

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2019/HP/A037

BETWEEN:

GRACE BANDA

AND

RODGERS MAPULANGA



APPELLANT

RESPONDENT

**Before the Hon. Mrs. Justice R. Chibbabbuka on the 17th day of
March, 2020**

For the Appellant: Mr B. Ngalasi, Messrs Nkusuwila Nachalwe
Advocates

For the Respondent: Mr A.K Longwe & Mr I Mulubwa, Messrs
Legal Aid Board

JUDGMENT

Cases referred to:

1. *Ann P. Nkhoma vs Smart Nkhoma* [2004] ZMHC 1 (6 March 2004).
2. *Union Gold (Zambia) Limited vs Attorney General*, SCZ Judgment No. 14/2016.
3. *Attorney General, Commissioner of Lands and two others vs Ambex Clothing Manufacturing Limited*, Appeal No. 134/2013.
4. *Crosland Mutinta and another vs Donovan Chipanda*, Selected Judgment No. 53 of 2018.
5. *Aristogerasimos Vangelatos and another vs Metro Investments Limited and Others*, SCZ Selected Judgment No. 35 of 2016.

6. *Elias Tembo vs Sichembe and two others* SCZ/8/141/2014.
7. *ZCCM Investment Holdings PLC vs Mufakili and others* Appeal No. 238/2013.
8. *Mususu Kalenga Building and Others vs Richman's Money Lender's Enterprises* (1999) Z.R 27.
9. *Avondale Housing Project Limited* (1982) Z.R 170 (S.C).
10. *Marcus Kampumba Achiume* (1983) Z.R 1 (S.C).

Legislation referred to:

The High Court Act, Chapter 27 of the Laws of Zambia
The Lands Tribunal Act No. 39 of 2010
The Constitution of Zambia Act No. 2 of 2016 in Article 134

Other works referred to:

Rayden and Jackson's Law and Practice in Divorce and Family Matters, D.M Booth, N. Wall, G.J Maple, A.K Biggs, Volume 1, Sixteenth Edition, Butterworths, London, 1991

This is an appeal against the Judgment of the Subordinate Court sitting at Lusaka and delivered on the 21st March, 2019. In the court below, the appellant was the defendant while the respondent was the plaintiff.

The appellant has raised four grounds of appeal as follows:

1. That the Honourable Magistrate misdirected herself in fact and in law when she entered judgment against the defendant for property settlement in the face of evidence that the plaintiff and the defendant are married at law and that proceedings for divorce are pending in the Local Court.
2. That the Honourable Magistrate misdirected herself in law and in fact when she granted ownership of the real property being Stand No. 7A/25 Matero in total disregard of the Certificate of Title in the name of the defendant.

3. That the Honourable Magistrate misdirected herself in law and in fact when she declared the plaintiff as the owner of the property in question effectively cancelling the defendant's Certificate of Title a jurisdiction of the Lands Tribunal and the High Court only.
4. That the Honourable Magistrate misdirected herself when she proceeded to deliver Judgment without hearing the defendant when the record showed that no Notice of hearing was issued by the court, but merely relied on the plaintiff's assertion that he had served the defendant in the absence of an Affidavit of Service for any of the dates alleged to have been skipped by the defendant.

The appellant filed into Court supporting heads of arguments on the 19th November, 2019 and argued grounds one and four separately while grounds two and three were argued together. The gist of the appellants' heads of arguments is as follows:

In relation to ground one, the Court below found as a fact that the appellant was married to the respondent and that the property in question was acquired prior to the marriage. Further the Court below found without any proof from the respondent that the marriage between the appellant and the respondent had been dissolved. Counsel pointed out that the principal claim in the Court below was an order for property settlement. Counsel contended that the issue of property settlement is a preserve of the Court hearing the dissolution of a marriage unless the same goes

to a higher and Court of competent jurisdiction on appeal or on referral. Counsel stated further that the finding of fact by the Court below was based on misinformation by the respondent as the respondent never produced any evidence on which a competent Court would make such a finding of fact. Counsel went on to explain that the said property is on title in the appellant's name and that the respondent has never had any proof to show otherwise as he would have availed the same to the Court below. Counsel argued further that the respondent willfully concealed the fact that the parties have a pending suit for dissolution of marriage in the Matero Local Court wherein the appellant petitioned the respondent for divorce under cause No. CR/2916/2004 which matter is yet to be heard and determined by the said Local Court.

