IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.53 OF 1998

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

RICHARD JOHN CHANSA MUSONDA APPELLANT

AND

FLORENCE CHAO MUSONDA RESPONDENT

Coram: Chirwa, Lewanika and Chibesakunda, JJS

22nd August 1998 and 1999

For the Appellant: Dr. Mulwila, Ituna Partners

For the Respondent: Mr. H. Silweya, Messrs Silweya & Company

J U D G M E N T

Chibesakunda, J.S. delivered the judgment of the court.

CASES REFERRED TO:

1. WATCHEL v WATCHEL 1973 (1AER) 113
2. MASAUSO ZULU v AVONDALE 1982 (ZLR) 171
3. THE ATTORNEY GENERAL v MACUS ACHIUME 1983 ZR 1
4. HAZEL v HAZEL 1972 AER 923

LAWS REFERRED TO:

1. MARRIED WOMEN'S PROPERTY ACT OF 1882 S.17
2. ENGLISH LAW (EXTENT OF APPLICATION) ACT CAP 11
3. MATRIMONIAL PROCEEDINGS AND PROPERTY ACT OF 1970 (1) S.5 AND S.4(b)
4. MATRIMONIAL CAUSES ACT 1969

This is an appeal against the lower court's judgment in an application for Ancillary Relief filed by Florence Chao Musonda (the respondent in the original divorce petition and who in this judgment hereinafter will for convenience sake be referred to as the respondent) against Richard John Chansa Musonda (the petitioner in the original divorce suit who hereinafter will be referred to for convenience sake as the petitioner)

It was common cause before the trial court that the Petitioner and the Respondent were married on the 10th December 1983 in Kitwe. They cohabited in Chingola before they moved to Lusaka where they first lived in Kalundu, in the petitioner's employer's house. The petitioner had acquired Farm No.10/C396AFS/DC (hereinafter referred to as matrinomial home) before his marriage to the respondent as per exhibit JM2 in the affidavit in opposition to the petition. This matrimonial home up to now

is still registered in the petitioner's name. The couple stayed in this matrimonial home from 1985 to 1992. The petitioner had acquired two mortgages one for paying for their house: this was obtained before marriage. The redemption of the first mortgage which was between 1983 to 1990 was done during the existence of the marriage. The second mortgage which was obtained to purchase irrigation pipes during the subsistence of the marriage, was redeemed during marriage. At the time the petitioner and the respondent were living in the matrimonial home they had three children of the marriage. The petitioner had four children by the previous marriage. The respondent knew of these four children and she treated them as children of the marrige. The marriage was from 1983 to 1994

At the time the couple moved to the matrimonial house in 1985, it was a three-bedroomed with a separate toilet outside the house with one living room, one kitchen. It was then extended during the subsistence of the marriage to have self-contained master bedroom. Five chicken houses were built and two fishponds developed, one was completed by the 24th of November 1992 and yet to be completed. A number of farm workers' houses were also built. The matrimonial home was carpeted wall to wall and as already stated irrigation system was installed. The respondent before marriage had bought herself a Fiat 127, which subsequently after marriage was sold by the petitioner. The purchase money was used to buy for the respondent a Peugeot. The Peugeot after being involved in an accident was sold by the petitioner and thereafter he bought using the purchase price a Mazda Van for the respondent which was sold before the respondent was chased out of the matrimonial home on the 24th of November 1992.

The facts which were in contention were that the respondent collected all the household goods which she personally purchased before and during the subsistence of the marriage. The petitioner testified that subsequently to the respondent leaving the matrimonial home, she came back and collected all her personal goods and the goods she bought during the existence of the marriage. The respondent on the other hand testified that she collected some items but left a number of items. She went on to testify that part of the Peugeot purchase price was spent on redeeming the mortgage for irrigation pipes. It is therefore her contention that she contributed directly and indirectly to the welfare of the family and as such she was entitled to have a fair share of all the assets including the matrimonial home which assets were bought either jointly or by the petitioner during the subsistence of the marriage. She testified before the court that during the marriage the petitioner left his formal employment and that she was the one who was working and as such she maintained

the family, this contributing to the extension of the house indirectly. But she testified also that she even bought items which were used directly in the expansion of the house, items such as door. She also testified that although they had to joint account the petitioner confided in her and made her part of the plans to develop the matrimonial home.

