IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA

2016/CRMP/LCA/008

(Civil Jurisdiction)

BETWEEN:

GEOFREY SILAVWE **APPELLANT**

AND

CHARITY NAMUTUNDA **RESPONDENT**

Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, in open court at 09:00 hours this 27th day of July, 2017.

For the Appellant: In Person

For the Respondent: In Person

JUDGMENT

LEGISLATION REFERRED TO:

1. ***Local Court Act, Cap 29 of the Laws of Zambia, ss: 35, 56, 58***

CASES REFERRED:

1. ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000***
2. ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79***

OTHER AUTHORITIES REFERRED TO:

1. ***Halsbury's Laws of England, 4th edition, Vol. 16, Lord Haisham of St. Marylebone, Butterworths, London at paragraph 1526***

This matter was commenced by way of an appeal from the local court. On 3rd December, 2015 the respondent sued the appellant in the local court for divorce on the ground of matrimonial disputes. I will maintain the parties in this matter as they appeared in the court below. The respondent and appellant shall herein be referred to as plaintiff and defendant respectively.

The local court on the 4th December, 2015 dissolved the customary marriage. At the conclusion of the matter, the local court made the following pronouncements:-

1. Divorce granted;
2. Defendant to compensate plaintiff with K15,000 by K1,000 first instalment then K500 monthly instalments with effect from 30th December, 2015;
3. Also the defendant to maintain his children with K500 monthly; and
4. All properties acquired together whilst in marriage to be shared equally.

The defendant aggrieved by the decision of the lower court appeals to this court in accordance with section 56 of the Local Court Act, Chapter 29 of the Laws of Zambia. The grounds of appeal advanced by the defendant on record are lengthy and many of them quite irrelevant to the facts in issue.

This appeal from the local court is dealt with by way of rehearing the matter *de novo* in accordance with section 58 of the Local Court Act, Chapter 29 of the Laws of Zambia.

In civil matters the plaintiff bears the burden of proving her claim on the balance of probabilities.

The parties were married under Mambwe customary law in 1990 at Mbala in the Mbala District in the Republic of Zambia. At that time the defendant had another wife with four young children. That the defendant chased his other

wife and the plaintiff started living with the woman's children namely: Nelly, now late; Leah Mulongoti now aged over 32 years, a divorcee living with the defendant in the house the plaintiff occupied during marriage; Mainess now aged 29 years, married and living with her husband; and Douglas Mulongoti now aged 27 years, unemployed and living with the defendant.

That the parties cohabited at unknown address in Mbala and relocated to George compound, Lusaka. There are now living five (5) children of the family namely: Medison Mulongoti aged 25 years, a male general worker; Debyster Mulongoti aged 22 years, a male general worker; Exodus Mulongoti a female aged 17 in grade 12 at unknown school; Omi Mulongoti a girl aged 14 years in grade 10 at unknown school ; and Uli Mulongoti, a boy aged 10 years in grade 7 at unknown school.

The parties divorced due to irreconcilable matrimonial disputes. The divorce was not contested by either party in this court. The matter before this court was not logically argued or presented around the grounds of appeal. It would appear from the facts or evidence on record that the only issues for determination are:

1. Child custody;
2. Maintenance of the children of the family;
3. Maintenance of divorced spouse; and
4. Property adjustment.

On child custody, the local court did not make any order to that effect. However, I must hasten to state that Medison Mulongoti, Debyster Mulongoti, and Exodus Mulongoti are by judgment date aged 26, 22 and 18 years respectively. As such, the said persons are adults who are ineligible for child custody. Considering the ages of Omi Mulongoti and Uli Mulongoti that is, 12 and 14 year respectively, in my view it is in their best interest if the two children were left in the custody of the plaintiff and the defendant given reasonable access. I order accordingly.

I will consider the issues of maintenance of children of the family and divorced spouse together. The issue of maintence of the children of the family was strongly canvassed by the plaintiff. That the plaintiff during the subsistence of the marriage was at all material times a business woman running a family shop. Upon divorce the plaintiff lives in a rented house at a monthly rental of K700. The defendant on the other hand has continued living in the matrimonial home and does not pay rent. That currently the plaintiff is a street vendor selling carrier plastic bags. The defendant stopped working in 1992 due to ill health. He is diabetic patient which illness has effected his sight. It was argued that the defendant does not support his family such that all the children could not proceed with school because of the defandant's failure to pay for their school fees. The defendant contended that he has been supporting the education of his children who failed on their own.

