IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.154/2014**
HOLDEN AT LUSAKA **SCZ/8/194/2014**
(CIVIL JURSDICTION)

BETWEEN:

IRENE MUKELABAI MUSONA **APPELLANT**

AND

STEVEN SAMUSHIKA MUSONA **RESPONDENT**

CORAM: MAMBILIMA, CJ, KAOMA AND CHINYAMA JJS
On 4th October 2016 and.....2016

For the Appellant: **Mrs. L. Mushota, of Mushota and Associates**
For the Respondent: **Mr. O. Sitimela, of Fraser Associates**

JUDGMENT

MAMBILIMA, CJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. **ZAMBIA REVENUE AUTHORITY V T & G TRANSPORT (2007) ZR 13**
2. **VIOLET KAMBOLE TEMBO V DAVID LASTON TEMBO (2004) ZR 79**
3. **PETTIT V PETTIT (1970) AC 777**
4. **CHIBWE V CHIBWE (2001) ZR 1**
5. **WATCHEL V WATCHEL**
6. **ANNIE SCOTT V OLIVER SCOTT (2007) ZR 17**
7. **NDONGO V MOSES ROOOSTICA BANDA (2011) ZR VOL. I PAGE 187**

WORKS REFERRED

1. **P.J. SCHWIKKARD, PRINCIPLES OF EVIDENCE, 2ND EDITION PAGE 298**

LEGISLATION REFERRED TO:

1. **THE SUPREME COURT ACT, CAP 25 OF THE LAWS OF ZAMBIA**

2. THE MATRIMONIAL CAUSES ACT, NO. 20 OF 2007

This is an appeal from the decision of a Judge of the High Court, sitting in Chambers on an appeal from the Deputy Registrar (sometimes hereinafter referred to as the DR) in relation to property settlement after divorce.

On 2nd November 2013, the learned trial Judge granted a decree nisi, dissolving the marriage between the Appellant and the Respondent, on a petition filed by the Appellant. He referred the matter of assessment on property settlement to the Deputy Registrar with the following order:-

> **"I hereby refer all issues pertaining to the assessment of maintenance or property settlement that may arise to the Deputy Registrar of the High Court for determination. For the purpose of any assessment, and the avoidance of doubt, I find that all property disposed of during the subsistence of the marriage is not part of the current matrimonial assets."**

The learned Deputy Registrar found the following properties to have been acquired during the subsistence of the marriage.

1. **Stand No. 2318/M Leopards Hill Road, Lusaka**
2. **Three shops at Woodlands Shopping Centre, Lusaka**
3. **House No. 20 Mwalule Road, Northmead, Lusaka**
4. **Fortuna Enterprises Limited**

After hearing the parties, the DR ordered that the Appellant be awarded the property on Stand No. 2318/M (Leopards Hill Road

property). The property comprises two dwelling houses with five bedrooms each, two swimming pools, three boreholes and two sets of servants' quarters. In addition, she was awarded one shop of her choice of the three shops at Woodlands Shopping Centre and the value of her shares in Fortuna Enterprises Limited, based on an evaluation by a qualified economist. The Respondent was awarded House number 20, Mwalule Road, Northmead and two shops at Woodlands Shopping Centre. He was also awarded the family business, Fortuna Enterprises Limited, from which the Appellant would be paid an economic value for her shares.

In accordance with the guidelines given by the trial Judge, the DR disregarded eight (8) other properties which the Respondent was said to have disposed of during the subsistence of the marriage.

The Respondent was aggrieved by the Deputy Registrar's judgment on property settlement and appealed to a Judge at Chambers. His contention, in the main, was that the Appellant should not have been awarded the Leopards Hill property in its entirety. He prayed that the Appellant should be awarded the **'old'** house on the property and that he should be awarded the **'new'**

house, as he was looking after three of their sons, who despite being of majority age, were still dependent on him. He also contended that house Number 20, Mwalule road, Northmead was not part of the matrimonial assets, as it was purchased for the benefit of his children born out of wedlock. That this property was financed jointly from his personal resources and those of the family of one, Dorothy MSONI, the party named in the divorce petition, who is the mother of his children.

The Appellant, on the other hand, urged the Court to uphold the assessment of the learned Deputy Registrar in every respect. She contended that the Northmead house was part of the matrimonial property because the Respondent bought it with resources from the family business and assets which he disposed of for his own benefit, leisure and pleasure. The Appellant also deposed that there were three other properties; **Plot 4768/M Lusaka, Plot 8003 Lusaka, and Plot 378/A Lusaka,** that were bought secretly by the Respondent during the proceedings. She proposed that these properties should be awarded to the Respondent in addition to the other properties awarded by the Deputy Registrar.

