

# Ellen Tewesa v Chimwemwe S. Tewesa

## Matrimonial Cause No. 9 of 2012

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Family and Probate Division
<b>Bench:</b>	Honourable Justice S.A. Kalembera
<b>Cause Number:</b>	Matrimonial Cause No. 9 of 2012
<b>Date of Judgment:</b>	August 31, 2020
<b>Bar:</b>	Mr Matumbi for the Petitioner Respondent and unrepresented

### Head Notes

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**Family Law** – Matrimonial Property – Distribution – Customary and constitutional law mandate fair distribution upon marriage dissolution.

**Family Law** – Matrimonial Property – Distribution – Individual contribution is not the sole principle for property distribution.

**Property Law** – Educational Qualifications – Property Status – Educational qualifications are considered property for distribution purposes.

**Constitutional Law** – Women's Rights – Property – Section 24(1)(b)(i) of the Constitution grants women right to fair disposition of jointly held property.

**Family Law** - Matrimonial Property - Definition - "Property" encompasses various rights, not just physical things.

**Family Law** - Family Law - Matrimonial Property - Jointly Held Property - Mere existence of marriage does not create community rights.

**Property Law** - Educational Qualifications - Family Property - Educational qualifications are not precisely family property; they are uninheritable.

**Family Law** - Matrimonial Property - Distribution Principles - Intention and contribution are key, but only where parties were financially active.

## Summary

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The Petitioner initiated proceedings in the High Court, Principal Registry, for the determination of matrimonial property distribution following the dissolution of her customary marriage to the Respondent in the Third Grade Magistrates' Court on 27 April 2012. The lower court had previously ordered the Respondent to compensate the Petitioner with K300,000.00 and to build a matrimonial house or pay K150,000.00 in lieu, but deferred the property distribution to the High Court due to a want of jurisdiction. The Petitioner sought declarations that the Respondent's educational qualifications (Bachelor of Education Humanities and Diploma in Education) constituted family property, in which she had a beneficial interest due to her significant contribution during their 20-year marriage, and sought a 50/50 distribution of these and other household properties. She also appealed against the inadequacy of the compensation and the sum ordered for house construction by the Magistrate. The Court noted that there were no children from the marriage, thus custody was not an issue. The Petitioner, a housewife, contributed to the family's well-being while the Respondent, a teacher turned lecturer, pursued his education.

The High Court considered principles of matrimonial property distribution, emphasizing that both the Constitution and customary law mandate fair and just distribution upon divorce, and that individual contributions are not the sole factor. The Court found that there is "property" in educational qualifications, but clarified that they are not "family property" as they are uninheritable and personal to the holder. While acknowledging that Malawian precedent on educational qualifications as marital property was absent, the Court referred to American case law which offers differing views but generally denies professional degrees the status of marital property with an exchange value. The key reasoning of the Court was that fairness is the cardinal principle in property disposition upon dissolution of marriage, requiring consideration of all circumstances. The Court implicitly allowed the application regarding the inadequacy of compensation and the house, ordering the Respondent to build a house for the Petitioner or pay K2,000,000.00 as an alternative sum. Each party was ordered to bear its own costs.

## **Legislation Construed**

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Constitution of the Republic of Malawi (s 24, s 28)

Married Women's Property Act 1882 (s 17)

## **Judgment**

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This matter came before me for determination on distribution of matrimonial property after dissolution of the marriage in the Third-Grade Magistrates' Court sitting at Chiradzulu on the 27th day of April, 2012. The Petitioner and the Respondent got married under customary law in 1995 and they remained married until the 27th day of April, 2012. At the time of dissolution of the marriage, the presiding magistrate ordered the Plaintiff (Respondent in this case) to compensate the Defendant (Petitioner in this case) with the sum of K300 000.00 payable in ten equal installments of K30 000.00. He also ordered the plaintiff to build a matrimonial house for the defendant at her home village or in default, deposit the sum of K150 000.00 into court-Order 11 rule 1 of Subordinate Court Rules. This matter was commenced by summons seeking five reliefs under section 17 of the Married Women's Property Act 1882.

