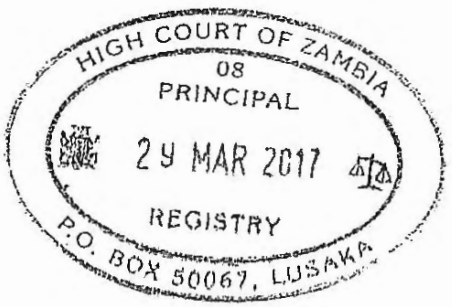
IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HP/A51

BETWEEN:

JOSEPH MWANSA **Appellant**



AND

ESTHER NANKAMBA **Respondent**

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 29th March 2017

For the Plaintiff: Mr. J Mwansa, In Person
For the Defendant: Ms. E. Nankamba, In Person

J U D G M E N T

Legislation referred to:

The Marriage Act Chapter 50 of the Laws of Zambia

Cases referred to:

1. *Penias Mafemba v Esther Sitali (2007) ZR 215*
2. *Rosemary Chibwe v Chibwe (2001) ZR 1*
3. *Watchel v Watchel (1973) 1 All E.R 829*

This is an appeal brought by the Appellant, Joseph Mwansa by way of Notice of Appeal filed on 6th May 2016. The appeal is against the Judgment of the Subordinate Court dated 16th May 2016.

By that judgment, the Honourable Magistrate of the Subordinate Court found that the parties had lived together as a family for over 20 years since 1993 and that they had a valid marriage certificate, showing that the parties were married. The Magistrate also found that the Respondent had acquired House No. 62 Muzovu Street, New Kabwata in 2000 whilst living with the Appellant. The Magistrate of the Subordinate Court proceeded to uphold the decision of the lower Court and ordered that all the properties including the house and motor vehicle acquired during the subsistence of the marriage be shared between the parties in equal proportions.

Being dissatisfied with this judgment, the Appellant filed this appeal and filed two sets of grounds of appeal on the 6th May and 24th June 2016 advancing the following grounds:

1. **The learned trial Magistrate erred in law and fact in ordering that the family house be sold and shared equally;**
2. **The learned trial Magistrate erred in law and fact when he held that there was a valid marriage certificate;**
3. **The learned trial Magistrate erred in law and fact when he held that there was a valid marriage between the Appellant and Respondent;**
4. **The learned trial Magistrate erred in law and fact when he ignored overwhelming evidence adduced that there was no dowry paid for the alleged marriage**
5. **The learned Magistrate erred in law and fact when he ordered that all the properties acquired during the subsistence of the alleged marriage should be shared in equal proportions in total disregard of the evidence adduced before court.**

6. **The learned Magistrate erred in law and fact when he held that House Number 62 Muzovu Street New Kabwata was acquired when the couple were living together and ignored evidence adduced that showed that this was a family home and the Appellant was a mere steward.**

The matter came up for hearing before me on the 31st January 2017. Both parties were in attendance. The Appellant sought an adjournment to retain a lawyer to represent him. Despite the Respondent objecting to the adjournment on account of the previous adjournments sought by the Respondent, the Court granted an adjournment to enable the Appellant obtain legal representation.

The matter was adjourned to 8th February 2017. On that date both parties were in attendance. The court proceeded to hear the Appeal.

The Appellant argued that the Magistrate erred in not researching into what constituted a valid marriage in the Zambian culture. He stated that the Magistrate erred when he found that there was a valid marriage between him and the Respondent when the evidence showed that no dowry was paid for the marriage. He argued further that the Magistrate erred by ordering that all the properties acquired during subsistence of the marriage should be shared in equal proportions in total disregard of the evidence adduced before the court. He also argued that the Magistrate's decision that the house was acquired when the couple were living together was wrong as he ignored the evidence that showed this was a family home and

that he was a mere steward. He stated that he was given the house to manage on behalf of his brother's children.

The Appellant went on to argue that according to the Bemba custom, the payment of dowry constituted a marriage as was affirmed by the Supreme Court in the case of **Penias Mafemba v Esther Sitali**. He stated that the payment for the house was made in instalments on 18th July 1997; 9th August 1998 and on 2nd September 1998. Therefore, the property was acquired prior to their marriage contracted on 29th October 1998. The Certificate of Marriage dated 29th October 1998 indicates that the parties were married on 3rd January 1994 and that dowry was paid of K100,000.

The Respondent opposed the appeal and insisted that she and the Appellant had started courting in 1993 and at that time he was living in the house in question with a friend. She stated that she married the Appellant and after their marriage he had included her as his wife on the tenant card from the council. At the time the Appellant purchased the house they were living together as husband and wife.

In reply, the Appellant insisted that he was not married to the Respondent as dowry was not paid.

I have considered the Record of appeal and the submissions of the parties. The gist of the appeal is that the learned trial Magistrate erred when he found that there was a valid marriage between the Appellant and the Respondent and ordered that all the property

including the matrimonial home and car be shared equally between them.

With regard to the first issue of appeal, the issue for my consideration is whether the lower Court erred in holding that there was a valid marriage between the parties. The Appellant contended that there was no valid marriage between him and the Respondent as he had not paid dowry for the marriage. The learned trial Magistrate found as a matter of fact that the parties had lived together as a family for over 20 years, the Appellant having shown intention to marry her by meeting her family in Chibombo and that there was subsequently a valid marriage certificate issued to the parties.

