

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Divorce Jurisdiction)

2010/HK/D. 13

IN THE MATTER OF: THE MATRIMONIAL CAUSES ACT 2007

BETWEEN:

LUCY LEWA CHIYUNGI

PETITIONER

AND

VISTO CHIYUNGI

RESPONDENT

BRIDGET CHISENGA MWALIMU

CO-RESPONDENT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Chambers at Kitwe
this 11th day of June, 2013

For the Petitioner: Mr. S.A.G. Twumasi - Kitwe Chambers

For the 1st Respondent: Mr. K. Nsofu - Katongo and Company

For 2nd respondent: No Appearance

J U D G M E N T

Cases referred to:

1. Kershaw v Kershaw (1963) 3 ALL E.R. 635
2. Chibwe v Chibwe (2001) Z.R. 1
3. Watchel v Watchel (1973) 1 ALL E.R. 829
4. Payne v Payne (1968) 1 ALL E.R. 1113
5. Calder Bank v Calder Bank (1975) 3 ALL E.R. 333
6. Venter v Venter & Joubert (1966) Z.R. 50
7. Solomon v Solomon (1897) A.C. 22
8. Salome v Salome (no citation provided)
9. Costa Tembo v Hybrid Poultry Farm (Z) Limited (2003) Z.R. 98

10. C v C and D (1977) Z.R. 5
11. White v White (2001) ALL E.R. 1
12. Wakeford v Wakeford (1953) All E.R. 827
13. Griffiths v Griffiths (1974) ALL E.R. 954

Legislation and other works referred to:

1. Matrimonial Causes Act 2007, sections 55 and 56
2. Order 58, rule 1(6) RSC, 1999
3. Halsbury's Laws of England, 4th Edition, Volume 13, paras 1060 and 1066

On 30th November, 2010 I dissolved the marriage between the petitioner, Lucy Lewa Chiyungi and the respondent, Visto Chiyungi on account of the respondent's adultery with the co-respondent Bridget Chisenga Mwalimu and on account of the respondent's unreasonable behaviour. I referred the issues of maintenance and property adjustment to the learned Deputy Registrar. I also entered judgment for the petitioner against the co-respondent for damages for the adultery to be assessed.

On 4th February, 2011 the petitioner applied for property settlement and maintenance pursuant to sections 55 and 56 of the Matrimonial Causes Act 2007 (the Act). The application was supported by an affidavit. The petitioner also applied for assessment of damages against the co-respondent. The details of the damages claimed were set out in the affidavit in support. On the 3rd March, 2011, the petitioner filed another affidavit in support of summons for property settlement and maintenance to which she attached a list of some household items and property acquired during the marriage at house No. 4891 Kariba Road, Riverside Kitwe. On that list she also included an item under para 17 for compensation for some burnt clothes. On 27th April, 2011 the respondent filed an affidavit in opposition.

In his ruling dated on 6th September, 2012, the learned Deputy Registrar took into account the contents of the affidavits, the evidence of the parties and the submissions by counsel for the petitioner. The co-respondent did not attend. The Deputy Registrar also took into account the provisions of section 56 of the Act and various authorities such as *Kershaw v Kershaw* (1), *Chibwe v Chibwe* (2), *Watchel v Watchel* (3), *Payne v Payne* (4), *Calder Bank v Calder Bank* (5), and *Venter v Venter & Joubert* (6). He properly summarised the principles in these authorities.

On the claim for damages for adultery against the co-respondent the Deputy Registrar awarded K10 million as opposed to the K50 million that the petitioner was asking for. With regard to the property of Contromatic Automation Limited he found that it was not subject to property adjustment whether or not the respondent is a shareholder or the property was treated as though it was a family asset, unless the corporate veil was lifted. He found that the matrimonial house was encumbered by the mortgage, but ordered that if it survived foreclosure or should there be surplus after sale; the petitioner should have 30% and the respondent 70% share.

With regard to Flat No. 9 Chandamali Avenue, he found that it was sold for K240 million, in order to meet school fees and requirements for Nsunga. There was no evidence of the exact amount directed towards the child's requirements and school fees, but he accepted the respondent's evidence that there was a sum of K35 million available for sharing. He gave the petitioner 30% share of that sum being K10.5 million. He also found that the plot in Nkana East was sold prior to the divorce and was unavailable for property adjustment. He gave the Jaguar motor vehicle to the respondent.

