

**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
Civil Jurisdiction**

2016/HK/684

IN THE MATTER OF:

AND

IN THE MATTER OF:

**AN APPLICATION FOR A VESTING ORDER
IN RESPECT OF PLOT 1122/23, KABWE**

**SECTION 14 AND ORDER 30 RULE 11 OF
THE HIGH COURT RULES, CHAPTER 27 OF
THE LAWS OF ZAMBIA.**

BETWEEN:

MAUREEN MUYOBA

AND

GODWIN MUYOBA

APPLICANT

RESPONDENT

Before: Mrs. Justice C. B. Maka - Phiri

For the Applicant: Mr. M. Kapukutula, Legal Aid Counsel

**For the Respondent: Mr. M. Moonga of Messrs Tembo, Ngulube &
Associates**

J U D G M E N T

Legislation referred to:

1. Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia

Cases referred to:

1. Chibwe v. Chibwe 2001 Z.R 1
2. Mwiya v. Mwiya 1977 Z.R. 113
3. R V. University of Cambridge 1973, ALL ER 698
4. Isaac Tatameni Chali v. Liseli Mwalla 1995/97 Z.R 199

By originating summons dated 3rd November, 2016, the Applicant seeks the following reliefs:

- 1. A declaration that the Applicant is the rightful owner of Plot No. 1123 Ndola Road, Kabwe which was given to her by the Local Court from the properties the Applicant and the Respondent acquired during their subsistence of marriage.**

- 2. An order directing the Deputy Registrar to execute the assignment on behalf of the Respondent.**

The summons was pursuant to section 14 of the High Court Act and Order 30 Rule 11 of the High Court Rules. In support of the summons is an affidavit deposed by the Applicant.

The evidence as deposed to in the said affidavit is that the parties bought plots 1122 and 1123, Ndola Road, Kabwe during the subsistence of their marriage. The property at house number 1123 Ndola Road, Kabwe was re-registered in the children's names when problems heated up in their marriage culminating into divorce.

The Local Court at Chelstone shared the properties acquired by the parties during the subsistence of their marriage and house number 1123, Kabwe was awarded to the Applicant. The Certificate of Judgment from the Local Court was exhibited in the affidavit. That following the said Judgment the Applicant has on several occasions communicated to the Respondent to change the ownership of the said house from the children's names to her name but to no avail.

The Applicant now seeks the indulgence of the Court to grant her a vesting order to transfer the property into her name and that the Deputy Registrar should be allowed to execute the assignment.

In a further affidavit in support of originating summons for a vesting order dated 2nd March, 2017, the Applicant deposed that Plot number **1122** and **1123** are collectively referred to as Plot 1123 as they are in one wall fence and were acquired from the joint efforts of both parties. That on 6th September, 2016, the Respondent through his advocates, Messrs Tembo Ngulube and Associates authorized the registration of the property into the Applicant's name, but when the Applicant went to the Ministry of Lands to secure her interest, she was advised to obtain a vesting order from the High Court. The letter was shown as exhibit MM2.

The Applicant deposed further that the Respondent has since benefited from the Local Court Judgment as the Applicant's joint interest in farm known as Lot 32, Munyama, Kabwe, has been severed at the instance of the Respondent. It was contended that the Respondent has been evasive when it comes to the Applicant registering her interest in Plot number 1123 being the property where she has lived since 1982 and has been responsible for payment of rates and other incidental fees. The Applicant has since made numerous improvements to the property.

The Respondent filed an affidavit in opposition on 29th May, 2017. According to the said affidavit Plots number 1122 and 1123, Kabwe were bought out of a loan acquired by the Respondent alone and

not together with the Applicant. Further that the Respondent by way of Deed of Gift bequeathed Plot 1123, Kabwe to the children with the full knowledge and consent of the applicant. This was way before the matrimonial disputes ensued between the parties.

It was the Respondent's contention that since Plot 1123, Kabwe was bequeathed to the children prior to the dissolution of the marriage; the said property did not form part of the matrimonial property subject to property settlement. That it was therefore an error for the Local Court to grant the said property to the Applicant which decision was appealed against but the appeal was not prosecuted.

