

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2020/HP/D356**

*(Divorce Jurisdiction)*

**BETWEEN:**



**EMELDAH BWALYA CHINYANTA PETITIONER**

**AND**

**FRANCIS MUONGA CHINYANTA**

**RESPONDENT**

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA  
ON 10<sup>TH</sup> JUNE, 2024 - IN CHAMBERS**

*For the Petitioner* : *Ms. S. Chifita – Legal Aid Clinic for Women*  
*For the Respondent* : *Mrs. C.D. Phiri – Legal Aid Board*

## ***RULING***

**CASES REFERRED TO:**

1. *Pande V Bwalya* (Appeal 51 of 2011) [2016] ZMSC 26
2. *Violet Kambole Tembo V David Lastone Tembo* (2004) ZR 79 (S.C.)
3. *Jobsi Ulrich Stoyke V Cleotha Ilona Emily Stoyke* Appeal No. 67 of 1998
4. *R V Gygall* (1893) 2 QB 232
5. *Musweu V Musweu* Appeal No. 30/2019
6. *Copeland V Copeland* 904 50 2d 1066 (Miss 2004)
7. *Albright V Albright*
8. *Mponda V Mponda* (Appeal 199 of 2015) 2018
9. *D V M* (Minor Custody Appeal) 3 ALL ER 897
10. *M V M* (1982) 4 FLR
11. *Rosemary Chibwe V Austin Chibwe* (SCZ No. 38 of 2000)
12. *Watchel v Watchel*
13. *Chiyungi V Chiyungi* 2010/HK/D13
14. *Peter Mburu Ectiria V Prischilla Njeriectiria* (2001)
15. *PNN V ZWN* 2017 Eklr
16. *Van Deijil V Van Deijil* (1996) 45 A 260
17. *J V C* (1970) AC 688
18. *Stoyke V Stoyke* SC Z Appeal No. 67 of (1998)
19. *Ramkisson v Ramkisson* HCA No. 1102/85

**AUTHORITIES & OTHER WORKS REFERRED TO:**

1. *The Matrimonial Causes Act No. 20 of 2007.*
2. *Re Adoption Application No. 41/61*
3. *The Children's Code Act Number 12 of 2022*
4. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
5. *Rayden's Law and Practice in Divorce and Family Matters, 14<sup>th</sup> Edition Volume*
6. *Family Law in Zambia Cases and Materials*

The petitioner petitioned for divorce from the respondent on the 18<sup>th</sup> September, 2020. The Order of divorce was granted on the 29<sup>th</sup> December, 2022. The decreed absolute was granted on the 7<sup>th</sup> June, 2023.

On the 27<sup>th</sup> June, 2023 the petitioner filed summons for an Order for maintenance and property settlement pursuant to **section 55(1)(B) and 56(1) of the Matrimonial Causes Act No. 20 of 2007**. In her affidavit in support of the same **Emeldah Bwalya Chota Chinyanta** deposed as follows:

1. *There are three children of the family living, namely;*
  - i. *Francis Munona Chinyanta (male) born on the 18<sup>th</sup> November, 1999 aged 22 years, awaiting to go to tertiary training.*
  - ii. *Mutale Muonga Chinyanta (female) born on the 27<sup>th</sup> December, 2004 aged 18 years at the University of Lusaka.*

- iii. Emmanuel Chinyanta (male) born on 22<sup>nd</sup> July, 2010 aged 12 years currently in grade 7 at Polydrive School in Kabwata.
2. That she is currently employed under the Ministry of Health K4,900.00 per month while the respondent is a businessman earning K2,500.00 as well as the rentals received from the matrimonial property amounting to K11,000.00 per month.
3. That the respondent has not been consistent with the financial support for the children of the family despite being capable of doing so. The respondent has however been paying for all the children's school fees.
4. That the expenses for the children of the family include school fees which are as follows:
- i. Mutale Muonga Chinyanta (female) born on the 27<sup>th</sup> December, 2004 aged 18 years at the University of Lusaka whose school fees are at K11,000.00 per semester, the monthly expenses include: Groceries K2,000.00, accommodation K1000.00 and school requirements K500.00.
  - ii. Emmanuel Chinyanta (male) born on 22<sup>nd</sup> July, 2010 aged 12 years, currently in grade 7 at Polydrive School in Kabwata whose school fees are at K2000.00 per term. The monthly expenses include the following: Groceries K1500.00 and tuitions K350.00.

5. That the respondent should provide for requirements for Mutale Muonga Chinyanta while she provides for Emmanuel Chinyanta.
6. That the respondent and her should ensure that Francis Munona Chinyanta is enrolled into tertiary education and both contribute to his tertiary fees.
7. That during the subsistence of the marriage, they acquired the following properties:
  - i. 4 bedroomed house in Kabwata
  - ii. 4 bedroomed plot 31, deeper life road, Kabwata.
  - iii. Honda CRV car.
  - iv. Household goods (Couch, dinning set, microwave, deep freezer, 4 beds).
8. That she contributed towards the acquisition of the matrimonial property listed above both materially and in kind.
9. That she would like the property acquired to be shared equally between the respondent and herself.
10. That this is a proper case for this Honourable Court to make an Order as to property settlement and maintenance.

