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

2016/HP/A. 006

(Civil Jurisdiction)

BETWEEN:

ELIZABETH KAUNDA LEMBELEMBA Appellant

AND

RASFORD KAUNDA LEMBALEMBA Respondent

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 17th August 2018

For the Appellant : Ms. R.P Bwalya of Messrs Lusitu Chambers
For the Respondent: Mr. R. Lembalemba, In Person

J U D G M E N T

Authorities referred to:

1. *Matrimonial Causes Act, No. 20 of 2007*
2. *Watchel v Watchel (1973) 1 All ER 829*
3. *Violet Kambole Tembo v David Lastone Tembo (2004) ZR 79*

The appellant, Elizabeth Kaunda Lembalemba filed a notice of appeal on the 3rd September 2015 seeking to appeal against a Judgment of the Subordinate Court.

In support of the notice of appeal, the appellant filed two grounds of appeal indicating an appeal against the judgment of the Subordinate Court of 12th January 2012 as well as the order of the said court of 31st July 2014.

The Appellant subsequently applied for leave to amend the notice of appeal seeking to include an appeal against the order of the Subordinate Court of 31st July 2014. By ruling of this court of 13th December 2016, the application was allowed. An amended notice of appeal was filed on 19th December 2016 expressing the appellant's intention to appeal against the judgment and subsequent order of the Subordinate Court given under cause number 2011/CRMP/LCA/82 on 12th January 2012 and 24th June 2014 respectively.

The brief background leading up to this appeal is that following the granting of a divorce by the Local Court on 5th March 2007, the court ordered that the household goods be shared equally but made no order for settlement of property. Being dissatisfied with the judgment of the Local Court, the appellant appealed to the Subordinate Court on the issue of property settlement.

By his judgment of 12th January 2012, the learned trial Magistrate ordered that the appellant retain the house on Mukonke Avenue in Mufulira whilst the respondent was to retain ownership of the Ibex Hill house in Lusaka.

The Court further ordered that that the appellant be entitled to a share of their lodge in Mufulira, which was to be valued to determine the Plaintiff's share of the property. The court also awarded the appellant one of the motor vehicles (albeit a non-runner), the mukwa dining room suite and a plot in Mufulira which the appellant had already acquired.

On the 25th January 2012, the respondent filed an *ex-parte* Summons for correction of the judgment of 12th January 2012. The respondent sought an amendment of the description of the property awarded to the appellant.

By Order of 25th January 2012, the learned Magistrate directed that the earlier judgment of 12th January 2012 be amended to describe the property awarded to the appellant as House 13 Quorn Avenue, Mufulira and the lodge as at Plot 592, Mukonke Avenue in Mufulira (hereinafter 'the lodge').

The appellant subsequently filed an application on the 9th October 2013 seeking an order for sale of the said lodge. The evidence of the Appellant in the affidavit in support was to the effect that the lodge in Mufulira had been evaluated and valuation reports rendered to the court. There is no record of the application for sale having been heard and determined, although the order of the lower court of 31st July 2014 appears to have been prompted by this application.

The record reveals that the Government valuation department submitted a valuation report dated 20th June 2012 in respect of the lodge.

The report revealed that the Senior Clerk of Court had requested the Government Valuation Department to inspect and assess the said property, which instruction they had undertaken, and after considering relevant factors, such as location, state of repair, accommodation and market conditions, they had concluded that the lodge in question be valued at K1,160,000 as at 8th June 2012.

Subsequent valuation reports are on record in respect of the same lodge valuing the property at K700,000 as at 7th January 2014 and the latest valuation report valuing the lodge at K719,128.76 as at 16th June 2014.

On the 31st July 2014, the learned trial Magistrate proceeded to order that the lodge be shared between the appellant, respondent and their four grandchildren and that the valuation of the lodge had been pegged at K719,128.76, each party would be entitled to an amount of K119,854.79. He also directed that the respondent be at liberty to pay out the appellant for her share in the lodge. The parties were granted liberty to appeal against the order.