It was counsel's considered view that before the Court felt safe to order property settlement, it should have requested for evidence from the respondent to prove that actually the marriage was dissolved in accordance with the law. Counsel submitted further that the Court below should have inquired if at all, the issues of dissolution of marriage and property settlement were ever attempted to be resolved by any Local Court which is the Court of competent jurisdiction in customary marriages in Zambia. The Court was referred to the case of **Ann P. Nkhoma vs Smart Nkhoma**¹ which is instructive as to when a Subordinate Court can exercise its supervisory jurisdiction in matters arising from a customary law marriage. Counsel explained that in that case the applicant and the respondent were married under customary law

and their marriage was dissolved by the Local Court. After the dissolution of the marriage, the applicant sought a declaration that after divorce she is legally entitled to an equal share of the matrimonial property acquired during the subsistence of the marriage. Counsel went on to cite what the Court held in that case as follows:

- “2. *When a matter has been transferred from a local court to a subordinate court, the parties in that case do not lose the right to have their case dealt with according to their customary law.*

4. *Since the applicants case has not come to the High Court by way of appeal or order of transfer, and the fact that the parties in this case were married under customary law and the marriage was dissolved in a local court, the High Court has no jurisdiction over the proceedings because the law applicable in the High Court is the English divorce law and not the customary law of the parties.*

Counsel argued further that the record will show that the respondent commenced the matter in the Subordinate Court by way of a Writ of Summons and not by way of an appeal or transfer from the Local Court. It was counsel's contention that in the circumstances the Subordinate Court did not have the requisite jurisdiction to hear and determine a matter on property settlement as that is primarily the preserve of the Local Court as it relates to marriages contracted under customary law more so that the marriage has never been dissolved and is pending in the Local Court.

In relation to grounds two and three, counsel submitted that save for the jurisdiction of the High Court as enshrined in the *Constitution of Zambia* as amended by *Act No. 2 of 2016* in *Article 134 (a)* the jurisdiction to hear and determine land disputes vests in the Lands Tribunal pursuant to *Lands Tribunal Act No. 39 of 2010*. The Court was also referred to the cases of **Union Gold (Zambia) Limited vs Attorney General**² and **Attorney General, Commissioner of Lands and two others vs Ambex Clothing Manufacturing Limited**³ for the argument that the High Court's jurisdiction is not ousted by the Lands Tribunal in land matters. Counsel went on to point out that the only law close to giving authority to the Subordinate Court to deal with land matters is *section 23 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia* which provides that:

"If, in any civil cause or matter before a Subordinate Court, the title to any land is disputed, or the question of the ownership thereto arises, the Court may adjudicate thereon, if all parties interested consent; but, if they do not all consent, the presiding magistrate shall apply to the High Court to transfer such cause or matter to itself."

Counsel contended that from the above section, it is a legal requirement that consent of the parties concerned should be obtained if the Subordinate Court is to have the requisite jurisdiction to hear and determine a land dispute. The Court was referred to the case of **Crosland Mutinta and another vs Donovan Chipanda**⁴ where the Supreme Court held that in the absence of express consent

by all parties, the Subordinate Court does not have jurisdiction to hear and determine a matter on land. Counsel went on to point out that the Supreme Court in the **Crosland Mutinta** case referred to the case of **Aristogerasimos Vangelatos and another vs Metro Investments Limited and Others**⁵ where it held that:

"...the absence of jurisdiction nullifies whatever decision follows from such proceedings."

Learned counsel argued that in the **Vangelatos** case the court annulled the judgment of the trial magistrate for want of jurisdiction and stated that the court proceedings from which it arose were null and void. Counsel went on to argue that based on these authorities a decision of a court which purports to exercise a jurisdiction that it does not have amounts to nothing as per the Latin maxim *ex nihilo nihil fit* (from nothing nothing comes).

Counsel reiterated his contention that the court below erred in deciding on the ownership of the property as it was on title against a certificate of title holder and in so doing in effect cancelled a valid certificate of title without the requisite jurisdiction. Counsel argued further that the court below erroneously found as a fact that the marriage between the parties had been dissolved and that the property in question belonged to the respondent who had bought it before the parties got married. It was counsel's considered view that the court below found that the property in question was not subject of property settlement but that the respondent was merely claiming ownership from a 'stranger' to the property. Counsel opined that the court below

assumed that this removed the property from the realm of matrimonial property to the realm of a claim of right and possession, which claim was not supported by any pleading and as such was disputed. Counsel submitted that the net effect of this is that the Subordinate Court did not have the requisite jurisdiction to hear and determine ownership of the land as a court of first instance.

