Appeal No. 51/2011

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

FEBIAN PONDE **APPELLANT**

AND

CHARITY BWALYA **RESPONDENT**

Coram: Phiri, Muyovwe and Wood, JJJS.
On the 1st day of March, 2016 and .....March, 2016.

For the Appellant: **In Person**

For the Respondent: **Not in Attendance.**

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chibwe vs Chibwe (2001) Z.R. 1.**

Statutes referred to:

1. **Matrimonial Causes Act of 1973**
2. **Section 16 of the Subordinate Court Act, Cap 28 of the Laws of Zambia**

For convenience we will refer to the appellant as the petitioner and the respondent as such. This cause has a long

history. At the time the cause of action arose, the petitioner and the respondent were married under customary law and lived together as husband and wife respectively, at a registered property at which was built one relatively large house and a cottage. The property was registered in the petitioner's name. They were married for 15 years and had three children born of their customary wedlock.

On the 23rd of November, 2007 the petitioner caused to be issued a divorce summons out of the Chilenje Local Court. At the conclusion of the proceedings in that court, divorce was granted and the petitioner was ordered to pay the respondent K15,000,000 (unrebased) compensation in monthly instalments of K500,000 (unrebased) with effect from 30th November, 2007. The petitioner was also granted custody of the couple's three children, with the respondent retaining her right of access. The couple were also ordered to share their household goods equally.

The respondent was dissatisfied with the judgment of the Local Court in so far as it was silent on the sharing of the two houses acquired by the couple during the subsistence of their marriage. She appealed to the Subordinate Court on grounds that the Local Court did not address the issue of property adjustment, maintenance, custody and access to the children of the family.

In accordance with rules of the Subordinate Court, the appeal from the decision of the Chilenje local court was heard and determined by way of retrial. After analyzing and assessing the evidence given by both sides, the Subordinate Court noted, without reference to any specific authority, that the law relating to maintenance of both the divorced party and the children of the family; and the sharing of property acquired during the subsistence of the marriage, custody of the children of the family and access by the other party to the children, was now settled. Consequently, on property adjustment, the Subordinate Court found that all the property which was acquired during the subsistence of the marriage

was subject of sharing at divorce. This included the couple's plot on which was built the two houses. As a consequence of this finding, the Subordinate Court also ordered that the children remain with the petitioner who was already looking after them; with reasonable access to the respondent; which included staying with them at weekends and on school holidays.

Regarding the couple's plot, the lower court considered the evidence that Plot No. 50/17 Lilanda which the couple acquired during their marriage had two houses on it surrounded by a concrete block perimeter wall with a steel gate. The first house consisted of two bedrooms, a sitting room, a kitchen, a toilet room and a bathroom. This house was used as a matrimonial home for the couple during their marriage. The second house consisted of eight rooms, a bathroom and a toilet room. This house was occupied by three tenants who paid monthly rentals ranging from K195,000 per month to K220,000 per month (unrebased). Both houses were built with concrete blocks and were

plastered, painted, electrified and have piped water; with all necessary fittings in place including asbestos roofing sheets. The Subordinate Court ordered that the bigger house be for the petitioner and the small house be for the respondent. The lower court further ordered that the smaller house should be valued by Government Valuation officers and be sold off to the benefit of the respondent or in the alternative to the sale, the petitioner be at liberty to buy it from the respondent.

Dissatisfied with the decision of the Subordinate Court, the petitioner appealed to the High Court advancing three grounds of appeal. The first ground was that the lower court did not consider the circumstances under which the marriage was dissolved before awarding the respondent the smaller house. The second was that the lower court did not take into account that the respondent was already awarded compensation of K15,000,000.00 by the local court, and the third ground was that the lower court did not consider that the property which was awarded to the respondent belongs to the children who currently reside in it.

The petitioner lost his appeal in the High Court on all three grounds of appeal. The High Court held that the lower court was on firm ground to order that the petitioner retains the main house while the smaller house was allocated to the respondent; and further ordered that the property be subdivided and if the petitioner was not comfortable with the lower court's order, he was at liberty to buy the cottage upon valuation by the government valuers.

Dissatisfied with the judgment of the High Court the petitioner launched his appeal in this court, canvassing three grounds of appeal. The first ground was that the High Court erred in both law and fact when it held and ordered that the matrimonial house should be shared equally between him and the respondent. The second ground was that the High Court erred in law and fact when it ordered that the respondent be given the smaller house, which house is in the same plot using one gate. The third and last ground was that the High Court erred in both law and fact when it accepted the respondent's

assertion that she pays school fees for the children of the family.

Both the petitioner and the respondent were not legally represented in this appeal; and they both filed written heads of argument on which they entirely relied. The respondent elected not to attend the hearing.

In support of the first and second grounds of appeal, the petitioner submitted that the matrimonial home was built on a small plot, measuring 20 x 30 metres, and it was illogical to order that it be subdivided and be shared equally between the two parties who have irreconciliable differences and cannot live in harmony in such limited space. In the petitioner's view, it would be very impossible to share this property. In support of ground three of the appeal, the petitioner submitted that no evidence was adduced to prove that the respondent was paying school fees for the children; and that in fact the respondent never made such a claim during trial. On the basis of these arguments we were urged to find merit in the

appeal, set aside the judgment of the lower court and remit the case back to the High Court for retrial.