Upon considering the evidence and the submissions that were before him, the learned Judge at Chambers found in favour of the Respondent. He set aside the award to the Appellant of the Leopards Hill property in its entirety and made the following adjustments:-

- **That the Appellant be awarded the 'old' house on Stand No. 2318/M for her exclusive use**
- **That the Respondent be awarded the 'new' house on Stand No. 2318/M where he resides with the children (of the family) for his exclusive use**
- **that the remaining extent be subdivided proportionately - 3.2370 hectares inclusive of the old house in favour of the Appellant; and 3.2370 hectares inclusive of the new house in favour of the Respondent**
- **that House No. 20 Mwalule Road, North mead Lusaka did not form part of family property and thus was to remain the property of the Appellant and the said Dorothy Msoni for the benefit of their three children**
- **that the additional properties namely Plot 4768/M Lusaka be awarded to the Respondent; Plot 8003 Lusaka to the Appellant and Stand No. 378A Lusaka to remain the property of Fortuna Enterprises Limited which was under the control of the Respondent**
- **that the Appellant should continue to run her events business at the 'new' house rent free until 31st December 2014 or until the lease at the 'old' house was determined, whichever event occurred last**
- **that the Appellant should be given a choice between Shop No. 1 and Shop No. 3 at Woodlands Shopping Centre *'to avoid the likelihood of any future conflict'* and the Respondent be awarded the remainder of the shops including Shop No. 2.**

On the assets which were disposed of during the subsistence of the marriage, the learned Judge was satisfied that the Deputy Registrar adhered to his guideline. That in any event, on the

evidence that was before him, the Respondent could not be said to have sold any of the family assets at whim since the proceeds were used for the children's school fees and the general welfare of the family, including holidays abroad and medicals.

On 17th February, 2016, the Respondent filed a Notice to raise preliminary objections pursuant to Rule 19 of the **SUPREME COURT ACT**[1]. Three objections were raised. These were that:-

(1) The record of appeal was irregular in that it contained documents which were not before the lower Court; documents which were not specifically admitted, and, letters marked 'without prejudice';

(2) The second ground of appeal was incompetent in that it emanated from an earlier judgment by the Court dated 2nd November 2012 and no leave was obtained to appeal out of time; and,

(3) This appeal ought not to be entertained because the Appellant did not comply with the Order of the Court, dated 19th November 2012 to pay into Court, security for costs amounting to K20,000.00 within thirty (30) days of the Order.

At the hearing of the appeal on 4th October, 2016, we decided to deal with the preliminary objections before delving into the main matter. At the outset, the learned Counsel for the Respondent withdrew the third ground of objection.

With regard to the first objection, Counsel submitted, on the authority of Rule 58(4) of the Rules of the **SUPREME COURT**[1], that

the record of appeal in this case is irregular, because documents that were not produced into evidence in the Court below were included in the record. According to Counsel, these documents relate to Cause Number 2009/HP/0332, which was on maintenance and they appear from pages 306 to 313. Counsel also submitted that some letters marked '**without prejudice**' were included in the record, and so were letters that were not specifically admitted into evidence.

Mrs. MUSHOTA's response to the first ground of objection was that it is the interest of justice that all matters that were in the Court below are brought to the attention of the Court; that the letter marked '**without prejudice**' on page 304 of the record of appeal is by the Appellant herself and she has no objection using it. That this document only indicated the willingness of the Appellant to resolve the matter if the Respondent was agreeable. To buttress her argument, Mrs. MUSHOTA relied on, among others, the literally works of P.J. SCHWIKKARD in his book, **PRINCIPLES OF EVIDENCE** when he said:-

> **"However, the words 'without prejudice' do not by themselves protect the statement from disclosure. If the communication constitutes a bonafide attempt to settle the dispute it will be privileged."**

She submitted that it is the maker of the document who is protected by law against the opponent.

On letters that were admitted without being specifically admitted, Counsel relied on Rule 58(4) of the Supreme Court Rules. According to Rule 58(4)(i) ***'such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant to the appeal;'*** should be included in the record of appeal.

On the second ground of objection, that the second ground of appeal is incompetent, Mrs. MUSHOTA's response was that the issue did come up in the appeal in chambers; that the issue was being raised to show the unreasonable behaviour by the Respondent. She submitted that if this Court was inclined to agree with the Respondent that leave to appeal against this finding by the Judge ought to have been obtained, she would seek leave to include it in the grounds of appeal.

