

IN THE HIGH COURT FOR ZAMBIA
AT PRINCIPAL REGISTRY
LUSAKA
(Civil Jurisdiction)

2008/HP/A59

CATHERINE NG'ANDU



APPELLANT

AND

HARRY NG'ANDU

RESPONDENT

Before Honourable Mr. Justice C.F.R. Mchenga SC

For the Appellant: N. Chilambwe-Zimba, National Legal Aid Clinic for Women
For the Respondent M. Achiume, M.K. Achiume & Associates

J U D G M E N T

Cases referred to:

1. Richard John Chansa Musonda v Florence Chao Musonda SCZ Judgment No. 53/1998
2. Watchel v Watchel [1973] 1 ALLER 113
3. Dart v Dart [1966] 2FLR 286
4. Rosemary Chibwe v Austin Chibwe SCZ Judgement No. 38 of 2000
5. Anne Scott v Oliver Scott SCZ Judgment No.3 of 2007.

Legislation referred to:

1. The Subordinate Courts Act, Chapter 28 of the Laws of Zambia
2. The Matrimonial Causes Act of 1973.

Works referred to:

1. Halsbury's Laws of England, Vol. 19, 3rd Edition

This matter, which is concerned with property settlement after divorce, was originally heard in the Local Court. It then went to the court below on appeal. Dissatisfied with the Subordinate Court's decision, Cathrine Ng'andu, the appellant, appealed to the High Court. During the hearing of the appeal, it emerged that the bulk of the record of proceedings in the lower court, had gone missing and could not be traced.

In exercise of the powers vested in the court by **Order 44 rule 18 of the Subordinate Court Rules of the Subordinate Court Act**, the High Court ordered that the matter be reheard in the High Court.

The appellant's evidence was that Harry Ng'andu, the respondent, married her under customary law, on 23rd September 1990. They remained in marriage for 16 years until they divorced on 14th March 2006. At the time of they were divorcing, they had two shops; one was in Misisi Compound while the other was at David Kaunda Market. They also had three houses, one was in Kabwata and the other was in Kuku Compound. Both houses were one roomed. The house in Kuku Compound was sold for an unknown amount 2006.

The third house is in Kamwala South and it is registered in the respondent's name. They built it on a plot they bought on 8th September

2004. When they were divorcing, they had not yet fitted the windows and the doors. It has three bedrooms, a store room, a sitting room, toilets and bathrooms.

She also gave evidence that during the marriage, they bought three motor vehicles, two vanettes and a Mitsubishi Canter. The respondent left a television set, kitchen unit, double bed and headboard, plates, pots, four stools and a table when he left the matrimonial home.

On the desolation of the marriage, the Local Court granted her compensation of K2.5 Million but the Subordinate Court increased it to K4 Million. The respondent paid it in 4 instalments. She was given the household goods that remained after the appellant left the matrimonial house, a motor vehicle and the house in Kabwata. She was also given the shop in Misisi Compound. She was not given a share of the Kamwala house though she has an interest in it because she watched over its construction for a period of seven months. This was from September 2005 to February 2006.

When she was cross-examined, the appellant said at the time the Local Court granted them divorce, the house in Kamwala was still incomplete. They were staying in the Kabwata house at the time. The appellant moved into the Kamwala house in 2007. She admitted that from the time

they divorced, she did not make any contribution to the completion of the house which the appellant has since plastered. She wants her interest in the house to be calculated on the basis of its current value. She admitted that at the time they divorced, the Kabwata house was the matrimonial house and that the lower court gave each of them a house.

When she was re-examined, the appellant admitted that the Kamwala house was not habitable at the time the appellant left the matrimonial home. It had no water, electricity, windows or toilet.

The respondent's evidence was that the appellant used to be his wife and following their divorce, they shared household property. At the Subordinate Court, he was given the Kamwala house which was incomplete. It was partially roofed but had no windows, was not plastered, had no waster, had no electricity, had no floor, had no toilet or ceiling board. He has since put windows, plastered it, connected water, electrified it, put a floor, put a ceiling board and roofed it.

He sold the house in Kuku compound at K1 Million and it was sold when they were still married. He produced receipts for materials he bought to complete the Kamwala house.

When he was cross-examined, the respondent admitted having been married to the appellant for 16 years and not having any property at the time they got married. At the time they were divorcing, they had two real properties as he had already sold the Kuku house. He admitted that the appellant did not benefit from the proceeds of the sale of the house.

The Kamwala house has a 30m x 25m yard, a toilet, a master bedroom, a sitting room, a dining room and a kitchen. The plot was offered to him and started building after clearing the land. He bought all the building materials. He admitted that the appellant was still married to him at the time construction started. He also admitted that the house was not valued at the time the Subordinate Court made its order.

Both parties filed in written submissions.

It was submitted on behalf of the appellant that family assets ought to be shared on the dissolution of marriage. Counsel referred to the case of **Richard John Chansa Musonda v Florence Chao Musonda (1)** and submitted that since the Kamwala house was constructed with the intention that it be used by the parties and their children, it was a family asset. This was the case even if it was purchased by the respondent.

Counsel also referred to **Halsbury's Laws of England, Vol. 19th 3rd Edition** where the editors have indicated that where a spouse contributes to the purchase of family property, even if it is registered in the name of the other spouse, the property belongs to both of them in equal shares. She also referred to the case of **Watchel v Watchel (2)** and submitted that it was enunciated in that case that a wife who looks after the home and family contributes as much as one who goes for work.

In addition, counsel submitted that the Kamwala house was acquired out of the parties' joint effort. She referred to the case of **Dart v Dart (3)** which sets out some factors that the court should take into account in arriving the appellant's entitlement. Further, she urged the court to consider the principles laid out in the cases of **Rosemary Chibwe v Austin Chibwe (4)** where it was held that equity and law are concurrently applied in Zambia and **Anne Scott v Oliver Scott (5)** where it was stated that the first step in the equal sharing of property is to ascertain the value of all the improvements through valuation.

She submitted that the lower court erred in law and in fact when it failed to conduct a valuation of the Kamwala house as well as all other properties before arriving at the share that the appellant was entitled to. The respondent is not entitled to the house to the

exclusion of the appellant because it is matrimonial property. She prayed that the property be shared equally with due regard to the developments made by the respondent since the divorce and the benefits he has derived from its use to the exclusion of the appellant.

Submitting on behalf of the respondent, counsel referred to the case of **Rosemary Chibwe v Austin Chibwe (4)** and **Section 16 of the Subordinate Courts Act** and argued that since the marriage was under customary Law and there are no express rules on property settlement under customary law, the issue was supposed to be determined on the basis of justice, equity and good conscience. Counsel pointed out that at the time of the judgement, the matrimonial properties available where the one roomed house is Kuku Compound, the three bed roomed house in Kamwala South, two shops, two Toyota vanettes, one Mitsubishi Canter and various household goods.

He submitted that the lump sum, the shop, the vanette and the household goods that the appellant received took into account her contribution as a wife. Although the Kamwala house was given to the respondent, it was incomplete and from that time, she did not make any contribution to get it to its current state. In the circumstances, justice was done and the appeal should be dismissed with costs.

I am indebted to both counsels for their submissions and I have taken them into account in arriving at my decision. Though this is an appeal, in this judgment, I will treat the matter as if this is an application for property settlement at first instance. This is because the loss of the bulk of the record of proceedings in the court below makes it inappropriate to refer to what has remained.

From the evidence before me, I find that it is not in dispute that the respondent married the appellant under customary law on 23rd September 1990. The marriage lasted until 14th March 2006. During the subsistence of the marriage, property including a plot in Kamwala, a house in Kabwata, a house in Misisi Compound, a Mitsubishi Canter truck, two vanettes and household goods were acquired. The plot in Kamwala was registered in the respondent's name. When the marriage was dissolved, the appellant was given the house in Kabwata, a vanette, a shop and household goods. She was also paid K4 million in instalments.

In addition, it is not in dispute that at the time of the dissolution of the marriage, a house had been built on the Kamwala plot but it was incomplete. Though the appellant watched over the construction of the house, she did not pay for or purchase any of the building materials. It had no windows, was not plastered, it had no waster, electricity, floor, toilet or ceiling board. The respondent, without and

contribution from the appellant, plastered it, connected water, electrified it, put a floor and ceiling board.