In deciding the issue of the maintenance of the children of the family and divorced spouse (plaintiff), regard was had to the provisions of ***section 35(1)(d) and (e) of the Local Court Act, Chapter 29 of the Laws of Zambia*** which reads as follows:

"S.35(1) Subject to the provisions of this Act or of any other written law, and to the limitations imposed by its court warrant, a local court, in cases of a civil nature, may-

(d) make an order for the payment of such monthly sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until re-marriage whichever is the earlier;

(e) make an order for the maintenance of any child below the age of eighteen years whether born in or out of marriage....."

I have carefully considered the ages of the children of the family. As stated above Medison Mulongoti, Debyster Mulongoti, and Exodus Mulongoti are by judgment date aged 26, 22 and 18 years respectively. As such in terms of section 35, the said persons are ineligible adults for child maintainance. In this circumstance, Omi Mulongoti and Uli Mulongoti aged 12 and 14 years respectively the two qualify for child maintainence. The only question to be deciced is the *quantum* which in my view must be K300 monthly and not the K500 ordered by the court below. In considering maintenance in divorce cases the court should not look at or treat the parties' reasonable requirements as a determining factor. The available financial resources is what court must consider. As regards maintenance of the plaintiff it was wholly unreasonable for the local court to have ordered a jobless man laboring under ill health and without any financial resources or means to maintain or compensate the plaintiff with a sum K15, 000. The order of the court below is accordingly reversed on the ground of lack of available financial resources or means for either party to maintain the other. As such the maintenance or compensation of K15, 000 awarded to the Plaintiff is hereby quashed.

Property adjustment is the most controverted issue in this appeal. There are two properties in issue namely plots number 521/22 and 333/17 both situate in George compound, Lusaka. The defendant in his grounds of appeal and *viva voce* evidence stated that he acquired the two properties before he married the plaintiff. According to the defendant he built a three bedroomed house on plot no. 333/17 between 1970 to 1984 with the help of his unknown brother and first wife one Mary Mayembe. That the defendant demolished the structures on the plot and built a 7 roomed structure. The defendant submitted that plot no. 333/17 was registered in his name. It was further contended that the defendant had another plot but that UNIP and its government would not allow a person to own more than one property. As such an agreement was made between the plaintiff and the defendant to jointly own plot no. 521/22 and

make a living out of the property. The property was registered in the plaintiff's name.

The plaintiff submitted that it is not true. It was contended that the plaintiff at the time of marriage found the defendant at plot no. 333/17 in a two roomed structure. That the plaintiff built another three bedroomed structure on the (same) plot and let it to the tenants.

It was further asserted that the defendant in 1993 found another plot and used the plaintiff's K70 to purchase the plot. That the plot was acquired from UNIP Chairman in plaintiff's names who erected a four bedroomed structure on the plot. It was submitted that she sourced capital from her mother in Kitwe. According to the plaintiff she was selling groceries in the family shop and that the business was booming. It was asserted that the plaintiff proceeded to develop plot no. 521/22 situate in George compound, Lusaka. That the defendant gave the plaintiff some documents to sign. That the plaintiff did not understand the nature of the document she signed. It was submitted that the defendant started demanding to have ownership of the plot changed into his names. It was further submitted that when the plaintiff refused to have the property changed into a business name the defendant sued the plaintiff at Matero local court. That matter was reffered to subordinate court and magistrate Amy Masoja presided over the matter. That the court placed the property under a business name holding that the defendant was the chairman and the plaintiff was the secretary of the business (company).

I have no doubt that the plaintiff was grossly misrepresented and deceived. I have carefully read the judgment of magistrate Amy Masoja which was produced by the defendant as exhibit MGS1. The learned honourable magistrate held as follows:

"I therefore order as follows:

(i) I order specific performance of the contract for transfer of the names of the premises house number 521/22 in accordance with the terms and conditions of the contract between the parties within.

(ii) Each party to bear their own cost."

The defendant further produced a letter marked exhibit MGS2 purportedly authored and signed by the plaintiff which letter was the basis upon which specific performance for change of names for plot number 521/22 from the plaintiff into the names of the defendant was ordered.

