

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

2018/CRMP/LCA/102

(CIVIL JURISDICTION)

BETWEEN

GETRUDE HACHIBOONE

APPELLANT

AND

SICHINTU SIKALINDA

RESPONDENT

Before : Resident Magistrate M. N. Sakala

For the Applicant : In Person

For the Respondent : In Person



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## JUDGMENT

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**Statutes Referred to:**

1. Local Court Act, Cap 29 of the Laws of Zambia, ss: 56, 58
2. Subordinate Court Act, Cap 28 of the Laws of Zambia, s 15
3. Affiliation and Maintenance of Children Act, Cap 64 of the Laws of Zambia.



**Cases Referred to:**

1. *Enock Mwiimbu v Wilfred Habeenzu (1977) Z.R. 111 (S.C.)*
2. *Zambia Railways Limited v. Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)*

This matter was commenced in the Subordinate Court by way of an appeal against the judgment made by Kanyama Local Court. At the conclusion of the matter, the local court granted the parties a divorce, the Defendant (hereinafter the Appellant) was granted custody of the two children of the family though the Plaintiff (hereinafter the Respondent) was given reasonable access to the children and was ordered to be maintaining them with K700 per month, and both were told to be contributing 50% towards school fees, medicals and clothing would be the Appellant's responsibility. The local court further ordered that the matrimonial house & vehicle should be evaluated of which 40% of the sale proceeds of each was to be given to the Respondent.

The Appellant aggrieved by the decision of the lower court appealed 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 Appellant are as follows:

- That she could not value the house and give the respondent 40% while being in custody of the two children and staying in the said house.
- The children are beneficiaries of the said house and that she has put a lot of development towards the house with a lot of cost.
- The two children's requirement cannot fit the maintenance which was ordered by the court.
- That the 40% value of the car cannot be shared as the Dependents of the car are the children who are ferried to and from school and that the clinic is very far from their premises as the car is the only dependable transport they have.

This appeal from the local court was dealt with by way of rehearing the matter in accordance with *Section 58 (2) of the Local Court Act, Chapter 29 of the Laws of Zambia*. In the case of



*Enock Mwiimbu v Wilfred Habeenzu (1977) Z.R. 111 (S.C.)* the Supreme Court stated that “*the terms of section 58 (2) of the Local Courts Act, Cap.54, are directory and mean that in general the magistrate should re-hear all the evidence although in special circumstances a magistrate may dispense with a rehearing.*”

It was stated in the case of *Zambia Railways Limited v. Pauline S Mundia, Brian Sialumba (2008) Z.R. 287 Vol. 1 (S.C)* that:

“The standard of proof in a civil case is not as rigorous as that in a criminal case. Simply stated, the proof required is on a balance of probability “as opposed to beyond all reasonable doubt in a criminal case”.

I will determine this application while warning myself that the standard of proof in civil cases is on a balance of probabilities and that the subordinate court is a court of both law and equity as is provided in *Section 15 of the Subordinate Court Act, Chapter 28 of the laws of Zambia*.

Both the Appellant and Respondent gave viva voce evidence, and none of them called any witnesses. The brief facts of the matter are as follows:

The Appellant aged 34 and a civil servant at Ministry of Community Development gave evidence on oath. She stated that she was here because she was not happy with the judgment from Kanyama Local Court. She explained that she did not want to sell and share the proceeds of the house which is in Makeni Villa, Kanyama with the respondent because she built the house whilst he was in Chipata although they were still married. It was her testimony that she built the house for the two children. She went on to say that she does not want to sell the house because if sold it she would have difficulties buying another one since houses have become very expensive to buy nowadays and she cannot afford to buy another one for the children with the proceeds from the sale. Furthermore she stated that she got loans to build the house and is still paying off the loans. It was her evidence that she is currently staying in the said house with her two children aged 9yrs and 5yrs respectively. She submitted that she will suffer more if it is sold because she paid for his education using the same loans she got to build the house. She went on to ask the court to make the children the beneficiaries of the house and insisted that it was not her who wanted the house. She also asked that the car not be sold as was ordered by the Local Court but





instead it should be given to her ex-husband whilst she gets the house. She lastly stated that the maintenance sum of K700 for two children is very little.

There was no cross examination from the Respondent.

The Respondent aged 37 and a teacher at Barma Primary school gave sworn evidence and stated that the main reason why they went to the local court was because they had difficulties sharing the properties they had attained during their marriage. According to him they had tried to share the properties but had failed because the main problem was that they could not agree on who got the house, farm, motor vehicle. He narrated how he was told by the Appellant that he did not use any of his money when building the house, buying the farm and also the house hold goods and that she is the one who paid for everything. According to him he just kept quiet and told her that they should take the matter to court so that they could help them share the properties because he had contributed a small amount.

It was his testimony that when he wanted to take the vehicle but she refused and told him that he should give her back the K15,000 together with the money she had used for his school, and the money she used to pay for her lobola. He stated that he explained to her that the value of the vehicle in its current state is K20, 000. And that if he was to give her K15, 000 he would only remain with K5, 000 which would not be fair.

He went on to say that it was not true that there was no money he had contributed because he had been working for 11 years therefore there must have been things he had contributed to. He on the other submitted that he would like the court to decide how they share the properties because even he deserves to get something valuable and that from the beginning he never mentioned that he wanted to get the house. He explained that he did not want to mention the house because they have children together. He however, insisted that all he wants is to get something valuable as well. It was his evidence that his salary is K2, 700 and that when it comes to maintenance even their families had agreed to the amount of K700 because his salary is very little and he already pays K1, 000 rent. He further explained that if he had agreed to more than K700 he would not have managed and they would have started coming back to court for contempt.

It was however, his testimony that he has always had the children's interest at heart and that it's the reason why he has allowed the Appellant to have the vehicle up to now because the area where their house is the roads are bad and he wanted to ensure that she uses the car during the rainy season to take the children to school. In relation to school fees he stated that he was paying K450 per term for the older one and the Appellant was paying K400 per term for the younger one.

His final submission was that the court should distribute the properties fairly so that he could walk away with something valuable as well because all he got were two (2) pots, cups, plates and a blanket. He asked that he gets something valuable other than a car which depreciates in value.

There was no cross examination by Appellant.

Both parties submitted into court a list of properties and household goods that were obtained during their marriage and actually indicated what they would like to get and what the other party should get. The Appellant chose the House, vehicle, 1 fridge, stove, king size bed, two sofas, kitchen unit and dining table whilst giving the farm, two sofas, 1 double bed, 1 sitting room table and 1 fridge to the Respondent. The Respondent on the other hand chose the farm, vehicle, glass door fridge, dining table set, decoder, microwave and 5 bags of maize and gave the Appellant the house, GO TV, bed, stove, sofa, TV, strong decoder, upright fridge, home theatre, deep freezer and 17 bags of maize.

Based on the totality of the evidence adduced by both parties and my findings, I make the following orders:

1. That the house located in Makeni Villa, Kanyama will not be sold and that Appellant and the children will continue to live in the said house.

Whenever children are involved the court is obligated to make decisions which will be in their best interest and in the current case it is in the children's best interest that they continue to stay in the house they know as their family home. Since the children are minors the mother (Appellant) will continue to have ownership of the house and when both children attain the age the eighteen she can transfer ownership of the house to them. I also noted that the Respondent did not object



to the Appellant keeping the house as he understands that it is in the best interest of his children for them to continue living there.

2. That the Respondent shall continue paying the monthly maintenance sum of K700 per month for the two children.

In making maintenance orders, the court is guided by the provisions of Section 11(2) of the Affiliation and Maintenance of Children's Act which provides that:

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

**(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;"**

This provision of the law clearly shows that the income, earning capacity, property and financial resources of both parties need to be taken into consideration in this matter.

In this case only the Respondent submitted his monthly salary which is K2, 700 from that salary it would be unreasonable to expect him to contribute more than K700 per month.

3. That the Respondent shall get the vehicle.

The Appellant during her testimony had stated that she would like Respondent to have the vehicle instead of selling it and even the Respondent had stated that he would like to have the vehicle.

4. That the following properties will be distributed between the two parties as follows:

The Appellant will get:

1) The House 2) 1 Fridge 3) Stove 4) King Size Bed 5) 2 Sofas 6) Kitchen Unit 7) Dining Table 8) The Children's favorite Decoder 9) TV and TV Stand 10) Home Theatre 11) Wardrobes 12) 17 Bags of Maize





The Respondent will get:

1) The Farm 2) The vehicle 3) 1 Fridge 4) 2 sofas 5) 1 Double Bed 6) 1 Sitting Room Table 7) The Decoder which is not being used by the children 8) Microwave 9) 5 bags of maize

These orders are with effect from 31<sup>st</sup> May 2018 and only the maintenance shall be subject to review by the Court from time to time at the instance of either party as need arises.

Costs in the cause.

**Parties are hereby informed of their right of appeal to the High Court within 30 days if not satisfied; leave to appeal allowed, on condition that K1,000.00 security for costs be paid into court.**

**DELIVERED IN CHAMBERS THIS 31<sup>st</sup> DAY OF May, 2018**

  
M. N. SAKALA  
RESIDENT MAGISTRATE