From the court record, it is crystal clear that this matter came before me not as an appeal but rather that the court below deferred the issue of distribution of matrimonial property to the High Court for want of jurisdiction so that this court can make a final determination on the same.

I must state from the outset that I have noted that the couple has no children hence, the custody of children is not an issue here. If the couple had children, then factors which have a direct bearing on the final disposition of property and maintenance of children up until they are fully independent would have come into play in this case. Furthermore, the court also has noted that the parties were not financially independent and they were on unequal footing. Our Constitution and customary law both recognize that property acquired during subsistence of marriage is subject to fair and just distribution upon dissolution of the marriage. Individual contributions of the spouses to the acquisition of matrimonial property is not the only reigning principle-

***Kamphoni v Kamphoni High Court (Principal Registry) Matrimonial Cause 7 of***

**2012.** The Appellant is therefore entitled to a share of the matrimonial property. Section 24 of the Constitution of the Republic of Malawi (the Republican Constitution) provides as follows:

*"S.24 (l) -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 property that is held jointly with a 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. "*

The petitioner herein was therefore entitled to a fair distribution of the matrimonial property. In the matter at hand, the Petitioner was a housewife and the Defendant was the bread winner for the family. The Petitioner contributed to the well-being of the family as a whole by among other things, cooking for the husband, the four children they were staying with, doing some businesses just to top up the family budget and so forth. While the Respondent was a teacher in various primary and secondary schools but later, a lecturer at Domasi College of Education.

The husband upon completion of his tertiary education approached the court for a dissolution of his marriage to the Petitioner. Though this conduct of the Respondent might be considered unfortunate and ungrateful, it is not unusual. See, e.g., **In re Marriage of Graham, 194 Colo. 429, 574 P.2d 75r 78 (1978)** Carrigan, J., (dissenting),

*"The case presents the not unfamiliar pattern of the wife, willing to sacrifice for a more secure family financial future, works [sic] to educate her husband only to be awarded*

*a divorce decree shortly after he is awarded the degree'''*

In the matter at hand the Petitioner prays for the following orders:

[1] A declaration that there is property in the educational qualifications of the Respondent, namely the Bachelor of Education Humanities and the Diploma in Education.

[2] A declaration that the property in the said educational qualifications is family property.

[3] A declaration that the Applicant has beneficial interest in the property in the Respondent's Bachelor's Degree and Diploma owing to the significant contribution the Applicant made towards the Respondent's acquisition of the said degree in the 20 years the Applicant was married to the Respondent'

[4] An order distributing the said property in the Bachelors' Degree and Diploma on a 50/50 basis.

[5] An order distributing the other properties of the family, namely the Toyota Carina BN 2260 and other household items'

The petitioner also raised the following issues as an appeal but the court will also add them to the list of the five prayers (above) thereby making them seven in total:

[6] That the Learned Magistrate erred in ordering that the sum of MK300 000.00 would justly compensate the Appellant as the said sum is grossly inadequate.

[7] That the Learned Magistrate erred by ordering that the Respondent pays a sum of MK150 000.00 in lieu of construction of a house for the Appellant as the said alternative sum is grossly inadequate for construction of a house.

First and foremost, I will briefly highlight on multifarious principles governing distribution of matrimonial property.

The term **property** is defined as follows:

- (i) The right to possess, use and enjoy a determinate thing either land or a chattel or;
- (ii) Any external thing over which the rights of possession, use or enjoyment are exercised or;
- (iii) In narrower sense, it means a person's proprietary (exclusive) and not his personal (individual) rights (i.e. his status or personal condition.) or;
- (iv) It is the right of ownership in a material object itself- **John Salmond**, Jurisprudence 423-24 (Glanville L. Williams ed., 10th ed. 1947.) [**Black's Law Dictionary** 9th ed. pp. 1335-36.]

