IN THE HIGH COURT FOR ZAMBIA **2014/HP/A003**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

BETWEEN:

ODILIA CHILEKWA **APPELLANT**

AND

VENANCIO GOMANI **DEFENDANT**

Before the Hon. Mrs. Justice A. M. Banda – Bobo on....day of June, 2015

FOR THE APPELLANT: Mesdemes Kangwa Kapita Advocates, Lusaka.

FOR THE RESPONDENT: Messrs National Legal Aid Clinic for Women, Lusaka

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J U D G M E N T

Case referred to:

1. *Rosemary Chibwe vs. Austin Chibwe SCZ Judgment No. 38 of 2000*
2. *Wachtel vs. Wachtel [1973] 1 ALL ER 829*
3. *Nkata and Four Others vs. The Attorney General [1966] ZR 124*
4. *Isaac Tantameni Chali (executor of the Will of the Late Mwalla Mwalla) vs. Liseli Mwala [1997] SJ 22(SC).*
5. *Sanikonda Phiri vs. Elestina Phiri [2012] ZR 441*

6. *Kabwe Transport Company Limited vs. Press Transport (1975 Limited) (1984) Z.R. 43 (S.C.)*

Legislation and Other material referred to:

- *The Matrimonial Causes Act No. 20 of 2007*
- *The Matrimonial Causes Act of England, 1973*
- *The High Court Rules, Chapter 27 of the Laws of Zambia*
- *The Rules of the Supreme Court 1965, RSC, White Book (1999 edition)*
- *Affiliation and Maintenance of Children's Act Chapter 64 of the Laws of Zambia*
- *The Subordinate Courts Act Chapter 28 of the Laws of Zambia*

This is an appeal from the Judgment of the Magistrate Court of the First Class sitting at Lusaka dated 7th November, 2012.

The brief background of this case so far as is relevant to this appeal is that the appellant herein sued the respondent in the Local Court for divorce which was granted. The Local Court also ordered the appellant to maintain the children at K200 per month. Dissatisfied with the Judgment, the respondent herein appealed to the Court below, which in its Judgment made the following orders:

1) ***"The appellant is awarded a 30 percent interest in the family asset being plot 30058 Kamwala South. The same shall be evaluated by the Government's valuation department within 60 days after which a further order will be made as regards terms of payment should the respondent decide to buy out the appellant's interest.***

2) ***The appellant will keep the RAV4 given to her by the respondent plus the household goods already in her possession.***

3) ***The appellant is granted custody of all three children of the family.***

4) The respondent will maintain the children at K800 per month and will meet all school and medical requirements as and when they arise.

5) Each party to bear his/her own costs".

The appellant being dissatisfied with the above filed four grounds of appeal to this Court namely that;

1. ***The Court below erred in law and fact in not considering the welfare and custody of all the children vis-a-vis the income and expenses of both parties.***

2. ***The Court below erred in law and fact in holding that the respondent's property where he lives with the other five children be valued in order to give the appellant a 30 percent interest and by removing the three properties owned by the appellant from property for consideration.***

3. ***The lower Court erred in law and in fact when it failed to take into consideration the welfare of the other children of the family when dealing with the custody of the children.***

4. ***The lower Court erred in law and in fact when it ordered an onerous payment of ZMW 800.00 per month as maintenance for three children as well as payment of medical and school fees given the earnings and other expenses of the respondent.***

On behalf of the appellant, counsel contended that what the Court below considered to be in the best interest of the children in its decision appears to prejudice the respondent's children. Quoted in this regard was **section 15 (2) of the Affiliation and Maintenance of Children's Act Chapter 64 of the Laws of Zambia.** The

rationale for awarding custody of the children said counsel, is what is in the best interest of the child. In counsel's view, the lower Court failed to consider the welfare of the respondent's other children by placing responsibility of the 3 children on the respondent. Counsel submitted that the Court should instead have considered all the circumstances of the case specifically the income and expenses of both parties.

Coming to ground 2, counsel argued that **sections 23, 24 and 25 of Matrimonial Causes Act 1973** gives the Court powers to make orders and places a duty on the Court to have regard to all the circumstances of the case. The circumstances of this case according to counsel were that the marriage did not last for a long time to alter the financial status of the parties after the dissolution of the marriage, and the purpose of a Court order was not to enrich one party at the expense of the other but rather to ensure that they continue in more or less the same standard of life they were accustomed to. The case of **Rosemary Chibwe vs. Austin Chibwe**[1] cited on this point.

Additional reference was made to the cases of **Wachtel vs. Wachtel**[2] and **Chibwe vs. Chibwe (supra)** to augment the submission that contributions of a woman in a home are taken into account regardless of whether they contributed financially or not to the acquisition of the property during the subsistence of the marriage. In counsel's view the wife who looked after the home and

the family contributed as much to the family assets as the wife who went out to work.