The appellant being aggrieved by the decisions of the learned Magistrate filed a notice of appeal on the 3rd September 2015 advancing two grounds of appeal namely:

1. **That the learned Magistrate in the court below erred in law and in fact by not sharing the matrimonial property equitably relating to various house, plots and cars.**

2. **That the learned Magistrate in the court below erred in law and in fact by adjudging that the Elizabeth lodge in Mufulira be shared amongst the appellant, respondent and grandchildren.**

The matter was heard before me on 24th April 2017. The appellant was represented by Ms. R.P Bwalya and the respondent appeared in person.

In support of the appeal, Counsel for the appellant, Ms. Bwalya relied on the heads of arguments filed on 16th February 2017.

In the submissions, counsel contended that despite the parties having acquired several properties and assets during their forty years of marriage, the respondent had refused to share the properties with the appellant after their divorce and that he had resorted to selling them. Counsel argued that the matrimonial properties ought to have been shared equitably with the appellant

considering the contributions either had made towards their acquisition and maintenance. She argued that despite the joint efforts of the parties, the respondent had only offered the appellant a dilapidated house in Mufulira. She insisted that this was unfair and that the properties ought to have been shared equally. This was the gist of the appellant's argument in relation to ground one.

With respect to ground two, Counsel for the appellant argued that the learned Magistrate erred in law and fact by adjudging that the lodge in Mufulira be shared between the appellant, respondent and their grandchildren. She contended further that the lodge had been valued at K719,128.26 and that the court had ordered that the appellant be given the sum of K119,854.79 and the remaining portion be shared between the respondent and their four grandchildren. Counsel argued that the property having been acquired by the appellant and the respondent, only they were entitled to the matrimonial properties they had acquired during the subsistence of their marriage. The grandchildren were not party to the marriage and not entitled to a share in the lodge. She argued further that the award of K119,854.79 to each of the grandchildren was not supported by law. She urged the court to uphold the Appeal.

In opposing the appeal, the respondent relied on the heads of argument filed on 23rd May 2017.

In relation to the first ground, the respondent contended that at the time of the divorce, the parties owned only three properties as the other properties they had owned had been sold between 1969 and 1972. He stated that out of the three properties, the appellant had been given the house in Mufulira and this property was transferred into her name, he had retained one property and the third property upon which the lodge was situate, could not be claimed or sold by either party as it had been pledged to Zambia National Commercial Bank as security for a loan taken in 1996. He hoped that this property could be given to their grandchildren.

The respondent also added that the inclusion of the children in the proceeds of the lodge was on account of the fact that it was considered a family home as the children of the family had contributed their skill and labour to construction of the lodge, particularly their second son (now deceased) who had renovated the property at his own cost. It was his desire therefore that the children of his deceased son benefited from their father's contribution to the lodge. He insisted that the lodge in Mufulira was worth K550,000 although valued at K719,128.26. Lastly, the respondent concluded by indicating that they had shared the two non-runner vehicles equally between them. He also stated that the appellant was not in a desperate situation as she claimed as she had received her pension, support from the children and rentals from the house situate at Quorn Avenue in Mufulira.

He also stated that the appellant has since purchased another home for herself along Brentwood Avenue in Lusaka. He urged the court to dismiss the appeal.

I have carefully considered the evidence of the parties on record and their respective arguments.

The appellant has brought two grounds of appeal. In ground one, the appellant contends that the learned trial Magistrate erred in law and in fact by not sharing the matrimonial property equitably in relation to various houses plots and cars. In ground two, the contention is that the learned Magistrate erred by adjudging that the lodge be shared amongst the appellant, respondent and the grandchildren.

I will begin by addressing the second ground of appeal which arises from the fact that the lower court held that the lodge be shared between the parties and the appellant, respondent and their four grandchildren and that each person be entitled to a sum of K119,128.26.

The Appellant contended in this regard that the learned Magistrate in the court below erred in law and in fact by adjudging that the said lodge be shared amongst her, the respondent and their grandchildren. She argued that the said property ought to be

shared only between her and the respondent and not their grandchildren who were not parties to the marriage.

