

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)

2008/HP/A70

BETWEEN:

SANIKONDA PHIRI

APPELLANT

V

ELESTINA ZULU

RESPONDENT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 5th day of September, 2012.

For the appellant: M.V. Kaona of Messrs Nakonde Chambers.

For the respondent: Mrs. A. Chanda of National Legal Aid Clinic for Women.

JUDGMENT

Cases referred to:

1. *Nkhata and Others v Attorney General (1966) Z.R. 124*
2. *Pettitt v Pettitt [1970] A.C. 777.*
3. *Gissing v Gissing [1971] A.C. 886.*
4. *Watchel v Watchel [1973] 1 ALL E.R. 113.*
5. *Minton v Minton [1979] A.C. 593.*
6. *Attorney General v Achume (1981) Z.R. 1.*
7. *Midland Bank Trust Company Limited v Green No. 3 [1982] Ch. 529 CA.*
8. *Finance Bank Limited v Africa Angle Limited and Others (1998) Z.R. 237.*
9. *Musonda v Musonda SCZ 53 of (1998) (unreported).*
10. *Chilima v Chilima (2000) Z.R. 103.*
11. *Chibwe v Chibwe (2001) Z.R. 1.*
12. *Tembo v Tembo (2004) Z.R. 79.*
13. *Scott v Scott (2007) Z.R. 17.*

Legislation referred to:

1. *Matrimonial Proceedings and Property Act 1970, ss. 2,3,4, and 5.*
2. *Matrimonial Causes Act of 1973, s. 24.*
3. *Matrimonial Causes Act No. 20 of 2007, s. 55.*
4. *Married Women's Property Act 1882.*
5. *Act No. 7 of 2011; An Act to Amend the High Court Act, cap 27, s. 2.*

Works referred to:

1. *N. V. Lowe and G Douglas, Bromley's Family Law. Tenth Edition, (Oxford, University Press, 2007).*
2. *Kate Stendley, Cases, and Materials on Family Law (London, Blackstone Press Limited, 1975).*
3. *Lilian Mushota, Family Law in Zambia: Cases and Materials (Lusaka, UNZA Press, 2005).*

This action was commenced in the Local Court, where the respondent alleged that the appellant refused to share the matrimonial property after dissolution of the marriage. In a terse judgment delivered on 11th April, 2006, the Local Court held that the appellant was to surrender to the respondent the following property within a period of one month from the date of the judgment:

- (a) house number 713, New Kanyama;
- (b) a shop at Kanyama Market;
- (c) a tavern at plot number E 13, Old Kanyama; and
- (d) two sewing machines.

The appellant was dissatisfied with the judgment of the Local Court and therefore appealed to the subordinate Court. In a Notice to Appeal dated 21st April, 2006, the appellant advanced the following grounds of appeal:

1. that the Court below erred in law and in fact by awarding judgment to the plaintiff contrary to the evidence before it; and
2. Further grounds were to follow.

In what appears to be heads of arguments, but styled as “*Grounds of Appeal*,” the following points were attached to the Notice of Appeal:

1. the Court should have gone on a visit to see the properties in question;
2. we can’t stay together at a farm after divorce;
3. the tavern at plot number E 13, Old Kanyama belongs to my uncle; and
4. the Court should have given me one sewing machine.

In the Subordinate Court, the learned Magistrate decided to hear the matter *de novo*. For the purposes of the proceedings before the Subordinate Court, I will refer to the respondent as the plaintiff, and the appellant as the defendant because this is how they were designated in the Court of first instance; the Local Court.

The plaintiff testified that the defendant had divorced her. And she was mother of nine children. At the time of her divorce, she was living alone on a farm at Barlastone Park. The plaintiff further testified that during the subsistence of the marriage, the couple acquired the following properties:

- (a) a Bar and Tavern in Kanyama;
- (b) seven houses situated in Kanyama, and George Compound; and
- (c) a farm in Barlastone Park.

The plaintiff also testified that after dissolution of the marriage, the couple did not share the property referred above. Thus, the plaintiff maintained before the Subordinate Court, that she was not allocated any property after dissolution of the marriage. The plaintiff thus requested the Subordinate Court that she be given the farm; a house; a shop; and one sewing machine.

The defendant in his testimony confirmed that the marriage had been dissolved. And the couple was in Court because of a dispute regarding distribution of the property. The defendant testified that he gave the plaintiff the following property: house number 7 B in Kanyama; a shop in the market; (F 17) and a sewing machine. The defendant stressed that they were two sewing machines. And that he retained one of the sewing machines.

The defendant contended before the Subordinate Court that where the Bar and Tavern is situated belongs to his uncle; Mr. Joseph Banda. Further, the defendant testified that he gave the house on plot number 644 Kanyama, to his son who at the material time was ailing. And that the house on plot number 712 was for his first born son. The defendant however confirmed that he owns farm number 37, Barlastone Park. The defendant maintained that what he gave to the plaintiff was sufficient. However, the defendant opined that if the Court was of the considered view that what he gave to the plaintiff was not sufficient, then he was prepared to share the farm in Barlatone Park. The defendant pressed that he could not give the plaintiff the Bar, and Tarven, because the property did not belong to him.

After the trial, counsel filed written submissions into Court. On 28th September, 2007, Mrs. Chanda filed submissions on behalf of the plaintiff. In the submissions, Mrs. Chanda pointed out that the matter was before the Subordinate Court by way of an appeal, following the dissolution of the 54 year old marriage by the Local Court. The appeal, Mrs. Chanda submitted, was anchored around distribution of matrimonial property. Mrs. Chanda argued that it was not dispute that during the subsistence of the marriage the couple acquired a lot real properties, comprising a farm, residential

houses, and a Bar, and Tavern. In addition, the couple acquired three trucks. The properties___ both real and personal___ were listed by Mrs. Chanda as follows:

- (i) house No. 648, New Kanyama;
- (ii) a house in George Compound;
- (iii) house No. 712, New Kanyama;
- (iv) house No. 713, New Kanyama;
- (v) house No. 644, New Kanyama;
- (vi) farm No. 37, Barlastone Park, Lusaka;
- (vii) a Bar, and Tavern at plot E 13, New Kanyama market;
- (viii) two shops at New Kanyama market;
- (ix) one Bedford truck;
- (x) two Mazda trucks;
- (xi) one Saloon car (Datsun); and
- (xii) three sewing machines.

Mrs. Chanda submitted that according to the testimony of the defendant, two of the properties listed above were given to two of the couple's children. Namely, house number 644, and 712, New Kanyama. However, Mrs. Chanda pointed out that according to the defendant's testimony, and that of his witness, the defendant is still responsible for the collection of the rentals, and he is using the money collected for himself. Furthermore, Mrs. Chanda submitted that following the dissolution of the marriage, the defendant disposed of the some of the properties. And the money realized was used by the defendant to the exclusion of the plaintiff. The properties in question were listed as follows:

- (i) house number 648, New Kanyama;
- (ii) a house in George Compound;
- (iii) a plot in George Compound;
- (iv) one Bedford, and two Mazda trucks; and

(v) a saloon car (Datsun).

Furthermore, Mrs. Chanda submitted that the defendant claims that the Bar and Tavern at plot E 13 Old Kanyama, and one of the sewing machines belong to his late uncle. Mrs. Chanda contends that the claim by the defendant was not supported by his witnesses. Mrs. Chanda submitted that it is not in dispute that the defendant's uncle has since passed on. And no one has claimed the property in the last thirty five years. Mrs. Chanda argued that by maintaining that the property belongs to his uncle, the defendant's sole aim is to simply deprive the plaintiff a reasonable share of the matrimonial properties. Mrs. Chanda contends that of all the properties listed above, the plaintiff was only given house number 713, New Kanyama, and one sewing machine. Further, Mrs. Chanda contends that as regards the shop purportedly that was given to the plaintiff, the defendant still continues to collect the rentals.

Mrs. Chanda submitted that the evidence before the Court below clearly pointed to an injustice. Because it is trite law that upon dissolution of marriage, parties to a marriage ought to share the properties acquired during the subsistence of the marriage equally, or at least equitably. The plaintiff was seriously disadvantaged in the sharing of the matrimonial properties. The defendant carved for himself a lion's share and also benefited immensely from the disposal of the properties. That was grossly unfair, considering that the couple invested their lives in the acquisition of the properties.

Mrs. Chanda argued that although the plaintiff was not in gainful employment, she nonetheless contributed to the acquisition of the properties in many ways as a wife, and mother. But for the small businesses the plaintiff was carrying on, selling at the market, the defendant would not have acquired the properties in issue. Mrs. Chanda pressed that the plaintiff has

been excluded from enjoyment of the matrimonial properties because whilst the defendant re-married soon after the divorce and took occupation of the farm house in Barlastone Park with a new spouse, the plaintiff was squatting with one of the children.

Mrs. Chanda drew the attention of the Court below to the case of *Watchel v Watchel 1973 1 ALL E.R. 113*, in which matrimonial properties was defined to mean assets acquired by one or the other, or both parties married with the intention that these should be continuing provision for their joint lives. And should be for the use and benefit of the family as a whole. Mrs. Chanda stressed that matrimonial property includes capital assets such as houses, vehicles, and income generating ventures like businesses. In this case, Mrs. Chanda submitted that the capital assets include the Bar, and Tavern; houses, trucks, and business ventures for the parties. These assets she argued were meant to provide the parties a comfortable life. It followed therefore that upon dissolution of the marriage, the matrimonial properties should be shared to afford the parties a life as close as possible to what they enjoyed during the subsistence of the marriage.

Mrs. Chanda also drew the attention of the Court below to the case of *Chibwe v Chibwe (2001) Z.R.* Mrs. Chanda submitted that in the *Chibwe case (supra)*, the Supreme Court held that even where matrimonial property is disposed of to avoid the outcome of the proceedings, it is take into account when distributing properties to ensure that the property is distributed equally or equitably.

In the same vein, Mrs. Chanda contends that the disposal of properties in this case, and in particular house number 648, New Kanyama; a house in George

Compound; the three big trucks; and a car, ought to have been taken into account in distributing the properties. Mrs. Chanda contends that the purported gifts to the two children was a scheme or cover up to avoid the outcome of the proceedings. In fact, Mrs. Chanda pressed that the evidence on record shows that the defendant is the one collecting the rentals, and using all the money for himself. Mrs. Chanda maintained that the plaintiff made a life time investment into the marriage, and should therefore not be disadvantaged at its dissolution.

Mrs. Chanda also argued that she took cognizance of the fact that the marriage between the plaintiff and the defendant was contracted under customary law. And as a consequence, was dissolved by a Local Court. Be that as it may, she submitted that the law relating to property adjustment is nonetheless the same regardless of the type of marriage. Mrs. Chanda submitted that the position at law is that matrimonial property have to be allocated to the parties by the Court after dissolution of marriage.

Mrs. Chanda pointed out that the Matrimonial Proceedings and Property Act of 1970, in sections, 2, 3, 4, and 5, accord the Courts the widest powers possible in re-adjusting financial positions of the parties after dissolution of the marriage. According to section 5 of that Act, when a marriage comes to an end, capital assets have to be shared between the parties. The revenue producing assets, have to be allocated to both parties. And the Court has power after the dissolution to effect transfer of the assets to one or the other.

Mrs. Chanda also submitted that section 5 (1) of the Matrimonial Proceedings and Property Act of 1970 provides that, a wife who has looked after a home

and family for many years is entitled to a share in the matrimonial home if the Court can conclude that the matrimonial and other assets were acquired and maintained by the joint efforts of both parties. Mrs. Chanda argued that in this case, the plaintiff made both direct and indirect contributions to the acquisition of all the properties by being a house wife for 54 years, as well as a marketeer. Further, she submitted that the plaintiff provided labour by transporting building materials and supervising the workers in the absence of the defendant. Mrs. Chanda argued that the plaintiff also contributed as a house wife by caring for the defendant, and the nine children of the family. Mrs. Chanda contends that the contribution of the plaintiff in this regard is immeasurable. Mrs. Chanda therefore contends that the plaintiff was entitled to equal share of the matrimonial properties. She further contends that what was allocated to the plaintiff fell short of what is reasonable and acceptable.

