

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Divorce Jurisdiction)**

**2012/HP/D.086**

**BETWEEN:**

**IRENE MUKELABAI MUSONA'**

**AND**

**STEVEN SAMUSHIKA MUSONA'**



**PETITIONER**

**RESPONDENT**

**Before the Hon. Justice D.Y. Sichinga, SC in Open Court at Lusaka  
on the 24<sup>th</sup> day of July, 2014.**

**For the Appellant : Mr. O. Sitimela - Messrs Fraser and  
Associates**

**For the Respondent : Mrs. L. Mushota – Messrs Mushota and  
Associates**

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**JUDGMENT ON APPEAL TO A JUDGE IN CHAMBERS**

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**Cases referred to:**

1. *Mohammed A. Omar v. Zambia Airways Corporation Limited* (1986) ZR 23 (SC)
2. *Violet Kambole Tembo v. David Lastone Tembo* Appeal No. 42 of 2002
3. *Calderbank v. Calderbank* (1975) 3 ALL ER 333
4. *Watchel v. Watchel* (1973) ALL ER 829
5. *Pettit v. Pettit* (1970) AC 777
6. *Rosemary Chibwe v. Austin Chibwe* (2001) ZR 1
7. *Tembo v. Tembo* (2004) ZR 79.
8. *Martin v. Martin* (1976) Fam 167.
9. *Jones v. Maynard* (1951) Ch 572 1 ALL ER 802.
10. *Anne Scott v. Oliver Scott* (SCZ Judgment No. 3 of 2007
11. *Rosemary Phiri v. Varisto Mulenga*
12. *Steven Kabamba* (2003) ZR
13. *Chibwe v. Chibwe*, SCZ Appeal No. 38 of 2000
14. *Mohammed v. The Attorney General* (1982) ZR 49

**Authorities referred to:**

1. *Halsbury's Laws of England vol. 19 3<sup>rd</sup> Edition, Page 841*
2. *Matrimonial Causes Act, No. 11 of 2007*

Firstly, I regret that it has taken a while to deliver this judgment following the filing of the Notice in March, 2014. This was due to the fact that in April, this court was moved to Kitwe and soon thereafter took up a criminal session which took precedence over other civil matters.

This is an appeal by the Respondent STEVEN SAMUSHIKA MUSONA' to a Judge in Chambers pursuant to Order 30 Rule 10 (i) of the High Court Rules, Chapter 27 of the Laws of Zambia against the Judgment of the Learned Deputy Registrar delivered on the 23<sup>rd</sup> of March, 2014.

I heard the Petition for dissolution of marriage and the Cross-Petition in 2012 and I delivered Judgment on the 2<sup>nd</sup> day of December, 2012. In my judgment I referred all issues pertaining to the assessment of maintenance and or property settlement to the Learned Deputy Registrar. The learned Deputy Registrar delivered judgment on property settlement on the 3<sup>rd</sup> day of March, 2014 and ordered some property adjustment which is now the subject of this appeal.

The brief facts of this case are that the Applicant, IRENE MUKELABAI MUSONA' and the Respondent, STEVEN SAMUSHIKA MUSONA' were married on the 8<sup>th</sup> day of December, 1973 at St. Ignatius Catholic Church at Lusaka under the Marriage Act.

During the subsistence of their marriage they acquired various properties including-

1. Stand Number 2318/M, Leopards Hill Road, Lusaka
2. Three (3) Shops at Woodlands Shopping Centre, Lusaka
3. Plot Number 1490 No. 20 Mwadule Road, Northmead, Lusaka
4. Fortuna Enterprises Limited.

In the judgment on assessment the Learned Deputy Registrar held as follows;

1. That the applicant, Irene Mukelabai Musona' be awarded property number 2318/M Leopards Hill Road, Lusaka; and one shop of her choice of the three shops in Woodlands shopping area, Lusaka.
2. That the Applicant be awarded the value of her shares in Fortuna Enterprises based on an evaluation by a qualified economist to be agreed upon by the parties. The evaluation to take no more than six (6) months.
3. That the Respondent, Steven Samushika Musona' be awarded house number 20 Mwalule Road, Northmead in Lusaka and the remaining two shops in Woodlands Shopping area, Lusaka; and
4. The Respondent be awarded another capital asset being Fortuna Company Limited from which the Applicant shall be paid on economic value of her shares.

The Respondent appealed against the holdings of the Learned Deputy Registrar citing ten Grounds of Appeal as follows:

**Ground One**

The Learned Deputy Registrar erred in law and fact in the manner she shared the properties in particular giving the Applicant the entire Plot 2318/M Leopards Hill Road comprising of 2 houses each with 5 bedrooms thereby rendering the Respondent therein a destitute against the principle that the standard of living of the parties prior to dissolution of marriage must be maintained for both parties as nearly as possible after the dissolution of marriage.

