IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ Judgment No. 3 of 2007
APPEAL NO. 122 OF 2004

B E T W E E N:

ANNE SCOTT	APPELLANT
AND	
OLIVER SCOTT	RESPONDENT

CORAM: **SAKALA, CJ, SILOMBA AND MUSHABATI, JJS.**
On the 20th October and 17th November, 2005 and 2nd February, 2007.

For the Appellant: Mr. Mudenda, Lewis Nathan Advocates
For the Respondent: Mr. J. Banda, A.M. Wood and Company

J U D G M E N T

SILOMBA, JS, delivered the judgment of the Court.

Cases referred to:-

1. **The Attorney General -Vs- Marcus Achiume (1983) ZR 1.**
2. **Rosemary Chibwe -Vs- Austin Chibwe, (2001) ZR, 1.**
3. **Richard John C. Musonda -Vs- Florence Chao Musonda, SCZ Appeal No. 53 of 1998.**

Authorities referred to:

1. **Halsbury's Laws of England, 3rd Edition Vol. 19.**
2. **Bromley's Family Law, 5th Edition.**

The delay in the delivery of this judgment is deeply regretted.

This appeal is against the ruling of the learned Deputy Registrar dated the 20th of May, 2004. The background to the ruling is that the appellant and the respondent were lawfully married in November, 1993 and after more

(25)

than ten years of togetherness they decided to end their relationship by judicial process. There was no child born during the marriage. The issue that arose as a consequence of the dissolution of the marriage was property adjustment and settlement pursuant to Section 21(2) of the Matrimonial Causes Act, 1973. The application for property adjustment and settlement before the learned Deputy Registrar was by summons supported by an affidavit filed by the respondent. The appellant filed an affidavit in opposition.

The gist of the respondent's evidence, both affidavit and oral evidence, was that Stand No. 5672, Kalundu, Lusaka, was bought in 1994 during the subsistence of the marriage. The respondent bought the stand using his own resources. It was, however, jointly owned by the respondent and the appellant as per the certificate of title relating to the stand. According to the evidence of the respondent, Stand No. 5672, Kalundu, has four big houses, one bedroom cottage and one bed-sitter. The main house with four bedrooms is not complete.

The respondent's evidence was that he paid for all the constructions on the Kalundu stand, except for the paints and pipes the appellant bought for one of the houses. He rejected the claim of the appellant that she made more contribution to the development of the stand than himself. The respondent, apart from his regular employment with Zambeef, was also in the business of buying and selling cars and the profits realized from there went into the construction of the houses on the Kalundu stand.

The respondent recalled that the only other contribution made by the appellant was the landscaping she did to the lawns of the Kalundu stand. He rejected the claim that the appellant contributed building materials, which

she obtained on credit from her employer because it was the respondent who ended up clearing the debt. On movable assets, the respondent testified in the court below that he had two cars for personal use; he gave one to the appellant and kept one; that although the appellant was in gainful employment and later did clearing business, the respondent never saw proceeds of her business or earnings from her employment.

In consideration of what the appellant did in the development of the Kalundu stand, the respondent proposed to the trial court to give her a three bed roomed house valued at K80,000,000.00, one motor vehicle, assorted furnishings and electrical household equipment valued at K40,000,000.00 and other items valued at K6,000,000.00. The latter were already given to the appellant.

On Stand No. 10514, Olympia Park in Lusaka, the respondent told the trial court that he bought the land alone and put up a wall fence, a gate and bed sitter. As far as he was concerned, the appellant never made any contribution to the development of the stand. Unlike the Kalundu stand, Stand No. 10514, Olympia Park, was not generating any income in form of rent. The title to the Olympia Park stand was, according to respondent, in his name; that he acquired the stand during his marriage to the appellant for the benefit of his son, Jerome, who was not a child of the marriage. The fact that the stand was for Jerome was made known to the appellant who was told to stay away from it.

In cross-examination, the respondent admitted that the appellant contributed something to the Kalundu stand and that he had no objection to the valuation and sale of the property. He, however, rejected the sale of the Olympia Park house because the appellant had no claim to the property,

especially that it was his alone. On household goods, the respondent was prepared to share.

The appellant's evidence in opposition was that Stand No. 5672, Kalundu, was purchased by herself and the respondent through a 4 x 4 Toyota vanette and cash. Her evidence was that after purchase they developed the stand jointly. On her part, she obtained tiles, showers and baths from her employer on credit. It was apparent from her evidence that the improvements on the Kalundu stand were built in stages. She testified that after they had built the first two houses, the construction of the rest of the houses was, according to her, financed with money from rentals of the finished houses. At the time she left all the houses were complete, except the four bed roomed house.