Furthermore, Mrs. Chanda submitted in the Court below that in arriving at decision the Court below was called upon to take into account the financial means, obligations and responsibilities that the parties are likely to have and bear in the foreseeable future. In the this case, Mrs. Chanda submitted that the plaintiff has the obligation of looking after her grand children. And yet she has no foreseeable means of income. Mrs. Chanda also argued that given the age of the plaintiff, it is not possible that she can be employed by any one. Mrs. Chanda urged the Court below to take into account this particular factor in arriving at a fair decision. Mrs. Chanda pointed out to the Court below that the couple had only one farm on which there is a house that was used by the couple as their matrimonial home. Mrs. Chanda argued that the plaintiff has been excluded from enjoyment of the matrimonial home. And another woman is now enjoying its use even though she did not contribute to its acquisition. Mrs. Chanda pressed that the plaintiff was chased from the matrimonial home, and remained without any accommodation for close to three years. Mrs. Chanda submitted that it was

inhuman, considering also that the defendant had abandoned the plaintiff on the farm for a period of five years before he chased her away.

Relying on the *case Musonda* case (supra) referred to above, Mrs. Chanda urged the Court below to order that all the family assets be shared equally. In so doing, the Court below was urged to take into account all the assets that had been disposed of.

Mr. Kaona filed the written submissions on 28th September, 2007. Mr. Kaona pointed out that this matter arises as an appeal from the decision of the Local Court which ordered that:

- (a) the defendant surrenders to the plaintiff house number 713, New Kanyama;
- (b) a shop at Kanyama market;
- (c) a Bar and Tavern on plot number E 13 Old Kanyama; and
- (d) two sewing machines.

Mr. Kaona also submitted that the Court below ordered that farm number 37 Barlasone park, Lusaka belongs to both parties, and that the certificate of title should be surrendered to the plaintiff. When the appeal was called, Mr. Kaona submitted that the matter should be heard *de novo*.

During the trial, Mr. Kaona submitted that the plaintiff testified that during the course of her marriage to the defendant, they acquired the following properties:

- (i) farm number 37, Balastone park, Lusaka;
- (ii) tavern on plot number E 13 Old Kanyama, Lusaka;
- (iii) bar on plot number BP/06/03, Kanyama, Lusaka;
- (iv) house on plot number 648, Kanyama, Lusaka.
- (v) house Number 713, New Kanyama;

- (vi) plot 646, New Kanyama;
- (vii) plot 712, George Compound;
- (viii) a plot in George Compound;
- (ix) two shops in New Kanyama market;
- (x) one bedford truck;
- (xi) two Mazda trucks;
- (xii) one saloon car (Datsun); and
- (xiii) and three sewing machines.

Mr. Kaona also observed in his submissions that the plaintiff testified in the Court below that apart from property that was allocated to her by the Local Court, she also considered that the Court below was fair in declaring that she had an interest in farm number 37, Barlastone Park, Lusaka. Mr. Kaona noted in his submission that in support of her testimony, the plaintiff called Sophia Phiri, her daughter, as her witness. For convenience, I will continue to refer to her as PW2. PW2 listed some of the properties that were acquired by her parents during the course of their marriage. PW2 also confirmed during cross-examination that her mother was not enlisted in formal employment. She was a house wife. And that was the nature of her contribution to the welfare of the family. Mr. Kaona also pointed out in his submissions that the defendant testified that he had no objection to the plaintiff acquiring house number 713 New Kanyama; the Tavern at plot E 13 Old Kanyama. However, the defendant was not agreeable to the plaintiff acquiring two sewing machines, and also having an interest in farm number 37 Barlastone Park, because they were no longer married and therefore it was inconceivable that they could jointly own a property. The defendant also testified that the other properties mentioned by the plaintiff were either non-existent or were no longer his property. Mr. Kaona further submitted that the second witness for the defendant was DW2. DW2 a son to the couple, confirmed that the properties were acquired by his parents during the subsistence of the

marriage, and also confirmed the contention by the defendant that house number 644, New Kanyama was gifted to him by the defendant.

Mr. Kaona also drew the attention of the Court below to the *Chibwe case* (supra). On the basis of the *Chibwe case* (supra), Mr. Kaona submitted to the Court below that the Court had the discretion to award one and not all the properties to a party after the dissolution of the marriage, taking into account the circumstances of the case. In this case, Mr. Kaoma argued before the Court below that the plaintiff was awarded house number 713. New Kanyama; a shop at Kanyama market; a Tavern on plot E 13, Old Kanyama, two sewing machines; and also decalred that the plaintiff is joint owner of stand number 37, Barlastone park, Lusaka.

Mr. Kaona submitted that the plaintiff can only have one sewing machine and the rest of the property awarded to her by the Local Court. Mr. Kaona however, maintains that the plaintiff cannot have any interest in Farm number 37 Balastone Park, Lusaka. Mr. Kaona argued that bearing in mind the *Chibwe case* (supra), the plaintiff was awarded by the Local Court more than an equal share of the property. Mr. Kaona contends that the award by the Local Court was unjust, inequitable, and not supported by law. Mr. Kaona therefore urged the Court below to allow the appeal.

In a judgment that was handed down on 5th October, 2007, the Court below observed that it was not in dispute that the parties acquired property, part of which was distributed by the Local Court. Further, the Court below observed that although the plaintiff contended on appeal, that she had nowhere to stay, she conceded that the defendant gave her a house. The Court below noted that the plaintiff was particularly interested in the farm; the shop;

another house; and a sewing machine. The Court below went on to hold that it considered it inappropriate for the plaintiff and the defendant to live on the same farm after a divorce.

As regards the distribution of the matrimonial property by the Local Court, the Court below considered that the distribution was done fairly taking into account the fact that some of the properties were given to the children who are also the plaintiff's children. However, the Court below took the view that the plaintiff should have been awarded one sewing machine instead of two. The Court below also acknowledged the fact that the defendant sold some of the properties without sharing the proceeds of the sell with the plaintiff.

In the circumstances, the Court below allowed the appeal to the extent that the plaintiff should only be awarded one sewing machine instead of two; The Court below upheld the award of house number 713, New Kanyama market, and the Tavern at plot E 13 Old Kanyama. However, the Court below quashed the order of the local Court that Farm number 37 Barlastone Park, Lusaka should be jointly owned by the plaintiff and the defendant. Further, the Court below ordered that the defendant should pay the respondent the sum of K 6, 000, 000=00, as compensation for not sharing the proceeds from the sell of some of the properties.