With regard to the demand of K250 million damages for burnt clothes the learned Deputy Registrar rightly found that there was no judgment directing that these damages arising out of a tort should be assessed by him and that it was outside the purview of property adjustment and untenable. Lastly with regard to the maintenance of the petitioner the learned Deputy Registrar awarded periodical maintenance of K4 million per month with effect from 30th August, 2012 on the basis that the respondent's income was derived solely from the income generated from Contromatic Automation Limited via salaries and otherwise.

On 4th October, 2012 the petitioner appealed against the orders of the Deputy Registrar on the following grounds:

- a) That the learned Deputy Registrar erred in law and fact in not awarding 50% of the property to the petitioner
- b) That the learned Deputy Registrar erred in law and fact in not awarding the Jaguar, a motor vehicle which in fact the respondent himself had agreed that the same be given to the petitioner
- c) That the learned Deputy Registrar erred in law and fact in not finding as a fact that behaviour of the respondent was the main cause of the breakdown of the marriage
- d) That the learned Deputy Registrar erred in law and fact when he failed to award to the petitioner a sum of money from the other properties acquired in the marriage
- e) That the learned Deputy Registrar erred in law and fact in not granting the petitioner the costs of the application

The appeal was filed out of time and in terms of Order 58, rule 1(6) RSC, 1999, the petitioner is seeking an enlargement of time for the hearing of the appeal. There being no objection, I grant leave and extend the time for hearing of this appeal.

Mr. Twumasi submitted that after the Deputy Registrar's ruling, what the petitioner is getting as settlement and maintenance is K4 million and K10.5 million being a share of Flat No. 9 Chandamali Avenue which is totally inadequate and disproportionate to the wealth and assets the parties enjoyed during the marriage. On the first ground of appeal he said the Deputy Registrar awarded the petitioner 30% from proceeds of sale of the property instead of the usual 50% contrary to the law in *Chibwe v Chibwe* (2). On the second ground of appeal concerning the sharing of the Jaguar, he submitted that in his affidavit the respondent accepted that the vehicle was available for sharing, but the Deputy Registrar ordered that the vehicle remains with the respondent. Counsel submitted that the petitioner had a vehicle during her marriage, but she left without any while the respondent and co-respondent had vehicles for usage, so she should be given the Jaguar or she should get a share as the vehicle was available for sharing.

On the third ground of appeal, counsel referred me to *Watchel Watchel* (3) and submitted that the conduct of the respondent was so gross that to divide the property 50:50 would be awarding him for his gross conduct when he had an adulterous relationship with the co-respondent. With regard to the refusal by the learned Deputy Registrar to award anything for the burnt clothes, Mr. Twumasi contended that this was part of property adjustment and that the Deputy Registrar erred as the respondent did not dispute this. In relation to the decision by the Deputy Registrar that the property of Contramatic Automation Limited cannot be part of property adjustment as the company was separate and distinct, counsel submitted that this was a family company which provided resources for house-hold requirements and school fees.

He submitted that to allow a strict interpretation of company law is unfair because a family company is not run on the principle of strict legal entity. He again relied on *Chibwe v Chibwe* (2) where an order was made to transfer some asset of a company to be given to Mrs. Chibwe. In the alternative counsel urged that the petitioner is entitled to 30% of the shares held by the respondent as shares are personal property. On the last ground of appeal, Mr. Twumasi argued that the learned Deputy Registrar erred in not making an order for costs. He urged that it is usual for women petitioners to get an award of costs and that there is nothing in the proceedings to disentitle the petitioner to costs.

On the other hand it is the submission of counsel for the respondent that an award of maintenance is a discretionary remedy which can only be exercised upon assessment by taking into consideration all the circumstances of the case including the conditionalities under section 56(1) (a) to (g) of the Act and para 1060 of Halsbury's Laws of England, 4th Edition. He argued that the court must view the situation broadly and see that the financial arrangements meet the justice of the case. *Watchel v Watchel* (3) is cited. On the petitioner's argument that the Deputy Registrar ought to have awarded her 50% of the proceeds of the property, counsel submitted that the petitioner conceded that she was not contributing towards the liquidation of the K500 million mortgage in respect of the matrimonial home; that the task fell squarely on the respondent who should also liquidate the leases for the four trucks and Isuzu Van; and that the Deputy Registrar was on firm ground in deducing that the respondent had more financial obligations than the petitioner, hence the 30% award.

On the petitioner's argument that she is entitled to the Jaguar, counsel contended that this is untenable because during the marriage the petitioner was driving the Isuzu Van which she caused to be in a road traffic accident and that the gear box repair would require an amount of R47,000. He said the only car that the respondent had and still has is the Jaguar; and that it would be unfair for the petitioner to acquire the vehicle. On the third ground of appeal, counsel for the respondent argued that the conduct of the party should not override the cardinal principles set forth under section 56(1) of the Act and that the respondent's conduct should not attract financial punitive measures. He cited section 56(2) of the Act and urged that the paramount consideration is to place the parties as far as it is practicable in a position in which they would have been if the marriage had not broken down. Counsel submitted that there is evidence that the respondent's financial muscle had declined hence the mortgages on properties.

On the fourth ground of appeal, counsel argued that there is no judgment directing that damages for burnt clothes borne out of a tort should be assessed by the Deputy Registrar; that this falls outside the perimeters of property adjustment. With regard to Contromatic Automation Limited, he argued that there is a finding of fact at page R5 that the shareholders of the company were the respondent's late father and the two children of the marriage, so the petitioner cannot have a share of the property belonging to the company. He urged that the company has distinct legal personality from its directors and shareholders and that the money owed by the company is regarded as wholly distinct from that owed by those running the company, and that the members of the company are not liable for the debts of the company. *Salomon v Salomon* (7) is cited for this proposition.

He contended that *Chibwe v Chibwe* (2) is not applicable to this case and that the Court in that case went further to state that in making property adjustments or awarding maintenance after divorce, the court is guided by the need to do justice taking into account all the circumstances of the case. He urged that *Salome v Salome* (8) is relevant to this case; that there is no evidence that the respondent holds any shares in the company; and that it would be presumptuous to claim 50% of what is not ascertained. On the issue of costs counsel argued that the petitioner did not succeed in all her claims hence the appeal. *Costa Tembo v Hybrid Poultry Farm (Z) Limited* (9) is cited. He said the learned Deputy Registrar discharged his discretion judiciously and was on firm ground for not awarding the petitioner costs.

In addition, counsel submitted that in any calculation for assessment, the court must have a starting point. He referred to para 1066 of Halsbury's Laws of England, Volume 13 (*supra*) and *C v C and D* (10) and urged that a starting point at one third of the combined resources of the parties is as good and rational as any other. Counsel also urged, based on para 1063 of Halsbury's Laws of England (*supra*) that it is fundamental that both parties must disclose all their resources to the court. He contended that according to the respondent's evidence the petitioner obtained K100,000,000.00 from Contromatic Automation Limited to run Dorandy Fashions at Parklands Shopping Complex and that she runs a bar in Ndeke called "Signature Bar", but the sum total of her earnings is not disclosed. Counsel contended that the respondent said he earns K8,900,000.00 per month though no pay slip was attached and that since both parties did not fully disclose their income, the court ought not speculate the quantum of maintenance.

He also cited *White v White* (11) where the Court outlined the considerations that should be taken into account as (1) available financial resources of each of the parties; and (2) financial needs, obligations of each of the parties. Counsel urged that (1) above seems to have become largely subsumed into a wider, judicially developed concept of “reasonable requirements,” which in turn appears to have displaced consideration of the parties available resources as a factor in its own right.

Counsel further submitted that no unfair pressure should be put on a party. For this proposition he relied on *Wakeford v Wakeford* (12) where he says it was stated that “the making of an order against a husband larger than circumstances of the party warrant, so as to bring pressure on him to do something he reasonably refuses to do is wrong in principle.” Counsel urged the Court to take into account that neither party has filed for custody of the children of the marriage; and that the respondent provides for the children’s educational requirements and all necessities. He contended that this is a proper case in which a lump sum award ought to have been granted instead of periodic payments because of the respondent’s earning position being unclear taking into account his financial woes. Counsel cited *Griffiths v Griffiths* (13) and *Calder Bank v Calder Bank* (5).