The respondent argued on the one hand that the lodge situate at Plot 592 Mukonke Avenue in Mufulira could not be shared or sold as it was encumbered to Zambia National Commercial Bank of Zambia for a loan that they had taken in 1996 to develop the lodge. He also argued on the other hand, that the property was a family home and that it ought to be reserved for their grandchildren whose father had contributed to the construction of the property. He referred specifically to a deceased son, the late Captain Kaunda who had contributed to the renovations at his own cost.

The issue for consideration under this second ground, is whether the learned Magistrate in the court below erred by ordering that lodge situate on Plot 592, Mukonke Avenue, Mufulira be shared with the grandchildren.

Section 55(1) of the Matrimonial Causes Act provides that:

> ***'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 of 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 children of the family or either or any of them.'

From the above provision, it is undisputable that a court is empowered to make property adjustment orders in favour of, or for the benefit of a child of the family or to such other persons as the court may deem fit. However, the instances under which a court would exercise such discretion to settle property in favour of the children of the family would depend on the circumstances in each case.

The evidence before the lower court in relation to the lodge was that the property was acquired by the Appellant and the respondent during the subsistence of their marriage.

The property consisted initially of a single house but at some later point, a loan was secured from a bank to convert the house into a lodge. The Appellant, in her evidence did acknowledge that their children had assisted in the building of the lodge as early as 1974. In addition, the evidence of the respondent revealed that apart from the loan that they had secured from the bank, their children, particularly their deceased son, Captain Kaunda had utilized his own resources to renovate the lodge.

It is clear from the evidence of the parties that some of the children of the family had assisted in the construction of the lodge. In determining the settlement of property, it is apparent that the lower court acknowledged that the children of the family had made contributions to improvement of the lodge, although there is no evidence on record of the actual contributions made by any of the children of the family.

Therefore, a pronouncement on the extent of their contribution or that their children should benefit from their parents contribution would be irregular given that there was no claim before the lower court from any of the children and the issue arose as a result of the wish of the respondent that his grandchildren should benefit from their father's support rendered to them.

In any event, the award made by the learned Magistrate in the court below was to the grandchildren and not the children of the family.

There was no indication that the grandchildren made any contribution whatsoever to the development of the lodge. There is no legal provision empowering a court to transfer a property to a grandchild upon the divorce of their grandparents. From the foregoing, there is no legal basis upon which to award the four grandchildren equal shares in the lodge. I am of the view therefore that the Magistrate erred in doing so. Ground two therefore succeeds.

I accordingly set aside the Magistrate's award of shares in the property situate at Plot 592, Mukonke Avenue, Mufulira (the lodge) to the grandchildren of the Appellant and the respondent. In its place, I order that the property known as Plot 592, Mukonke Avenue, Mufulira, be shared equally between the Appellant and the respondent only.

A new valuation must be secured to determine the current market value of the property. The respondent is at liberty to pay the appellant out for her share of the property, or vice versa, if the parties so wish. In the event of the parties failing to agree, the said property shall be sold and the proceeds shared equally.

Before concluding this issue, I wish to mention that the evidence on record of the parties was that the lodge is encumbered to the Zambia National Commercial Bank. The extent of the loan or amount due to the bank has not been disclosed to the court.

Therefore, the award of the lodge to the appellant and respondent and/or its distribution is subject to the repayment in full of the amounts due to the bank.

I now turn to address the first ground of appeal. Under this ground, the appellant contends that the learned Magistrate in the court below erred in law and in fact by not sharing the matrimonial property equitably relating to their various houses, plots and cars.

From the record, it appears that during the subsistence of the long marriage between the parties, they had acquired many properties. It is not in dispute however, that several of these properties were disposed off many years prior to the separation of the parties. The record reveals that at the time of the divorce, the parties remained with the following assets:

1. Plot 592 Mukonke Avenue, Mufulira.
2. House No. 13 Quorn Avenue, Mufulira
3. Plot 377A/47/H, Ibex Hill, Lusaka.
4. A mukwa dining room suite
5. Lot 5353/M, Mufulira
6. Mercedes Benz S-Class
7. Mini Bus
8. Two plots

By its judgment of 12th January 2012 and subsequent order of 31st July 2014, the Magistrate adjudged that the above property be divided between the parties in the following manner namely: to the appellant, House No. 13 Quorn Avenue, in Mufulira, one vehicle, one plot and the mukwa dining set and to the respondent, Plot 377A/47/H, Ibex Hill, Lusaka, one plot in Mufulira and one vehicle.