The Respondent deposed further that he was thus not the legal and beneficial owner of Plot 1123, Kabwe and cannot be said to have refused to comply with the Local Court Judgment in as far as executing documents relating to Plot 1123, Kabwe is concerned nor can the reliefs the Applicant seeks be made against him. It was deposed further that it would be unjust and against the rules of natural justice for the Court to make an order 'adverse to the legal and beneficial owners of Plot 1123, Kabwe without according them an opportunity to be heard.

Lastly, that Plots 1122 and 1123, Kabwe are two separate plots with two different Certificates of Title and the fact that they are in one wall fence does not entail that they are one plot. Further that the Respondent's advocates did not authorize the registration of Plot 1123, Kabwe in the Applicant's name but merely requested the

Ministry of Lands to cancel the Ex-parte Order staying execution of the Local Court Judgment pending appeal.

At the hearing of the matter, counsel for the Applicant informed the Court that he was relying on the affidavits in support of the originating summons. In addition, counsel submitted that it was common cause that the marriage between the parties was dissolved in November, 2002 and the Local Court made property settlement orders in which Plot 1123, Kabwe was given to the Applicant whilst Lot 32 Munyama, Kabwe was given to the Respondent who has since taken possession of it.

Counsel submitted that from 2002 to date, the Applicant has had difficulties to register her interest in the said the property on account that the Respondent has been uncooperative. Further that the property in question was matrimonial property and any attempts to transfer it into the children's names in a bid to avoid the Court apportioning the same cannot hold. This is because firstly, the Local Court adjudicated that the said property be given to the Applicant and secondly, the Court has powers to vest matrimonial property to another party at property settlement even if the other party transferred the ownership of the said property into the names of third parties. Counsel relied on the case of **Chibwe v. Chibwe**⁽¹⁾ in which the Supreme Court emphasized that the Courts must invoke the principles of equity and law concurrently.

Counsel submitted that in the **Chibwe case**⁽¹⁾, the Respondent had transferred some properties to a company both before and during

the divorce proceedings. The Court stated that the transfer of the property could not prevent the Court from making an equitable and fair order with regard to the property. Counsel argued that the transfer of Plot 1123, Kabwe, from the Respondent's into the children's name cannot prevent this Court from vesting the said property into the Applicant's name because the said transfer was done in 2002, being the same year that divorce proceedings were taken out.

Counsel further submitted that as can be seen from a letter exhibited as MM2, the Respondent through his counsel indicated that he had no problems with the Applicant registering her interest in Plot 1123, Kabwe. Further that Plots 1123 and 1122 are in one yard with the main house sitting at Plot 1123 whilst the borehole and water tank are on Plot 1122 making the two properties inseparable in terms of sustainability. It was Counsel's contention that the Local authority treats the said plots as one and the parties treated the two properties as one during the subsistence of their marriage. Counsel prayed that this Court may treat the two plots as one in the same way that the Local Court did when the said property was granted to the Applicant. Counsel prayed that the application to vest the said property to the Applicant be allowed.

On behalf of the Respondent, Mr. Moonga informed the Court that he was relying on the affidavit in opposition. In addition, counsel submitted that Plots 1123 and 1122 are two different plots sitting on two separate Certificates of Title with Plot 1122 in the Respondent's name whilst Plot 1123 is in the Respondent's

children's names. That to ask this Court to treat the two properties as one will be asking this Court to cancel the Certificate of Title relating to Plot 1122, Kabwe and yet no facts exist to warrant the cancellation of the said Certificate of Title. That to assert that a boundary wall surrounding the two properties and developments on both properties make it difficult for one to exist independent of the other are not sufficient reasons to warrant the cancellation of the Certificate of Title duly issued by the Ministry of Lands. Counsel prayed that this Court should treat the two properties as separate and that the dispute before Court relates to Plot 1123, Kabwe only.

With regard to Plot 1123, counsel submitted that the property was by way of deed of gift given to the Respondent's children before the dissolution of marriage. This is evident by the Certificate of Title issued in the Respondent's children's names. Counsel argued that the Applicant has failed to prove on the balance of probabilities that she did not consent to the said transfer of the property to the children and her assertions that she never consented should be treated as mere allegations.

Counsel argued that notwithstanding the Local Court ruling, granting the said property to the Applicant, the property did not form part of the matrimonial property which was subject of property settlement between the two parties.

Further that even if the property was matrimonial property, counsel urged the Court to be mindful that the marriage in question was governed by Lozi customary law and that according to the case of

Mwiya v. Mwiya⁽²⁾ a woman under Lozi customary law walks away with only personal effects and kitchen utensils. In the case in casu, the dispute is over real property which according to Lozi culture and traditions belongs to a man at divorce.