The evidence reveals that the parties began living together sometime in 1994 and that they had a child in 1996. They were subsequently married on 29th October 1998 as indicated on the marriage certificate. This marriage certificate was issued by the Lusaka Local Court. **Section 12 (1) of the Local Court Chapter 29 of the Laws of Zambia**, provides: Subject to the provisions of this Act, a local court shall administer-

(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law;

Rule 8 (2) of the Local Court Rules states that ***a fee of two units shall be paid to a local court by parties to a customary law marriage for the issue of a marriage certificate.***

It is clear from the above provisions that the Local Court has the jurisdiction to preside over African Customary marriages and to issue marriage certificates in relation to the said marriages. It follows therefore, that a marriage certificate issued by the Local Court is admissible evidence of a marriage between two parties.

- **Section 34 of the Marriage Act, Chapter 50 of the Laws of Zambia** provides that ...**nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any African customary law, or in any manner apply to marriages so contracted.**

The above provision clearly states that a marriage contracted under African Customary Law is a valid marriage and shall be so recognised as such.

- I am of the view that the marriage certificate is admissible evidence in a court of law of the marriage to which it relates. In the present case, the evidence reveals that a marriage certificate was issued to the parties on the 29th October 1998 and that the parties have been living together as such until their separation. This evidence proves that the parties were indeed lawfully married. The Certificate of Marriage dated 29th October 1998 indicates further that the parties were married on 3rd January 1994 and that dowry was paid of K100,

000. This information appears to have been inserted at the time that the Certificate was made as the information inserted is consistent with the writing on the entire document.

The Appellant did not challenge the validity of the marriage certificate. His only argument was to the effect that he had not paid the dowry for the marriage. Therefore the issue is whether the non-payment if dowry can override a valid marriage certificate. Having established that the Local Court has the authority to issue marriage certificates to certify a marriage instituted under Customary Law, I am of the view that this is sufficient evidence of a marriage. I therefore find that the trial magistrate was on firm ground in finding that there was a valid marriage subsisting between the parties. I see no reason to interfere with the learned trial Magistrate's finding in this regard. Grounds 2, 3 and 4 above therefore fail.

Under the second leg of the appeal, the Appellant argued underground 1,5 and 6 that the learned trial Magistrate erred when he held that House No. 62 Muzovu Street New Kabwata was acquired when the parties were living together and ignored the evidence that it was a family home and that he was just holding it as a steward. He also argued that the Magistrate erred when he ordered that the family house be sold and shared equally between the parties. He argued that the said house was acquired before the parties were officially married as evidenced by the dates on the receipts. He stated that the property did not constitute part of the property held between the parties. The evidence reveals that the house was

purchased between 18th July 1997 and 2nd September 1998. It is clear that a Tenant card dated 18th November 1994 shows the Appellant as the tenant of House No. 62 Muzovu Road and the Respondent is indicated on the card as the wife of the Appellant as far back as 1994. It appears that for all intents and purposes the Appellant and the Respondent were living as husband and wife as far back as 1994 and the matrimonial home was purchased during the subsistence of their marriage. This information also confirms the Respondent's evidence that the parties were married in 1994.

The Appellant further argued that the house belonged to his older brother and he was merely in possession of it as a steward. He later conceded that he did not bring this evidence to the attention of the Magistrate. Therefore the fact that the issue was not brought to the lower court's attention appears to be an afterthought. The Magistrate cannot therefore be faulted for failing to consider the issue when the evidence was not before him. This ground therefore fails.

I now turn to address whether the Magistrate erred by finding that the Respondent is entitled to an equal share of the matrimonial property. In considering this, I have considered the guidance of the Supreme Court in the case of **Chibwe v Chibwe**, where their Lordships stated

> ***'...a party to divorce proceedings, provided he/she has contributed either directly or in kind (that is looking after the house) has a right to financial provision. The percentage is***

left in the court's discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances of that case. For instance, the court is to take in to account all circumstances of that case. For instance, the court is to take into account the income of both parties, earning capacity, property and other financial resources 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 of the parties.'

The above authority clearly shows that a court shall consider all the circumstances of each case and the contribution each party has made to the family. The final decision of what percentage to award each party is left in the court's discretion after having taken in to account all the circumstances of the case.

The evidence indicated that the Appellant worked as a driver and the Respondent was employed as a Prisons officer where she had worked for 24 years by the year 2015. It is clear that the Respondent has been in gainful employment during the subsistence of the marriage and lived in the matrimonial home since 1994 where she has raised the child of the family born in 1996. Taking into account the circumstances of the case, I am of the view that the Respondent contributed to the welfare of the family by working throughout her marriage.

I am also of the view that the lower court did take into consideration, the Respondent's contribution to the family in deciding the quantum of the Respondent's share in the property.

For the reasons stated above I find that there is no merit in this appeal. I dismiss all the grounds accordingly. I confirm the lower court's holding that all the property be shared equally between the parties and the matrimonial home be sold and the proceeds shared equally between the parties.

I further **ORDER** that the Appellant shall bear the costs of the Respondent.

Delivered at Lusaka this day of 29th March 2017

N.A. Sharpe-Phiri
High Court Judge