We dismissed the first ground of objection as we were of the view that it had no bearing on the outcome of the appeal. We

upheld the second ground of objection and expunged the second ground from the memorandum of appeal. We stated that we would give our reasons in this judgment and this we now do.

With regard to the first ground of objection, the documents complained of include Originating Summons for maintenance and its supporting affidavit; and a '**without prejudice**' communication between the parties.

Rule 58(4) of the **SUPREME COURT RULES**[1] makes it mandatory to include, in the record of appeal, among others, such other documents that may be necessary for the proper determination of the appeal. The Originating Summons had no bearing to this appeal as it related to an application for maintenance and not property settlement. The letter marked ***'without prejudice'*** was authored by the Appellant herself and as Mrs. MUSHOTA rightly pointed out, it is the maker of the statement who is protected by law and in this case, she had no objection to using the document. The Appellant, in the document, indicated her willingness to resolve the matter amicably if the Respondent was agreeable. Obviously, she would not suffer any prejudice.

The third set of documents are said to be on pages 17, 18, 33, 40 and 42 of the record of appeal. According to the Respondent, these documents needed to be specifically admitted into evidence before the lower Court. Our perusal of the record of appeal shows that pages 17, 18 and 33 are pages J10, J11 and J26 of the judgment appealed against. Pages 40 and 42 of the record of appeal comprise pages J3 and J5 of the learned DR's judgment. It would appear that the named pages do not speak to the objection raised. By their very nature, there could not have been any need to specifically produce them in evidence. In our view, all the documents mentioned under the first ground of objection had no bearing on the outcome of this appeal. This ground of objection could not be upheld or sustained.

The second ground of objection was that the second ground of appeal is incompetent as no leave was obtained to appeal out of time against the judgment of 2nd November, 2012 from which this ground emanates. Counsel submitted that there was no evidence before this Court to show that leave to appeal was granted. He cited the case of **ZAMBIA REVENUE AUTHORITY V T AND G TRANSPORT**[1] in which we held that the requirement of leave to

appeal goes to the jurisdiction of an appellate Court. The Appellant's response was that this Court should pronounce itself on the matter of a party selling property before dissolution of marriage, without the consent of the other. That should this Court agree with the Respondent on this issue, the Appellant would apply for the necessary leave to appeal against that portion of the judgment of 2nd November, 2012.

Indeed, when sending the matter for maintenance and property settlement to the DR, the Judge stated in his judgment that: ***"For the purpose of any assessment and the avoidance of doubt, I find that all property disposed of during the subsistence of the marriage is not part of the current matrimonial assets.*** In her appeal from the judgment of the DR, to a Judge in chambers, the Appellant referred to this issue in passing, through the third (3rd) and ninth (9th) grounds of appeal. These grounds were couched in the following terms:-

"3. **The learned Deputy Registrar misdirected herself in law and fact by taking into account the Respondent's conduct towards the disposal of assets during the subsistence of the marriage as by so doing the lower Court took a narrow view of the issues.**

9. **Despite the guidance given to exclude any property disposed off during the subsistence of the marriage the lower court misguided itself when it observed that 6 acres of land was sold off from Plot**

2318/M Leopards Hill Road, Lusaka at the price of United States Dollars sixty-five thousand (US $65,000.00) per acre."

In his Judgment on appeal, the Judge stated:-

"There was no evidence adduced before this Court to the effect that properties were disposed off in contemplation of dissolution of marriage or proceedings for property settlement. It is for this reason that this Court ruled that all property disposed off during the subsistence of the marriage would not be part of current matrimonial assets."

Clearly, the Judge was not making a new finding, but reiterating his earlier ruling that all property disposed of during the subsistence of the marriage would not be part of the current matrimonial assets. An appeal against this portion of the Judgment would have come to this Court. It is our view that the Judge made a categorical decision, in his judgment of 2nd November, 2012, that properties disposed off during the subsistence of the marriage would not form part of the matrimonial assets. In the judgment on appeal from the Deputy Registrar, the Judge merely echoed what he had decided on 2nd November, 2012. It is clear that no leave was obtained to appeal to this Court against the portion of the judgment referred to in the judgment of 2nd November 2012. Leave ought to have been obtained from the trial Court and not this Court. The jurisdiction of this Court can only be invoked if the trial Court declines to grant

leave. In the circumstances, the position as at now is as we stated in the case of **ZAMBIA REVENUE AUTHORITY V T.G. TRANSPORT**[1], that the issue of leave goes to the jurisdiction of an appellate Court. Accordingly, we had no jurisdiction to entertain the second ground of appeal and we could not allow Mrs. MUSHOTA to entice us to cloth ourselves with jurisdiction to entertain an application for leave. For this reason, we allowed the second objection and expunged the second ground of appeal from the Memorandum of Appeal.