Skeleton arguments and list of authorities were also filed. I was referred to **section 55(1) of the Matrimonial Causes Act No. 20 of 2007**. I was referred to the case of **Pande V Bwalya**<sup>1</sup> where the court held that:

***“It is also settled that it does not matter whether or not both spouses contributed financially or materially to the acquisition or development of the family assets; and that a party to the marriage does contribute either materially or in kind to those assets.”***

That what this meant was it did not matter which manner either of the parties contributed to the acquisition of the property as what matters is that a contribution was made.

The same case was referred to where the Court further held that:

***“There should be no family property which is too small for the court to share between a former husband and wife after divorce. If the physical structures cannot be shared, for whatever reason, then the couple should share the market values of the properties.”***

That what this meant was that all family property should be shared by the parties and in the case where it is physical structures that cannot be shared for any reason then the parties should share the market values of the properties.

I was referred to the case of ***Violet Kambole Tembo V David Lastone Tembo (2004) ZR 79 (S.C.)*** where the Supreme Court held that:

***“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.”***

That the court should have regard to the circumstances of the case and the property settlement should be intended to place the parties in a position they would have been had the marriage not ended and each had properly discharged his or her financial obligations and responsibilities toward the other. I was again referred to the case of ***Violet Kambole Tembo V David Lastone Tembo*** where the court held 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.”***

In relation to maintenance of children of the family the court’s attention was drawn to the provision of ***section 56 of the Matrimonial Causes of Act No. 27 of 2007 of the Laws of Zambia***. I was referred to the case of ***Andreas Panagiotis Xirocostas V Yolanda Guizanda Poma SCZ Judgment No. 7 of 2014***.

Filed on the 28<sup>th</sup> July, 2023 were summons for an Order for custody of the children of the family pursuant to ***section 72(1)(a) of the Matrimonial Causes Act No. 20 of 2007***.

The petitioner in her affidavit in support of summons for an order for custody of the children of the family deposed as follows:

1. *That the contents of paragraph 6 (i) are disputed to the extent that the respondent only pays for school fees and he does not maintain the entire family with regard to the general well-being of the children and her. Further, the respondent does not entirely depend on rentals as he owns an Airtel Money Booth and the money, he gets from NAPSA for the voluntary severance package.*
2. *That the contents of paragraph 6 (ii) are disputed. Despite the respondent not being in formal employment, he usually leaves home in the early morning until evening and the child usually prepares his own school lunch and other things and others the elder brother also helps with preparing him for school. While she leaves home for work at 05:00 hours to 17:00 hours during the course of the week and she is home on weekends.*
3. *That the contents of paragraph 6(iii) are disputed. She will maintain that the respondent is not capable of taking care of the children as he does not provide for the children's needs and necessities apart from school fees.*
4. *The contents of paragraph 7 are disputed. She will repeat and reiterate the contents of paragraph 9(ii) of her affidavit in support of this application.*
5. *That the contents of paragraph 8 are disputed. She will aver that the respondent takes the child to church once in a while. It is not true that she was last at church in 2018 she does go to church every Sunday. She will*

*further state that the respondent usually uses vulgar language in the presence of the child and on several occasions the child has informed her that the respondent told him that your mother is useless and also accusing her that she would poison his food.*

*6. That the contents of paragraph 9 are not disputed.*

*7. That the contents of paragraph 10 are disputed as the respondent is not better placed to have custody of the child.*

In the petitioner's list of authorities and skeleton arguments the court was referred to **section 72(1)(a) and 75 of the Matrimonial Cause.**

That the respondent is a businessman whose work requires him to be away from home which would leave the children with insufficient supervision and parental care. That the plaintiff be granted custody of the children with reasonable access to the respondent. That it will be in the best interest of the children that the respondent continues to financially provide for the children's school fees and other school requirements.

A question was posed as to whether or not I had jurisdiction to grant an order for custody of children of the family to the petitioner. That the court has jurisdiction to grant an order for custody of the children of the family and what the court needs to take into consideration in its decision.

I was referred to the fact that as a court I should regard the welfare of the children of the family as the first and paramount consideration. That this principle was adopted in the case of *Jobsi Ulrich Stoyke V Cleotha Ilona Emily Stoyke Appeal No. 67 of 19983*<sup>3</sup> where the Supreme Court stated the following:

*“The general principle regarding custody of children is that, the paramount consideration is the welfare of the child. It has been said that the welfare of the child is not to be measured by money only nor by physical comfort, the moral and welfare of the child must be considered as well as his physical well-being, nor can the times of affection be disregarded.”*

My attention was drawn to the case of *Musweu V Musweu Appeal No. 30/2019*<sup>4</sup> where the Court of Appeal made reference to *Re Adoption Application No. 41/61* where Dankwarts LJ stated as follows:

*“But I would respectively point out that there can only be one ‘first and paramount consideration’ and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court.”*

In elucidating the meaning of Welfare, the Court of Appeal in the above cited case referred to the case of *R V Gygall (1893) 2 QB 232*<sup>5</sup> where Kay, L J stated that:

*“... Again, the term ‘welfare’ in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction.”*

That the Court of Appeal in the Musweu case stated the following:

*“All circumstances should be considered in arriving at a decision. The Court will assess the suitability of the parties to look after the child, the home environment, the relation of the child with members of its family, suitability and continuity of care among other considerations.”*

