IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No./202/2023**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MAAMBO SIMUKUNI: **APPELLANT**

AND

TENYIWE SIBINDI: **RESPONDENT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
25 MAR 2026
REGISTRY 2
P.O. BOX 50067, LUSAKA

CORAM: **Siavwapa JP, Chishimba and Patel JJA**

On 17th February and 25th March 2026

FOR THE APPELLANT: NOT IN ATTENDANCE

FOR THE RESPONDENT: MR. S.T. BANDA WITH MRS. M.N. CHINYAMITI BOTH OF SIMEZA SANGWA AND ASSOCIATES

J U D G M E N T

SIAVWAPA JP delivered the Judgment of the Court

Cases referred to:

a) *Caroline Lwando Nkwabilo Maiga v Maiga Temimu SCZ Appeal No 160 of 2012*

b) *Febian Ponde v Charity Bwalya SCZ Appeal 51 of 2011*

c) *Violet Kambole Tembo v David Lastone Tembo SCZ Appeal No 42 of 2002*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of the High Court delivered by the Honourable Mr. Justice M.D Bowa on 30th December 2022.

1.2 By the said Judgment, the learned Judge confirmed the Subordinate Court's settlement order that the parties' matrimonial house be sold and the proceeds shared between them.

2.0 BACKGROUND

2.1 In 2006, the Appellant and Respondent got married under the rite of customary law and they were blessed with two children.

2.2 In 2017, the Appellant commenced an action to dissolve the marriage with the Respondent in the Kanyama Local Court. In dissolving the marriage, the Local Court held that matrimonial home, (Stand No.24/Block 139 Kanyama comprising five flats and two shops), was not a subject of consideration in the divorce proceedings as it was held in trust for the parties' son.

2.2 The Respondent appealed to the Subordinate Court while the Appellant filed a cross appeal against the Local Court's decision to grant custody of the parties' son to the Respondent.

3.0 IN THE SUBORDINATE COURT

3.1 The Subordinate Court heard the matter de novo with the Appellant and Respondent each giving evidence but called no witnesses.

3.2 The Subordinate Court delivered its Judgment on 13th May 2020, by which it found that the property in issue was transferred to the Trust while the divorce proceedings were

underway as a deliberate manoeuvre to deprive the Respondent of her share of the property acquired during the marriage.

3.3 Subsequent to the said Judgment, the Court ordered that the property be evaluated by a Government valuator, sold and the proceeds shared between the Appellant and the Respondent at 40% and 60% respectively.

3.4 In relation to the children of the marriage, the Subordinate Court gave custody of the children to the Respondent with reasonable access to the Appellant. In addition, the Court ordered the Appellant to be paying the children's school fees, medical expenses and a monthly maintenance allowance.

4.0 IN THE HIGH COURT

4.1 The Appellant submitted that he had obtained a loan of K700, 000.00 against the property which meant it could not be part of the property adjustment as it was encumbered.

4.2 The Respondent, on the other hand, supported the findings of the Subordinate Court on the issue.

4.3 The Respondent however, rejected the argument on the encumbrance of the property arguing that it came up for the first time on appeal.

5.0 DECISION OF THE HIGH COURT

5.1 After considering the arguments by the parties, the learned Judge affirmed the decision of the Subordinate Court. The

learned Judge also refused to entertain the argument on encumbrance of the property because it was not argued in the Subordinate Court.

6.0 THE APPEAL

6.1 Displeased with the Judgment of the Court below, the Appellant has launched an appeal in this Court fronting the following two grounds:

1. *The court erred in fact and law when it decided that the lower court did consider the existence of the trust but was not persuaded by it.*

2. *The court erred in fact and law when it ruled that the lower court properly directed itself in taking all the circumstances and history into consideration when in fact not.*

7.0 ARGUMENTS IN SUPPORT

7.1 In support of the first ground of appeal, the Appellant, relying on the case of Caroline Lwando Nkwabilo Maiga v Maiga Temimu[1] argues that if a trustee relationship exists, a property's use cannot be converted but must be held in trust for the beneficiary.

7.2 Further, the Appellant argues that the Respondent did not contribute to the development of the property and should not be allowed to have a substantial share in it.

7.3 In ground two, the Appellant argues that the Court below erred by finding that the Subordinate Court took all the circumstances and history into consideration because the Respondent was not entitled to a share in a property that belonged to the children and was held in trust for them.

8.0 ARGUMENTS IN OPPOSITION

8.1 In response to ground one, the Respondent argues that the property was acquired during the subsistence of the marriage and that both parties made contributions towards its acquisition. Consequently, the Respondent argues that the property is subject to property settlement, which position cannot be disturbed by the existence of a trust.

8.2 In relation to the Nkwabilo case *supra*, the Respondent argues that it was distinguishable from the present case because in the Nkwabilo case it was the High Court that ordered that the property be held in trust for the children.

8.3 As regards the contribution to acquiring the property, the Respondent submits that she had contributed financially and in kind.

