

**REPUBLIC OF MALAWI**  
**MALAWI JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRAR**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 111 OF 2017**  
**(Before Justice J.M. Chirwa)**

**BETWEEN**

**ANDREW SILIYA.....APPELLANT**

**-and-**

**THOKOZANI SILIYA.....RESPONDENT**

**Coram: Honourable Mr. Justice J. M. Chirwa**  
Appellant, present (unrepresented)  
Respondent, present (unrepresented)  
Mr. O. Chitatu Official Court Interpreter

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## JUDGEMENT

This is an appeal by **ANDREW SILIYA** against the judgment of the Second Grade Magistrates Court sitting at Limbe delivered on the 16<sup>th</sup> day of May, 2017. The appeal is on the following grounds;

- “(a) The learned magistrate erred in law and fact in holding that the Appellant should pay monthly maintenance of MK70,000. 00 for the children of the marriage, the same being excessive and without considering the Appellant’s means of income;*
- (b) The learned magistrate erred in law and fact in holding that the Appellant should construct a house for the Respondent within 36months without considering the Appellant’s means of income,*
- (c) The learned magistrate erred in law and fact in holding that the Appellant should pay the Respondent a token of MK50, 000. 00 the same being without basis, excessive and without considering the evidence which was before the court;*
- (d) The learned magistrate erred in the law and fact in holding that the Appellant should buy a piece of land for children of the marriage within 7 years”.*

This being an appeal from the lower court, this Court is mindful that an appeal from such a court comes to this Court by way of an actual re-hearing and that as an appellate court, this Court is not in any way bound by the decision of the lower court but can give the weight it deserves to the decision.

### **Determination:-**

This Court intends to determine the within grounds of appeal separately,

#### **Ground 1**

That the learned magistrate erred in law and fact in holding that the Appellant should pay monthly maintenance of Mk70, 000. 00 for the children of the marriage, the same being excessive and without considering the Appellant’s means of income.

Section 23(4) of the Constitution of the Republic of Malawi (“the Constitution”) provides as follows;

- “(4) *All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate to State assistance.*
- (5) .....
- (6) *For the purposes of this section children shall be persons under the age of sixteen years”.*

Now, given that the children of the marriage under the ages of 16 years are entitled to a reasonable maintenance from their parents under the Constitution this Court would, in the premises, be constrained to fault the lower court in ordering the Appellant to pay maintenance for his children given that at the time of the order of the lower court they were all under the ages of 16 years. This Court however, faults the lower court in failing to have regard to the Appellant’s income at the time of the making the said order. And in the absence of any evidence proving the income of the Appellant having been adduced before the lower court the order for maintenance in the monthly sums of K70, 000.00 cannot thus be justified.

In the premises, this Court would be inclined to allow the appeal on this ground but only as regards the quantum of the monthly sums to be paid by the Appellant for the maintenance of the children of the marriage. This Court sets aside the said order and directs the lower court to proceed to take evidence on the income of the Appellant from the parties hereto and thereafter proceed to make an appropriate order for the maintenance of the children.

## **Ground 2**

That the learned magistrate erred in law and fact in holding that the Appellant should construct a house for the Respondent within 36 months without considering the Appellant’s means of income.

Section 100(2) of the Marriage, Divorce and Family Relations Act provides as follows:-

*“If the respondent is entitled to occupy the matrimonial home by virtue of a beneficial estate or interest or contract or any other legal entitlement but the applicant is not so entitled, the court may order the respondent to provide suitable accommodation for the applicant and any child who is entitled to be maintained.”*

It is in evidence in the present action that it is the Appellant who remained in the matrimonial home even before the divorce proceedings were concluded. It would, in the premises, follow, that the Appellant is under a statutory obligation to provide the Respondent herein with a suitable accommodation.