Counsel surmised grounds one, two and three by stating that the court below fell into grave error to cloth itself with the jurisdiction that it did not have to hear a property settlement matter as court of first instance. Counsel argued that it was also an error for the lower court to render a judgment relating to land with the effect of cancellation of a certificate of title without the requisite jurisdiction as required by the *Subordinate Court Act*. Counsel contended that the as such the proceedings and the judgment of the court below should be found to be a nullity for want of jurisdiction.

In arguing ground four, counsel argued that should this court find that the court below had jurisdiction to adjudicate on a land matter without having obtained the consent of the parties, then this court should stay the Judgment so as to allow the appellant a chance to be heard on the merit. Counsel contended that it is trite law that a judgment obtained by a party in a case where the other party has not been given an opportunity to be heard should not stand and that such judgment should be set aside. The court was referred to *Order 35 Rule 5* of the *High Court Act, Chapter 27* of the *Laws of Zambia* which provides that:

“Any judgment obtained against any party in the absence of such party may, on sufficient cause shown be set aside by the Court, upon such terms as may seem fit.”

Counsel also referred this court to the case of **Elias Tembo vs Sichembe and two others**⁶ where Judge Hamaundu in delivering the Judgment of the Supreme Court stated and held as follows:

“In support of those arguments we were referred to cases such as Zambia Revenue Authority v Jayesh Shah, where we said that cases should be decided on their substance and merit: and the case of RDS Investments Limited v Moon Jelly Joseph, where we reiterated what we have said in a number of cases that any judgment not on the merits is liable to be set aside.....a judgment that is obtained in the absence of a party may be liable to be set aside and that when dealing with applications to set aside such a judgment, the overriding concern is that matters should be decided on their substance and merit.....we have again held on numerous occasions that when dealing with applications to set aside such a judgment, the overriding concern is that matters should be decided on their substance and merit. We said for example in RDS Investment Limited vs Moon Jelly, Ouseph Joseph that hearing a matter on the merit means that both sides must be heard.”

Counsel argued that although the court below lamented that neither the appellant nor her advocates appeared on the days the

matter was called, the said court failed to notice that no Notice of Hearing was ever issued by the Court save for the date that was verbally given to the respondent who neither informed the appellant of the same nor filed any affidavit of service to show proof of service.

Counsel contended that in the absence of proof of service of the date of hearing on the appellant by the respondent, the lower court was not on firm ground to proceed to enter judgment and therefore its judgment was delivered contrary to the rules of justice and fairness and must not stand and should therefore be set aside.

The respondent did not file into court any heads of arguments or submissions despite applying to this court and being granted leave to do so.

At the hearing on the 17th March, 2020, counsel for the appellant relied on their heads of arguments which arguments I will not repeat as they are essentially the same save for some points highlighted in ground four.

In arguing ground four, counsel contended that the record will show that the appellant had the intention to defend the matter and that on the first two sittings the appellant and her counsel were present. On the subsequent sittings of whose dates were only given to the respondent, neither the appellant, nor her counsel were present. Counsel argued that the rules of court are very clear that where a court has given a date in the presence of a party, such party must serve the other and must file an affidavit of service to show the

court that the other party was actually aware of the return date. Counsel went on to point out that the record will show that the court below never inquired as to whether the appellant herein was served with any of the material dates in this matter. Counsel concluded ground four by more or less repeating his written arguments.

Counsel prayed that this court grants the appeal together with the reliefs sought and costs.

In opposing this appeal counsel Longwe indicated that he would be arguing grounds two and three together while grounds one and four would be argued independently.

In response to ground one counsel argued that the issues raised therein should have been brought to the attention of the court below at trial. Counsel submitted that it was too late in the day for the appellant to raise the issue of divorce proceedings before the Local Court as a basis for challenging the decision of the lower court when the appellant had ample time to raise those issues at trial and also challenge the respondent's evidence on whether or not their marriage had been dissolved. Counsel argued that as the record will show it was the respondent's evidence in the court below that the bride price was returned to his family members while he was incarcerated and considering that this marriage was not a statutory marriage it was counsel's considered view that traditionally this marriage was dissolved.