That the Musweu case further made reference to *Copeland V Copeland* 904 50 2d 1066 (Miss 2004)<sup>6</sup> a decision of the Mississippi Supreme Court which referred to *Albright V Albright*<sup>7</sup> and reiterated as follows:

*“The Albright factors used to determine what is in the ‘best interest’ of the child in regard to custody are:*

*Age, health and sex of the child. Determination of the parent that had the continuity of care prior to separation; which has the best parenting skills and which has the capacity to provide primary child care, the employment of the parent and responsibilities of the employment; physical and mental health and age of the parents, emotional ties of parents and child;*

***moral fitness of parents; the home school and community record of the child ... stability of home environment and other factors relevant to the parent-child relationship.”***

I was referred to the case of *Mponda V Mponda (Appeal 199 of 2015) 2018*<sup>8</sup> where the Supreme Court at page 25 made reference to the holding in the case of *D V M (Minor Custody Appeal) 3 ALL ER 897*<sup>9</sup> as follows:

***“...it is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child’s sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so.”***

The last case I was referred to was *M V M (1982) 4 FLR*<sup>10</sup> stated that:

***“Good working rule, when dealing with young children is that the right place for them to be is with their mother unless there are some substantial reasons why this should not be.”***

On the 31<sup>st</sup> August, 2023 the Respondent filed an affidavit in opposition to affidavit in support of summons for an order for maintenance and property sharing. The respondent deposed as follows:

1. *That the contents of paragraph 5 are disputed, I deny the allegation that he is a business man earning K2500.00 as this is not correct.*

2. That he does not runs any business nor is he a business. He retired on voluntary severance service and depends on the rentals to feed his children and the petitioner of which rental income is K10,500.000.
3. That out of this K10,500.00 he pays a total of K4,450.00 towards mortgage repayment every month to a financial lending institution called Entrepreneurs Financial Centre. Produced and marked "FMC 1" is a loan security form to confirm the same.
4. That the remaining balance K6,050.00 is what he uses for the family to pay water bills, food, electricity and school fees for the children among others. Produced and marked "FMC 2" are copies of receipts for the grocery that he buys for the family including the petitioner.
5. That paragraph 6 and 7 are disputed as he has been consistent with financial support for the children as well as paying the children's school fees as confirmed by the petitioner. Produced and marked "FMC 3" are receipts for the school fees and accommodation for Emmanuel Chinyanta and Mutale Muonga Chinyanta.
6. That paragraph 8 is disputed as he is the one providing all requirements for Mutale Muonga Chinyanta and Emmanuel Chinyanta currently.
7. That paragraph 13 is disputed the family house No. 18/8436 cannot be shared as it is a property of the

children Emmanuel Chinyanta, Mutale Muonga and Francis Munona Chinyanta as it is under a trust and being held in trust of the children by himself as a trustee. Produced and marked "FMC 4" is a trust indicating the names of the children under a trust.

8. That property No. 31/8536 which is on mortgage be sold and the money shared equally between the petitioner and respondent.
9. That during the subsistence of the marriage there were two cars which the petitioner and respondent agreed to share one each. The petitioner decided to sell her car and he kept his. He sees no reason why the share of his car should be subjected to sharing with the petitioner when she made a choice to sell hers.
10. That the petitioner and the respondent should jointly maintain the children.

The respondent exhibited a loan security form and receipt. He exhibited invoices from Cheers Hyper market all for the year of 2023. Some invoices were from Shoprite. Exhibited were receipts from Polydrive Sunset School some were dated the year 2022 others 2023. These were for fees for Emmanuel Chinyanta. Some school payment receipts for Mutale Muonga Chinyanta were also exhibited for the year 2023. Exhibited was 'FMC 4' a Deed of Trust dated 2021 from Francis Muonga Chinyanta to Francis Chinyanta, Mutale Chinyanta and Emmanuel Chinyanta.

The same related to plot No. 18 stand No. 8536 Kamwala – Kabwata, in the city of Lusaka in the Province of the Republic of Zambia. In it on the 14<sup>th</sup> April, 2021 the respondent created a Trust which was known as the family trust. That the same trust shall become effective on the date of signature of this Trust Deed and shall remain valid until the youngest beneficiary namely Emmanuel Chinyanta attains tertiary education at the age of twenty-one years whichever shall be earlier. The document was long however the intention of the respondent was clear.

Filed on the same day was an affidavit in opposition to affidavit in support of the order for custody of the children of the family. The respondent deposed as follows:

- 1. That paragraph 8 is not disputed to the extent that the two older children of the family namely Francis Munona Chinyanta (male) aged 22 years and Mutale Muonga Chinyanta (female) aged 18 years have the liberty to choose where to live with reasonable access to the other parent, save for Emmanuel Chinyanta (male) aged 12 years who is a minor and apply to have joint custody of him.*
- 2. That paragraph 9 is disputed, the petitioner is not better placed to have custody of the children and has not been providing solely for them;*

- i. *The respondent has been the provider for the entire family, all the children of the family including the petitioner herself and paying school fees and general well-being of the children. Produced and marked "FMC 2" I retired on voluntary severance service and depend on rentals to take care and feed the children and the petitioner.*
  - ii. *It is not true that the respondent leaves for work in the morning and knock off late. The respondent is not in employment nor is he a businessman doing any business or attending any workshops for him to be out for a long time. He is well able to take care of the children as he remains home most of the time and prepare (cooking) food for the children and prepare the youngest child Emmanuel Chinyanta for school. The petitioner leaves for work at 05:00 hours in the early morning and returns home after eighteen hours from Monday to Friday.*
  - iii. *The respondent is capable of taking care of the children as he is the one already doing it and who has been doing it all this while despite his being unmarried.*
3. *That the respondent is desirous to have joint custody of the children with reasonable access granted to the*