I have considered the affidavit evidence and the submissions. I am grateful to both counsel for the authorities cited. I may not be able to discuss all the authorities in detail, but I am alive to the principles stated therein. In dealing with the grounds of appeal, I intend to start with the third ground alleging that the Deputy Registrar erred in not finding as a fact that behaviour of the respondent was the main cause of the breakdown of the marriage.

I granted a decree nisi for divorce in an undefended petition alleging irretrievable breakdown on account of the respondent's adultery with the co-respondent and the respondent's unreasonable behaviour whose graphic details were given in para 11 (a) to (g) of the petition. It was clear that the respondent was responsible for the breakdown of the marriage. In his ruling at page R13 under "conduct of the parties", the Deputy Registrar acknowledged my finding that the adultery and the respondent's conduct were responsible for the breakdown of the marriage. However, he said the respondent should not be punished to pay more or give more because of his conduct. This followed the petitioner's argument that she was entitled to more than half of the family assets because the conduct of the respondent was "both obvious and gross". The Deputy Registrar's interpretation of the principle in *Watchel v Watchel* (3) is that since the conduct of the petitioner was not responsible for the breakdown of the marriage, no reduction or denial is to be made in respect of her entitlement to maintenance or property adjustment. The learned Deputy Registrar was on firm ground.

There was no need for him to hold that behaviour of the respondent was the main cause of the breakdown of the marriage or to apportion blame. In fact in *Chibwe v Chibwe* (2) the Supreme Court reiterated that *Watchel v Watchel* (3) demonstrates the development of the law with regard to distribution of assets post divorce after the 1970 English Act and that the whole concept of apportioning blame was removed when a marriage has broken down irretrievably. What this means is that the court should not hold the respondent's conduct against him when it comes to distribution of assets. The third ground of appeal has no merit and it fails.

I turn now to the first ground of appeal alleging error in law and fact in not awarding 50% of the family property to the petitioner. I think that this ground relates to the award of 30% on the matrimonial home and the balance of proceeds of sale of Flat 9 Chandamali Avenue. As I have already said, in making the awards the learned Deputy Registrar rightly and properly took into account the statutory guidelines in section 56(1) and (2) of the Act, which provisions are common cause. With regard to the distribution of family assets, the learned Deputy Registrar adopted the definition of “family assets” in *Watchel v Watchel* (3). It reads:

“The phrase “family assets” has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts: (1) those which are of a capital nature, such as the matrimonial home and the furniture in it, (2) those which are of a revenue producing nature, such as the earning power of husband and wife. When the marriage comes to an end, the capital assets have to be divided; the earning power of each has to be allocated.”

He also considered that the matrimonial home was encumbered by the mortgage of K500 million. The respondent said the mortgage was obtained by the children through the family company called Contromatic Automation Limited and that the petitioner was contributing nothing towards redeeming the house. In my judgment the Deputy Registrar found that the property of Contromatic Automation Limited was not subject to property adjustment because the company is a separate legal entity despite that it was formed and made successful by the varied and various efforts of both parties to the marriage. From the Lands Register exhibited as “VC1” to the affidavit in opposition, the mortgage was obtained by the respondent and the company, which according to the respondent is an independent legal entity.

I do not see why the petitioner should contribute anything towards redeeming the house. This is the full responsibility of the respondent and the company in which he is shareholder. As rightly argued by Mr. Twumasi, there is no reason given by the Deputy Registrar for giving the petitioner only 30% share in the matrimonial home and the K35 million from the proceeds of the sale of Flat 9 Chandamali. The Supreme Court has held in *Chibwe v Chibwe* (2) that in Zambia courts must invoke both the principles of equity and law concurrently; and 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 one third rule as expounded at para 1066 of Halsbury's Laws of England (*supra*) and in *C v C and D* (10) is a mere starting point. The need to do justice is much more important and the modern trend by the Courts is to share the matrimonial home equally. Therefore, the petitioner should have been awarded 50% share of the matrimonial house if the mortgage is redeemed and 50% of the balance of proceeds of sale if there is foreclosure by the bank and 50% of the balance of the proceeds of the sale of Flat 9 Chandamali Avenue. Accordingly I set aside the award of 30% on both items and I impose an award of 50% in favour of the petitioner.