She rejected the respondent's claim that he developed the Kalundu stand from the profits he generated from the sale of motor vehicles. As far as she was concerned, the car business was a family business because she also assisted in the clearing of vehicles and contributed money to buy more cars. She accordingly claimed a share in the profits realized from the sale of cars. She prayed for an equal share in the Kalundu property based on the valuation. She also prayed for the equal share of the household goods with the exception of a TV set and a stove, which she took on separation.

On the Olympia Park stand, the appellant conceded that it was in the name of the respondent. She, however, contended that she had an interest in it because it was bought during marriage; that she bought roofing sheets and supervised the construction of the building. She disputed the respondent's claim that he bought the stand in Olympia Park for his son, Jerome, as the

title deed did not reflect the name of the son. She prayed before the trial court for a 50% share in the Olympia Park property.

In cross-examination, the appellant told the trial court that she did not have proof relating to the collection of buildings materials from her employer. She also conceded that she did not have proof for window and doorframes she bought for the Kalundu property. On the Olympia Park property, the appellant told the learned Deputy Registrar that as the respondent's wife she was involved in the buying of the property.

With regard to the issue of rentals, the appellant testified that she got K1,500,000.00 in March, 2003 as rent for Kalundu houses when she left the respondent. At that time, the rents varied between US $500 and US $700. She recalled that the cottage was K500,000 a month. She asked the court to order the respondent to account for the rentals so that she could get what was due to her.

The foregoing evidence, including the decided cases cited by the parties, was duly considered by the learned Deputy Registrar. On Stand No. 5672, Kalundu, the learned Deputy Registrar noted that the property was bought and registered in the joint names of the parties during the subsistence of their marriage. Notwithstanding the contention of the respondent that the contribution from the appellant was minimal, the learned Deputy Registrar thought that she had an interest in the property and, therefore, entitled to a share on divorce. He found that the appellant was entitled to 1 x 2 and 1 x 3 bed roomed houses, which formed part of the Kalundu property and ordered that they be assigned to her for her absolute use and benefit.

On rentals, the learned Deputy Registrar noted that the appellant's claim was 50% share in the rentals realized from the Kalundu and Olympia

Park property. He also noted the evidence of the respondent that for most of the time he had no tenants in the Kalundu property and that if there was any rent realized it was used in the improvement of the structures on the stand. Since the appellant had been given a share of the Kalundu property, the learned Deputy Registrar found that there were no rentals on which the respondent could be held accountable to the appellant.

On motor vehicles, the learned Deputy Registrar, after the evaluation of the evidence, found that the parties conducted their financial undertakings independently of each other and that they neither disclosed or accounted for their earnings to each other. He agreed with the assertion of the respondent that the sale of motor vehicles was not a family business. He rejected, the appellant's claim for a 50% share of the proceeds from motor vehicles sales, especially that the respondent did not make a similar claim on the appellant's private undertakings.

With regard to Stand No. 10514, Olympia Park, the trial court noted that there was no dispute that the stand was in the name of the respondent and further noted that the respondent had bought it for his son, Jerome, born out of wedlock. The learned Deputy Registrar agreed with the statement of the law that during a marriage a spouse can, on her own or his own, acquire property in which the other spouse may have no interest at all in the absence of evidence to the contrary and ruled against the appellant's claim for a 50% share in the Olympia property.

The appellant has, on appeal, advanced eight grounds of appeal. These are:-

(30)

1. **The learned Deputy Registrar erred in law and in fact when he held that the petitioner (appellant) refused to give evidence as to her present situation and as such it was not possible to consider her situation now or in the foreseeable future in dealing with property allocation.**
2. **The learned Deputy Registrar erred in law and in fact when he held that there was evidence that the respondent developed the Kalundu properties on Plot No. 5672 Kafulafuta Road, Kalundu Lusaka, with his own resources without contribution from the petitioner save for the landscaping that the petitioner did.**
3. **The Deputy Registrar erred in law and in fact when he held that the appellant was only entitled to 1 x 3 bedroom and 1 x 2 bedroom houses out of the properties at Plot 5672 Kafulafuta Road Kalundu considering that the property is jointly owned and also considering the weight of evidence on record.**
4. **The learned Deputy Registrar erred in law and fact when he held that since the petitioner has been given a share of the properties there were no rentals the respondent could account to the petitioner.**
5. **The learned Deputy Registrar erred in law and in fact in respect to household goods when he held (contrary to parties wishes) that the petitioner (appellant) will have the assorted households furnishing, and electrical equipment valued at approximately K6 million named in the affidavit and of which the petitioner has possession when the parties were in total agreement at the hearing that all the household goods would be shared equally.**
6. **The learned Deputy Registrar erred in law and in fact when he held that the appellant was not entitled to claim the proceeds of the sale of motor vehicles.**
7. **The learned Deputy Registrar erred in law and in fact when he held that Plot No. 10514 Lusaka was not meant to be part of the family property and thereby dismissing the appellant's claim for share in the property.**
8. **The learned Deputy Registrar erred in law and in fact in evaluating the evidence before him thereby making biased findings unsupported with evidence in favour of the respondent.**

