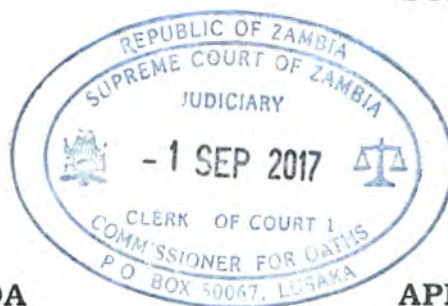


IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 008/2015
SCZ/8/206/2014



BETWEEN:

DAVID TEDDYSON NYIRENDA

APPELLANT

AND

PATRICIA KAPEMBWA NYIRENDA

RESPONDENT

Coram: Wood, Kajimanga and Musonda, JJS
on the 1st August, 2017 and 31st August, 2017

For the Appellant: In Person

For the Respondent: Mr. C. Musonda, P.M. Kamanga & Associates

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. Zulu v. Avondale Housing Project: (1982) Z.R. 172
2. Konkola Copper Mines PLC v. Chiyeni Kanswata: SCZ Appeal No. 91 of 2002
3. Harrington v. Siliya & A-G (2001) Z.R. 253
4. Zambia Telecommunications Co. Ltd. v. Mulwanda & Ng'andwe: (2012) 1 ZLR 404
5. Kearney & Company Limited v. Agip (Z) Limited & Asphalt & Tarmac: (1985) Z.R. 7

Legislation referred to:

1. Section 22 of the Matrimonial Causes Act, (1973)
2. Section 2 of the Judgments Act, Cap. 81 of the Laws of Zambia
3. Section 25 of the Supreme Court Act, Cap. 25 of the Laws of Zambia

The appellant has appealed against a Judgment of the High Court of Zambia sitting in its appellate capacity at Lusaka on 15th August, 2014 whereby the court below dismissed all but one of four grounds which had been canvassed in that court against the earlier Ruling or Order on property settlement of the honourable Deputy Registrar sitting at Lusaka. For completeness, the learned Deputy Registrar had determined, in effect, that the petitioner and the respondent who, in their happier times, had been con-joined in holy matrimony, should share the assets or properties which the duo had acquired during the subsistence of the duo's marriage. However, although the Deputy Registrar had declined to introduce the appellant (then respondent)'s claim for a sum of K38,000.00 which he, the appellant, had claimed to have lent to the respondent (then petitioner) during the subsistence of the marriage in question in the post-divorce property-sharing matrix before that lower court, the same, that is, the appellant's claim for K38,000.00, found favour with the appellate court in the sense that not only did the latter court recognise the K38,000.00 claim, it also proceeded to introduce the same into the former couple's post-divorce property-sharing matrix and apportioned

the respondent. In spite of the appellate court having extended this respite to the appellant, he, the appellant, has taken issue with the appellate court's supposed failure to award him interest by escalating his grievance to this court.

The history and background facts surrounding this appeal are of undoubted clarity.

The appellant and the respondent had lived as husband and wife until their marriage was put asunder on 8th September, 2008 at the behest of the respondent who had successfully petitioned the High Court of Zambia for divorce.

Following the dissolution of the marriage between the appellant and the respondent, the latter launched an application (purportedly pursuant to Section 22 of the Matrimonial Causes Act, 1973) before the Deputy Registrar at Lusaka seeking an order for property settlement in accordance with the decree nisi which was pronounced by the Honourable Mr. Justice G. S. Phiri (as his Lordship then was) when he dissolved the marriage in question.

The respondent's application for property settlement was

herself and in which she deposed that, during the subsistence of the marriage between herself and the appellant, the duo acquired various assets or properties together. The respondent also deposed that she acquired two industrial sewing machines and a dining table using her personal money.

The respondent accordingly invited the learned Deputy Registrar to distribute the personal assets which were jointly acquired between the two and to order the sale of one real property which had been acquired during the subsistence of the marriage and the distribution, in equal shares, of the arising sale proceeds.