8.4 The Respondent argues that the intention of the parties was for the property to provide ongoing support for the overall benefit of the entire family.

8.5 In ground two, the Respondent agreed with the holding of the Court below to the effect that the property was acquired during the subsistence of the marriage and justified its sale and the sharing of the proceeds.

9.0 ARGUMENTS IN REPLY

9.1 In reply, the Appellant submitted that the Court below should have considered the intention of the parties to transfer the property to their son and to secure the future of the children. He further submitted that he was not

benefitting from the trust as the property was under the control of a money lender from whom he had obtained a loan to complete the flats.

10.0 OUR ANALYSIS AND DECISION

10.1 This appeal raises two issues namely; whether the property should have been shared between the Appellant and Respondent since it was held in trust and secondly, whether the Respondent is entitled to a share of the property when, according to the Appellant, she did not contribute to it.

10.2 It is not in dispute that after the parties acquired the property during the subsistence of their marriage, the Appellant registered it in his name and obtained an occupancy license.

10.3 Subsequent to the above, it would appear that the Appellant executed a deed of trust during the divorce proceedings, or soon after the divorce in favour of the eldest child of the marriage.

10.4 The Court below was satisfied with the finding by the Subordinate Court that the timing of the Appellant's creation of the trust revealed that it was intended to exclude the Respondent from the property.

10.5 According to the Judgment of the Subordinate Court, appearing from page 87 to 95 of the Record of Appeal, in particular at page 90, the Appellant consulted the Respondent before executing the Trust Deed.

10.6 The Respondent however, denies being consulted before the Appellant executed the Trust Deed. To that extent, the Appellant needed to provide proof, beyond his word that he consulted and the Respondent agreed.

10.7 In the arguments in support and in reply, the Appellant heavily relied on the Nkwabilo case, to support his argument that the property cannot be sold as it was held in trust.

10.8 In our considered view, the Appellant misconstrued the holding in that case. This is because in that case the District Registrar made a property settlement order by ordering that the house be held by the Respondent in trust for the benefit of the Children. The Supreme Court further guided that the house would then be transferred to the Respondent once all the children attained the age of 18 years.

10.9 Given the foregoing, we would not fault the Court below for refusing to interfere with the findings of the Subordinate Court.

10.10 In the second ground, the Appellant is of the view that the Respondent is not entitled to a share of the property as she did not contribute to the property financially or in kind.

10.11 The Respondent however, contends that she contributed to the acquisition of the property in kind by overseeing its construction and financially after she got employed.

10.12 In upholding the findings of the Subordinate Court, the Court below considered reason or intention of the parties for acquiring the property. The Court held that the parties acquired the property during the subsistence of the marriage and lived on it until their divorce.

10.13 In the case of Fabian Ponde v Charity Bwalya[2], the Supreme Court had occasion to pronounce itself on property adjustment in marriages under customary law. It stated thus:

> *"In Zambia, since our decision in Chibwe v Chibwe, it is settled that the meaning of property adjustment remains the same, whether the marriage was contracted under the statutory Law or under a Zambian Customary law. 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 (even as a mere mother of the children of the family). .....But the court has power, after divorce, to reallocate family assets between the parties, taking into account all circumstances of each particular case."*

10.14 Further, in the case of Violet Kambole Tembo v Davia Lastone Tembo[3], the Supreme Court guided that in property settlement the Court may look at the intentions of the parties and their contribution to the acquisition of property. If their intentions cannot be ascertained by way of an agreement then the Court must make a finding as to what was going on in the parties' minds at the time of the acquisition of property.

10.15 The last issue is the submission by the Appellant that the property in issue was encumbered; however, we have noted

that no loan documents have been exhibited on Record of Appeal.

10.16 In addition, the fact that the issue of the loan only arose on appeal and that the property said to be encumbered had been transferred makes the Appellant's assertions in this regard improbable.

11.0 CONCLUSION

11.1 The evidence at pages 88 and 89 of the Record of Appeal is that after the Appellant and Respondent acquired the property, five flats and two shops were erected on the property.

11.2 The Appellant and the Respondent occupied one flat and collected rent from the other units. The parties lived in the flat as their matrimonial home until their divorce in 2017.

11.3 The parties are not agreed on each party's contribution to the property, however, in view of the guidance by the Supreme Court in the case of Ponde *supra*, the Respondent contributed as a mother to the children of the family. Further, her evidence that she was overseeing the construction of the flats was not challenged.

11.4 To all intents and purposes, the parties acquired that property for matrimonial use and family benefit. The

decision by the Appellant to execute a Trust Deed, during or after the divorce proceedings, for the benefit of the son, is curious and not made in good faith.

11.5 The net result is that the two grounds of appeal fail and the appeal is dismissed with costs for lack of merit.

M. J. SIAVWAPA
JUDGE PRESIDENT

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

A. N. PATEL SC
COURT OF APPEAL JUDGE