

**IN THE SUBORDINATE COURT OF THE FIRST CLASS    2015/CRMP/LCA/313**  
**FOR THE LUSAKA DISTRICT**  
**HOLDEN AT LUSAKA**  
**(Civil Jurisdiction)**

**BETWEEN :**

**CLEOPATRA FUNGAFUNGA**

**APPELLANT**

**AND**

**JOSEPH FUNGAFUNGA**

**RESPONDENT**

**FOR THE APPELLANT:**                      B. M. Mulenga of National Legal Aid Clinic for Women

**FOR THE RESPONDENT:**                In Person

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***JUDGMENT***

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**Cases cited:**

- Chibwe v. Chibwe (2001) ZR 1
- Galunia Farms Limited v. National Milling Company Limited and another (2004) ZR
- J v C [1970] AC 688
- Musonda v Musonda Appeal Number 53 of 1998
- Van Deijil v. Van Deijil (1996) 4 S.A. 260 (R)
- Violet Kambole Tembo v David Lastone Tembo (2004) Z.R. 79 (S.C.)
- Watchel v Watchel [1973] 1 All E.R 829 at 838
- Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172 (SC)

Other materials referred to:

Black's law Dictionary, 18<sup>th</sup> edition, 2004, West Publishing Company, Thomson West.

This matter came to this court by way of appeal from the local court and the grounds of appeal were as follows:

1. The appellant felt that the compensation she was given was not enough looking at the years she lived with the respondent and the money they used to make without him giving her anything
2. The respondent infected her intentionally, he knew he was HIV Positive but he did disclose to her
3. The appellant felt that the Maintenance of the children was not enough looking at the economy and knowing that the respondent will not be giving them enough support as ordered by the Local Court. He is threatening her to give him the girl children who are still very young between the ages of 4 to 9 years.
4. The respondent is refusing to the share the property as ordered by the local court

I warn myself from the outset that, in civil matters, the burden of proof is on the Plaintiff and the standard of proof is on the balance of probabilities. This means the party with the most probable story carries the day.

In Galunia Farms Limited v. National Milling Company Limited and another (2004) ZR Sakala Cj as he was then stated that,

*"the burden to prove any allegation is always on the one who alleges"*

The plaintiff in this matter gave evidence on her own behalf and called one witness.

Pw1 was CLEOPATRA PHIRI the appellant herein who averred that she married the Respondent in 2002 and they had 3 children together. The first being twins aged 10 years, a boy and a girl.



The other one is a girl and she was born on 14<sup>th</sup> October 2010. The two girls were living with the Respondent.

Between 2009 and 2010, they started running a business together of rearing pigs at the farm. They used to sell after two months and the least they sold was K10,000.00. At the time of divorce on 8<sup>th</sup> September 2015, she left about 100 pigs. The money awarded upon divorce by the Local Court was not enough considering the business they were doing. More so that she was found Positive when she was living with the respondent. The respondent told her that he would support her and apparently, he was not surprised when she informed him and this surprised her.

The lower court granted her custody of the children and ordered that the respondent maintains them at K1,000.00 per month which was not enough considering the ages of the children and the prices of things. She was not satisfied with the court order because her children were used to living comfortably. The respondent had not been paying school fees for the child she is living with from the time they divorced

During the subsistence of the marriage, they acquired 3 vehicles and the first one was a Nissan which he bought from his former place of Work, the second one was also a Nissan which he bought from Armcors with Registration Number AAX 8085 and the third one was a Vitz with registration number ALF 5272. He told the local court that the Vitz was the vehicle he bought for her when they were living together. They were using the Vitz together as the Nissans were parked as they waited to change the colours

She also stated that they acquired a 5 acre farm together in Lusaka West where they used to live. They found a two bed roomed house and built 3 piggeries. They acquired household goods together. They also acquired a fire arm.

She wanted the respondent to give her money so that she could start business as she was not doing anything but piecework of washing clothes to feed the children and pay school fees.

She further stated that the respondent was a Rapid Response Manager at Magnum Security.

In cross examination, she stated that they bought the farm in 2002 and at the time, they were married. When he married her,

she was taken to the farm as she had lived with him at the ZAF camp for a year. When he paid dowry, her parents got her for marriage counselling and took her to the farm and at that time, he had shifted.

