**IN THE HIGH COURT FOR ZAMBIA** **2015/HP/A.029**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
*(Civil Jurisdiction)*



**BETWEEN:**

**SAMPA KASONGA MULILO CHOMBE** **APPELLANT**

**AND**

**ENERST KABWE CHOMBE** **RESPONDENT**

**CORAM:** **HONORABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Appellant:* *Mr. S.K Simwanza of Messrs Lungu Simwanza & Co.*

*For the Respondent:* *Mr. P.G Katupisha of Messrs Milner Paul Legal Practitioners*

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**JUDGMENT ON APPEAL**

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***Cases referred to:***

*(i)* *Lewanika and others v. Chiluba (1998) ZR 79*
*(ii)* *Rosemary Bwalya Chibwe v. Austin Musubila Chibwe (2001) ZR1*
*(iii)* *Honorius Maurice chilufya v. Chrispin Haluwa Kangunda (1999) ZR 166*

***Legislation referred to:***

(i) *Subordinate Court Rules Chapter 28 of the Laws of Zambia*

(ii) *High Court Rules Chapter 27 of the Laws of Zambia*

(iii) *High Court Act, Chapter 27 of the Laws of Zambia*

(iv) *Lands and Deeds Registry Chapter 185 of the Laws of Zambia*

This is an appeal from the Ruling of the learned trial Magistrate dated 23rd January, 2015 declining an application for special leave to review the Judgment of the learned trial Magistrate dated 9th October, 2014.

The Appellant filed in 3 grounds of appeal namely that:-

(i) *The Honorable Magistrate erred in law and in fact when he refused to review his judgment in the light of the fresh evidence adduced showing that the lawful owner of the house in issue as per requirement in his Judgment.*

(ii) *The court erred in law and in fact when he held that he could not review his Judgment on the issue of the house in question, despite the fact the he relied solely on witness testimonies that they contributed to the building of the house in issue without producing any documentary evidence of expenses to prove the claim.*

(iii) *That the learned trial magistrate erred in law when he failed to consider the fact that although the Judgment was orally*

*delivered on 9th October, 2014, he only managed to make available a typed Judgment to the Appellant on 12th November, 2014 thereby making it difficult for the Appellant to seek legal advise on a Judgment that was not written.*

At the hearing of the appeal, the learned senior Counsel for the respective litigants opted to file in written submissions. They did file and I am indebted on the researchful industry of the learned Counsel who made reference to a host of relevant and useful judicial precedence.

I do not propose to replicate the Counsel's submission firstly on account of brevity and secondly on account of the fact that the issue at hand is simply whether the learned trial Magistrate exercised his discretion judiciously when he declined to grant special leave to review his Judgment of 9th October, 2014.

The starting point in this appeal is to look at the provisions of Order 38 Rule (1) (2) of the Subordinate Court Rules which provides as follows:-

> *"Any Magistrate may upon such grounds as he shall consider sufficient and either on application by any party to a cause or matter or his own violation, review any Judgment or decision given by him (except where an appeal shall have been entered by any party, as such appeal is not withdrawn), and upon such review, it shall be lawful to open and rehear such cause or matter wholly or in part , and to take fresh evidence and to*

*reverse, vary or confirm his previous judgment or decision provided that the Magistrate shall not rehear any evidence or take any fresh evidence unless he shall have reason to believe that there has been a miscarriage of justice.*

*Any application by any party for review of any judgment or decision shall be made not later than fourteen days after such judgment or decision. After expiration of fourteen days, an application for review shall not be admitted except by special leave of the Court and on such terms as to the court seem just"*

Both learned Counsel are in agreement on the Law as to when a court may review its decision or Judgment and they made reference to the much quoted celebrated case of ***Lewanika and others v. Chiluba (1998) ZR 79***[1] where there Lordships had occasion to pronounce themselves instructively and authoritatively on the provisions of Order 39 (1) (2) of the High Court Rules[2] when they opined:-

*"Review of the Judgments is a two staged process that is to say first showing or finding a ground considered to be sufficient which then opens the way to actual review. Review enables a Court to put matters right. However, I do not believe that the provisions simply exists to altered a dissatisfied litigant the chance to argue for an alteration to bring about a result considered more favorable to him"*

The provisions of Order 39 (1) (2) are couched more or less in the same wording as those of order 28 (1) and (2) of the Subordinate Court rules[1].