*petitioner during school holidays because he believes that he is better placed to look after the children of the family and provide a stable and conducive home environment.*

- 4. That the respondent is better placed to impart good morals, spiritual values and good behaviour and staunch Christian as he always goes to church with him. The petitioner hardly goes to church and the last she did was in 2018 which may affect the youngest child Emmanuel Chinyanta's spiritual guidance as a minor.*
- 5. That the petitioner and him currently have custody of the children as they are still living under the same roof.*
- 6. That he verily believes that this is a proper case in which this Honourable court should exercise its discretion and grant an order of joint custody between him and the petitioner.*
- 7. That he therefore craves the indulgence of this Honourable Court to grant the reliefs sought herein.*

The court has taken note of the exhibits which were earlier referred to. In the respondent's skeleton arguments, the court was referred to the **Children's Code Act Number 12 of 2022** which provides that:

**Section 143 of the Children’s Code Act Number 12 of 2022** which provides that:

*“A Court may make an Order relating to the custody of a child and the right of access to the child of either parent.”*

**Section 3 of the Children’s Code Act Number 12 of 2022** which provides that:

*“Court” has the meaning assigned to the word in the Constitution.”*

**Article 133 of the Constitution of Zambia Chapter 1 of the Laws of Zambia** which provides that:

1. *“There is established the High Court which consists of-*
  - a. *The Chief Justice, as an ex-officio Judge, and*
  - b. *Such number of Judges as prescribed.*
2. *There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children’s Court.*
3. *.....”*

I was referred to **Article 266 of the Constitution of Zambia** which states that:

*“Court” means a Court of competent jurisdiction established by or under this Constitution.”*

I was further referred to **Article 133 of the Constitution of Zambia** which provides that:

1. "There is established the High Court which consists of-

c. The Chief Justice, as an ex-officio Judge, and

d. Such number of Judges as prescribed.

7. There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children's Court.

8. ...."

Reliance was placed on **section 3(1) of the Children's code Act No. 129 2022** which provides that:

**Section 3(1)** "A child's best interest is the primary consideration in a matter  
or  
action concerning the child, whether undertaken by a public or private body."

I was further referred to **section 3(2) of the same Code** which provides that:

(2) A Court, an administrative institution or an authorized officer shall in determining the best interests of a child have regard to-

a) The ascertainable feelings and wishes of the child concerned, having regard to the age and understanding of the child;

b) The child's physical, emotional and educational needs and in particular, where the child has a disability, the ability of a person or institution to provide and the special care or medical attention that may be required for the child;

c) The likely effect on the child of any change in the circumstances of the child;

- d) *The child's age, sex, religious persuasion, cultural background and any characteristics of a child which the court or an authorized officer considers necessary;*
- e) *Any harm which the child has suffered or is at risk of suffering;*
- f) *The ability of a parent or a person having parental responsibility for the child to meet the child's needs;*
- g) *The strength of the relationship between a child and the child's parent or a person having parental responsibility for the child;*
- h) *Where a child's parents have joint custody, the willingness of the parents to cooperate and co-parent;*
- i) *The customs and practice of the community to which the child belongs except where the customs and practices are repugnant to justice and morality;*
- j) *The child's exposure to, or use of, drugs or precursor chemicals and in particular, whether the child is addicted to drugs or precursor chemicals and the ability of a person or institution to provide special care or medical attention that may be required for the child; and*
- k) *Other matters that the court, an administrative institution or an authorized officer considers necessary."*

It was submitted that the affidavit evidence shows that the parties are currently enjoying the joint custody from the time the marriage was dissolved in June, 2023 and no interest of the children has been threatened during the periods of the applicant's custody. That the best interest of the children is served by both parents participating in the raising of the children. With respect to the respondent's skeleton argument opposing an order of maintenance and property sharing I was referred to **section 55(1)(a)(b) and section 55 (1)(a)(c) and (d) of the Matrimonial Causes Act, No. 20 of 2007.**

That the petitioner having been married to the respondent contributed in kind towards the acquisition and development of the property. According to the respondent this meant that there ought to be property adjustment only to the matrimonial property and matrimonial house to the exclusion of the house which is under a Trust for the children and being held in Trust of the children.

In the affidavit in reply to affidavit in opposition to the affidavit in support of summons for an order for maintenance and property settlement the petitioner deposed that:

- 1. That the contents of paragraph 5 and 6 are disputed. The respondent runs an Airtel Money business and that the respondent receives a K2500.00 from NAPSA as Voluntary Severance package. The rentals are more than the stated K10,500.00 per month as the respondent increases every year. The respondent has instructed the tenants to insult and chase as well as report me to the police whenever she inquired on the rentals and any other business concerning the matrimonial properties.*
- 2. That the contents of paragraph 7 are disputed as she is not aware of the stated Loan security and is within the peculiar knowledge of the respondent. She will aver that the exhibit "FMC 1" does not contain the terms of*

the loan. Further that the said loan security from does not contain the words "Entrepreneurs Financial Centre" as deposed in the respondent's affidavit in opposition.

