ANNETTE CHILIMA *v* PETER CHILIMA

Supreme Court
Chirwa, Muzyamba and Lewanika, JJS
7th March, 2000 and 6th June, 2000
(SCZ Judgment No. 22 of 2000.)

Flynote

Family Law – Power of Court –To order distribution or share of matrimonial property.

Headnote

This is an appeal against a decision by the High Court on a preliminary issue that it had no original jurisdiction to hear the application as it pertained to a customary law marriage.

Held:
The court is not competent to order distribution or share matrimonial property between parties where a marriage is still subsisting.

W.M. Forrest of Forrest Price and Company for the appellant.
Respondent appeared in person.

Judgment

MUZYAMBA, JS, delivered the judgment of the court.

This is an appeal against a decision by the High Court, on a preliminary issue, that it had no original jurisdiction to hear the application as it pertained to a customary law marriage.

The brief facts of this matter are that on 16th November 1978, the parties contracted a customary law marriage and were given a marriage certificate by a Mindolo local court. After marriage they acquired immovable properties namely plot 120 Itimpi, Kitwe which is in their joint names and D14 Old Ndeke Township, also in Kitwe in the name of the respondent. They also own various moveable and household properties. In February 1999, the respondent left the matrimonial home to cohabit with his girlfriend. On occasions when he went to the matrimonial home he slept in a separate bedroom. This prompted the appellant to bring an action against the respondent under Section 17 of the married women's property Act 1882 for an order for the share of the matrimonial properties. When the matter came up for hearing the then Counsel for the respondent, Mr Mbindo of Jaques and Partners raised a preliminary objection that as the marriage between the parties was contracted under customary law, the High Court had no original jurisdiction to hear the matter. The court upheld the objection and dismissed the application.

The appeal is on various grounds but as we see it the pertinent question is whether or not there can be a share of matrimonial property when a marriage is still subsisting.

In arguing the appeal on behalf of the appellant, Mr Forrest submitted that the Act under which the application was brought speak of *'married'* women and therefore that it was competent for the court to order sharing of matrimonial property during the subsistence of a

marriage between parties. The respondent did not address us on this issue except to say that at the time of hearing the appeal he had resumed cohabitation with the appellant. The fact that the marriage between the parties is still subsisting is therefore a common cause.

We have considered Mr Forrest's argument and Section 17 of the Married Women's Property Act 1882, hereinafter referred to as the Act. The relevant parts of the Section read:

"In any question between husband and wife as to the title or possession of property, either party may apply by summons or otherwise in a summary way to any Judge of the High Court of Justice in England or Ireland and the Judge may make such order with respect to the property in dispute."

It is quite clear that this Section relates to property in dispute between husband and wife. Indeed a question or dispute may arise between husband and wife as to who owns what property and whether or not such property is a matrimonial property. In these circumstances the Section or Act would apply. In the instant case, there is no dispute as to ownership of the properties in question. The Act does not therefore apply. The matter does not end here. The question that still remains unanswered is whether or not there can be a share of matrimonial property when the marriage between the parties, is still subsisting. When man and woman join in (Holy) matrimony they become one body, one flesh and during the subsistence of their marriage they acquire and own property jointly and indivisibly and until the marriage is put asunder, none of them should be heard to say he owns this or that property. It necessarily follows that the court is not competent to order distribution or share of matrimonial property between the parties where a marriage is still subsisting. This is so even where the parties are on separation. To hold otherwise would not only be striking a death nail in a principle which is sacrosanct but would also be opening a Pandora box in this era of greed for wealth. This would inevitably lead to unstable marriages. Had the learned trial Judge addressed his mind to this issue, we have no doubt that he would have come to the same conclusion.

For the foregoing reasons, the appeal fails. It is dismissed with costs to be agreed upon failing which to be taxed.

Appeal dismissed