We will now deal with the main appeal by the Appellant against the judgment of the Court below from the judgment of the DR. The Appellant has contested this judgment through a Notice of Appeal filed on 21st August 2014. A Memorandum of Appeal containing six (6) grounds was also filed on the same day. These are:-

1. **That Court below erred in law and in fact in awarding 7 of the 10 properties acquired during the marriage to the Respondent, and only 3 of the 10 properties to the Appellant, when the law and equity require that property settlement be done fairly by the Court;**

2. **That the Court below misdirected itself in law and in fact in ruling that all the properties disposed of by the Respondent during the subsistence of the marriage, were not part of the matrimonial assets and should not be considered part of the property settlement, when the Respondent in fact disposed of the properties to solely benefit himself and to the prejudice of the Appellant;**

3. **That the Court below erred in fact and in law in holding that the Northmead House did not form part of the matrimonial assets for the purposes of matrimonial settlement when the said property was purchased with proceeds from the sale of their matrimonial assets of the family, to which the Appellant had an interest and was legally entitled to.**

4. **That the Court below erred in fact and in law in holding that there was no evidence adduced to the effect that properties were disposed of in contemplation of the dissolution of the marriage or proceedings of property settlement, when no other conclusion may be drawn from the facts that the Respondent disposed of family assets without informing the Appellant, and also actively concealed other properties he acquired during the subsistence of the marriage;**

5. **That the Court below erred in fact and in law in ordering that the Appellant be awarded the old house on Plot No. 2318/M built on the said matrimonial property, and the Respondent be awarded the new house for his exclusive use where he resides with the children, when in fact it is the Appellant that resides at the house with her sons and operates her business, which is her only source of income and livelihood, whereas the Respondent spends most of his time in Northmead with his other family; and,**

6. **That the Court below erred in fact and in law in ruling that moving the Respondent away from the family unit would be unfair, and that his status ought to have been preserved as much as possible, when he in fact spends most of his time with his Northmead family, and the Appellant's financial and economical status ought to be preserved as much as possible.**

We expunged the second ground of appeal on account of failure by the Appellant to obtain leave to appeal out of time. It will therefore not be considered.

In support of the first ground of appeal, it is the contention of the Appellant that the Court below awarded seven out of ten properties acquired during marriage to the Respondent, leaving the

Appellant with only three properties. The Appellant argued that since both parties contributed to the acquisition of family assets, all assets, including those disposed of, should have been considered and apportioned equally. To support her argument, the Appellant relied on the case of **VIOLET KAMBOLE TEMBO V DAVID LASTON TEMBO**[2] where it was held that the Court, when dealing with property settlements, should take into account several factors, such as the history of the marriage and the conduct of the players to the marriage before arriving at a final settlement.

She also referred to the case of **PETTIT V PETITT**[3] where it was held:-

> **"where a couple by their joint efforts get a house and furniture intending it to be a continuing provision for them both for their joint lives, it is a family asset in which each is entitled in an equal share. It matters not in whose name it stands, or who stays for what, or who goes out for work or who stays at home. It they contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally."**

The Appellant also cited the case of **CHIBWE V CHIBWE**[4] **in** which we adopted the definition of what constitutes **"family assets"** that was given in the case of **WATCHEL V WATCHEL**[5]**.** This is that family assets include items acquired by one or both

parties, with the intention that they should be continuing provisions for the use and benefit of the family as a whole.

On the third ground of appeal, the Appellant submitted that she had an equitable interest in all properties bought using proceeds from Fortuna Enterprises Limited. She argued that the Court below ought to have drawn the inescapable inference, that the Respondent bought the Northmead house with resources from Fortuna Enterprises Limited, a company in which she had an equitable interest and, therefore, part of the family assets. According to the Appellant, there was no evidence on record, to show that the MSONI family contributed towards the purchase of the Northmead house, except that given by Dorothy MSONI's nephew, who, in this case should be treated as a witness with an interest to serve, in the absence of corroborative evidence.