In another definition of **property**, it is not a thing but a bundle of rights. This basically means that property comprises "a bundle of rights." [**Kevin Gray** "Property in Thin Air" (1991) 50 Cambridge LJ 252 - 307] The House of Lords in **Boardman v Phipps**

**(1967) 2 AC 46** held that "knowledge" was property and further ruled that such knowledge held on as property was trust property.

**Marital property** is defined as the one acquired during marriage and that is subject to distribution or division at the time of marital dissolution. It is also called **marital estate** or **community property**. It includes property acquired after the date of marriage and before a spouse files for separation or divorce. [**Black's Law Dictionary** 9th ed. p. 1338.]

There are two broad overriding principles which are considered mostly when it comes to distribution of matrimonial property which are: **intention** and **contribution** (which can be actual or perceived) of the parties- ***Rachel Sophie Sikwese v Gracian Zibelu Banda MSCA Civil Appeal No. 76 of 2015***. Property that is jointly held is the one that is prone to distribution on dissolution of marriage. Whether or not in any particular case, property is jointly held is a matter of fact and will solely be contingent upon the circumstances of each and every case which include the conduct and intention of the parties in relation to the acquisition of the property. The mere existence of marriage is not sufficient. There must be evidence that the property is held jointly. In conclusion, what is distributable on dissolution of marriage is only property that is jointly held- ***Kayambo v Kayambo (1987-89) 12 MLR 408***. However, these two principles of intention and contribution become applicable only to marriages where both parties were actively engaged in various financial activities.

Sections 24 and 28 of the Constitution are in their entirety also considered when it comes to distribution of matrimonial property at dissolution of marriage. Section 24 (1)



(a) of the Constitution inter alia, grants women the same rights as men to enter into contracts, acquire and maintain rights in property. Section 24 (1) (b) (i) of the Constitution grants women the right, on the dissolution of marriage, to a fair disposition of property that is jointly held with the husband and applies to every marriage. Section 28 (1) of the Constitution provides that every person is entitled to acquire property alone or in association with others.

There is also a litany of case law which duly touches on distribution of matrimonial property upon dissolution of marriage. For example, in a recent decision by the Supreme Court of Appeal of **Rachel Sophie Sikwese v Gracian Zibelu Banda** (*supra*), the court stated as quoted from **Kayambo v Kayambo (1987-89)**(*supra*) which was decided before the adoption of the Constitution in 1994)-

*"where there is evidence that one spouse contributed to the acquisition of the other party's property or to its development and the parties intended that the other should acquire a beneficial interest, and the extent of contribution can be ascertained, the contributing party will acquire a corresponding beneficial interest. However, where the extent of the contribution cannot precisely be ascertained, the maxim '**equality is equity**' duly applies. The court went on to state that the intention of financially independent and equal partners that the Respondent and the Appellant were during subsistence of their marriage in respect of acquisition of property be dislodged. The fact of existence of marriage by itself does not create community rights in property."*

In **Kishindo v Kishindo (Principal Registry) Civil Case No. 397 of 2013**, Mwaungulu J as he then was, held this in relation to section 24 (1) (b) (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."*

In **Kamphoni v Kamphoni** (supra), Mwaungulu J as he then was held-

"Section 24 (1) (b) (i) of the Constitution could be declaratory that all property held by husband and a wife is joint property, and the wife is entitled to have it shared fairly.

In the **Kamphoni** case supra, he further opined that "**fairness**" is the dominant principle for disposition of property under section 24 (1) (b) (i) of the Constitution; and that "the common law of the Commonwealth is fairness, and that contribution is not the dominant consideration. This in principle, basically means that the spouse's contribution should, together with everything else, go to [determine] fairness." Fairness requires the Court to take into account all the circumstances of the case.

