

IN THE HIGH COURT FOR ZAMBIA

2020/HK/SCA/40

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

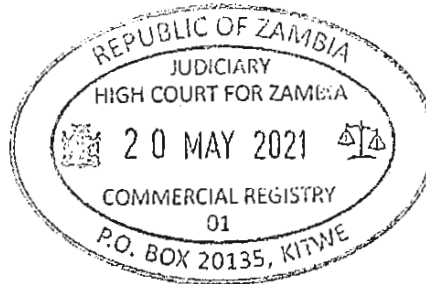
(CIVIL JURISDICTION)

BETWEEN:

MWEEMBA KABWE

AND

LYDIA CHIFITA



APPELLANT

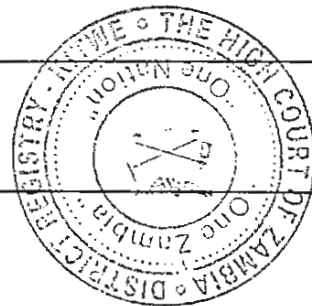
RESPONDENT

Before the Hon. Lady Justice Abha Patel, S.C.

For the Appellant: Mr. M. Nzala- Messrs. Legal Aid Board

**For the Respondent: Mr. E. Sichone-Messrs National Legal
Aid Clinic for Women**

JUDGMENT



Case referred to:

- 1. Zulu v Avondale Housing Project (1982) ZR 172 (SC).**
- 2. Khalid Muhammed v Attorney General (1982) ZR 49 (SC).**

Legislation referred to:

- 1. Halsburys Laws of England, Volume 19, 3rd Edition, page 841.**
- 2. Annette Chilima v Peter Chilima (2000) ZR 1.**
- 3. White v White [2001] 1 All ER 1.**

1. INTRODUCTION AND BACKGROUND

This matter originally started in the local court where following dissolution of marriage, between the Appellant and the Respondent, orders concerning property settlement were made.

Aggrieved by the local court orders, the Respondent, *Lydia Chifita*, appealed to the Subordinate Court, where she was awarded the matrimonial four bed room house while the Appellant, *Mweemba Kabwe*, was given a motor vehicle and a two bed room house. Being dissatisfied with that judgment the Appellant has launched this appeal to the court.

At the hearing on 14th December 2020, Counsel for the Appellant, Ms. Nzala, made an application to this court to hear the matter de novo, which application was dismissed in a Ruling dated 17th February, 2021. In the said ruling, this court directed the Appellant to file its submissions by or before 17th February, 2021 and the Respondent to file its submissions by or before 3rd March, 2021.

However, by 5th March, 2021, only the Appellant had filed its submissions and there being no excuse, nor any application to enlarge time, for not complying with this court's directions by the Respondent, I have proceeded to deliver the Judgment of the Court on the submissions received and the record before the Court.

2. **GROUNDS OF THE APPEAL**

In the Appellant's Heads of Arguments filed on 17th February, 2021, Counsel for the Appellant, Ms. Nzala raised seven grounds in support of the appeal, viz:

- i. That the learned magistrate erred and misdirected himself both in law and fact when he gave the matrimonial house to the Defendant;
- ii. That the learned trial magistrate erred in law when he gave the matrimonial house to the Defendant without considering the Plaintiff's financial contributions towards the construction of the said house;
- iii. That the learned trial magistrate erred in law when he gave the matrimonial house to the Defendant when the land where it is built was given to the Plaintiff by his father;
- iv. That the learned trial magistrate erred both in law and fact by not considering or commenting on the evidence of the Plaintiff the date when the construction of the said house began but accepting the evidence of the Defendant without giving any reason;
- v. That the learned trial magistrate erred by concluding that the Defendant contributed more money towards the construction of the subject house despite the Plaintiff giving both oral and documentary evidence to the effect that the Defendant used K19,000.00 out of the K29,000.00 loan which she obtained and went to South Africa for business which did not succeed;

- vi. That the lower court erred both in law and fact when it gave the small house to the Plaintiff without considering that it had far less value than the house which was given to the Defendant;
- vii. The learned trial magistrate erred both in law and in fact when it stated that the two bed roomed was purchased in 2001, when both oral and documentary evidence adduced by the Plaintiff showed that it was sold to him on 24th March, 1999 before he married the Defendant hence, the court's finding was not supported by any evidence.

3. SUBMISSIONS FOR THE APPELLANT

- 3.1 The thrust of the Appellant's argument in ground one was that the lower court gave the matrimonial house to the Respondent without applying the standard rules applicable to matters of property settlement. It was argued that there was no justification for the lower court to give the matrimonial house solely to the Respondent when evidence showed that the house was built on a plot which was given to the Appellant by his father.

Further, it was argued that although the Respondent claimed to have contributed more money towards the construction of the said house, she did not produce any evidence to support her claim. To support this argument, the cases of **Zulu v Avondale Housing Project** and **Khalid Muhammed v Attorney General** were relied on.