The fourth ground of appeal has two limbs. The first one is that the Court below erred when it held that there was no evidence adduced, to show that properties were disposed off in contemplation of the dissolution of the marriage when no other inference could be drawn from the fact that family assets were disposed off without

informing the Appellant. Secondly, that the Respondent actively concealed other properties that he acquired during the subsistence of the marriage.

The Appellant submitted that she discovered as late as 30th May 2013, well after the proceedings for property settlement had commenced, that the Respondent had purchased other properties. According to the learned Counsel for the Appellant, the fact that the Respondent concealed some assets, ought to have led the Court to draw an inference that the Respondent intentionally disposed of the family assets to deprive the Appellant and the children of the family.

Coming to the fifth ground of appeal, the Appellant contended that the Court failed to address the fact that the Appellant is the one who is living and has been living in the **"new"** house with her sons since it was built and that she runs her business from there, while the Respondent spends most of his time at the Northmead house, with his other family. She prayed that she should be awarded the **"new"** house and the Respondent be given the **"old"** house in addition to the Northmead house and other awards.

The learned Counsel for the Appellant further submitted that the Respondent has not been maintaining the Appellant; that the Appellant solely depends on proceeds from the events company that she runs on the premises of the new house and moving her will cause irreparable injury and destitution on her part. Further, that the geographical location of the old house is not ideal for her events business. Further, that the new house was constructed using proceeds from Fortuna Enterprises Limited and, therefore, that she equally contributed to its construction and supervision.

The sixth and last ground of appeal raises issue with the observation of the Court below that moving the Respondent away from his family unit would be unfair and as such, his status ought to be preserved as much as possible. The Appellant contends that her financial and economic status ought also to be preserved as much as possible. That in considering the status quo, the primary fact to consider is that the Appellant has built a reputable business which has been running since 2010, whereas the Respondent spends most of his time with his other family in Northmead. Counsel referred to two unreported High Court cases for the

submission that where factors appear to be evenly balanced, it is advisable to maintain the status quo.

In response to the Appellant's heads of argument, the learned Counsel for the Respondent filed written heads of argument which he augmented with oral submissions. On the first ground of appeal, which alleges that the Court below awarded seven out of ten properties acquired during the marriage to the Respondent, Counsel referred us to a portion of the judgment appealed against, appearing on pages J28 through to page J30, in which the Court below outlined what was awarded to each of the parties. This part of the judgment shows that the Appellant was awarded:-

1. **a sub-division of lot 2318M which is 3.237 hectares inclusive of the old house;**
2. **one shop of her choice between shop number 1 and shop number 3 at Woodlands Shopping Centre;**
3. **the value of her shares in Fortuna Enterprise Limited to be assessed and sold to the Respondent; and,**
4. **plot 8003, Lusaka.**

The Respondent was awarded:

1. **the remaining extent of Lot No. 2318/M Leopard Hills road which is 2.2370 hectares in extent, inclusive of the new house**
2. **two shops at Woodlands Shopping Centre, Plot No, 4768M, Lusaka;**
3. **Plot No. 4768M, Lusaka**
4. **His shares and those of the Applicant in Fortuna Enterprises Limited.**

Counsel submitted that from these awards, it was not correct to state that the Appellant was awarded three out of ten properties. That the lower Court's awards were based on family property which was available before it, excluding those properties which were disposed off during the subsistence of the marriage. He thus contended that the first ground of appeal is misconceived and should be dismissed.

On the third ground of appeal, which attacks the finding of the lower Court that the Northmead house did not form part of the matrimonial settlement, Counsel submitted that this ground of appeal is an unfair criticism of the Court's legal and factual finding on the property in Northmead. He argued that the Appellant, in her evidence to the Court below, stated that she had no proof that this property was purchased with proceeds from Fortuna Enterprises Limited; that there was no evidence on record to show that any of the proceeds used in the acquisition of the property did, in fact, come from the company in which both parties were shareholders; neither was there evidence to the effect that the Appellant did in fact, contribute to the acquisition of the Northmead house. He submitted that the lower Court was therefore on firm ground when

it found, in line with the case of **ANNIE SCOTT V OLIVER SCOTT[6],** that the only presumption to be drawn is that the Respondent used his own money and together with the MSONI family, acquired this property for the benefit and use of Ms MSONI and the three children. He pointed out that the Respondent informed the lower Court that he used proceeds from his private consultancy service to contribute towards the acquisition of this property while the rest of the money came from the MSONI family.

