

**IN THE SUBORDINATE COURT OF THE FIRST CLASS    2017/CRMP/LCA/213**

**FOR THE LUSAKA DISTRICT**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN :**

**ELIAS MWALE**

**APPELLANT**

**AND**

**MISOZI TEMBO**

**RESPONDENT**

**FOR THE APPELLANT:**            In Person

**FOR THE RESPONDENT:**        In Person

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***JUDGMENT***

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**Cases referred to:**

- Chibwe v. Chibwe (2001) ZR 1
- J v C [1970] AC 688
- Violet Kambole Tembo v David Lastone Tembo (2004) Z.R. 79 (S.C.)
- Watchel v Watchel [1973] 1 All E.R 829 at 838

**Statutes referred to:**

- Subordinate court Act chapter 28 of the laws of Zambia
- Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia

This matter came to this court by way of appeal from the local court and the grounds of appeal were as follows:

1. The honourable court erred both in law and in fact by verbally ordering the respondent to be collecting all rentals when initially the judgment was that rentals be shared between the parties
2. The court erred in law and fact by not considering that the Appellant's salary was just K700.00 by ordering the appellant to pay the respondent K250.00 and maintenance of the children of K400.00 every month.

I warn myself from the outset that, in Civil matters, the standard of proof is on the balance of probabilities and he who asserts must prove his claim.

The Appellant gave evidence on his own behalf and called one witness. The respondent also gave evidence on <sup>el</sup>his own behalf and called 2 witnesses.

**ELIAS MWALE** (PW1) the appellant herein testified that he lived with the respondent in marriage for 13 years and they divorced on 16<sup>th</sup> February 2017. They built a 5 roomed house in Mutendere and during the marriage, they occupied 3 of the rooms and other 2 rooms were on rent. After divorce, he moved out of the house as per court order and the respondent remained therein with the

children. The respondent continued collecting rentals from the 2 rooms.

He also stated that they had 4 children together the first child being female aged 11 years and doing grade 5. The second child is a boy aged 9 years and the third is girl aged 7 years old. The last child is a boy aged 1 year and some months. The last 3 children are not in school and all the children are in the respondent's custody.

He further stated that he works as a Gardener and his salary was K700.00.

He prayed that the rentals should be shared between the parties equally and that the house be given to the children.

On the K400.00 maintenance, he stated that it was too high as he had other children and other expenses.

On compensation, he stated that he wanted the amount to be reduced considering how much he was getting.

On custody of the children, he stated that he did not have a problem with the respondent keeping the children but he wanted to keep the first two because the respondent leaves early and comes back late without knowing what the children do. He had a wife who could keep the children.

In cross examination, he stated that from the time they divorced, he does not do anything for the children because he remains with K50.00 and he did not know why the children don't visit him.

PW2 was **TIPILILE BANDA** who stated that the respondent did not want her step children. In cross examination, she stated that she could not talk about custody of the children.



The Respondent **MISOZI TEMBO** (DW1) averred that she married PW1 in 2004 and they started having problems. She told the lower court that they sale the house. She was not refusing to share the rentals with PW1 but the was using the same money to buy food for the children, pay their medical bills and school requirements because PW1 failed to maintain the children as per court order. They could not share the rentals because she was maintaining the children and maintenance by PW1 was erratic.

She also stated that the house has 4 rooms of which 2 rooms are on rent at K250.00 and the other 1 room at K150.00. She lives in a room that she partitioned to make it 2 rooms. For the 1 room she gave out, she had to put a door frame and floor.

She went further that PW1 could not keep the children because the wife he married was her best friend and their children used to play together. PW1 spits when DW1's children pass and she tells them that they will suffer. PW1's wife even beat up DW1's 8 year old child and the matter was at Kalikiliki Police. She stated that PW1's wife can't keep her children and they could suffer.

Furthermore, she stated that the K400.00 maintenance was not even enough as the expenses for the children were high.

In cross examination, she stated that it was PW1's young brother who brought the door frame and she bought it from him. She gave out the room after divorce and she used to give him his share from the rentals save for the period when the tenant left with arrears. The tenant in the 1 room pays K150.00 and not K250.00. The 2 rooms was not at K300.00.

DW2 was **HARRISON TEMBO** who stated that PW1 does not support his children.

In cross examination, he stated that it was DW1 supporting the children and he did not know where she takes the money that PW1 gives him. He knew that PW1 was not supporting the children when he was put in Police cells for beating DW1 because he was not buying mealie meal and other things.

DW3 was **JESSY TEMBO** who also stated that PW1 was not supporting the children and her sister DW1 was suffering with the children. PW1 and DW1 struggled to build the house together.

In cross examination, she stated that she knew that he was not supporting the children because she used to find them without charcoal and mealie meal. DW1 told her that sometimes, he does not pay her the money he is supposed to pay and DW1 does business to buy food for the children.

Having considered the evidence, I am satisfied that the parties acquired a house during the subsistence of the marriage and have four children between them who are in DW1's custody. I find that DW1 is occupying part of the house and some rooms are on rent.

What ought to be determined is whether or not the parties should share the rentals from the house, whether or not the compensation and maintenance should be reduced and whether custody of the last children should be granted to PW1 or not.

