IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 160/2012

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CAROLINE LWANDO NKWABILO MAIGA **APPELLANT**

AND

MAIGA TEMIMU **RESPONDENT**

Coram : Wood, Kajimanga and Mutuna JJS

On 13th April, 2021 and 26th April, 2021

For the appellant : No Appearance

For the respondent : Mr. A. Wright of Wright Chambers

JUDGMENT

Wood, JS delivered the judgment of the Court

Cases referred to:

1. ***Chamberlain v. Chamberlain [1974] 1 All E.R. 33***
2. ***Re Andrews Trust [1905] Ch 48***
3. ***Re the Trusts of the Abbott Fund***
4. ***Re Osoba [1997] 2 ALL E.R. 293***
5. ***Martin v. Martin [1977] 3 WLR P101 CA***
6. ***Mesher v. Mesher [1980] 1 All E.R. 126 CA***

Legislation referred to:

1. ***Section 3 of the Lands Act Chapter 184 of the Laws of Zambia***
2. ***The Matrimonial Causes Act of 1973***
3. ***The Matrimonial Causes Act No. 18 of 2010***

Other works referred to:

1. ***Paragraph 1132 of Volume 13 of Halsbury's Laws of England 4th Edition***
2. ***Trusts and Equity, 2nd Edition, Pitman Publishing, London, (1995) at page 225 by Richard Edwards and Nigel Stockwell***
3. ***Jackson's Matrimonial Finance and Taxation, 6th edn. Paragraph 8.8***

Introduction

1. This is an appeal against a decision of the High Court which held that property arising out of a property settlement was

settled in favour of the respondent in trust for the parties' three children, only up to the time the youngest child attained the age of eighteen years. Thereafter, the property was to be transferred to the respondent.

Background

2. This appeal has its roots in a divorce petition and custody of children order which was granted by the High Court on 11th July, 2002. There was however a serious dispute with regard to the sharing of property situate at Subdivision 299 of Farm No. 441a Roma, Lusaka. The property was divided into two namely Sub. B comprising of the matrimonial home and Sub A which was a stand-alone house that was let out to tenants.

3. When the district registrar dealt with the issue of property settlement, he came to the conclusion that even though both properties were vested in the appellant, the respondent had an equitable interest. He then made the following order:

> ***"I therefore, order that the property otherwise known as Subdivision A of Subdivision 299 of Farm 441a Roma Township , Lusaka shall continue to vest in the respondent***

while the remaining extent otherwise known as Sub B of Sub 299 of Farm 441a Roma Township, Lusaka shall be transferred to the petitioner or his duly authorised agents who shall have possession and hold the house in trust for the benefit of the three children of the family and never to be disposed of until the youngest of the three children shall have attained the age of 18 years. This order is made in accordance with the provisions of section 24 (1) (c) and (d) of the MCA 1973 and shall take effect forthwith. (see also Jackson's Matrimonial Finance and Taxation, 6th edn. Paragraph 8.8). I make no order as to costs."

4. The above ruling is dated 21st February, 2003. The respondent who was the petitioner in the court below applied for an interpretation of the said ruling. The deputy director – High Court, dismissed the application on the ground that it was an attempt to review the district registrar's ruling. Undeterred by this setback, the respondent appealed to a judge at chambers. The judge agreed with the respondent that the ruling was unambiguous. The learned judge pointed out that in the ruling of 23rd February, 2003, the district registrar granted both beneficial interest and possession of the property known as Sub

B of Sub 299 of Farm 441a Roma Township, Lusaka to the respondent for him to hold the same in trust for the couple's children. The trust was to be in force until the youngest of the children was 18 years and during the period when the trust was in force, the respondent was prohibited from disposing of the property by way of sale. The learned judge accordingly held that the property in issue was settled in favour of the respondent in trust for the parties' three children, only up to the time the youngest child attained the age of eighteen years.

Grounds of Appeal

5. The respondent who is now the appellant was dissatisfied with the ruling of the High Court. She has filed the following three grounds of appeal:

(I) The Court below misdirected itself in law when it held that the deputy registrar vested beneficial interest in the property in the respondent and not the children of the family.

(II) The Court below misdirected itself in law when it held that the children's interest in the property was extinguished upon the youngest child attaining the age of eighteen years.

(III) The Court below erred in law when it held that the beneficial interest in the property vested in a trustee who cannot be a beneficiary of a trust.

The appellant's heads of argument

6. Counsel for the appellant has argued in respect of the first ground of appeal that although the wording in the ruling on the property settlement made by the district registrar on 23rd February, 2003 was said to be clear and unambiguous, both the district registrar and the learned judge misdirected themselves when they ruled that the property was vested in the respondent and not the children of the family. The learned judge ought to have taken into consideration the fact that the respondent is a non-Zambian who cannot own land in Zambia Counsel for the appellant conceded that this issue was not raised in the court below but nevertheless referred us to section 3 of the Lands Act in support of the argument that land could not be alienated to the respondent because he is a non-Zambian who does not qualify under the exceptions in the said section. We were urged not to place much reliance on

paragraph 1132 of **Volume13 of Halsbury's Laws of England 4th Edition** which provides as follows at page 525:

> ***"If it is desired to ensure that the matrimonial home acquired by the joint labours of the spouses, should continue to serve as a residence for the wife and children during the latter's education, it is proper to settle the home on trust or sale with a provision that it should not be sold until time as the education of the children has been completed."***

7. The reason for urging us not to do so was that the import of this quotation was wrong in law as the learned judge failed to appreciate the aspect that the respondent did not qualify to be vested with property as provided by section 3 of the Lands Act Chapter 184 of the Laws of Zambia. Further, the court below erred in settling the house so that the beneficial interest at the end of the day became that of the respondent even though it was not in dispute that the house in issue was acquired by the work and resources of both the appellant and the respondent. It was therefore only right and proper that the property in issue should have been held in trust by the appellant for the children given the legal incapacity of the husband and only to be sold at

the end of the education of the children if they so wished. The learned judge also erred in law as she failed to appreciate the circumstances of **Chamberlain v. Chamberlain**[1] which she referred to when related to the peculiar circumstances of the case at hand. Even though the respondent in this appeal was granted a beneficial interest in the property in trust for the children, his interest expired when the youngest child attained eighteen years of age.

8. The second ground of appeal focused on the children's interests which were extinguished when the last child attained the age of eighteen years.

9. Counsel for the appellant referred us to a passage from **Trusts and Equity,** 2nd Edition, Pitman Publishing, London, (1995) at page 225 by Richard Edwards and Nigel Stockwell to illustrate the point that the children's interest was not extinguished at all.

The passage reads as follows:

> ***"This case (Re the Trusts of the Abbott Fund[2]) should be compared with Re Andrew's Trust[3]. The Rt Rev. Joseph Barclay, the first bishop of Jerusalem, died in 1881 leaving seven infant children. Friends raised 900 Pounds which they gave to trustees with the power to use the funds for the education of the children. By 1899 the children had completed their formal education and the trust was terminated leaving surplus funds. The court decided that the intention of the subscribers was to create a trust for the benefit of the children and that education was just a method of benefitting them, which was appropriate at the time of setting up the fund. Therefore, the surplus was not held on resulting trust but belonged to the children absolutely. In other words, the court found that the subscribers intended to give out and out."***

Counsel for the appellant further referred us to page 226 of the same book and in particular to the case of **In Re Osoba[4].**

The paragraph quoted states as follows:

> ***"In Re Osoba[4] [1997] 2 All E.R. 293, a testator left money on trust for the maintenance of his daughter and for the training of her up to university grade. After the daughter***

finished university there were funds remaining. How should the trustees hold these funds? The Court of Appeal held that there was no resulting trust because the testator intended to make an absolute gift to his daughter and the fact the will specifically mentioned maintenance and education was merely an expression of the motive of the testator for making the gift rather than an indication that he had given the property for a specific and limited purpose only. So again, the court decided that gift was out and out and so precluded the possibility of there being any resulting trust."

10. The argument by the appellant is that the property in issue was initially in the name of the appellant and not the respondent. In this regard, in line with the **Re Andrews Trust**[3] case, the settlement of the property in issue in this matter in favour of the respondent in trust for the parties' three children can only be construed to mean that the trust was created for the benefit of the children. The aspect of it ending at the time when the youngest child would have attained eighteen years of age was just a method of benefitting them, which was appropriate at that time of setting up the trust. Counsel therefore argued that at the determination of

the trust, the property belonged to the children of the parties and not to the respondent. In the same vein, the learned judge misdirected herself when she held that the children's interest was extinguished upon the youngest child attaining the age of eighteen years as the respondent was a mere beneficial owner who had no legal title to the property as it was only settled in favour of the respondent in favour of the children. As such, there was no resulting trust.

11. The third ground of appeal has raised the issue that a trustee may not profit from a trust. The basis of this argument is a passage from Trusts and Equity at page 355 which reads as follows:

> ***"Where a trustee holds property for the benefit of another, that other, the beneficiary, has a proprietary remedy, that is the right to the property and its fruits or the profit made from it, since a trustee may not benefit from the trust. The trustee must administer the property solely for the benefit of the beneficiaries, and if they are adult and sui juris they can of course call for the property to be transferred to them."***

12. According to counsel for the appellant, it is clear that the respondent is holding the property in issue under trust for the benefit of the children of the family who are the beneficiaries and have a right to the property and its fruits or the profit made from it.

The respondent's heads of argument

13. The respondent has argued that the first ground of appeal is misconceived at law for a number of reasons. Firstly, property settlement after dissolution of marriage is almost always invariably between the parties to the marriage. The court has a duty to make property adjustment orders taking into account the welfare of minor children if any to the marriage. Secondly, the contention by the appellant that the court below failed to take into account that the respondent is not Zambian and cannot own property is a further serious misconception by the appellant because section 3 of the Lands Act Cap 184 of the Laws of Zambia, particularly sub-section (i) provides an exemption for such instances as follows:

"Where the interest or right in land is being inherited upon death or is being transferred under a right of survivorship or by operation of law."

14. The property settlement orders are by operation of law as guided by the relevant provisions of the Matrimonial Causes Act of 1973 and the Matrimonial Causes Act No.18 of 2010. Thirdly, the settlement order states that the property in issue shall be transferred to the respondent or his duly appointed agents. This means that even if the respondent was prohibited from owning land, he could simply transfer the property to his duly authorized agents as ordered by the district registrar.

15. The respondent distinguished the **Chamberlain**[1] case and the quotation from **Halsbury's Laws of England** cited by the appellant by stating that both authorities demonstrate the intention of the courts to make provisions for minor children until such time when they attain majority.

16. Counsel for the respondent argued that the submission by the appellant to the effect that the interest of the respondent expired when the children attained eighteen years was rather

startling and counterproductive to the appellant's own argument as it would then appear that there was in effect no property settlement at all but a distribution of property by the court to members of the respondent's family as if the respondent had died intestate as the appellant's own argument acknowledges that both properties were acquired through hard work and resources of both parties. We were therefore urged to dismiss this ground of appeal.

17. The respondent argued the second and third grounds of appeal together. Counsel contended that the cases of **Re Andrews Trust**[3] and Re **Osoba**[4] cited by the appellant were of no assistance to her as these cases were cited out of context by the appellant. Counsel argued that the **dramatis** personae in both cases were deceased at the time when the "out and out gift" in the said cases took effect whereas in this case he is alive. In the said cases, the gifts were made voluntarily by the testator and/or friends of the deceased. The central issue in both cases was whether the surplus gift or residual legacy should either be held as a resulting trust or an outright gift.

In this appeal there is no surplus gift and/or residual legacy at all. An order for property settlement granted by the court cannot be regarded as a gift..

18. Counsel for the respondent has argued that contrary to the appellant's argument, attaining the age of eighteen by the youngest child was not a mere expression of granting title to all the children as the court never created a legal right on behalf of the children. The order the court made limited the right of the respondent in dealing with the property until the youngest child was eighteen years.

19. In the case of **Martin v. Martin**[5].

CA Stamp LJ stated that:

> ***"It is of primary concern that, on the breakdown of marriage both parties should if possible, have a roof over his or her head, whether or not there are children of the marriage. This perhaps is the most important circumstance to be taken into account in applying MCA 1973..."***

20. In the case of **Mesher v. Mesher**[6].

CA Davies LJ stated that:

"It is submitted for H that, it would be quite wrong to deprive H of the substantial asset which his half-interest in the house represents...one must take a broad approach to the whole case... with that end in view I have come to the conclusion that, counsel's submission for H is right. It would in my judgment be wrong to strip the husband entirely of any interest in the house. The house would be held on trust for sale until the child reaches a specified age."

21. Counsel for the respondent concluded by submitting that property adjustment orders are guided by the Matrimonial Causes Act of 1973. Sections 24 and 25 of this Act make ample provisions relating to property settlement. Section 29 of the same Act makes provisions for the duration of continuing provision orders of children and age limited for making certain orders in their favour. Section 29 (1) of the Matrimonial Causes Act states that no financial orders or order for transfer of property under section 24 can be made in favour of a child who has attained eighteen years or extend beyond the date of the child's eighteenth birthday.

The decision of this Court

22. The issue as we see it is quite narrow. The issue is whether given the undisputed facts stated above which we see no need to repeat here, Sub B of Sub 299 of Farm 441a Roma Township, Lusaka was held in trust for the children of the family by the respondent or whether the respondent the respondent was to hold the property in trust only up until the youngest child attained the age of eighteen.

23. The order made by deputy registrar on 21st February, 2003 and as confirmed by the learned Judge in her ruling on appeal made on 24th April, 2012, is as the Judge stated, clear and unambiguous. The property settlement of 23rd February, 2003 granted the respondent both beneficial interest and possession of Sub B of Sub 299 of Farm 441a Roma Township, Lusaka. Such trust was to be in force until the youngest child was eighteen years and during the period when the trust was in force, the respondent was prohibited from disposing of the property by way of sale. We can discern no other interpretation from the order for property settlement made by

the deputy registrar. We must mention that the trust that was created emanated from a property settlement order which distinguishes this matter from the cases of **Re the Trusts of the Abbott Fund**[2] and **Re Andrew's Trust**[3] or **Re Osoba**[4]. In **Re Abbott** the court held that there was a resulting trust as there was no intention on the part of the subscribers to part with their money out and out and they did not intend that the fund should become the absolute property of the ladies. In **Re Andrew's Trust**[3] the court decided that the intention of the subscribers was to create a trust for the benefit of the children. Therefore, the surplus was not held on resulting trust but belonged to the children absolutely. In **Re Osoba**[4] the Court of Appeal held that there was no resulting trust because the testator intended to make an absolute gift and not for a specific and limited purpose only.

24. The appellant has understood this order by the district registrar to mean that the property was to be held by the respondent until the youngest child attained the age of eighteen and thereafter would revert to the children. If we

agreed with this interpretation, it would in effect mean that there was no property settlement as has been argued by counsel for the respondent, but a mere distribution of property between the appellant and the children.

25. The appellant has also argued that section 3 of the Lands Act Chapter 184 of the Laws of Zambia does not allow the respondent who is a non-Zambian to own land in Zambia. We note that this argument relating to ineligibility to own land was only raised on appeal. Although it is a legal argument it has come rather late in the day particularly in view of the fact the respondent stated in his affidavits that he is Malian and was married to the appellant who should have known of her former spouses' nationality and raised it earlier.

26. With regard to the argument itself by the appellant that the respondent was in any event prohibited from owning land in Zambia by virtue of section 3 of the Lands Act, we take the view that section 3(i) of the Lands Act allows for the alienation of land to a non-Zambian where the land is being transferred

"by operation of law." The phrase operation of law is, according to Black's Law Dictionary,

> ***"The means by which a right or a liability is created for a party regardless of the party's actual intent."***

Wikipedia states that:

> ***The phrase "by operation of law" is a legal term that indicates that a right or liability has been created for a party, irrespective of the intent of that party, because it is dictated by existing legal principles. For example, if a person dies without a will. His or her heirs are determined by operation of law."***

27. It is quite clear from the two definitions given above that property transferred to a non-Zambian under a property settlement comes within the ambit of property transferred by operation of the law as it was done so, after taking into account all the principles relating to property settlement and legislation such as the Matrimonial Causes Act of 1973 and the Matrimonial Causes Act No. 18 of 2010 relating to property settlement, following the parties' divorce.

28. We do not accept the appellant's argument that the respondent is a trustee as defined in the paragraph from **Trusts and Equity** since in this case the respondent was only to hold the house in trust for the benefit of the children until the youngest child attained the age of eighteen years.

29. We also do not accept the appellant's argument that the trial judge failed to appreciate the context in which it was made. In **Chamberlain v. Chamberlain**[1], the Court of Appeal held that where after a divorce, the wife remained in the former matrimonial house with the children, it was not necessarily appropriate that the house should be settled for the benefit of the children after the wife's death. There was nothing in that case to suggest that any of the children had any special circumstance that entitled them to make demands on their parents after the conclusion of their full time education. The court ordered that the beneficial interest should be divided between the husband and the wife in proportions ordered by the registrar. The learned judge when making reference to **Chamberlain v. Chamberlain**[1] was illustrating the point that

a matrimonial home does not necessarily have to be settled for the benefit of the children and that this position is also supported by paragraph 1132 of Volume 13 of **Halsbury's Laws of England 4th edition**. There was therefore, nothing wrong in making reference to **Chamberlain v. Chamberlain**[1]

30. From what we have said above, it can be seen that all the three grounds of appeal are unsuccessful and are dismissed with costs to the respondent, to be agreed or taxed in default of agreement

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A. M. WOOD
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE