ROSEMARY CHIBWE *v* AUSTIN CHIBWE

Supreme Court

Sakala, Ag D.C.J, Chirwa and Chibesakunda, J.J.S.

6th June, 2000 and 5th December, 2000

(SCZ Judgment No. 38 of 2000)

Flynote

Family Law –Customary Law- application of Divorce – Property settlement and maintenance awards – When appeal court may intervene Customary law duality of legal system – Repugnancy clause

Headnote

This is an appeal from the Local Court to the Magistrate's Court, then to the High Court and eventually to the Supreme Court. The appellant, Rosemary Chibwe was originally in the Local Court the respondent in a divorce petition brought by her former husband Austin Chibwe now the respondent. The respondent sued the appellant for divorce before the local court in Mufulira under customary law alleging inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted as prayed the said prayer on the said grounds.

The appellant appealed to the Magistrates court on the grounds that the local court justices had misdirected themselves by dissolving the marriage on unestablished grounds and that the local court Justices had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. The learned Magistrate heard de novo the evidence and sat with assessors in Ushi customary law.

At the end of the trial, he dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court. The Learned High Court Commissioner considered Ushi Customary Law, and directed the respondent to pay the appellant the sum of K10,000,000 with simple interest at the rate of ten per cent from 8th July, 1991, to the date of Judgment which was 25th June 1998, the appellant appealed against the decision of the learned trial commissioner.

Held:

(i) In Zambia courts must invoke both the principles of equity and law, concurrently

(ii) It is a cardinal principle supported by a plethora of authorities that court's conclusions must be based on facts stated on record.

(iii) In making property adjustments or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case.

(iv) Customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law.

Case referred to:

1. Watchel v *Watchel* [1973] 1 All E.R 829 at 838.

Legislation referred to:

(1) English Law (Extent of Application) Act, Cap. 11;
(2) High Court Act, Cap. 27;
(3) Matrimonial Causes Act 1969;
(4) Matrimonial Proceedings and Property Act, of 1970 (1) s.5 and s.4 *(b)*.
(5) Matrimonial Causes Act, 1973.

W. Mubanga of Messrs. Permanent Chambers for the appellant.
Chitabo of Messrs Chitabo Chiinga and Associates for the respondent.

Judgment

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

This is an appeal, which comes right from the Local Court first to the Magistrate's Court, then to the High Court and now to the Supreme Court. The appellant, Rosemary Chibwe was originally in the local court the respondent in a divorce petition brought by her former husband Austin Chibwe now the respondent. The respondent sued the appellant for divorce before the local court in Mufulira under customary law alleging inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted as prayed the said prayer on the said grounds. The appellant appealed to the Magistrate's court on the grounds that the local court Justices had misdirected themselves by dissolving the marriage on unestablished grounds and that the local court Justices had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. She also alleged that the local court justices were prejudiced in favour of the respondent in handling the case before them. The learned Magistrate heard de novo the evidence and sat with assessors in Ushi customary law. At the end, he still dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court and raised the following grounds:-

(1) that the learned trial Magistrate was biased in favour of the respondent and that he never considered the appellant's evidence before him;

(2) that the learned trial Magistrate failed to order a lump sum maintenance or monthly maintenance for the appellant;

(3) that the learned trial Magistrate failed to make any property adjustment order;

(4) that the learned trial Magistrate misinterpreted the provisions of section 16 of the subordinate Court's Act; and

(5) that he failed to appreciate the principle of equity so as to provide for the appellant upon granting divorce.

The learned High Court Commissioner chose to receive submissions from the two parties and held that since the appeal was not against divorce in principle, his main concern was property adjustment. After he considered the Ushi customary law, he ruled that the respondent had to pay a lump sum of K10,000,000.00 with simple interest at the rate of ten per cent from 8th July, 1991, to the date of judgment, which was 25th of June, 1998, to the appellant. The appellant has now appealed against that decision of the learned trial commissioner.

The facts of the case on which there was no dispute are that the appellant and the respondent married in 1977 under Ushi customary Law and at the time of the divorce they had five children, not including nine born by the respondent from his previous marriage. Some five years after the marriage in 1982 the couple started encountering problems. The main ones being, according to the respondent, the appellant's constant late coming to the matrimonial home each time she went to church gatherings and visitations and her alleged adultery with a man who was not cited in the proceedings and which accusation was not supported by evidence before the local court and the Magistrate's court. According to the appellant, however, the main reason was that the respondent after 1982 started to refuse to have sexual intercourse with her without any reasons. It is evident from the record that the said marriage was riddled with problems such that at the local court although she, during the proceedings, pleaded that she was not for dissolving of the marriage, in the end she conceded to the fact that she and her husband could not stay together and as such she accepted the dissolution of the marriage. At the Magistrate's court level, one of the grounds of her appeal was that she challenged the local court's decision to dissolve the marriage as she alleged that there was no proof on the allegations leveled against her by the respondent. But during the proceedings she did not pursue it with vigour. At the High Court level, although one of her grounds of appeal was that the learned Magistrate was biased against her by not considering her evidence and thus supporting the findings of the lower court in dissolving the marriage as there was no proof of the allegations leveled against her by the respondent. Nevertheless, in her arguments before the court she did not press challenges of the Magistrate court's findings in dissolving the marriage. Her contentions were on her entitlements vis-à-vis the matrimonial property and her claim to maintenance for herself and children of the marriage who were in her custody and control after divorce.

Now before us, the submissions by the learned counsel for the appellant hardly touched on the merits for divorce but rather concentrated on her claim to property adjustment or/and an order for maintenance for the appellant and the children.

It was also common ground throughout the proceedings that the respondent was a very successful businessman and that he acquired a lot of personal and real properties listed at

pages 40 to 47 of the main record of the appeal. Some personal ones are listed at pages 28 and 29 of the record of appeal. The respondent before the subsistence of the marriage in question had acquired a few of these properties but most of those listed were acquired during the subsistence of this marriage in question. Those properties included leaseholds, household goods and business properties. Some of these properties, e.g. the garage and motor vehicles were originally in the respondent's name but were transferred to a company called AMC Contractors Limited, which company, the respondent, according to evidence was the sole shareholder and/or director. It is also common ground that some of these properties were transferred to AMC Contractors Limited during the proceedings for divorce. It was common ground that appellant's occupation was that of a secretary in a bank and that she brought into the family a small salary she was earning from her employment at the bank. The appellant was awarded in another court's proceedings a house in Kamuchanga Compound, a property that the respondent built for her during the subsistence of their marriage. There was also no dispute that the appellant lived a very luxurious life whilst married to the respondent.

Before this court neither the appellant nor her counsel appeared. Mr. Chitabo, counsel for the respondent, appeared and submitted that upon consent by both parties, both parties were to rely on written submissions. We accept that approach and we wish to encourage parties to adopt this approach whenever they are satisfied that all issues they seek this court to consider are well articulated in the written heads of argument or written submissions. In the written submission before us we note that there are five grounds of appeal raised by the appellant. She has argued
on:-

Ground (1)

That although the learned commissioner was on firm ground in law and fact when he held that she was entitled to property adjustment and maintenance in accordance with the evidence on record and Ushi customary law and the doctrine of equity (fairness), surprisingly the sum he awarded of K10,000,000 plus interest for both entitlements was totally inadequate and thus erroneous in law and fact.She argued that as could be seen from pages 53 to 55 in the supplementary record, the assessors were unanimous that under the Ushi customary law, the appellant ought to have been given a reasonable share of the matrimonial property. She pointed out to us the views of the assessors that according to Ushi customary law a divorced woman, regardless of any accusation of any matrimonial offence, is entitled to a reasonable share of matrimonial property acquired before and during the subsistence of the marriage.

According to the Ushi customary law if a divorced woman found her husband with few properties and later acquired more properties she was entitled to a reasonable share after divorce. Her argument is, therefore, that as it was well established by evidence, and fact that was unchallenged, that during the marriage the respondent acquired lots of personal and real property, the learned High Court Commissioner misdirected himself in awarding a sum of K10,00,000.00 as this was not a reasonable share.

Ground (2)

That it was common cause that the respondent was a very successful businessman, the argument that there ought to have been a means assessment test before awarding must be viewed by this court as legally unattainable and a misdirection.

Ground (3)

That although the principle of a company existing as a distinct and separate legal entity from the shareholders is a well established principle, in this case, however, the respondent being aware of these proceeding before the court, transferred some properties registered in his name to AMC Contractors Limited, a company incorporated by him, and in which he had fifty per cent shares. Her argument is therefore that the transfers were done mala fide and a deliberate maneuver to deprive the appellant of her share of that property acquired during the marriage.

Ground (4)

That contrary to the views of the respondent that because the appellant was working as a secretary in a bank with a low salary, she would not and did not contribute to the welfare of the house in accordance with the principle laid down in *Watchel* v *Watchel (1),*Matrimonial Causes Act and Matrimonial Proceedings and Property Act (2), she the appellant contributed in kind as a mother to five of his children and that even as a housewife she contributed in kind to the running of the house in carrying out household chores.

Ground (5)

That the award by court of K19,000,000.00 to her as damages for wrongly and fraudulently change of property known as No. 305, Kamuchanga, Mufulira, (the award this court made to her in a civil claim brought by her against AMC Contractors Limited, SCZ Appeal No. 123 of 1998) cannot be said to bar her claim now before the court. She maintained that under the law she is entitled to maintenance and property adjustment order.

The respondent in response responded that they accepted in principle that there isa distinction between property adjustment and maintenance orders. They argued the following grounds:-

(1) That there was no need for the High Court to award any other entitlement to the appellant as she had taken her share of the matrimonial property before the marriage was dissolved and as such the K10,000,000 order made by the learned High Court Commissioner was adequate. They emphasized this point by saying that in addition, she was given a restaurant and a house in Kalukanya. It was also argued on behalf of the respondent that the maintenance of the children of the marriage and payment of the educational requirements had already been taken care of by the respondent. They tried to adduce evidence to the effect that at the time the appeal was being heard by the learned High Court Commissioner, the appellant was cohabiting with another man;

(2) That the principle of equitable sharing of matrimonial property would not apply as according to them, the appellant had not contributed in kind because as a full time secretary in a bank she did not have enough time to do household chores. Also the little money she earned as a secretary she made it a point to spend it on her self, not on the welfare of the children nor the matrimonial home;

(3) That the learned Commissioner was on firm ground when he did not award the local court costs to the appellant because the local court does not allow appearances of advocates. They however, argued that granting of costs is entirely in the discretion of the court and the learned High Court Commissioner used his discretion correctly. But they concluded that the learned High Court Commissioner erred and misdirected himself in awarding costs at High Court level because their argument is that the whole appeal had no merit. It is therefore, their argument that the costs awarded to the appellant should be quashed; and

(4) In the alternative they submitted that there was no legal basis on which the learned High Commissioner awarded the sum of K10,000,000.00, plus simple interest as there was no means test of the respondent and the appelant had already been awarded a K19,000,000 in the case referred to in SCZ Appeal No. 123 of 1998.

These were the arguments before us. We have considered the evidence and arguments before us. We have observed in this case with interest the dichotomy resulting from the application of an unrecorded customary law, against the background of the changed environment of macro economic with its ramifications, the growth of the common law of Zambia with the changes in the social values influenced by the international values received by Zambia through its ratification of various international instruments more or less creating two justice paradigms. In fact, this existance of two justice paradigms results in some cases in gross disparities bringing about inequality before the law contrary to our Constitutional provisions. It is incumbent for all the courts to uphold the Constitution. Our Constitution has provided that in Zambia courts must invoke both the principles of equity and law concurrently, a point which some judicial officers at local court and subordinate court levels fail to put into practice.

It was argued that the lower court misapprehended the provisions of Section 16 of the Subordinate Act which says:

"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 between African 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.

Provided that –

(i) no party shall be entitled to claim the benefit of any African customary law, if it shall appear either from express contract or from the nature of the transactions out of which any civil cause, matter or question shall have arisen, that such party agreed or must be taken to have agreed that his obligations in connection with all such transactions should be regulated exclusively by some

law or laws other than African customary law:

(ii) in case where no express rule is applicable to any matter in issue, a Subordinate Court shall be guided by the principles of justice, equity and good conscience:

We accept that looking at the record of the proceedings before both the local court and Magistrate court it was common ground that the marriage, which is subject to this litigation, was conducted under Ushi customary law. We are therefore surprised that both the Local and Magistrate Courts which sat with the assessors who are the experts of the Ushi customary law, made no reference to Ushi customary law in dissolving the marriage and in property adjustments. This was improper and a misdirection. Also both the Local Court and the Magistrate Court made certain findings of facts, which were not supported by evidence. It is a cardinal principle supported by a plethora of authorities that courts' conclusions must be based on facts stated on record. In our view this would have been a proper case for us to interfere with the findings of both the Local Court and the Magistrate Court had it not been for the fact the appellant in both these courts, granted reluctantly, conceded to the fact that she and her former husband could not live together and that the marriage had broken down irretrievably.

At the High Court level, although in her grounds of appeal she made references in ground (1) to the learned trial Magistrate's biases against her, she, nonetheless, did not pursue these grounds of appeal before the learned High Court Commissioner. Rather she concentrated on her claim on maintenance and property adjustment. In our view, therefore, she abandoned this ground. In fact before us, she made no reference whatsoever to this ground. However, be that as it may, we would like to point out in this judgment the cardinal principle in our justice system that all the judicial officers are duty bound to be impartial and to be fair to all parties thus invoking the principle of equity before the law. The other cardinal principle well grounded in our justice system is the observance of the principle of stare decisis. The courts must also be alive to the well-established principle of giving reasons for their decisions.

The appellant's first ground of appeal is that the learned High Court Commissioner was on firm ground to have held that the appellant was entitled to property adjustment by awarding her a lump sum of K10,000,000.00, but that he erred in awarding her the lump sum for maintenance and property adjustment as that was not adequate. The customary law in Zambia is recognized by our Constitution provided its application is not repugnant to any written law. According to the Ushi customary law which ought to have been invoked at the High Court level, the appellant was entitled to a reasonable share in property acquired during the subsistence of the marriage. Additionally, the law applicable both at the High Court and in this court in divorce matters is normally the English Divorce Law applicable at the time. This is by virtue of Section 2 (b) of the English Law (Extent of Application) Act (1) as read with section 11 of the High Court Act (2). The leading English case of *Watchel* v *Watchel* (1) demonstrates the developments of the law with regard to distribution of assets post divorce after 1970 English Act. The whole concept of apportioning blame was removed when a marriage has broken down irretrievably.

Now the court inquires and concludes in most cases that both parties contributed to the breaking down of the marriage in question. In this case, the learned counsel correctly made no reference to the alleged adultery of the appellant in arguing on the distribution of assets and in any case the Ushi customary law referred to, according to the record, does not recognize the concept of apportioning blame. What was in issue before the High Court and

us was the percentage of sharing the family assets. Family assets have been defined in *Watchel v Watchel* 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 their 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. Looking at the list at page 40 to 47 in the record of appeal, the list of properties listed at 40, 41, 43, 44, 45 and 46 comprise of all income generating properties and as such covered in principle enunciated in *Watchel v Watchel* cited supra. We have asked ourselves whether or not the learned High Court Commissioner misdirected himself when he ordered a lump sum as both maintenance and property adjustment. Maintenance orders are meant to be periodical payments to maintain either children or the other party. Whereas property adjustment means allocation of one or more properties among the family assets to provide for a divorced person. Section 24 of the *Matrimonial Causes Act* (5) deals with property adjustment.

Under this section a party to divorce proceedings, provided he/she has contributed either directly or in kind (that is looking after the house) has a right to financial provision. The percentage is left in the court's discretion. In the exercise of that power the court is statutory duty bound to take into account all circumstances of that case. For instance, the court is to take in to account all circumstances of that case. For instance, the court is to take into account the income of both parties, earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and standard of living of each of the parties.

Under sections 2, 3, 4 and 5, the Court has been vested with widest possible powers in readjusting financial positions of the parties to the divorce. Under section 5, for instance, the court has powers to reallocate family assets between parties. The court has powers after divorce to effect transfer of one of the assets to the other party. However, in this case it is well beyond any doubt that the wife, now the appellant devoted her energies every time she was not working to the welfare of the family. We are satisfied that she contributed in kind even as a mother to five of the children. She contributed in kind to the acquisition of the properties listed.

We have addressed our minds as to whether or not the learned High Court Commissioner was correct in awarding a lump sum and not periodical maintenance. In our view, these financial arrangements are inter-related. They are not meant to cripple the other side. They are meant to support the divorced party to maintain the standards she/he had during the marriage. Although there are no hard and fast rules in making awards either in lump sum or periodical payments of maintenance or property adjustment, the court is guided by the principle of doing justice, taking into account the circumstances of a given case. We have considered all the circumstances of the case. The learned High Court Commissioner was right in choosing one of the two methods. However, we are not satisfied that he did take into account all the circumstances of the case. We are satisfied that he misdirected himself in awarding only a lump sum of K10,000,000.00 in light of the number of properties acquired during the marriage and the fact that the appellant led a life of comfort with him. We take that view even after taking into account the fact that she was awarded a sum of K19,000,000.00 in Cause No. 123 of 1998. We also do not accept the respondent's submission that he has now taken over the education expenses of the children, as this was not supported by any evidence on record. We are not persuaded by the assertion by the respondent that the appellant was by the time we heard the appeal cohabiting with another man as this was not supported by evidence on record and the learned counsel for the respondent tried to sneak in that evidence by giving it from the bar. It is with those reasons that we intend to interfere with the order made by the learned High Court Commissioner.

In addition to that order by the High Court we order the transfer of one viable income generating property to be specifically named by the learned Deputy Registrar. We also order a lump sum to be assessed by the learned Deputy Registrar to meet all the educational expenses of any of the five children of the family if any of them would not have completed their education and training.

We find no merit in ground (2), (3) and (4) of the appeal. We hold the view that they are covered in ground (1). We are also of the considered view that in this case there is no need for a means test as there was conclusive evidence on numbers of properties acquired by the respondent during the subsistence of the marriage and these properties were valued with the consent of the respondent by the government valuers. We also hold the view that all properties which were listed at pages 40 to 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 those transfers have no effect on our order. In conclusion we uphold the appeal and we order costs in this appeal and High Court costs to be borne by the respondent and to be taxed in default of an agreement.

Appeal allowed