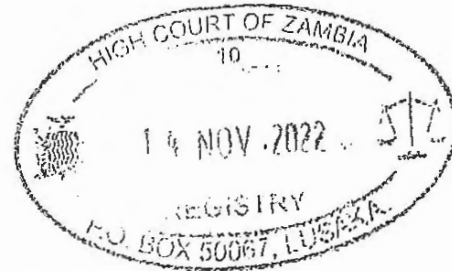


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2019/HP/A025



**BETWEEN:**

**LUBASILUBI TRUST REGISTERED TRUSTEES  
JOSEPH LUBINDA**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**FRIDAH MWANGALA KAKOMA**

**RESPONDENT**

**BEFORE HON. JUSTICE ELITA PHIRI MWIKISA**

**FOR THE APPELLANT: MR. L.M. MUKANDE S.C OF MESSRS MUKANDE &  
COMPANY**

**FOR THE RESPONDENT: MR. Y. DAKA OF MESSR GEORGE KUNDA &  
COMPANY**

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## **JUDGMENT**

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### **Cases Referred To:**

1. *Rosemary Chibwe v Austin Chibwe* SCZ Judgment No. 38 of 2000
2. *Kasote v The People* (1977) Z.R 75
3. *BP Zambia PLC v Interland Motors Limited* (SCZ Judgment No. 5/2001)
4. *Kajimanga v Chilemya* (Appeal No. 50/2014)
5. *Watchel v. Watchel* (1993) 1 ALL ER 829

### **Legislation Referred To:**

1. *The Subordinate Courts Act, Chapter 28 of the Laws of Zambia*
2. *The Land (Perpetual Succession) Act Chapter 187 of the Laws of Zambia*

This is an appeal against the Ruling of the Subordinate Court dated 22<sup>nd</sup> January, 2019, which found in favour of the Respondent herein.

The appeal is promised on two grounds namely, that:

1. The lower court misdirected itself in law and fact by overturning its own decision to misjoin the 1<sup>st</sup> Appellant from the action;
2. The lower court misdirected itself in law and fact when it held that properties registered under the 1<sup>st</sup> Appellants name should be part of divorce proceedings.

The brief facts of the case, as revealed by the record in the Court below, are that the 2<sup>nd</sup> Appellant and the Respondent had their marriage dissolved by the Local Court on 22<sup>nd</sup> March, 2018. On 12<sup>th</sup> July, 2018, the 2<sup>nd</sup> Appellant herein (who was Respondent in the Court below) filed an affidavit in support of notice of motion for joinder of party of the 1<sup>st</sup> Appellant herein. He deposed therein that the 1<sup>st</sup> Appellant is a body corporate registered under the Land (Perpetual Succession) Act Chapter 187 of the Laws of Zambia and that it is the registered owner of Stand No. 13615 Lusaka and Subdivision No. 259 of Stand No. 100 Kabulonga, Lusaka. The 2<sup>nd</sup> Appellant added that a perusal of the Appellant's grounds of appeal

revealed that the properties referred to are the same properties the Respondent herein wanted a share of and wanted to remain in occupation of. That the outcome of the Appeal would affect the Trust and therefore the Trust ought to be made party of the proceedings.

On the other hand, the Respondent deposed that the Local Court refrained from sharing the matrimonial property due to the fact that the property was put in a Trust. That the purpose of agreeing to add the Trust to the proceedings was to ensure that the Trust itself was bound by the decision of the Court.

According to the record of appeal at pages 101-102, the Court had this to say when the matter came up on 23<sup>rd</sup> August, 2018:

***"I have heard the application made by the defence Counsel who intends to join LubasiLubi Trust as party to the proceedings and appellants Counsel has no objection to their application. This Court has got no objection as well. The intended party LubasiLubi Trust is therefore joined to the proceedings as 2<sup>nd</sup> Respondent."***

The Appellants then filed a notice to raise preliminary issue on 11<sup>th</sup> September, 2018, as to whether the 1<sup>st</sup> Appellant's properties namely; Stand No. 13615 Lusaka and Subdivision No. 259 of Stand No. 100 Kabulonga, Lusaka could be part of the proceedings herein. The application was supported by an affidavit deposed to

by Joseph Lubinda, the 2<sup>nd</sup> Appellant herein. He essentially re-echoed what was in the affidavit in support of notice of motion for joinder of party and added that the 1<sup>st</sup> Appellant being a corporate does not intend to dispose of its said properties as no resolution was passed to that effect. He sought the indulgence of the Court that the said properties be removed from the proceedings that are subject to settlement herein. That the 1<sup>st</sup> Appellant is not privy to the marriage dissolution between the 2<sup>nd</sup> Appellant and the Respondent.