Counsel submitted further that this Court is not bound by the Local Court Judgment and neither can it be called upon to enforce the said Judgment. Counsel contended that the Respondent cannot be said to have been uncooperative with regard to the Applicant's quest to change ownership of property as the property in issue does not belong to him. Secondly that since the property does not belong to the Respondent, any order that this Court will make regarding the said property will have an effect on the legal and beneficial owners of the said property.

Counsel relied on the case of **R v. University of Cambridge**⁽³⁾ where it was held that no one ought to be condemned unheard. Counsel further relied on the case of **Isaac Tatameni Chali v. Liseli Mwala**⁽⁴⁾ where the Supreme Court pointed out that the Lower Court was legally and effectively precluded from considering the interests of non-parties. Thus to proceed to order that the property in issue be vested in the Applicant will be dealing with the interests of non-parties to these proceedings who are the children. Counsel prayed that the application should be dismissed.

In reply, Mr. Kapukutula submitted that the Applicant has shown proof that she was not consulted when the matrimonial property was transferred from the Respondent into the children's name

through the affidavit evidence on record and the Certificate of Judgment from Chelstone Local Court.

Counsel noted that the grant of Plot 1123, Kabwe to the Applicant by the Local Court had the effect of revoking the Certificate of Title issued without the approval of the Applicant who contributed to the acquisition of the house. Counsel further submitted that the Respondent's argument that the title in the property had passed from the Respondent to the children and as such this Court cannot grant a vesting order as the children were not heard, cannot be sustained as the Local Court considered the interest of both parties and deemed it fit to share the matrimonial property in the manner it did.

Counsel reiterated that in the case of **Chibwe v. Chibwe**⁽¹⁾, an attempt to transfer property was deemed to have no effect on property settlement and the Court was not precluded from making a just order in the face of evidence of a party trying to circumvent the wheels of justice. Counsel contended that the alleged transfer of the property from the Respondent to the children had no effect both on the Local Court and this Court which has to make a just and equitable order with regard to the said property.

Counsel argued that there was evidence that Plot 1123, Kabwe was a matrimonial house as the Applicant was staying at the said house even during divorce proceedings and as such the argument that children ought to be heard falls off. Counsel argued further that granting the vesting order will not amount to punishing anyone

before they are heard because the parties who were the subjects of the proceedings that vested the property in the Applicant have been heard.

Counsel submitted that the case of Isaac Tatameni Chali⁽⁴⁾ cited by the Respondent is distinguishable from this case because in that case, it was a non-party to proceedings who was considered by the Court. That the case in casu deals with matrimonial property and in such cases, it is the interest of the parties to the marriage that are considered.

Counsel insisted that there is a Local Court Judgment that vested the said property in the Applicant. That the Respondent invoked the transfer of the property without the consent of the Applicant and that though the Local Court has limited powers in land matters, its settlement order was in tandem with the Supreme Court decision in the case of Chibwe V. Chibwe⁽¹⁾.

Further that the Local Court settlement order has been religiously followed by the Respondent who has proceeded to register his interest in the farm at Munyama. It would thus be unfair for the Respondent to benefit from the said Local Court order and then on the other hand not allow the Applicant to enjoy the fruits of the said Judgment.

On the issue of Lozi customary law and the case of Mwiya v. Mwiya⁽²⁾, Counsel's response was that the Mwiya case⁽²⁾ has no place in modern society as such customs are repugnant to good

conscious. That it is because of such cases that the Supreme Court in the case of **Chibwe v. Chibwe**⁽¹⁾ emphasized that the Courts must invoke principles of equity and law concurrently and that to allow the Respondent's argument that women must just get clothes after divorce is tantamount to confining our civilized society to the realm of primitivity. That what the Applicant is seeking is for the Court to vest property which was given to her at the time when the marriage was dissolved.

Lastly, counsel submitted that though Plots 1122 and 1123 are on separate Certificates of Title, the parties treated them as one and this explains why the matrimonial property was on one Plot and water facilities on the other Plot. Counsel prayed that the Applicant who is in occupation of the property should be granted the entire property and this Court should vest Plots 1122 and 1123 into her names.