Dissatisfied with the judgment of the Court below, the plaintiff filed a Notice of Appeal on 17th October, 2007. The grounds of appeal were eventually field into this Court on 28th January, 2009. There are five grounds of appeal stated as follows:

1. the Court below erred in law and fact by ordering that the defendant herein pays K 6, 000, 000=00, only to the plaintiff as compensation for the matrimonial properties sold during the course of the proceedings without assessing the value of the properties or at least the monies realized from the sales;
2. the Court below erred in law and fact by failing to take into account the evidence on the undisputed fact that the purported gifts to the two children of the family are not in reality gifts because the defendant continues to benefit alone from the rentals from the two houses being house number 644, and 712, New Kanyama;
3. the Court below erred in law and fact by awarding the plaintiff a share in the family business at plot E. 13, Kanyama;
4. the Court below erred in law and fact by failing to award an equal share of the matrimonial property to the plaintiff and also by failing to take into account the plaintiff's lifetime investment into the 54 year old marriage; and
5. the Court was biased and therefore failed to analyse the evidence objectively to order an equal sharing of the matrimonial properties.

On 21st September, 2009, by consent of the parties, Justice Kakusa ordered that the appeal would be dealt with by each party filing written submissions. And thereafter judgment would be rendered. Thus, on 28th September, 2009, Mrs. Chanda filed submissions on behalf of the plaintiff. Under the first ground of appeal, Mrs. Chanda argued that the term "valuation" is defined by the Chambers Compact dictionary as: *"an assessment of the monetary value of something especially from an expert or authority."* Thus, Mrs. Chanda submitted that for the Court to arrive at a proper and fair amount to award the plaintiff as compensation for the matrimonial properties sold, the Court should have first ordered an assessment of the property sold, in order to determine in money worth, the value of the property, and the amount to

award as compensation to the appellant. Mrs. Chanda contends that although the properties have been sold, they can still be valued. To support this proposition, Mrs. Chanda relied on the case of *Finance Bank Limited v Africa Angle Limited and Others (1998) Z.R. 237*. Thus, Mrs. Chanda contends that because the Court below neglected to value the properties, the plaintiff has been seriously prejudiced.

Further, Mrs. Chanda argued that the property acquired during the subsistence of the marriage belongs to the spouses. The implication of this, Mrs. Chanda submitted, is that parties to a marriage have equal claim and ownership in the properties. In aid of this submission, Mrs. Chanda drew my attention to the case *Chilima v Chilima (2000) Z.R. 103*, where the following observation was made;

“When a woman and a man join in holy matrimony they become one body, one flesh and during the subsistence of their marriage they acquire property jointly and individually and until the marriage is put asunder none of them should be heard to say he owns this or that property.”

Lastly, under this ground of appeal, following the *Chibwe case (supra)*, Mrs. Chanda submitted that a Court is not precluded from making an award even after matrimonial property is sold in order to defeat the course of justice.

As regards the second ground of appeal, Mrs. Chanda submitted that the Court below erred in law and in fact by failing to take into account the evidence of the undisputed fact that the purported gifts to the children of the family are not genuine, because the respondent continues to benefit alone from the rentals from the two houses. Namely, 644 and 712 New Kanyama. Mrs. Chanda argued that the evidence by the defendant in the Court below clearly showed that the defendant is in charge of the two houses in question,

albeit he claims to have gifted them to the two children. Mrs. Chanda maintained that the defendant having gifted the two houses to the children of the family should not be allowed to deal with the houses as he pleases, because the purpose of gifting the houses to the two children is defeated. In the circumstance, Mrs. Chanda contends the gifts are fictitious. And the Court should therefore proceed to share the properties equally between the plaintiff and the defendant.

In connection the third ground of appeal, Mrs. Chanda submitted that the Court below erred in law and in fact by failing to award the plaintiff a share in the family business at plot E 13, Kanyama. In this respect Mrs. Chanda drew my attention to the dictum in *Watchel v Watchel [1973] 1 ALL E.R.* as follows:

“Family assets include those capital assets such as home, furniture and income generating assets such as commercial properties.”

Thus Mrs. Chanda contends that the family business at plot E 13 Kanyama is a family asset, entitling the plaintiff to a share.

Under the fourth ground of appeal, Mrs. Chanda contends that the Court below erred in law and fact by failing to award an equal share of the matrimonial property to the plaintiff considering the plaintiff's investment in the 54 year old marriage. In advancing this particular ground of appeal, Mrs. Chanda drew my attention to section 5 of the Matrimonial and Property Proceedings Act of 1970. Mrs. Chanda argued that in terms of section 5, when a marriage comes to an end, capital assets have to be shared between the parties. Mrs. Chanda submitted further that the revenue producing assets have to be allocated to both parties. And the Court has powers after the divorce to effect transfer of the assets to one or the other. Thus, Mrs. Chanda argued that when a marriage comes to an end, section 5 (1) of the Matrimonial Proceedings and Property Act 1970, stipulates that a wife who looked after a home and a family for many years is entitled to a share in the

matrimonial home if the Court establishes that the matrimonial home, and other assets were acquired and maintained by the joint efforts of both parties. Mrs. Chanda argued that in this case, the plaintiff made both direct and indirect contribution to the acquisition of all the properties as a housewife and a marketeer, during the subsistence of the 54 year marriage. Mrs. Chanda submitted that the Court in the *Musonda case (supra)* held that: “for the 50% rule to be applied, there must be proof of direct contribution by the claimant.” Mrs. Chanda contends that the plaintiff made both direct and indirect contribution to the acquisition of the matrimonial properties.

Lastly, Mrs. Chanda contends under ground five that the Court below was biased and therefore failed to analyse the evidence objectively. As a result, failed to order that each party should have an equal share of the matrimonial property. Overall, Mrs. Chanda urged me to allow the appeal and order that the plaintiff be awarded equal or equitable share of the properties acquired during the subsistence of the marriage.

Mr. Kaona, filed the heads of arguments on 1st April, 2009. Under the first ground of appeal, Mr. Kaona submitted that it is a trite principle of law in common law jurisdictions that property is held separately by spouses. In a bid to justify this submission, Mr. Kaona drew my attention to a learned author; Kate Stendley, Cases and Materials on Family, (London, Blackstone Press Limited, 1997). This is what he observes at page 55:

“England and Wales has a system of separation of property whereby each spouse may own property separately during marriage. Although in practice many couples own property jointly. There is no special regime of shared property ownership for married couples.”

Mr. Kaona argued that it therefore follows that whatever property a party to a marriage has, belongs to that particular spouse if the contracts, documents

deeds etc indicate so. Further, Mr. Kaona argued that a party to a marriage only has a claim to a property at the time of dissolution of marriage.

