Hon. Justice Chifengi

(110)

IN THE SUPREME COURT OF ZAMBIA — SCZ Judgment No. 8 of 2004

HOLDEN AT KABWE — APPEAL NO. 42 OF 2002
(Divorce Jurisdiction)

B E T W E E N:

**VIOLET KAMBOLE TEMBO** — APPELLANT

AND

**DAVID LASTONE TEMBO** — RESPONDENT

CORAM: CHIBESAKUNDA, SILOMBA, JJS AND MUNTHALI, A/JS.

On the 6th November, 2002 and 2nd April, 2004

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

For the Respondent: Mrs. N. Sharpe Phiri, Sharpe and Howard

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**J U D G M E N T**

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**SILOMBA, JS, delivered the Judgment of the Court.**

Cases referred to:-

1. **Pettit -Vs- Pettit (1970) AC 777.**
2. **Gissing -Vs- Gissing (1971) AC 886.**
3. **Wachtel Vs. Wachtel (1973) 1 A. E. R., 829**

This appeal lies to this Court against the judgment of the High Court, sitting at Lusaka, in respect of property settlement following a divorce. The record of appeal reveals that in 1996 the learned Deputy Registrar entertained an application from the appellant for property settlement, which was contested by the respondent. It would appear from the record that during the subsistence of their marriage the appellant and the

respondent acquired property, both movable and immovable, in substantial quantity while in Zambia and while serving abroad.

However, upon hearing the evidence from both parties and upon the consideration of the written submissions from counsel, the learned Deputy Registrar came to the conclusion that most, if not all, of the matrimonial property, both in and outside Zambia, was acquired by the respondent. Even though the appellant's contribution could be ascertained, the learned Deputy Registrar found that her contribution, compared to what the respondent had put in, was negligible.

On the basis of his findings, the learned Deputy Registrar did not go along with the argument of the appellant that the matrimonial assets be shared equally. There was undisputed evidence that some of the assets, both movable and immovable, acquired by the respondent during the subsistence of the marriage, had been disposed of by the appellant and the proceeds from those assets had never been accounted for by her. The only immovable asset of substance that had survived the sale by the appellant was Subdivision 9 of Farm No. 283a in Lusaka West. Apparently, this property was very well developed and, therefore, became the focal point of the dispute in the settlement proceedings.

From the evidence on record, Subdivision 9 of Farm No. 283a consisted of the main residence, a garage, ten workers' houses, a clinic, doctor's house and a cafeteria under construction. Considering the nature of the business on the subdivision, it was awarded to the respondent, a medical practitioner, so as to enhance its utilization. The learned Deputy Registrar awarded the Woodland house and the classic hair saloon in Windhoek, Namibia, to the appellant. It is important to note here that at the time the award was being made the appellant had sold off the two immovable assets. Also awarded to the appellant was Stand No. 175, Kabulonga (partially developed with servants quarters) and Stand No. 1001, Lilanda in Lusaka. Besides, the appellant was awarded, a lump sum of K40, 000, 000 or K1, 500, 000 per month for her maintenance and a motor vehicle in good state of repair or in the alternative K10,000,000 to enable her to buy a good car of her liking.

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It would appear that the appellant was not entirely satisfied with the award of the learned Deputy Registrar and so she appealed to a Judge at Chambers. Considering that appeals to a Judge at Chambers, from the decisions of the Deputy Registrar, are heard *de novo*, the learned trial Judge was compelled to hear the evidence afresh. At the conclusion of the testimonies, the learned trial Judge, in a judgment dated the 10th of September, 2001, made the following awards, among others:-

a) That Stand No. 175, Kabulonga, with servants quarters, be given to the appellant as awarded by the learned Deputy Registrar. The respondent was, however, ordered to build a homestead or decent house on the stand to "their expectations" before the marital breakdown or be refunded half of the valuation of the total assets for her re-allocation elsewhere;

b) That Subdivision 9 of Farm No. 283a, Lusaka West, be retained in its entirety by the respondent as ordered by the learned Deputy Registrar;

c) That the assets that had been sold off in Windhoek (Namibia) and Lusaka be evaluated and the proceeds there-from be shared on equal basis between the two parties;

d) That Stand No. 1001, Lilanda, be disposed of with proceeds shared equally;

e) That household effects at Subdivision 9 of Farm No. 283a, as well as, motor vehicles acquired before divorce be disposed of and proceeds shared equally; and

f) That Stand No. 7677, Woodlands, Lusaka, sold off by the appellant without rendering an account to the respondent, be given an estimated value to be shared equally with the respondent.

Being dissatisfied with the judgment of the learned trial Judge, the appellant appealed to this Court. There are seven grounds of appeal, which are exemplified in the heads of argument filed by the appellant's counsel. The respondent's counsel has filed the heads of argument in response to the appellant's heads of argument. At the very outset, counsel for the appellant told us that she was not pursuing ground 1. We have looked at the rest of the grounds of appeal and considering the similarities among some of them we have decided to merge grounds 2, 3, 4 and 7; these will be dealt with together. Grounds 5 and 6 will be dealt with separately.

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Before we could hear arguments on the seven grounds of appeal, counsel for the respondent raised preliminary objections as indicated in her notice filed on the 31st of October, 2002. Her objections related to the record of appeal, which she said was irregular. For example, (a) the affidavit at pages 102-104 of the record was said to be incomplete in that it was not commissioned; (b) the unsigned orders of the learned trial Judge at pages 115-117 were included in the record of appeal; (c) documents that were not specifically admitted in the court below were part of the record (see pages 92 to 101 and pages 66 to 85 and 294); (d) documents used for application for maintenance before the learned Deputy Registrar are part of the record (see pages 22-26) and yet the issue is one of settlement of property and (e) "without prejudice" letters at pages 24 and 25 are part of the record.

Besides, counsel for the respondent told us that the evidence in chief prior to page 290 was missing, which she thought would impact significantly on the proceedings. After hearing arguments from both sides on the preliminary objections and considering that there was limited time left in which to deal with the main appeal we assured counsel that we would assign reasons in our judgment for any disputed documents we may decide to use or expunge. As promised the reasons can be found at the end of the judgment.

The gist of ground 2 is that, the learned trial Judge erred in law and in fact when he held that Subdivision 9 of Farm No. 283a, Lusaka West, was being considered a matrimonial home only because it was the remaining property and also because of its high value, when there were other properties at Lilanda and Kabulonga. In ground 3, it is contended that the learned trial Judge erred in law and in fact when he held, that the appellant asked for the subdivision and sharing of Subdivision 9 of Farm No. 283a on 50% basis because of her large appetite and not because it was a matrimonial home and yet he (the learned trial Judge) did not consider the aggrandism of the respondent in holding on to all property before he surrendered the stand on which there was a servant's quarter and that the learned trial Judge did not order a time limit by which the respondent was to build a house to the appellants' standards.

With regard to ground 4 it is also contended that the lower court erred in law and in fact when it apportioned 50-50 all the other properties on the basis of Section 25 (1) and (2) of the Matrimonial Causes Act and the Matrimonial and Family Properties Act 1987 but failed to be consistent with respect to the disputed farm whose value surpassed all values put together. And in ground 7 it is contended that the court below erred in ordering the appellant to pay 50% of all the properties she disposed off without considering the need that prompted such disposal. On the other hand the respondent disposed of motor vehicles and furniture only to spite the appellant and yet the respondent was a destitute for money.

In her oral submission relating to ground 2, counsel for the appellant briefly referred to the several places and countries the appellant and the respondent resided during the subsistence of their marriage. Apparently, from the time the respondent was appointed to join the World Health Organization (WHO), he served the organization mostly in countries outside Zambia. Counsel's view was that as they moved from country to country the houses they lived in became their matrimonial homes. Back at home, the appellant and the respondent acquired property because they knew that they would one day return to their country of birth, she submitted.

According to counsel, in 1975 they jointly purchased Subdivision 9 of Farm No. 283a. However, counsel could not confirm whether the property was paid for jointly in view of the fact that the title to the land was in the name of the respondent. The foregoing notwithstanding, counsel said that it was the appellant who was chasing the title to the land at the Department of Lands; that she settled on the matrimonial farm long before 1992 upon her return from Namibia; that during her brief stays in Zambia while on holidays, the appellant used to put up developments on the farm and that upon her return she lived on the farm for 20 years.

Counsel's argument was that for a home to qualify to be a matrimonial home it was not dependent on the contributions made by the couple towards its acquisition. She cited to us the case of ***Pettit -Vs- Pettit*** (1) to reinforce the principle that in cases of settlement of property, it did not matter in whose name the property was registered. Considering the kind of development that was on the farm and the contribution of the

appellant towards the improvements, it was canvassed by counsel that the appellant had an equitable interest in the farm as a matrimonial home, a home in which both parties intended to live after active service.

With regard to ground 3, counsel said that the lower court did not consider the aggrandism of the respondent in holding on to all properties in his name to the exclusion of the appellant when it ruled that the appellant had 'large appetite' following her request for a 50% share in Subdivision 9 of Farm No. 283a, Lusaka West. Counsel submitted that, the respondents' aggrandism was further exemplified in 1996 when he appealed against the learned Deputy Registrar's award of Stand No. 175, Kabulonga, to the appellant because it was on this piece of land on which he wanted to build a clinic.

Counsel said that the respondent later withdrew the appeal and surrendered keys to the house on Stand No. 175 to the appellant so that she could move out of the farm. It would appear from Counsel's submission that the withdrawal of the appeal and surrender of keys to the house on Stand No. 175, Kabulonga, was conditional upon the appellant moving out of the farm. In her written submission, counsel said that considering the high standard of developments on the farm, it was a misconception to accuse the appellant of having a large appetite for the farm. She argued that it did not matter in whose name the subdivision was registered; the important thing was whether they both contributed to its development through their joint efforts and if that was the case then the property belonged to both equally. To reinforce her argument we were referred to the case of ***Gissing -Vs- Gissing*** (2).

In relation to ground 4, counsel submitted that the properties that were ordered to be shared equally had been disposed of by both the appellant and the respondent during the subsistence of the marriage but while on separation. She argued that the appellant disposed of assets out of necessity, as she needed money to sustain herself and clear debts in Namibia. On the other hand counsel did not appreciate why the respondent disposed of property. She submitted that it was the duty of the respondent to take care of the appellant because she was in the weaker position. It was contended, very forcefully, that the lower court was misguided in ordering the sharing of property equally that did not

exist at the time of divorce. The arguments under this ground do apply to ground 7 with equal force.

In response, counsel for the respondent, argued grounds 2 and 3 together. She submitted that there was no evidence to support the view that Subdivision 9 of Farm 283a was a matrimonial home as the couple, prior to divorce, never resided on the farm as husband and wife. According to counsel, the appellant had admitted that she moved on to the farm before 1993 when there was no marriage as such and while the two were living separately pending divorce.

She accordingly agreed with the decision of the learned trial Judge that the subdivision was never intended to be a matrimonial home as the parties never contemplated to retire there. She said this in view of the evidence on record, which shows that at one time the respondent had decided to sell the property to the Government or give it to his daughter, a medical doctor. Her further argument was that the first house the couple bought and lived in, as their matrimonial home, was the Woodlands Extension house; that the said house was later transferred into the appellant's name, who sold it and moved to the disputed farm.

Counsel has also argued that when awarding property the lower court properly addressed its mind to the totality of all family assets as they stood before divorce and not what they acquired before and after the marriage. It was contended that the appellant had benefited fully from the settlement ordered by the learned Deputy Registrar and in the view of counsel it was improper for the appellant to contest the decision of the learned Judge. Counsel argued that the appellant was awarded more property, even though she has no children and yet the respondent was awarded only one property when he had nine children. The record shows that the children the respondent accumulated over the years were from various women.

In her written submission, counsel did not say much about ground 4 because, as far as she was concerned, this had been covered under grounds 2 and 3. On ground 7 the respondent's counsel submitted, in her heads of argument, that the learned trial Judge was, in her view, justified in making the order he made. She said that the learned judge had taken into account all the properties, moveable and immoveable, that the appellant

had custody of during the life of the marriage but which she later sold without rendering an account to the respondent; that despite this she was awarded three properties as against the respondent's only one property; that she had no children of her own to look after, which meant that she had no financial obligations like the respondent had over his nine children.

We have anxiously considered the oral submissions and the heads of argument, in support of each party's position in this appeal. It is not a secret, as the record will confirm, that during the subsistence of their marriage the respondent had acquired a good number of assets, both movable and immovable. The record will further confirm that the assets that were entrusted to the appellant were sold during the life of the marriage but never accounted for. In short, the record paints a very sad picture of the appellant's explosive and extravagant life that may, as well, explain the predicament in which she is in today.

When the issue of settlement of property has arisen, as it did in this case, the court is obliged to take into account several factors, such as, the history of the marriage and the conduct of the players to the marriage before arriving at a final settlement. In Section 25 of the Matrimonial Causes Act, 1973, which re-enacts provisions introduced by the Matrimonial Proceedings and Property Act in 1970, the court is obliged, among other things, to have regard to all the circumstances of the case and so exercise its powers "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

It is from the foregoing provision that Lord Denning evolved the principle of the one-third share of the family assets for a wife in ***Wachtel Vs. Wachtel*** (3) because of the belief that a husband, more than a wife, was likely to shoulder more financial obligations towards the children of the family after the break-up of a marriage. In this appeal there are no children born during the marriage, although it is well established by evidence that the respondent has nine children outside wedlock.

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Where the couple have had a turbulent marriage and are compelled to part company, the conduct of the parties towards each other becomes a big factor and the proceedings for settlement of property take a broader view. The principle enunciated in ***Pettit -Vs- Pettit*** and adopted in ***Gissing -Vs- Gissing*** is instructive. Although the two cases were decided before the coming into effect of the Matrimonial Causes Act, 1973, they cannot be ignored in the present appeal.

In such a settlement, the court looks at the intentions of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement then the court must make a finding as to what was going on in their minds at the time of the acquisition of property. In the first place, Subdivision 9 of Farm No. 283a is registered in the name of the respondent as beneficial owner. The improvements on the subdivision fairly indicate as to what were the intentions of the respondent before the dissolution of the marriage. There are residential houses for both the respondent and his workers and above all there are structures for a clinic, which the respondent, as a medical doctor, hoped to fall on in retirement.

The other undisputed facts on record are that the respondent bought a house in Woodlands Extension, which was used as the matrimonial home. Before he left for an assignment with the WHO outside Zambia he transferred the house into the name of the appellant. While in Namibia the respondent is said to have established a classic and profitable hair saloon, which the appellant managed. The two immovable assets and several other movable assets were later sold by the appellant and no account was rendered to the respondent.

After the sale of the house in Woodlands Extension the appellant headed for Subdivision 9 of Farm 283a, which she later termed "the matrimonial home." It has been submitted, and we agree with the respondent's counsel, that Subdivision 9 could never have been intended to be the matrimonial home. This is so because at the time the appellant moved there, there was no consensus between the two to live together and in harmony due to pending divorce proceedings, which were preceded by separation.

As already indicated, it cannot be denied that Subdivision 9 is a well developed property and that it was the last property the appellant could aspire to after disposing of

other properties. She went to settle on Subdivision 9 because it was superior to the Lilanda and Kabulonga properties. Because of its superior infrastructure, the learned trial Judge cannot be faulted for finding, as a fact, that it was targeted by the appellant to be the matrimonial home.

In our judgment, we think that after being awarded assets, through the ruling of the learned Deputy Registrar, which in most cases she had already consumed, the appellant cannot qualify for some more. We are, therefore, at pains to appreciate the learned trial Judge's award, on a 50-50 sharing basis, of all the moveable assets sold and consumed by the appellant and the respondent. We express this view because it is virtually impossible to provide an inventory and let alone place any value on them for purposes of assessing each one's entitlement. If the order was to be carried through it would, in our view, be a recipe for continued acrimony between the two litigants.

Our foregoing reasoning equally applies to the learned trial judge's order that estimated values be placed on Stand No. 7677, Woodlands Extension and the Namibian salon for purposes of sharing out the money on equal basis. Because of the difficulties we have articulated above, that are likely to arise in the implementation of the order, we have no choice but to reverse the learned trial Judge by maintaining the awards as decreed by the learned Deputy Registrar.

Before we leave grounds 2, 3, 4 and 7 we have been able to remind ourselves about that part of ground 3, whereby it is argued that the learned trial Judge, in ordering that the respondent should build a house for the appellant, did not order the time limit by which to build the house to the appellant's standards. Without delving into the submissions, which were in any case not detailed, we are of the view that the order for the respondent to build a house "to their expectation" is not only vague but also very oppressive to the respondent.

We are saying that the order is vague because it does not specify up to what amount the house should be built; it does not also stipulate the standard design of the structure so that the appellant is aware of what is expected of the respondent. In its present form it would mean that the appellant and the respondent would be entitled to

hold different views as to the structure to be built in terms of value and structural design. In our view, this kind of arrangement would not be compatible with the aspirations of both parties, especially after a turbulent relationship, which both of them are very keen to put behind them.

We are aware that the learned Deputy Registrar awarded Stand No. 1001, the Lilanda house, to the appellant in addition to Stand No. 175, Kabulonga, where there is a servant's quarter. On appeal to a Judge at chambers, the learned trial Judge reversed, for no good reason, the order to award the Lilanda house to the appellant but upheld the learned Deputy Registrar's award of Stand No. 175, Kabulonga. We do not appreciate the direction given by the learned judge that the Lilanda house must be sold and the proceeds there-from shared equally. In this regard the award is reversed and in its place we restore the learned Deputy Registrar's award.

We are also aware that although the proceedings before the learned Deputy Registrar were in respect of settlement of matrimonial property, the appellant was awarded a lump sum of K40,000,000 for maintenance, which the respondent has not challenged. From the submission of the respondent's counsel, it would appear that the lump sum has been paid. In consideration of the lump sum for maintenance, which should have never been ordered, and the Lilanda house we have awarded to the appellant we do not think that the respondent should be subjected to building a house for the appellant.

We accordingly set aside the order of the learned trial Judge for being vague and oppressive and for not taking into account the benefits already enjoyed or being enjoyed by the appellant. It, therefore, follows that grounds 2 and 3 have failed while the learned Judge's reasoning in grounds 4 and 7 is set aside on the understanding that it is not feasible to enforce the award on a 50% sharing basis of all assets sold or consumed by the appellant or by the respondent during the marriage. The better view is that what was sold off by the appellant shall be part of her award as per the learned Deputy Registrar's award.

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With regard to ground 5, it is contended that the court below erred when it held that the appellant failed to expunge evidence about her alcoholic and drug habits; that the respondent did not produce any medical findings as to the allegations and so a denial on the part of the appellant was sufficient. The appellant's counsel has submitted in the heads of argument by reproducing the lower court's findings, found at page 10 of the record of appeal, at length.

In the quotation, the learned trial Judge catalogues the history of the marriage and from our point of view it was a marriage marred by mistrust and unfaithfulness between the parties. The findings have been attacked for being biased against the appellant in that the learned Judge used slaying language against the appellant throughout his judgment. In response, counsel for the respondent submitted that there was no bias against the appellant as the evidence before the learned Judge spoke volumes; that the appellant's own evidence before the lower court was an admission to being hooked to alcohol and gambling.

We have considered the evidence before the learned trial Judge, as well as, that adduced before the learned Deputy Registrar and having regard to the submissions, we are of the view that there is no basis for our intervention into the findings of fact of the learned Judge. Even though the appellant denied before the lower court that she had taken to drugs and gambling there is evidence from the respondent to that effect, which the learned trial Judge must have believed after evaluating his demeanour and credibility. For example, there is evidence by the respondent that the appellant was admitted to a Namibian hospital because she had taken drugs and the evidence was never challenged in cross-examination. Ground 5 is accordingly dismissed.

In ground 6 the appellant averred that the learned Judge further erred in fact, when he held that it would be unreasonable for a retired no longer United Nations (UN) servant to aspire to a "golf course life" when the future of every retiree especially of a UN standard, is secured. We have considered the heads of arguments and what was submitted orally by relating them, in context, to what the learned Judge meant. We shall not summarise the submissions here because it is not necessary.

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It is, however, important to note, in full, what the learned Judge meant at page 10 of the record when he said - "It should be bizarre to consider placing the appellant to the world class civil service benefits they enjoyed over the last 20 years because that would be unreasonable for a retired no longer UN servant to aspire to but it is reasonable to place them both in an acceptable social life, their status and education could locally place them, of course 'golf course life' may be a beneficial return but on their own effort." The quotation is a finding based on fact for which we have no basis to intervene. The learned Judge, having heard the parties live and having assessed their demeanour was entitled, in the absence of any evidence to the contrary, to observe as he did. Clearly, what the learned Judge had in mind was how to strike the balance in the awards. This ground has failed also.

In conclusion, we wish to say that we have carefully considered the settlement awards granted by the learned trial Judge. It is quite clear that we do not agree with him on some of the orders that he made. We note that in some of the awards the learned Judge does affirm the awards made by the learned Deputy Registrar, while in others he has reversed the learned Deputy Registrar. In this judgment, we have said that Stand No. 1001, Lilanda, will revert to the appellant as decreed by the learned Deputy Registrar, even though the appellant did not appeal against the order of the learned Judge reversing the learned Deputy Registrar.

We have also said that Stand No. 7677, Woodlands Extension and the Namibian salon, should not be given values and shared equally, instead we have said that they should revert to the appellant as per the learned Deputy Registrar's award. Even though the appellant has partially succeeded under grounds 4 and 7 we have no choice but to dismiss the appeal with no order for costs. Having rendered our judgment in the manner we have done, the preliminary issues raised at the beginning of the judgment cannot be

maintained. The preliminary application is accordingly dismissed, again with no order for costs.

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L.P. Chibesakunda,
**SUPREME COURT JUDGE.**

.....
S.S. Silomba,
**SUPREME COURT JUDGE.**

.....
S.S.K. Munthali,
**ACTING SUPREME COURT JUDGE.**