In **Matupa v Matupa**, Mwaungulu J as he then was, also quoted the following statement by Lord Nicholson in **White v White [2001] 1 AC 596**-

"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 ... Then fairness, like beauty, lies in the eyes of the

beholder."

In **Sikwese**'s case (supra), the Supreme Court concluded that it is crystal clear, based on the cited case authorities, that **fairness** is a cardinal principle in cases of disposition of property upon dissolution of marriage. However, it is equally clear from the case authorities that in order to ensure fairness in the disposition of property on the dissolution of a marriage, the court ought to take into account all the circumstances of a particular case, and the circumstances that need to be considered in assessing fairness differ in from one case to another.

I have not come across any Malawian precedent dealing with educational qualifications as forming part of family property which is to be shared between spouses upon dissolution of marriage. I have also scoured the English case law as well, unfortunately, I have not found any case law on the same though my failure to find any precedent does not mean none exists. Thus, I have referred to American case law which has a myriad of cases on the same.

However, in the United States of America, distribution statutes fall into three distinct classes namely: **strict common law, equitable distribution, and community property**. Understanding the classification of an asset as divisible property requires an examination of each category of distribution statutes. For purposes of deciding what to classify as the "thing" to be divided, the courts have not clarified the distinction between a professional license and increased earning capacity. The distinction largely is semantic and for the purposes of this Note does not affect the outcome of the cases. E.g., **Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr.**

**131 (1969)** (law degree not community property); In *re Marriage of Graham*, **194 Colo. 429, 574 P.2d 75 (1978)** (educational degree is not marital property); In *re Marriage of Horstmann*, **263 N.W.2d 885 (Iowa 1978)** (future earning capacity of husband's law degree is marital property); *Inman v. Inman*, **578 S.W.2d 266 (Ky. Ct. App. 1979)** (license to practice dentistry is marital property.) Various American schools of thought on the subject tend to differ on the subject. From the summary of case law here, it can be concluded that each state has a unique scheme of post-dissolution marital property distribution.

I now dispose of the matter as follows:

**[1] On the first prayer, that is, a declaration that there is property in the educational qualifications of the Respondent, namely the Bachelor of Education Humanities and the Diploma in Education;**

**[Vol. 6:101 4 Campbell Law Review, Vol. 6, Iss. 1 [1984], Art. 5**  
<http://scholarship.law.campbell.edu/clr/vol6/iss1/5> PROFESSIONAL DEGREE;

In *re Marriage of Graham*, **555 P.2d 527 (Colo. Ct. App. 1976)**, *aff'd*, **194 Colo. 429, 574 P.2d 75 (1978)**, upon attaining the degree, the husband filed for divorce. The couple had accumulated no assets to be divided unless the court was willing to classify the degree as divisible property. Arguing against the "property" status of the degree, the court stated: An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property:" It does not have an exchange value or any objective transferable value on the open market. It is

personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term. The Graham majority opinion ( a US case) reflects the position taken by earlier decisions denying property status for the professional degree.

In ***DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980)**, the Wisconsin Court of Appeals recently considered whether an advanced educational degree constitutes marital property. The court held that neither a professional degree, nor a license, nor education constitutes marital property. Here, there are two decisions from different states in the United States of America agreeing on whether there is property in educational qualifications.

From case law and academic writing above, this court is of the ultimate view that there is property in the educational qualifications of the Respondent. However, it ought to be understood that the component comprising the educational qualifications is uninheritable. Its component duly vests in the owner whose name appears in it.

**[2] A declaration that the property in the said educational qualifications is family property;**

It is trite that any person who pursues further education does it for the benefit of both him and his family (that is, his wife, children and any persons staying with him) as long as he is living and the marriage subsists. However, the said educational qualifications cannot precisely be said to be family property. If it was to be family property, then bearers would have been bequeathing them in their wills so that they be inherited by beneficiaries and be used to look for jobs.