Mr. Kaona also referred to the *Chibwe case* (supra), and submitted that Chibesakunda, J, observed as follows at page 9.

“Whereas property adjustment means allocation of one or more properties among family assets to provide for a divorced person. Section 24 of the Matrimonial Causes Act deals with property adjustment. Under this section a party to divorce proceedings provided he/she contributed either directly or in kind, that is looking after the house) has a right to financial provision. The percentage is left in the Court’s discretion. In the exercise of that power the Court is statutory bound to take into account all circumstances of that case.”

Mr. Kaona argued that the plaintiff is not entitled to any proceeds of property sold during the subsistence of the marriage, because the law provides for a claim or right to assets existing at the time of the marriage. Mrs. Kaona argued in essence that the order to award compensation for the proceeds of the sell of matrimonial properties is in the discretion of the Court. And therefore there is no need for assessment as suggested by Mrs. Chanda. Mr. Kaona contends that the Court below in awarding the sum of K6, 000, 000=00, took into account the circumstances of this case, and therefore cannot be faulted for making the award it made.

Under the second ground of appeal, Mr. Kaona argued that the undisputed fact is that the defendant gave two houses to his children. Thus, Mr. Kaona contends that it is immaterial whether or not the defendant continued to collect the rentals or not. Mr. Kaona further contends that that is a matter between the defendant and the children.

In relation to the third ground of appeal, Mr. Kaona argued that the Court below cannot be faulted for not awarding the plaintiff a share in the family business at plot E 13 Kanyama because the plaintiff was given a shop and tavern.

Under the fourth ground of appeal Mr. Kaona argued that the Court below cannot be faulted for not awarding the plaintiff a share in the matrimonial property because the plaintiff was given a house, shops, tavern and two sewing machines.

Lastly, under-ground five, Mr. Kaona argued that the plaintiff has not demonstrated how the Court below was biased, and failed to analyse the evidence objectively. In aid of this submission Mr. Kaona drew my attention to the case as *Attorney General v Achiume (1983) Z.R. 1*. Ultimately, Mr. Kaona submitted that the appeal lacks merit and should therefore be dismissed.

I am indebted to counsel for their assistance in this matter. In order to fully appreciate the property consequences of marriage, it is necessary to put the subject in its proper historical context. In this regard, it is instructive to note the observation of Chibesakunda JS, in the case of *Musonda v Musonda* SCZ judgment number 53 of 1998; reproduced in Lilian Mushota's Family Law in Zambia: Cases and Materials (Lusaka, UNZA Press, 2005 at page 298), that the current English divorce law; be it common law or statute law applies to Zambia. I hasten to add however that, currently, section 10 of the High Court Act provides, *inter alia*, that the jurisdiction of the High Court shall in so far as is relevant to matrimonial causes, be exercised in the manner provided by the Matrimonial Causes Act Number 20 of 2007. (See section 2 of Act

Number 7 of 2011; An Act to Amend the High Court Act). Thus reference to the English Matrimonial Proceedings and Property Act of 1970, in this day, and age, is outdated.

To continue with the discussion, it is note worthy from the outset that at common law the principal effect of marriage was that for many purposes it fused the legal personalities of husband and wife into one (see N Lowe and G Douglas Bromley's Family Law, Tenth Edition, (Oxford, Oxford, University Press, 2007, at page 107).

Further, according to Blackstone:

“By marriage, the husband and wife were one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything; and is therefore called in our law __ French covert... Upon this principle of a union of person in husband and wife, depend almost all legal rights, duties and disabilities that either of them acquire by the marriage”. (See Commentaries I,442).

The doctrine of unity was doubtless biblical in origin (see Genesis 2 - 24; and Genesis 2 - 16).

It must also be noticed that at common law, the husband gained control over all freehold lands which his wife held at the time of marriage, or which he subsequently acquired during marriage. The wife had no power to dispose of her real property during marriage although the spouses could dispose of the whole estate together. The wife's leasehold property belonged absolutely to her husband. (See N. Lowe and G. Douglas, Bromley's Family Law, (supra) at page 127).

If the husband died before the wife, she immediately resumed the right to her freeholds; if she predeceased him, her estates of inheritance descended

to her heir subject; to the husband's right, as tenant by the courtesy of England, to an estate for his life in her freeholds in possession. (See N. Lowe and G. Douglas Bromley's Family Law (supra) at page 127).

By the middle of the nineteenth century, it was clear that the old rules would have to be reformed. More middle-class women were earning incomes of their own either in trade or on the stage, or by writing and there were a number of scandalous cases of husbands impounding their wives earnings for the benefit of their own creditors or even mistresses. No relief could be obtained by the woman whose husband deserted her and took all her property with him. (See N. Lowe and G. Douglas, Bromley's Family Law, (supra) at page 129).

The reform came with the passage of the Married Women's Property Act 1882. The Act provided that any woman marrying after 1882 should be entitled to retain all property owned by her at the time of marriage as her separate property, and that whenever she was married any property acquired by a married woman after 1882, should be held by her in the same way. (See N. Lowe and G. Douglas Bromley's Family Law (supra) page 129). To this end, section 1 (1) of the Married Women's Property Act 1882 provides:

"A married woman shall.... be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a female sole without the intervention of any trustee."

With the passage of the Married Women's Property Act of 1882, it became impossible for a married man to acquire any further interest in his wife's property by operation of law.

The learned authors of Bromleys Family Law (supra) doubt whether the view that marriage as such creates a legal unity of personalities irrespective of the social implications survived the decision of the Court of Appeal in *Midland Bank Trust Company Limited v Green [No. 3] [1982] Ch 529 C.A.* In this case, a husband and wife sued for conspiracy; it was argued that they could not be liable on the ground that they were one person in law, and therefore could not conspire with each other. This defence failed. At first instance Oliver J. concluded:

“Unless I am compelled by authority to do so and I do not conceive that I am ___ I decline to apply as a policy of law a medieval axiom which was never wholly accurate and which appeals to me now to be as ill-adapted to the society in which we live as it is repugnant to common sense.”

On appeal, the same sentiments were expressed in the Court of Appeal where Oliver J’s judgment was affirmed. Lord Denning, M.R. expressed himself in these words:

“Nowadays, both in law and in fact, husband and wife are two persons not one.... The severance in all respects is so complete that I would say that the doctrine of unity and its ramifications should be discarded altogether, except as it is retained by judicial decision or by an Act of Parliament.”