3. That the contents of paragraph 8 are disputed to the extent that the groceries are never brought home it is within the peculiar knowledge of the respondent as to where he takes the groceries. She is the one who buys groceries for their household. Further, the utility bills. The respondent does not respond to her reminders that he should buy groceries instead he will just walk away.
4. That the contents of paragraph 9 are not disputed to the effect that the respondent pays the bills after constant reminders. The respondent only pays accommodation for Mutale Muonga Chinyanta as Emmanuel Chinyanta is staying at their matrimonial home. Emanuel has been on several occasions chased from school for failure of paying schools. Emmanuel Chinyanta was recently chased from school and is currently at home for failure of payment of school fees as the school is being owed an amount of K2000.00 for this term.
5. That the contents of paragraph 10 are disputed and she will repeat and reiterate the contents of paragraph 11 is not disputed.
6. That the contents of paragraph 12 are disputed. The respondent entrusted the said property House No. 18/8536 in the names of the children seven months

after she served him the divorce petition and accompanying documents. She served the said documents on the 28<sup>th</sup> day of September, 2020 and the exhibited Deed of Trust exhibited was filed on the 14<sup>th</sup> day of April, 2021. The respondent did not obtain consent nor was she informed that he was entrusting the property in the names of the children. She will furthermore, aver that the Trust Deed was calculated to hide matrimonial property.

7. That further to paragraph 12 above, she maintains that House No. 18/8536 be given to her while the respondent keeps plot No. 31/8536.
8. That should the Court uphold the trust deed, that both the respondent and she be appointed trustees while she remains in the house with the children.
9. That the contents of paragraph 13 are disputed. She will aver that she was not aware that the respondent had intentions of obtaining a mortgage on the property in question, she discovered early this year (2023) of the said Mortgage when she went to Lusaka City Council – Lands and Deeds Registry to lodge a caveat on the two matrimonial houses in question. She will further aver that the respondent did inform her about the existence of the said mortgage on the property nor did he use the sum of money for any matrimonial purpose.

10. *That the contents of paragraph 14 are disputed. She will aver that the respondent has obtained a loan which she was not aware about and put one of the vehicles as collateral, when he defaulted, the loan people subsequently came to their matrimonial house to confiscate the same vehicle.*
11. *That the contents of paragraph 15 are not disputed save to state that the respondent is never consistent as he has to be pushed to maintain the children.*

Further in the affidavit in reply to affidavit in opposition to affidavit in support of an Order for custody of the children of the family the petitioner deposed that:

1. *That the contents of paragraph 6(i) are disputed to the extent that the respondent only pays for school fees and he does not maintain the entire family with regard to the general well-being of the children and her. Further, the respondent does not entirely depend on rentals as he owns an Airtel money Booth and the money he gets from NAPSA for the voluntary severance package.*
2. *That the contents of paragraph 6(ii) are disputed the respondent not being in formal employment, he usually leaves home in the early morning until evening and the child usually prepares his own school lunch and other things and others the elder brother also helps with*

*preparing him for school. While she leaves home for work at 05:00 hours to 17:00 hours during the course of the week and she is home on weekends.*

- 3. That the contents of paragraph 6(iii) are disputed. She will maintain that the respondent is not capable of taking care of the children as he does not provide for the children's needs and necessities apart from school fees.*
- 4. That the contents of paragraph 7 are disputed. Show will repeat and reiterate the contents of paragraph 9(ii) of her affidavit in support of this application.*
- 5. That the contents of paragraph 8 are disputed. She will aver that the respondent takes the child to church every once in a while. It is not true that she was last at church in 2018 she does go to church every Sunday. She will further state that the respondent usually uses vulgar language in the presence of the child and on several occasions the child has informed her that the respondent told him that your mother is useless and also accusing her that she would poison his food.*

The parties were heard on the 19<sup>th</sup> September, 2023. The petitioner stood by the contents of the affidavits filed in support of her applications. She informed the court that she was the one who provided food for her children. That the respondent never used to buy food. She recalled that Emmanuel was once sick due to lack of food, that this incident occurred before she started

work. That the respondent used to beat her. That Emmanuel still stays with her. That their last born son has been disturbed academically, that health wise he was not doing too well. That Emmanuel would ask why she and the respondent were not reconciling so that they can all live in harmony. That although she was willing to reconcile, the respondent used to use bad language describing her as useless. That he also feared that she could poison him. She considered the respondent a bad influence on her son. He would ask their son to report on her what she was saying. That there was a time when the respondent asked a teacher to hide their son Emmanuel in the ablution block because his fees were not paid for three weeks. She engaged the school promising to pay the fees. She made sure Emmanuel did extra lessons. That her son would call her at work informing her that they have not eaten food. That the respondent would tell the children that he did not have money that these were the reasons why she wanted custody of Emmanuel.

When cross examined the petitioner confirmed that the respondent paid fees for Emmanuel. She confirmed seeing the school fees receipts as well as the receipts for food. She denied producing a medical report as proof that the respondent used to beat her.

In his testimony the respondent informed the court that he was standing by the contents of the affidavits filed. He added that he wants his last born son to be with him because he was a good father to him. That he takes good care of him. That he took him to school and church. That he wanted his son to grow up having good morals. That he had a good relationship with his son. That he was the one who buys the food. That their first born son does not know how to cook nor does any work. That he just sleeps, he attributed his behaviour to his mother's influence. That as a father he has tried to push him to university but to no avail. That Emmanuel the youngest child should remain with him as he was the provider.

When cross examined the respondent denied that Emmanuel has been at home for three weeks for non-payment of school fees. That the lack of a receipt was because he paid through the phone or bank. He denied that Emmanuel was ever sent away from school. That for two Sundays he did not attend church. On the irresponsible behaviour of their first born he pointed out that the couple were married to each other when he became irresponsible. That their son prefers to listen to his mother rather than to him. The petitioner was then heard on her application for maintenance and property settlement. She stated that she relied on the contents of the affidavit and affidavit in reply. It was her testimony that they acquired properties during the subsistence of their marriage. That between them they have two houses with a

cottage and a vehicle namely a Honda Civic. That the household goods include a set of sofas, a dining set, a deep freezer, kitchen units a micro wave, a tv stand three beds for the children and one king size bed for the master bedroom.

That the matrimonial house was acquired in 2007 through a loan from ZANACO. That when the house was acquired there was no cottage. It was the petitioner's testimony that at the time she worked for Cadbury company. That while her husband was repaying the loan she used to buy groceries, food and clothes for the children.

That a plot was purchased in Kabwata site and service plot 31 in 2018 after the respondent retired. That she was the one who found plot 31 Kabwata site and service and helped renovate it (paint it and fix windows and locks of the doors). The house had no servants quarter so they decided to put up a cottage. That she looked for builders bought the paint and helped plastering the inside of the cottage. That the car was bought after the respondent retired to help them with school rounds.

It was her testimony that she would like the court to give her the matrimonial property at plot 18. That the house was under a Trust which came about after divorce proceedings began. That the Trust must be set aside.

When cross examined the petitioner informed the court that she was in employment from 2006 to 2010 when the matrimonial house was purchased.

She denied that after the respondent retired two cars were bought one for her and the other for the respondent. It was her testimony that between them they have three children. That their first born Francis completed grade twelve but did not get good grades. That it was her desire that he rewrites his subjects so that he can go to college. Their second born is currently at Lusaka University whilst their last born has just written his grade seven exams (2023). The petitioner would like the respondent to continue paying for their second born's university. That she would maintain Emmanuel their last born until he completes secondary school.

When cross examined the petitioner confirmed that she would like the respondent to continue paying fees. She admitted that the respondent was the one who paid the fees.

The respondent in his evidence informed the court that on the 31<sup>st</sup> August, 2023 he filed an affidavit in opposition to property settlement and maintenance. That he started working in 1993. That he married the petitioner in 1999 and was working for ZANACO at the time. That he was entitled to obtain a house loan after working for five years he got his first loan and bought a

house. That he got a second house in 2016 when he retired. That the actual purchase took place in 2017. That house number 18 was put in a family trust. That this was done in April, 2021. That the trust was established with the knowledge of the petitioner. That in order for a trust to be established there was need for the children's National Registration Cards or birth records. That the petitioner stated that they ensure that the house is for the benefit of the children. That the house bought after retirement was the house meant for the petitioner and himself.

On the motor vehicles it was his testimony that before he got his current vehicle the couple had two cars. That the vehicles were a spacio and a fiesta. That the Toyota fiesta was bought for the petitioner. That the petitioner decided to sell the car that belonged to her. It was his testimony that when he married the petitioner in 1999, she was working but stopped work the same year. That the petitioner gave birth to their first born in 1999 and was not working. That there is no way she contributed in kind. That the house given to the children should remain with the children and the other should be sold and proceeds shared between them. That he should remain with his car. That the children should remain with him. He believed that the children stood a better chance of getting an education if they remained with him. That maintenance came from the rentals. That he

paid for the children's education from the rentals as he does not work.

When cross examined the respondent informed the court that he bought the house in 2007 and that by then the couple were married. That he was referring to the same house that was for the benefit of the children held in trust. That he was the settlor and the trustee according to the Trust document. That he was the one in control of the house in the Trust. He admitted that what this meant was that he could make any decision over the house. He denied that the contents of paragraph 13 meant he was in charge of the property. That the ones in charge were the children as it was in their house. That the petitioner was not a trustee out of choice despite the fact that the idea that the house should belong to the children came from her.

I have considered the affidavit evidence the submissions as well as the evidence of both the petitioner and the respondent.

### **POSITION OF THE LAW**

**Section 55(1) of the Matrimonial Causes Act No. 20 of 2007** in respect of property adjustment matters provides as follows:

1. *"The court, may upon granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation at any time thereafter whether in the case of a decree of divorce or of nullity of marriage;*

*before or after the decree is made absolute make anyone or more of the following orders;*

*(b) An order that settlement of such property as maybe specified being property to which party of a marriage is entitled be made of the other party to the marriage and of the children of the family or either or any of them.”*

The above provision provides that in property adjustment matters it is not only the welfare of the two parties to the marriage that must be considered but the children of the family as well. The children at the time of filing the petition on the 18<sup>th</sup> September, 2020 were aged 20, 15 and 9 years. Francis Munona Chinyanta male is now 23 years old Mutale Muonga Chinyanta female is now 18 years old. Emmanuel Chinyanta male is aged 9 years old.

***Rayden’s Law and Practice in Divorce and Family Matters, 14<sup>th</sup> Edition Volume*** states as follows:

*“In many cases the power of settlement will be used simply as a means of qualifying the effect of an order for out right and absolute transfer and, while ensuring secure enjoyment of the property by one spouse during a particular period will preserve some right for the other party to benefit in the proceeds of the property’s realization at the expiry of that period. The court seeks to preserve homes for both parties and the children.”*

In the cases of ***Miller V Miller and Mcfastane V McFarlane (2006) UK HL*** five law Lords agreed that the bench mark for division should be equal shares – save in certain circumstances – no matter how

short the marriage. They said that to achieve fairness at the end of a marriage, the courts should look at three main considerations: financial needs, compensation and equal sharing. Thus, the court is caused up on how to achieve financial needs, compensation and equal sharing.

It should not be seen that the court discriminated between the petitioner and respondent.

The law has developed several principles that have to be considered in determining a matter of this nature. In the case of *Rosemary Chibwe V Austin Chibwe (SCZ No. 38 of 2000)*<sup>11</sup> it was stated as follows:

*“The percent is left in the court’s discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances as of that case. For instance, the court is to take into account the income of both parties, earning capacity property and other financial resources which in the foreseeable future, financial needs, obligations and responsibilities of each of the parties and standard of living of each of the parties.”*

Also of great importance is what amounts to family assets. Family assets have been defined in *Watchel v Watchel*<sup>12</sup> as

“items acquired.....*“The percent is left in the court’s discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances as of that case. For instance, the*

*court is to take into account the income of both parties, earning capacity property and other financial resources which in the foreseeable future, financial needs, obligations and responsibilities of each of the parties and standard of living of each of the parties.”*

Another principle is the contribution to the purchase of family assets, the approach to be adopted when evaluating the contribution each party has made to the welfare of the family is not an easy task.

The holding in the case of **Wachtel V Wachtel** was approved by the Supreme Court in the case of **Chibwe V Chibwe** where the court held that:

1. *In Zambia courts must invoke both the principles of equity and law concurrently.*
2. *It is a cardinal principal supported by a plethora of authorities that courts conclusions must be based on facts stated on record.*
3. *In making property adjustments or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case.*

Honourable Justice RMC Kaoma also relied on **Chibwe V Chibwe** in the case of **Chiyungi V Chiyungi 2010/HK/D13**<sup>13</sup> where she rightly observed at page J12 that:

*“The Supreme Court has held in Chibwe V Chibwe (2) that in Zambia Courts must invoke both the principles that in making property adjustment or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case... The need to do justice is much more important and the modern trend by the courts is to share the matrimonial home equally.”*

The position of the Kenyan courts support that the trend may be changing in the way the courts are dealing with or ought to deal with property settlement. The trend in the Kenyan courts has been said to focus on the parties’ contributions.

In the case of *Peter Mburu Ectiria V Prischilla Njeriectiria (2001)*<sup>14</sup> a Kenyan case of the court of appeal held that:

*“...where the disputed property is not registered in the names of the spouses but is registered in the name of one of the spouses the beneficial share of each spouse would ultimately depend on the proven respective proportions of financial contribution either indirect or direct towards acquisition of the property. However, in cases where each spouse has made substantial but uncertainable contribution it may be equitable to apply the maximum equality is equal.”*

*PNN V ZWN 2017 Eklr*<sup>15</sup> matrimonial property was shared in the ratio of 70 to 30 in favour of the wife, one can safely conclude that:

2. *A four bedroomed house plot 31, Deep life Road Kabwata*
3. *A Honda CRV car*
4. *House hold goods (couch, dining set, microwave, deep freezer, 4 beds).*

On the other hand, the respondent urges the court not to include one of the properties which he says is a subject of a trust. Concerning the trust the court makes a few observations that the deed relating to plot No. 18 Stand No. 8536 Kamwala Kabwata in Lusaka was made on the 14<sup>th</sup> April, 2021 by the respondent for the benefit of the three children.

The Court is aware of **section 55(1)(b)** in which an order that settlement of such property as maybe specified being property to which party of a marriage is entitled be made of the other party to the marriage and of the children of the family or either or any of them. That the law provides that children should not be excluded when the court is dealing with property settlement. However, the Supreme Court in the case of **Chibwe v Chibwe** frowned upon properties transferred during divorce proceedings which cannot escape the order of this court as such transfers of such properties must have been done to avoid the outcome of these proceedings.

The petition for the dissolution of marriage in the matter before me was filed on the 18<sup>th</sup> September, 2020. The Deed was

prepared on the 14<sup>th</sup> April, 2021 whilst the hearing of the petition was before court. I have taken the position that the action taken by the respondent to put in place the deed of trust at the time that he did was in order to avoid the outcome of these proceedings. By definition plot No. 18 stand No. 8536 Kamwala-Kabwata Lusaka is and remains matrimonial property and the court has jurisdiction to deal with it as such.

I have taken the intentions of the parties and their contributions to the acquisition of the matrimonial property as well as the well being of the family. At the time the property was acquired from the evidence before court it was for the benefit of the petitioner, the respondents and their children. There is evidence that both properties that is the houses were improved on by both the petitioner and respondent for the benefit of the family.

In arriving at my decision, further in order to preserve homes for both parties and the children. In order to achieve fairness at the end of the marriage. Taking into consideration the financial needs, compensation, equal sharing as well as what is in the best interest of the children of the family and not discriminating between the parties.

I have decided as follows; in respect of property settlement, I award the respondent house number 18/8536 and the petitioner plot No. 31/8536.

This of course is based on the fact that the court has not upheld the trust deed. The car the Honda CRV will go to the Respondent.

As for the household goods the dining set, is granted to the Petitioner whilst the couch set goes to the Respondent. The four beds will be equally shared. The microwave goes to the petitioner and the deep freezer to the respondent. I believe those were the only properties listed in the petition. As for the custody of the children the law relating to the powers of the court in custody proceedings are contained in the *Matrimonial Causes Act No. 20 of 2007* and specifically *Section 75*. *Section 75 (1) (a) (b)* states as follows:

**1. "In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of a marriage-**

**a) "The court shall regard the interest of the children as the paramount consideration; and**

**b) Subject to paragraph (a) the court may make such order in respect of those matters as it thinks proper.**

The Learned Author of *Family Law in Zambia Cases and Materials at Page 377* (with reference to the duty of the court) states as follows:

*"The duty of the court is to concern itself with the child's welfare whether the father's claim is superior to the mother or vice versa. Courts also consider the age of the children and their health. Courts do not ignore the reality that where the children are very young, the mother is often better placed to bring*

them up. The courts must counsel the parties at the time of making the custody order and if co-operation between them is possible, grand joint custody. This is possible to achieve if both parties have the welfare of the children at heart. There is a general bias against women entered in a society that is highly traditional such that once a woman is divorced all contact between the parties must cease and the woman be put to suffer the separation even when she was the innocent party. In particular she is touched where it hurts the most; refusal of access to her children.”

In arriving at my decision, I have considered a number of past cases. In the case of *Van Deijl V Van Deijl (1996) 45 A 260*<sup>16</sup> the court stated:

***“The interest of a minor means the welfare of the minor and the term welfare must be taken in the widest sense to include economic, social, moral and religious consideration. Emotional needs and ties of affection must also be regarded.”***

In yet another case *J V C (1970) AC 688*<sup>17</sup> the court explained that:

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

Yet another case that the court found useful was the case of *D V M (minor custody Appeal) (1982) 3 ALL ER 897*. In this case although the court awarded custody of the child to the father, the Court of Appeal reversed the decision of the lower court and awarded custody to the mother stating that the court of the first instance justices gave too little weight to three important considerations, namely:

- i. *Continuity of care was the most important in the upbringing of a child and the disruption of established bonds was to be avoided.*
- ii. *The child would be looked after by hired help if custody was awarded to the father, whereas the mother looked after him herself.*
- iii. *The father was less co-operative than the mother in terms of access. This was likely to lead to "...the ousting of the mother if he had custody..."*

In the case of *Stoyke V Stoyke SC Z Appeal No. 67 of (1998)*<sup>18</sup> it was argued that:

*"In considering the welfare of the children, it is not monetary or physical wellbeing. The rights and wishes of the parents must be weighed against the welfare of the children. The court held that the question for the Judge to ask is not what the essential justice of the case requires but what the best interest of the child requires."*

Apart from the cases that I have already referred to I wish to also refer to the case of *Ramkisson v Ramkisson HCA No. 1102/85*<sup>19</sup> where

the court listed the relevant factors to be taken into consideration when making an order for custody of children.

1. *“Accommodation and material advantage*
2. *Stability of home life*
3. *The children’s wishes when the child is old enough to express its own views the court will consider them, nor so that it can give effect to those wishes, but to be better able to Judge what is best for its welfare.*
4. *Sex and age of the children*
5. *Education*
6. *Retention of existing position*
7. *Personality, and character of parents*
8. *Access.”*

In this case the respondent has asked for custody of the youngest child. The court was informed that currently the parties are enjoying joint custody from the time the marriage was dissolved in June, 2023. I believe that the best interest of all the children is served by both parents. Participating in ensuring that they grow up to be responsible adults. I have decided not to look at their ages and decide based on the fact that all the three children are dependant on their parents. I have considered what the children have gone through thus far in relation to the divorce of their parents and how they have continued to live as a family. Although the desires of the parents are important and should be considered what is paramount is the best interest of all the three children.

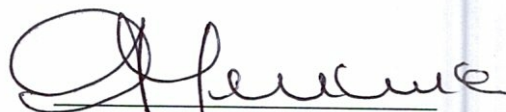
I can only call upon the parents to respect and appreciate the bond between the children and each parent. I do not believe that it would be in the best interest of the children to disrupt their already established bonds between themselves and their parents.

For the above reasons the petitioner and respondent are hereby granted joint custody of the youngest children of the family namely Emmanuel Chinyanta and Mutale Muonga Chinyanta.

It would be best that the children especially Emmanuel spends equal amount of time with each parent. This will allow both parents to continue to participate in any decision making affecting not only his life but the life of Mutale Muonga Chinyanta who is still at university as well as Francis Munona Chinyanta who maybe an adult but who from the testimony needs a lot of help and encouragement from his parents.

Each parent will continue to maintain the children and supporting the two who are still pursuing school and university.

**DELIVERED AT LUSAKA THIS 10<sup>TH</sup> DAY OF JUNE, 2024.**



**G.C. CHAWATAMA  
HIGH COURT JUDGE**