My attention was drawn to **section 16 proviso (ii)** of the **Subordinate Courts Act Chapter 28 of the Laws of Zambia** and **Chibwe vs. Chibwe (supra)** to buttress the submission that the lower Court misdirected itself by awarding the appellant 30 percent in the house that she did not contribute to either in kind or money to its purchase and development. By removing the property owned by the appellant from consideration, counsel asserted, the principle of justice, equity or good conscience was not reflected in the lower Court's judgment. The Court, counsel continued, should have considered all the property which was acquired during the subsistence of the marriage.

With respect to ground three, counsel submitted that the lower Court failed to take into consideration the needs of the five children for whom the respondent is the sole provider.

As regards ground four, counsel contended that the purpose for maintenance is not to punish or burden a party to the marriage but that the family continues to enjoy the living standard as though the marriage still subsisted. However, the Court's rationale for placing such an onerous amount on the appellant was, in counsel's view, not justified. This was because, as counsel saw it, the Court below failed to consider the circumstances and financial capacity of the respondent who has 8 children, 5 of whom live with him.

In response, respondent's counsel submitted with respect to ground one that the Court below did not err in law and in fact when it awarded custody of the minor children to the respondent. Counsel submitted that in hearing custody matters, the Court is duty bound to take into account the welfare of the child as the paramount consideration. In so doing, said counsel, the Court must consider a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well being the paramount concern. It was submitted further that the Court below took the following into consideration: (i) the ages of the children (ii) her occupation, (she is a career woman) (iii) the fact that the appellant had recently remarried (iv) the conduct of the parties.

Being minors and taking into consideration the fact that the appellant had remarried, the Court, counsel contended, was right to find that it would not be in the best interest of the children to place them under the care of a step mother when their mother was alive and well.

Further, that the appellant had not shown ability in the Court below to maintain the children despite several appeals to do so. Additionally, that the Court below adjudged that the fact that the respondent is a career woman could in essence, to follow counsel's argument, not work against her in the determination of the issue of custody.

Going on, counsel submitted that financial capabilities and obligations of the parents should not be a major consideration in making custody orders. This was, counsel asserted, why the Courts are vested with powers to make orders for maintenance. The best interest of the child must, according to counsel, compel the Courts to order the party with more means, in this case, the appellant to provide the respondent and the children with accommodation and to maintain them. The learned trial magistrate was therefore not, in counsel's view, duty bound to consider the income and expenses of the parties in making the order for custody.

In responding to ground two, counsel contended that the learned Magistrate was on firm ground when she awarded the respondent 30 percent in the matrimonial home being plot 30058, Kamwala South, Lusaka. The foregoing according to counsel was predicated on the lower Court's finding that there was evidence on record and the same was not challenged that the respondent contributed towards the acquisition of the plot and also towards construction of the matrimonial home. My attention was again drawn to the case of **Chibwe vs. Chibwe (supra)** to support counsel's arguments on the considerations which the Court ought to take into account when dealing with property settlement including the definition of family assets. Plot 30058, Kamwala South was, according to counsel, a family asset subject to property settlement.

In addition, counsel referred the Court to the case of **Nkata and Four Others vs. The Attorney General**[3] on findings of fact by the lower Court and the fact that this Court should not interfere.

Counsel's argument with respect to ground three was to the effect that the lower Court was on firm ground by not considering the welfare of the other children when dealing with the custody of the children of the family. Counsel asserted that the other children were not subject of this appeal as they were not considered children of the family of parties in the matter at hand and the Court was not obliged to concern itself with non-parties. Counsel cited the case of **Isaac Tantameni Chali (executor of the Will of the Late Mwalla Mwalla) vs. Liseli Mwala**[4].

In response to ground four counsel asserted in the main that the learned Magistrate below did not err when she ordered the payment of ZMW800 per month as maintenance for three children as well as payment of medical and school fees as she took into consideration the appellant's income and did not order the payment of a lump sum.

I have anxiously considered the written submissions and the authorities to which I was referred. I have also fully applied my mind to the Judgment and evidence on record from the Court below.

It seems to me that grounds one, three and four are related and as such I propose to deal with these in that order and to lastly deal with ground two. Before going on it is worth mentioning that the

submissions by appellant's counsel seemed confusing in places as it was not clear at every turn whose case counsel was arguing. This somewhat careless approach is deprecated.

In ground one, this Court was called upon to decide whether the Court below erred in law and fact in not considering the welfare and custody of all the children vis-a-vis the income and expenses of both parties.