It is important to recall that section 17 of the Married Women’s Property Act 1882, stipulates the procedure for vindicating property rights in a marriage when it enacts that:

“In any question between husband and wife as to the title to or possession of property either of them may apply for an order to the High Court or County Court and the judge may make such order with respect to property in dispute as he thinks fit.”

For some years there was considerable judicial controversy over the width of the powers which the wording of section 17 of the Married Women’s Property Act 1882 gave to the judges. The controversy was however finally settled by

the House of Lords in the case of *Pettitt v Pettitt* [1970] A.C. 777. In the *Pettitt* case (*supra*) the House of Lords held that the Court has no jurisdiction under section 17 of the Married Women's Property Act to vary existing titles and no wider power to transfer or create interest in property than it would have in any other type of proceedings. But by using its powers to make different types of orders, the Court may effectively control the way in which property is used without departing from the principle that it cannot alter the title. (See N. Lowe and G Douglas, Bromely's Family Law, (*supra*) at page 145).

However, if the document is silent as to the beneficial ownership, then it is open to the non-legal owner and even joint legal owners to claim entitlement to a share of the property under a trust. To substantiate such a claim, the claimant must establish that the legal owner holds the property in trust *inter alia* for the claimant. The establishment of such trust is dependent upon the parties common intention. In *Gissing v Gissing* 1971 A.C. 886, Lord Diplock pointed out that a party's intention in this context must mean that which his words and conduct led the other to believe that he holds. Thus *Pettitt v Pettitt* (*supra*), and *Gissing v Gissing* (*supra*), established that English law knows of no doctrine of community of property. And no special rules apply to the ownership of family assets. And that instead, one must apply ordinary property principles. The application of these principles requires first having to establish legal ownership, and then to determine equitable or beneficial ownership.

The corollary of these rules is that if one spouse buys property intended for common use with the other whether it is a house, furniture, or a car___ this cannot *per se* or of itself give the latter any proprietary interest. From this follows the second principle stated in *Gissing v Gissing* (*supra*) that if either of them seeks to establish a beneficial interest in property, the legal title to

which is vested in the other, he or she can do so only by establishing that the legal owner holds the property on trust for the claimant.

The guidelines given in *Pettitt v Pettitt* (supra), and *Gissing v Gissing* (supra) continued however to give rise to considerable difficulties. The difficulties were later largely removed by the Matrimonial Proceedings and Property Act of 1970, which gave the Court power to make property adjustment orders on pronouncing a decree of divorce, nullity, or judicial separation. And expressly required it to take into account, *inter alia*, the contributions which each of the parties has made to the welfare of the family. The Matrimonial Proceedings and Property Act of 1970, therefore represented a new code of family law. The gist of the Act was to give the Court power to re-allocate property rights in such a way as to ensure broad justice between spouses after dissolution of a marriage, and to reflect in this their real contributions to the welfare of the family.

Having stated the English law on property consequences in a marriage, I will now proceed to examine the Zambian jurisprudence on this subject. To begin with, Zambian jurisprudence has not discarded the principle of legal unity of personalities in a marriage. This proposition is confirmed by the Supreme Court decision in *Chilima v Chilima* (2000) Z.R. 103. The central question in the *Chilima* case (supra) was whether or not matrimonial property can be distributed before dissolution of marriage. The question was answered in the negative. However, in the course of the judgment delivered by Muzyamba JS, the Supreme Court observed at page 104 that:

“When man and woman join in (holy) matrimony they become one body, one flesh and during the subsistence of their marriage they acquire and own property jointly and indivisibly and until marriage is put asunder, none of them should be heard to say he owns this or that. It necessarily follows that the Court is not competent to order distribution or share of matrimonial

property between the parties where a marriage is still subsisting. This is even where the parties are on separation. To hold otherwise would not only be striking a death nail in a principle which is sacrosanct, but would also be opening a pandora box in this era of greed for wealth. This would inevitably lead to unstable marriages.”

To continue with the narration of Zambian jurisprudence, in *Musonda v Musonda* (supra), the Supreme Court defined matrimonial assets. Matrimonial assets were defined as being things or items acquired by one or the other or both parties with the intention that they should be continuing provision for them and the children during their joint lives and use for the benefit of the family as a whole. Examples of these assets the Supreme Court noted, include assets of a capital nature such as the matrimonial home, furniture in the home, and revenue producing assets or commercial ventures.

The Supreme Court further pointed out in the *Musonda case* (supra) that the current position of the law is that matrimonial assets have to be allocated by the Court to the parties upon dissolution of a marriage. In this regard, the revenue producing assets also have to be allocated to both parties upon dissolution. The Court also has powers after dissolution of a marriage, to effect transfer of the assets to one or other of the parties to a marriage. And when a marriage is dissolved, a wife who had taken care of a home and family for many years is entitled to a share in the matrimonial home, if the Court can establish that the matrimonial home was acquired and maintained by the joint efforts of both the husband and the wife. The property adjustment, should take into account the earning capacity of both parties, and the financial resources which each of the parties to the marriage has or was likely to have in the foreseeable future. And the Court is also required to

take into account the financial obligations or responsibilities which the parties have or are likely to have in the foreseeable future.

It is note worthy also that in the case of *Tembo v Tembo (2004) Z.R. 79*, in a judgment delivered by Silomba JS, the Supreme Court held at page 86 that in making the determinations referred to above, the Court looks at the intention 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 mind at the time of acquisition of the property.

Another seminal case on property consequences in a marriage is the case of *Chibwe v Chibwe (2000) Z.R. 1*. The *Chibwe case* (supra) another judgment delivered by Chibesakunda, JS, essentially affirmed the law laid down in the *Musonda case*, (supra). The definition of matrimonial assets as including assets which are acquired by one or the other or both parties to the marriage and with the intention that the assets should be continuing provision for them and their children during their joint lives and should be for the benefit of the family as a whole, was affirmed. Also affirmed was the proposition that matrimonial assets include those capital assets such as a matrimonial home, furniture, and income generating assets.

In the course of the judgment in the *Chibwe case* (supra), the Supreme Court referred to section 24 of the Matrimonial Cause Act of 1973. Section 24 enacted as follows:

“24-(1) on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether in the case of a decree or divorce or of nullity of marriage before or after the decree is

made absolute), the Court may make any one or more of the following orders, that is to say:-

- a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled either in possession or reversion;
- b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement including such a settlement made by will or codicil) made on the parties to the marriage;
- d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

Subject, however, in the case of an order under paragraph (a) above, to the restrictions imposed by section 29 (1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.