It is also worth noting that the custody of the children of the marriage was granted to the Respondent after the lower court had considered their best interests and welfare (vide: s.23 (1) of the Constitution). And in the absence of any evidence to show that the Respondent is not a woman of good conduct being available on the court record this Court holds the view that the best interests and welfare of the children of the marriage in the present action would indeed be properly taken care of by their mother, the Respondent herein. As a matter of fact, it is in very rare circumstances that a step mother would have the best interests and welfare of her step children at her heart. The fact that two of the children of the marriage, the younger ones, are girls also militates in favour of the grant of their custody to the Respondent herein.

Now, the custody of the children having been granted to the Respondent herein, the Appellant as the biological father thereof is, no doubt, obligated to provide them with shelter (vide s.3 of the Child Care and Protection Act and s.100(2) of the Marriage, Divorce & Family Relations Act). It is the view of this Court that it cannot be a mammoth task for the Appellant herein to construct a suitable accommodation for the Respondent herein within a period of 36 months as per the order of the lower court.

For the reasons given above, this Court finds itself constrained to interfere with the order of the lower court directing the Appellant to construct the house for the Respondent herein. The Appellant’s appeal on this ground is without merit. It is consequently dismissed.

### **Ground 3**

That the learned magistrate erred in law and fact in holding that the Appellant should pay the Respondent a token of MK50, 000. 00 the same being without basis, excessive and without considering the evidence which was before the court.

In making the award of K50, 000. 00 complained of by the Appellant the lower court had this to say:

*“Since the complainant was so willing to reconcile and go back in marriage but defendant has vehemently refused her and considering that the marriage has stayed for 16 years it will not be in the interests of justice for the complainant to leave with bare hands, I therefore order the defendant to pay K50, 000.00 (Fifty Thousand Kwacha only) as a token.”*

Section 24(1) (b) of the Constitution provides as follows:

*“24(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-*

*(b) On the dissolution of marriage-*

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

This being the law and considering the fact that the Appellant and the Respondent must have acquired some property jointly during their marriage for the period of 16 years, it would indeed be against the interests of justice to allow the Appellant to retain all such property without giving any share to the Respondent.

This Court has carefully perused the record of the proceedings in the lower court but has found no evidence adduced by the Appellant to suggest that before the dissolution of the marriage the Respondent took away some of the property jointly acquired during the subsistence of the said marriage. And when one considers what could have been acquired by the parties during the period of their marriage, as aforesaid, this Court would be constrained to interfere with the order of the lower court. This Court would have been inclined to increase the said amount had there been a cross- appeal made by the Respondent contending that the award is on the lower side.

In short, this Court therefore, finds no merit in this ground of appeal. It is consequently dismissed.

#### **Ground 4**

That the learned magistrate erred in law and fact in holding that the Appellant should buy a piece of land for children of the marriage within 7 years.

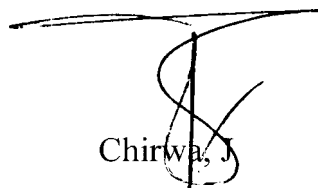
It was also in evidence before the lower court that the Appellant had bought land for the children of his marriage with the Respondent because he wanted his children to have an inheritance. This land was as per the evidence before the lower court however, sold by the Appellant without the consent or approval of the children. It was the view of the lower court that the Appellant was holding the land on trust for the children. As such a trustee the Appellant had no right to sell the same without the consent or approval of the said children.

This Court fully subscribes to the views of the lower court, as aforesaid. The Appellant having thus proceeded to sell the land which he held on trust for his children without their consent or approval he was thus in breach of trust. In premises, this Court would be constrained to interfere with the lower court's order that the Appellant should buy land for the children of the marriage within 7 years by way of restitution. Consequently, this Court finds no merit in this ground of appeal as well and proceeds to dismiss the same.

#### **The Costs:**

The costs of an action are in the discretion of the court and normally follow the event. In this appeal, the Appellant has been successful only in part on ground 1 but has been unsuccessful in all the other grounds of appeal. In the exercise of its discretion on costs, this Court finds it just that the costs of this appeal be awarded to the Respondent. The same are to be taxed, if not amicably agreed upon by the parties. It is so ordered.

Dated this 11<sup>th</sup> day of April 2018.

  
Chirwa, J  
JUDGE