Florence Chanika v Joseph MacNewton Mwalilino

Court:	High Court of Malawi
Registry:	Family and Probate Division
Bench:	Honourable Justice Fiona Atupele Mwale.
Cause Number:	Matrimonial Cause No. 15 of 2023
Date of Judgment:	April 18, 2024
Bar:	Milanzie, counsel for the petitioner Salima, counsel for the respondent

Head Notes

Family Law – Marriage by Repute or Permanent Cohabitation – Purpose of Recognition – To grant ancillary reliefs, not to create a formally dissolvable union.

Family Law – Divorce Petition – Marriage by Repute or Permanent Cohabitation – Divorce petition is not the correct procedure, it is only the correct procedure for formally contracted marriages.

Civil Procedure – Jurisdiction – High Court – Marriage by Repute or Permanent Cohabitation – Jurisdiction is to determine existence and settle ancillary reliefs, not to dissolve it.

Summary

The Petitioner sought the dissolution of her relationship with the Respondent through a Petition for Divorce, alongside ancillary reliefs including child custody, maintenance, and a share of matrimonial property. The parties began their relationship in 2013 and cohabited from 2017, having conceived two children. The relationship was never formally officiated. The Petitioner alleged that the relationship broke down due to the Respondent's disdainful treatment of her children from a previous relationship and repeated physical abuse. Although the Respondent entered a memorandum of appearance, the proceedings were undefended as he filed no subsequent process.

The principal legal question before the Court was whether a marriage by repute or permanent cohabitation could be dissolved by the courts, and whether a Petition for divorce was the correct procedure for obtaining the sought reliefs.

The Court observed that while the Constitution and the Marriage, Divorce and Family Relations Act recognise informal unions (marriages by repute or permanent cohabitation) to ensure parties are not excluded from ancillary reliefs, this recognition does not formalise the union in a way that makes it dissolvable by the court. The Court affirmed the principle that it can only dissolve a union that was once formally bound, which requires a marriage certificate or proof of formal entry. The jurisdiction of the Court in such relationships is only limited to **determine** if the relationship qualifies as a marriage by repute or permanent cohabitation in accordance with the law, and consequently, to settle the rights and obligations of the parties upon breakdown. The Petition was dismissed. The Court ruled that the correct procedure for the Petitioner was not a Petition for Divorce, but an application to the Court to have her relationship declared a marriage by repute or permanent cohabitation, and only then seek the ancillary orders thereto.

Legislation Construed

Statutes.

Constitution of the Republic of Malawi (s 23(3), (4), (5))

Marriage, Divorce and Family Relations Act (s 12, 13)

Ruling/Judgment

Introduction

1. The marriage the parties wish me to dissolve was never officiated. The parties begun their amorous relationship in or around 2013 and upon the petitioner falling pregnant, they cohabited from 2017. Two children were conceived in the course of this relationship.

2. From 2018, the relationship took a turn for the worse. The respondent begun to treat the petitioner's children from a previous relationship with what the petitioner considered to be disdain. The petitioner also laments that the respondent took to beating her on numerous occasions and orchestrated situations in which the parties no longer shared a bed. Unfortunately, the relations of the parties who have been called upon to mediate have been unable to resolve these differences. The petitioner having reached the end of her tether, now seeks this Court to dissolve the marriage, grant her custody of the children, maintenance, a fair proportion of the matrimonial property and costs of these proceedings.

3. As there is no marriage certificate in view of the relationship between the parties, the petitioner seeks the reliefs sought on the basis of the existence of a marriage by

repute or permanent cohabitation.

4. The respondent entered a memorandum of appearance in which he indicated that he intended to defend the proceedings. He however filed no process thereafter and the Petition is therefore undefended. This notwithstanding, an issue nonetheless arises as to whether the petitioner is entitled to the reliefs sought as a matter of law and whether filing a Petition for divorce is the correct procedure for obtaining such reliefs.

Court's reasoned determination

5. The fact that the parties never formalised their union at law is not a bar to the reliefs sought. It a is however my considered view that the procedure for obtaining such reliefs is not through petition for divorce.

6. Subsections (3), (4) and (5) of section 23 of the Constitution recognizes the existence of unions that have not been entered into using the formal means prescribed by law as follows:

> "(3) All men and women have the right to marry and found a family.
>
> (4) No person shall be forced to enter into marriage.
>
> (5) Subsections (3) and (4) shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation."