In the application for special review it was demonstrated in the supporting affidavit that the certificate of title in respect of property subject to these proceedings was registered in the name of respondent in the year 2004 as revealed by computer print out from the Lands Deeds Registry. The property was acquired during the substance of marriage of the litigants having been married in 1994.

Had the learned trial Magistrate disclosed his mind to the computer printout revealing the legal owner of the property subject to this appeal he could inevitably have found sufficient reason to grant a review on 3 grounds.

Firstly, the learned trial Magistrate having properly alluded to the Supreme Court of ***Rosemary Bwalya Chibwe v. Austin Musubila Chibwe***[2]. It should have dawned on him that the property having been acquired during the subsistence of the parties marriage, that property was subject to consideration when dealing with the issue of property settlement amongst the parties.

Secondly, it is trite law that a certificate of title is conclusive evidence of ownership unless it is demonstrated that the same was obtained by fraud or mistake. See sections 33 and 54 of the Lands and Deeds Registry Act. There is no such allegation by the respondent. The opposing affidavit to the application for special review tacitly admits the legal ownership save to state that the

learned trial Magistrate was on firm ground when he ruled that the property did not form part of the Matrimonial property as it was constructed by relatives of the Respondent.

The Supreme Court had occasion to consider the effect of section 33 and 54 of the Lands Deeds Registry Act [iv] in the case of ***Honorius Maurice Chilufya v. Chrispin Haluwa Kangunda*** [iii] as to the conclusiveness of a certificate of title and the exceptions falling there under.

On the authority of ***Rosemary Bwalya Chibwe v. Austin Musubila Chibwe***[2] (which I had occasion to argue on behalf of Mr. Chibwe in the Supreme Court), the learned trial Magistrate's hands were shackled and he was dutifully bound to apply the principles enunciated in that case in respect of property settlement.

Thirdly, there is no registered interests of the Respondents' witnesses who were reputed to have contributed to the putting up of the unexhausted improvements or put simply a house on the property in question.

It has been submitted that the provisions of Order 38 of the Subordinate Court Rules could only have been invoked if the appellant had demonstrated that she could not have by diligence search been able to access the evidence which was being sought to be submitted or that the evidence was not available at the time the matter was held. I agree with this proposition but the matter does not end there. This court in adjudicating has to concurrently

administer law and equity as required by ***Section 13 of the High Court Act***.

The evidence on record insofar as is relevant to the review application is that the parties have been married for about 22 years. Both parties were in gainful employment. During the subsistence of the marriage the Respondent acquired property.

At trial the Respondent made tremendous effort to distance himself from the said property wishing to divest his interest therein and vest it in his relatives. The Lands Register however reveals that the Respondent is the lawful owner of the property.

On the foregoing, I hold that the appeal was richly founded. The learned trial Magistrate fell into error when he failed to take into account fresh evidence which was material but was not in possession of the Appellant. This was a miscarriage of justice on the part of the Appellant. The appeal is upheld.

Having so held, I do not think that it will be just to resend the matter back to the learned trial Magistrate to rehear the case nor would it be just to order that the matter be reheard before another Court, there would be a serious legal cost implication and delay in conclusion of the matter.

I will therefore make the following declaration:-

*(i) The property subject to these proceedings forms part of Matrimonial property;*

(ii) *The orders by the learned trial Magistrate in respect of property settlement are set aside.*

(iii) *The matter is referred to the learned Deputy Registrar to deal with the issue of property settlement wholistically following the dissolution of marriage within 30 days from the date hereof on application by either party.*

(iv) *Ordinarily costs follow the event unless good cause is shown why the successful litigant should not harvest the fruits of his successful suit. The costs are in the discretion of the court but in exercising the discretion, it must be judiciously exercised. In this case the genesis of the case is that the litigants have been married for over 2 decades. The justice of the case is that each party bears its own costs.*

Leave to appeal is granted.

**Dated at Lusaka this** 21st **day of September, 2016**

**Mwila Chitabo, SC**
**Judge**