(2) The Court may make an order under subsection (1) (c) above notwithstanding that there no children of the family.

(3) Without prejudice to the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute."

In the *Chibwe* case, (supra) the Supreme Court went on to observe that under section 24 of the Matrimonial Causes Act of 1973, a party to divorce proceedings, provided he or she had contributed either directly or in kind, that is, looking after the matrimonial home, has a right to financial provision. The actual percentage is left to the discretion of the Court. And in the exercise of the power, the Court is statutory bound to take into account all the circumstances of that case. For instance, the Supreme Court affirmed the principles laid down in the *Musonda* case (supra) that the Court is to take

into account the income of both parties, earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, as well as financial needs, obligations, and the standard of living of each of the parties. The Supreme Court went on to conclude in the *Chibwe* case (supra) that the Court is vested with wide powers in re-adjusting the financial positions of parties to the divorce. But the Supreme Court cautioned that although there are no hard and fast rules in making awards on property adjustment, the Court is guided by the principle of doing justice taking into account the circumstances of a given case.

The current law relating to property adjustment in divorce proceedings is spelt out in section 55 of the Matrimonial Causes Act No. 20 of 2007. Section 55 enacts as follows:

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

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as the Court may specify in the order for the benefit of such a child such property as may be specified in the order, being property to which the first-mentioned party is entitled, either in possession or reversion;

(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 to the marriage and of the child of the family or either or any of them;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either any of them ante-nuptial settlement including a settlement made by will or codicil made by the parties to the marriage;

(d) an order extinguishing or reducing the interest of either of the parties of the marriage under settlement;

Subject, in the case of an order made under paragraph (a) to the restrictions imposed by this Act on the making of orders for the transfer of property in favour of children who have attained the age of twenty-one.

(2) The Court may make an order under paragraph (c) of subsection (1) notwithstanding that there are no children of the family.

(3) Where an order is made under section sixty on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.”

Apart from minor variations, section 55 has re-enacted section 24 of the Matrimonial Causes Act of 1973.

Before I proceed to apply the law to the facts of this case, it is useful to recall the counsel of Lord Scarman in *Minton v Minton* [1979] A.C. 593 at page 608, as follows:

“There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other; of equal importance, is the principle of the “clean break”. The law now encourages spouses to avoid bitterness after family breakdown, and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship with has broken down.”

I will now embark on consideration of the grounds of appeal in this appeal. In the first ground of appeal it is contended that the Court below erred in law and fact by ordering that the defendant should only pay the sum of K 6, 000, 000=00 as compensation; without assessing the value of the properties.

On behalf of the plaintiff, Mrs. Chanda argued that the properties should have been valued in order to determine in monetary terms their value. In aid of this submission, Mrs. Chanda drew my attention to the case of *Finance Bank v Africa Angle Limited and Others* (1998) Z.R. 237. Reference to this case however is in my opinion irrelevant because it addressed another issue altogether. And laid down that it is not unreasonable for a Court to order re-

valuation of a property where a mortgagor claims that the price obtained on a sale by a mortgage was insufficient.

In response, Mr. Kaoma argued that it is a trite principle of law that in common law jurisdictions property is owned separately by spouses. And a party to a marriage only has a claim to property at the time of dissolution. It is on this basis that Mr. Kaoma maintained that the plaintiff is not entitled to any of the proceeds from the sell of the houses.

I have already demonstrated elsewhere in this judgment that English law knows of no doctrine of community of property or any separate rules of law applicable to matrimonial assets. Thus if a spouse buys property intended for common use, the other party cannot by that act alone acquire proprietary interest in the property of whatever description unless of course he or she can demonstrate that she or he has beneficial interest in the property.

Assuming therefore on the facts of this case that the properties in issue were registered in the name of the defendant, the question that rises is whether or not the plaintiff acquired beneficial interest in the properties; both real and personal. It is noteworthy that in the Court below the plaintiff testified that she acquired the property in issue with the defendant. This piece of testimony went unchallenged. I therefore find and hold that the property in issue was acquired jointly. That being the case, the defendant has obviously beneficial interest in the sundry properties. As a *sequitur* the plaintiff also had beneficial interest in the properties that were sold by the defendant. Since, the plaintiff had beneficial interest in the properties sold by the defendant, I therefore agree with the submission by Mrs. Chanda that the proper course of action the Court below should have adopted is to order a valuation of the properties sold. And subsequently include the proceeds of the sell in the distribution of the property. I am fortified in postulating this

proposition by the observation of Silomba JS in *Scott v Scott (2007) Z.R. 17* at page 25 as follows:

“The first step towards the sharing of the property in equal shares is to ascertain the value of the improvements on the stand by way of valuation. The valuation can be done by a valuation officer acceptable to both parties”

It is also instructive to note the observation again of Silomba JS in *Tembo v Tembo* (supra) at page 88 that whatever property is sold off prior to the distribution should be included in the award(s).

Since the valuation of the properties sold was not undertaken, I now order that the following properties should be valued. Namely;

- i) house number 648, New Kanyama;
- ii) the house in George;
- iii) the plot in George Compound;
- iv) the Bedford and two Mazda trucks; and
- v) the saloon car.

The assessment of the properties listed above should be undertaken before the Deputy Registrar. After the assessment is done, I further order that the defendant should pay the plaintiff one half of the assessed value of the properties by way of compensation, in lieu of the K 6, 000, 000=00, which was awarded by the Court below without any basis whatsoever. The first ground of appeal is therefore allowed.

Under the second ground of appeal it was argued that the Court below erred in law and fact by failing to take into account the evidence on the undisputed fact that the purported gifts to the two children of the family are not in reality gifts because the defendant continues to benefit alone from the rentals from the two houses; number 644 and 712, New Kanyama. In this regard, Mrs. Chanda argued that the defendant having gifted the two houses

to the children, should not be allowed to deal with the houses as he pleases. Since the defendant is dealing with the properties as he pleases, Mrs. Chanda contends that the gifts are fictitious. And she urged me to distribute the properties in these proceedings.

In response, Mr. Kaona argued that the undisputed fact is that the defendant gave the two houses to his children. Mr. Kaona contends that it is immaterial whether or not the defendant continues to collect the rentals or not. Mr. Kaona maintained that this is an issue, in any case, between the defendant and the children.