**Ground Two**

The Learned Deputy Registrar erred in law and fact by holding that the Respondent herein get both houses at Plot 2318/M Leopards Hill Road against the weight of evidence on record that the Respondent attributed heavily financially in constructing the two houses on the said property.

**Ground Three**

The Learned Deputy Registrar misdirected herself in law and fact by taking into account the Respondent's conduct towards the disposal of assets during the subsistence of the marriage as by so doing the Lower Court took a narrow view of the issues.

**Ground Four**

The Learned Deputy Registrar fail in error in law and fact by finding that House Number 20 Mwalule Road, Northmead, Lusaka was part of the matrimonial assets for purposes of property adjustments.

**Ground Five**

The Learned Deputy Registrar erred in law and fact by finding that the Respondent used money from the company to buy the House Number 20 Mwalule Road, Northmead, Lusaka as this was against the weight of evidence to the contrary.

**Ground Six**

The Learned Deputy Registrar failed to take into account the absence of any evidence on record of the company Fortuna Enterprise Limited not having declared dividends by finding that the Applicant never got her share of profits from the said company.

**Ground Seven**

The Learned Deputy Registrar erred in law and fact when it ordered that the Respondent continues to run what she termed the "major" income generating asset Fortuna Enterprises Limited against the weight of evidence on record that that the said company Fortuna Enterprises Limited was struggling financially from the year 2000 onwards.

**Ground Eight**

The holding by the Lower Court that the Respondent purchased a Flat for the Respondent's son in Italy and did so using proceeds from the said company was without evidence.

**Ground Nine**

Despite the guidance given to exclude any property disposed off during the subsistence of the marriage the Lower Court misguided itself when it observed that 6 acres of land was sold off from Plot 2318/M Leopards Hill Road, Lusaka at the price of United States Dollars Sixty-Five (\$65,000=00) per acre/.

**Ground Ten**

The finding by the Learned Deputy Registrar that the company was not limping financially because the Respondent was able to send all his children to expensive universities abroad and expensive private schools in Zambia was against evidence to the contrary.

The Applicant, Irene Mukelabai Musona' in her application for property settlement relied on her affidavit in support filed on 25<sup>th</sup> January, 2013 affidavit in reply dated 28<sup>th</sup> March, 2013, affidavit in support of summons to produce documents which were not available at the material time filed on 25<sup>th</sup> October, 2013. Further affidavit in reply to Respondent's supplementary affidavit filed on 27<sup>th</sup> May, 2014, supplementary affidavit in support of summons for property settlement filed on 30<sup>th</sup> May, 2013, Applicant's submissions filed on 9<sup>th</sup> January, 2014 and applicant's authorities and arguments filed on 8<sup>th</sup> May, 2014.

The Respondent, Steven Samushika Musona' relies on the affidavit in opposition filed on 15<sup>th</sup> March, 2013, affidavit in opposition to summons for leave to produce documents which were not available at material time filed on 11<sup>th</sup> November, 2013, Respondent's submissions filed on 9<sup>th</sup> January, 2014, affidavit filed on 13<sup>th</sup> May, 2014; Respondent's authorities and arguments in support of appeal filed on 21<sup>st</sup> May, 2014.

In line with the holding in the case of **Mohammed A. Omar v. Zambia Airways Corporation Limited (1986) ZR 23 (SC)** to the effect that-

***“An appeal to a judge in Chambers is treated as an actual rehearing of the application and the judge should have regard to the contents of supplementary affidavits”.***

I will accordingly deal with this appeal in like manner and address the parties as there were before the Learned Deputy Registrar, before I deal with the grounds of appeal raised.

In her affidavit in support filed on 25<sup>th</sup> January, 2013 the Applicant gave an elaborate history of various properties acquired by the parties and the Respondent on his own during the subsistence of their marriage. She prayed for the court to grant her Stand Number 2318/M in its entirety, and one shop at Woodlands Shopping Complex. She further prayed that the Respondent be awarded the house in Northmead, Lusaka; two shops at Woodlands Shopping Centre; and Fortuna Company Limited.

In her affidavit in reply of 28<sup>th</sup> March, 2013, the Applicant has deposed to role in the formation of Fortuna Enterprises Limited; her knowledge as to the acquisitions of the House in Northmead allegedly from proceeds of Fortuna Enterprises Limited; her role in the acquisition and construction of houses at Plot 2318/M, Leopards Hill Road, Lusaka; and she has deposed as to her liabilities and obligations.

In her further affidavit in reply to the Respondent's supplementary affidavit filed on 27<sup>th</sup> May, 2014, the Applicant deposes as to the solvency of Fortuna Enterprises Limited and contends that the said company was not facing financial problems.

In her further affidavit in reply to the Respondent's Supplementary affidavit filed on 30<sup>th</sup> May, 2013 the Applicant deposes that she omitted to include the following properties in her affidavit in support dated 25<sup>th</sup> January, 2013-

1. Plot 4768/M in the Respondent's name;
2. Plot 8003 Lusaka in the Respondent's name; and
3. Plot 378/A Lusaka in the name of Fortuna Industrial Limited.