She also stated that all the 3 vehicle were theirs. She told court that the vehicles were not being used as they were waiting to change the colour. He did not buy the vits as a family vehicle but her personal vehicle. She did not claim that he bought it for her but he told the court that he bought it for her.

She further stated that during the subsistence of the marriage, they did attain more than 100 pigs. He refused to share the property and told her not to get anything including the clothes he bought for her.

The Respondent gave evidence on his own behalf and called 3 witnesses.

Dwl was **JOSEPH FUNGAFUNGA** the respondent herein who recounted that he was earlier married with 3 children. At that time, his late wife's dues were paid and he paid for the said farm. He bought the farm before June 2002 but he did not move from the camp as he had not yet been cleared. He received his money a bit late then he finished paying for the farm. Thereafter he started working for Amcor and in the same year 2002, he came to know PW1 while he was living in the ZAF camp. When he got cleared, he was given repatriation and he went to the farm. He stayed with her at the Camp but married her when he was at the farm. He had 3 children with her.

He also stated that she was not part of the property. The small vehicle was bought by his nephew in his names because he did not have money. He bought the other Nissan but it was just a shell. He bought the vits as a family vehicle and not as a present for PW1. Even the letter of sale was in his names.

For the household good, he said that they never sat down to share and he did not have a problem with sharing. PW1 could go and get the property even the vehicle.

He had started paying the money he was ordered when he got a job with Magnum but unfortunately, he was out of employment. He used



to take whatever he had for the children and he avoided going to PW1 because she was violent. The children never used to go to his brother's place in makeni but one day, his brother called him informing him that the children were at his place. He got the children and he was summoned by Victim Support Unit. He was advised to give the children to Pw1 as per court order. After a day, his brother called and informed him that his son was at his place. He informed Pw1 and she advised him to keep the child. He did not have a problem with keeping the boy and Pw1 keeping the girls as was the position.

He further stated that it was not true that they used to keep pigs in hundreds. They used to sale K2000.00, K5,000.00 and they sold K10,000.00 once. He gave her the said money and asked her to open an account. PW1 acquired a Plot in Lusaka using the same money of which she did not mention.

In cross examination, he stated that he could not remember if he signed any documents the time he married PW1 and he married her in 2002. The vehicle he alleged having bought by his nephew was in his names and legally, the vehicle was his. He also stated that the pig business at that moment was nonexistent. He was at a loss on how the children would survive because he did not even know where his next meal would come from.

Dw2 was **FREDRICK MUKUKA** who averred that the time when DW1 bought the Farm, he was not married. He assisted DW1 in looking for the said land at the time he was being discharged by the Air Force where he was supposed to move and keep his family as he was widowed. Because PW1's children were young, he witnessed the sale agreement which was signed in October 2001. At that DW1 had not been paid his benefits and the only money available was the children's share from their mother's benefits. It was agreed that he deposits part of the money towards the acquisition of the land and it was done. They started renovating the small house which was on the land. When DW1 was given benefits in 2002, he moved from ZAF base to the farm. Sometime towards the end of 2002, he married PW1 and she was brought to the farm.

DW3 was **WILLA CHITUNDU FUNGAFUNGA** PW1's son who testified that it was not true that Dw1 bought the farm with PW1. He continued that when his mother died in 1998 and from the year 2000, Dw1 bought the farm using his mother's benefits as she was a Nurse.

At the time, Dw1's money was not yet paid as he was discharged from ZAF. In 2001 he bought the farm when they were staying in ZAF with his father, siblings and his uncle. In 2002, Dw1 started working for Armcor Security Company and around June of the same year, they moved to the farm. When they were at the farm, Pw1 used to come and go until the time she stayed for some time. Dw1 took Pw1 back and brought her officially. At the time, he was in grade 9.

In cross examination, he stated that the farm was acquired in 2001 and he could not recall the date and month. He did not have documents to show that the farm was acquired in 2001 and prove that it was acquired in 2001, there was a witness that signed being DW2.

Dw4 was **ABEL FUNGAFUNGA** the father to DW1 who averred that DW1 married Pw1 in August 2002 and he was charged K2, 000.00 of which they paid part of it. They paid the balance later.

In cross examination, he stated that the payments were signed for and he did not have the document to show the court. The documents could show that they got married in 2002.

This is the evidence I received.

It is common ground that the parties got married in the year 2002 and they had 3 children between them. It is also common ground that their matrimonial home was the farm and that they were into Pig rearing business. Further, it is common ground that during the subsistence of the marriage Pw1 bought two vehicles.