I have considered the affidavit evidence adduced in this matter together with the documents attached thereto. I have also considered the spirited submissions by Counsel representing both parties. The law that the Applicant relied upon in seeking a vesting order is section 14 of the High Court Act which reads as follows:

"14. Where any person rejects or refuses to comply with a Judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other documents shall be executed or that the negotiable instrument shall be endorsed by such person as the

Court may nominate for that purpose, and a conveyance, contract document or instrument so executed shall operate and be for all purposes available as if it has been executed or endorsed by the person originally directed to execute or endorse it.”

It is clear from the cited section that this Court has discretionary powers to nominate a person to execute conveyance or contract documents where persons who are supposed to execute the said documents neglect to do so. The paramount consideration when the Court is faced with such an application is what would be just in the circumstances of the case. A vesting order therefore results from a finding that the fairness of the case demands that the Court acts in such a way as to transfer property from one party to another. The Applicant in this case has asked this Court to direct the Deputy Registrar to execute the assignment on behalf of the Respondent. That is after the Court makes a declaration as to ownership of property at Plot number 1123, Ndola Road, Kabwe. This Court has therefore powers to grant a vesting order that the Applicant seeks.

From the evidence on record, it is not in dispute that the parties in this matter were husband and wife and were duly divorced at Chelstone Local Court on 1st November, 2002. It is further not in dispute that upon dissolution of marriage, the Local Court made property settlement orders. The Certificate of Judgment issued by Chelstone Local Court exhibited in the Applicant's affidavit in support shows that the Applicant was given house number 1123, Kabwe where she was residing and all that was in the house whilst the Respondent was given the farm and everything on it. The Local Court also revoked the Certificate of Title for house number, 1123,

Kabwe, which it found to have been obtained without the approval of the Applicant who contributed to the acquisition of the house.

I have not found anything from the said Local Court Judgment to support the applicant's submission that the Local Court treated Plots 1122 and 1123, Kabwe as one. It is evident that the Applicant was only granted one property being house no. 1123, Kabwe and the subject of this application. The Applicant's submission that this Court should treat Plots 1122 and 1123, Kabwe as one on account that the parties as well as the Local authority considered the two plots as one cannot be sustained because the Applicant was given Plot 1123 which property is distinct from Plot 1122, Kabwe. The two properties as the evidence shows are on separate titles and should be treated as such. It should be noted that this matter is not an appeal against the Local Court Judgment for me to set aside or alter the Local Court Judgment. I do not therefore agree with the Applicant's view that because the two plots are in one boundary wall they should be treated as one.

It is further not in dispute that the Respondent has since secured his interest in the farm that he was granted by the Local Court. The Respondent relied on the Local Court Judgment alluded to above to secure his interest in the farm also known as Lot No. 32, Munyama, Kabwe. The statement of claim under cause **2016/HP/725** between **Godwin Nicholas Muyoba and Maureen Inonge Muyoba** shown in the Applicant's further affidavit in support has not been disputed by the Respondent and the averments therein show that the Respondent sought to sever the Applicant's interest in the Farm.

The Applicant has on the other hand not registered her interest in Plot/house number 1123, Kabwe which she was given by the Local Court and alleges that she has encountered resistant from the Respondent in her efforts to do so.

It should be noted that the Respondent had appealed against the said Local Court Judgment but the appeal was dismissed for want of prosecution. It is therefore insidious for the Respondent to bring up the issue of an appeal against the local Judgment when he knows very well what became of the said appeal. In any case, the Respondent has enforced the Local Court Judgment in so far as his interests are concerned and the issue of their having been an appeal once upon a time is irrelevant to this case. I find the Respondent's frantic endeavors to preclude the Applicant from benefiting from the Local Court Judgment when he himself is enjoying the fruits of the said Judgment to be highly appalling and a reflection of inconceivable selfishness in man. It should be emphasized that the position as it stands is that the Local Court Judgment has not been reversed by any higher Court and as such it remains in force.

It is further incontrovertible that the Certificate of Title for house number 1123, Kabwe is in the names of the Respondent's children. The Respondent's argument is that he bequeathed Plot number 1123, Kabwe by way of gift to his children way before the matrimonial disputes ensued and with the Applicants full consent and knowledge. The Applicant has denied the Respondent's assertion and rightly so. I have looked at the Certificate of Title in

issue and note that it is dated 4th March, 2002. What this means is that at the time of the parties' divorce proceedings in the Local Court on 1st November, 2002, the Certificate of Title was already in the Respondent's children's names. It is clear that this fact was brought to the attention of the Local Court which went ahead and granted the property to the Applicant.