In **DeWitt v. DeWitt** (*supra*), the Wisconsin Court of Appeals recently considered whether an advanced educational degree constitutes marital property. The court held that neither a professional degree, nor a license, nor education constitutes marital property. The De Witts married in 1968 and separated permanently in 1977. Mr. DeWitt, a full-time student, was employed part-time from 1968 until he completed a law degree in 1975. Mrs. DeWitt worked full-time as a legal secretary during most of the marriage. In addition, she performed most of the household and child-care tasks, handled the family finances, and worked part-time assisting her husband in several business ventures. Mr. De Witt was employed by his father's law firm upon completion of his law school education. Subsequently, Mrs. De Witt quit her job to attend school full-time and completed an associate degree in accounting prior to the institution of divorce proceedings. The court of appeals held that the trial court abused its discretion by making a property-division award that divided the plaintiff husband's law degree between the parties upon divorce. The Wisconsin court chose instead to follow the opinion of the Colorado Court of Appeals in *Graham* and specifically rejected the reasoning of in **Re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978)**, an Iowa Supreme Court case and **Inman v Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979)** saying:

*"Equity compels some form of remuneration for a spouse. Plaintiff-husband also spent substantial time, money, and effort on home improvements to three structures owned by the parties during marriage. Mrs. De Witt alleged that at the time of marriage, the parties had "agreed that it would be financially preferable for the plaintiff to attend school and complete his law degree first, and that she would then complete her college education. "Plaintiff denied those allegations.*

Thus, it can therefore be safely concluded that specific law degrees (that is, the actual papers) are not marital property because when the bearer dies, they cannot be inherited by any person to enable him or her to look for a job. However, future earning capacity and practicing licence which are attendant to these educational qualifications are marital property. This is so because with future earning capacity, the family and other beneficiaries will benefit from whatever is realized by the degreed person so long as that person lives and works. As for a practicing licence, it is also family property because when the owner dies, his practice can be inherited and continued by his family and friends.

**[3] A declaration that the Petitioner has beneficial interest in the property in the Respondent's Bachelor's Degree and Diploma owing to the significant contribution the Petitioner made towards the Respondent's acquisition of the said degree in the 20 years the Petitioner was married to the Respondent.**

The Petitioner in this case was already married to the Defendant when the latter decided to go for further education. It can also be concluded that they mutually

agreed that the Defendant should go for further education knowing that upon completion, there will be a great improvement in their financial status. Moreover, as per the court record, the Petitioner stayed with three of the Defendant's siblings without being bored with them as the latter proceeded with his education.

In *Re Marriage of Horstmann* (supra), an Iowa Supreme Court case, the Horstmans married during their junior year in college. Mrs. Horstmann, who never finished her college education, worked as a bank clerk while her husband attended law school. Both Mr and Mrs Horstmann's parents also provided financial assistance during their marriage. Affirming the district court's decision, the Iowa Supreme Court held that the potential for increased earning capacity made possible by a law degree and certificate of admission to the bar constituted an asset for distribution by the court. Thus, Horstmann appears to be the first state supreme court decision to recognize the working spouse's right to a portion of the nonworking spouse's increased future earning capacity as valuable property upon dissolution of marriage. The court found that the Horstmans earned and spent the majority of their assets to allow Mr. Horstmann to complete his legal education. Moreover, the court noted the couple's significantly low standard of living because of Mr. Horstmann's status as a fulltime student rather than a full-time employee during the couple's marriage.

In ***Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979)**, in a per curiam opinion, the Oklahoma Supreme Court took the position of the majority in ***Graham*** that a professional degree is a form of intangible, indivisible property in which no other person can have a vested interest. The court held, rather, that Mrs. Hubbard had an equitable claim to repayment in lieu of property division for the investment she had made in Dr. Hubbard's education and training. Thus, instead of a right to a



proportional share. The court fixed the measure of damages as "the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation, apportioned to the spouse who provided support when there is little or no increased earning capacity provided by the supported spouse's degree or training.