What remains to be determined in this matter is property settlement, Compensation, custody and maintenance of the children.

Family assets have been defined in **Watchel v Watchel [1973] 1 All E.R 829 at 838.** 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 a definition adopted by the Supreme Court in the case of *Chibwe v Chibwe* SCZ Appeal No. 38/2000.

In *Violet Kambole Tembo Vs David Lastone Tembo* (2004) Z.R. 79 (S.C.) it was held inter alia that:

*The Court examines 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 intended at the time of the acquisition.*

It was also held that:

*Where the couple have had a turbulent marriage and are compelled to Part Company, the conduct of the parties towards each other becomes a major factor and the proceedings for settlement of property take a broader view.*

It was further held that:

*When the issue of settlement of property arises, 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 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 toward the other.*

It is the evidence of PW1 that during the subsistence of the marriage, they acquired the farm which had a house found and they built Piggeries. DW1 on the other hand stated that the time he bought the farm, he had not yet married PW1. He stated that



she used to visit him and when he married her, she was brought to the farm. This evidence was confirmed by DW2 and DW3 who stated that the time DW1 acquired the farm, he was not yet married to PW1. PW1 stated in cross examination that when he married her, she was taken to the farm though she had lived with him for a year. From this evidence, I am inclined to believe DW1's evidence that the time the farm was acquired, he had not married PW1 yet. It is clear that when PW1 got married to DW1, he had already acquired the farm. It therefore follows that the farm was not acquired during the subsistence of the marriage. PW1 stated that they built piggeries at the farm, evidence not challenged by DW1. DW1 stated that the piggery business was not in existence. This means that the piggeries are not in use. Much as they were built during the subsistence of the marriage, they are not in use and no one is deriving a benefit from them. Successively, I am of the opinion that it is unnecessary to put them into consideration in property adjustment. It therefore follows that the farm does not farm and the things attached thereon do not form part of the property to be adjusted in this matter.

Turning to the vehicles, it is common ground that DW1 bought two vehicles. PW1 stated that they bought 3 vehicles while DW1 disputed and stated that only 2 of the vehicles were theirs as the other Nissan was bought by his nephew his nephew using his names from his place work. On the vehicle in dispute, DW1 stated that he bought it for his nephew. The said vehicle is still parked at the farm and the nephew has not collected it. If truly the vehicle belonged to his nephew, the nephew could have collected it since he bought for himself. For the fact that the vehicle is in DW1's names and still parked at the farm, I am meant to believe that DW1 bought the vehicle and not his nephew. I find it very difficult to believe DW1's evidence on the said vehicle.

DW1 stated that he did not have a problem with PW1 getting the vits and that he bought for the family to use and not as a present for PW1. PW1 stated that they were using the vehicle together. If DW1 bought the vehicle as a present to PW1, he would have bought it in her names instead of his names. It is therefore clear that DW1 bought the vits so that the family could be using it.

It clear from the evidence that the vehicles were bought for the use of the family. It therefore follows that the parties acquired 3 vehicles during the subsistence of the marriage which are subject to property adjustment.

Coming to household goods, it is common ground that they acquired some household goods together. Pw1 also said that they also acquired a firearm but did not give details on the use. DW1 stated that he did not have a problem with sharing the household property with PW1. It is clear that the household goods were also acquired for use by the family. Since the said property was acquired during the subsistence of the marriage, it forms part of the property to be adjusted.

It is clear on the totality of the evidence herein that the matrimonial property was bought by Dw1. It is also clear that as a wife, PW1 contributed in kind as she carried out duties of a wife. It is clear in the circumstances that DW1 contributed more than PW1. It therefore follows that Dw1 has a bigger share than Pw1 of the matrimonial property.

However, on household goods, I am guided by the case of *Musonda v Musonda Appeal Number 53 of 1998 (unreported)* it was held that:

*Household goods provided they were bought during the subsistence of the marriage by either of the parties are to be share equally.*

It therefore follows that the household goods acquired by the parties during the subsistence of marriage is to be shared equally.

