

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(CIVIL JURISDICTION)

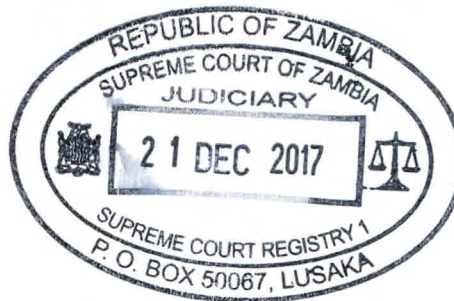
APPEAL NO 57/2015

BETWEEN:

LIZZY MUSAUKA

AND

MPASI SOLOMON DUBE



APPELLANT

RESPONDENT

CORAM: MAMBILIMA CJ, MALILA AND MUTUNA JJS;
on 7th November, 2017 and 21st December, 2017

For the Appellant : No-appearance
For the Respondent : In person

JUDGMENT

MAMBILIMA CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. WACHTEL V WACHTEL [1973] 1ALL ER 829 CA
2. GRIFFITHS GRIFFITHS [1974] 1 ALL ER 932
3. CHIBWE V CHIBWE (2001) ZR 1

WORKS REFERRED TO:

- a. HALSBURY'S LAWS OF ENGLAND VOLUME 13, 4TH EDITION
PARAGRAPH 1122

This is an appeal from the decision of the High Court, relating to property settlement after divorce. The Appellant and the Respondent were divorced by a Local Court in Mazabuka. The Appellant then complained to the Deputy Director, Local Courts, over the judgment of the Local Court with regard to settlement of property after divorce. She alleged that the Court did not consider a house which was in her name. The Deputy Director referred the matter to the Local Courts Officer for review. Upon review, the Local Courts Officer decided that the two properties in contention, which were acquired during the subsistence of the marriage, should be sold and the proceeds from the sale should be shared equally between the Appellant and the Respondent.

The facts of the matter, as can be gleaned from the record, are that the Appellant and Respondent were married in 1989 and had four children. During the subsistence of their marriage, they acquired some properties. For purposes of this appeal, the properties in question relate to house No. 295/a/B/N in Changa Changa and house No. 477 in Nakambala Compound, Mazabuka.

Each party contended before the Local Courts Officer, that they had contributed financially towards the construction of the house in Changa Changa but title was obtained in the Appellant's name. Further, that the Respondent bought the house in Nakambala Compound. The Court viewed both properties and found that the Changa Changa house was more upmarket with four bedrooms, big yard and it was in a good locality. The property in Nakambala Compound used to be a council house and had been extended to 14 rooms.

The Local Courts Officer, when making a determination in the case, did not consider the ownership of the two houses between the Appellant and the Respondent, but the time when the properties were acquired. He came to the conclusion that the houses were family property since they were acquired between 1989 and 2009, when the marriage was subsisting. Consequently, he ordered that the two houses should be sold and the proceeds there from, should be shared equally between the Appellant and the Respondent.

The Appellant was not satisfied with this judgment. She appealed to the Subordinate Court Class 1, contending, in the

main, that the children of the family would be rendered destitute if both houses were sold. Before it rendered its decision, the Subordinate Court gave the parties an opportunity to attempt an ex curia settlement to share the property between them amicably but to no avail. At the end of the day, the Subordinate Court upheld the local Court's decision for the parties to sell the houses and share the proceeds equally. It found that the two houses in question, having been acquired during the subsistence of the marriage, comprised family assets. In arriving at this conclusion, the learned Magistrate relied on the definition of family assets as espoused in the case of **WACHTEL AND WACHTEL**¹. He also found the case of **ROSEMARY CHIBWE AND AUSTIN CHIBWE**³ to be almost on all fours with this case having regard to the sentiments that we expressed therein that a wife who devotes her energies to working for the welfare of the family is deemed to have contributed in kind to the acquisition of family assets. The Magistrate found, however, that in this case, the Appellant went further than just providing for the welfare of the family: she contributed financially, materially and physically to the acquisition of the property.

It is clear from the Judgment of the Subordinate Court that it found it difficult to apportion the two houses between the Appellant and the Respondent. It reasoned, ***“It is a palpable fact that the two houses have different values and that it is probably the reason why the parties failed to exploit the opportunity this Court granted them to attempt to share.”*** The Court ordered that the two houses be sold and the proceeds thereof be shared equally between the parties. According to the learned Magistrate, leaving the parties to share proceeds from the rentals of the houses ***“in this obvious rift”*** would result in ***“an imminent danger of perpetual acrimony between the parties”***. Further, that since the Appellant and Respondent had failed to secure valuers to determine the value of the houses, he directed the parties to agree on the market price.

It would appear from the record that after this judgment was delivered, the Appellant and Respondent signed a separate agreement, brokered by the Appellant’s legal representatives, the Legal Aid Clinic for Women, to rent out the two properties. The parties agreed among other issues, that the Respondent would

vacate the Changa Changa house and that proceeds from both houses would go towards the education of their children. That in the event of any shortfall in school fees, the deficit would be met by the two parties in equal amounts.

This agreement seems to have collapsed. The Appellant was back in Court, to appeal against the decision of the Subordinate Court to the High Court. She advanced two grounds of appeal. The first ground was that the lower Court did not consider the earning capacities of the parties when it made the order to sell the houses. According to the Appellant, the Respondent was still in gainful employment as a clinical officer but that she was unemployed and had sole custody of the children, two of whom were still in secondary school while the other two were waiting to go to college.

The second ground of appeal was that the lower Court did not consider maintenance of the Appellant and the children. Her prayer was that the Court should give her the Changa Changa house which was registered in her name and which was where she resided with the children, and that the Respondent should remain in the Nakambala house where he resides.

The Respondent objected to the Appellant's prayer, insisting that the houses should be sold as directed by the Subordinate Court. He denied that he was staying in the Nakambala house but that he was living in a rented house somewhere else. He alleged that the Appellant fraudulently registered the house in Changa Changa in her name. That he was the one living in that house but he agreed to vacate it on the understanding that the two properties would be sold but that the Appellant secretly moved into the house and was now demanding to be awarded the same house as her share of the matrimonial property. Further, that contrary to the Appellant's claims that he was not looking after the children, he was paying school fees and had arranged college places for the older children.

Upon considering the submissions and evidence on record, the High Court dismissed the appeal. The Court dispensed with the second ground of appeal on maintenance on the ground that the matter which resulted in the judgment that was being appealed against related only to the issue of sharing the two houses and not maintenance of the Appellant and the children.

On the remaining ground of appeal; that the Subordinate Court did not consider the earning capacity of the parties when it ordered that the two houses be sold and the proceeds be shared equally; the Appellant contended that the Respondent was in gainful employment while she was not; and that she was keeping the four children of the family.

The Respondent opposed the Appellant's prayer and maintained that the properties should be sold and the proceeds should be shared equally as ordered by the Subordinate Court. He also submitted that he was residing in the house in Changa Changa but only moved out when they had agreed to sell the house. According to the Respondent, upon vacating the house, the Appellant secretly moved in and fraudulently registered the house in her name.

The High Court held that while the earning capacity of a party was a valid ground in a proper case, the Appellant's claim was unsustainable because she had not come to Court with clean hands. The Court found that the Appellant's prayer was made in bad faith because she had agreed with the Respondent to vacate the

house in Changa Changa so that both houses could be sold, but instead, she moved into the house and was now seeking to be awarded the same house. In conclusion, the Court below found nothing wrong with the lower Court's order to sell both houses, in the circumstances of this case.

Not satisfied with this determination, the Appellant has escalated the case to this Court on appeal. She has advanced seven grounds of appeal couched as follows:-

- 1. That the Court did not look into the matter that the Appellant is the custodian of all the four children of the family.**
- 2. That the Court did not consider the share of the four children of this broken family.**
- 3. That the Honourable High Court Judge misdirected himself in fact and law when the (he) believed the Respondent claim of supporting and paying the children's school fees.**
- 4. That the trial Court misdirected itself by accepting the prayer of the Respondent to sell the two houses and share equally when he has been benefitting from both houses and a car since 2008. I was not benefitting anything.**
- 5. That the Respondent misled the Court beyond reasonable doubt by saying I changed the ownership of the Changa Changa house.**
- 6. That the Respondent misled the Court by saying he is renting a house when he is staying in a matrimonial house with another woman. We acquired three plots and a car together. I paid five million over the car and he paid seven million over the same car. Plots number 477 Nakambala and 73 M Changa Changa and the car are in his name. The Court should find out from Onard, Frank and Elvis. The Court side-lined plot 73 and the car. I tried to complain to the Director of Local Court, still no one is ready to take my complaint.**
- 7. That as a matter of common sense, it is prudent to send or ask for further investigation over the whole case to prove the reality of the matter since the Respondent has misled the Court.**

At the hearing of the appeal on 7th November 2017, the Appellant sought an adjournment of the appeal through a Notice to Adjourn, which was filed on 25th October 2017. She attached some Discharge slips from Mazabuka General Hospital showing that she had been in and out of hospital on account of illness. We declined to adjourn the appeal upon finding that she had filed detailed heads of argument prosecuting the six of the seven grounds of appeal.

On the first ground of appeal, the Appellant argued that the Court below overlooked the fact that she was the sole custodian of the children. She alleged that the Respondent and his wife failed to take care of two of the children of the family, namely, Onard and Elvis, as ordered by the Local Court after divorce. She alleged that in 2013, the Respondent's wife even assaulted Elvis with an iron bar whereupon the matter was taken to Court. That the Respondent and his wife thereafter refused to take care of the children and even chased them from their home.

On the second ground of appeal, it was the Appellant's submission that the contrary to his claims, the Respondent has not, since 2013, supported or paid the children's school fees. That two

of the children are awaiting to go to college and the Respondent has refused to sponsor them while a girl who is in Grade 11 struggled to pay school fees until an NGO called FAWEZA paid the fees for her.

On the third ground of appeal the Appellant contended that the Court below misdirected itself by accepting the Respondent's prayer that the two houses be sold and the proceeds be shared equally between them. She stated that since 2008, the Respondent has been receiving rentals from the Nakambala house while he stayed in the Changa Changa house for five years. That, during this time, she was being kept by the church, together with the children, prompting her to take the matter to the National Legal Aid Clinic for Women. She contended that the Respondent has benefited more and the idea of selling the houses would not be fair to her and the children.

In the fourth ground of appeal, the Appellant responded to the allegation that she fraudulently changed the ownership of the house in Changa Changa. She contended that she is the rightful owner of the Changa Changa house. That she borrowed to build the house and out of the four assets acquired during the subsistence of the

marriage, she owned only one asset while the Respondent owned three. These assets include a car; Toyota Chaser, and a plot.

With regard to the fifth ground of appeal, the Appellant submitted that the Respondent misled the Court when he said that he was renting a house. That in fact, the Respondent has another house where he is now living and hence the insistence that the two houses should be sold. That contrary to the Respondent's claim that she secretly occupied the Changa Changa house which the Court ordered for sale; the Respondent was insisting on selling both houses because he had another house which he developed using proceeds from the family assets.

On the sixth ground of appeal, the Appellant submitted that it was the children who moved into the house in Changa Changa with the help of the police, after the Respondent had chased them. That after being chased from the house, the children reported the Respondent to the police and he failed to show up when he was summoned.

The Appellant did not put up any arguments in support of the seventh ground of appeal.

The Appellant's prayer is that the houses should not be sold. That if they were sold, that would deprive the children of a shelter and a source of funds for their education. She maintained that she is still unemployed and has the custody of the four children of the family.

The Respondent did not file any written submissions. He responded viva voce to the Appellant's heads of argument. His position was that he was ready to comply with the Court order to sell the houses and share the proceeds because of the Appellant's conduct. That they tried, when given an opportunity to discuss the settlement of property between them, but nothing came out of it because the Appellant was uncompromising and started insulting him. That after the Court ruled that they sell the houses, he was preparing to find alternative accommodation when she dragged him to the Legal Aid Clinic for Women, alleging that he had refused to vacate the family home in Changa Changa. That at the Legal Aid Clinic for Women, he was given three months to vacate the house. He found alternative accommodation and as he was in the process

of moving out, the Appellant quickly moved into the house and even took over some of his assets that were still there.

When asked by the Court if it was prudent to sell the two houses and share the money between the two of them leaving nothing for the children, the Respondent submitted that it was his view that the property was for the children and that matrimonial property should be shared equally. But that the Appellant had been very inconsistent and aggressive, forcing him to agree with the order of the Court to sell the houses, just so that they did not quarrel.

The Respondent submitted that he had no problem sharing the houses equally as long as he was given the house in Changa Changa. He submitted that both houses were four-bedroomed though the house in Changa Changa was bigger in terms of size and value. That its estimated value would be K50,000.00 higher than that of the house in Nakambala. He prayed that if this Court was to order that they share the two houses, he should retain the Changa Changa house where he used to live and the Appellant should be given the Nakambala house.

We have anxiously considered the evidence on record, the oral and written submissions from both parties, and the order appealed against. The Appellant and the Respondent were divorced in the local court. The contention, from the local court up to this Court has been on the sharing of the two houses that the couple acquired during the subsistence of the marriage. It is not in dispute that the two properties in Changa Changa and Nakambala comprise family assets. The Local Court, Subordinate Court and the High Court ordered that the two houses should be sold and the proceeds should be shared equally between the Appellant and the Respondent. Maintenance and custody of children was not an issue in the appeals to the Subordinate Court and the High Court. We, therefore, agree with the Court below, that the issues of maintenance and custody of the children, which were not before the Subordinate Court, could not be subject of appeal before the High Court.

What cuts across all the grounds of appeal is whether the orders by the lower Courts, that the two houses of the family should

be sold and the proceeds shared between the Appellant and the Respondent, was fair and served the interests of justice in this case.

The Appellant has argued forcefully before us, as she did in the Court below, that selling the two properties would be unfair to both her and the children. That she was the sole custodian of the children of the family and was unemployed while the Respondent was in gainful employment in the Ministry of health. The Respondent confirmed that he was in employment but argued that the Appellant has been inconsistent and aggressive and hence his resolve to sell the properties.

We are alive to the fact that the parties in this case were divorced in the Local Court. We can, therefore, safely assume that theirs was a customary marriage. We did state in the case of **CHIBWE VS CHIBWE**³ in which the marriage was governed by Ushi customary law, that in matters of financial provision and property adjustment after divorce, the court has a duty to take into account, all the circumstances of the case including, among others, the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable

future. The desired outcome is that the proposed financial arrangements must meet the justice of the situation.

In this case, we have a situation where a divorced couple, with a very acrimonious relationship and four children in tow, failed to agree to share the two houses of the family. It would appear that the hostility between the parties influenced, to a large extent, both the Local Court and the Subordinate Court's decision that the Appellant and the Respondent should just sell the two houses and share the proceeds equally. The High Court, on the other hand, was of the view that the Appellant's prayer was made in bad faith in that she surreptitiously moved into the house in Changa Changa after the Respondent had vacated it so that it could be sold. After all is considered, the question that begs to be answered is whether the decisions of the lower Court have taken into account all the circumstances of the case, so as to address the justice of the situation.

The situation on the ground is that the Appellant, who is not in gainful employment, has custody of the children. The Respondent is still in employment and, therefore, has the capacity

not only to build, but to find alternative accommodation. Caught in between, are the children of the family who, if their parents will not wisely use the proceeds from the sale of the houses, will be rendered destitute.

It has been stated in the Respondent's submissions in this Court and the Court below that the Appellant had not been sincere in that she hounded him out of the house in Changa Changa on the pretext that the two houses would be sold, only to secretly move into the house, and is now demanding to be awarded the same property. The decision of the Court below seems to have been anchored on this aspect. The Court below seems to have been labouring under the presumption that the conduct of a party can override the other considerations in property adjustment. We say so because the Judge stated:-

"The other ground of appeal, that the court below did (not) consider the present earning capacity of the parties, and therefore the court should not consider sharing the houses as proposed by the appellant (respondent) could have been a valid reason. However, in the present case, it is clear the appellant's prayer is made in bad faith. She had agreed with the respondent that the later (latter) vacates the house at Changa Changa so that the house together with the other at Nakambala are sold for the parties to share the proceeds, but the appellant later moved into the house vacated by the respondent and now she wants to be given that house and no longer wishes to have the houses sold. The

appellant has come to court with dirty hands and her scheme to deprive the respondent of a fair share of the matrimonial property does not get the assistance of the court."

This, in our view, was a misdirection. While we accept that the conduct of the Appellant, as exposed in the evidence could be said not to have been sincere, we are of the view that the decision of the Court was flawed in principle and at law. The primary consideration on property settlement after dissolution of the marriage, whether statutory or customary, is that the settlement must take into account all the circumstances of the case in order to meet the justice of the situation without apportioning blame or misconduct on either party. Lord DENNING supported this principle in the case of **WACHTEL V WACHTEL**¹ when he said:-

"...a lengthy post-mortem to find out who killed it. It has been suggested that there should be a "discount" or "reduction" in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument.

The learned authors of **HALSBURY'S LAWS VOLUME 13^a** also echoed the principle when they said:-

"The power to order transfer of property should not be employed as a punitive measure but as a means of recognizing the transferee's contribution to the accumulation of the family wealth, and of, assuring, so far as just and practicable, his or her future living standards."

In the case in *casu*, the issue is that there are two properties acquired during the subsistence of the marriage. It has been submitted that there are other assets namely, Plot M73 in Changa Changa and a motor vehicle, but these were not part of the settlement in the Court below.

The Appellant has indicated to us her desire to remain in the house in Changa Changa because that was where she was residing and that the property was registered in her name. The argument that the property is registered in her name does not hold. As long as the property qualifies to be family property, the actual legal title in the capital asset is not a material consideration. Whether the house is registered in the wife's name is not a determinative factor any more than it would if the house was registered in the husband's name. What the Court looks at is the totality of the family assets. As stated in the case of **CHIBWE V CHIBWE**³, items acquired by one or the other or both parties in a marriage with intention that these should be continuing provision for them and the children during their joint lives should be for the benefit of the family as a whole.

In this case, there are four children of the family who appear to have been completely sidelined in the settlement that was ordered by the Court below. As we have stated above, upon sale of the houses these children will have no claim to any house and in the event that their parents squander the proceeds from the sale of the houses, they could be rendered destitute. In any property settlement after divorce, whether in a customary or statutory marriage, the interest of the children of the family must be considered. This principle has been captured in Section 55 1(b) of the Matrimonial Causes Act No. 20 of 2007 which states:-

“55 (1) The Court may, upon granting a decree of divorce, a decree of nullity of marriage or a decree of judiciary separation or at any time thereafter, whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute, make any one or more of the following orders:

(b) an order that settlement of such property as may be specified, being property to which a party to a marriage is entitled, be made to the satisfaction of the Court for the benefit of the other party t the marriage and of the children of the family or either or any of them.”

It is our view in this regard, that the decision to sell the two houses and share the proceeds between the Appellant and the Respondent, in the circumstances of this case, can only be

supported on compelling grounds. The imminent danger of perpetual acrimony between the parties alluded to by the Judge, does not, in our view amount to compelling or exceptional circumstances. If anything, the rights of the children, who are members of the family and on whom both the Appellant and the Respondent have an obligation to secure their future were ignored. In addition, the situation of the Appellant that she is not in employment and has custody of the children cannot be ignored. Once the houses are sold, she will be homeless, and probably use the proceeds to secure shelter and maintain a livelihood, while the Respondent, on the other hand, has an added advantage in that he is still in gainful employment and can easily relocate and acquire more properties. In our view, this scenario creates a more favourable situation for the Respondent. The interests of justice will be better served by apportioning the two houses between the Appellant and the Respondent.

Accordingly, we order that the Appellant should be awarded the house in Nakambala. We have taken into account that she is not in gainful employment, and can use the income from the rented

apartments for her sustenance and that of the children. We also order that the Respondent should be awarded the house in Changa Changa in which he resided prior to the agreement to sell the houses.

This appeal therefore succeeds to the extent we have indicated. We make no order on costs.



I.C. Mambilima
CHIEF JUSTICE



SUPREME COURT JUDGE



N.K. Mutuma
SUPREME COURT JUDGE