It cannot be emphasized enough that when a Court is faced with a matter such as this one an indispensably important and paramount consideration is to take into account the welfare of the child/ children if any. Factors that the Court is expected and required to consider include but are not limited to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well being the chief concern. In the present case and as respondent's counsel correctly submitted, the learned Magistrate appears in my view and from the evidence on record to have taken into consideration the ages of the children; the fact that the respondent was a career woman; the fact that the appellant had recently remarried and the conduct of the parties.

I have considered the fact that the learned Magistrate observed that the children in question were minors taking into consideration the fact that the appellant had remarried. In the view that I take the fact that the learned Magistrate predicated her finding on the fact that it would not be in the best interest of the children to place the

said children under the care of a step mother when their mother was alive and well cannot be faulted.

It is rather curious that the appellant's alacrity to have custody of the children now is not matched by the lukewarm attitude he had exhibited regarding the same issue in the Court below. The appellant, it seems to me, had not shown ability in the Court below to maintain the children despite several appeals to him do so. It was argued in this Court that the fact that the respondent is a career woman could in essence, work against her in the determination of the issue of custody. I am not swayed by this argument considering the weight of the evidence on record. Further, financial ability cannot in my view be the sole criterion to be used by a Court in determining the issue of custody. Respondent's counsel argued and I agree,that this was why the Courts are vested with powers to make orders for maintenance. It is permissible and this is trite, for a Court of competent jurisdiction to order the party with more means to provide the party with lesser means if the Court considers the latter to be in a better position to take care of the children with accommodation and to maintain them. The learned trial magistrate can therefore not be faulted in the approach she took. This ground must fail.

Coming to ground three, respondent counsel's argument that the lower Court was on firm ground by not considering the welfare of the other children when dealing with the custody of the children of the family cannot be sustained for several reasons. Counsel

attempted to impress on this Court the assertion that the other children were not subject of this appeal as they were not considered children of the family of parties in the matter at hand. I disagree. **Section 5 (1) (C)** provides as follows:

> ***For the purposes of this application of this Act in relation to a marriage-***
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) a child of either the husband or wife, including a child born outside wedlock to either one of them and a child adopted by either of them, if at the relevant time the child was ordinarily a member of the household of the husband and wife and accepted by both as a member of the family;*
>
> ***shall be deemed to be a child of the family, and a child of the husband and wife. (emphasis added by Court)***

It is quite clear from the foregoing that the definition of children of the family is wide enough to encompass the appellant's children whom the Court below failed to consider in its Judgment. I am therefore not swayed by counsel's submission that the Court below was not obliged to concern itself with non-parties. The said children could not properly be said to be 'non parties' within the context of counsel's argument. The cited case of **Isaac Tantameni Chali (executor of the Will of the Late Mwalla Mwalla) vs. Liseli Mwala (supra)** cannot, in the view that I take, be called to aid this argument. That case is distinguishable on several fronts: Firstly, unlike the case at hand, it involved suing on a Will. Secondly, the originating notice of motion of the said case only had two parties to

the action, the appellant and the respondent, until the conclusion of the trial. Therefore, the case was concerned with the interpretation of **Order 14 Rules 1-5 of the High Court Rules** , and **Order 15 Rule 4 of the White Book, 1995 edition** which provide for joinder of a party, which joinder had to be made before the trial of the action. The same had not been done and as such the learned trial judge was, according to the Court, legally and effectively precluded from considering the interests of non-parties to the action. Patently, the circumstances and facts of the present case differ markedly from the foregoing case mainly due to the fact that when deciding cases of custody, joining children to the matter in question is not a necessary predicate to determining the said custody nor is there a specific legal provision for such procedure in our jurisdiction. This ground succeeds.

As regards ground four it was argued by appellant's counsel that the order by the lower court for the appellant to pay ZMW 800.00 per month as maintenance for three children as well as payment of medical and school fees given the earnings and other expenses of the respondent was onerous. I cannot conquer. As respondent's counsel correctly argued, the learned Magistrate below did not err in this respect as she took into consideration the appellant's income and did not order the payment of a lump sum. Also to be considered is the old age rule that an appellate court should not lightly interfere with the findings of the lower court unless the same are *inter alia* perverse or come to it with a sense of shock. I do not

consider that the facts and circumstances of this case on which the foregoing order was premised were such as would necessitate the varying of the order in question nor could they be considered unjust or inequitable. This ground also fails.

