

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Civil Jurisdiction)

APPEAL NO. 158/2013

SCZ/18/191/2013

BETWEEN:

ANDREW CHIBEKA

APPELLANT

AND

EDAH SIKOMBE

RESPONDENT

CORAM: Mwanamwambwa, D.C.J, Chibomba, Malila, J.J.S.

On 1st December, 2015 and 31st March, 2017

For the Appellant:

Mr M. Z. Mwandenga, MZ Mwandenga and Company

For the Respondent:

Mr Zacheus Musonda, National Legal Aid Clinic for Women.

J U D G M E N T

Mwanamwambwa, DCJ, delivered the Judgment of the Court.

Cases referred to:

- 1. Minister of Home Affairs and the Attorney-General V. Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes (2007) ZR 207.**
- 2. Hindustan Times Ltd V. Union of India 1998 (2) SCC 242.**
- 3. Zamtel V. Aaron Mweenge Mulwanda and Paul Ng'andwe (2012)1 ZR 404.**

4. ZRA V. Hitech Trading Company Limited (2001) ZR 17.
5. Watchel V. Watchel (1973) 1 ALL ER 113.
6. Chibwe V. Chibwe (2001) ZR 1.

Legislation referred to:

The High Court Rules, Cap 27 of the Laws of Zambia, Order 47, Rule 20.

This is an appeal from the decision of the High Court on property adjustment.

The brief facts of the matter are that the Appellant and Respondent were husband and wife. Their marriage was dissolved by the Local Court. The Local Court ordered the Appellant to pay K1,500,000 (before rebasing) to the Respondent as compensation. It also ordered the Appellant to give the Respondent a motor vehicle. The Respondent was dissatisfied with this Judgment. She appealed to the Subordinate Court.

The Subordinate Court heard the matter *denovo*. The evidence in the Subordinate Court was to the effect that the couple married in 1995 and acquired two houses during the course of the marriage. Despite hearing the matter *denovo*, the

Subordinate Court did not make any findings of fact. It simply summarised the evidence from the witnesses and made the following orders:-

1. that the parties share kitchen utensils equally;
2. that the Appellant pays the Respondent K100,000 (before rebasing) monthly instalments, as maintenance;
3. that the motor vehicle should be returned to the Appellant;
and
4. that the Appellant should build a house for the Respondent within a period of 12 months.

Dissatisfied with the above order, the Respondent appealed to the High Court. The High Court ordered that the parties share all the household property equally and that the Respondent be given the house at plot No. 02/07 Kamanga Overspill. The lower Court added that the rentals accruing from plot No. 02/07 Kamanga Overspill be paid to the Respondent, from the time of the dissolution of the marriage, to date of the Judgment, with interest at the bank deposit rate, from the date of the writ to date of judgment, thereafter at the Bank of Zambia lending rate from the date of judgment to the date of handing over the house in issue to the Respondent.

Dissatisfied with the above Judgment by the High Court, the Appellant appealed to this Court on three grounds. These are:-

Ground one

That the Honourable learned Judge misdirected herself by failing to give reasons as to why and how she allowed the appeal in the Court below

Ground two

That the Honourable learned Judge misdirected herself by failing to take cognisance of the fact that there was no or insufficient evidence before her upon which she could have made the order that the Respondent should be given a house at plot No. 02/107 Kamanga Overspill.

Ground three

That the Honourable learned Judge misdirected herself, in the absence of sufficient evidence, by ordering that the rentals accruing from the house at plot No. 02/107 Kamanga Overspill, be paid to the Respondent from the time of dissolution of the marriage to the date of Judgment with interest at the bank deposit rate from the date of the writ to date of judgment, thereafter at the Bank of Zambia lending rate from the date of judgment to the date of handing over the house in issue to the Respondent.

In ground one of the appeal, Mr Mwandenga submitted that the Judge in the Court below ought to have given reasons for allowing the appeal. It was Counsel's argument that the Judge in the Court below just summarised the arguments by the Appellant and went on to make orders. Counsel argued that the judgment in the Court below was not a judgment. He cited the case of the **Minister of Home Affairs and the Attorney-General V. Lee Habasonda (Suing on his own behalf and on behalf of the Southern African Centre for the Constructive Resolution of Disputes**⁽¹⁾ to support his argument. In addition to the above authority, Counsel referred this court to an article entitled "a lesson to judges on judgment writing-II" by Mr Justice M. Jagannadha Rao which article was referred to in the Indian case of **Hindustan Times Ltd V. Union of India**⁽²⁾.

It was Counsel's argument that this judgment does not have the elements that must be contained therein in accordance with the case of **Zamtel V. Aaron Mweenge Mulwanda and Paul Ng'andwe**⁽³⁾. Mr Mwandenga argued that according to the above case, a judgment comprises the following elements:-

1. an introductory section;
2. a setting out of facts;
3. the law and issues;

4. applying the law to the facts;
5. the reliefs; and
6. the order of the court.

It was Mr Mwandenga's argument that even if the court in the above matter was referring to a trial court, the principles apply to an appellate court as well. Counsel argued that there is insufficient material on record to enable this honourable court to be able to write the judgment on behalf of the court below.

