

IN THE SUBORDINATE COURT OF THE FIRST

2016/CRMP/LCA/292

CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

GLADYS PHIRI
AND

APPELLANT

JOSEPH BANDA

RESPONDENT

Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, in open court
at 09:00 hours this 18th day of May, 2017.

For the Appellant: In Person

For the Respondent: In Person

JUDGMENT

LEGISLATION REFERRED TO:

1. Local Court Act, Cap 29 of the Laws of Zambia, ss: 35, 56, 58

CASES REFERRED:

1. Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000

2. Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79

This matter was commenced by way of an appeal from the local court. On the 22nd September, 2015 the appellant sued the respondent in the local court for divorce on the ground of adultery. I will maintain the parties in this matter as they appeared in the court below. The appellant and respondent shall herein be referred to as plaintiff and defendant respectively.

The local court on the 6th October, 2015 dissolved the customary marriage. At the conclusion of the matter, the local court made the following pronouncements:-

1. Divorce granted;
2. No compensation awarded to either party;
3. Defendant to have custody of the three children and the Plaintiff to have custody of the youngest child and to be maintained by K100 monthly instalment with effect from 31st October, 2015 subject to yearly review;
4. All medicals, education and clothing are defendant's responsibilities; and
5. All properties and household goods acquired together whilst in marriage to be shared equally.

The Plaintiff aggrieved by the decision of the lower court appeals to this court in accordance with section 56 of the Local Court Act, Chapter 29 of the Laws of Zambia. The grounds of appeal advanced by the plaintiff are as follows:

1. The court erred by ordering that the defendant should not compensate plaintiff after staying together in marriage for 21 years with 4 children;
2. That on paper the judgment says all properties acquired together should be shared equally but verbally it was said that the house should remain for the children, and considering that the defendant was given custody of the three children of the family he is the one to occupy the house.
3. The defendant also informed court that he acquired a loan for him to build the house, it is not true because the loan was obtained recently after the house was already built; and
4. More to be heard in appeal court.

This appeal from the local court was dealt with by way of rehearing the matter in accordance with section 58 of the Local Court Act, Chapter 29 of the Laws of Zambia.

In civil matters the plaintiff bears the burden of proving her claim on the balance of probabilities.

There is undisputed evidence on record that the defendant has his demons of womanizing and alcoholism which weaknesses contributed to the irretrievable break down of the marriage of 21 years.

The parties were married in July, 1993 in accordance with Chewa customary law. The parties cohabited at unknown address in Kamanga compound, Lusaka.

There are now living four (4) children of the family namely: Bina Banda, a girl born on the 13th May, 1994 completed her junior secondary school at Micheal Primary Trust School; Eunice Banda, a girl born on the 30th January, 1996 in grade nine (9) at Chimwemwe Primary School; Maxwell Banda, a boy born on the 16th April, 1999 in grade nine (9) at Chamba Valley Primary School; and Emmanuel Banda, a boy born on 20th January, 2005 not in school.

The divorce was not contested by either party in this court. The matter before this court was not logically argued or presented around the grounds of appeal. However, it would appear from the facts or evidence on record that the only issues for determination are:

1. Child custody;
2. Maintenance of the children of the family;
3. Maintenance of divorced spouse; and
4. Property adjustment.

On child custody, the local court ordered the defendant to have custody of the three children and the plaintiff to have custody of the youngest child. However,

the evidence on the record before this court clearly indicate that Eunice and Emmanuel are in the custody of the plaintiff in Jack compound. The defendant is keeping custody of Maxwell and Bina. I heard the children on the issue of custody and I discovered that upon the dissolution of the marriage the children were given the option of electing which parent they wanted to live with. As such the custody of the children is in accordance with their choices. I recognize and respect the rights of the child in making decisions regarding their welfare. I will not disturb the current custody arrangements as it is in the best interest of the children.

In this appeal, I will address the issues of maintenance of the children of the family and divorced spouse together. Maintenance of the children of the family was strongly canvassed by the plaintiff and the children themselves who had an opportunity to be heard on the issue. The plaintiff during the subsistence of the marriage was at all material time a house wife and was not engaged in any gainful employment. The defendant on the otherhand for the last 22 years has been working as general worker at Zambia Airforce. It was argued that the defendant does not support his family such that all the children could not proceed with school because of the defendant's failure to pay for their school fees. I heard the children on this issue who concurred with the mother's assertions that they dropped out of school due to lack of financial support from the father. It was further submitted that the defendant does even buy food for the children who are in his custody.

That the K100 ordered by the local court for monthly maintenance of the two (2) children of the family living with the plaintiff is insufficient given the needs of the children.