In ***Hubbard v. Hubbard (supra)***, the Supreme Court of Oklahoma affirmed in part and reversed in part the district court holding that Mrs. Hubbard, who had supported her husband for twelve years through college, medical school, internship and residency, had a property interest in her husband's medical degree. The Hubbards, divorced shortly after Dr. Hubbard completed his hospital residency. The lower court found that Mrs. Hubbard had a "vested interest in the defendant's medical profession, which is deemed to be a valuable property right," and awarded her \$100,000 gross alimony in lieu of property division.

In the trial court decision of ***Mahoney v. Mahoney***, a New Jersey case, the court, favouring reimbursement for the contributing spouse, stated: [A] working spouse who contributes to the education of another spouse does so certainly with the expectation that there will be in the future some benefit derived from such a sacrifice. The court is convinced that the facts of this case and the interrelationship of the parties mandate some credit to the working spouse by the spouse who pursued and achieved an education during the marriage. To ignore the contributions of the sacrificing spouse would be to work an injustice, an unfair advantage to the spouse who has gained the education and degree without obligation. There would be an unjust enrichment of the educated spouse.

This court is of the view that indeed the Petitioner has beneficial interest or equitable claim in the Defendant's educational qualifications as long as the marriage subsists. However, since the marriage has been dissolved, that beneficial interest divests itself of the Petitioner but she has to be compensated for such a loss through distribution of matrimonial property and any other monetary orders made by the court while also considering the Defendant's future earnings. After distribution of matrimonial property, the Petitioner's beneficial interest in Defendant's educational qualifications duly comes to an end.

**[4] An order distributing the said property in the Bachelor's Degree and Diploma in a 50/50 basis;**

Every person who pursues further education as alluded to above does that for the benefit of himself or herself, his/her current/subsequent spouse and children. This basically means that these people have beneficial interest in his qualifications.

However, this beneficial interest continues as long as the marriage subsists and dies away the moment the marriage is dissolved. However, at dissolution of the marriage, this beneficial interest will manifest itself in that there will be an order for distribution of property and maintenance of children. The property to be distributed is acquired through work which is obtained by using the educational qualifications of the Respondent.

In ***Colvert v Colvert*, 568 P.2d 623 (1977)**, insofar as one could interpret Colvert to "mean that a court can consider the future earnings of a spouse in setting the amount of alimony and then designate the alimony payments based on future income as

property division alimony."

Several US courts have treated a professional degree as a marital asset; this Note seeks to examine the solutions and non- solutions proposed by the courts in the context of existing remedies and statutes. This Note contends that to allow a court to classify an advanced educational degree or license as marital property subject to division upon divorce is both reasonable and necessary. Furthermore, the classification of a professional degree as a property asset, distributable upon dissolution of marriage, is the only feasible, widely available remedy when the parties, for whatever reasons, end the marriage without other divisible marital assets. If through the working spouse's effort, the degreed spouse becomes unjustly enriched, the courts as a matter of equity must value and distribute the professional degree as a marital asset.

In ***Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969)**; the Todds married in 1947 and separated in 1964. Mrs Todd, the plaintiff, worked to support the family while her husband obtained undergraduate and law degrees. She contended that because her husband's education was financed in large part with community funds, her husband's education constituted a community asset with substantial value that the court ought to divide between the parties upon divorce. The California Court of Appeals rejected Mrs. Todd's argument, holding: "If a spouse's education preparing him for the practice of law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community monies, it manifestly is of such a character that a monetary value cannot be placed upon it. The court in Todd, therefore, considered the husband's degree as at best an intangible property right incapable of monetary valuation. In the same action, however, the court

awarded Mrs. Todd \$111,500 in community assets, while awarding only \$89,116.35 in community assets to the husband. Subsequent opinions citing the Todd case for doctrinal support in denying a property interest in the spouse's degree often neglect to mention the larger award to the wife.