The lower court granted the application and made the following order:

1. All the property the respondent acquired before her marriage to the petitioner to be given to her.
2. All the property acquired jointly during marriage to be shared equally between the parties.
3. The purchase money for her motor vehicle Mazda sold by the petitioner to be refunded to the respondent or the equivalent value to enable the respondent to purchase another motor vehicle.
4. The house on Plot No.10/C/3969 being a matrimonial home to be sold and the proceeds to be shared equally between the two parties.

The Petitioner has appealed challenging the second, third and fourth items in the lower court's order arguing through his learned Counsel Dr. Mulwila that the court below erred in law and in fact in applying 50/50% basis in distributing matrimonial assets. Citing the case of **Watchel v Watchel 1973 (1)** Dr. Mulwila argued that at law any court faced with the question as to how much to award to each of the contending spouses in the distribution of matrimonial assets must take into account each spouse's financial obligations. It is his submission that because the petitioner remained with 8 children to take care of and educate them and the respondent had no family obligations, the court in fixing the percentage of matrimonial assets to be given to her should not have arrived at 50% of the matrimonial assets. It is his contention also that since the respondent received K3 million as her terminal benefits from her employers before the decree nisi was made absolute, the court should have taken into account in deciding the percentage to be given to her. He has therefore argued that we should set aside this award on that first ground.

His second ground of appeal is that the learned Deputy Registrar misdirected himself in holding against the principle of equity in that he ruled that the respondent should keep all her properties she had bought before marriage but went on to hold that she should in addition be given 50% of the property bought during the existence of the marriage.

According to him if the Deputy Registrar maintained that that was the proper equitable apportionment then he should have held that all property bought by the petitioner before marriage should not have been shared on 50/50% basis. He went on to say that in the judgment the Deputy Registrar found as a fact that there was no sufficient evidence on which to make any findings on how much contribution the respondent made to the family's welfare. That should have been the only consideration.

Dr. Mulwila's other argument is that the learned Deputy Registrar misdirected himself in holding that the petitioner should pay to the respondent the purchase money of the Mazda, the motor vehicle which the petitioner bought for her and sold just before she was chased out of the matrimonial home. According to Dr. Mulwila there was evidence before the court that the money the petitioner got from selling the Mazda was used to purchase another vehicle for the family. It is therefore his argument that the Deputy Registrar misapprehended facts because he made findings in favour of the respondent even where there was contrary evidence from the petitioner. For instance the evidence at page 60 line 13 which says that the petitioner bought another motor vehicle for the family using the proceeds of the sale of the Mazda. He therefore argued that the order that the Petitioner should pay to the respondent amounted to punitive measures and as such must be set aside.

The learned Counsel for the respondent argued that equity is justice and that the Deputy Registrar in drawing up the order followed the principles of equity. He cited the case of Hazel v Hazel (4) as the authority for the legal position that the respondent was entitled to a share in the value of and or the proceeds of the sale of the matrimonial home.

Mr. Silweya in supporting the order argued that the line of cases decided over the last century both in Britain and Zambia which dealt with ordering of ancillary relief were decided when the reconsiderations on the right to relief were based on the concept of matrimonial offence. Now by virtue of 1969 Act the whole basis for such relief has gone through changes. He submitted that Section 5 (1) of 1970 Act has preserved this obligation on the court to have regard to the conduct of the parties. He further argued that it has been held in a number of authorities that this section was not meant to codify all the decisions of the court on this aspect and that this section was not meant to ensure that early decisions should be slavishly followed. Rather it was meant to secure that common sense principles which found their origins in long outstanding judicial

decisions should continue to apply where appropriate. He further argued that this Act incorporated all the principles of equity which had been espoused up to 1970 in case law. The learned Counsel further argued that the order made by the Deputy Registrar was correct because there was evidence on record that the respondent contributed by paying towards the redemption of the mortgage especially the mortgage to purchase irrigation pipes. He went on to say that there was evidence also which was not challenged that she even bought a door to be fixed on the extentions and that she maintained the family - thus indirectly contributing to the welfare of the family. According to him having done all that she was entitled to a share in the matrimonial home and even in the other family assets - assets which were bought or acquired by either herself or her husband or both with the intention that they should be continuing provisions for them and the children during the joint life and had been used for the benefit of the family as a whole.