For his part, the appellant filed an affidavit opposing the respondent's application on the basis that the real property which the respondent had targeted in her application was bought using funds that had successively arisen from the sale of properties that he had been purchasing and owning alone. Of direct relevance to this appeal was the deposition by the appellant in his opposing affidavit that he had lent a sum of K38,000.00 to the respondent for the purpose of investing in a Bureau de Change business which had been connected to the

The appellant further deposed in his opposing affidavit that the respondent did not repay the said K38,000.00 in spite of all his efforts to recover the same and that, under those circumstances, the respondent would be unjustly enriched if she were to receive any payment from him on the basis of the latter's property settlement application.

The learned Deputy Registrar considered both the oral and affidavit evidence which the parties had deployed before that court and came to the conclusion that the respondent was entitled to the relief which she had sought via the application in question.

With regard to the issue of the K38,000.00 which the appellant had introduced in the proceedings in question, the learned Deputy Registrar reasoned as follows:

"The KR38,000.00 alleged by the respondent as being (sic.) borrowed by the petitioner and was not paid back does not affect the sharing of the property, as in cross-examination the petitioner alleged that the respondent is the person who got the money, and ... was in fact drawing a salary from the business and the rest of the money was used to acquire the property shared in court...."

The appellant was displeased with the outcome of his exertions before the Deputy Registrar and appealed to the court below on the basis of the following grounds:

"Ground One

That the learned Deputy Registrar erred in both law and fact when she ordered that the two industrial sewing machines, dining table and other items be given to the Petitioner when in fact such property had already been taken by the Petitioner without requisite consideration of the principles regarding sharing of household property acquired during the subsistence of the marriage.

Ground Two

That the learned Deputy Registrar erred in both law and fact when she ordered that proceeds from two houses acquired before marriage to the Petitioner must be shared equally.

Ground Three

That the learned Deputy Registrar erred in both law and fact when she failed to address her mind to the fact that the Petitioner owes him K38,000.00 which has not been repaid to date.

Ground Four

That the learned Deputy Registrar erred in both law and fact when she considered [the] testimony of the Petitioner that he was receiving a salary from APT bureau without requisite documentary evidence."

At the hearing of the appeal, the court below heard the two parties. Essentially, the appellant spoke to his grounds of

Registrar on property settlement. Of specific relevance to the issues at play in the present appeal, the appellant told the court below (leaving out what is not relevant) that:

"...the petitioner owes K38,000.00 which has not been repaid todate; there is a contract which is signed [as] exhibit DRN4. The money I lent [to] the petitioner to invest in APT Bureau de Change was out of the proceeds of the sale of an incomplete house in Chalala ... The petitioner failed to provide documentary evidence in court ... that she had paid the money back to me or documentary evidence of the person who withdrew the K38,000.00 from APT Bureau de Change where it was invested and the petitioner was a director ... The petitioner is the one who took the K38,000.00 to [the Bureau]...

It is my humble appeal [that] the petitioner be ordered to pay me the K38,000.00 plus interest."

For her part, the respondent reacted to the appellant's allegations in the following terms:

"This contract was signed amongst 4 people, including the respondent to do a bureau business. According to Clause 9 of the contract, surplus accrued had to be shared at the monthend. [The] appellant used to receive salaries at the monthend ...

During the time, the money was there, himself and myself we used part of it to do car business. He went to RSA and bought a van for a Permanent Secretary who changed his mind upon his return. If he did not receive the K38,000.00 why has he taken so long to query ... Mr. Sakala?"

The court below considered the evidence and submissions on record and made the following finding of fact which is specifically relevant to this appeal, namely that, the petitioner borrowed a sum of K38,000.00 from the respondent (now appellant) which she invested in APT Bureau de Change in May, 2004.

Having made the above finding of fact, the learned Judge in the court below then proceeded to make the following pronouncements:

"Having critically looked at the record, I agree with the respondent [now appellant] that the sum of K38,000.00 was not paid back to him by the petitioner as there is no documentary evidence to prove otherwise. However, in the cited cases of ... matrimonial property includes capital assets. Money in my view is also a capital asset. The K38,000.00 in question qualifies to be matrimonial property as that money was acquired during the subsistence of the marriage. In my view, the purpose of borrowing the money by the petitioner was to invest in a business that would ultimately benefit the whole family. In view of this I will uphold this ground of appeal and order that the K38,000.00 be shared equally between both parties. Therefore, the petitioner will be required to pay back the respondent the sum of K19,000 while the other half would have been her entitlement."