In response to the fourth ground of appeal, the learned Counsel for the Respondent referred us to the portion of the judgment of the Court below, appearing on pages 29 and 30 of the Record of Appeal in which the Court below stated as follows:-

> **"the evidence on record regarding other properties was that the same were disposed of during the subsistence of the marriage. The evidence before me from the Applicant herself was that the Respondent took care of everything that the family needed. The Applicant told the Court that the Respondent opened a shop for her after her retirement and provided all the funds to run the shop. He bought her vehicles including a BMW in 1994 and a Mitsubishi Pajero in 2006. He provided for her medical expenses within and outside Zambia and he paid for the children's education. The Respondent's un-impeached evidence was that he provided for all her needs materially including buying her vehicles and grocery money."**

Counsel submitted that these were findings of fact by the Court below and they cannot be easily overturned by an appellate Court.

For this submission, he relied on the case of **NDONGO V MOSES MULYANGO ROOSTICO BANDA**[7] in which we stated that an appellate Court will not easily reverse a finding of fact made by a trial judge unless the Court is satisfied that these findings are either perverse or made in the absence of relevant evidence or upon misapprehension of facts.

In the alternative, Counsel has argued that firstly, the properties in question were disposed of between 1995 and 2010, while the petition for dissolution of marriage was filed in 2012. He argued, agreeing with the lower Court, that it could not have been the intention of the Respondent to circumvent these proceedings by disposing off the properties. And, secondly, that the inference by the Appellant that the Respondent used proceeds from the sale of other properties during the marriage and income from the family company to purchase the house in Northmead is without basis and ought to be dismissed because there is no evidence to support this inference. That the Court below was on firm ground to have held that this particular property does not form part of the matrimonial assets. Counsel invited us, in line with our decision in the case **TEMBO V TEMBO**[2] to take a broader view in this case, as there was

no evidence of any financial mismanagement on the part of the Respondent to the detriment of the family.

Counsel argued the fifth and sixth grounds of appeal together. He reiterated that the lower Court was on firm ground when it ordered that the Respondent be awarded the new house on Lot 2318/M in Lusaka, together with 3.237O hectares while the Appellant was awarded the older house on the same plot together with 3.2370 hectares. According to Counsel, the lower Court cannot be faulted when it held that moving the Respondent away from the Leopard Hills area, which is one of the most prestigious areas in Lusaka, to live in Northmead at Plot 20 Mwalule Road, in a house which has a small toilet and three bedrooms, would be unfair. Counsel again referred us to the case of **TEMBO V TEMBO** in which we stated, that:-

> **"when the issue of settlement of property has arisen, the Court is obliged, among other things to have regard to all the circumstances of the case and exercise its powers as to place the parties so far as it is practicable and, having regard to their conduct, just to do so, in the financial condition in which they had been before the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."**

Counsel submitted that the lower Court found as a fact, that the intention of the parties was that Lot 2318/M was intended to be

their permanent home. He argued that in the circumstances, the lower Court was within the confines of the law, to have found that moving the Respondent from the family house at Lot 2318/M, a place to which he is accustomed for the past three decades, would be unfair. He stated further, that the Respondent discharged his financial duties towards the Appellant diligently as he had been supporting her. That in line with our decision in case of **CHIBWE V CHIBWE**[4], the Court below took into account all the circumstances of the case, including the standard of living of the parties, their needs, obligations and responsibilities before making its decision.

On the argument by the Appellant that if she was moved out of the new house, she would lose her only source of income, Counsel pointed out that the Court below awarded her one of the shops at Woodlands Shopping Centre, from which she would be receiving rentals; that in fact the Appellant, by her own conduct always treated the first house as hers and at one time, she moved out of the second house and took residence in the first house. That in addition, the evidence on record would show that she has been renting out the property and pocketing the rentals. Counsel also submitted that there is evidence on record that the lawns at which

the events business takes place were done by the Respondent in 1994/95, following advice from his medical doctor that he needed a hobby to keep his mind busy. According to Counsel, moving the Respondent would alter his status and lower his standard of living. He urged this Court to maintain, as far as is practicably possible, the standard of living that the parties enjoyed prior to the dissolution of the marriage. In his view, the Court below did strike a balance in the manner in which it awarded the properties to the parties.

We have considered the evidence on record, the judgment of the Court below, the submissions of Counsel and the issues raised in this appeal. The first ground of appeal accuses the lower Court of having been unfair in the manner that it distributed family property between the parties. That out of ten properties, the Appellant was only awarded three.