The Respondent's submissions insinuating that the Local Court erred when it granted the property to the applicant because the property was not matrimonial property at the time of divorce and the Respondent had changed ownership from his name to that of his children cannot be sustained. This is on account that the application before me is neither an appeal nor review of the Local Court Judgment and as already alluded to the Local Court order has not been assailed by any higher Court. Suffice to note that the position of the law on property adjustment after divorce is settled in this country following the landmark case of **Chibwe vs. Chibwe**⁽¹⁾. The Courts will not tolerate any kind of shrewdness when it comes to property settlement and any change of ownership of property solely intended to deprive one party upon dissolution of marriage will have no effect on property settlement proceedings.

It is preposterous for the Respondent's counsel to argue that according to Lozi customary law a woman will simply walk away with clothes and kitchen utensils at divorce as real property belongs to men. Such submissions are in my considered view dangerous and should not be supported as they have the effect of taking this country backwards and reversing strides made in the emancipation

of women from the bondage of such repugnant cultural practices and customary laws. The holding in the **Mwiya case** should be contextualized to avoid misleading the Court. The holding that there is no Lozi custom which compels a husband to share property after divorce did not in any way suggest that real property should not be shared at divorce as it belongs to the man. It should be noted that customs evolve and customs which are repugnant to good conscious and natural Justice have no place in modern society.

It is not in dispute that on 6th September, 2016, the Respondent, through his counsel, Mr. Moonga, wrote to the Chief Registrar at the Ministry of Lands, requesting for cancellation of entry number 11 from the Land Registrar relating to house number 1123, Kabwe. I have read the said letter and have digested the contents therein. I am startled that the Respondent could depose in his affidavit that his advocates did not authorize the registration of plot 1123, Kabwe, in the Applicant's name as the letter was merely a request to cancel the Ex-parte order staying execution pending appeal. For avoidance of doubt, the letter reads in part as follows:

“.....Madam Maureen Muyoba now wishes to have the Local Court judgment executed by transferring the subject property into her name, however owing to the nature of the document aforesaid which was erroneously registered against the subject property, it appears that the said documents prohibit any further transactions on the said property. Our writing therefore is to request your good office to cancel entry number 11 on the Land Register relating to house number 1123, Kabwe so as to enable Madam Maureen Muyoba to proceed as aforesaid.”

With the said letter, I find no justification as to why the Respondent would now vehemently oppose the application which seeks to register the property into the Applicant's name. My only conclusion is that the opposition is an afterthought and an attempt to perpetuate an injustice towards the Applicant.

It should be noted that both parties submitted extensively on the acquisition of the property in issue and the ownership. The Respondent claimed that he acquired the property alone to the exclusion of the Applicant. The Applicant on the other hand attests that she contributed to the acquisition of the property through a mortgage. These submissions are in my considered view tantamount to a storm in a cup of tea. The submissions are highly misplaced because the application before me is not for property settlement as that was done by the Local Court. The application before me is for a vesting order and all the Applicant needs to show is that she has an interest in the property to justify the grant of the order.

On the facts of this case, I am satisfied that the Applicant is the rightful owner of Plot No. 1123, Kabwe which she was given by the Local Court following the dissolution of marriage. The Applicant has been in occupation of the house since 2002 and it is within her rights that she has the property which was granted to her after divorce registered in her name. I do not agree with the Respondent's submission that making a vesting order will affect the interests of the legal and beneficial owners of the property on account that the property in issue was given to the Applicant by a competent Court

after duly considering the circumstances of the case. The said purported legal owners should have challenged the Local Court Judgment if they so wished but have not done so from 2002 to date. It is common knowledge that the purported transfer of the property from the Respondent's into his children's name was solely intended to deprive the Applicant of her interest in the property which was acquired during the subsistence of the marriage between the parties.

With the foregoing, I am satisfied that the application has merit and it is hereby granted. I accordingly order that the Deputy Registrar shall execute all conveyance documents relating to Plot 1123, Kabwe. I have awarded costs to the Applicant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in Chambers at Kitwe; this **1st day of March, 2018.**



MRS. C. B. MAKA - PHIRI
HIGH COURT JUDGE