- 3.2 Ground two and three were argued together and the argument was that not only did the evidence show that the plot on which the said house was built on was given to the Appellant by his father but it also showed that the Appellant made huge financial contributions towards its construction.
- 3.3 As regards ground four, Ms. Nzala submitted that the trial magistrate did not give the requisite consideration to the oral and documentary evidence of the Appellant as he merely glossed over it. She argued that some of the pay sheets for the Appellant revealed that he had obtained loans which went towards the construction of the matrimonial house, and that the letter of sale of the two-bedroom house showed that it was bought before the parties got married.
- 3.4 Under ground five, the basis of the argument was that the aspect of financial contribution of the parties was tilted in favour of the Respondent by the trial court when there was no evidence disclosing that the Respondent had a much higher contribution towards the construction of the house.
- 3.5 In ground six, it was argued that the two bedroom house given to the Appellant had a much lesser value hence the trial court fell into grave error by giving the same to the Appellant and the bigger one to the Respondent, despite evidence showing that the Appellant bought the two bedroom house before he married the Respondent.

3.6 Further, in ground seven, counsel argued that since both oral and documentary evidence showed that the two bedroom house was sold to the Appellant on 24th March, 1999, before he married the Respondent, it did not form part of the property acquired by the joint efforts of the couple.

4 ISSUE IN CONTENTION

The Appellant has appealed against the Subordinate Court's decision in which the Respondent was awarded the matrimonial four bedroom house while the Appellant was given a motor vehicle and the two bedroom house.

5 THE LAW AND ANALYSIS

I thank the Appellant's learned counsel for the submissions. I shall first deal with grounds six and seven together, and thereafter deal with grounds one, through to five, as though they were one ground.

The issue raised in ground six and seven was that the two bedroom house which the trial court gave to the Appellant was acquired by the Appellant on 24th March, 1999 before he married the Respondent and as such it should not have been part of the property settlement as it did not form part of the property acquired by the joint efforts of the couple. I fail to appreciate this argument by learned counsel because there is no such evidence on the record of appeal.

After perusing the record of appeal, I have observed that the two bedroom house was included in the list of properties to be shared by the parties in the local court. Further, in the subordinate court the Appellant told the court that he was sold the two bedroom house in 2001. Even the learned magistrate on *page J7* of the judgment observed that “***there was also another house where the parties never brought out enough evidence of how it was acquired***”. But despite making this observation, the magistrate considered it as part of the family property. It would have been most helpful if counsel had referred this court to where exactly in the record of appealsuch evidence was adduced. For the above reasons, I find the Appellant`s arguments under ground six and seven, not factual andtherefore dismiss the saidgrounds.

The main issue of argument in grounds one through to five, as I see it, was that the Appellant had contributed more money towards the construction of the matrimonial home which was built on a plot he was given by his father.

In the trial court, the father to the Appellant, who testified on his behalf, told the court that he is the one who was offered the plot which he later gave to the Appellant. Although this evidence was not contradicted by the Respondent, she however adduced evidence showing that she obtained loans which she used towards construction of the house and that she paid for the house plan and for the title deed.

On the other hand, the Appellant also adduced both oral and documentary evidence showing loans he got which he said went to the construction of the said house.

Its trite that in cases of property adjustment, where spouse proves that he/she contributed to the purchase of family property that spouse is entitled to a share of that property upon dissolution of marriage. In Halsbury's laws of England the learned authors wrote that;

***“where property is made out in the husband or the wife, as a continuing provision for them during their joint lives, and both the husband and the wife contribute towards the purchase price, the property belongs beneficiary to the husband and wife in equal shares*”**

The above position was strengthened by the case of **Annette Chilima v Peter Chilima** where it was held that;

“When a man and woman join in holy matrimony, they become one body, one flesh and during the subsistence of their marriage they acquire and own property jointly and indivisibly and until the marriage is put asunder, none of them should be heard to say he owns this or that property.”

6 FINDINGS

On the basis of the cited authorities I find that although the plot on which the matrimonial house was built on was given to the Appellant by his father, the intention of both parties to build a

matrimonial house on it made the said house belong to both parties equally.

Further, I also find that both the Appellant and the Respondent did contribute to the construction of the said house. I therefore agree with the trial magistrate's finding that the two houses and the motor vehicle were acquired during the subsistence of the marriage and should be subject to property adjustment.

Before I pronounce my orders, I would like to state that property adjustment is not an easy exercise, the difficulties that comes with it were aptly outlined by Lord Nicholls in the 2001 case of **White v White** when he said:

"My Lords, divorce creates many problems. One question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other. Stated in the most general terms, the answer is obvious. Everyone would accept that the outcome on these matters, whether by agreement or court order, should be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."

With Lord Nicholls' words on my mind and taking into account all the circumstances of this case, and this court endeavoring to

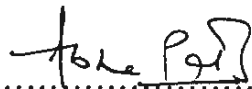
be as fair as possible, I find no reason to overturn the finding by the lower court and agree with the lower court that the Respondent should be awarded the matrimonial four bedroomhouse while the Appellant should get the two bedroom house and the motor vehicle.

Further, I am of the considered view that even if both parties contributed to the construction of the matrimonial house, the Appellant being a miner, is presumed to be in a stronger financial position than the Respondent, who is a teacher.

The party who is in a lesser financial position is supposed to be left in a position she used to enjoy before the marriage ended.

Therefore, I am not convinced in the merits of this appeal and the same is dismissed. There is no order as to costs.

Delivered at Kitwe this²⁰ day of May, 2021



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Mrs. Abha N. Patel, S.C.

HIGH COURT JUDGE