In his submission in support of the appeal, the appellant's counsel heavily relied on the filed heads of argument, which he amplified in his oral submission. On ground one, counsel submitted that in her evidence in chief at page 164 of the record, as well as in her cross-examination and re-examination, the appellant testified that she was in Kenya where she had enrolled at a school and not in employment. Counsel thought that it was a contradiction for the learned Deputy Registrar to find that the appellant had

refused to give evidence as to her present situation and that such a finding was not supported by evidence.

On ground two, counsel submitted that the finding of fact that the respondent developed the Kalundu property with his own resources, save for the landscaping that the appellant did, flew in the teeth of the evidence on record; we were urged, as an appellate court, to interfere with it on the basis of the principle found in the case of ***The Attorney General -Vs- Marcus Achiume***. (1)

With regard to ground three, counsel submitted that it was not in dispute that Stand No. 5672, Kalundu, Lusaka, was jointly owned by the appellant and the respondent. The issue arising from a jointly owned property on the dissolution of a marriage, was how to share such property, he said. He relied on Halsbury's Laws of England, 3rd Edition, at page 841 to reinforce the principle that where property is jointly owned the husband and wife are beneficially entitled in equal shares on the dissolution of the marriage.

Coming to ground four, counsel referred us to the submission under ground two, which he said had covered ground four as well. He stated that since the stand was jointly owned the appellant had a share in the rentals.

On ground five, counsel drew our attention to paragraph 21(III) of the affidavit in support of settlement of property at page 26 of the record, and argued that it was wrong for the learned Deputy Registrar to apportion to the appellant K6,000,000 of assorted household furnishings and electrical equipment which the appellant was already in possession of when the agreement of the parties was that they would have household goods shared equally.

(32)

When it came to ground six, the appellant's counsel combined this ground with ground seven and said that the two grounds had already been covered. Notwithstanding the submission, we note that in ground six the appellant, based on her heads of argument, contends that since the business of motor vehicles was a family venture she was entitled to a 50% share of the proceeds of sale. The case of ***Rosemary Chibwe -Vs- Austin Chibwe*** (2) was called in aid.

As for ground seven, the contention was that since Stand No. 10154, Olympia, Lusaka, had been acquired during the subsistence of the marriage and since she had contributed to its development the appellant was entitled to a 50% share of the house upon sale. The appellant's argument was that the Olympia stand was a family asset as it was acquired during the marriage and that the name of the respondent's son, Jerome, was not on the certificate of title.

Finally on ground eight, it was submitted, by way of summary of all the grounds, that from the evidence on record it appeared as if the learned Deputy Registrar's findings of fact, the subject of appeal, were made in the absence of any relevant evidence or upon a misapprehension of the facts. The appellant accused the trial court of failing to make a balanced evaluation of the evidence and simply echoed what the respondent said in his evidence. We were urged to allow the appeal and reverse the learned Deputy Registrar's findings on the basis of the principle in the case of the ***Attorney General -Vs- Marcus Achiume***. (1)

In response, the respondent's counsel relied on the filed heads of argument. He combined grounds one and eight because the arguments somewhat overlapped. The remaining grounds were also argued together for

the same reason. He submitted that although the appellant advanced grounds of appeal as of mixed law and fact she was actually attacking findings of fact.

He submitted further that during trial it was incumbent on the appellant, in terms of Section 25 of the Matrimonial Causes Act of 1973, to disclose fully all the relevant information for the court to determine the matter fairly. Counsel said that under the foregoing section the law requires either party to a marriage to disclose his or her income, earning capacity, property and other financial resources, which they have or are likely to have in the foreseeable future, so that the court did not engage in the business of speculation.

Counsel referred us to the evidence of the appellant, particularly the evidence at page 164, lines 14-15, where she said; "I am a lawyer in Kenya, I am at school. All I do is not relevant here" and asserted that the appellant's evidence was not full and frank. As such, the learned Deputy Registrar was entitled to draw the necessary inferences. Counsel submitted that where a party behaved in the manner the appellant did the trial court was entitled to make the findings it did. We were urged not to interfere with the findings as the learned Deputy Registrar came to these findings after observing the demeanour of the appellant and not as a result of bias on his part.