In the affidavit in opposition, the Respondent deposed that the lower Court refrained from sharing the matrimonial property due to the fact that the property was put in a Trust. That the said Trust was registered during the divorce proceedings without her knowledge and that she appealed to the Subordinate Court so that the matrimonial property could be shared in an equitable manner. It was also deposed therein that the 1<sup>st</sup> Appellant was incorporated on the 21<sup>st</sup> of September, 2017, which was during the period when the 2<sup>nd</sup> Appellant was already aware of her intention to dissolve the marriage and the divorce process had already begun. The Respondent sought the indulgence of this Court that the application to remove the properties in the Trust be dismissed as

they are subject matter of these proceedings and since the creation of the Trust itself is also in question.

In the Ruling, the Honourable Magistrate stated as follows:

***"I have considered the preliminary issues raised by the Respondent's Counsel to joining a trust registered by Lubasi Lubi which some of the properties are alleged to be matrimonial properties have been transferred".***

*In arriving at my decision, I will not lose track of the fact that this is a divorce case and incidental to it is property settlement. It is trite law that in divorce cases there are only two parties a husband and a wife therefore the trust herein sought to be joined to the proceedings has no locus standi or interest in proceedings. Notwithstanding the fact that some of the properties in contention have been transferred to the said trust."*

The Honourable Magistrate relying on the case of **Rosemary Chibwe v Chibwe (SCZ No. 38 of 2000)**<sup>1</sup>, went on to hold as follows:

**"A company being a person at law, if it was proper to join it the Court should have ordered that it be joined to the proceedings. Similarly in this case it will be irregular for this court to order a trust to be joined to these proceedings just because some of the alleged matrimonial properties have been transferred to the said trust.**

**In the circumstances I find no merit in the application and its accordingly dismissed.**

**Then in relation to the application to order that the properties alleged to have been registered under trust be removed from these proceedings, is certainly premature as the same such an order can only be made at the conclusion of the whole case in the event that a party claiming that they are part of matrimonial property has proved the same on the balance of probabilities. This application is equally dismissed."**

Dissatisfied with the Ruling, the Appellants appealed to this Court advancing two grounds couched as follows:

- i) The lower Court misdirected itself in law and fact by overturning its own decision to misjoin the 1<sup>st</sup> Appellant from the action; and
- ii) The lower Court misdirected itself in law and fact when it held that the properties registered under the 1<sup>st</sup> Appellant's name should be part of divorce proceedings.

At the hearing of the appeal on 19<sup>th</sup> January, 2021, Counsel for the Appellants, Mr Mukanda, SC, submitted that this was an appeal from the judgment of the lower Court delivered on 3<sup>rd</sup> March, 2018. He told the Court that the parties agreed to proceed by way of heads of arguments and that the Appellants would be entirely relying on the heads of arguments and the list of authorities filed.

On the other hand, Counsel for the Respondent, Mr Daka, was also of the view that this Court could proceed on the basis of the heads of arguments filed into Court by both parties.



In the Appellants heads of arguments dated 27<sup>th</sup> March, 2020, it was Counsel's submission that the lower Court misdirected itself in law and fact by overturning its own decision to misjoin the 1<sup>st</sup> Appellant from the action. That the 1<sup>st</sup> Appellant had made an application for joinder before the lower Court pursuant to Order 27 Rule 1 and Order 8 Rule 5 (1) of the Subordinate Court Rules Cap 28 of the Laws of Zambia and in the lower Courts Ruling at pages 101 to 102 of the Record of Appeal, the lower Court joined the intended party to the proceedings as the 2<sup>nd</sup> Respondent (the 1<sup>st</sup> Appellant in this case) without any objections from the parties or the Court. That the 1<sup>st</sup> Appellant was joined to the proceedings on 3<sup>rd</sup> August, 2018.