It is instructive to note that in the Court below the defendant testified as follows:

"I gave a house on plot No. 644 Kanyama, to my son, who is sick. I built a house on plot 712 for my first born son. These are our children. I gave the houses whilst our marriage was subsisting."

It is also note worthy that Sophia Phiri, a daughter to the plaintiff and the defendant also in so far as is relevant testified as follows:

"House number 712 is for my late brother Henry Phiri. The appellant is collecting rentals...."

In the judgment delivered by the Court below it was observed at J1 that:

"Sophia Phiri told the Court that the appellant gave the respondent house number 713. She went on to say that house 712 was for the late brother though the appellant was collecting rentals."

Eventually, the Court below held at J2 as follows:

"As regards the sharing of property, I am satisfied that it was fair taking into account that the appellant gave some of the assets to the children who are also the respondent's children."

By her submission, Mrs. Chanda has in effect invited me to interfere with the finding of the Court below that the distribution of the property was fair; taking into account that the defendant gave two of the houses to the

children of the family. The *locus classicus* regarding the jurisdiction of an appellate Court to disturb findings of facts of a trial Court is the case of *Nkhata and Others v Attorney General (1966) Z.R. 124*. In the *Nkhata case* (supra), it was held that a trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate Court that:

- (a) by reason of some non-direction or misdirection or otherwise, the judge erred in accepting the evidence which he did accept; or
- (b) in assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account or failed to take account some matter which he ought to have taken into account; or
- (c) it unmistakably appears from the evidence itself or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
- (d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

The evidence of the defendant and Sophia Phiri, that the defendant gave his sons two houses as gifts went unchallenged in the Court below. Thus I am unable on the basis of the *Nkhata case* (supra) to interfere with the finding of the Court below. And I so agree in the event with the argument by Mr. Kaona that the fact that the defendant continues to collect the rentals in respect of the houses in question, cannot be the basis of impeaching the gifts. This ground of appeal is therefore dismissed.

Under the third ground of appeal the plaintiff argued that the Court below erred in law and fact by awarding the plaintiff a share in the family business at plot E 13, Kanyama. In aid of this submission, Mrs. Chanda drew my attention to the case of *Watchel v Watchel [1973] 1 ALL E.R. 113*, where it was held that family assets include capital assets such as a home, furniture, and income generating assets. Thus Mrs. Chanda pressed that the plaintiff is entitled to share of the family business at plot E 13, Kanyama.

In response to the preceding submission by Mrs. Chanda, Mr. Kaona argued that the Court below cannot be faulted for not awarding the plaintiff a share in the family business at plot E 13, Kanyama, because the plaintiff was given a shop and a tavern.

I have already stated elsewhere in this judgment that on the basis of *Musonda* (supra) and *Chibwe* (supra) cases family assets have been defined as including things acquired by one or the other or both parties with the intention that they should be continuing provision for them and their children during their joint lives and use for the benefit of the family as whole. These include of course income generating assets. I have therefore no doubt in my mind that the plaintiff is entitled to share of income generating assets. Be that as it may, I agree with the submission by Mr. Kaona that the Court below cannot be faulted for not awarding the plaintiff a share in family business at plot E 13, Kanyama, because the plaintiff was in any event allocated a shop and a tavern. This ground of appeal is therefore dismissed.

Under the fourth ground of appeal, the plaintiff argued that the Court below erred in law and fact by failing to award an equal share of the matrimonial property to the plaintiff. And also by failing to take into account the plaintiff's life time investment in the 54 year old marriage. In this regard, Mrs. Chanda, submitted, in essence, that a wife who looked after a home and the family for many years is entitled to a share in the matrimonial home, if the Court is

satisfied that the matrimonial home was acquired and maintained through the joint efforts of both parties. In this case, Mrs. Chanda pressed that the plaintiff made both direct and indirect contribution to the acquisition of all the properties during the subsistence of the 54 year old marriage.

In response to the preceding submission, Mr. Kaona argued that the Court below cannot be faulted for not awarding the plaintiff a share in the matrimonial property because the plaintiff was given a house, a shop, tavern and two sewing machines.

It is significant to note that the Court below made the following observation regarding the matrimonial home at J2:

“After consultation of the facts, I find it inappropriate for the two parties to live on the same farm after a divorce.... I quash the order which stated that the farm belongs to both parties. My order is that the farm belongs to the appellant.”

Whilst it may be inappropriate, nay undesirable, or indeed impracticable, or plainly hazardous for parties to live in the same property after a divorce, that does not nonetheless stymie a party to estranged marriage from claiming a beneficial interest in a matrimonial home. I am therefore satisfied on the facts of this case that during the subsistence of the 54 year old marriage, the plaintiff made both direct and indirect contribution to the acquisition and maintenance of the various properties, including the matrimonial home. I therefore hold that the plaintiff has a beneficial interest in the farm situate in Barlastone Park. As a consequence, I hold and direct that farm in question should be valued. The valuation should be undertaken by a firm of valuation surveyors or a valuation surveyor acceptable to both parties. The cost of the valuation should be met by the defendant. The assessment of the property should be undertaken before the Deputy Registrar. And one third of the net value of the farm should be paid to the plaintiff by the defendant as a lump sum. This ground of appeal is therefore allowed.

Under the last ground of appeal, the plaintiff argued that the Court below was biased and failed to analyze the evidence objectively. And consequently, failed to order an equal sharing of the matrimonial properties. Thus, Mrs. Chanda urged me to distribute the properties acquired during the subsistence of the marriage equally or at least equitably.

Mr. Kaona's response to this ground of appeal is that the plaintiff has not demonstrated how the Court below was biased, and failed to analyze the evidence objectively. In aid of this submission, Mr. Kaona drew my attention to the case of *Attorney General v Achume (1983) Z.R. 1*.

The *Achume case* (supra) lays down, *inter alia*, that:

- a) an appeal Court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts or that the findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make; and
- b) an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial Court should reasonably make, and entitles the appeal Court to interfere.

Although the Court below may have committed certain misdirections, especially of the law, there is no evidence on record to suggest that the Court below was biased, or indeed failed to analyse the evidence before it objectively. Accordingly this ground of appeal is dismissed.

In view of the overall outcome of the appeal, I order that each party bears their respective legal costs. And leave to appeal is hereby granted.

Dr. P. Matibini, SC
HIGH COURT JUDGE