The plaintiff further contended that the court below erred by ordering that the defendant should not compensate or maintain her after staying together in marriage for 21 years and with 4 children born in wedlock.

The defendant contended that the plaintiff wanted the marriage to end despite his efforts to resuscitate the same. It was contended that he was granted custody of three grown up children whom he is keeping.

The defendant submitted that he has been supporting his children but that the children are so indisciplined.

In deciding the issue of the maintenance of the children of the family and divorced spouse (plaintiff), I was guided by the provisions of **section 35(1)(d) and (e) of the Local Court Act, Chapter 29 of the Laws of Zambia** which reads as follows:

“S.35(1) Subject to the provisions of this Act or of any other written law, and to the limitations imposed by its court warrant, a local court, in cases of a civil nature, may-

(d) make an order for the payment of such monthly sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until re-marriage whichever is the earlier;

(e) make an order for the maintenance of any child below the age of eighteen years whether born in or out of marriage.....”

I have carefully considered the ages of the children of the family. As at 18th May, 2017 day of judgment: Bina, Eunice, Maxwell and Emmanuel are aged 23, 21, 18 and 12 years respectively. It follows therefore, that it is only Emmanuel who is entitled to child maintenance and the rest are ineligible adults. Whether the K100 ordered by the local court towards the maintenance of the children of the family is sufficient, is a question of the means and circumstances of the parties. The number of years the parties have been married and lived together or indeed the number of children born during wedlock are not the factors for consideration of the question of maintenance. I

have carefully examined the defendant's payslip which was exhibited in the local court. The defendant's net payable income at the time was K284.34 only. Considering the defendant's meagre income, it was reasonable and just for the local court to order the defendant to maintain the children of the family at K100 monthly. Nevertheless, the local court stated in its judgment that the order for child maintenance was subject to yearly review. There is no evidence on record proving that the means and circumstances of the parties have improved to oblige this court to exercise its power to review the maintenance orders of the court below. The same reasoning apply *mutatis mutandis* on the question of maintenance of divorced spouse. This means the local court was on firm ground by ordering no compensation or maintenance for either party on the premises of the means and circumstances of the parties.

I now come to the last issue of property adjustment. It is not in dispute that the land on which the matrimonial house is situated was acquired during the subsistence of the customary marriage. The local court was very clear on the issue of property adjustment. The local court held:

"All properties and household goods acquired together whilst in marriage to be shared equally."

I honestly do not see any reason why this issue should now be controverted in this appeal. The plaintiff submitted that the matrimonial house was built from the defendant's earnings from his employment and loans which are evident from the defendant's payslip I referred to above. It is not in dispute that the defendant provided the financial resources. The plaintiff on the other hand was physically on the building site ensuring that the matrimonial house was built. She would fetch water to be used for building and generally supervised the building process. The defendant submitted that at the time of the divorce he had so many loans running. As such the lower court saw it fit and just to let him live in the matrimonial house with the children. That the plaintiff has been

asking the defendant to sell the house but that the same belongs to the children.

The Supreme Court has been very clear on what type of properties are ordinarily subject of property adjustment after the dissolution of marriage. In the case of ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000*** in which case the Supreme Court, *inter alia* stated:

“What was the issue before the High Court and us was the percentage of sharing the family assets. Family assets have been defined in Watchtel v Watchtel as items acquired by one or the other or both parties married with the 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.”

I have carefully considered the issue of property adjustment before me. It is not controverted that during the subsistence of the marriage the couple built a two roomed house in 2009 which became a matrimonial house and later erected a 6 roomed structure on the same plot which structure has been let out to tenants. The intention of the parties when they were acquiring the property was 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.

The Supreme Court in the subsequent case of ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR. 79*** provided guidance to the courts on what to take into consideration when sharing properties after divorce and held *inter alia* as follows:

“The court examines the intentions of the parties and their contributions to the acquisition of the matrimonial property. If their intentions cannot

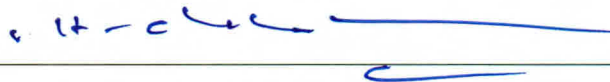
be ascertained by way of an agreement then the court must make a finding as to what was intended at the time of the acquisition."

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.

In my view, on the totality of the contributions of the parties towards acquisition of the properties, I do not see any reason to warrant the disturbance of the order by the local court sharing equally between the parties the property acquired during the subsistence of the marriage. In default of agreement on how the matrimonial house (properties) shall be shared between the parties the same shall be evaluated by a registered valuer, be sold at market price and the proceeds of the sale shall be shared equally between the plaintiff and the defendant.

I do not order any costs.

Delivered in open court this 18th day of May, 2017.



HUMPHREY MATUTA CHITALU

RESIDENT MAGISTRATE