It was submitted further that on 11<sup>th</sup> September, 2018, the 1<sup>st</sup> Appellant raised a preliminary issue and the lower Court in rendering a Ruling, dated 22<sup>nd</sup> January, 2019, reversed its Ruling of 3<sup>rd</sup> August, 2018, on its own motion where the 1<sup>st</sup> Appellant was joined to the action. The lower Court stated as follows:

***“Similarly in this case it will be irregular for this Court to order a trust to be joined to these proceedings just because some of the alleged matrimonial properties have been transferred to the said trust.***

***In the circumstances I find no merit in the application and it's accordingly dismissed.”***

It was contended that it is trite law that Courts should stand by their decisions to promote certainty in the law which is a principle and element of good justice. The case of **Kasote v The People (1977) Z.R 75<sup>2</sup>** was cited to support this position.

Counsel concluded this ground by submitting that the lower Court's decision to reverse its own decision by disjoining the 1<sup>st</sup> Appellant from the proceedings be reversed by this Court.

Under ground two, it was argued that the lower Court misdirected itself in law and fact when it held that properties registered under the 1<sup>st</sup> Appellant's name should be part of divorce proceedings. It was Counsel's contention that the 1<sup>st</sup> Appellant is the registered and legal owner of Stand No. 13615 Lusaka and Subdivision No. 259 of Stand No. 100 Kabulonga, Lusaka as exhibited on pages 33 to 46 of the Record of Appeal. That the 1<sup>st</sup> Appellant therefore found it prudent to join the proceedings to avoid commencing an action before a different Court against the 2<sup>nd</sup> Appellant and the Respondent. It was contended that the lower Court's decision to disjoin the 1<sup>st</sup> Appellant from the proceedings when they are an interested party only invites the effects of multiplicity of actions as it leaves the 1<sup>st</sup> Appellant with no option but to commence a fresh



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action against the 2<sup>nd</sup> Appellant and the Respondent. That this may lead to two different Courts dealing with the same facts and the same litigants, which courts may end up delivering conflicting judgments. The case of **BP Zambia PLC v. Interland Motors Limited (SCZ Judgment No. 5/2001)**<sup>3</sup> was cited to fortify this position.

It was also submitted that the Trust was created by the 2<sup>nd</sup> Appellant and the trust deed contains a number of beneficiaries who include the 2<sup>nd</sup> Appellant and the Respondent's children and also the Respondent as shown at pages 59-68 of the Supplementary Record of Appeal. That the 2<sup>nd</sup> Appellant only holds the properties in question as the trustee for the beneficiaries. That according to Halsbury's Laws of England 4<sup>th</sup> Edition Re-issue at paragraph 501, a Trust is defined as follows:

***"Meaning of 'trust'. Where a person has property or rights which he holds or is bound to exercise for or on behalf of another or others...The trustee holds and must exercise his rights of property in a fiduciary capacity, and stands in a fiduciary relationship to the beneficiary."***

It was submitted that the trustee by law holds fiduciary duties to the beneficiaries. That once a Trust is incorporated, it becomes a body corporate and that the Certificate of Incorporation which was

issued to the 1<sup>st</sup> Appellant was issued under the Land (Perpetual Succession) Act Chapter 186 of the Laws of Zambia.

It was further submitted that a Certificate of Title is conclusive evidence of ownership to which it relates and that to nullify such ownership, an allegation of fraud must be proved beyond any reasonable doubt as per the case of **Kajimanga v. Chilemya (Appeal No. 50/2014)**<sup>4</sup>. It was contended that the 1<sup>st</sup> Appellant

being a body corporate and a person at law has a right to plead with this honourable Court that its properties be removed from the 2<sup>nd</sup> Appellant and Respondent's matrimonial proceedings. The Appellants prayer was that this Appeal has merit and that the same succeeds with costs.

On the other hand, the Respondents heads of arguments were filed on 21<sup>st</sup> April, 2020. Counsel for the Respondent contended that the lower Court did not misdirect itself both at law and fact when it held that the Lubasilubi Trust Registered Trustees should not be part of the proceedings. The case of **Kasote v. The People**, supra, was also cited as follows:

***“Courts should stand by their decisions even if they are erroneous unless there be a sufficiently strong reason requiring that such decision should be overruled.”***

It was argued that there was clearly a sufficiently strong reason for the lower Court to have later misjoined the Trust, and this was due to a Supreme Court Judgment she made reference to in the Ruling. It was submitted further that the fact that lower Courts are bound by decisions of higher Courts entails that lower Courts are not entitled to upset a decision of a superior Court, so as to replace it with its own decision.