In response to the petitioner's arguments in grounds one and two of the appeal, the respondent submitted that the plot on which the two houses were built was quite big and can be shared equally; and that if the petitioner was opposed to the sharing of the plot, then the plot together with the two houses on it should be ordered to be sold and the money shared equally. The respondent also argued that the lower court was on firm ground when it ordered that the petitioner gives her the small house while the petitioner had the option to buy it off her. The respondent also asserted that she had been keeping the three children of the family in her rented house while the petitioner was awarded custody of the children, and that she paid the children's school fees from 2012 without any support from the petitioner.

We have considered the evidence on record, the judgment appealed against, the grounds of appeal and the written

arguments filed by the parties. We will begin by considering ground three of the appeal.

The petitioner couched ground three in the following words:

> **"The lower court erred in law and fact when it arrived at the respondents assertions (Sic) that she pays school fees for the children."**

We have carefully examined the short judgment appealed against and it is clear to us that the entire judgment is devoid of any finding of fact or consideration concerning the payment of school fees. In fact there is no mention of school fees either in the body of the judgment or in the petitioner's three grounds of appeal that were filed in the High Court. The only mention of school fees is in the respondent's written heads of argument in response to the petitioner's written heads of argument in support of ground three of the appeal before us; but then, this was no more than a lamentation; a complaint by the respondent to the effect that she paid the school fees alone. Clearly, ground three of the appeal before us is misplaced and lacks merit.

We return to ground one and two which relate to the sharing of the two houses between the petitioner and the respondent as ordered by the court below. These two grounds were argued together as they relate to the sharing of property by a married couple after divorce. The gist of the petitioner's argument is that the property; in particular the plot, is too small to be shared equally between him and his former wife. He also argued that the smaller house should not be given to the respondent because that is where the children of the family are currently living.

In this case, we note that the proceedings in the Subordinate Court and in the High Court show that there was no contest between the parties on the fact that they were married under Zambian customary law; and that they divorced under it. Although no specific reference was made as to which customary law applied, none of the parties raised any issue or concern on the merits of the divorce and the consequential orders which accompanied the dissolution of this marriage by the Local Court.

What has survived before us in this appeal is the respondent's claim to property adjustment in respect of the matrimonial property and the two houses built on it, acquired during the subsistence of the marriage; which claim was decided in the respondent's favour by the Subordinate Court on appeal from the Local Court; and upheld by the High Court on appeal from the Subordinate Court. What is in issue before us is whether the award of the smaller house to the respondent was a just and proper order of property adjustment.

Property adjustment is universally understood to mean allocation of one or more properties among the family assets to provide for a divorced person. In Zambia, since our decision in **Chibwe v Chibwe**[1], it is settled that the meaning of property adjustment remains the same, whether the marriage was contracted under the **Statutory Law** or under a Zambian Customary law. It is also settled that it does not matter whether or not both spouses contributed financially or

materially to the acquisition or development of the family assets; and that a party to the marriage does contribute either materially or in kind to those assets (even as a mere mother of the children of the family). It is also settled that blameworthiness as to the cause of the divorce is not a material consideration when deciding property adjustment; but the court has power, after divorce, to reallocate family assets between the parties, taking into account all circumstances of each particular case. Our approach since **Chibwe v Chibwe**[1] is premised on the recognition of customary law in Zambia by our Constitution, provided its application is not repugnant to any written law. Our courts are also permitted to invoke both the principles of equity and law concurrently, and to observe a duty to do substantial justice and apply good conscience. See **Section 16 of the Subordinate Court Act, Cap 28 of the Laws of Zambia.**

In the present case, the petitioner's grounds of appeal and the heads of argument before us reveal that the petitioner simply does not want to share any of the family assets at the

family plot in question. He has given a number of reasons. Firstly, that the plot is too small to share. Secondly, that he should not be compelled to live with his former wife using a single gate and in limited space; and thirdly, that the smaller house allocated to the respondent by the court was already occupied by the three children of the family.

Our understanding of the petitioner's resistance to the court order on property adjustment is that the petitioner simply does not want the respondent to be anywhere near the family assets. He does not want to share the plot or the houses on it; and he has not cited any legal reasons for his resistance. In our considered view, the petitioner is simply being greedy. He was awarded the bigger of the two houses while the respondent was allocated the smaller house. This is understandable because he was also granted custody of the three children of the family. The lower court went further than that. It ordered that the plot be subdivided and if the petitioner is not comfortable, he should buy the smaller house off the respondent upon valuation by government valuers. We

do not see any injustice in any of these orders. The petitioner was granted legal options on the enforcement of the property adjustment order, and this was perfectly within the powers of the court. The lower court was therefore on firm ground when it allocated the smaller house to the respondent.

We do not see any merit in grounds one and two of the appeal and we dismiss them. We wish to add, for purposes of emphasis, that there should be no family property which is too small for the court to share between a former husband and wife after divorce; and the husband's convenience is immaterial as a consideration. If the physical structures cannot be shared, for whatever reason, then the couple should not have any difficulties to share their market value. In the present case, the lower court's decision to grant the petitioner the option to buy the smaller house off the respondent after valuation or in the alternative, to sell the entire property and share its market value, was perfectly just and correct in the circumstances of this case. We dismiss this appeal with costs

to the respondent both in the lower court and in this court. These costs shall be taxed in default of agreement.

G.S. PHIRI
SUPREME COURT JUDGE

E.C. MUYOVWE
SUPREME COURT JUDGE

A.M. WOOD
SUPREME COURT JUDGE