Coming to ground 2, appellant's counsel argued that **sections 23, 24 and 25 of Matrimonial Causes Act 1973** give the Court powers to make orders and places a duty on the Court to have regard to all the circumstances of the case. The reference to the foregoing sections in the said Act was misguided as the same are inapplicable to this Jurisdiction. The reason is as correctly observed by Matibini, J. in **Sanikonda Phiri vs. Elestina Phiri**[5] at 458 that:

> ***...currently, section 10 of the High Court Act provides, inter alia, that the jurisdiction of the High Court shall in so far as is relevant to matrimonial causes, be exercised in the manner provided by the Matrimonial Causes Act Number 20 of 2007. (See section 2 of Act Number 7 of 2011; An Act to Amend the High Court Act)***

In an earlier case of **Kabwe Transport Company Limited vs. Press Transport**[6] the Supreme Court was asked to decide whether the provisions of section 10 of the High Court Act enable courts in this country to decide that there is an absence of legislation when, in the specific instance, there was a definite Act the Court held as follows:

> ***We have no hesitation in finding that, where there is a specific Act dealing with a matter of law, such as evidence, in this country, there is no default of legislation as envisaged by section 10 of the High Court Act.***

In any case, the sections in the **English Matrimonial Causes Act, 1973** that counsel referred to are covered under **part VIII of the Matrimonial Causes Act, 2007. Section 55** in particular provides as follows:

> ***55(1) The Court may upon granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter, whether, in the case of a decree of divorce of nullity of marriage, before or after the decree is made absolute make any one or more of the following orders:***
>
> ***(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as the Court may specify in the order for the benefit of such a child such property as may be specified in the order, being property to which the first-mentioned party is entitled, either in possession or reversion;***
>
> ***(b) an order that settlement of such property as may be specified, being property to which a party to a marriage is entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage and of the child of the family or either or any of them;***
>
> ***(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either any of them ante-nuptial settlement including a settlement made by will or codicil made by the parties to the marriage;***
>
> ***(d) an order extinguishing or reducing the interest of either of the parties of the marriage under settlement;***
>
> ***Subject, in the case of an order made under paragraph (a) to the restrictions imposed by this Act on the making of orders for the transfer of property in favour of children who have attained the age of twenty-one.***
>
> ***(2) The Court may make an order under paragraph (c) of subsection (1) notwithstanding that there are no children of the family.***

(3) Where an order is made under section sixty on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.""

Having said that and in moving on, I am compelled to briefly discuss what amounts to matrimonial assets. In **Chibwe vs. Chibwe (supra)**, matrimonial assets were defined to include assets acquired by one or the other or both parties to the marriage. Additionally that the same should be so acquired with the intention that the assets should be continuing provision for them and their children during their joint lives and should be for the benefit of the family as a whole. Further, included in the definition were capital assets such as a matrimonial home, furniture, and income generating assets. This definition in my view does away with and makes irrelevant counsel's argument that circumstances of this case were that the marriage did not last for a long time to alter the financial status of the parties after the dissolution of the marriage especially as regards property subject of this appeal in general and the current ground in particular.

To be remembered also is the case of **Wachtel vs. Wachtel (supra)** which is basis for the jurisprudence that contributions of a woman in a home are taken into account regardless of whether they contributed financially or not to the acquisition of the property during the subsistence of the marriage.

Further and more importantly with respect to the facts and circumstances of the present case is **section 16** of the **Subordinate**

Courts Act Chapter 28 of the Laws of Zambia which enjoins the Subordinate Court to be alive to the requirements of equity, good conscience among others in order to do justice irrespective. In the present case and from the evidence on record, the lower Court awarded the appellant 30 percent in the matrimonial house being plot 30058, Kamwala South, Lusaka that according to appellant's counsel she did not contribute to either in kind or money to its purchase and development. However this flies in the face of the evidence on record which within the authority of the **Chibwe case (supra)** shows that the respondent made contributions. Be that as it may however, by removing the property owned by the appellant from consideration, the principle of justice, equity or good conscience was not reflected in the lower Court's judgment. The Court as appellant's counsel correctly argued should have considered all the property which was acquired during the subsistence of the marriage. This in my view the Court failed to do in that it glossed over the issue despite the overwhelming evidence to the effect that there were other properties acquired during the subsistence of the marriage.

In the case of **Nkata and Four Others vs. The Attorney General (supra)** it was held as follows:

> ***A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellant court that:***
>
> ***(a) by reason of some non-direction or mix-direction or otherwise the Judge erred in accepting the evidence which he did accept; or***

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

It is my considered view that as respects the present ground, the foregoing obtains here and in consequence the judge's findings should be interfered with. This ground succeeds. The matter is referred to the Deputy Registrar for assessment of the matrimonial property and determination of its distribution between the parties.

In conclusion and for the avoidance of doubt, grounds one and four fail and grounds two and three of the appeal succeed. In view of the fact that this appeal has only partially succeeded each party will bear their own costs.

Leave to appeal is granted.

DELIVERED AT LUSAKA THIS ..... DAY OF JUNE, 2015.

MRS JUSTICE A.M. BANDA-BOBO
JUDGE