I come now to the second ground of appeal relating to the Jaguar. Admittedly the petitioner had during the subsistence of the marriage use of the Isuzu Van, which unfortunately was involved in a road accident prior to the divorce. There is no evidence that the petitioner was given a replacement vehicle after the accident.

Despite the alleged cost of R47,000 needed to repair the damaged gear box, the respondent indicated both in his affidavit in opposition in para 4(g) and in his evidence that the Jaguar was available for sharing. However, the Deputy Registrar ordered that the respondent should retain possession and title to the Jaguar. No reason was given. In my view it would be unfair to give the Jaguar to the petitioner. This was matrimonial property which was available for sharing and must be shared. Therefore the parties are entitled to 50:50 share of the vehicle. In my view the best option is to sell the vehicle for each party to get 50% of the proceeds of sale. However, if the respondent wants to keep the vehicle he should pay the petitioner 50% of the assessed and agreed value of the vehicle. Accordingly the order of the Deputy Registrar giving the Jaguar to the respondent is set aside.

This brings me to the fourth ground of appeal relating to the refusal by the Deputy Registrar to award the petitioner a sum of money from the other properties acquired in the marriage. This ground relates to the petitioner's clothing and the property of Contromatic Automation Limited. It is the petitioner's argument that the clothes which were burnt by the respondent are part of property settlement and that the Deputy Registrar should have given her an amount for the same. The respondent does not dispute that he burnt the petitioner's clothes during a matrimonial scuffle and he said he paid her K20 million as replacement cost for the burnt clothes. The respondent's main argument and the finding by the Deputy Registrar is that there is no judgment directing assessment of damages for burnt clothes and that this arises out of a tort and is not part of property adjustment. Clearly the particulars of the respondent's unreasonable behaviour did not include the burning of the petitioner's clothes.

While the petitioner prayed for damages against the co-respondent for adultery which has been assessed at K10.5 million, and there is no appeal, there was no claim for damages for burnt clothes. I agree entirely with the holding by the Deputy Registrar that this claim fell outside the ambit of property adjustment. This ground of appeal fails and is dismissed.

Coming to the property of Contromatic Automation Limited, both sides have argued spiritedly and referred me to various authorities. I accept as did the Deputy Registrar that the company was formed and made successful by the varied and various efforts of both parties to the marriage and that the company property was treated as though it was a family asset. I agree that in the *Chibwe case* (2), the Supreme Court ordered the transfer to the appellant of one viable income generating property to be specifically named by the Deputy Registrar. Counsel for the respondent argued that that case is not applicable here, but without stating why. In that case the Supreme Court also adopted the definition of family assets given in *Watchel v Watchel* (3) and stated that these include income generating assets such as commercial properties. It seems to me that commercial properties may include limited companies depending on the background of the company.

According to the petitioner the directors of Contromatic Automation Limited are the children and she was deriving no benefit from the company. However, she said initially they had formed Micro Genesis, but it was deregistered with the mines and then they formed Contromatic Automation Limited. According to the respondent the petitioner had 25% shares in Micro Genesis, but it was no longer operational and it owed Zambia Revenue Authority K300 million in unpaid taxes.

From the history of Contromatic Automation Limited, I have no doubt that it falls within the definition of 'family asset' as it was formed with the intention that there should be continuing provision for the spouses and their children during their joint lives and should be for the use and benefit of the family as a whole. I note that in the Chibwe case (2) there were a number of properties which comprised income generating properties, from which the Supreme Court ordered the transfer of one property to the appellant. In this case, besides Contromatic Automation Limited, there is no other income generating property in the name of the respondent.

It appears that Micro Genesis in which the petitioner had 25% shares was closed. The the two Corolla motor vehicles and No. 7 Central Street Nkana-West are the only assets of Contromatic Automation Limited. It also appears that the respondent's source of income is a salary from Contromatic Automation in the sum of K8.9 million though there is no proof that this is his only income. There was evidence that the petitioner was running Dorandy Fashions at Parklands Shopping Complex and Signature Bar in Ndeke Village, but the income was not disclosed. In fact the respondent undertook to relinquish all his shares in Dorandy Fashions.

I should add that there is on the record an application by the petitioner for custody of the two children of the marriage filed on 24th February, 2011, which has not been heard because the parties are more concerned with property adjustment and maintenance for the petitioner. Suffice to add that the petitioner has proposed that she takes custody of Nsungu while the respondent should take custody of Chisha and that the respondent should continue to pay for their education, upkeep and medicals.

The Deputy Registrar found that the respondent has huge financial needs, obligations and responsibilities and that solely through Contromatic Automation has to pay the school fees for the children, to redeem the mortgage on the matrimonial home and other undischarged loans and to provide support to the petitioner and his relatively new family. He also found that the petitioner has some modest resources helping her to meet some of her needs. I entirely agree with him. I also agree with the statement of Scarmen L.J in *Calder Bank v Calder Bank* (5) that “.....it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property on a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life.”

In the particular circumstances of this case, considering the respondent's huge financial obligations as found by the Deputy Registrar, it would not be just to transfer any of the assets of Contromatic Automation Limited to the petitioner or to award her 50% of the shares held by the respondent as the petitioner is running her own cosmetic business and a bar while Contromatic Automation Limited appears to be the only viable company that should support the respondent and the children of the marriage and also help to maintain the petitioner. The Deputy Registrar was on firm ground when he declined to give any of the assets of the company to the petitioner. In the result the fourth ground of appeal fails.

In relation to the household goods on the list exhibit “LLC1” to the further affidavit in support, the learned Deputy Registrar found that the petitioner requested for some of the goods which were delivered to her.

He also found that the sharing was equitable; and that he was unable to make an order for replacement of equipment that is not working because he was not sure whether these were damaged during the marriage or after the marriage was dissolved or in the process of delivering them or after delivery, whether destroyed beyond repair or not. However, I note that in para 12 of his affidavit in opposition the respondent indicated that he did not object to the sharing of the items on the list. Therefore, if there are any other items remaining in the matrimonial home that are supposed to have been shared, the items should be shared equally between the parties, of course taking into account that there are still children of the marriage who have in fact been affected negatively by the divorce and the sharing of property between their parents and who have been ignored completely.

I turn now to the fifth ground of appeal relating to costs. It is the petitioner's argument that the Deputy Registrar's ruling has put her out of money given to her and also has to pay costs to her advocates which is unfair and that in all cases, unless the woman has totally misbehaved in court, she is entitled to costs. It is trite that costs are always in the discretion of the Court and usually follow the event. Of course, the petitioner did not get all the property that she wanted, but she was entitled to make the application under sections 55 and 56 of the Act. In my view the petitioner should have had her costs of the application. This ground of appeal has merit.

The petitioner seems to have raised no issue with the monthly periodic payment of K4,000,000.00. On the other hand, counsel for the respondent has argued that this is a proper case in which a lump sum award ought to have been granted instead of periodic payments.

The Deputy Registrar rejected the petitioner's prayer for a lump sum payment of K800 million on the ground that it would cripple the respondent. He also rejected the latter's proposal of a lump sum payment of K20 million as being inadequate. Instead he awarded the periodic payment of K4 million as the most ideal. It should be observed that this award is subject to variation on account of general change of circumstances and the marital status of the petitioner. The learned Deputy Registrar was on firm ground in the circumstances of this case and I confirm the award.

I turn now to the second appeal relating to the refusal by the Deputy Registrar to set aside the stay of execution granted to the respondent pending appeal. I have already said that the petitioner's appeal was filed on 4th October, 2012. On 9th October, 2012 Katongo and Company filed notice of appointment of advocates for the respondent and also applied for leave to file notice of appeal out of time and for stay of execution pending appeal. Exhibited to the first affidavit was a copy of the intended notice of appeal. In paras 3 to 5 of the second affidavit the respondent deposed that he had since filed a notice of appeal; that he believed that he had a good chance of success on appeal as evidenced by the ground of appeal; and that if stay of execution was not granted the respondent would not be able to refund him such monies as he would have paid her in the settlement.

From the record on 2nd November, 2012 the respondent by his original advocates filed a notice of intention to raise preliminary issue alleging that the appeal filed by the petitioner on 4th October, 2012 was filed without leave and was thus incompetent. The appeal by the petitioner came before me for hearing on 6th November, 2012. Only Mr. Twumasi was present.

He told me that there were applications by Katongo and Company before the Deputy Registrar for leave to appeal and for stay of execution. I observed that the matter was scheduled to be heard by the Deputy Registrar on 16th November, 2012. I adjourned the matter to allow the Deputy Registrar to hear the applications before him. I further indicated that if leave to appeal would be granted, I would hear the appeals together. The two applications were heard by the Deputy Registrar as scheduled. Mr. Katongo appeared for the respondent. Mr. Twumasi had no objection to both applications and they were granted. The respondent was directed to file the notice of appeal on or before 23rd November, 2012. When the matter came before me on 26th November, no appeal had been filed. I refused an application by Mr. Chishimba to adjourn the matter. I proceeded to hear the petitioner while the respondent filed written submissions later. Judgment was scheduled to be delivered on 31st January, 2013.

On 16th January, 2013 the petitioner applied before the Deputy Registrar to set aside the stay of execution on the grounds that the respondent failed to lodge the appeal within the period granted; that there was no appeal against the ruling for maintenance of K4,000,000.00; and that there should be no stay. I do not see any affidavit in opposition. The application was heard on 28th January, 2013 and was rejected. According to the Deputy Registrar, the fact that the petitioner did not object to the application for stay meant that there was no prejudice and the filing of the appeal by the petitioner which was earlier in time gave the respondent tactical advantage as they were afforded an opportunity to argue their case and essentially there was an appeal before me. It was also his view that to avoid multiplicity of proceedings the application be denied.

He further stated that there was no prejudice because the ruling on appeal was expected to be delivered on 31st January, 2013. Of course, the judgment on appeal was not delivered because the case record was not before me. On 29th January, 2013, the petitioner appealed alleging that the Deputy Registrar erred in upholding the stay of execution when there was no appeal by the respondent and when he held that there was no prejudice to the petitioner when the stay denied her the benefits of maintenance.

It is correct as submitted by Mr. Nsofu that an appeal to a Judge-in-Chambers is an actual rehearing of the matter. Mr. Nsofu has also urged that when they were filing their application for leave to appeal, they had not been served any process by the petitioner; that they were not aware of the appeal; and that on 16th November, 2012 when the respondent's applications were granted, counsel for the petitioner did not bring to the attention of the Deputy Registrar the existence of the notice of appeal.

Spirited though this argument by Mr. Nsofu is, I am not persuaded. I have already made the point that on 2nd November, 2012 the respondent by Messrs Nyirongo and Company filed a notice of intention to raise preliminary issue alleging that the appeal filed by the petitioner was incompetent. Therefore, by 16th November, 2012 when leave to appeal out of time and stay of execution were granted, the respondent was well aware of the appeal by the petitioner. The Deputy Registrar was also aware of the appeal and that it was scheduled to be heard on 26th November, 2013. That was the reason he directed the respondent to file his appeal by 23rd November, 2012.

As rightly submitted by Mr. Twumasi, the respondent obtained the stay of execution on the ground that he intended to appeal when he was aware that there was already an appeal by the petitioner. He cannot successfully argue that a perusal of the Rules did not reveal the provision of the existence of cross-appeals regarding appeals against decisions of the Deputy Registrar. The respondent cannot have his cake and eat it. The respondent having failed to file the notice of appeal as directed by the Court, there was no basis on which to maintain the stay of execution. The learned Deputy Registrar ought to have set it aside.

With regard to the Deputy Registrar's view that there would be no prejudice as the judgment was scheduled to be delivered on 31st January, 2013, clearly the petitioner was kept out of the money she was entitled to and the judgment was not delivered as scheduled because the matter delayed before the Deputy Registrar. Moreover, the respondent did not seriously argue all the grounds he raised in the intended notice of appeal. The second appeal has merit and I allow it. The respondent should pay the arrears of maintenance. In default the petitioner is at liberty to execute. Costs of the application for property adjustment and maintenance before the Deputy Registrar and costs of both appeals are for the petitioner to be taxed if not agreed. Leave to appeal shall not be granted to either party.

Delivered in Chambers at Kitwe this 11th day of June, 2013

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R.M.C. Kaoma
JUDGE