We have looked at the arguments before us and the evidence before the lower court. As per Section 2(b) of the English Law (Extent of Application Act (2) the current English divorce law, be it common law or statute law applies to Zambia. In the case of Watchel v Watchel (1) Lord Denning traced the developments of the law with regard to distribution of matrimonial assets after divorce up to 1970 Act (4). Before 1969 Act (5) divorce was based on the doctrine of matrimonial offence. If a party to the proceedings was guilty of matrimonial offence, her right to custody of children, award of maintenance etc was affected. Post 1969 Act the whole concept of apportioning blame was removed. Now the divorce is granted because a marriage has broken down irretrievably. In that now the courts conclude in most cases that both parties contributed to the break down of the marriage.

In the case before the court correctly the learned Deputy Registrar made no references to the apportioning of blame.

With regard to Dr. Mulwila's argument that the learned Deputy Registrar misdirected himself in holding against the principles of equity, we accept his arguments that Section 5(1) of the 1970 Act (4) sets out various criteria to seriously consider, in the distribution of family assets post divorce. Family assets have been defined as referring to things acquired by one or other or both parties with intention that they should be continuing provision for them and the children during their joint lives and use for the benefits of the family as a whole. Family assets include those of capital nature such as matrimonial home, the furniture in

it and revenue producing assets such as chicken runs and fishponds as in this case. All the things recorded at pages 26 and 27 are all family assets. The current position at law is that family assets have to be allocated by the court to the parties after divorce. Section 2, 3, 4 and 5 of the 1970 Act have accorded to the courts widest possible powers in re-adjusting financial positions of the parties to the divorce. According to Section 5 of this Act when a marriage comes to an end, capital assets have to be divided between parties. The revenue producing assets have to be allocated to both parties. The court has powers after divorce to effect transfer of the assets to one or the other. The position now is that when a marriage ends, under Section 5 (1) (f) of 1970 Act a wife who has looked after a home and family for many years is entitled to a share in the matrimonial home if the court can conclude that the matrimonial home was acquired and maintained by the joint effort of both husband and wife. In this case we are satisfied that she contributed indirectly as a housewife for almost ten years. According to the evidence which was not disputed, she remained in formal employment whilst the petitioner was engaged in agricultural activities. We are equally satisfied that she directly contributed to the acquisition and maintenance of the matrimonial home because there is evidence that she bought items which were used in expanding of the house. There is even evidence that she contributed to the redemption of the two mortgages. We are satisfied that the respondent and the petitioner pulled their resources together in acquiring and maintaining the matrimonial home.

It has been argued by Dr. Mulwila that 50%/50% basis ordered by the Deputy Registrar was against the principle of equity because the respondent has been allowed to keep the property she bought before the marriage. According to the law, the fact that the respondent gets property she bought before the marriage has nothing to do with her entitlement in her share in the family assets. What has to be taken into account in deciding the portions are the criteria stated in Section 5(1) of the 1970 Act. We accept Dr. Mulwila's argument that the court should have taken into account the earning capacity of both parties and the property and financial resources which each of the parties to this marriage had or was likely to have in the foreseeable future. The respondent at the time of the divorce was in employment. She also had received K3 million as terminal benefits as compared to the petitioner who was totally dependent on his agricultural activities and had 8 children to look after. The court below should have taken into account financial means, obligations and responsibility that the petitioner had or was likely to have in the foreseeable future. In our view the court below should have sought the

evidence to establish the actual or nearest amount of the respondent's contribution to the family welfare. On the other hand, the learned Deputy Registrar should have indicated in his judgment his serious reflections on the financial needs, obligations and responsibility of the respondent at the time he made this order, taking into account the fact the respondent indicated at page 52 that she had commenced paying school fees for the children and even assisting them as stated at page 46 of the record. She has lost shelter with the serious consequences. She had no transport. With all these considerations, our conclusion is that although 50%/50% basis of sharing the matrimorial home or the value of the matrimonial home may not have been the correct basis, in our view three eighth of the value of the matrimonial home or K17 million, which ever is greater of the two herein is the correct basis in all fairness to both parties.

Coming to the second argument by Dr. Mulwila that the learned Deputy Registrar misdirected himself in ordering the refund of the purchase of the Mazda, on the record there is evidence adduced by the petitioner in line 13 page 60 of the record which says: "We sold her car to buy another car for the family." On record, however, there is evidence of the respondent that the Mazda was sold without her consent and that the money was used to offset the mortgage - page 53 of the record. The learned Deputy Registrar chose to believe the respondent and not the petitioner on this point. He is entitled to do that. That court cannot interfer with the findings of facts because the trial court is best suited to deal with questions of credibility and as such the two authorities cited - "Masauso Zulu v Avondale (2) and the Attorney-General v Macus Achiume (3) do not apply. Also we find no basis for Dr. Mulwila's assertion that the evaluation of evidence by the Deputy Registrar was biased in that he made findings in favour of the respondent which he should not have made had he considered evidence of the petitioner because we are of the view that the trial court is best suited to deal with the assessment of the truthfulness or otherwise of a witness. We see no merit of such submissions by Dr. Mulwila.

With regard to consequential argument by Dr. Mulwila that the Deputy Registrar misdirected himself in ordering a refund of the purchase price of the Mazda, thus was sine qua non that with his assessment of the truth, he had to conclude that the proceeds of sale of the Mazda had to be refunded to the respondent. We hold that such findings were not based on the evidence before the court because according to the record, the respondent testified in cross examination that those proceeds were used to redeem the second mortgage and as such this was one of her direct contributions to the maintenance and acquisition of the matrimonial home. We therefore quash that order.

The appeal therefore is partially successful, we order that the learned Deputy Registrar's order be quashed and set aside and in its place we order that:

(1) All the family assets, excluding the matrimonial home (that is furniture and other household items vide page 26 and 27 of this record provided they were bought during the subsistence of the marriage by either of the parties) to be shared equally.

(2) The value of the chicken runs to be allocated to the respondent

(3) Three-eighth of total value of the matrimonial home or K17 million which ever is greater to be given to the respondent as her share in the matrimonial home and the cost of this appeal to be borne by the petitioner.

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D.K. CHIRWA
SUPREME COURT JUDGE

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D.M. LEWANIKA
SUPREME COURT JUDGE

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L.P. CHIBESAKUNDA
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 84/98

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

HILARY KABWE	APPELLANT
AND	
BANK OF ZAMBIA	RESPONDENT

Coram: Chaila, Muzyamba and Chibesakunda, JJS

4th February, 1999

For the Appellant : Mrs. L. Mushota of Mushota and Associates

For the Respondent: Mr. F.J. Mensah of Achimota Chambers

O R D E R

When this matter came up this morning, the learned Advocate for the appellant Mrs. L. Mushota after her attention was drawn to various Supreme Court decisions, decided to withdraw the appeal. Counsel for the respondent did not have any objection to the withdrawal and he himself decided to withdraw the cross-appeal.

The court granted both counsel leave to withdraw their respective appeals. The appellant's appeal was, therefore, withdrawn and the respondent's cross-appeal was also withdrawn.

In view of the position taken by both parties, we make no order as to costs.

Dated at Lusaka the.....day of .....1999.

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M.S. CHAILA

SUPREME COURT JUDGE

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W.M. MUZYAMBA

SUPREME COURT JUDGE

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L.P. CHIBESAKUNDA

SUPREME COURT JUDGE