That in the Ruling, the lower Court referred to the case of **Rosemary Chibwe v Chibwe (SCZ No. 38 of 2000)** and stated as follows:

**"I am guided by the proceedings in the case of Rosemary Chibwe v Chibwe SCZ No. 38 of 2000 in which some of the matrimonial properties were transferred into a company registered by one of the parties, the Court in that case did not make a company party to the proceedings despite having made orders touching on the properties transferred to the company.**

**A company being a person at law, if it was proper to join it the Court should have ordered that it be joined to the proceedings similarly in this case it will be irregular for this Court to order a trust to be joined to these proceedings...."**

That the above is a clear outline of the reason to later not join the Trust. It was contended that the lower Court was alive to the doctrine of stare decisis which binds the Subordinate Courts to the decisions of the Supreme Court.

It was further contended that Order 8 Rule 5 (2) of the Subordinate Court Rules allows the Court to remove a party at any stage of the proceedings. That the said provision provides as follows:

***“The Court may, at any stage of the proceedings and on such terms as appear to the Court to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out.”***

Pursuant to the above, Counsel concluded this ground by submitting that the lower Court's Ruling with regards to the Trust was not a misdirection on her part.

In relation to ground two, it was contended that black's law dictionary defines marital property as property that is acquired from the time when a marriage begins until one spouse files for divorce (assuming that a divorce decree actually results). Further that the case of **Watchel v Watchel 1 ALL ER 829<sup>5</sup>** at 838 defines family assets as:

***“Items acquired by one or the other or both parties married with intention that these should be continuing provision for them and the children during joint lives and should be for the use for the benefit of the family as a whole. Family assets include those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties.”***

It was submitted that the Court has been clothed with power to distribute and share the said matrimonial property. That

matrimonial property must be dealt with as matrimonial property and that in this case, the property that was placed in a trust ought to be treated as such property. It was also contended that this Court should keep in mind that the said Trust was merely registered to avoid dealing with the property according to the Law that governs matrimonial property. That the Trust was not created in good faith and that a clear perusal of the record of appeal and supplementary record of appeal, illustrates all the issues and facts that arose before the Court could remove the said properties from forming part of matrimonial property as shown at pages 89-90 as well as pages 49 to 50. It was also Counsel's contention that the Record of Appeal illustrates the time frames that exist from the period of the 2<sup>nd</sup> Appellant becoming aware of the divorce, to the creation of the Trust and the beginning of the divorce proceedings. That these time frames, as submitted in the lower Court, create a doubt as to the rationale for creating the Trust. The case of **Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000** was cited as follows:

***"We also hold the view that all properties which were listed at pages 40-47 belonged to the Respondent and that those which were transferred during the proceedings to AMC contractors, a company owned by the Respondent, cannot escape the order of this Court as the transfer of such properties must have been done to***

***avoid the outcome of these proceedings. In our view these transfers have no effect on our order."***

It was submitted that similarly, the transfer of the properties into the trust deed were done mala fide and a deliberate manoeuvre to deprive the Appellant of her share of the property acquired during the marriage. That the terms of the Trust deed are entirely to the advantage of the 2<sup>nd</sup> Appellant, as is evident from the powers that the Trustee/Settler holds since the 2<sup>nd</sup> Appellant is both trustee and settlor.

It was Counsel's contention that despite the fact that the 2<sup>nd</sup> Appellant appeared on the Certificate of Title, these were still properties acquired during the duration of the marriage and are as such part of matrimonial property as the Respondent herein equally contributed to their acquisition as illustrated in the affidavit in rebuttal at pages 89-90 of the Record of Appeal.

It was submitted that the Court's ruling was therefore on firm ground when it stated that the application to Order that the properties alleged to have been registered under the Trust be removed from the proceedings, was premature as it could only be made at the conclusion of the whole case. That there would be need to hear oral testimonies before such an Order can be made.