This recognition must be understood for what it is. The Constitution should not be taken to have created a way of formalizing a union, it simply provides recognition for certain informal unions because in the absence of that recognition, parties would be

excluded from enjoying the same reliefs as parties who are legally entitled to those reliefs by virtue of having entered into a marriage contract. Whilst parties must formally enter into a marital union sanctioned by the law to be able to automatically benefit from the reliefs that accrue upon entering into marriage, those that are not legally married can only benefit from those reliefs if a court, and not the parties themselves, finds as a fact that a marriage by repute or permanent cohabitation existed. Constitutional recognition of marriages by repute or permanent cohabitation is intended to protected the rights of those whose relationship does not satisfy the statutory requirements but the circumstances under which a relationship can be deemed to be a marriage by repute and cohabitation have been left to statute, which the enabling law, the Marriage, Divorce and Family Relations Act has adequately articulated.

7. Section 12 of the Marriage, Divorce and Family Relations Act therefore mirrors the Constitution and sets out what marriages are recognized in Malawi. These are:

> "(1) A marriage recognized under this Act shall be either—
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> (a) a civil marriage;
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> (b) a customary marriage;
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> (c) a religious marriage; or
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> (d) a marriage by repute or permanent cohabitation.
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> (2) A marriage conducted in accordance with the laws of another country, where one or both of the parties is subject to the laws of that country, shall
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> be recognized in Malawi as a valid marriage.

(3) All marriages recognized under this Act shall have the same legal status.

(4) Without prejudice to any procedures prescribed for marriage under this Act, any institution or procedure that traditionally facilitates the celebration

of a customary marriage shall continue to be recognized as such under this Act.”

8. Section 13 of the Marriage, Divorce and Family Relations Act sets out the requirements for recognising such a relationship as a marriage, as follows:

A marriage by repute or permanent cohabitation shall only be recognized under this Act upon a finding of a court of competent jurisdiction where

that court considers—

(a) the length of the relationship, which, in any event, shall not be less than five years;

(b) the fact of cohabitation;

(c) the existence of a conjugal relationship;

(d) the degree of financial dependence or interdependence and any agreement for financial support between the parties;

(e) ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) whether the parties mutually have, care for, or support, children;

(h) the reputation of the parties in the community as being married and the public display of aspects of their shared relation; and

(i) any other factors that the court considers fit.

9. Under the circumstances, the question that has exercised the mind of the Court is whether a marriage by repute or permanent cohabitation can be dissolved by the courts. There are various narratives that suggest that such marriages can be dissolved, however, a strict application of the law reveals otherwise, and I find accordingly. It should be remembered that the reason that a marriage by repute or permanent cohabitation is recognized in the first place is to ensure that those that qualify under it benefit from various reliefs ancillary to marriage. For persons who have entered into a lawful union, certain of those rights can only be exercised if the parties' union 1s dissolved and so they must come to court for a declaration of the dissolution of that union to access those rights in accordance with the type of marriage that the parties entered into.

10. Essentially, as a principle, a court can only dissolve that which was once bound. As a contract, one that is *sui generis*, parties can only be absolved from the obligations under it if the contract is broken. A marriage contract can only be dissolved by a finding of a court with competent jurisdiction. The High Court has subject matter jurisdiction over marriages that were either entered into under the now repealed Marriage Act or that have followed entry formalities for a civil marriage under the Marriage, Divorce and Family Relations Act. The marriage certificate exhibited to the court is the one that gives the court. Subject matter jurisdiction over it. In the absence of a certificate, the issue of dissolution does not arise. The parties or either party themselves decide that they are no longer cohabiting or are no longer associated with

each other as to be reputed as married, and the court then has jurisdiction to settle the rights and obligations of each party if satisfied that the relationship indeed qualifies as a marriage by repute or permanent cohabitation. The jurisdiction of the Court with such relationships is therefore to find whether the nature of the relationship qualifies as a marriage by repute and or permanent cohabitation in accordance with the law.

11. Renowned jurist L.J. Chimango has clearly articulated the position this Court now confirms in his 1977 article in which he stated as follows:

> "No matter how long they lived together, and whether or not they have children, the parties cannot subsequently institute divorce proceedings to
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> dissolve the marriage, for it is inconsistent with common sense to dissolve a marriage that never existed."[1]

I am aware that this article predates the Constitution which now recognizes the existence of marriages by repute and cohabitation, however, the principle behind the statement remains sound. It is my considered view from the context in the totality of the article that what the learned jurist meant was that it is inconsistent with common sense to dissolve a marriage that was never formally entered into because at that time, it was not conceived that there would be Constitutional recognition of a relationship outside formal unions.

