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

APPEAL NO.12/2014
SCZ/8/009/2013

BETWEEN:

NOAH BWALYA — 1ST APPELLANT
FREDRICK MUTALE — 2ND APPELLANT

AND

IDAH NAMWALIZI — RESPONDENT

CORAM: Hamaundu, Kaoma and Mutuna, JJS

On: 7th June, 2016 and 13th June, 2016

For the Appellant: No Appearance
For the Respondent: Mrs. K.M. Simfukwe-Senior Legal Aid Counsel

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JUDGMENT

KAOMA, JS, delivered the Judgment of the Court.

Authorities referred to:

1. *Chibwe v Chibwe (2001) Z.R. 1*
2. *Antonia Ventriglia and ManvelaVentriglia v Eastern and Southern African Trade and Development Bank (2010) Z.R. 486*
3. *WalusikuLisulo v Patricia Anne Lisulo - SCZ Judgment No. 21 of 1998*
4. *Subordinate Courts Act, Cap 28, Section 16*

The backdrop to this appeal is that in May, 2011 the respondent sued the 1st appellant for reconciliation at the Kapiri

Mposhi Local Court. The parties were married but they had marital problems. The Local Court found that the marriage could not continue because the reconciliation failed and the 1st appellant admitted to divorce and was already married to another woman; and he even demanded for his dowry; and that the respondent was not interested in polygamy.

The Local Court divorced the couple and ordered the 1st appellant to maintain the respondent with the sum of K2000.00 (rebased) plus K100.00 for the children to start with K3.00 and then continue with K100.00 every month until he finishes. The household property was to be shared equally.

The respondent was aggrieved and appealed to the Subordinate Court on two grounds: that the court did not consider that during their marriage they built two houses and one shop at the plot in Riverside and bought one plot near Kapiri School; and that the amount of child maintenance was too little considering that the children were little and needed more care and to live a comfortable life; and the 1st appellant was in gainful employment.

The Subordinate Court heard the matter *de novo*. The respondent's testimony was that she got married to the 1st appellant in 2006 after elopement. They had two children who were living with her, but were not going to school because the 1st appellant was not supporting them. She wanted the 1st appellant to be paying K400.00 per month for the children's food, K300.00 per month for their school and K300.00 twice a year for their clothing.

Her evidence was also that they built two houses in Kapiri Mposhi, a 3 bedroomed house which was the matrimonial home, and a 2 roomed x 4 block of flats. They also built a grocery shop, and a chicken-run at the same plot. They bought the plot in 2007 from the 2nd appellant, a nephew to the 1st appellant's sister's husband and they signed a sale agreement and later ownership was changed to the 1st appellant. They built the properties from the 1st appellant's wages at Chimsoro Company and he got a loan of K10,000.00 from Barclays Bank and Capital Solutions Money Lenders. They had another plot near Kapiri Mposhi School developed to foundation level.

After they built the properties, the 1st appellant's relatives claimed that she did not suit the man and the 1st appellant's sister got the papers for the plot and later claimed the plot as her own, and chased her from the matrimonial home. At the Local Court the 1st appellant claimed that the plot and house belonged to the 2nd appellant and produced documents showing that the 2nd appellant bought the plot from one Teddy Miselo.

The respondent's sister Gladys Namwalizi (PW3) confirmed that the 1st appellant and the respondent found a plot in 2007 whilst living in Kabwe and her late husband built the house for him and was paid between K600.00 and K800.00. The couple shifted to the house after it finished and later they built the flats, and shop, but the chicken run was just a box.

The 1st appellant's testimony was that he knew the respondent in 2006 while staying in Lusaka. She was in Grade 12 and got pregnant by him in 2007. He was married then and had three children. When his wife heard the news they differed and separated. He was transferred to Kabwe and the respondent joined him. He was transferred to Kapiri Mposhi in August, 2008. He had no

accommodation. His nephew had a house which he built in 2006 that was left under his elder sister's care. His sister agreed that he could stay in the house as caretaker whilst improving the house.