Counsel Mulubwa argued that the Subordinate Court is a court of record and the proceedings therein are also taken down and noted by the court hearing the matter. Counsel argued further that it is a notable fact that the appellants' counsel was also the same counsel seized with conduct of the matter in the court below and was therefore alive to the proceedings of the court. Counsel pointed out that on the 9th August, 2018 it is on record that counsel for the appellant appeared before the court and also filed a Notice of Appointment as Advocates in the matter. Further that on the 4th October, 2018 when counsel for the appellant was present he heard the witnesses that were present to the extent of cross-examining them and that at the close of the respondent's case the court made a pronouncement as to when the matter would come up next as is reflected on pages 17-18 of the record of appeal. Counsel went on to argue that when the matter came up for hearing on the 3rd January, 2019 the Clerk of Court informed the court that defence counsel had called and proposed the 24th January, 2019 for continued hearing of the matter and it was accordingly adjourned. Counsel pointed out that from there, there were two subsequent adjournments given on account of counsel for the appellant not being present as is reflected on page 19 of the record of appeal. Counsel went on to add that on the 7th March, 2019 as is reflected at page 20 of the record of appeal, the court took note of the absence of both the appellant and her counsel and since the respondent had closed his case proceeded with judgment.

It was counsel's considered view that if the appellant had raised the issue in ground one of the appeal as a preliminary issue in the court below, the said court would have properly dealt with such an issue and as such it was too late in the day for the appellant to raise such an issue now. Counsel opined that by the appellant's conduct, it was a clear demonstration that the appellant sat on her right to raise the issue that she now raised in ground one and accordingly this ground should be quashed.

In relation to grounds two and three, counsel Longwe argued that the appellant had the opportunity to participate in the proceedings in the court below wherein evidence relating to the certificate of title should have been brought to court. Counsel pointed out that it was during the period that the respondent was incarcerated that the appellant obtained a title to the said property. It was counsel's considered view that to argue that the court below did not have jurisdiction to determine land on title should have been a question which could have been challenged at trial as both the appellant and her counsel were present when the witnesses testified. Counsel argued further that during trial the issue regarding when the said plot was bought was not challenged and neither was the issue of whether or not both the appellant and the respondent were married at the time of the purchase of the plot. Counsel contended that the certificate of title is not a document that was brought to the attention of the court for the court to have sight as to whose name reflects on the said certificate of title. Counsel surmised on this point that by the appellant's failure to challenge the purchase of the said

plot and the house built thereon, it clearly demonstrates that she concedes that the said property did in fact belong to the respondent and accordingly grounds two and three should be quashed.

In arguing ground four, counsel Longwe pointed out that although a claim has been made by the appellant with regard to lack of sufficient service of the Notices of hearing by the respondent, the record shows that counsel for the appellant had been present for the proceedings. Counsel argued that counsel for the appellant has a duty to his client to follow up on matters that they are seized with conduct and that this duty can be discharged by conducting a search on the record. Counsel went on to argue that no mention has been made either in the proceedings in the court below or indeed by counsel for the appellant on whether or not this duty was discharged. It was counsel's considered view that the argument that no affidavit of service was filed was unsubstantiated but rather there was a dereliction of duty and in that regard ground four should equally be quashed for lack of merit.

Counsel prayed that the whole appeal be dismissed with costs against the appellants' counsel owing to their failure to discharge their duty owed to their client.

In reply counsel for the appellant argued that page 17 of the record of appeal shows that when the matter came up for hearing on the 25th October, 2018 counsel for the appellant and the appellant herself were present and that it was evident from that date that the respondent had not closed his case. On this date the respondent