12. The principle that only a formal marriage can be dissolved by the courts or any lawful authority vested with that power is derived from the sanctity with which the institution of marriage has historically been granted. Marriage is a sacred and serious undertaking which must be entered into willingly and by one with full capacity

amongst other requirements. One cannot enter into a marriage without an authority officiating over it, who has ensured that the parties are eligible to enter into such a serious undertaking. Hence, to exit such a bond, an authority must dissolve the union upon satisfaction that the relationship has broken down according to grounds set out in the law.

13. A marriage that has been formally entered into alters the civil status of the parties and the fact of their marriage binds third parties, for example those that enter into contractual dealings with both or either of them. In such circumstances third parties whose rights might be affected by the marriage require proof that the marriage was lawfully entered into or lawfully terminated. A marriage by repute or permanent cohabitation where one is deemed by the court to exist, cannot bind third parties. It is only recognised to protect the nghts of the parties in the event of dissolution and is therefore recognised only for specific purposes such as rights to inheritance, matrimonial property distribution, child custody and maintenance. A marriage by repute or permanent cohabitation is not a thing in itself that is capable of being dissolved by the courts. The role of the court, as an agent of the state, in such relationships, is to ensure that those rights that it is fair and just to accord the parties to the union are accorded to them. That is the sole purpose for the recognition of a marriage by repute or permanent cohabitation. Since the parties never went before any state authority to enter into a marriage, they cannot now appear before one to dissolve it.

14. My findings are supported by a careful analysis of the decision of my brother Judge, Honourable Tembo, J., in the case of*Malola v Malola* Civil Appeal Case No. 48 of 2016. The *Malola* case is widely cited as authority for which court has jurisdiction over

marriages by repute or permanent cohabitation as follows:

“the only time magistrate courts will have jurisdiction over marriages by repute or permanent co-habitation is when the customary law of the area

recognizes such marriages”.

A careful reading of the judgment is required to discover the stance of the Judge in relation what the jurisdiction of the courts in relation to marriages by repute or permanent cohabitation. Of particular relevance, the learned Judge states:

“This Court wishes, however, to observe that the manner of proceeding by the lower court raises some fundamental questions. The lower court determined

that under the law before the current Marriage, Divorce and Family Relations Act the lower court had jurisdiction to determine divorce cases where the

parties were married by repute. This Court's view is that this is not the correct position at law.

The lower court only had jurisdiction to determine marriages under customary law in terms of section 39 (2) which provides that ...” (Emphasis supplied).”

15. Whilst the cited excerpt above may seem to suggest that the learned Judge was in agreement that the subordinate courts had jurisdiction to dissolve marriages by repute or permanent cohabitation. It is important to note that he did not use the word “dissolve” but the word “determine”, meaning that the function of the court referred to determining whether a marriage by repute or cohabitation existed and not

dissolving such marriages. His line of reasoning is further revealed when he goes on to lament an unfortunate *lacuna* in the Marriage, Divorce and Family Relations Act by not granting jurisdiction to the subordinate courts to determine the existence of such marriages. In lamenting this *lacuna* his reasoning affirms the principle that the courts cannot dissolve such marriages when he stated as follows:

> "great hardship will be caused to people from all far away corners of this country whenever they want to settle their affairs upon break-down of their marriages by repute or permanent co-habitation". (Emphasis supplied)

Recourse to the High Court in relation to such marriages is therefore only in relation to determining the existence of a marriage by repute or cohabitation and consequently settling the affairs of the parties after the relationship has broken down or one party has died, and not to dissolve the relationship.

16. It is up to the parties, once they find that the relationship between them has been dissolved, either by death or irretrievable breakdown, or are separated or in any other way no longer a union, to apply to the Court for reliefs such as those sought in the present Petition. In making such application, the parties must first provide proof for the Court's satisfaction that the court that the union or relationship satisfies the requirements of section 13 of the Marriage Divorce and Family Relations Act, if such relationship was entered into after that Act came into force, or the common law requirements if date of entry into the relationship precedes the Marriage Divorce and Family Relations Act, the parties must satisfy the requirements of the common law. by Once the Court is satisfied and determines that the relationship was indeed a marriage repute or cohabitation, it shall proceed to consider the application for ancillary reliefs on its merits.

Order

17. For all I have reasoned above, I hereby dismiss the Petition. The petitioner is at liberty to apply to the Court to have her relationship declared a marriage by repute or permanent cohabitation and seek ancillary orders thereby.

I so order

MADE in chambers in **Lilongwe** in the Republic of Malawi this **18th** day of **April 2024.**

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Chimango, L.J. (1977) “Woman without Ankhoswe: A discussion of the legal position of women who enter into informal relationships”, African Law Studies 15, 54-61 at 54