On behalf of the Respondent, Mr Musonda submitted that the advice given in the case of **Minister of Home Affairs, the Attorney-General V. Lee Habasonda**⁽¹⁾ was meant for trial Courts. That nonetheless, the learned Judge in the Court below did address her mind to the evidence before her.

Counsel went on to quote the following passage from the Judgment:

"it was submitted further that in the case of Chibwe V. Chibwe, the Supreme Court held that the spouse was entitled to an equitable share of the marital property adjustment following the dissolution of the marriage even if one party may have made more financial contribution to its acquisition than the other, it was submitted in this matter that the Court in fact found that the Appellant was doing business during the

subsistence of the marriage and thereby contributed to the acquisition of the property in addition to discharging her responsibilities as a wife and mother in the matrimonial home the court below erred by ordering that the Respondent should build a house for the Appellant, when in fact there are two houses and a plot in existence for the family a fact which was found by the court below and there was no dispute regarding this fact.

For the foregoing this appeal is allowed and it is ordered and directed that the parties share all the property equally and I further order and direct that since there are 2 houses for the family the Appellant be given a house at plot No. 02/107 Kamanga Overspill..."(SIC)

It was submitted that the above extract from the judgment reveals findings of fact as well as the Judge's reasoning before giving her order. Mr Musonda added that a perusal of the entire judgment will further reveal that the requisite elements for a judgment, in light of the authority above, are present. That as a result, the issue of whether the court below ought to rewrite the judgment should not arise.

In the arguments in reply, it was submitted that **Order 47 Rule 20 of the High Court Rules** provides for how the High

Court must exercise its appellate jurisdiction or powers. And in material respects provides that the High Court shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the court as the court of first instance. That the High Court may rehear the whole case, or remit it to the court below to be reheard, or to be otherwise dealt with as the Court directs.

We have looked at the evidence on record. We have considered the submissions by both parties. We have also considered the Judgment appealed against. This Court has, on several occasions, guided lower courts on how to write Judgments. In the case of Zamtel V. Aaron Mweenge Mulwanda, Paul Ngandwe⁽³⁾, this court quoted an article by the former Chief Justice of the Supreme Court of Appeal of South Africa, where he stated that a Judgment comprises of-

1. an introductory section;
2. a setting out of the facts;
3. the law and the issues;
4. applying the law to the facts;
5. the relief; and
6. the order of the court.

In the case of **Minister of Home Affairs, Attorney-General V. Lee Habasonda (Suing on behalf of SACCORD)**⁽¹⁾, this Court held:-

“Every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.”

In the case before us, the learned Judge heard this matter as an appellate Court. We are of the view that even though the authorities we have referred to above, discussed matters in the context of trial courts, the principles that apply in trial Courts, apply to appellate courts as well.

Although every judge will have one's own style of writing, there are essential requirements which ought to be followed. A Judgment needs to make the parties understand how the court has dealt with their case and reached its decision. A Judgment will achieve the above if it gives reasons for arriving at a particular order.

In the case before us, the learned appellate Judge set out the grounds of appeal and summarized the submissions. After

summarizing the submissions, the appellate Judge went ahead to make a decision, allowing the appeal. The Judge then proceeded to make certain orders; one of them was that the Appellant transfers house number 02/107, Kamanga Overspill, to the Respondent. The Judge did not show how she arrived at the decision, allowing the appeal. She did not give reasons for her decision. We do not approve of the approach taken by the learned appellate Judge.

We agree with the submission by Mr. Mwandenga that the judge ought to have given her reasons for arriving at the decision she did. Accordingly, we find merit in ground one of the appeal and we allow it.

In ground two of the appeal, it was submitted by Mr Mwandenga that from the testimonies of the witnesses who testified in the Local Court and Subordinate Court, it is evident that none of the witnesses specifically mentioned plot 02/107 Kamanga Overspill in their testimonies. That plot 02/107 Kamanga Overspill is brought into focus through the grounds of appeal to the High Court and the Appellant's heads of argument. He submitted that evidence should not be drawn from the grounds of appeal or heads of argument. Counsel added that

submissions or arguments by a party should not provide evidence upon which a court can rely on in coming up with any conclusions or Judgment. He referred us to **ZRA V. Hitech Trading Company Limited** ⁽⁴⁾, which held that arguments and submissions at the bar, spirited as they may be, cannot be a substitute for sworn evidence.

It was Mr Mwandenga's argument that conclusions or judgments by a court should be based on facts on the record arising from evidence properly adduced before it by the parties or their witnesses.

Mr Musonda submitted, on ground two, that the Appellant, while on oath in the Subordinate Court, stated the following:

"I built a house. I own two houses in Kamanga Compound. I built the first house in 1997. I built the second house in 2002..."

Counsel stated that in cross examination, the Appellant stated that-

"I gave her K1,200,000 to buy a plot, which is in dispute. I had contacted Navers Banda to buy a plot from him in 2002..."