applied for an adjournment as his witness was not before court and therefore he could not proceed. Counsel contended that the appellant did not object to this application and the matter was adjourned to the 15th November, 2018 for continued hearing of the case. Counsel argued further that contrary to the submission by the respondent, this was the last time that the court sat in the presence of both parties and subsequently the date that was issued was not convenient as it was issued during the period of Michealmas and counsel for the appellant was on a break. Counsel contended that therefore it was incorrect for the respondent's counsel to state before this court that at the time the matter was being adjourned the respondent had actually closed his case. Counsel referred the court to page 20 of the record of appeal and argued that the position as observed by the court on the 21st February, 2019 was not true and remains as such. Counsel contended that to state the appellant ignored to prosecute her matter is not true when the record is clear that at the time counsel was on a break and the subsequent dates were only given to the respondent. Counsel submitted that in the absence of proof that the respondent had served the appellant or her counsel with the return date given by the court, it is an assault to justice as the appellant was never given an opportunity to explain her case. It was counsel's considered view that the court has a duty to ensure that justice is not only done but that justice is seen to be done. Counsel opined that in this case it was clear that the appellant did not have her day in court to state her case clearly and as such

justice will not be served if the judgment of the court below is upheld in this matter.

Counsel went on to ask this Court to take judicial notice of the proceedings that are before the Local Court on the divorce of the parties and the challenge of the property settlement. Counsel argued that the respondent should know by now that by the nature of the proceedings in the Subordinate Court there is no discovery and inspection and as such the appellant had no opportunity to avail the court below with the requisite certificate of title and the proceedings of the divorce which are before the Local Court in Matero.

In response to the argument that the issue of jurisdiction should have been raised in the court below, counsel for the appellant contended that the law is very clear as was set out in the case of **ZCCM Investment Holdings PLC vs Mufakili and others**⁷ as according to that case, the legal position that an issue not raised before a trial court cannot be raised for the first time on appeal does not apply where the issue is one questioning the very authenticity or jurisdiction of the court to have heard the matter in the first place, this is because in the absence of jurisdiction, the ensuing decision is a complete nullity and no appeal can lie against it on the merit.

Counsel pointed out that neither of the respondent's counsel had directed this court to any legal provision or any part of the record of appeal to show that the court below had the requisite jurisdiction in this matter. It was counsel's considered view that the court below did not have the requisite jurisdiction and therefore this court should

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as although it is trite that matters not raised in the court below, cannot be raised on appeal as pronounced in the case of **Mususu Kalenga Building and Others vs Richman's Money Lender's Enterprises**^s in relation to matters of jurisdiction however, it has been held in the more recent Supreme Court case of **ZCCM Investment Holdings Plc vs Mufakili and others** cited by counsel for the appellant that the issue of jurisdiction is a substantive issue. The said **ZCCM** case goes on to guide that the legal position that an issue not raised before a trial court cannot be raised for the first time on appeal, does not apply where the issue is one questioning the very authority or jurisdiction of the court to have heard the matter, in the first place, for in the absence of jurisdiction to hear a matter, the ensuing decision is a complete nullity and no appeal can lie against it on the merits.

Accordingly the argument raised by counsel for the respondents' in grounds one, two and three that it is too late in the day to raise issues of lack of jurisdiction cannot stand in view of the position in the **ZCCM Investment Holdings** case.

Turning now to the arguments, in ground one, learned counsel for the appellant argued that the lower court found as a fact that the appellant was married to the respondent and that the property in question was acquired prior to the marriage. Counsel also argued that the court below found as a fact that the marriage between the appellant and the respondent had been dissolved. It was counsel's contention that the respondent had willfully concealed the fact that

the parties have a pending suit for dissolution of marriage in the Matero Local Court under Cause No. CR/2916/2004, which is yet to be determined by the Local Court. Counsel argued that the finding of facts by the court below was based on misinformation as the respondent never produced evidence on which a competent court would make such a finding of fact.

Counsel argued further that the principle claim in the court below was property settlement which is a preserve of the court hearing a dissolution of marriage unless the same goes to a higher court of competent jurisdiction on appeal or by way of transfer. It was counsel's considered view that before the lower court felt safe to order property settlement, it should have requested for evidence from the respondent to prove that actually the marriage was dissolved in accordance with the law in the Local Court as it is the court of competent jurisdiction in customary marriages in Zambia.

It is trite that an appellate court will not interfere with findings of fact of a trial court unless the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts as was held in the cases of **Avondale Housing Project Limited**⁹ and **Marcus Kampumba Achiume**¹⁰. It is apparent in this case that the findings of fact that were made by the lower court were perverse as the court had not established that a decree of divorce had been granted by the Local Court for it to adjudicate on the issue of property settlement and will need to be interfered with. At this juncture though, the court takes note that

the appellant requested this court to take Judicial Notice of there being an action between the parties in the Matero Local Court bearing Cause No. CR/2916/2004. In response to this request this court declines to take Judicial Notice as requested as clearly this is not a notorious fact and it needed to have been substantiated with evidence, which it was not.

