

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

Appeal No.104/2005

JUDITH NAMWAWA MUYOYETA

APPELLANT

AND

JOHN MULETETWI MUYOYETA

RESPONDENT

Coram: Sakala CJ, Mumba JS, Kabalata, AJS
4th April 2006 and 30th November 2007

For the Appellant: Dr John Mulwila of Messrs Ituna Partners

**For the Respondent: Mr Peter Gondwe of Peter Gondwe &
Associates**

JUDGMENT

Mumba, JS, delivered the Judgment of the court.

This is an appeal against the decision of the Deputy Registrar on property settlement after the dissolution of the marriage by the High Court. For convenience, the appellant will be referred to as the respondent and the respondent will be referred to as the petitioner, designations they were in the court below.

The parties had two real properties during their marriage. Stand no. 2644, Livingstone, known as house no. 864/865 and an apartment or flat no. 3, Mistry Court, Fairview, Lusaka. In the court below, the respondent had proposed that the Livingstone house be held entrust for the party's infant child Aketata Chrispin M. Muyoyeta and that the trust be administered by an independent body. The Petitioner had proposed that the house in Livingstone be sold and the proceeds be shared equally between the parties. The Deputy Registrar agreed with the petitioner's suggestion and ordered valuation of the property in Livingstone so that it could be sold and the proceeds shared equally between the parties. On the Lusaka property, Flat no. 3, Mistry Court, Fairview, the respondent had submitted that it too be sold and the proceeds shared equally between the parties, but the petitioner had submitted that there was a mortgage running on it which he was servicing. It was common cause that the respondent had paid the initial deposit on the property for its purchase while the petitioner had obtained a mortgage. The Deputy Registrar decided that because there was a mortgage still running on the property, it could not be sold

because a 3rd party had priority interest in the same property. There is evidence that on a later date, the Registrar issued an order to evict the respondent from the Lusaka property, that left the petitioner and the child of the family living in the flat. Costs were awarded to the petitioner.

The respondent has appealed to this court against the decision of the Deputy Registrar regarding the Lusaka property Flat no. 3, Mistry Court, Fairview, and the order on costs.

Dr John Mulwila, learned Counsel for the respondent, advanced two grounds of appeal. The first ground of appeal is that the learned Deputy Registrar misdirected himself on flat no. 3, Mistry Court, Fairview, which at the material time was under mortgage when he decided that the property was not amenable to property settlement yet there were many authorities, to the contrary thus, the order was erroneous. Dr Mulwila submitted that the property should be sold and the parties should have equal shares of the remains of the proceeds of the sale after the mortgage has been settled. As there was no evidence on record

of the level of contributions by the parties, Dr Mulwila submitted that as the petitioner was servicing the mortgage it would not be out of line to share the remainder of the proceeds two-thirds the petitioner and one-third the respondent.

On the second ground of appeal, Dr Mulwila submitted that there was no basis for ordering costs against the respondent. He submitted that authorities showed that for partial success, parties should bear their own costs. Dr Mulwilwa submitted that in this case the Deputy Registrar should have ordered each party to bear their own costs. He pointed out that the appellant should have won and the costs would have followed the event. He submitted that costs be awarded to the appellant.

Mr Gondwe, on behalf of the petitioner, relied on the filed heads of argument. He added that the interests of the child of the family should be taken into account; that the appellant was ordered to pay maintenance because the respondent was servicing the mortgage. On costs, Mr Gondwe submitted that each party should bear their own costs.

Dr Mulwila in reply, insisted that appellant who had been dragged to court should get costs.

We have considered the submissions, the evidence on record and the decision of the Deputy Registrar appealed against. As the appeal is restricted to the Deputy Registrar's decision regarding one property only, Flat 3, Mistry Court, Fairview, Lusaka and the order on costs, we do not believe that it is necessary to recite all the submissions and the authorities which are on record as Dr Mulwila rightly submitted, authorities are bound and the question of law is settled, whether a mortgaged property is amenable to property settlement in a matrimonial cause. Indeed, the answer is in the affirmative as long as prior rights of the mortgagor are taken care of. The existing mortgage on the Lusaka property cannot permanently thwart the interests of the respondent in that property.

On the interests of the child, as submitted by Mr Gondwe, there's nothing amiss in the order of the Deputy Registrar

regarding the child of the family. We find that it is only just, that the respondent should have a share in the Lusaka property on which she had paid the initial deposit which made it possible for the purchase to proceed by way of mortgage. We deem it important to settle for a decision that will leave the parties more or less at equal disadvantage or advantage, whichever way one looks at it, after the dissolution of their marriage.

It is not in dispute that the petitioner alone is servicing the mortgage but at the same time, it was the respondent who paid the initial deposit of the property. The purchase price being obviously greater than the deposit, it should follow that proportionate shares be awarded.

Consequently, we order that Flat 3, Mistry Court, Fairview, Lusaka, be valued by a registered valuer, thereafter, be sold without undue delay. After satisfying the mortgage balance, if any, the remainder of the proceeds be shared between the parties in the proportion of 66% to the petitioner and 34% to the respondent. The appeal succeeds to that extent. The order of

the Deputy Registrar, to the extent it affects the said property, is set aside. No order for costs here and below.



E.L. Sakala
CHIEF JUSTICE



F.N.M. Mumba
SUPREME COURT JUDGE



T.A. Kabalata
ACTING SUPREME COURT JUDGE