Delving into the issue of compensation, Black's Law Dictionary defines Compensatory payment as

*Post marital spousal payment made by a richer ex-spouse to the poorer one and treated as an entitlement rather than as a discretional award. It goes further that compensatory awards are based on a formula using the length of the marriage, difference*



*in post-divorce income, role as primary caregiver and other factors. The purpose is to compensate somewhat for disparate income levels after a failed marriage.*

In this matter, it is clear that DW1 was the breadwinner. PW1 stated that they used to make a lot of money from the pig sales and that at the time of the divorce, she left 100 pigs plus. DW1 on the other hand stated that they never attained that number and disputed the sums stated by PW1. He stated that they only sold K10, 000.00 once and he gave the money to her. According to him, she used the money to buy a plot that she did not mention in court. According to the record of the lower court, the parties divorced in on 8<sup>th</sup> September 2015 which a year plus ago. There is a possibility therefore of the pigs being nonexistent. It is DW1's evidence that he was out of employment and did not even know where his next meal would come from. It is clear that there is no disparate in the income levels to compensate. It therefore follows that DW1 cannot be ordered to compensate PW1.

Coming to the issue of the children, It is trite that when making decisions touching the welfare of children, the paramount consideration is the best interest of the child. I seek refuge in the persuasive case of *J v C* [1970]AC 688 Lord MacDermott explained paramountcy of the child's welfare that:

*'...more than that the child's welfare is to be treated as the top item on the list of items relevant to the matter in question. The words denotes a process whereby when all relevant facts relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child's welfare. It is a paramount consideration because it rules upon or determines the course to be followed'.*

The parties had 3 children between them. There were 2 and 1 boy. According to PW1 the first 2 were 10 years old and the third girl was 6 years old. DW1 stated that when the children were

with PW1, the boy moved on two occasions from PW1's place to his brother's place in Makeni and when he informed PW1 the second time he went there, she advised him to keep the child and according to him, the child was in his custody. He stated that he did not have a problem with the arrangement on the children at that time. From her grounds of appeal which were not proper in form, she contended that she did not want DW1 to keep her girl children. There is a possibility of the boy child continuing with his tendency of going to makeni from his mother's place which is quite a distance and considering his age. In the circumstances, it will be in the Child's best interest to live with DW1. For the girl children, it will be in their best interest to live with PW1 considering that they are girls of tender years who still need their mother's tender care and guidance in life.

Delving into maintenance, PW1 stated that the K1,000.00 ordered by the lower court was not enough considering the high prices of things and their age. DW1 on the other hand stated that he did not know how he would maintain the children because he did not know where his next meal would come from and he was out of employment. It is true that things are expensive and it would be difficult for the children to survive on the K1,000.00. Children of that age need a lot of things. PW1 also stated that the children were used to living a comfortable life. Where children were living a comfortable life before the divorce of their parents, the court should endeavor to make orders that will make the children as comfortable as they were living before the divorce as far as possible to avoid a disparate in their lifestyle. In the circumstances, the children used to be comfortable because DW1 was working and now that he is out of employment and has no means of income as he stated, the children might not be as comfortable as they and this is not because of the divorce but for the reason that DW1 is not in employment. Much as he is not in employment, as a father, he is under obligation to make ends meet for his children. He is under obligation to provide the children with the basic needs of life.

For the foregoing, order that:



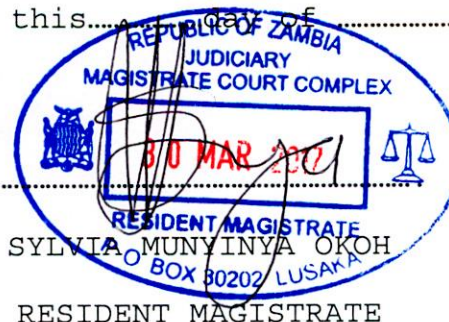
1. The household goods acquired during the subsistence of the marriage be share equally between the Plaintiff and the Respondent
2. The vits be given to the appellant and the respondents keeps the two Nissan vehicles.
3. The firearm be sold and share the proceeds at 80% and 20% between the respondent and appellant respectively. In the alternative either party with the capacity to buy off the share of the other upon establishing the value.
4. The appellant to have custody of the two female children and the respondent of the male child. Parties to have reasonable access to the children
5. The respondent to maintain the female children at K2,000.00 per month, provide school requirements and pay medical expenses. The appellant to provide shelter for the children in her custody while the respondent provides all the needs of the male child in his custody.

The orders on the welfare of the children are subject to review.

I make no order as to costs

Right of Appeal 30 days and security for costs K3,500.00

Delivered in Open Court this.....day of .....2017



RESIDENT MAGISTRATE