The appellant has now appealed to this court on the basis of one ground of appeal which has been formulated in the following terms:

“GROUND ONE

The court below misdirected itself both in law and in fact when it overlooked and/or ignored to award me the interest and the fact that the respondent benefitted from the amount of K38,000.00 which was lent to her and that the money was invested into the bureau de change which was in the business of buying and selling of foreign currency at a profit.”

Both the appellant, who has been acting in person and counsel for the respondent filed their respective Heads of Argument to buttress the positions which they have respectively taken in the appeal.

For his part, the appellant contended that he gave the respondent a sum of K38,000.00 by way of a loan and that this amount was to be invested in a business known as APT Bureau de Change in which the respondent was both a shareholder and a director.

The appellant further contended that since APT Bureau de Change was a going concern business which was earning a profit on the money which had been availed to it as aforesaid, it stood

to reason that interest ought to have been awarded on the same when the judge below pronounced the judgment now under appeal. The appellant then went on to cite some decided cases which, for reasons which will become apparent later in this judgment, we have considered unnecessary to cite or review suffice it to say that we are fully alive to the legal principles which those cases had adumbrated.

The appellant accordingly invited us to allow his appeal on the basis that the lower court fell in error when it did not award him interest on the K38,000.00 which, according to him, he had advanced to the respondent for a commercial transaction.

For his part, learned counsel for the respondent opposed the appeal and contended that the court below was on firm ground and did not err whatsoever given that his lordship dealt with the K38,000.00 in question as part of the appellant and the respondent's matrimonial property which had to be apportioned as between the two following the failure of their union as man and wife. Under these circumstances, counsel contended, the question of the amount which was apportioned to the appellant accruing interest could not arise. Counsel went on to add that

K19,000.00 earning interest could not arise for the additional reason that the amount in question was not a judgment debt under the provisions of the Section 2 of the Judgments Act, Cap. 81 of the Laws of Zambia.

The respondent's counsel also argued that no evidence was deployed before the court below to suggest or confirm that the K38,000.00 which the appellant had availed to the respondent was of the nature of a loan. Besides, according to counsel for the respondent, the question of the appellant earning interest on the moneys in question could not receive the blessing of this superior court given that the appellant had not demonstrated that he was a certified money lender and that, in that capacity, he enjoyed the privilege of charging interest on his lending.

Counsel for the respondent's penultimate argument was of the nature of an attack against the judgment of the court below and was to the effect that the court below had glossed over the evidence which had suggested that the K38,000.00 had been applied towards the joint business of the appellant and the respondent.

We propose to pause here to outrightly dismiss this argument by the respondent given that she did not mount any cross-appeal. In like manner, and for the same reason, we outrightly reject the respondent's last argument in terms of which we were invited to invoke our inherent jurisdiction pursuant to Section 25 of the Supreme Court Act, Cap. 25 and set aside the order of the court below apportioning the K38,000.00 as between the appellant and the respondent on the basis that this money was unavailable at the time when the order on property settlement was pronounced and could not, therefore, have been the subject of the order in question.

At the hearing of the appeal, the appellant sought and was granted leave to file additional arguments after which he confirmed that he was relying upon his filed arguments.

For his part, learned counsel for the respondent also confirmed that he was relying upon his filed Heads of Argument. Additionally, the respondent sought and was granted leave to augment his written Heads of Argument.

In augmenting his written arguments, counsel for the respondent drew our attention to the definition of the term

'interest' as offered in the *Oxford's Law Companion* and argued that interest on the K38,000.00 could only have been payable by the person that had actual use of the money in question, or who had delayed such money's repayment or who had withheld the same. According to counsel, the respondent did not do any of the things described above.

Upon being pressed by the court as to why the court should take his oral arguments seriously in the absence of a filed cross-appeal, and whether his client had difficulties with paying the K19,000.00 which the lower court had ordered, counsel for the respondent indicated that his client had no difficulty with settling the K19,000.00 as ordered by the court below.

We have given anxious consideration to the arguments which were canvassed before us by or on behalf of the two parties to this appeal around the solitary ground on which this appeal is founded.

In the view that we have taken, we feel sufficiently comfortable to affirm that this was a typically weak appeal which lacked a visible legal leg to stand on. It is, indeed, tempting to

discount it in no more than a few words. We, nonetheless, propose to say a little more than we should have.

It is very clear to us that the appellant appears to have lost touch with the context in which the subject matter of this appeal was located when the same was escalated from the Deputy Registrar to the High Court Judge, from whose decision the present appeal arose. That context, in case the appellant seeks to be reminded, was property settlement following a dissolution of a marriage.

As counsel for the respondent correctly argued, once the court below had determined that the K38,000.00 constituted matrimonial property which had to be the subject of distribution as between the appellant and the respondent as former husband and wife, there could have been no question of interest arising. Indeed, and as we intimated a short while ago, given the context which the court below was working with, the question of interest was an implausible proposition.

Having said what we have just canvassed above, it is our view that there was only one aspect of the judgment of the court below over which the appellant was entitled to complain about.

According to the record, in the course of the proceedings of 3rd January, 2014 before the court below, the appellant, then respondent, told the learned judge the following:

“... It is my humble appeal that the order by the Deputy Registrar be dismissed and set aside and the petitioner be ordered to pay me the K38,000.00 plus interest. I rest my case.”

It is clear from the passage which we have quoted above that the appellant had clearly and distinctly raised the issue of being paid interest on his K38,000.00. However, in its judgment now under attack, the court below did not pronounce itself upon this issue of interest. Undoubtedly, the court below fell into error when it failed to pronounce itself or reveal its mind upon the issue of interest.

We have said in countless decisions such as **Zulu v. Avondale Housing Project¹**; **Konkola Copper Mines PLC v. Chiyeni Kanswata²**; **Harrington v. Siliya & A-G³** that it is the duty of the trial court to:

“adjudicate upon every aspect of the suit so that every matter in controversy is determined in finality.”

In **Zambia Telecommunications Co. Ltd. v. Mulwanda & Ng'andwe**⁴ we said:

"[A] trial court should completely and finally determine all matters in controversy, properly brought before it, to avoid multiplicity of proceedings concerning such matters" (at p. 415).

In the context of this appeal and, as earlier noted, the issue of interest was raised in the appeal which was escalated to the court below. For the avoidance of doubt, although the court below was sitting in an appellate capacity, the hearing of the matter (which had arisen by way of appeal from a decision of the Deputy Registrar in Chambers) was of the nature of an actual rehearing. This was the point we made in **Kearney & Company Limited v. Agip (Z) Limited & Asphalt & Tarmac**⁵ when we said, at page 9, that:

"We would also comment that we agree with Mr. Sikota's argument that on an appeal to a Judge in Chambers, the application is an entirely fresh application ..."

To the extent, therefore, that the appellant criticised the lower court's failure to pronounce itself or to reveal its mind upon the issue of interest which the appellant had specifically raised before that court, we do share in his criticism of the

appellant had mounted against the court below on the narrow point we have just made above does not take anything away from our broader and decisive conclusion that the appellant's search for interest in the post-divorce property settlement matter which had confronted the court below was wholly misconceived. Consequently, the appeal must fail on that account with costs.

This outcome does not, however, affect the order of the court below relating to the apportioning of the K38,000.00 in equal shares as between the appellant and the respondent. This being a final judgment, we expect the respondent to stop dithering over her obligation to pay K19,000.00 to her former husband.



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A. M. WOOD
SUPREME COURT JUDGE



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C. KAJIMANGA
SUPREME COURT JUDGE



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M. MUSONDA, SC
SUPREME COURT JUDGE