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

2013/HP/A-039

CLEMENT PHIRI — **APPELLANT**

AND

ROSINA PHIRI MAILA — **RESPONDENT**

BEFORE : **HON. G.C. CHAWATAMA - IN CHAMBERS**

For the Plaintiffs : *Messrs. Chifumu Banda & Associates*

For the Defendant : *Mrs. K. Kabalata – Legal Aid Clinic for Women*

JUDGMENT

Cases Referred to:

1. ***Nkhata & Four Others v The Attorney General (1966) ZR 124***
2. ***The Attorney General v Marcus Kampumba Achiume (1983) ZR 1***

This is an appeal against the decision of the Honourable Magistrate. The matter went to the Subordinate Court by way of appeal but was heard de novo. The Magistrate passed judgment against which the Appellant now appeals.

The Appellant advanced two grounds of appeal.

In ground one, it was contended that the Learned Honourable Magistrate erred in law and fact when she gave the undeveloped part of Plot No. 17, Lilayi to the Respondent for her to build a house to live in with Tiya Phiri who is above 21 years.

In ground two, it was contented that the Learned Magistrate also erred in law and fact when she ordered that the rest of the land on Plot No. 17, Lilayi should be sold and shared equally without regard to the Respondent's properties.

It was submitted on behalf of the Appellant that the lower court should have firstly ascertained what properties made up family assets or matrimonial property at the time of the divorce. The Appellant relied on the case of ***Watchel v Watchel (1973) 1 ALL ER 829,*** in which the court defined *family assets or matrimonial property as items acquired by one or the other or both parties during the subsistence of the marriage with the intention these should be continuing provision for them and the children during their joint lives and should be for the use or benefit of the family as a whole.* Further that *family assets include those capital assets such as matrimonial home, furniture and income generating assets such as commercial properties.*

It was also pointed out that in that case Lord Denning evolved the principle of the *one third share* of the family assets for a wife because of the belief that a husband more than the wife was likely to shoulder more financial obligations towards the children of the family.

Other cases cited are ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR 79; Pettit v Pettit (1969) 2 ALL ER 385; Anne Scott v Oliver Scott, SCZ Judgment No. 3 of 2007; Rosemary Chibwe v Austin Chibwe, SCZ Judgment No. 38 of 2000 and John Musonda v Florence Chao Musonda SCZ No. 53 of 1998 (unreported).***

It was further submitted that as stated in the case of ***Rosemary Chibwe v Austin Chibwe, SCZ Judgment No. 38 of 2000,*** provided that he or she has contributed either directly or indirectly or in kind, a party to divorce has a right to financial relief. The percentage or share is within the discretion of the court. In the exercise of that discretion, the Court takes into account income of both parties, earning capacity, property and other financial sources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and standard of living of each party.

It was the contention of the Appellant that the lower court had an obligation of ascertaining what properties made up family assets or matrimonial property at the time of the divorce. That it was not in dispute that Plot No. 17 formed part of the family assets.

The Appellant went on to itemize the assets which were acquired by the Respondent during the subsistence of the marriage as: Plot No. 160 Kanyama, Los Angeles Road, on which a store was built and was being rented for K250.00; inherited 100 hectares from the deceased mother and which she is developing; and that the Respondent has a chibuku business.

The Appellant further contended that on the other hand, the plot in Mumbwa does not belong to him. It belonged to his nephew

Timothy Phiri. He argued that the court should have determined equitably the appropriate share for each party.

In addition, the Appellant contended that the case of ***Anne Scott vs Oliver Scott SCZ Judgment No. 3 of 2007*** on equal shares did not apply but that what applies is the principle laid down in the cases of ***Chibwe vs Chibwe*** and ***Watchel vs Watchel.*** His contention was that there was evidence that he, the Appellant put in more in respect of the acquisition and the development of the property and therefore should be awarded more significantly.

It was further contended that it was not necessary to consider the child of the family, Tiya Phiri who is over 21years of age. Further that it was not necessary to give the Respondent the undeveloped part of the land plus 50% just because she resides with Tiya. The Appellant submitted that the order was unjust and deprives the Appellant of a property which he had worked hard for. The Appellant suggested that the best approach was to value the entire property and give the Respondent a specific share in accordance with her contribution.

It was the Appellant's prayer that the judgment of the lower court be set aside and the Respondent be apportioned a share in the family assets according to her contributions, other property, income capacity, businesses and all other circumstances of the case, particularly that she be awarded one third of Plot 17, Lilayi

considering her contribution, her businesses and her land in Mungule.

In response, Mrs. Kabalata, Counsel for the Respondent submitted that they would argue both grounds together as they believed there were common matters in both.

It was submitted on behalf of the Respondent that while the Respondent looked after the children of the family as well as the Appellant's children from his first marriage, the Respondent collected rentals of Three Thousand Kwacha (K3000) per month from leasing the matrimonial home which for years he spent indiscriminately without sharing with the Respondent or the children. The Appellant does not support her and the family neither does he pay the court order of K1000 per month. Counsel submitted that it was the testimony of the Respondent that she occupied the servant's quarter where the Appellant had locked up one room for his own occupation each time he came to collect rentals.

It was further submitted that the property which was acquired during the subsistence of the marriage was acquired upon the Respondent being told about the house on sale by her workmate. The husband and herself sold their cars to pay a deposit on the mortgage in the sum of Kwacha Thirty-Six Thousand only (K36,000) to enable them purchase the house. It was the Respondent's testimony, it was submitted, that the Appellant

stopped working in 1985 and the Respondent continued paying towards the mortgage. The Respondent also stopped work in 1989 when she was nursing a sick child until he passed away. However, that the Respondent started doing various businesses so that she could continue paying towards the mortgage. It was further submitted that the businesses are no longer operational.

It was also submitted that the Respondent was forced to redeem the mortgage for fear of losing the house because one of the Appellant's creditors had demanded for the Certificate of Title to the said property. Counsel submitted that the Respondent paid a sum of Kwacha Seven Thousand, Three Hundred and Seventy-Eight, Fifty-five Ngwee (K7,378.55) which was outstanding on the mortgage.

In addition, it was submitted that it was testified that when the Plot was bought there was just one house now there is an addition of a three roomed servant's quarter, occupied by the Respondent, as well as fruit trees.

The Respondent's prayer was that the Court may uphold the decision of the lower court to subdivide the plot into two and to sell the portion where the houses are and the proceeds be shared between the Appellant and Respondent in equal shares and that the other half of the plot be given to the Respondent as she has nowhere to start from while the Appellant has a house in Mumbwa. The Respondent's contention was that the land in

Mungule was family property and was not bought using matrimonial funds as the case for the Mumbwa property. That the Appellant did not provide any proof that the land was not his.

Counsel cited the cases of ***Watchel vs Watchel*** and ***Rosemary Chibwe v Austin Chibwe*** as authorities to back their position that where a party to a marriage contributes to the acquisition of a matrimonial asset she should be entitled to a proportion of the asset upon dissolution of the marriage.

I have considered the submissions of both parties. I am alive to the fact that this is an appeal against the decision of the Learned Magistrate which was arrived at after a due legal process. My jurisdiction as an appellate court is a guarded one. It is not a light thing to overturn the decision of a trial court unless in very exceptional circumstances.

The Supreme Court in the case of ***Nkhata & Four Others v The Attorney General (1966) ZR 124***[1] outlines circumstances under which the appellate court can reverse the decision of the trial court as follows:

> ***a) by reason of some non-direction or otherwise the judge erred in accepting the evidence which he did accept; or***
> ***b) in assessing and evaluating the evidence the judge had taken into account some matter which he ought not to have taken into account or failed to take into 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 by the judge for accepting it, that he cannot have taken proper advantage of his seen and heard the witnesses; or***

d) ***in so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the 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.***

In another case of ***The Attorney General v Marcus Kampumba Achiume (1983) ZR 1***[2] the Supreme Court, inter alia, that:

1) ***The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.***

2) ***An unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere.***

In a plethora of cases cited by both parties which, interestingly, are the same cases, to support their respective positions, the golden thread is that in cases of property settlement the percentage or share is within the ***discretion of the court***. In the exercise of that discretion, the Court must take into consideration all circumstances concerning the parties involved such as, earning capacity, property and other financial sources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and standard of living of each party.

There is nothing on record or in the submissions brought before me to show that the learned trial Magistrate disregarded this duty in arriving at her decision. The submissions are a reproduction of the evidence that was presented before the trial court; the cases relied on in the Subordinate Court were also the same. The Magistrate took time to hear the parties denovo even if the matter had gone to the Subordinate Court by way of appeal from the Local Court. It is therefore my considered view that the Magistrate used her discretion judiciously. In addition, I cannot find anything that I can call an extraneous consideration in her arriving at her decision.

As guided by the cases of ***Nkhata & Four Others*** and ***General v Marcus Kampumba Achiume*** cited above, I find no merit in this appeal. This appeal fails with costs to the Respondent.

Leave to appeal is hereby granted should any party be unhappy with my decision.

DELIVERED AT LUSAKA THIS 18TH DAY OF FEBRUARY, 2016.

G.C. CHAWATAMA
JUDGE