In response to the Respondent's heads of arguments, the Appellants filed heads of arguments in reply dated 31<sup>st</sup> July, 2020. It was submitted therein that the difference between the Rosemary **Chibwe v Chibwe** case supra, and the case in casu is that firstly the 2<sup>nd</sup> Appellant herein did not place the properties in question in the name of the Trust during the matrimonial proceedings herein. That this is evident from the affidavit in reply on page 32 of the Record of Appeal which shows that the Trust was created on 21<sup>st</sup> September, 2017, months before the Respondent commenced divorce proceedings. That the 2<sup>nd</sup> Appellant had no idea that the Respondent would commence divorce proceedings. That further, the said Trust deed lists down who the beneficiaries of the properties in question are and they include the children and the Respondent herself. That the 2<sup>nd</sup> Appellant is not even a beneficiary. That it is evident from the entire record that the Respondent intends to be greedy and have a 50% share of the properties in question through property settlement when in actual sense the properties do not even belong to either the 2<sup>nd</sup> Appellant or the Respondent. That the properties belong to the beneficiaries under the Trust and it would be unjust and unfair for the said properties to be subjected to matrimonial proceedings.

It was also submitted that the properties in question cannot be considered as family assets because they are registered under a Trust which is a body corporate pursuant to the Land (Perpetual Succession) Act, Cap 186 of the Laws of Zambia. It was contended that it is irregular for the Respondent to plead that the properties placed in a Trust ought to be treated as matrimonial property.

It was further argued that the Respondent has not adduced any evidence to prove the allegation that the Trust was merely registered to avoid subjecting the properties to matrimonial proceedings. That the affidavit in rebuttal contains mere assertions that are not supported by any evidence, hence the Court must disregard the same when delivering its judgment. It was submitted that this appeal must succeed with costs and that the properties herein be removed from matrimonial proceedings.

I have carefully considered the evidence on record together with the written submission filed by Counsel on both sides. I will deal with both grounds of appeal together.

I am of the considered view that the case of **Chibwe v. Chibwe** is still binding based on the principle of stare decisis and I am equally guided by the principles propounded in that case in which the facts are similar to the case in casu in that, in the former, a party to the

proceedings created a company to which he transferred certain matrimonial properties. The Supreme Court held that those properties transferred to AMC contractors, a company owned by the Respondent, could not escape the order of the court as the transfer of such properties must have been done to avoid the outcome of those proceedings.

The Appellant's argument is that the 2<sup>nd</sup> Appellant herein did not place the properties in question in the name of the Trust during matrimonial proceedings herein. That the Trust was created on 21<sup>st</sup> September, 2017, months before the Respondent commenced divorce proceedings. That the beneficiaries of the Trust are the Respondent herself and the children. It was the Appellant's contention that the court below misdirected itself by holding that the properties belonging to a Trust can be subjected to matrimonial proceedings and that the properties in issue belong to the beneficiaries under the Trust. It was argued that it would be unjust and unfair for the said properties to be subjected to matrimonial proceedings and that in the Chibwe case the Supreme Court borrowed the definition of family assets from the case of **Watchel v. Watchel (1993) 1 ALL ER 829** as follows;

***“.....items acquired by one or the other or both parties married with the intention that these should be continuing provision for them and the children during their joint lives and should be for the use of the benefit of the family as a whole”.***

It was therefore contended that the properties in question cannot be considered to be family assets as they are registered under a Trust which is a body corporate pursuant to the land (Perpetual Succession) Act, Cap 186 of the Laws of Zambia. It was also submitted further that the fact that the 2<sup>nd</sup> Appellant placed the said properties under the Trust, the beneficiaries being the children and the Respondent, automatically changes the status of these properties as they cannot be classified as family assets. The Appellant submitted that it is irregular for the Respondent to plead that the properties placed in a Trust ought to be treated as matrimonial property and denied the allegation that the Trust was merely registered to avoid subjecting the properties to matrimonial proceedings as there was no evidence to prove that allegation. That it is a well established principal of law that he who alleges must prove.