The Magistrate further ordered that the lodge situate on Plot 592 Mukonke Avenue, Mufulira be valued and shared between appellant, respondent and 4 grandchildren. The property was subsequently valued at K719,128.79 and the learned Magistrate directed that the appellant be entitled to an amount of K119,544.79 and that she be paid out. The remainder of the value of the estate was apportioned between the respondent and five grandchildren.

I have already made my finding under the second ground of appeal that the grandchildren ought not to have been allocated a share of the lodge. Therefore, in addressing the first ground of appeal, I will restrict myself to consider whether the remainder of the matrimonial assets and properties belonging to the parties were shared equally by the Magistrate.

The appellant alleged that the respondent had refused to share the properties equally and had resorted to selling the properties and that the appellant had not benefitted from any of the sale proceeds.

In response, the respondent indicated that several of the properties were disposed off between 1969 and 1972 during the subsistence of the marriage. This is a period of approximately 20 years or more prior to the breakdown of the marriage or the separation of the parties. The appellant did not deny the fact that the properties were sold many years ago and there is no evidence of any properties having been sold recently. It is therefore clear that the appellant's allegation that the respondent had resorting to disposing their matrimonial properties after their separation is inaccurate.

From the submissions of the appellant's counsel, who listed all the original properties that the parties had owned during their lifetime, it appears that the appellant was expecting to be awarded properties that did not exist as matrimonial assets of the family at the time of the divorce. Counsel for the appellant cited the **Violet Kambole Tembo and David Lastone Tembo** case to support her contention that the properties that had been disposed off should form part of the matrimonial assets to be settled after a divorce. The present case is distinguishable from that case, as in that case, during a separation of the parties and at the time that the parties were contemplating divorce, the husband had transferred the matrimonial home and other assets to the wife, which she later sold and did not account for. The court was of the view that the assets that the wife sold did form part of the matrimonial assets and that the wife having being awarded these assets could not qualify for more.

The facts of that case are different from the present case. In this one, some of the properties of the family were disposed off during the subsistence of the marriage and there is no allegation of non-accountability of the proceeds from the sale. It is clear that the sale of these assets were necessitated at the time and carried out in the ordinary manner of business and subsequently the family acquired other assets.

The further guidance of the Supreme Court of Zambia in the **Tembo and Tembo** case was that when the issue of settlement of property arises after a divorce, the court's obligation is to have regard to all the circumstances of the case and required to exercise its powers to place the parties as far as practically possible, in the financial position they would have been in had the marriage not broken down.

In the present case, the respondent also revealed that in addition to the settlement that the appellant had received under the order of the lower court, the appellant had now also purchased a property along Brentwood Drive in Lusaka and was therefore not a destitute.

Based on all the foregoing, I am of the considered view that in the circumstances of this case, the moveable and immovable properties disposed off during the subsistence of the marriage and over 20 years prior to the breakdown of the marriage should not form part of the properties available for distribution at the time of the divorce.

The learned Magistrate was therefore on firm ground to only consider the properties available at the time of the divorce and uphold the split of the two properties and plots as agreed between the parties. He was also on firm ground to award the appellant one of the motor vehicles and the Mukwa dining set and cabinet.

I find that the appellant's contention is unfounded. I am satisfied that the distribution of moveable and immovable properties was fair in the circumstances. I see no reason to interfere with the decision of the lower court on this aspect. Ground 1 therefore fails and I dismiss it accordingly.

The appellant being partially successful with this appeal, I order that each party shall bear their own costs of and incidental to this appeal.

Delivered at Lusaka this 17th day of August 2018

N.A. Sharpe-Phiri
HIGH COURT JUDGE