The the form and content of the letter is as follows:

25th June 2005

House No. 333/17

George

Township

Lusaka

I Charity Namutunda Mulongoti (Mrs) of house No. 333/17 George Township NRC No. 661969/11/1

Hereby write to confirm that when getting the plot, it was gotten in my name above, plot No. 521/22 George Township, Reference No. 0025210022.

Therefore, as building has been completed, I hereby declare to be transferred back to my husband Mr. Silavwe M. Georfrey NRC No. 139730/42/1 as one who has built the house and my son Silavwe Mulongoti Medson.

SIGNATURE: C. NAMUTUNDA 26-06-05 (*Thumb print*)

CHARITY NAMUTUNDA MULONGOTI.

It is not controversy that the plaintiff is illiterate and cannot read or write a word in English. I believe the story by the plaintiff that by appending her thumb print to the letter she was deceived into believing that the property was being changed into some business name when in fact she was effecting property transfer.

The fact that this issue of property ownership was addressed by magistrate Masoja a court of same standing brings the entire issue of ownership under the Latin maxim ***res judicata***. The learned authors of ***Halsbury's Laws of England, 4th edition, Vol. 16, Lord Haisham of St. Marylebone, Butterworths, London at paragraph 1526*** state thus:

"The most usual manner in which questions of estoppels have arisen on judgments inter-partes has been where the defendant in an action raised a defence of res judicata, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppels. In order to support that defence, it was necessary to show that the subject matter in dispute was the same (namely that everything that was in controversy or open to controversy in the first suit) that it came in question before a court of competent jurisdiction and that the result was conclusive to bind every other court."

It is clear from the above excerpt that the doctrine of ***res judicata*** is a strict rule of law binding parties to the decision made by a competent court. The previous court decided on property transfer and by implication declared the defendant to be owner of plot no. 521/22 George Township. I will not comment on the propriety of the court's judgment with regard to ownership as the same is *res judicata*. However, it is important to note that same letter upon which the previous court acted contains a paragraph- words ascribed to the plaintiff which reads as follows:

"Hereby write to confirm that when getting the plot, it was gotten in my name above, plot No. 521/22 George Township, Reference No. 0025210022."

The above statement in my view can only be construed to mean that ***plot No. 521/22 George Township*** was acquired during the subsistence of the marriage. For the purposes of property adjustment it does not matter which party acquired or in whose names the property is registered during marriage, therefore this court is not bound by the strict rule of law known as *res judicata.*

It is not in dispute that plot no. 333/17 situate in George compound, Lusaka was acquired by the defendant before he married the plaintiff as such the same is not subject to property adjustment.

The Supreme Court has been very clear on what type of properties are ordinarily subject of property adjustment after the dissolution of marriage. In the case of ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000*** in which case the Supreme Court, *inter alia* stated:

"What was the issue before the High Court and us was the percentage of sharing the family assets. Family assets have been defined in Watchtel v Watchtel as items acquired by one or the other or both parties married with the intention that these should be continuing provision for them and the children during their joint lives and should be for the use for the benefit of the family as a whole. Family assets include those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties."

I have carefully considered the issue of property adjustment before me. The intention of the parties when they were acquiring plot no. 521/22 situate in George Township was that the same should be continuing provision for them and the children during their joint lives and should be for the use for the benefit of the family as a whole.

The Supreme Court in the subsequent case of ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79*** provided guidance to the courts on what to take into consideration when sharing properties after divorce and held *inter alia* as follows:

"The court examines the intentions of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement then the court must make a finding as to what was intended at the time of the acquisition."

When the issue of settlement of property arises, the court is obliged, among other things, to have regard to all the circumstances of the case and so exercise its powers as to place the parties, so far as it is practicable and having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities toward the other.

In my view, on the totality of the contributions of the parties towards acquisition of the property, I do not see any reason to warrant the disturbance of the order by the local court sharing equally between the parties the property acquired during the subsistence of the marriage. In default of agreement on how plot no. 521/22 situate in George Township, Lusaka shall be shared between the parties, the same shall be evaluated by a registered valuer, be sold at market price and the proceeds of the sale shall be shared equally between the plaintiff and the defendant.

I do not order any costs.

Delivered in open court this 27th day of July, 2017.

HUMPHREY MATUTA CHITALU
ACTING SENIOR RESIDENT MAGISTRATE

REPUBLIC OF ZAMBIA JUDICIARY MAGISTRATE COURT COMPLEX 27 JUL 2017 RESIDENT MAGISTRATE P O BOX 30202 LUSAKA