In this matter, it is clear that the parties built this house to continue providing for the family during their joint lives and for the use and benefit of the family as a whole therefore the house is a family asset subject to adjustment.

Family assets have been defined in **Watchel v Watchel [1973] 1 All E.R 829 at 838** as items acquired by one or the other or both parties married with 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 a definition adopted by the Supreme Court in the case of **Chibwe v Chibwe SCZ Appeal No. 38/2000.**

It is clear from the evidence of the parties that the arrangement of them sharing the rentals as verbally ordered by the lower court is not working well and if the parties continue with this arrangement, they might continue having the same problems. PW1 stated that he wanted the house to be maintained for the children however, to put these problems to rest, it is better for the house to be sold and share proceeds thereof.

In **Violet Kambole Tembo Vs David Lastone Tembo (2004) Z.R. 79 (S.C.)** it was held inter alia that:

***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.***

From the evidence, it is also clear that the person who was in employment is PW1 and it is not clear what DW1 was doing during the subsistence of the marriage. That notwithstanding, DW1 contributed in Kind to the acquisition of the house as a wife and mother a matter to be considered in sharing proceeds.

On the issue of reducing the compensation, the parties were married for 13 years and considering the K5,000.00 ordered by the lower court to be paid in monthly installments of K250.00, I am of a view that the amount is not too high of course having considered PW1's salary of K700.00 and the fact that he has

other expenses. Since the money is to help DW1 to compensate for somewhat disparity after divorce, the amount ordered by the lower court is reasonable and I choose not to adjust it.

Coming to the welfare of the children, The Affiliation and Maintenance Act Chapter 64 of the Laws of Zambia provides that:

11. (1) It shall be the duty of the court before making any maintenance order to have regard to all the circumstances of the child concerned. ~~Matters for consideration when making maintenance order~~

(2) Without limiting the generality of subsection (1), the court shall have regard to the following matters:

(a) the welfare of the child while an infant, including any preliminary expenses;

(b) the income, earning capacity, property and other financial resources which each interested person has, or is likely to have, in the foreseeable future, including, in the case of earning capacity, any increase in that capacity which it would, in the opinion of the court, be reasonable to expect a person to take steps to acquire;

(c) the financial needs, obligations and responsibilities which each interested person has or is likely to have in the foreseeable future;

(d) the standard of living enjoyed by the family before the breakdown of the marriage, in the case of persons who are divorcing;

(e) the age of the child and of each interested person;

(f) any physical or mental disability of the child;



(g) the contributions which each person has made, or is likely in the foreseeable future to make, to the welfare of the child, including any contribution made or to be made by looking after the home or caring for the child;

(h) the financial needs of the child;

(i) the income, earning capacity, property and other financial resources, if any, of the child; and

(j) the manner in which the child was being, and in which its parents expected it to be, educated or trained.

15(1) Where the court makes a maintenance order in respect of a child, the court shall also have power to make whatever order it thinks fit with respect to the custody of the child, and the right of access thereto of either parent, but the power conferred by this subsection and any order made in exercise of that power shall have effect only during any period while the maintenance order is in force.

(2) In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.

In resolving the issue of maintenance and custody of the children, I am guided by the Law above.

DW1 stated that the money was not even enough because there are a lot of expenses for the children. I agree with her because the cost of living is quite high and it will be unreasonable to expect four children to get provision from K400.00 which translates to K100.00 per month per child. Reducing the amount



in the circumstances would be unreasonable. I am alive to the fact that PW1 gets K700.00 per month and he has other expenses but as a father, he is under obligation to provide the basic necessities of life for his children.

Delving into the issue of custody of the last two children who are in DW1's custody, the reason advanced by PW1 that he wants to keep the children because DW1 leaves home early and does not know what the children do is not enough to remove the children from their mother. More so, he did not demonstrate the effect this has on the children if any. DW1 stated that PW1's wife can't keep her children well and that they would suffer. According to her, his wife spits when the children ~~suffer~~ and tells them that they would suffer. She also stated that she even beat her 8 year old child and the matter was at the Police, evidence that PW1 did not challenge.

It is trite that when making decisions touching the welfare of children, the paramount consideration is the best interest of the child. I seek refuge in the persuasive cases of **J v C [1970]AC 688** Lord MacDermott explained paramountcy of the child's welfare that:

*'...more than that the child's welfare is to be treated as the top item on the list of items relevant to the matter in question. The words denotes a process whereby when all relevant facts relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child's welfare. It is a paramount consideration because it rules upon or determines the course to be followed'.*

Clearly, it will not be in the best interest of the children in this matter to live with Pw1 and his wife. The children are better placed with DW1.

For the forgoing, I order that:

1. The house be sold upon valuation by the Government Valuers, the appellant and respondent to share the proceeds at 65% and 35% respectively. However either party with the capacity can buy out the share of the other.
2. Custody of the children is granted to the respondent and the appellant to have reasonable access to the children
3. The appellant to maintain the four children at K500.00 per month, pay their school fees and incidentals thereto, provide clothing and pay their medical bills
4. The appellant to pay the outstanding amount of compensation in monthly installments of K250.00

I make no order as to costs

IRA 30 days

I order security for costs in the sum of K1,500.00

Delivered in Open Court this.....day of .....2017

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SYLVIA MUNYINYA OKOH

RESIDENT MAGISTRATE