouncements, persuasive and binding, by the High Court and the Supreme Court, the latter being ultimate.

In *Kamphoni v Kamphoni* (2012) Matrimonial Cause No 7 (HC) (PR) (unreported) this Court examined various legislation, decisions of this Court, decisions of the Supreme Court, authoritative works on customary law, international law and relevant foreign decisions against sections 24 (1) (a) (ii), 24 (1) (b) (i), 24 (1) (b) (ii) and 28 (1) of the Constitution dealing with the right of all citizens and women in particular to acquire property and the rights of married women to property on dissolution of marriage. All these constitutional rights, as observed in the case, can be limited by law. The Matrimonial Property Act 1873, a statute of general application before 1902, did not create rights in property but a process for ensuring that after dissolution of a marriage whatever rights a woman has at general law are *in situ*. Section 28 of the Divorce Act, which deals only with distribution of property where adultery, and only of the woman, I resolved was discriminatory against women and, therefore, unconstitutional. I also determined that where, like in this case the marriage was contracted at customary law, where there was applicable customary law, the Common Law would not apply. The customary law, however, would be subjected to section 44 of the Constitution considerations. The word 'law' in section 44 (2) is broad enough to include legislation, Common law, international law and customary law. Consequently, much so here, where parties married under customary law, constitutional provisions may not determine the rights' extent and scope. The court must approach the matter from does customary law cover the right with the consequence that, if it does, the Court must decide whether customary law annihilates or limits the right. In *Kamphoni v Kamphoni* I concluded that at customary law that disposal of matrimonial property at dissolution of marriage bases on principles of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity:

*"The duty of a customary law court is to espouse the customary law in space and time from the principles of customary law. The customary law principles themselves may change, albeit gradually, but it must be the functions of customary law courts to derive the customary law from the principles of customary law exigent at a given point in time. There is no doubt whatsoever that at customary law the disposal of matrimonial property on dissolution of marriage based on principles of fairness and justice. In Matimati v Chimwala, Southworth, C.J, after laying down the customary law as given to him by assessors, said:*

*"This Court accepts the three assessors' exposition of their people's law and custom, which is in accordance with fairness and justice, and can see no reason to disagree with their assessment of the amount due from the respondent to the appellant."*

*At customary law disposal of family property bases on the customary law principles of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity. Customary law courts, which this one is, apply these broad principles to different situations and the following customary law emerges in relation to disposal of matrimonial property in this Court. The following customary law is based on decisions on customary law marriages where the Common law never and should not have applied. All decisions are from this Court; there has been no Supreme Court decision on disposal of matrimonial property on a customary law marriage.*

Equally, because the Constitution underscores the concept of fairness, I concluded that the broad principles on which matrimonial property is disposed of at customary law were not a limitation, but adumbration of the right:

*“It remains to review some decisions of this Court on the matter in view of the concept of fairness. There cannot be a blue print of what is fair that fits all. Fairness depends on circumstances on each case and one cannot successfully list all the circumstances. Consequently, decisions of this Court that I review should be understood as not laying any general or broad principle. They are each one of them an attempt by the Courts to be fair in the particular situation. The case under consideration is a customary law marriage and, in the absence of election of the Common law, not that it would matter as now both the Common law and customary law follow the fairness principle, customary law must apply. At customary law, disposal of property at customary law bases on the principles of fairness, reasonableness, comity, proportionality and solidarity. The principles are wider than those stipulated in section 24 (1) (b) (i) of the Constitution and are, therefore, an adumbration of the right, not a limitation. These principles do not conflict with section 24 (1) (b) (i) of the Constitution. It must be that a law that expands a right is not offending a right because constitutional rights are the minima, not the maxima of the rights that inure to citizens.*”

Consequently, the constitutional provision that deals with disposal of matrimonial property on dissolution of marriage, and which, in the absence of any limitation by law, must apply is section 24 (1) (b) (i) of the Constitution:

*“ 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 ... on the dissolution of marriage, howsoever entered into ...to a fair disposition of property that is held jointly with a husband ...”*