Later, his sister sold her house in Kawama and built a block of flats, a shop and a chicken-run at the same plot. Subsequently, his sister permitted him to use the shop for the respondent to sell groceries. He got a loan of K2,000.00 from Capital Solutions to buy groceries whilst other groceries were obtained on credit. He also got a loan of K10,000.00 from Barclays Bank. He used K5,000.00 to buy the plot behind Kapiri Mposhi School and the balance to build blocks and build a box at the same plot. He admitted that he gave papers for the plot in Riverside to his sister. He disputed that he was not maintaining the children.

He produced his pay slip to show that his gross pay was K1,610.00 and net of K784.80. He also produced documents to prove that the disputed plot belonged to the 2nd appellant. He also testified that they had a debt of K4,500.00, comprising of K1,700.00 for groceries obtained on credit from Central Bakery and K2,800.00 balance on the Barclays loan.

According to the 1st appellant's sister (DW2), she raised the 2nd appellant and she bought him a plot as she considered him as her son. She also gave him something with which to start building while his uncle got him a job at Chimsoro and he started building a house. When the house was almost complete he moved to Lusaka and left the house papers with her. Later, she also built a house at the same plot. When the 1st appellant moved to Kapiri Mposhi, she allowed him to live in the house whilst helping her with final touches. She used to get the rentals since the house is hers. She did not consider the respondent as the 1st appellant's wife and her parents do not know her. She chased the respondent from the matrimonial home.

The 2nd appellant (DW3), testified that the disputed house was his. He allowed the 1st appellant to occupy the house on condition that he makes improvements to it. He used to send money to the 1st appellant and several other people for improving the house.

Boniface Chinenga, a witness called at the instance of the court testified that in 2009 when he served as Resident Development Committee (RDC) Secretary, he presided over the

change of ownership for the disputed plot from the 2nd appellant to the 1st appellant for a consideration of K1,500.00.

On this evidence, the trial magistrate found as a fact that the respondent and the 1st appellant fell in love in 2006 and later lived together up to June, 2011 when the Local Court pronounced a divorce; that they had two children aged 4 years and 2 years who were with the respondent; and that the 1st appellant paid K50.00 towards the marriage payments to PW2. The trial magistrate also found that the couple first lived in Kabwe and that from the time they moved to Kapiri Mposhi they have been living at the disputed house; and that the second plot was in the names of the 1st appellant and was acquired in 2010.

According to the trial magistrate, what was in dispute was whether or not the two parties ever married, whether or not the 3 bed roomed house, the flats, the shop and chicken house belong to the 1st appellant, and child support. On the issue of marriage, the trial magistrate found that the two parties were properly married under customary law and the appellant paid K50.00 to PW2 as dowry and that the Local Court was within the law when it

pronounced their divorce. The trial magistrate also quoted *Chibwe v Chibwe*[1] which according to him is explicit that all property acquired by a couple during the subsistence of marriage should be shared equally upon divorce.

On the issue of the disputed plot, the trial magistrate found inconsistencies in the evidence tendered by the 1st appellant and his witnesses and that the defence raised by the 1st appellant was ill conceived and hatched for the purpose of denying the respondent a fair share of what they acquired as a couple and chose to conceal the documents relating to the change of ownership. He also found that the disputed plot and the properties thereon belong to the 1st appellant and were acquired during the subsistence of the marriage and thus subject to adjustment upon divorce.

Concerning child maintenance, the trial magistrate opined that the 1st appellant being the one in employment must maintain the respondent and the children. He then ordered that the 1st appellant maintains the respondent at K300.00 per month for 3 years or until remarriage whichever comes first; that food ration for the children be at K300.00 per month; that school requirements for

both children be at K300.00 per term; that clothing be provided twice a year in January and December at K300.00 until the children attain majority age; that the 3 bed roomed house be given to the respondent; and that the second plot at foundation level be sold and proceeds shared equally between the parties.

Dissatisfied with the decision, the 1st appellant appealed to the High Court advancing four grounds of appeal. Ground 1 alleged that the lower court erred when it held that he should compensate the respondent at K300.00 per month, for three years, amounting to K10, 800 (rebased), the amount was excessive. Grounds 2 and 3 alleged that the lower court erred by ordering him to maintain the two children without considering that he has five children and that the amount ordered as maintenance surpasses his income despite producing a pay slip as evidence. And in ground 4, the 1st appellant alleged that the trial magistrate erred by awarding the 3 bedroomed house which was not his despite, producing valid documents.