Mr Musonda contended that the above is logically probative of a fact in issue. And on a balance of probabilities, the Judge

ruled in favour of the Respondent and was specific as to which house in particular she would get. He stated that the courts are guided by the need to do justice. He stated that it was surprising that the Appellant was raising an objection in this Court when he raised no objection to the existence of the property as matrimonial property in the Court below.

In reply, Mr Mwandenga submitted that even though plot 02/107 Kamanga Overspill, is referred to in the letter of offer that is on record, there is no evidence to show that the offer letter was produced in evidence in the Subordinate Court.

We have looked at the evidence on record and considered the submissions by both parties. We note from the arguments on this ground that what is in contention is house number 02/107 Kamanga Overspill, Lusaka. The evidence on record shows that in the Subordinate Court, the Appellant said as follows:

"I borrowed K100,000 so that the Appellant(Respondent herein) could start business. I bought goods for her and she started business. Afterwards, I gave her money to buy Chibuku, Castle and Mosi to sell...

I own two houses in Kamanga Overspill. I built the first house in 1997. I built the second house in 2002, but it is

not yet complete. She is claiming the uncompleted house. The cause of the problem is a house for which she wanted a certificate of title. I couldn't allow her to obtain title. That is how she sued me..."

We note that none of the lower Courts made any findings of fact on the issue of the house. It is not the duty of an appellate court to rewrite the Judgment of the lower Court. However, an appellate Court may look at the facts and circumstances of each case and consider whether it is proper to write the Judgment on behalf of the lower Court. In this case, the lower Court heard this matter on appeal from the Subordinate Court. The Court that ought to have made findings of fact was the Subordinate Court. When we look at the circumstances of this case, we feel it would be undesirable, in the interest of justice, to send this matter back to the Subordinate Court for retrial so that findings of fact may be made. This is because, firstly, this matter has taken a long time in the court system. Secondly, we feel that there is enough evidence on record to enable this Court determine whether or not the couple owned plot number 02/107, Kamanga Overspill. We say this because from the evidence on record, it is not in dispute that the parties owned two houses in Kamanga Overspill. It is also not in dispute that the house in

question, number 02/107 Kamanga Overspill, was purchased in the name of the Respondent. It is also not in dispute that the Respondent conducted some business during the course of the marriage.

In the case of **Watchel V. Watchel** ⁽⁵⁾, family property was defined as:

“property which are acquired by one or other or both of the partners with the intention that they should be continuing provisions for them and their children during their joint lives and used for the benefits of the family as a whole.”

Further, this Court stated in the case of **Chibwe V. Chibwe** ⁽⁶⁾, that a party to divorce proceedings, provided he or she has contributed either directly or in kind to looking after the house, has a right to financial provision.

We note that in this case the parties did not have children together. However, they had family property as defined in the **Watchel v. Watchel** ⁽⁵⁾ case. In our view, the Respondent contributed to the acquisition of these family properties, through the business she carried out. Therefore, on the authority of the **Watchel** case, she is entitled to a provision. She is entitled to a

share in these properties. In any case, the two houses in question were acquired during the course of the marriage.

Accordingly, we find that there was sufficient evidence on record to show that the parties owned house number 02/107 Kamanga Overspill.

Because of what we have said above, we dismiss ground two of the appeal for lack of merit.

We now come to ground three of the appeal. In in this ground, Mr Mwandenga submitted that there is no evidence on record to show that plot 02/107 was put on rent, at how much and to who.

On behalf of the Respondent, Mr Musonda submitted that the Appellant, in the court below, in response to the Appellant's grounds of appeal, stated as follows:-

"the subject house was constructed for the children and that rentals earned therefrom are used to pay for the education of the children and that if the said rentals are disturbed or stopped, the effect on the school going children will be..."(SIC)

Mr Musonda stated that the above statement intimated that the property in dispute was actually on rent.

In reply, Mr Mwandenga submitted that the words quoted by the Respondents in their argument were said by counsel. That they were not words made by any of the witnesses. Therefore, they should not be considered as evidence.

We have looked at the evidence on record and considered the submissions by both parties on this ground. The learned appellate Judge ordered that the rentals accruing from this property be paid to the Respondent from the time of the dissolution of the marriage.

We agree with Mr Mwandenga that the assertion in question was made by Counsel for the Respondent. It was not made by a witness during trial. Accordingly, on the authority of **ZRA V Hitech Trading Co. Ltd.**⁽⁴⁾ it was not evidence. In effect there is no evidence on record that house No. 02/107, Kamanga Overspill was on rent. Accordingly, we hold that the learned appellate Judge erred on fact and in law, when she ordered that the rentals accruing from the property be paid to the Respondent, from the time of dissolution of the marriage. We hereby reverse and set aside the said order.

For the above reasons, we find merit in ground three of the appeal and we allow it.

All in all, this appeal succeeds in part in that we allow grounds one and three. We dismiss ground two of the appeal. We order that house number 02/107 Kamanga Overspill, be given to the Respondent. We make no order as to costs.



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M.S MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



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H. CHIBOMBA
SUPREME COURT JUDGE



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M. MALILA
SUPREME COURT JUDGE