The first point taken for the applicant is that she must have the dwelling house at Naisi because her husband was obligated at customary law to build her a house according to Chichewa customary law. The Applicant's Counsel relies on the case of *Matimati v Chimwala* (1964-66) ALR (MAL) 34, 36, lines 26 – 37 and a statement by Southworth, J: “Under customary law a man has an obligation to provide his wife with a house when he marries, and if he divorces his wife before doing so, this will not relieve the obligation.” The principle is well known and acknowledged as not to require authority. The principle, however, does not aid the applicant who, on her own admission, married under Chitengwa where, after payment formalities, she is to live at her husband's village. Under Chitengwa the husband has an obligation to build a matrimonial house at his village, which in this case he did. I have never understood the customary law to be what is suggested here, to wit, that a man under Chitengwa must build two matrimonial homes, one at his place, where the woman has agreed to live with him, and another at the woman's home, where, but for Chitengwa, she should have lived. If an obligation, therefore, exists, which it does, to build a matrimonial home for a wife it would be to build at the husband's home, the wife's new home, and that obligation is discharged, as happened here, by the husband constructing a house at his home. Consequently, the house at the husband's home becomes property jointly held by virtue of marriage.

This case, therefore, can be distinguished from *Kamphoni v Kamphoni* where this Court ordered the urban house for the wife and the husband got the one built in his village. One reason advanced there was that the husband, who built a house in his village in Mulanje and none in Nchitsi where the wife came from, with no Chitengwa, should not have built the house in Mulanje in the first place:

*“The realty has exercised my mind a great deal. The family has two homes: in Mulanje and Blantyre. The spouses have not indicated why, given that this is a matrilineal customary law marriage, the home was built in Mulanje, apparently where the husband comes from, and not in Nchitsi where the wife comes from. This, on the principles just espoused, works unfairly against the wife and is, on balance, intolerable.”*

In *Kamphoni v Kamphoni* this Court formed the view, albeit obiter, that the Court could order building a matrimonial home if, *per chance*, at dissolution of a Chitengwa marriage, children nurture obligations continued with the wife:

*Similarly, for Chitengwa, where upon payment, a woman in the matrilineal system lives at the husband's village, customary law places legal custody with the wife and on divorce the customary obligations of nurture for the children resuscitate to require the husband to build a house for the wife.*

In this particular case, the two children of the marriage are adults. I do not think that there is an obligation at customary law in the circumstances for the husband to build a matrimonial home for a wife.

Moreover, in *Kamphoni v Kamphoni* this Court, recognizing the customary law on this point' stated that this aspect of customary law would be subject to fairness principles. Consequently, there could be circumstances where it would be unfair to order building a house or ordering a house to be given to the wife on this principle of customary law:

*"In my judgment, following customary law principles of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity, where spouses under the matrilocal system, without more, own a house in the course of marriage which is used as a matrimonial home for the spouses (and the kids), that house could be treated as a customary law matrimonial house for purposes of disposal of property on dissolution of a customary law marriage. The same customary law principles of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity would require that the customary law court regard the situation of the husband and children at the time of dissolution of the marriage. Jusa v Jusa and Dunken v Dunken would be good law and in accordance with the requirements in section 24 (1) (b) (i) of the Constitution."*

One such circumstance would be to order a man in Chitengwa to build another matrimonial home after dissolution of a marriage. A woman who marries under Chitengwa risks such a prospect; and there is no unfairness because a man who marries under Chikamwini also carries such a risk. On the facts of this case, the children are adults and, therefore, should not come in the equation. I do not, for the same reasons given in *Kamphoni v Kamphoni*, consider inheritance rights to children, those will be sorted by the appropriate allocation of property to the spouses giving them a right to dispose of whatever property they are lawfully entitled to by testament or intestacy. On the facts of this case, the matrimonial home required at customary law is the one built, under Chitengwa, in the husband's village. To that house the applicant has rights together with the husband. The husband, according to Chitengwa, was not supposed to build a house at the wife's village.