On grounds 1, 2 and 3, it was the 1st appellant's argument that with a combination of children, food, ration and maintenance for the respondent, he was to be paying K600.00 exclusive of school

fees and that the pay slip produced showed a paltry income. It was also argued that the trial magistrate overlooked their debts amounting to K4,500.00; and that the 1st appellant had three other children he was taking care of.

It was further submitted that the trial magistrate ordered maintenance for the respondent at K300.00 which she did not claim. That the 1st appellant was no longer in employment and the High Court should set aside the order of the trial magistrate and substitute it with zero maintenance for the respondent and K200.00 per month for food for the children and for him to pay school fees to a school affordable to him; and that the responsibilities should be shared as children are a blessing to both parents.

As to ground 4, it was argued that according to the respondent the plot in issue belonged to the 1st appellant because water and electricity bills were in his names, but that is usually the case. That the court should have granted the parties an equal share of the proceeds of the second plot; and that while they succumbed to the authority of *Chibwe v Chibwe*[1], the court can only be free to share property whose ownership is not in doubt.

On the other hand, the respondent contended, on the same authority of *Chibwe v Chibwe*[1] that in making awards for maintenance, the court must be guided by the need to do justice taking into account the circumstances of the case, which in this case included the fact that the appellant had various sources of income which included salary which at the time of the initial action was K2,800.00, monthly profit of approximately K700.00 from the grocery, and house rent at K1,000.00 per month.

It was also submitted that the respondent was not in formal employment; she needed food, clothing, and accommodation; she had in her custody the two minor children who both attended school and were supposed to pay K210.00 per tern and they also required medical, clothing, food and other basic amenities; and the respondent was being looked after by her widowed sister.

On ground 4, it was submitted that during the time the disputed property was being built, the respondent was looking after the children and maintaining the household and actively running the family grocery shop; and contributed to the acquisition of the family property, and so she should be awarded a share of the

properties acquired. It was also submitted that the principles laid down in *Chibwe v Chibwe*[1], that recognise the need to protect the interests of the less financially capable party to a divorce, be upheld.

In her judgment, the learned High Court Judge referred to the case of *Chibwe v Chibwe*[1] and found that the trial magistrate's findings of fact could not be disturbed as he considered the credibility of the witnesses and followed the principles in *Chibwe v Chibwe*[1] in arriving at his decision and was on firm ground in awarding the disputed house to the respondent as it was built during the subsistence of the marriage.

The learned Judge also found that the respondent would suffer economic and emotional hardship if she was not awarded any of the properties of the marriage as she worked hard to acquire them; that the trial magistrate also observed the demeanour of the witnesses, especially DW2 whom the court described as arrogant and that she disliked the respondent to the extent she became a serious impediment to the respondent's marriage to the appellant and succeeded in destroying it. The learned Judge accepted that the

property belonged to the 1st appellant and upheld the decision of the trial magistrate.

Aggrieved by the decision, the 1st appellant appealed to this Court advancing ten grounds. In the main, this appeal still assails the court below for ordering maintenance of the respondent; for failing to take into account the family debts of K4,500.00 and that the 1st appellant has three other children to care for; for failing to consider that his means had substantively dwindled as he was no longer in employment; and for finding that the 1st appellant's salary was K2,800.00 when this was not supported by evidence on record.

The appeal further questions the court bellow for awarding the disputed house to the respondent; and for relying on the evidence from the RDC Secretary who according to the appellants failed to produce any documentary evidence or receipts on change of ownership and whose evidence contradicted that of the respondent regarding the dates of the purported transfer of ownership and when Fred Mwape, who was alleged to have taken Chinenga to the 1st appellant's house in March, 2009, died in February, 2009 as evidenced by a death certificate on record. The court below is

further accused of totally disregarding the evidence of Kapiri Mposhi District Council and the RDC Chairman which confirmed that the 2nd appellant was the legal owner of the disputed property.