**[Vol. 22:517 DIVISIBILITY OF PROFESSIONAL DEGREES];** Upon dissolution, the working spouse has realized none of her expectations. Courts should strive to provide at least a partial remedy to the nonstudent spouse for sacrifices made. A court ought to divide as property the quantifiable benefits of the graduate education of one spouse between the parties to reflect their respective efforts toward its attainment].

This court is of the ultimate view that there is no inheritable property in any educational qualifications a person has on the following grounds: [1] because the degree has only intangible or intellectual value, its monetary worth upon division is negligible; [2] because if they were indeed inheritable property then people would have been bequeathing their certificates to beneficiaries in their wills [3] A degree is regarded as property with only speculative value- **Todd v. Todd, 272 Cal. App. 2d 786, -, 78 Cal. Rptr. 131, 135 (1969);** In **re Marriage of Graham, 194 Colo. 429, -, 574 P.2d 75, 78 (1978); Stern v. Stern, 66 N.J. 340, - 331 A.2d 257, 260 (1975).** Moreover, beneficiaries in a will would have been using qualifications of deceased people to find work. However, when people die, it is trite that they are buried together with their educational qualifications; a clear indication that they cannot be inherited by anybody else because they bear their names and also that the knowledge they acquired during the duration of study cannot upon death or at moribund be passed on to its beneficiary.

Courts that are willing to recognize in theory the existence of a property interest in an advanced educational degree nevertheless often hold that, because the degree has only intangible or intellectual value, its monetary worth upon division is negligible.' Under this view of a degree as property with only speculative value, the working spouse reaps nothing by way of property division.

It is in the court's discretion to order compensation to the Petitioner on the basis of her contribution to the Respondent's educational qualifications be it financially and in kind. However, the demand to distribute the said property in the educational qualifications in a 50/50 basis is too farfetched. It ought to be borne in mind that the qualifications cannot physically be divided between the couple. This is so because it will be diametrically impractical to demand the Respondent to also impart the knowledge he acquired while at college but also that the names in the qualifications cannot be changed for example, in the Diploma from Chimwemwe S. Tewesa to Ellen Tewesa.

How would then the couple share these qualifications? It is indeed understandable that the Respondent acquired these qualifications while he was married to the Petitioner. Moreover, the Petitioner might have contributed either financially or in kind to the pursuance of his tertiary education. In law, there is the principle that where an employer sends her employee to school for further education, that cannot be ground upon completion, that the employee should not quit employment for greener pastures unless there was an agreement on restraint of trade before going for further education for a specific period. However, restraint of trade agreements are frowned upon as being contrary to public policy.

Therefore, this court orders that the Respondent do compensate the Petitioner with a sum to be assessed by the Registrar within 30 days, for the latter's contribution to the farmer's educational qualifications.

**(5] An order distributing the other properties of the family, namely the Toyota Carina BN 2260 and other household items;**

As per court record, I have looked at the litany of property owned by the family before dissolution of the marriage on the 21st day of April, 2012. The list is not enormous enough and I will take the trouble to catalogue down each and every property for convenience sake as follows:

1. Toyota Carina BN 2260
2. Three sofa sets
3. Two coffee sets
4. Three beds
5. One display cabinet
6. One fridge
7. Three mattresses
8. Six table chairs
9. Two television sets
10. One decoder
11. One home theatre
12. Secondary school books
13. Two carpets
14. CDs/DVDs
15. One fan

16. Picture frames
17. Beddings
18. One paraffin stove
19. One pressing iron
20. Two hot plates
21. Kitchen utensils
22. One piece of land
23. One small table
24. Three bags

The evidence in totality shows that all the items except 1 and 22 items are household items which were acquired during subsistence of the marriage and meant to be jointly owned by them as a family. Since, the Petitioner was nonworking class but a homemaker while the Respondent was the bread winner, the dictates of justice and fairness would thus demand that as much as possible these items be equally shared between the parties- section 24 (1) (b) (i) of the Constitution; ***Kamphoni v Kamphoni*** (*supra*) .