In assessing the property that was available for distribution, the Court below disregarded the property that was disposed off during the subsistence of the marriage. The Judge then considered the properties that were available for distribution before the DR. These were itemised as follows:-

1. **Lot 2318/M Leopards Hill**
2. **Three shops at Woodlands Shopping Centre**
3. **Value of shares in Fortuna Enterprises Limited**
4. **House No. 20, Mwalule road, Northnead**

The Judge also alluded to other properties that were mentioned in the Appellant's supplementary affidavit in support of summons for property settlement of 30th May, 2013. In the said Affidavit, the Appellant asked the Court to include three other properties in the property settlement. These were:-

1. **Plot No. 4768/M registered in the name of the Respondent;**
2. **Plot 8003 Lusaka, also registered in the name of the Respondent; and**
3. **Stand No. 378A Lusaka, in the name Fortuna Enterprises Limited**

After taking into account the circumstances of the case, the authorities cited to him by the parties, and, the provisions of Section 56 of the **MATRIMONIAL CAUSES ACT[2],** the Judge awarded the properties as follows:-

To the Appellant he awarded:-

1. **A sub division of Lot 2318/M comprising 3.2370 hectares inclusive of the old house;**
2. **Either Shop No. 1 or Shop No. 3 at Woodlands Shopping Centre**
3. **The value of her shares in Fortuna Enterprises Limited to be assessed and sold to the Respondent**
4. **Plot No. 8003, Lusaka.**

To the Respondent was awarded:-

1. **The remaining extent of Lot No. 2318/M, Leopards Hill Road, Lusaka which is 3.2370 hectares, inclusive of the new house where he resides with his sons**

2. **Two shops at Woodlands Shopping Centre, one of which is shop No. 2**
3. **All shares in Fortuna Enterprises Limited after paying the Appellant for her shares**
4. **Plot 4768, Lusaka.**

The awards show that out of nine (9) properties available for distribution, the Appellant was awarded four (4). The Court disregarded the house in Northmead after finding that it was bought by the Appellant together with contributions from the MSONI family. It is apparent from these awards, that it is not correct to state that the Appellant was only warded three out of ten properties. It is also apparent that the Judge took into account the circumstances of the case and the provisions of the law before arriving at his decision. We therefore, find no merit in the first ground of appeal. It therefore fails.

The third ground of appeal is on the Northmead house. According to the Appellant, the Court below erred when it held that this house did not form part of the matrimonial assets. Much as the Appellant alleged that the house in question was bought using proceeds from Fortuna Enterprises Limited in which she had an equitable interest, the Court below found no evidence that proceeds from the company were used to buy the property or that the

Appellant contributed to the purchase of the house. The Judge accepted the evidence by the Respondent and stated:-

> **"In my assertion, the presumption that the said house was bought by the Respondent from his own resources and the MSONI family for the benefit of Ms MSONI and their children has not been rebutted to this Court's satisfaction"**

In line with our decision in the case of **TEMBO V TEMBO[2],** the learned trial Judge held that there was no intention by the parties that the house would form part of their matrimonial property at the time of its acquisition. In the case of **SCOTT V SCOTT[6]**, we held that any property purchased by one spouse with his or her own money presumptively belongs exclusively to the purchaser. There was evidence that the Respondent used monies earned through his consultancy services and a contribution from the MSONI family to buy the house. The Appellant did not provide cogent evidence to counter this assertion. Also, as stated in the case of **PETIT V PETIT[3]**, to qualify to be a family asset, there must be an intention that the property would constitute a continuing provision for the parties during their joint lives. The Appellant did not prove any such intention. The learned Judge in the court below cannot, therefore, be faulted for having excluded the house in Northmead

from the matrimonial assets in this case. Accordingly, we find that the third ground of appeal equally has no merit.

The fourth ground of appeal raises issue with regard to the properties that were disposed of during marriage and those that were allegedly concealed upon acquisition during the subsistence of the marriage. The first limb of this ground of appeal seems to resurrect the second ground of appeal which we expunged from the Memorandum of Appeal on the ground that there was no leave granted to appeal against the portion of the judgment concerning properties disposed off during marriage. We do not intend to be lured to consider this issue as it was expunged from the memorandum. In our view, the question as to whether there was evidence to the effect that the properties in issue were disposed of in contemplation of the dissolution of the marriage or proceedings on property settlement goes to the root as to whether such properties should be included in the property settlement.