It was the Applicant's prayer in the said affidavit that these properties be awarded to the Respondent in addition to what he was awarded by the Learned Deputy Registrar.

On behalf of the Applicant, Mrs. Mushota urged the court to take into account all the circumstances of the case including the time the parties were living together. Counsel relied on the case of **Violet Kambole Tembo v. David Lastone Tembo Appeal No. 42 of 2002** which case held that 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 acquisition:

It was submitted that the Applicant contributed to the acquisition and development of the properties the parties had. The case of **Calderbank v. Calderbank (1975) 3 ALL ER 333** was cited which held that-

***“Husbands and wives come to the judgment.....upon a basis of complete equality”.***

Counsel further submitted on the court’s powers in respect to property distribution. She cited the provisions of Sections 53-56 of the matrimonial causes Act number 20 of 2007 of the Laws of Zambia, that –

***“the general powers conferred on the court to distribute assets are almost limitless.”***

The case of **Watchel v. Watchel (1973) ALL ER 829** was cited by Counsel to illustrate that;

***“the contribution of the wife, even when it is the caring of the house and looking after the children entitles her to an equal share in the matrimonial home/property.”***



It was submitted that this instant case was well summarized by the House of Lords in the case of Pettit v. Pettit when the court said-

***“where a couple by their joint efforts get a house and furniture intending it to be a continuing provision for them both for their joint lives, it is a family asset in which each is entitled in an equal share. It matters not in whose name it stands, or who pays for what, or who goes out to work or who stays at home. If they contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally”.***

Ultimately, Counsel urged the court to consider the property the Respondent had sold submitting that he had done so for his own benefit, leisure and pleasure.

On the other hand, the Respondent in his affidavit in opposition to summons for property settlement filed on 15<sup>th</sup> March, 2013 equally deposed to a detailed account on the formation of Fortuna Enterprises Limited; the acquisition of House in Northmead; the acquisition of the matrimonial home Plot Number 2318/M Leopards Hill Road, Lusaka; and his financial obligations to his children's school fees. The Respondent prayed that the Appellant be awarded the 'old house' on Plot 2318/M Leopards Hill, one shop from the Woodlands shopping Complex; and that she be paid off the value of her shares in Fortuna Enterprises Limited. He further prayed to be awarded the 'new home' on Plot 2318/M Leopards Hill Road; two shops from the Woodlands Shopping Complex; and Fortuna Enterprises Limited.

In his affidavit in opposition to summons for leave to produce documents filed on 11<sup>th</sup> November, 2013, the Respondent objects to the filing of particular documents including Memorandum from Behrens Limited on grounds that the same were sought to be produced too late in the day.

In his supplementary affidavit filed on 13<sup>th</sup> May, 2014, the Respondent deposes as to the financial challenges of Fortuna Enterprises Limited between the period 1995 to 2010.

On behalf of the Respondent, Mr. Sitimela submitted that the court should carefully consider the circumstances of this case and make a fair determination. He submitted that both the Applicant and the Respondent were in retirement. Counsel invited the court to consider the cases of **Rosemary Chibwe v. Austin Chibwe (2001) ZR** and **Tembo v. Tembo (2004) ZR 79**. Both cases deal with the exercise of the court's power in considering all circumstances of the case and the factors to take into account.

As regards Plot Number 1490 (No. 20 Mwalule Road, Northmead, it is submitted that this property was procured and purchased by the joint financial efforts of the Respondent and the Musoni family for the benefit of the Respondent's three children with one Dorothy Musoni. It is thus submitted that this property does not form part of the current matrimonial property for the purposes of property settlement in the instant case. Counsel relied on the case of **Rosemary Chibwe v. Austin Chibwe** supra and the **Halsbury's Laws of England vol. 19 3<sup>rd</sup> Edition, Page 841** on what constitutes family assets. Counsel also relied on the cases of **Tembo v. Tembo (2004)ZR. 79** and **Robson Banda** (suing as administrator of the estate of the late Rosemary Phiri) v. **Varisto Mulenga** (sued as administrator of the estate of the late Steven Kabamba (2003) ZR on what constitutes matrimonial property.

As regards Lot 2318/M Leopards Hill Road, Lusaka (the matrimonial property), it is submitted that there was no dispute that this was the matrimonial home of the parties. It is submitted that this property comprises two houses. It is submitted that the first house was built by primarily mortgage money repaid by the Respondent. It was submitted that the Applicant be awarded this property on account that she stayed in the property when the parties separated; the Applicant collects rentals which she uses for her benefit; and the Applicant has made renovations to the property.

On the second house, it is submitted that this property was equally constructed from the proceeds of Fortuna Enterprises Limited, a company run and operated by the Respondent. It is submitted that the Applicant merely over saw the building project. It is submitted that this house is used for public relations events for Fortuna Enterprises Limited; that the Respondents enormous financial obligations justify this position; and that despite the children being of majority age, the Respondent currently keeps three (3) of the children of the family.

As regards the three shops at Woodlands shopping Centre, it is submitted that the same were purchased by the Respondent from his own resources. It is submitted that the Applicant be awarded one of the three shops as she does not have substantial financial responsibilities as the Respondent.

The submissions in relation to Fortuna Enterprises Limited; it is submitted that the company is the Respondent's brain child. It is submitted that the Respondent buys off the Applicant's share in the said company.

Ultimately, counsel urged the court to consider all the circumstances of the instant case including the evidence on record.

These were the submissions before the Learned Deputy Registrar. I shall now highlight the submissions in respect of this appeal by the Respondent.

## **GROUND ONE AND TWO**

1. The Learned Deputy Registrar erred in law and fact in the manner she shared the properties in particular giving the Appellant the entire Plot 2318/M Leopards Hill Road comprising of 2 houses each with 5 bedrooms thereby rendering the Respondent herein a destitute against the principle that the standard of living of the parties prior to dissolution of marriage must be maintained for both parties as nearly as possible after the dissolution of marriage.
2. The Learned Registrar erred in law and fact by holding that the Respondent herein gets both houses at Plot 2318/M Leopards Hill Road against the weight of evidence on record that the Respondent contributed heavily financially in considering the two houses on the said property.

Firstly, it is submitted on behalf of the Respondent in relation to these grounds that the remaining extent of Lot 2318/M Leopards Hill Road, the matrimonial house was registered in the Respondent's name.

Secondly, it is submitted that the remaining extent of the matrimonial property is 6.4741 hectares (Approximately 16 acres) which would be valued at US\$1,040,000=00 exclusive of the value of the two dwelling houses.

Thirdly, the Respondent wishes the court to note that there are two dwelling houses on the matrimonial property of equal proportion.

Given the above facts, it is submitted by the Respondents counsel that the Respondent is aged 67 years and would not ordinarily have the energy, strength, and zeal to run his company as he had in the 1980s when he built the two dwelling houses at the property in question.

It is submitted that the company is now not doing as well as it did in the earlier years and as such awarding the matrimonial property to the Applicant alone without any evidence of the company's worth was a misdirection.

It is submitted that the Lower Court did not take into account the evidence that the Respondent bore the brunt of the financial burden in the construction of the dwelling houses on the matrimonial properties.

Counsel further urges the court to note from the evidence on record that the first house was built with a mortgage in the Respondent's name obtained from the Zambia National Building Society.

It is also submitted that when the second house was built, the Appellant was not in gainful employment and as such the second house was financed by the Respondent's financial efforts. Counsel submits that in spite of the Respondent's financial resources in the construction of the said house, the Appellant contributed as a house wife by looking after the children.

Counsel further asks the court to note that house number 20 Mwalule Road, Northmead awarded to the Respondent is tiny with a single toilet.

It is submitted that the court should have regard to all the circumstances of the case and proportionately share the assets the parties enjoyed during the marriage. Counsel relied on the cases of ***Violet Kambole Tembo v. David Lastone Tembo (2004) ZR. 79 (SC)***; ***Chiyungi v. Chiyungi 2010/HK/D 13 (unreported)*** and the ***Halbury's Laws of England***.

On the other hand, it is submitted by the Applicant's counsel, Mrs. Mushota that the Learned Deputy Registrar analysed and evaluated the evidence before her very well as she considered that the development of the matrimonial property was a joint effort of the parties. Mrs. Mushota contended that the Respondent should not have been given more as he had heavily stripped the family of its assets at will. She equally relied on the case of Violet Kambole Tembo v. David Lastone Tembo, supra.

### **GROUND THREE AND NINE**

3. The Learned Deputy Registrar misdirected herself in law and fact by taking into account the Respondent's conduct towards the disposal of assets during the subsistence of the marriage as by so doing the Lower Court took a narrow view of the issues.
  
9. Despite the guidance given to exclude any properly disposed off during the subsistence of the marriage the Lower Court misguided herself when it observed that 6 acres of land was sold off from Plot 2318/M Leopards Hill Road at the price of USD 65,000=00 per acre.

It is contended that the court below took into account property disposed off during the subsistence of the marriage against this Court's direction that property disposed off during the subsistence of the marriage should not be considered not be considered in the application for property settlement.

It is submitted that in the instant case the Respondent was neither extravagant nor reckless in his disposal of property. Counsel relied on the case of **Martin v. Martin (1976) Fam 167**.

With respect to Grounds Three and Nine, Mrs. Mushota has referred the court to the Matrimonial Causes Act 2007 on the considerations on the conduct of a party who severely depreciates or destroys family property. Counsel further referred to the following cases **Martin v. Martin, supra; Wachtel v. Wachtel, supra; and Brayant v. Brayant (1976) 129 Sol Jo 165** on the proposition that bad conduct should not be rewarded. It is submitted that the Learned Deputy Registrar did not take into account property previously disposed of by the Respondent.

#### **GROUND FOUR AND FIVE**

10. The Learned Deputy Registrar fell in error in law and fact by finding that House No. 20 Mwalule Road, Northmead was part of the matrimonial assets for purposes of property adjustment.
11. The Learned Deputy Registrar fell in error in law and fact by finding that the Respondent used money from the company to buy the House No. 20 Mwalule Road, Northmead, Lusaka as this was against weight of evidence to the contrary.

It is submitted that the Learned Deputy Registrar misguided herself in finding that the said property formed part and parcel of the matrimonial asset when there was no evidence that resources from Fortuna Enterprises Limited were used to purchase the property. Counsel relies on the cases of ***Anne Scott v. Oliver Scott (SCZ Judgment No. 3 of 2007)***; ***Rosemary Chibwe v. Austin Chibwe supra***; ***Tembo v. Tembo supra***; and ***Robson Banda (suing as administrator of the estate of the late Rosemary Phiri) v. Varisto Mulenga (sued as Administrator of the estate of the late Steven Kabamba) (2003) ZR***

With respect to House Number 20 Mwalule Road, Northmead, Mrs. Mushota submits that the Respondent bought the said property for a mistress during the subsistence of his marriage to the Applicant and that the resources of this acquisition came from Fortuna Enterprise Limited, a company in which the Applicant had an interest. Counsel relied on the case of ***Jones v. Maynard (1951) Ch 572 1 ALL ER 802***.

#### **GROUND SIX, SEVEN AND TEN**

6. The Learned Deputy Registrar failed to take into account the absence of any evidence on record of the company Fortuna Enterprises Limited not having declared dividends by finding that the Applicant never got her share of profits from the said company.
7. The Learned Deputy Registrar erred in law and fact when it ordered that the Respondent continues to run what she termed the 'major' income generating asset Fortuna Enterprises Limited against the weight of evidence on record that the said company Fortuna Enterprise Limited was struggling financially from the year 2000 onwards.



10. The finding by the Learned Deputy Registrar that the company was not limping financially because the Respondent was able to send all his children to expensive universities abroad and expensive private schools in Zambia was against evidence to the contrary.

It is submitted that there was no evidence before the Lower Court of any resolution by the directors of the company declaring a dividend. Counsel submitted that the evidence on record was such that the said company had various creditors. Counsel relied on the case of **Chibwe v. Chibwe**, supra to contend that the evidence on record was against the Lower Court's finding.

#### **GROUND EIGHT**

8. The holding by the Lower Court that the Respondent purchased a Flat for the Respondent's son in Italy and did so using proceeds from the said company was without evidence.

It is submitted that there was no evidence to prove and establish firstly that a Flat was purchased in Italy, and secondly, that the purchase came from Fortuna's accounts. Counsel relied on the cases of **Chibwe v. Chibwe, supra** and **Mohammed v. The Attorney General (1982) ZR 49** to assert the proposition that court's conclusions must be based on facts stated on record.

It is submitted in all that this court allow this appeal and reverse the Lower Court's findings.

Mrs. Mushota made global submission for Grounds Six, Seven, Eight and Ten.

It is submitted that the Learned Deputy Registrar was on firm grounds in evaluating the evidence relating to Fortuna Enterprises Limited and established that even though the Respondent purported to show that the money made from the company business paid for the children's education, the children had completed their education before the material period during which properties at 20 Mwalule Road, Northmead and Changwe were being purchased developed and renovated.

It is submitted that the said company was not struggling and that the Respondent's evidence to that effect was calculated to reduce or diminish the Applicant's share in the family assets.

Mrs. Mushota argued that if the Applicant had not been deprived of her interest in the company and side-lined, she would have been knowledgeable about any financial problems of the company if any, and the Respondent would not have managed taking trips abroad including buying a flat for his son. It is submitted that the Respondent's buying of a Flat for his son was not challenged, and should not now be disputed.

Counsel submits that the value of Fortuna Enterprises Limited should be established as ordered by the Learned Deputy Registrar to enable the Respondent show that the company was in fact in distress for the period he alleges.

Counsel contended that there was a danger that the assets of the company could be stripped or concealed by the Respondent to get them out of the reach of the Applicant. Counsel cited the case of **Chibwe v. Chibwe, supra** to show conduct to be taken into account.

It is submitted by the Applicant's Counsel that on the strength of the evidence presented to Court and the authorities cited, this appeal must fail.

I am grateful for the submissions which I have carefully considered in account with the pleadings on record, evidence and authorities cited. I shall deal with the grounds in like manner as presented by the Respondent, who is the Appellant before this court.

In Grounds One and Two the issue of contention is the awarding of Lot 2318/M Leopards hill Road, Lusaka to the Applicant. This is undisputed the matrimonial property and the most contentious issue in this property settlement. I heard the Petition for dissolution of marriage and dissolved the said marriage based on the evidence adduced at trial. In my Judgment, I found as a fact that both parties remained at the matrimonial property even at the height of their problems. I specifically found as a fact that the Respondent remained in the matrimonial home despite having a second family. In dismissing the Respondent's cross-appeal, I found that the Respondent was in fact tolerate of the Applicant, and keen to keep his family together. Further, there was no evidence before me that the Respondent slept out save that he came home late, and they slept on separate beds.

Both parties have gone to great lengths to show that they participated either in the acquisition of the matrimonial home or its development. The exhibits contained in the Applicant's in support of summons for leave to produce documents filed on 25<sup>th</sup> October, 2013 show that from 1979 both parties were actively involved in the acquisition of Lot No. 2318/M Lusaka East as joint tenants. In spite of this Certificate of Title No. 125325 produced in the Notice to Produce filed on 4<sup>th</sup> December, 2013 shows that the said property was registered in the name of the Respondent.

The Learned deputy Registrar in her Judgment at page J15 had this to say of her findings-

***“Coming to property 2318/M Leopards Hill Road, this court has perceived that it is the most contested issue. There are two houses on the property both having five (5) bedrooms and both having a swimming pool of the same size”.***

The Learned Deputy Registrar went on to observe from her physical visit that the whole family resides in the second home.

In the case of **Violet Kambole Tembo v. David Lastone Tembo, supra**, which case has been heavily relied upon by the Applicant, the Supreme Court stated as follows as regards to property settlement:

***“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, to far as it is practicable and having regard to their conduct in financial position in which they would have been if the marriage had not broken down and each had the property discharged his or financial obligations and responsibilities towards the other”.***

I accept Mrs. Mushota’s submissions that once parties divorce, property is settled between them, even when one was “just a house wife” because a house wife contributes in kind.

Further, the case of Watchel v. Watchel held that family property is

***“Property which are acquired by one or the other or both of the partners with the intention that they should be continuing provisions for them and their children during their joint lives and used for the benefits of the family as a whole”.***

In the instant case the Respondent proposed that the Applicant be granted the old house on Lot 2318/M Lusaka and that he retains the new house on Lot 2318/M Lusaka. I have in considering this proposal looked at all the circumstances of the case including the fact that the parties are both in retirement. They were married for nearly forty (40) years before this court dissolved their marriage.

The intentions of the parties, so far as can be deciphered, from the evidence on record was that Lot 2318/M was intended to be their permanent home. The parties, as it has been noted, are both of retirement age and may both not have an opportunity to build houses of such magnitude in current times. The properties were built in the 1980s, which means that both parties have been accustomed to the area for at least thirty (30) years and subjecting one of the parties to a different area would be unfair. I take Judicial Notice of the fact that Leopards Hill area is one of the most prestigious suburbs to live in Lusaka.

I further note from the Learned Deputy Registrar’s Judgment that she determined that the Respondent had always lived in the second house built on the said matrimonial property. She also found that he continued to live there with three (3) of their children even though they were of maturity age. In my assessment, looking at the

principle laid down in the case of *Tembo v. Tembo, supra*, another case cited by the Applicant, I am of the view that moving the Respondent away from this family unit would be unfair. His status as much as her's ought to have been preserved as much as possible.

Grounds One and Two of the Appeal succeed to the extent that the Learned Deputy Registrar's order that the Applicant be awarded Lot 2318/M Leopards Hill Road in its entirety is set aside. I order that the Applicant be awarded the first house built on the said matrimonial property for her exclusive use, and the Respondent is hereby awarded the new house for his exclusive use where he resides with his children. I order that the remaining extent of Lot 2318/M Leopards Hill be subdivided proportionately – **3.2370 hectares inclusive of the old house in favour of the Applicant;** and **3.2370 hectares inclusive of the new house in favour of the Respondent.**

Ground Three and Four of the Appeal relate to the disposal of assets during the subsistence of the marriage and the Respondent's conduct.

The evidence on record regarding other properties was that the same were disposed of during the subsistence of the marriage. The evidence before me from the Applicant herself was that the Respondent took care of everything that the family needed. The Applicant told the court that the Respondent opened a shop for her after her retirement and provided all the funds to run the said shop. He bought her vehicles including a BMW in 1994 and a Mitsubishi Pajero in 2006; he provided for her medical expenses within and outside Zambia and he paid for the children's education. The Respondent's un-impeached evidence was that he provided for all her need materially including buying vehicles, medicals, holidays and grocery money.