In dealing with the rest of the grounds of appeal, the respondent's counsel submitted that the learned Deputy Registrar awarded the appellant what he thought was just and equitable in the circumstances despite her demeanour; that the learned Deputy Registrar recognized her contribution and awarded her accordingly. As the awards were based on findings of fact, we were urged not to interfere with them.

(34)

We have carefully considered the evidence on record that was adduced before the learned Deputy Registrar. We have also considered the decided cases and the authorities that were cited to us during the submissions of counsel with due diligence. In our consideration of the grounds of appeal, we think that grounds one and eight should come last; that grounds two, three and four should be considered together and that the rest of the grounds be considered separately.

We note that grounds two, three and four relate to the sharing of the structures on Stand No. 5672, Kalundu, Lusaka, including rentals that may have accrued to the respondent after the dissolution of the marriage. There is indisputable evidence that the Kalundu stand is held on a joint lease. We are the first to appreciate that land held on a joint lease or a joint tenancy has its own implications that flow from such a relationship.

One of the implications is that land held under a joint tenancy is indivisible as between the joint holders; this is to be contrasted from land held in common and in distinct shares. The other implication is that once land is held jointly it is governed by the principle, of *jus accrescendi*, which literally means the right of survivorship between joint tenants. This can be further explained that on the death of one of the parties to the tenancy his share accrues to the other or others by survivorship. On the basis of the principle, there was no need to call for evidence to show the contributions each party made as that was totally irrelevant.

Having explained the law on joint tenancy, we now consider how the Kalundu stand should be shared now that there is no marriage relationship. Because the interest of the appellant and that of the respondent in the stand is indivisible, we find that it was wrong, in the absence of fraud or mistake

(35)

in the manner the stand was jointly owned, for the learned Deputy Registrar to award one or two structures to the appellant in that such an award had the potential of either subordinating the appellant's interest to that of the respondent or vice versa. In our opinion, the two should be treated as beneficially entitled in equal shares.

The first step towards the sharing of the property in equal shares is to ascertain the value of all the improvements on the stand by way of valuation. The valuation can be done by a Valuation Officer acceptable to both parties and in the absence of an agreement by Valuation Officers nominated by the parties.

Once the value of the improvements is ascertained, we order that the stand be sold and the proceeds shared on equal basis. Alternatively, if either of the parties has sufficient funds of his or her own and is desirous of keeping the stand he or she can do so by paying the other party his or her 50% share based on the valuation. To that extent, the order of the learned Deputy Registrar, granting to the appellant two structures only, is reversed and set aside.

The issue of rent has been raised and it is the contention of the appellant that she is entitled to 50% of the rentals paid to the respondent over the Kalundu stand. We have examined the evidence on this subject and our honest view is that the evidence is not clear but rather speculative. In fact, the appellant's evidence is that while she was in marriage Stand No. 5672, Kalundu, was the matrimonial home; that after the third house was completed the rest of the structures were built with rent from the finished houses and that when she left the fourth house (main house) had not been finished.

(36)

With this background, she testified that in March, 2003 when she left the matrimonial home she collected K1,500,000 as rentals. She has given the rental levels of the structures but she does not say if the houses were rented and if so to whom and from which period the rents should be calculated for purposes of sharing.

On the other hand, the respondent's evidence is that for most of the time he had no tenants for the Kalundu property; that the rent he ever got was used to finish or enhance the structures on the stand. In view of the lack of clear and convincing evidence we have not been able to make any finding in favour of the appellant. With regard to the Olympia Park house the respondent's evidence was that it never generated any rent and the appellant has not rebutted the assertion.

However, the point must be made that if the evidence was clear enough the appellant would have qualified for a share of the rentals on the Kalundu stand on the principle that the stand was held on a joint lease. The disqualification alluded to by the learned Deputy Registrar, based on the fact that the appellant had already benefited from the award of one or two structures, was wrong and at variance with the principle underpinning a joint tenancy. From our reasoning, grounds two and three are successful while ground four is declined.

In ground five, the bone of contention is over the sharing of household items that were acquired by the parties in the course of their marriage. The appellant is saying the K6,000,000 worth of household furnishing and electrical equipment the trial court awarded to her is not what the parties agreed upon. She referred us to paragraph 21(III) of the respondent's affidavit in support of summons for property settlement at page 26 of the

(37)

record where it is clearly stated that the respondent was to give the appellant assorted furnishings and electrical household goods valued at approximately K40,000,000 in addition to the K6,000,000 worth of household goods already in the possession of the appellant bringing the total to K46 million.