Though the parties were married under customary law, the customary law applicable to the marriage is unknown. Further, though there is no direct evidence on who held registration for the Kabwata house, the Misisi Shop and the vanette the appellant received, I am satisfied that they were registered in the respondent's name. Had it not been the case, I don't think the appellant could make reference to being "given" any of those properties.

In a nutshell, the appellant's position is that, since the plot on which the Kamwala house sits was purchased and partially built during the subsistence of the marriage, it is a family asset and she has a 50% interest in it. On the other hand, the respondent's position is that she is not entitled to 50% of the value of the property because the marriage was under customary law.

I am in agreement with the submission, on behalf of the appellant and in reference to the case of *Dart v Dart* (3), that when dealing with a property settlement matter, the court, should among other things, have in mind what is available, the standard of living to which the parties were accustomed and the duration of the marriage.

In the case of **Rosemary Chibwe v Austin Chibwe (4)**, the court found that the respondent was a very successful businessman who had acquired a lot of personal and real properties during the subsistence of their marriage. The appellant was a secretary who brought a small salary into the family. After taking into account the number of properties acquired during the marriage and the fact that the appellant led a life of comfort, the appellant was awarded a lump sum and a house. A viable, income generating property, was also transferred to her.

Further, in the case of **Anne Scott v Oliver Scott (5)**, the question of property settlement arose following the dissolution of the marriage. The respondent bought the stand using his own resources during the subsistence of the marriage but was it jointly owned with the appellant. The court noted that where land is held under a joint tenancy, it is indivisible and there is no need to call for evidence to show the contributions each party made as they are beneficially entitled in equal shares. The court ordered evaluation of the property to ascertain its value and each party's entitlement after sale as the proceeds were to be shared on equal basis.

The circumstances in the case of **Anne Scott v Oliver Scott (5)**, which the appellant has relied on to demand valuation of the Kamwala house, can be distinguished from the facts in this case. The property in that

case was jointly owned by the parties while in this case it is solely owned by the respondent. There is no evidence of the appellant financially contributing towards the purchase or building of the property in this case. It cannot, in the circumstances be said that the appellant is entitled to 50% of the value of the house.

In my view, the approach taken in the case of **Rosemary Chibwe v Austin Chibwe (4)** is well suited to deal with the situation in this case. From the evidence before me, it appears like appellant's contribution to property they acquired was through looking after the home, the family and supporting the respondent in his business activities. She also watched over as the Kamwala house was being constructed. The location of their business property, Misisi Compound and David Kaunda Market and the kind of motor vehicles they owned, give me the impression that they led a modest life.

When considering whether there was a fair and equitable distribution of the family assets in this case, one should not only look at the Kamwala house but all the property they purchased during the subsistence of the marriage and how it was distributed. I find that the award of one motor vehicle, the house in which they were living in during the subsistence of the marriage, household goods therein, a shop in Misisi Compound and K4 Million lump sum, enabled the appellant

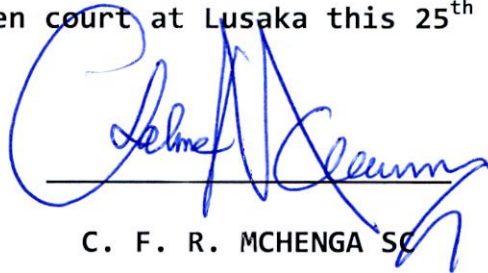
to continue with the lifestyle she enjoyed during the subsistence of the marriage.

At the time the family assets were shared, they had 3 motor vehicles and she got one; they had two shops and she got one and they had two complete houses and she got one. This is in addition the lump sum payment and the household goods.

Even though the values of each of the properties they got are not known, I am satisfied that the settlement was fair and just. She was not entitled to 50% of the property but a settlement that could have enabled her to maintain the life style that she enjoyed before they divorced. Consequently, I don't think that she has any interest in the Kamwala house and that should be valued, sold and the proceeds shared equally after deducting the respondent's expenditure to complete it.

I find that this appeal has no merit and it is dismissed with costs.

Delivered in open court at Lusaka this 25th day of July 2016

A handwritten signature in blue ink, appearing to read 'C. F. R. MCHENGA SC', is written over a horizontal line. The signature is stylized and includes a large circular flourish on the left side.

C. F. R. MCHENGA SC

JUDGE