Before we proceed any further, we wish to comment on the 2nd appellant to this appeal. We observed that he was not a party to the proceedings in the Local Court, Subordinate Court and the High Court. We therefore, did not appreciate how he became one of the appellants in this Court, considering that the record of appeal does not contain any application for joinder or proceedings relating to joinder or indeed any order joining the 2nd appellant to the appeal.

However, at the hearing of the appeal, Mrs. Simfukwe, learned counsel for the respondent informed us that the 2nd appellant was joined by an order of a single Judge of this Court. Although Mrs. Simfukwe did not have the order joining the 2nd appellant to the appeal, we are satisfied with her explanation. Suffice to add that the appellants did not attend the hearing of the appeal, either in person or by their counsel. However, they had filed brief heads of argument which we shall take into account in our judgment.

In support of ground 1, counsel for the appellants argued that the respondent never made any claim regarding maintenance, and so the court had no jurisdiction to make such an order. The case of *Antonia Ventriglia and Manvela Ventriglia v Eastern and Southern African Trade and Development Bank*[2] was cited where this Court stated, inter alia, that in order not to ambush the other party, only issues that were pleaded and raised in the Court below can be raised in this Court.

In response, Mrs. Simfukwe contended that the respondent raised the fact that she was not being supported by the 1st appellant in the Local Court and the court ordered the 1st appellant to maintain the respondent and the children; and that the trial court applied appropriate principles in awarding the respondent maintenance and took into account factors such as the respondent's unemployment and that the 1st appellant was employed and the court cited the case of *Chibwe v Chibwe*[1].

Mrs. Simfukwe also argued that the matter went before the trial magistrate on appeal on two issues, namely sharing of property acquired by the parties during the subsistence of the marriage and

the maintenance quantum awarded to the children. That the Local Court's award of maintenance to the respondent was not disputed and the trial magistrate upheld the award but revised the figures.

On grounds 2, 3 and 7, it was contended that in ordering the 1st appellant to pay maintenance for the children as it did, the court must have established the actual salary of the 1st appellant if any, and looked at his liabilities. That there was no evidence that his salary was K2,800.00 and as such the court's finding was not based on any evidence or facts and cannot be upheld.

In response, Mrs. Simfukwe submitted that the trial court was availed a copy of the 1st appellant's pay slip and that the respondent disclosed that they were operating a grocery, and so, the trial court was aware of the 1st appellant's income and also knew that he had a total of five children.

She further argued that the 1st appellant's claim of an outstanding debt of K4, 500.00 was not supported by evidence and was challenged by the respondent who asserted that the only outstanding debt was K400.00 as the loan had been settled. It was contended that though the 1st appellant said the loans were used to

buy stock for the shop, no accounting was made in respect of the stocks purchased and no statement regarding the state of that business was rendered. That the 1st appellant had a duty to produce documentary evidence of his financial position to enable the court arrive at an appropriate decision. Counsel cited the case of *Walusiku Lisulo v Patricia Anne Lisulo*[3] to support this argument.

It was further Mrs. Simfukwe's contention that the 1st appellant's argument that he had left employment did not arise during the proceedings in the Local Court and the Subordinate Court and cannot, therefore, be a ground for appeal. She argued that he produced a copy of a pay slip in the Subordinate Court as proof of his income and the trial magistrate proceeded to order him to pay maintenance for his children. That the order for maintenance made provision for review and the proper way to have the order revised was to make an appropriate application to that effect supported by an affidavit stating the 1st appellant's means. She again cited *Walusiku v Walusiku*[3].

In support of grounds 4, 5, 8, 9, and 10, counsel for the appellants reiterated that it is trite law that for the respondent to

claim any share in any property she must prove that the property belongs to the 1st appellant and was acquired during the subsistence of the marriage. It was argued that there is documentary evidence that the disputed property belongs to the 2nd appellant and no documentary evidence was produced by the respondent to the effect that the 1st appellant bought the property; and that the records held by the Kapiri Mposhi District Council indicate that the property is for the 2nd appellant. We were urged to reverse the decision of the lower court.