He admitted that he sold off properties in Chadleigh, Avondale, Mkushi and Kitwe as they had run out of money to settle the children's school fees abroad and their own upkeep. There was no evidence adduced before this court to the effect that properties were disposed of in contemplation of dissolution of marriage or proceedings for property settlement. It is for this reason that this court ruled that all property disposed off during the subsistence of the marriage would not be part of the current matrimonial assets.

In this case I find no evidence that the Respondent disposed of property to circumvent these court proceedings. I find that this was not the notice or intention of the Applicant when he disposed of property during the subsistence of the marriage.

Grounds Three and Nine thus succeed in part. They succeed to the extent that any property sold during the subsistence of the marriage cannot be said to have been done so for his own whims. However, I find that the Learned Deputy Registrar did not go against this court's direction and only distributed the property said to form the matrimonial property after the dissolution of the marriage.

Grounds Four and Five, relate to House Number 20 Mwalule Road, Northmead, Lusaka. The Respondent does not deny that he contributed to the purchase of the said property for the benefit of his children with the said Dorothy Msoni cited in the Petition for dissolution of marriage. The Applicant's evidence on record regarding the acquisition of the Northmead property was that it was bought by the Respondent and also that the money came from Fortuna. Her testimony was that when the house was bought the Respondent was not in employment but that he was running the business. The Applicant told the court that she had learnt from a worker at Fortuna that the Respondent had bought the said house.

She also told the court that she had no documents to show that the said house was bought with proceeds from Fortuna.

The Respondent's evidence on the acquisition of the Northmead house was that he acquired the house from his own resources in consent with Dorothy Msoni's family for the benefit of his children with her.

The Learned Deputy Registrar found as a fact that the Respondent was utilizing the money of the company according to his own whims. She was not convinced that he bought house number 20 Mwalule Road, Northmead, with his own money and not entirely the Fortuna Enterprises money. She thus found that the Applicant had **"a share in a way"** in the said house she was a shareholder of Fortuna Enterprises.

The cases of **Watchel v. Watchel, supra** and **Rosemary Chibwe v. Austin Chibwe supra** both held to the effect that family property is:

***"Property which are acquired by one or the other or both of the partners with the intention that they should be continuing provisions for them and their children during their joint lives and used for the benefits of the family as a whole".***

There is no evidence on record to show that any of the proceeding used in the acquisition did in fact come from Fortuna Enterprises a company in which both parties bare shareholding. Further, there was no evidence to the effect that the Applicant did as a matter of fact contribute to the acquisition of the Northmead house. On the contrary, the evidence on record shows that the Respondent was an employee of Fortuna Enterprises in as much as he was a shareholder of the company.



In line with the case of **Tembo v. Tembo, supra** I hold that there was no intention by the parties that the said house would form part of their matrimonial property at the time of its acquisition. It is trite law that he who alleges must prove. In this case, there is no proof of fact that that house was acquired by Fortuna Enterprises in part or in full. I accept Mr. Sitimela's submissions on this point and the authority of **Anne Scott v. Oliver Scott (SCZ Judgment Number 3 of 2007)**. I therefore hold that House Number 20 Mwalule Road, Northmead Lusaka does not form part of the family property. I order that the Northmead House shall remain to be the property of the Respondent and the said Dorothy Msoni for the benefit of their children, Mukuka, Chisengo, and Nyakalenji. In my assertion, the presumption that the said house was bought by the Respondent from his own resources and the Msoni family for the benefit of Ms. Msoni and their children has not been rebutted to this court's satisfaction.

In Grounds Six, Seven and Ten I deal with Fortuna Enterprises Limited. There is no dispute that both the Applicant and Respondent were shareholders in the family run enterprise. Further, there is no dispute as to the fact that the Respondent run the business of Fortuna Enterprises Limited for the benefit of the family, and as such it was family property. The issues raised in these grounds relate to the worth or value of the assets and shares of Fortuna Enterprises Limited in the light of the findings that the Learned Deputy Registrar made. There is no dispute to the awarding of Fortuna Enterprises Limited to the Respondent. The Learned Deputy Registrar accordingly awarded the company to the Respondent and ordered that its shares be accordingly valued for their worth by a qualified economist to be agreed upon by the parties. The order, in my assertion, is an evaluation to ascertain the value of the shares for the purpose of the Respondent buying out or paying the Applicant for their worth. It is not an order to strip the company of its assets or to value its assets.

I thus uphold the order of the Learned Deputy Registrar that the value of the shares be assessed in line with economic principles.

Ground Eight relates to the holding that the Respondent bought a Flat for his son in Italy using proceeds of Fortuna. I have carefully examined the record of this court and I do not find any revelation that the Respondent bought a Flat in Italy with proceeds of Fortuna Enterprises Limited. I thus agree with Mr. Sitimela's submissions on this ground hold that in the absence of any documentary evidence to support this assertion there cannot be a finding of such a fact. Ground eight of the appeal thus succeeds.

In considering this appeal I have taken into account all the circumstances of the cases including the standard of living of the parties, their needs, obligations and responsibilities. The case of **Chibwe v. Chibwe, supra**, refers.