Consequently, houses constructed after the Chitengwa house should under customary law be considered general matrimonial property and treated as it would be treated at customary law. Such property should not be treated as matrimonial homes for purposes of the principle that the husband must build a matrimonial home at the wife's home. As this Court pointed out in *Kamphoni v Kamphoni*, there is an obligation to build a matrimonial home for a wife; there is no obligation to build matrimonial homes for a wife. Customary law does not treat houses on customary land as realty as does the Common law. Consequently, houses are treated as personalty and subject to distribution between spouses. In *Regina v Damaseki* (1961-63) ALR (Mal 69, Cram J., said:

*"It is perfectly apparent that this African dwelling is in African trust land area, and that the English law of property can have nothing whatever to do with "ownership." In English law the house would be regarded as a real estate, inseparable from the land to which it was fixed, whereas in African customary law a dwelling house has not this fixed status, but is usually personal property."*

This is partly because customary land title is not a title in fee simple. The title is usufructuary. In *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) Ngcobo J., in the Constitutional Court of South Africa said:

*"When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law. There are obvious dangers in such an approach. These two systems of law developed in two different situations, under different cultures and in response to different conditions."*<sup>[19]</sup> In *Alexkor*, this Court approved the following passage by the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*:

<sup>[20]</sup>

*"Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is*

a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.”

The second argument made for the applicant is that the land parcel on which the Old Naisi building stands is registered in her name. The applicant’s Counsel makes two arguments in this respect. The first is that the husband allowed this because he was giving the house at Naisi as a gift after building the home at the village. On this point he starts with what Villiera J said in this Court in *Nyangulu v Nyangulu* [1981-83] 10 M.L.R.433, 435:

*“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 applicant’s Counsel, relying on the House of Lord’s decision in *Gissing v Gissing* [1971] A.C. 886, contends that, since at Common law, an inference of joint ownership of property cannot be inferred from the mere fact of marriage, the disposal of property after dissolution of marriage depends on the intention of the parties at the time of acquisition. He then argues, based on the decision of this Court in *Chibweya v Chibweya* [1981-83] 10 M.L.R. 279, that there is a presumption of a gift to wife where a husband purchases property or makes an investment in the name of a wife. I do not think so.

First, *Gissing v Gissing* was a decision at Common law and the Common law, as pointed out in *Kamphoni v Kamphoni*, did not recognize the concept of family property. In *Nyangulu v Nyangulu* was a case of marriage under the Marriage Act and, in that case, therefore, *Gissing v Gissing* applied. More importantly, it was a decision before the 1994 Constitution. I do not think that the High Court would have stated the principle that way considering sections 24 (1) (b) (ii) of the Constitution. The case of *Mwalwanda v Mwalwanda* (2008) Civil Appeal No 51 (M.S.C.A.) (unreported) was a decision of the Supreme Court where the decision of *Nyangulu v Nyangulu* and *Chabwera v Chabwera* received tacit approval. The Supreme Court, in arriving at the decision, never considered sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution. There was a duty on the Supreme Court under sections 9, 10 (1) and 10 (2) to regard sections 24 (1) (b) (i) and 24 (1) (b) (ii) of the Constitution. Moreover, the marriage in *Mwalwanda v Mwalwanda* was not under the Act. The Supreme Court of Appeal never considered the applicability of the Common law to a customary law marriage where there was customary law. The Common law cannot apply to a customary law marriage where customary law exists. English Common law, to the extent that it suggests differently, should not apply to this case which bases on customary law. The Common law does not recognize community of rights by virtue of marriage (per Lord Morris of Borth – Y – Gest, page 975 paragraph H; per Lord Upjohn, page 993 paragraph C in *Pettit v Pettit* [1969] 2 WLR 966 (House of Lords). The Matrimonial Property Act 1973 introduced the concept in English law (*White v White* [2000] UKHL 54; *Miller v Miller: McFarlane v*

*McFarlane* [2006] UKHL 24). The Common law, however, recognises that other systems do have the concept of family property. Lord Reid said at page 972 paragraph H:

*“I would therefore refuse to consider whether property belonging to either spouse ought to be regarded as family property for that would be introducing a new conception into English law and not merely developing existing principles. There are systems of law which recognize joint family property or *communio bonorum*”.*

Malawi customary law has the concept family joint property or *Communio bonorum*, and more importantly, joint family or *Communio bonorum* derives directly from section 24 (1) (b) (i) of the Constitution. In the course of the marriage, however, the matrimonial home, even if built at one spouse’s land, was co-owned or co-controlled (*Regina v Damaseki* (1961-63) ALR (Mal) 69). A husband and a wife at customary law communally own property of the marriage and this is in tandem with sections 28 (1) of the Constitution that recognises the right of anyone to own property singly or jointly and section 24 (1) (a) (ii) of the Constitution, applying specifically to women. In this case, our customary law was superior to the Common law which, for many years, until very recently, never recognised the right of women to own property, apart from her husband. This passage by Cram, J, in *Regina v Damaseki* is the acme of joint family property or rights *Communio bonorum* of husband and wife at customary law:

*“An African witness expert in the local customary law, testified that on the facts proved by the Crown, had Jeneti and the accused been joined in a regular union by their personal law, the accused would have been, if not the “owner,” at least the controller and possibly the owner of the house. I have some doubts whether the concept of “ownership” of a house is fully recognised as full dominium in the parties’ personal law. In the case of the irregular union proved, customary law appeared to be that when the accused came to live with Jeneti in the house, he became de facto and de jure the controller, and this power or right would endure if he left the woman, not permanently; but if he left her with intent to return, then she would be clothed with the control of the house. Further, Jeneti might be a joint “owner” or lawful occupier. On the facts, I think it was at least difficult to say whether the accused had left Jeneti permanently or not, and there was at least some doubt, by the customary law, whether he had ceased to have any control of the house”.*

It is because the Common law never recognised joint family property that the principles in *Gissing v Gissing*, *Pettit v Pettit* 1970] A.C. 777 developed. The Matrimonial Causes Act of 1973 subsumes these principles. The development of the Common law in England and elsewhere has been in the direction of fairness. The United Kingdom House of Lords, however, is adamant, that, the Matrimonial Causes Act, notwithstanding, the principles enunciated are a development of the Common Law and based on the wider judicial discretion envisaged in the Act (*Miller v. Miller: McFarlane v McFarlane*. In *White v White* Lord Cooke said:

*“There may be and is in the English Act no statutory presumption or prima facie rule, but there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice.”*

The development of the Common law within the Commonwealth is pervasive. Our Common law cannot be the exception by remaining with notional contribution by a spouse. Lord Cooke continued:

*“...The most important point, in my opinion, in the speech of my noble and learned friend Lord Nicholls is his proposition that, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions.”*

At Common Law, therefore, the dominant principle, which has a measure of universality, is that disposal of matrimonial property is based on fairness. Lord Nicholson said:

*“...Divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated*

*in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."*

In Both *White v White* and *Miller v Miller: McFarlane v McFarlane*, the House of Lords, the dominant theme is fairness. Lord Nicholson said:

*"A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': R v R [1992] 1 AC 599, 617. This is now recognised widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule."*

In *White v White* Lord Justice Cooke said:

*"The most important point, in my opinion, in the speech of my noble and learned friend Lord Nicholls is his proposition that, as a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be broad or detailed in its statutory provisions."*

For these reasons, the decisions of *Kayambo v Kayambo* and *Cromar v Cromar*, based as they are on notional contribution are incongruous with the developing Common law. I am persuaded by the principles laid in the cases of *White v White* and *Miller v Miller: McFarlane v McFarlane*, especially the remarks of Lord Justice Nicholson in *Miller v Miller: McFarlane v McFarlane* that legislation prior to the Matrimonial Causes Act and, therefore, the Common law developed there under, were based on a fading paradigm:

*"Self-evidently, fairness requires the court to take into account all the circumstances of the case ... As Butler-Sloss LJ said in Dart v Dart [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party ... If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."*

*Kayambo v Kayambo* is a Supreme Court decision. This Court is bound by it. In a sense, it may be insufficient to depart from it based on the development of the Common law elsewhere. So much so that the only reason that I am departing from it is because of section 24 (1) (b) (i) of the Constitution that entitles women to a fair disposal of property jointly held. *Kayambo v Kayambo* was decided before the 1994 Constitution. If it be regarded as a limitation, it is not concomitant with human rights standard, obliterates the right to fairness and not necessary in a democratic society. Moreover, based on foreign case law assists in understanding the concept of fairness the cases of *Miller v Miller: McFarlane v McFarlane* and *White v White*, aid interpreting sections 24 (1) (b) (i) and 24 (1) (b)

(ii) of the Constitution under section 10 (2) of the Constitution. Certainly, if the Supreme Court of Appeal was, when *Kayambo v Kayambo* was decided, using our Constitution, in developing the Common law they developed, would have developed it differently. The duty to develop the Common law falls on our shoulders today because us, unlike the Supreme Court when *Kayambo v Kayambo* was decided, have not only to develop the Common law as suggested in *White v White* and *Miller v Miller: McFarlane v McFarlane*, but, in the words of the Constitution, develop the Common law (and customary law) by regarding the principles and provisions of the Constitution. These foreign cases laws, under section 11(2) (c) of the Constitution, should aid interpretation of section 24 (1) (b) (i) of the Constitution, which provides for a fairness principle.

In any case, as we noted earlier, customary law recognises joint family property from the fact of marriage and the principles in *White v White* and *Miller v Miller: McFarlane v McFarlane* apply. Moreover, assuming that the statement by Villiera J., in *Nyangulu v Nyangulu* is right, it is inadequate to deal with a wife's right under the Constitution and at customary law. From a constitutional perspective, a wife is entitled to fair disposal of property jointly 'held.' Consequently, while it might be true that joint ownership of property is not to be made from the mere fact of marriage, the wife's right in the Constitution is for property jointly 'held,' not jointly 'owned.' The word 'hold' in the Constitution does not connote ownership; if it does, ownership is not the only aspect of holding. There could be holding where spouses, though not in ownership, could be holding property together. At customary law, as we saw from *Bhe and Others v Khayelitsha Magistrate and Others*, the distinction between possession and ownership is obscure. Consequently, at customary law and under the Constitution matrimonial property may, even if not jointly owned, be jointly held and the fairness principle applies.

In those circumstances, it appears to me, it is unfair, on dissolution of marriage to consider the intention of the parties at the time of acquiring the property. That intention, if it be relevant, can only be the express intention that the property would not be affected at dissolution of the marriage. Spouses when they marry or acquire property do not act on the assumption that the marriage will end. They act on the pretext that they will live happily thereafter and that the property acquired or brought into marriage will be used or be held in such a way. In *Chibweya v Chibweya* Banda, C.J., said:

*“Where a husband purchases property or makes an investment, in the name of his wife, there is a presumption that he is making a gift to her.”*

The applicant's Counsel, therefore, submits that in allowing the house to be in the wife's name, the husband, given the fact that they had built at the husband's village, was donating the Naisi house to the applicant. First, the principle must also apply to when a woman purchases property or makes an investment in the name of the husband. I do not think that the Court was making such a statement. If it was not, the principle would be discriminatory against men. The most important thing is that there is no such presumption because of the second point. Secondly, purchasing a spouse a property or opening an investment in a spouses name may be as consistent with giving a gift as it is that the spouses intend it to be jointly owned or held in the course of the marriage and most spouses proceed on the latter. From a legal perspective, the motivation may be irrelevant or, at least, one among many circumstances the court regards in deciding the fairness question on disposal of property on dissolution of the marriage.

On dissolution of marriage, the question of disposal of matrimonial property involves determining whether property is matrimonial property in the sense that, to quote from section 24 (1) (b) (i) the Constitution, it is “property that is held jointly with a husband.” The question is not in the *Nyangulu v Nyangulu* sense whether the property is jointly owned, for if the framers of the Constitution had intended to use the word 'owned,' they should have used it instead of the word 'held.' Neither is the question in the *Chibweya v Chibweya* sense whether a spouse bought or invested in another spouse's name. In either of these cases, the question is whether property owned, purchased or invested in another's name is property that is 'held jointly with a husband' for purposes of section 24 (1) (b) (i) of the Constitution.

Section 24 (1) (b) (i) of the Constitution, as seen earlier, refers to property jointly held. The word 'held' is not confined to ownership or possession. The word 'held' cannot be restricted to the two aspects. In interpreting the word 'held' in section (24 (1) (b) (i) of the Constitution, we must recourse, where it is necessary (under section 11 (2) (c) regard norms of international law and foreign case law. The cases of *White v White*, *Haldane v Haldane* and *Miller v Miller: McFarlane v McFarlane* are such cases. Under norms of international law, the word 'held' in



section 24 (1) (b) (i) of the Constitution must refer to all matters in Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women: “ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration.” Consequently, property in marriage, even if ‘acquired’ independently under sections 24 (1) (a) (iii) or 28 (1) could be jointly “held” for purposes of section 24 (1) (b) (i) because it is during marriage jointly possessed. If the framers of the Constitution wanted the right to emerge from ownership, the word ‘held’ was not the one to use. The framers were very clear about what they meant, ‘property jointly held.’ The framers did not use the word ‘acquire’ used in sections 24 (1) (a) (iii) and 28 (i) of the Constitution. The property need not be jointly acquired in order for it to be jointly held. The prospects are that, even though acquired before marriage, the other spouse did something to it directly for its retention, a point made by Lord Cooke makes in the same case:

*“In the present case, bearing in mind that it was a marriage of more than thirty years, that there were three children and that the wife was an active partner in the farming business as well as meeting the responsibilities of wife and mother, the only plausible reason for departing from equality can be the financial help given by the husband's father. I agree, however, that the significance of this is diminished because over a long marriage the parties jointly made the most of that help and because it was apparently intended at least partly for the benefit of both.*

Lord Simon of Glaisdale said, in delivering the judgment of the Privy Council in *Haldane v Haldane* [1977] A.C. 673, 697), a case under the former New Zealand legislation,

*"Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention."*

In this respect, even though the land parcel was in the wife’s name, either as a gift or purchase, it was property at the dissolution of the marriage that was ‘held jointly with a husband’ and subject to the fairness principle under section 24 (1) (b) (i) of the Constitution. There is no blue print of fairness that fits all. Fairness depends on circumstances on each case. One cannot successfully list all the circumstances. Consequently, decisions of this should be understood as not laying general or broad principles. Each decision is the courts’ attempt to be fair in a particular situation. The case under consideration is a customary law marriage and, in the absence of election of the Common law, not that it would matter as now both the Common law and customary law follow the fairness principle, customary law must apply. At customary law, disposal of property at customary law bases on fairness, reasonableness, comity, proportionality and solidarity. The principles are wider than those stipulated in section 24 (1) (b) (ii) of the Constitution and are, therefore, an adumbration of the right, not a limitation. These principles do not conflict with section 24 (1) (b) (ii) of the Constitution. It must be that a law that expands a right is not offending a right because constitutional rights are the minima, not the maxima of the rights inuring to citizens. Consequently, that the property was acquired and registered in the applicant’s name or given as a gift to a spouse does not prevent such property being property jointly held with a husband. In *Kamphoni v Kamphoni* this Court said:

*“In matrilocal marriages, once the matrimonial home is resolved, the Court must apply these general principles. In relation to non-real property, application of customary law principles entail, unless fairness, justice, reasonableness, proportionality, comity, conformity and solidarity, that the property is distributed equally between the spouses. There is no need, as we have seen, on dissolution of marriage, to investigate the intentions of the spouses. Kayambo v Kayambo and Cromar v Cromar in so far as they suggest that courts must on dissolution of marriage investigate the intention of the parties on acquiring of property are bad law. Such property would be jointly held for purposes of disposal under section 24 (1) (b) (i) of the Constitution and vulnerable under section 24 (1) (b) (ii) of the Constitution. A husband’s property would be as susceptible because, in ordering fair maintenance, such property will be regarded as the means of the husband and welfare considerations of the children. That intention, in my judgment, is not shown merely by the fact that property acquired with or without the other spouse’s contribution, was registered in the name of one spouse. Such a distinction, in my judgment would result in distinguishing real property from personal property with the result that the principle would only apply to property which would require registration. Generally property would, depending on the funding source, a bank, employer or mortgage, be in the name of the purchasing spouse. It would be precarious to the other spouse, who would have*

*been meeting different chores, to be told that the intention, just from the fact of registration, was that the other spouse would not own the property. Where, for example, the wife bought a house through her employer and the husband, based on this fact, agreed to buy a Porsche, it would be very difficult to infer that the parties intended not to have a share in both. Thirdly, where there are more houses, the rest of the houses, on principles of fairness, justice, reasonableness, proportionality, comity, conformity and solidarity, should be regarded as property of the marriage, distinct from a matrimonial home and must be shared on customary law principles suggested.”*

The application of customary law principles of fairness, reasonableness, comity, proportionality and solidarity, results in that property (other than the matrimonial home) is usually equally divided between husband and wife. “*In distributing ... the court shall endeavour to achieve a semblance of equal sharing,*” per Potani, J, in *Chingadza v Chingadza* (2011) Matrimonial Cause No 97 (PR) (unreported). Similar results obtained in *Botha v Botha* (2010) Matrimonial Cause No 15 (LDR)(Unreported), per Chombo J; *Ndalama v Jumbe* (2006) Civil Appeal 145 (PR) (Unreported), per Chipeta J; *Jusa v Jusa* (2009) Matrimonial Civil Cause No 75 (PR)(Unreported, per Potani, J; *Master v Kachingwe* (2011) Civil Cause No 13 (PR)(Unreported), per Chirwa, J. The principles of fairness, reasonableness comity and proportionality, results in that the matrimonial home, on the principles of nurture, will be left to the spouse with legal custody of the children.

Both spouses, however, co-own or control the matrimonial home. On the face of it, a wife in a matrilocal system acquires property in a matrimonial home by virtue of marriage. The wife, *per force*, in a sense, on dissolution of the marriage, acquires the property as a matter of right. At customary law, those rights would be conclusive and exclusive on the matrimonial home. The ownership of such a matrimonial home is not property acquired in association with another. It is, in the words of section 24 (1) (a) (ii) of the Constitution, probably property acquired independently. Consequently, the matrimonial home could not be subject to fair distribution under section 24 (1) (a) (ii) of the Constitution. In that sense, *Chimtedza v Chimtedza*, therefore, does not override *Matimati v Chimwala* and *Ganet v Ganet* on the right of a wife at matrilocal customary law to a matrimonial home. On the other hand, the decision in *Damaseki v R* suggests that during marriage, there is co-ownership or co-control of the matrimonial home. This is in tandem with the customary law earlier expressed that the woman at customary law built the house with her husband and, therefore, co-owns the matrimonial home. On the latter principle, which to me seems to be the more reasonable, a matrimonial home, just like any other matrimonial property would be subjected to the fairness principle under section 24 (1) )b)(i) of the Constitution. The husband’s rights, however, would be subject to section 24 (1) (b) (ii) of the Constitution.

Section 24 (1) (b) (ii) of the Constitution now requires the Court to order maintenance for a wife, after consideration of the means of the husband and welfare of children:

*“Women have the right to full and equal protection by the law, and have the right ...on the dissolution of marriage, howsoever entered into—to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”*

Those means must be property bequeathed to, received by or acquired by the husband. Bequeathal, acquisition or receiving of the property by the husband, even in the husband’s own name, does not protect such property from the powers of the court on dissolution of the marriage. It is, therefore, irrelevant, except on fairness consideration, to consider contribution by the spouse to the property, whether realty or personal, more especially for the wife.

*“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 ... on the dissolution of marriage, howsoever entered into ... to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”*

The means of the husband may include personalty and, as we shall see later, realty that the husband acquired after and before the marriage. The effect of section 24 (1) (b) (ii) is that all that property must be brought into the fore so that there is reasonable maintenance of the wife on dissolution of marriage. The equality formulas will, most likely, collapse, with or without the fairness principle where one spouse has the custody of children.

Applying all these principles to this case, the correct order in the circumstances is that all property is up to be shared fairly subject to equality. Equality here implies that both husband and wife come on equal footing to

property which, from the reasoning above, is jointly held between them and, in respect of the houses, irrespective of the motivation, the mode of acquisition or in whose name it is. I am the most reluctant, in the absence of the value of the property to make an omnibus order for the property. Household items can be of different values and aesthetic importance that cannot be understood or presumed by the courts better than the parties. For the same reason, an apportionment based on whether property was for a wife's or husband's use can be precarious. If, for example, one spouse had a high taste, there is an inherent unfairness to allocate such property to one spouse where in value it exceeds or is many times over other property. It is as precarious, more especially for houses, in the absence of value or description, to, without more, order a spouse to take a specific house. In this case, there is a real risk of unfairness, if, as is suggested, a rather modest house was built in Domasi and the spouses viewed the Naisi house as an investment for the future or old age. In this respect the words of Lord Nicholson in *White v White*, albeit in a different context, are apposite:

*“If a husband and wife by their joint efforts over many years, has directly in his business and hers indirectly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division!”*

Paucity of evidence on the nature and value of the house complicates an omnibus disposal. Moreover, the children are adult and, therefore, cannot be ordered to the custody of either spouse. Under *Chitengwa*, the custody of children would probably be given to the father. This is not a case where the husband is obligated to build a matrimonial home at the wife's place upon divorce. This is a case where all property is jointly held by husband and wife and, therefore, subject to fairness principles under sections 24 (1) (b) (i) and 24 (1) (b) (ii).

Sections 24 (1) (b) (i) and 24 (1) (b) (ii) must not be understood as being discriminatory against men in the sense that only women have the rights. Even if they were so understood, there is little to do about it. This is a constitutional provision. The framers of the Constitution intended it so. The sections, however, must be understood as suggesting that at dissolution of marriage fairness is a clarion. Section 24 (1) (b) (i) requires fairness in disposing property jointly held with a husband. Both are entitled to fair as international instruments to which Malawians marry and to found a family. They are entitled to equal rights as to marriage during marriage and at its dissolution” (Article 16 (1) of the Universal Declarations of Human Rights). “In case of Separation, divorce or annulment of marriage, women and men shall have the right to and equitable sharing of the property deriving from the marriage,”(Article 7 (d), Protocol to the African Charter on Human and Peoples Rights) “To ensure on the basis of equality the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposing of property whether free of charge or for valuable consideration,”(Article (6) (1) (h), of the International Convention on the Elimination of All Forms of Discrimination Against Women). Under section 24 (1) (b) (ii) of the Constitution, once the court determines that property is jointly held with a husband, as we have seen, equal sharing follows as a matter of course unless, of course, from the wife's evidence or the husband's evidence, and the burden is on the husband, circumstances are proved which make equal sharing unfair. The husband has never appeared in the proceedings starting from the court below. From the wife's evidence, only one aspect could make equal sharing unfair, that is to say, that the plot is in her name and she contributed to its construction. I do not think these aspects are consequential. The applicant admits that, albeit the land parcel was in her name, she and her husband contributed to the construction. These aspects just point to that the property was jointly owned with her husband. Equally, as we have seen, the Domasi house at customary law was held by both spouses and, therefore, jointly held with her husband. The fair property disposal principle, however, is subject to the fair maintenance principle under section 24 (1) (b) (i).

The applicant's Counsel never raised the maintenance issue in the affidavit or the actual summons. Counsel, however, never referred to section 24 at all. Section 24, however, is the paramount law on disposal of matrimonial property on dissolution of a marriage. Its two elements must pervade the Court required to dispose of the property. Disposal of property after marriage dissolution comingles with the wife's maintenance at the level of

fairness. Specifically, section 24 (1) (b) (ii) of the Constitution requires the court in making a fair maintenance order to consider the husband's means and the children's needs. The latter does not apply to the case here. The former connotes that what the husband gets on the fair disposal principle could be affected by the fair maintenance principle. There could be a claw back on what the husband gets on the fair disposal principle. Once again, I do not think that the section should be understood as being discriminatory against men. The assumption must be that generally matrimonial property would be disposed to ensure maintenance of spouses. As and when that occurs, the wife is entitled to a fair maintenance. Any other construction would comport that in circumstances where the woman maintains the man, the man on divorce cannot seek such maintenance from the wife. The section must mean that where both spouses can maintain themselves or the husband cannot maintain the woman it is not fair maintenance to require the husband to maintain the wife. Where the wife cannot maintain herself or where the woman can only maintain herself to a lower standard from her marriage, section 24 (1) (b) (ii) of the Constitution requires a fair maintenance. Once again, the applicant's Counsel laid no evidence of the applicant's maintenance needs. If it was established that the wife cannot maintain herself or can maintain herself at a lower standard, it would have affected the fair disposal principle award. The onus was on the wife to prove maintenance under section 24 (1) (b) (ii) of the Constitution.

All in all, the property listed will be disposed on a fairness principle as stated in the penultimate paragraphs. All property, if not sold or agreed upon, will be valued and distributed according to such value equally. I cannot, on the principles stated, declare that the wife is entitled to the house in Old Naisi. If at all, I can declare, on the principles stated, that the applicant and her husband are entitled to the house in equal shares. It is not clear from Counsel why I should order payment of rent in these circumstances when the house was co-owned. To remove all doubt, the matrimonial property must, in the absence of reasons to the contrary, be divided equally between the spouses. The property may be sold and proceeds divided equally or divided on an agreement between spouses based on evaluation of the property. Costs will be to the applicant.

Made this 8<sup>th</sup> Day of October 2014

D.F. Mwaungulu

**JUDGE**