In response, Mrs. Simfukwe argued that the finding of the court that the disputed property belonged to the parties during the subsistence of their marriage is supported by the evidence. It was argued that the court heard evidence from Borniface Chinenga who was a member of the RDC at the material time and whose evidence is significant as the RDC was the entity responsible for the demarcation of land, and overseeing land transactions in the area, and whose evidence supports the respondent's claim and that of PW3 that the property in issue had been purchased by the 1st appellant from the 2nd appellant.

It was further contended that a document showing change of ownership is not conclusive proof of ownership as the only document that conclusively proves ownership of property is a certificate of title which the 2nd appellant does not have and the change of ownership document does not mean that no further transactions were carried out in respect of the land in dispute.

It was also Mrs. Simfukwe's argument that the respondent was not in a position to provide documentary evidence that the 1st appellant had purchased the property because she claimed that the documents for the property were with DW2 who confirmed in her testimony that she had the documents.

Mrs. Simfukwe also argued that the defence offered by the 1st appellant raises doubts due to a number of contradictions some of which were pointed out by the trial magistrate; and that the concerns raised by the trial magistrate regarding the reliability of DW2 and DW3 cannot be ignored as the trial court had the opportunity to observe the demeanour of these witnesses during trial. We were invited to uphold the decision of the lower court and to allow the respondent to assume ownership of the property

awarded to her in keeping with the principles enunciated by this Court in *Chibwe v Chibwe*[1].

We have considered the evidence on record, the decision appealed against, the grounds of appeal, and the arguments by counsel on both sides. Because of the position we have taken in this appeal, we shall not deal with the grounds of appeal in the order they were argued. Instead, we shall deal with the main issues raised in this appeal regarding maintenance for the divorced spouse and the children and property adjustment.

It is trite law that a divorced spouse who was being maintained by the other spouse during the subsistence of the marriage is entitled to continue enjoying this maintenance from a spouse with means until such a spouse dies, remarries or becomes able to support himself or herself whichever occurs first.

Chibwe v Chibwe[1] has been heavily relied upon in this case. In that case, the respondent sued the appellant for divorce before the local court in Mufulira under customary law alleging, inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted the divorce. The appellant appealed to the

Subordinate Court alleging that the local court justices had misdirected themselves by dissolving the marriage on unestablished grounds and had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. The learned magistrate heard the evidence de novo and sat with assessors in Ushi customary law. At the end of the trial, he dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant appealed to the High Court. The learned High Court Commissioner considered Ushi customary law, and directed the respondent to pay the appellant the sum of K10,000,000 with simple interest at the rate of ten per cent from 8th July, 1991, to the date of Judgment. On appeal to this Court we held as follows:

(i) *In Zambia courts must invoke both the principles of equity and law, concurrently*

(ii) It is a cardinal principle supported by a plethora of authorities that court's conclusions must be based on facts stated on record.

(iii) In making property adjustments or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case.

(iv) Customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law.

We also stated in that case that:

> *"...a party to divorce proceedings provided he/she has 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 duty bound to take into account all circumstances of that case. For instance, 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, financial needs, obligations and responsibilities of each party and standard of living of each of the parties."*

We further stated that maintenance is not meant to cripple the other party but to support the divorced party to maintain the standards she or he had during the subsistence of the marriage.

Our view is that we should not lose sight of the cardinal fact that *Chibwe v Chibwe*[1] was decided on the basis of customary law or that the trial magistrate sat with assessors in Ushi customary law, but nevertheless failed to apply the customary law which was brought to the fore. This Court said that was a serious misdirection.

In this particular case, the trial magistrate found as a fact that the parties married under customary law. However, in contrast to *Chibwe v Chibwe*[1] where there was clear evidence that the parties married under Ushi customary law, there was no evidence, either before the Local Court or the Subordinate Court or indeed the High

Court of the customary law under which the parties married. There was also a dispute as to whether or not the parties were ever married. And, even if on appeal the parties were not concerned with the merits of the divorce, the orders on maintenance and property adjustment made by the Local Court and the Subordinate Court have been challenged, and so the court should have determined the applicable customary law.

The view we take is that it was a serious misdirection for the Local Court and the Subordinate Court to make maintenance orders for the spouse without first establishing what the divorced spouse was entitled to under customary law under which the parties contracted their marriage or whether the customary law was repugnant to any written law, or to justice, equity and good conscience.