I am however of the considered view that the fact that the Respondent is a beneficiary of the Trust does not take away the fact that the said property in the Trust is matrimonial property

which was acquired during the subsistence of the marriage as per definition of the family property in the case of **Watchel v. Watchel** Supra. I further find that the 2<sup>nd</sup> Appellant created the Trust after the Respondent's Lawyers wrote to him about the matrimonial misunderstanding between the parties on 20<sup>th</sup> February, 2017. In that letter the Respondent's lawyers even proposed that the parties herein file for divorce under 2 years separation. It is for this reason that I find that the 2<sup>nd</sup> Appellant, knowing that there was a pending divorce suit, decided to create the Trust in issue, which in my considered view was used as a vehicle in which to remove some of the matrimonial property before the commencement of the divorce proceedings in court. The 2<sup>nd</sup> Appellant created the Trust on 21<sup>st</sup> September, 2021, which is 7 months from the letter of 20<sup>th</sup> February, 2021, informing him about the impending divorce proceedings. I therefore concur with the Learned counsel for the Respondent that the Trust was not created in good faith and was meant to remove the said properties in the Trust from forming part of the matrimonial property as shown at pages 49 – 50 and pages 89 – 90 of the record of appeal.

There is evidence on record that the Respondent contributed towards the building or acquiring of the said properties. If the

Appellant in creating the Trust, was doing it in good faith, he should have considered making the Respondent a Trustee as well rather than merely allocating 5% as a share for the Respondent on the beneficiaries list which is the smallest share amounting to K1,800.00 per year as argued by the Respondent, whereas the 2<sup>nd</sup> Appellant's management fees are at K20,000.00 per year. In agreeing with the Respondent, I am of the considered view that the terms of the Trust Deed are entirely to the advantage of the 2<sup>nd</sup> Appellant as evidenced by the power that a Trustee/Settler holds.

I note at pages 59 – 68 of the Trust Deed that the 2<sup>nd</sup> Appellant is the owner of the two properties namely;

- i) Plot 13615 Tokyoway, south of Chilenje South valued at ZMK 2,000,000.00; and
- ii) Plot 259/100 Ibex Hill; off Twin Palm Road Lusaka, valued ZMK 2,500,000.00.

The 2<sup>nd</sup> Appellant is described therein as the Settler and Trustee. It further states that in the event of death of the Trustee, the beneficiary with the highest share percentage shall be successor of the Trustee and upon his death, his eldest child. It further states in paragraph 1 at page 61, that:



***“The Trustee shall stand possessed of the funds referred to in the schedule referred to hold on trust for the beneficiaries until the death of the Settlers (who are also the Trustees).***

Further in paragraph vi, it states that:

***“The beneficiary shall have no power of sale or dissolve the funds until the last beneficiary, Jessie Mweenda Lubinda, has attained the age of 50 years and upon attainment of such age, the Trust property shall revert to the Trustee.”***

It is clear from a perusal of the said Trust Deed that the Trustee who happens to be the 2<sup>nd</sup> Appellant, wields massive power in administering the Trust Deed. At the end of the document, the 2<sup>nd</sup> Appellant appends his signature as both Settler and Trustee to the total exclusion of the Respondent herein who has been left with no powers at all pertaining to the administration of the said properties in the Trust Deed which wholly belong to the 2<sup>nd</sup> Appellant herein.

It is no wonder that the Respondent contends that this Trust was merely created to stop the law from dealing with the property according to the matrimonial Causes Act, Cap 295, No. 20 of 2007, in an equitable manner. I further find that regardless of the fact that the 1<sup>st</sup> Appellant appeared on the certificate of titles, these are still properties acquired during the subsistence of the marriage and therefore form part of the matrimonial property more so that the

Respondent did show in the court below that she contributed to their acquisition as shown at pages 89 – 90 of the Record of Appeal, in the Affidavit in rebuttal, specifically paragraphs 9,10,11,12,13 14 and 15. I find that the 2<sup>nd</sup> Appellant did not adequately rebut the contents of that affidavit.

It is therefore my firm view that the Learned Magistrate in the court below was on firm ground in disjoining the Trust Company from the proceedings below. I accordingly hold that the said properties in the Trust are part of the matrimonial property herein and should be shared equally between the 2<sup>nd</sup> Appellant and the Respondent herein. It is for these reasons that I find that both grounds of appeal fail and the Appeal is dismissed forthwith, with costs to the Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the .....14<sup>th</sup>..... day of November, 2022

.....  
ELITA P. MWIKISA  
HIGH COURT JUDGE