Having said that, it is also trite, that in matrimonial proceedings, claims for property adjustment or property settlement are ancillary reliefs. In other words, the claim of property adjustment or settlement in matrimonial proceedings is predicated upon a substantive cause of action. The learned authors of **Rayden and Jackson on Divorce and Family Matters, Sixteenth Edition** explain at page 546 as follows:

“The power to make financial provision and property adjustment arises on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter. There is thus no jurisdiction, even with consent, to make such orders before decree nisi in the case of divorce.”

A perusal of the writ of summons that was filed in the court below on the 4th July, 2018 reveals the claims that were sought by the respondent as being:

“1. Property settlement of matrimonial property known as House No. 07A/25 Matero, Lusaka.

2. Damages for the inconvenience Plaintiff has suffered due to Defendant's actions.
3. An order for an interim injunction restraining the Defendant, her agents, servants, relatives or whosoever from interfering with plaintiff's quiet enjoyment of the said property being House No. 07A/25 Matero, Lusaka until full and final determination of this matter on its merits.
4. Costs and incidentals to these proceedings.
5. Any other relief the court may deem fit."

Upon examination of these claims, the lower Court should have alerted itself to the requirement of there being an Order pronouncing a divorce between the two parties from the Local Court and as there was none did not have the requisite jurisdiction to proceed to adjudicate on the matter. Further the action of the lower court to hear the respondent's evidence and accept that the parties had since divorced by way of the appellant having returned the lobola to the respondent's family was a misdirection as it did not have jurisdiction to adjudicate over a matter relating to property settlement without there being evidence of an order for divorce by the Local Court.

Similarly, counsel for the respondent also argued that it was the respondent's evidence that the bride price was returned to his family while he was incarcerated and considering that this marriage was not a statutory marriage, traditionally this marriage is dissolved. By implication, counsel for the respondent has indicated that there was no need for the respondent to obtain a formal order for divorce from

the courts as the same was already in effect. This in my considered view is a departure from the current position with regard to the law as already alluded to above in **Rayden and Jackson on Divorce and Family matters** and accordingly counsel's view cannot stand. Moreover, it is trite that for parties that have been married under customary law there is a requirement to obtain a divorce order from the Local Court which is the first court of instance clothed with jurisdiction in this regard. To buttress this position, the proviso to *section 20 (1) of the Subordinate Court Act Chapter 28 of the Laws of Zambia* makes it categorically clear that no Subordinate Court has jurisdiction in respect of any suit or matter concerning the validity or dissolution of any marriage, other than a polygamous marriage under African Customary Law which can be dealt with by a Subordinate Court Class III.

Consequently in interfering with the finding of the court below, I find that the parties are not yet divorced as there has been no formal order of divorce decreed by a local court to that effect.

Further under ground one, counsel for the appellant also argued that the cause of action in the court below was commenced by way of a writ of summons as opposed to an appeal or transfer from the Local Court. Counsel argued that in those circumstances the Subordinate Court did not have the requisite jurisdiction to hear and determine a matter on property settlement as that is primarily the preserve of the Local Court as it relates to marriages contracted

under customary law. In agreeing with counsel's view, the Subordinate Court as already indicated in the proviso to *section 20 (1)* of the *Subordinate Court Act* above does not have jurisdiction as a court of first instance to deal with matters relating to the validity or dissolution of any marriage save for when the matter has been transferred to it or brought to it by way of an appeal from the Local Court.

Ground one therefore succeeds to the extent that the lower court did not have jurisdiction which is a substantive issue, to adjudicate over a property settlement claim without there being evidence of an order for divorce, from the Local Court.

In relation to grounds two and three that address the issue of the jurisdiction of the lower court to deal with property settlement, counsel for the appellant has argued that the jurisdiction to hear and determine land disputes vests in the Lands Tribunal and the High Court for Zambia. Counsel went on to argue under these grounds that the Subordinate Court is only clothed with jurisdiction to hear and determine land disputes when the parties to a matter so consent as provided under *section 23* of the *Subordinate Court Act*.