Moreover, Mrs. Simfukwe conceded at the hearing of the appeal that the trial magistrate did not apply the appropriate principles in awarding the respondent maintenance. We reiterate what we said in *Chibwe v Chibwe*[1] that in making financial provisions, the court is duty bound to take into account all

circumstances of the case, for instance, the income of both parties, earning capacity, property and other financial resources which each party is likely to have in the foreseeable future, financial needs, obligations and responsibilities of each party and the standard of living of each of the parties.

It has been argued that it was the duty of the 1st appellant, to produce documentary evidence of his financial position to enable the trial court to arrive at an appropriate decision. At the same time it was counsel for the respondent who argued in the High Court that the appellant had various sources of income including a salary of K2,800.00, monthly profit of about K700.00 from the grocery, and house rent of K1,000.00 per month. However, those means were not proved and that evidence was not put before the trial magistrate.

In our view, both the trial court and the High Court had an obligation to conduct a means assessment since the evidence tendered by the parties did not sufficiently disclose the income and expenditure of the parties, their earning capacity. It seems to us that the trial court was punishing the 1st appellant for fathering the

children when there was evidence that his net pay was about K800.00 and that he had other serious obligations. As we have already said, maintenance is not meant to cripple the other party but to support the divorced party to maintain the standards she or he had during the subsistence of the marriage.

We also observe that in her judgment, the High Court Judge did not deal specifically with the issue of maintenance for the respondent or the two children. This was a serious oversight. For the reasons we have stated, we find merit in the appeal relating to the maintenance orders made by the trial magistrate.

Coming to the property adjustment orders, the gist of the appellants' argument is that the disputed property does not belong to the 1st appellant, but to the 2nd respondent. It is clear to us that the trial magistrate found that the disputed property was acquired by the parties during the subsistence of the marriage. Consequently, he apportioned the 3 bedroomed house to the respondent and an equal share of the proceeds of sale of the plot at Kapiri Mposhi School.

In our considered view, the finding by the trial magistrate that the disputed property was acquired by the parties during their marriage is supported by the evidence and the trial magistrate gave very good reasons for preferring the respondent's evidence to that of the appellant. We refuse to tamper with that finding of fact. As rightly submitted by Mrs. Simfukwe, the documents produced by the 1st appellant to show that the plot in question belongs to the 2nd appellant were not conclusive evidence of ownership of land.

As we see it, the appellants' argument that Fred Mwape could not have taken Chinenga to the 1st appellant's house in March, 2009 as he died in February, 2009 was never raised in the Subordinate Court or High Court and cannot be raised now.

Further still, the accusation that the court totally disregarded the evidence of Kapiri Mposhi District Council and the RDC Chairman which confirmed that the 2nd appellant was the legal owner of the disputed property is unjustified.

However, the matter does not end there because the view we take is that even for property adjustment, the trial magistrate should have first considered what the respondent's entitlement was

under customary law, as was the case in *Chibwe v Chibwe*[1]. In the event that the customary law was found to be repugnant to written law, equity and good conscience, or if there was no express rule applicable to the matter in issue, the trial magistrate would then have been guided by principles of justice, equity and fairness as stipulated in *Section 16 of the Subordinate Courts Act, Cap 28*[4]. Again for the reasons, we have given we find merit in the appeal relating to the property adjustment orders.

In conclusion, this appeal succeeds in part. We set aside the orders of the trial magistrate on both maintenance (for both the respondent and the two children) and property adjustment. We send the matter back to the trial court for that court to determine first, the customary law applicable to this case, and what the respondent was entitled to under that customary law, both in terms of maintenance and property adjustment and if the customary law is found not repugnant to written law, to apply the same; secondly for a proper means assessment; and thirdly for valuation of the properties in issue before they can be properly apportioned.

Because of the circumstances of this case we order each party to bear their own costs on appeal and in the courts below.

E. M. HAMAUNDU
SUPREME COURT JUDGE

R. M. C. KAOMA
SUPREME COURT JUDGE

N. K. MUTUNA
SUPREME COURT JUDGE