Accordingly, I order that these items be distributed as follows:

PETITIONER

1. Two [2] Sofa Sets
2. One [ 1] Coffee Set
3. Two [2] Beds
4. One [ 1] fridge

5. Two [2] mattresses
6. Three [3] table chairs
7. One [ 1] television
8. One [ 1] home theatre
9. Half of the secondary books
10. One [1] carpet
11. Half of the DVDs/CDs
12. One [1] fan
13. Half of the picture frames
14. Half of the beddings
15. One [ 1] paraffin stove
16. One [ 1] hot plate
17. Half of the kitchen utensils
18. One [1] small table
19. Two [2] bags

#### DEFENDANT

20. One [1] sofa Set
- 21 . One [1] coffee set
22. One [1] bed
23. One [ 1] display Cabinet
24. One [1] mattress
25. Three [3] table chairs
26. One [1] television
27. One [1] decoder
28. Half of the Secondary books



29. One [ 1] carpet
30. Half of the CDs/DVDs
31. Half of the picture frames
32. Half of the beddings
33. One [ 1] pressing iron
34. One [1] hot plate
35. Half of the kitchen utensils
36. One [1] bag

In respect of the **Toyota Carina BN 2260** and the **piece of land**, the evidence shows that these properties were also jointly acquired by the parties during subsistence of the marriage. There are strong indications that they were meant to be matrimonial property hence, the court finds and holds that the parties own them in equal shares as there is no evidence on how much exactly did each one of them contribute either financially or in kind to their acquisition. The court therefore, orders that within 30 days hereof, the property be valued by a valuer so as to arrive at its current market value less incidental costs incurred due to valuation and sale of the said property. Once the valuation is done within 60 days thereafter,

#### **Starting with land:**

Either party shall be at liberty to buy out the other's share in the said land by paying an equivalent of half of the value of the land failing which, the land shall be sold and the proceeds of the sale be shared equally between the parties.

**The vehicle:**

In respect of the vehicle, the court orders that upon ascertaining its value, the vehicle must be sold and the proceeds of the sale firstly, be used to pay off the remaining loan balance at the bank. Then the remaining amount be shared equally between the parties.

This court also orders that costs incidental to the valuation and ultimate sale of the property be jointly borne by the parties.

Turning to the two orders made by the court below which are appealed against:

**[6] That the Learned Magistrate erred in ordering that the sum of MK300 000.00 would justly compensate the Appellant as the said sum is grossly inadequate**

This court indeed has looked at various factors like: the couple's humble beginnings to prosperity, the current cost of living, the fact that the woman will no longer enjoy the fruits of their joint efforts as a couple but rather another woman if the Respondent remarries. This court is of the firm view that indeed the MK 300, 000.00 award made was far grossly inadequate and therefore, the court duly awards K1,000,000.00 to the Petitioner.

**[7] That the Learned Magistrate erred by ordering that the Respondent pays a sum of MK150 000.00 in lieu of construction of a house for the Appellant as**

**the said alternative sum is grossly inadequate for construction of a house.**

On this thread, the court has also considered divers factors like the fact that the Petitioner will have to re- start her life (if at all that happens), the Petitioner has no work to rely upon and others. This court therefore, orders the Respondent to build a house for the Petitioner ( which would be made of bricks and roofed with iron sheets) at the Petitioner's matrimonial home within ninety days. In the alternative the Respondent must within the said ninety days pay the Petitioner a lump sum of K2,000,000.00 (a sum I consider sufficient to build a habitable house in the village), for the Petitioner to build the said house.

All in all, it is so ordered. As to costs each party must bear its own costs.

PRONOUNCED this 31st day of August 2020 at the Principal Registry, Blantyre.