I have also been guided by the provisions of section 56 of the Matrimonial Causes Act, No. 20 of 2007 which provide:

- “(1). subject to the provisions of this section, the court may, in any matter or cause which application is made for the maintenance of a party to a marriage, or of children of the family, other than proceedings for an order for maintenance pending the disposal of proceedings, make such an order and such application as it thinks proper having regard to-***
- (a). the income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;***

- (b). the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;**
- (c). the standard of living enjoyed by the family before the breakdown of the marriage;**
- (d). the age of each party to the marriage and the duration of the marriage;**
- (e). any physical or mental disability of either of the parties to the marriage;**
- (f). the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;**
- (g). in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit, such as a pension, which as a result of the dissolution or annulment of the marriage, that party will lose the chance of acquiring”.**

In the instant case properties available for distribution before the Learned Deputy Registrar were:

- (i) Lot 2318/M Leopards Hill Road, Lusaka (The Matrimonial Home).
- (ii) Three Shops at Woodlands Shopping Centre, Lusaka.
- (iii) Value of shares in the Company, Fortuna Enterprises Limited.
- (iv) House Number 20 Mwalule Road.

These were the properties subject to the Learned Deputy Registrar's findings.

In her supplementary affidavit in support of summons for property settlement dated 30<sup>th</sup> May, 2013, the applicant has deposed that the following properties should be included for distribution-

- (i) Plot Number 4768/M in the name of the Respondent;
- (ii) Plot Number 8003 Lusaka in the name of the Respondent; and
- (iii) Stand Number 378A Lusaka in the name of Fortuna Industrial Limited.

In my assertion, in view of the findings on Fortuna Enterprises Limited, it is hereby ordered that Stand Number 378A Lusaka remains an asset of the said Fortuna Enterprises Limited, which is now under the control of the Respondent.

In paragraph 6 of her said affidavit, the Applicant prays that Plots No. 4768/M and Plot No. 8003 Lusaka be awarded to the Respondent. However, taking into account the adjustments I have made as a result of this appeal, I award Plot 4768/M to the Respondent, and Plot 8003 Lusaka to the Applicant in order to be fair to both parties. There was no further evidence to these properties save that the Applicant prayed that they be included in the settlement.

In view of the findings I have made in relation to all the properties presented before this Court, and further for the avoidance of doubt, **I order that the Applicant be and is hereby awarded-**

1. A subdivision of Lot 2318/M to the extent of more or less 3.2370 hectares inclusive of the Old house under her control.

2. The Learned Deputy Registrar visited Woodlands Shopping Centre and assessed that Shop No.1 Renaissance Bar was a total of 220 Square Metres with an income of K4,200 per month;

Shop No. 2 'AL Sabha' was equally 220 Square Metres with an income of K4,200 per month; and

Shop No. 3 'Woodlands Chemist' was 180 Square Metres with an income of K4,000 per month.

I amend the Learned Deputy Registrar's Order to the extent that the Applicant is awarded one (1) shop of her choice out of either Shop No. 1 or shop No. 3. I have done so to avoid the likelihood of any future conflict in the event that the Applicant picks Shop No. 2 which would divide the remainder the Respondent's other two (2) Shops.

3. The value of her shares in Fortuna to be assessed and sold to the Respondent.
4. Plot No. 8003, Lusaka.

On the other hand, **the Respondent is awarded -**

1. The remaining extent of Lot No. 2318/M Leopards Hill Road, Lusaka to the extent of more or less 3.2370 hectares inclusive of the new house where he resides with his sons.
2. Two Shops at Woods Shopping Centre Inclusive of Shop No. 2.
3. His and the Applicant's shares in Fortuna Enterprises Limited. The Respondent is to pay the Applicant for her shares after the value of the shares is assessed.
4. Plot No. 4768/M Lusaka.

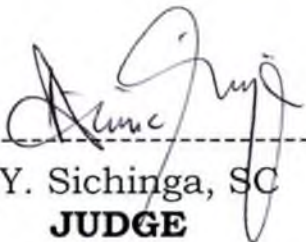
The evidence shows that the Applicant has been running an events business on the portion of Lot 2318/M Leopards Hill Road, Lusaka that now belongs to the Respondent, I order that she may continue to run her business events there, rent free until the 31<sup>st</sup> day of December, 2014 or until the current lease at her old house ends, whichever event occurs last.

All in all, Grounds One and Two are allowed;  
Grounds Three and Nine are allowed;  
Grounds Four and Five are allowed;  
Grounds Six, Seven and Ten are allowed;  
Ground Eight is allowed.

I order that each party bears its own costs.

Leave to appeal to the Supreme Court is hereby granted.

Delivered in Open Court at Lusaka this 24<sup>th</sup> day of July 2014

  
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D.Y. Sichinga, SC  
**JUDGE**