The salient point that has been missed in this line of argument under these two grounds is that the nature of the relief sought pertains to property settlement emanating from matrimonial proceedings particularly where African customary law is applicable which jurisdiction the Subordinate Court is vested with when dealing with a matter on transfer or on appeal to it, as per *section 16* of the

Subordinate Court Act. Section 16 of the Subordinate Court Act provides as follows:

(16) Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law:

The Supreme Court case of **Crosland Mutinta** cited by counsel for the appellant is as such not applicable in this case. The position

is as covered under ground one being that the issue in contention is property settlement arising out of matrimonial proceedings which both the Local Court and Subordinate Court have jurisdiction to adjudicate upon; the Local Court as a court of first instance while the Subordinate Court's jurisdiction is subject to there having being an Order for divorce from the Local Court or the matter being transferred or brought on appeal to it from the Local Court. Similarly the lines of argument as canvassed by the respondents under grounds two and three that the appellants arguments to challenge the ownership of the property was not an issue brought before the lower court cannot stand as already alluded to above.

In that event grounds two and three fail for lack of merit, on the basis of a misconstruction by the appellant, on the nature of the claim before the lower court.

Turning now to ground four, counsel for the appellants has basically argued that the appellant was denied an opportunity to be heard as the lower court proceeded to render judgment without the appellant being heard on her evidence. Counsel for the respondents argued with force that there was dereliction of duty on the part of counsel for the appellant as the record will show.

I have gone through the proceedings in the court below and find that indeed the lower court did adjourn this matter at least four times on account of the absence of the appellant and her advocates. On the 25th October, 2018 both parties were present and the respondent indicated that he had one more witness to call and the matter was

adjourned to the 15th November, 2018. On the 15th November, 2018 the respondent was present but the appellant and her legal counsel were not present. The court adjourned the matter to the 3rd January, 2019. On the 3rd January, 2019 the respondent was present and yet again the appellant and her counsel were both not present. At this sitting however, the court was informed by the Clerk of Court that counsel for the appellant had called to request that the matter be adjourned as they were still on break and proposed that the matter be allocated 24th January, 2019 for continued hearing and the matter was accordingly adjourned to that date. On the 24th January, 2019 the respondent was present but the appellant and her counsel were not present and the respondent indicated that he would not be calling any other witnesses. The Court at this point stated as follows:

“Since defendant is not before court, I will give her a benefit of doubt and adjourn this matter.”

The matter was accordingly adjourned to the 7th March, 2019. On the 7th March, 2019 the respondent was present but neither the appellant nor her counsel were present. At this hearing the Court stated as follows:

“I have noted that both the defendant and Counsel have not been appearing before Court. Since the plaintiff closed his case, I will proceed with judgment.”

The court proceeded to adjourn the matter for judgment to be delivered on the 20th March, 2019 which judgment was subsequently delivered on the 21st March, 2019.

With the foregoing in mind, it is my considered view that the lower court cannot be faulted for proceeding to render judgment in the absence of the appellant. I say so because one of those adjournments was at the instance of the appellant and the record clearly shows that the appellant nor her counsel bothered to appear on the date which they had proposed and never followed up on the same. Be that as it may, it is settled law that the overriding concern is that matters should be decided on their substance and merit and a judgment obtained in the absence of a party is liable to be set aside. This is the position in the holding of the **Elias Tembo** case cited by counsel for the appellant where Justice Hamaundu stated that:

"...a judgment that is obtained in the absence of a party may be liable to be set aside and that when dealing with applications to set aside such a judgment, the overriding concern is that matters should be decided on their substance and merit."

Being guided by this authority, I adopt this position and accordingly ground four succeeds.

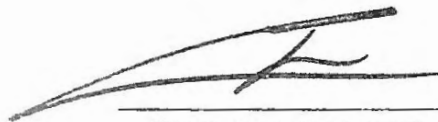
The upshot of the matter is that this appeal succeeds on grounds one and four and fails on grounds two and three. As jurisdiction is a substantive issue in all matters before the court and having found that the entire action in the lower court should not have

been adjudicated upon for want of jurisdiction, the judgment of the lower court is accordingly set aside.

Each party is to bear their own costs for this appeal.

Leave to appeal is hereby granted.

Dated at Lusaka this^{9th}.....day of^{September}.....2020



JUDGE CHIBBABBUKA