This evidence was never controverted by the respondent who reaffirmed his position in cross-examination that he was ready to share the household goods with the appellant. In the case of ***Richard John C. Musonda -Vs- Florence Chao Musonda*** [3] we said that all family assets, that is, furniture and other household goods, provided they were bought during the subsistence of the marriage by either of the parties were to be shared equally.

Applying the principle to this case, we think that it would be in the best interest of the parties to take an inventory of all the household goods, including those already with the appellant, that were bought during their marriage and share such goods equally. As per our reasoning under grounds two, three and four, the danger of one party offering to share the goods in the amount determined by him has the potential of disadvantaging the other party. The order of the learned Deputy Registrar, awarding K6,000,000 worth of goods already with the appellant, is reversed and set aside. Ground 5 is successful.

With regard to ground six, the appellant is contending that the business of buying and selling cars was a family business to which she is entitled on equal basis. We have looked at the evidence of the appellant and that of the respondent and we find that it is reconcilable on the manner the proceeds from such a venture were utilised. The evidence, simply stated, is that the respondent was in the business of selling cars. The profits realized

from the sale of cars was, according to him, invested in the development of Stand No. 5672, Kalundu, which later became the matrimonial home. The respondent's evidence was that at the time of divorce he had sold all the cars except two, one of which he gave the appellant.

The evidence of the appellant that she contributed to the buying and selling of cars has not been challenged by the respondent. Our finding, therefore, is that the business of buying and selling cars was a family business. Whether or not the appellant was entitled to a 50% share in the profits is a question of evidence. So far, there is no evidence to suggest that the respondent had accumulated profits from the sale of the remaining cars at the time of divorce.

We can understand the difficulty the appellant has in leading evidence to show that the respondent made profits to which she is entitled. We say so because the respondent has asserted, and the appellant has not rebutted, that any money he realized from the sale of vehicles went into the construction of the houses on the Kalundu stand. The assertion tallies with the evidence of the appellant herself who confirmed that at the time they divorced the main house was incomplete.

In the circumstances and for different reasons other than those given by the learned Deputy Registrar, we have no difficulty in finding that there was no money to share from the sale of cars at the time of divorce because there was an incomplete structure to which the resources had to be directed. Ground six has no merit.

With regard to ground seven, there is no doubt that Stand No. 10514, Olympia Park, Lusaka, was acquired by the respondent in his name during the subsistence of the marriage with the appellant. The evidence of the

respondent was that he acquired the stand for the benefit of his son, Jerome, born out of wedlock. The appellant does not agree with the evidence that the Olympia Park stand was bought for Jerome. Her contention is that since the stand was acquired during their marriage and since the title does not include Jerome, the property is a family asset for which she is entitled to a 50% share.

In her evidence in chief, she testified that she bought roofing sheets and supervised the construction of the building on the stand. The evidence of the respondent, both oral and affidavit, was that the appellant never contributed anything. If we accept the appellant's evidence that she contributed to the development of the stand her contention that the stand was a family asset will be reinforced. We have examined her affidavit in opposition to the respondent's application for property settlement, in particular paragraphs 23 and 24 at page 29 of the record, and nowhere is it pleaded that the appellant bought roofing sheets and supervised the construction of the house. To us, this piece of evidence was an after thought and we are not surprised that the respondent never made any reference to it in his affidavit in reply.

The respondent has consistently asserted that he bought the Olympia Park stand for his son, Jerome, which fact he says was well known to the appellant. We shall give him the benefit of doubt. On the principle that "any property purchased by one spouse with his or her own money will presumptively belong exclusively to the purchaser" (per Bromley's Law, 5th Edition, at page 447) we order that the Olympia Park stand shall continue to be the property of the respondent for the benefit of his son, Jerome. Our considered view is that the presumption that the stand was bought for

Jerome has not been rebutted to our satisfaction. Ground seven is unsuccessful.

On the allegations raised in grounds one and eight against the trial court, our view is that they all amount to a storm in a tea cup. From counsel's submission, ground eight does not seem to be a ground of appeal because it is a recap of all the grounds. Further, out of the six main grounds of appeal, the appellant has succeeded in three and lost in three. It is, therefore, our considered view that the learned Deputy Registrar had a balanced evaluation of the evidence and to accuse him that he favoured the respondent more than the appellant is neither here nor there. The two grounds lack merit and are dismissed. In the net result, the appeal is allowed. There will be no order for costs; each party to meet its own costs.

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E. L. Sakala
CHIEF JUSTICE.

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S. S. Silomba,
SUPREME COURT JUDGE.

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C. S. Mushabati,
SUPREME COURT JUDGE.