As to the alleged concealed properties, it is on record that the Court below considered, and included three more properties that were mentioned by the Appellant in her supplementary affidavit in support of the summons for property settlement. These were:-

1. **Plot 4768/M in the name of the Respondent**
2. **Plot 8003, Lusaka, also in the name of the Respondent, and**
3. **Stand No. 378A Lusaka, in the name of Fortuna Enterprises Limited.**

The Appellant deposed that all the three properties should be awarded to the Respondent in addition to what was awarded to him by the DR, while she should retain what the DR awarded to her. It is on record that from among the new properties, the Judge awarded her Plot 8003, to use his words ***"in order to be fair to the parties."*** If the three properties are the ones that were concealed from her, it is clear that the Judge took them into account and awarded one of them to her. The fourth ground of appeal therefore fails.

We will deal with the fifth and sixth grounds of appeal together, as they both relate to the award in respect of Lot No. 2318/M, Lusaka. The DR had awarded the entire property to the Appellant. This is the property which is said to comprise two houses, separated by four acres of bare land. Each house is five bedroomed, and each has a swimming pool. One was built earlier than the other. There was evidence that the Appellant runs an events business at the new house. The learned Judge in the Court below awarded 3.2370 hectares of the property on which there is

the old house to the Appellant; and the remainder 3.2370 hectares on which there is the new house to the Respondent.

The Appellant has spiritedly argued that she has been living in the new house with her sons since it was built, while the Respondent spends most of his time in Northmead, with his other family. That she depends on the events business that she runs from the new house to earn money for her livelihood and to deprive her of this business will cause her irreparable injury.

The Respondent on the other hand, has also vehemently argued that it could not be fair to move him to Northmead from one of the most prestigious suburbs in Lusaka, where the value of an acre is in the region of US$65,000. That the Appellant cannot say that by moving to the first house, she will be deprived of her only source of income when she was given a shop at Woodlands Shopping Centre from which she will be receiving rentals.

In the case of **CHIBWE V CHIBWE**[4] we did state that on property settlement, the Court should take into account all the circumstances of the case; including the income of both parties, earning capacity, property and other financial resources. In the case in casu, the Judge in the Court below stated that before

arriving at his decision, he had taken into account ***'all the circumstances of the cases including standard of living of the parties, their needs, obligations and responsibilities.'*** He also took into account Section 56 of the **MATRIMONIAL CAUSES ACT**.

From the evidence on record, it would appear that there were several income generating assets. These were:-

1. **Three shops at Woodlands Shopping Centre**
2. **The family business, Fortuna Enterprises Limited**
3. **The events business that was run by the Appellant from the new house at Lot 2318/M Leopards Hill, Lusaka**

The Appellant was awarded one shop at Woodlands Shopping Centre while the Respondent was awarded two shops at Woodlands Shopping Centre together with the family business, Fortuna Enterprises Limited, which is a going concern. Going by these awards, the events business run by the Appellant at the new house would either be continued by the Respondent or suffer a mortal blow. Taking into account the income earning capacity of the assets, it is our considered view that the award by the Court below was not fair in that as against five potential income generating assets of the three shops at Woodlands Shopping Centre; Fortuna Enterprises Limited and the events business, the Appellant was only awarded one and literally compelled to close her events

business. In our view, there was need to balance the income earning capacity of the parties using the available assets. The argument that the Respondent would be relegated to live in Northmead is not tenable because there is the other house on Plot 2318/M in which the Respondent can reside. We therefore, find merit in the fifth and sixth grounds of appeal and we allow them.

Consequently, the award of the Court below is varied only with regard to Lot 2318/M. We award the Appellant the remainder of Lot 2318/M to the extent of 3.2370 hectares inclusive of the new house, so that she can continue to run her events business. The Respondent is awarded a subdivision of Lot 2318/M to the extent more or less 3.2370 hectares inclusive of the old house. For the avoidance of doubt, the total awards are as follows:-

To the Appellant is awarded:-

1. **The remainder of Lot 2318/M more or less 3.2370 hectares inclusive of the new house;**
2. **One shop of her choice between Shop No. 1 and Shop No. 3 at Woodlands Shopping Centre;**
3. **The value of her shares in Fortuna Enterprises Limited to be assessed and sold to the Respondent**
4. **Plot No. 8003, Lusaka.**

To the Respondent is awarded:

1. **A subdivision of Lot No 2318/M, more or less 3.2370 hectares inclusive of the old house;**
2. **Two shops at Woodlands Shopping Centre inclusive of Shop No. 2;**

3. **His and the Appellant's shares in Fortuna Enterprises Limited. The Respondent is to pay the Appellant for the shares after the value has been assessed;**
4. **Plot 4768/M Lusaka.**

To this extent the appeal partially succeeds. In the circumstances of this case, we order that each party will bear their own costs.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE