IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 03 OF 2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MEAMUI GEORGINA KONGWA **APPELLANT**

AND

KEKELWA SAMUEL KONGWA **RESPONDENT**

CORAM: ***Chisanga, JP, Chashi and Mulongoti, JJA***

ON: ***11th April, 6th June 2017 and 29th May 2018***

For the Appellant: *L. Mushota (Mrs.), Messrs Mushota and Associates*

For the Respondent: *S. Sikota, SC, Messrs Central Chambers*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises (1999) ZR, 27***
2. ***Martha Mwiya v Alex Mwiya (1977) ZR, 113***
3. ***Rosemary Chibwe v Austin Chibwe (2001) ZR, 1***
4. ***Anne Scott v Oliver Scott (2007) ZR, 18***
5. ***Patricia Banji v Thirera Muamba – 2010/HP/456***
6. ***Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited (2001) ZR, 107***
7. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172***

8. ***Eves v Eves (1975) 3 All ER, 768***
9. ***Goodman v Gallant (1986) 1 All ER, 311***
10. ***Violet Kambole Tembo v David Lastone Tembo (2004) ZR, 79***

Legislation referred to:

1. ***The Judicial (Code of Conduct) Act No. 13 of 1999***
2. ***The Subordinate Court Act, Chapter 28 of the Laws of Zambia***

This is an appeal against the Judgment of the High Court delivered on 31st August, 2016 upholding the Judgment of the learned magistrate dated 5th April, 2013.

The background to this matter was ably captured by the learned Judge in her Judgment. We will recapitulate the same for ease of reference.

The Appellant and the Respondent got married on 22nd December, 1982 as evidenced by the certificate of marriage dated 30th May, 1983 appearing at page 80 of the record of appeal (the record).

With the exception of the first year of the marriage, the parties mostly lived apart. The Respondent was initially detained in India for one and half years. Thereafter, he mainly lived in Swaziland and South Africa, whilst the Appellant was living in Zambia.

The marriage was dissolved on 1st November, 2001 by the local court at the Appellant's instance in the absence, of the Respondent, after exchange of several letters in which they agreed to separate.

Apparently, after the divorce, the parties continued to relate until May, 2010 when the Respondent wrote a letter stating that, that was the final act of separation and divorce. That is what prompted the Respondent to sue for property settlement in the local court.

The local court dismissed the Respondent's claim for a share of properties acquired between 1983 to 2001, stating that the Kalundu property which the Respondent wished to be apportioned was now the property of the Appellant since she had bought it from the Respondent and that the other properties were also in her name.

Dissatisfied with the Judgment of the local court, the Respondent then appealed to the subordinate court where the parties were heard *denovo.*

After consideration of the evidence before her, the learned magistrate gave the Respondent the Kalundu house, while the Appellant was given the two Ibex Hill houses which were on the same plot. The magistrate ordered that the rest of the properties would go to the party in whose name they were. This was done in order to give the parties a clean break.

The Appellant was dissatisfied with the decision and she appealed to the High Court, advancing twelve grounds of appeal couched as follows:

1. The magistrate should have recused herself as she is married to a relative of the Appellant, information which had just come to the knowledge of the Respondent which in all probability was well known to the magistrate.
2. The effect of her non-recusal was total bias in her Judgment.
3. The magistrate ignored the evidence that the Respondent and the Appellant were married for only one year after which the Appellant deserted and he had never lived in Zambia nor had the Respondent lived with him in South Africa since.
4. The magistrate decided the customary law marriage without sitting with assessors who are experts in Lozi customary laws of marriage and divorce, and never applied anything from it particularly since she is not Lozi herself.
5. The magistrate misdirected herself in law and in fact by applying principles of English law and property settlement without addressing her mind to settled customary law that governed the marriage of the parties.
6. The magistrate ignored the evidence that the Appellant did not contribute anything to the acquisition and development of real property nor the welfare of the family.
7. The magistrate failed to make a finding as to the intention of the Respondent when buying the properties in spite of glaring evidence that the Respondent had paid for the properties without any contribution by the Appellant who

had already written several letters of divorce which she presented to court and a certificate of divorce was issued.

8. The magistrate failed to hold that the properties were not family properties notwithstanding the evidence on record that the properties were registered in the name of the Respondent exclusively as beneficial owner, and the Respondent actually bought the property which the magistrate awarded to the Appellant from the Appellant himself to indicate that it was purely a business transaction, legally binding, thereby giving the Respondent sole legal title to the property.

9. The magistrate misdirected herself by engaging on an exercise of distribution of properties between the parties without any evidence of the value of the same contrary to the cases she cited: Watchel v Watchel and Gissing v Gissing.

10. The magistrate misdirected herself in law and in fact by manufacturing evidence that the parties lived a luxurious life in the one year of marriage without supportive facts.

11. The magistrate ignored completely the monies the Appellant still owes the Respondent as follows:

    (1) K5,336,309.74 (page 4 of the Respondent's submission)

    (2) SAR 30,000.00 on a repossessed house (page 6(i) Respondent's submission) in the Republic of South Africa, which was beyond her jurisdiction and was already repossessed anyway, from the Appellant.

(3) K10,000,000.00 on Loveness Malambo (page 6 paragraph (ii) Respondent's submission).

(4) K9,750,000.00 (page 7 Respondent's submission)

12. The magistrate misdirected herself when she held that both parties were bringing into the family something they were earning from their salaries.

The learned Judge in her Judgment found as follows:

(1) The issue of the learned magistrate recusing herself was not raised in the court below; reliance was placed on the case of **Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises**[1] where the Supreme Court held that it was incompetent for a party to raise on appeal an issue not raised in the court below. further that perusal of the Judgment did not reveal any obvious bias of the learned magistrate.

(2) The learned magistrate could not be faulted in her finding that the marriage was only dissolved on 1st November, 2001 as evidenced by the divorce certificate. This was supported by the fact that the parties had a child in 1986 and that there was no basis for the Appellant to obtain a divorce certificate in 2001 if the marriage had been dissolved in 1984.

(3) The fact that the learned magistrate did not sit with Lozi assessors was not a ground for setting aside the Judgment in the absence of proof that the substantive decision was erroneous. The learned magistrate considered the case of **Martha Mwiya v Alex Mwiya**[2] and also took into account other relevant considerations in arriving at her decision.

(4) The learned magistrate took into consideration the **Mwiya[2]** case and the case of **Rosemary Chibwe v Austin Chibwe[3]**, before stating that there was need for the court to take into account the contributions by each party in order to achieve justice. The magistrate could not therefore be faulted for applying principles of English Law on property settlement.

(5) The issue of whether or not the Respondent built up the success of the Appellant was not relevant and in any case the Respondent had not shown that he built up the Appellant's success.

As regards the Respondent's contribution to the property and welfare of the family, relying on the **Chibwe[3]** case, the Judge was of the view that the court must take into account all the relevant circumstances of the case.

The learned magistrate as would be shown from the record, noted that there was periodic exchange of money between the parties, although the Respondent was contracting debts, he also had some income including rentals from the Kalundu house, which were said to have contributed to the development of the Ibex Hill property.

According to the learned Judge, it was therefore not true that the Respondent did not contribute anything towards the acquisition and development of real property and welfare of the family.

(6) As regards the intention of the Appellant when buying the Kalundu property, all the facts coupled with the transactions and exchanges between the parties and the lack of a clear contract of sale, shows that their transactions over the Kalundu house were not clear cut.

That this was coupled with the finding that the Appellant was collecting rentals from the Kalundu house.

As for the Ibex Hill property, the Judge found that it was acquired by the Appellant and was owned by her and as held in the case of **Anne Scott v Oliver Scott[4]** – *"any property purchased by one spouse with his or her own money will presumptively belong exclusively to the purchaser."*

According to the learned Judge the presumption, in *casu*, was rebutted as the parties intended that the properties would be their family or matrimonial property.

That the learned magistrate took into account that both parties contributed to the Kalundu and Ibex Hill houses despite both properties being in the Appellant's name and arrived at the decision that justice demanded that they share the same as family property in line with equity and the principle of constructive trust.

The learned Judge was of the further view that the Respondent was therefore entitled to a share of the Ibex Hill property. However, taking into account that the two houses comprising the Ibex Hill property are on the same plot and the need for the parties to have a clean break, it was appropriate that the Ibex Hill property should remain with the Appellant while the Kalundu property should go to the Respondent.

(7) On the issue of distribution of the property without evidence of the value, the learned Judge was of the view that the onus was on the parties and not on the court to determine the value of the property. Be that as it may, the Judge observed that the case before the magistrate was an

appeal from the local court which was properly before it. That it would be unreasonable for the subordinate court to recuse itself and refuse to determine the matter based on the value of the property as that would lead to injustice as it would also logically follow that the local court proceedings were null and void as the local court's jurisdiction is way below that of the subordinate court.

(8) That the holding of the learned magistrate that the couple lived a luxurious life was not supported by facts. According to the Judge what was apparent is that they had a relatively comfortable life.

(9) On the issue of ignoring the monies the Respondent was owing the Appellant, the court was of the view that the monies were apparently given on the understanding of the relationship the parties had and not as business dealings. That if they were intended to be a debt to be repaid, then it should clearly have been stated.

As earlier alluded to, the learned Judge largely upheld the Judgment of the learned magistrate and dismissed the appeal.

Disenchanted the Appellant has now appealed to this Court relaunching most of the grounds which were before the court below as follows:

(1) The court below erred in law and fact by failing, neglecting and refusing to recognize the customary marriage of the parties and the customary laws governing the marriage, divorce and property, whereby the parties

divorced when the Respondent wrote the letter of divorce as per the Lozi custom

(2) The learned Judge erred in law and fact when she awarded the property purchased by the Appellant from the Respondent long after dissolution of the marriage which happened in 1984. The said property was not matrimonial property as it was purchased in May, 1999 and was fully paid for by 28th January, 2003 as confirmed by the Respondent at the material time as the record of appeal will show.

(3) The court below erred in law as there was an Order for stay of execution granted by a single Judge of the Supreme Court which the High Court Judge discharged, when she had no such authority.

(4) The court below misdirected itself in ignoring the evidence of the Appellant that the magistrate should have recused herself as she was married to a relative of the Respondent (Appellant in the magistrates court) which information was well known to the magistrate. The effect of her non-recusal was total bias in her Judgment.

(5) The court below misdirected itself in ignoring the evidence of the Appellant that the magistrate misdirected herself in law and in fact when she completely ignored the evidence that the Respondent owed the Appellant monies as follows:

(a) K 5,336,309.14 (page 4 of the Respondents submissions)

(b) SAR 30,000.00 on a repossessed house (page 6 (i) Respondents submission). On this point the house was repossessed by the bank as clearly stated in line 10 and the Judgment says the Appellant

should repay the money or forfeit the house in the Republic of South Africa, beyond her jurisdiction and was already repossessed anyway from the Appellant.

(c) K10,000,000 on Loveness Malambo (page 6 paragraph (ii) Respondent's submissions)

(d) K9,750,000.00 (page 7 Respondents submissions)

(6) The court below misdirected itself in ignoring the evidence of the Appellant that the court below misdirected itself in law and fact when it manufactured evidence that: - (i) the parties lived a luxurious life and (ii) that both the Appellant and the Respondent were bringing in the family something from their earnings when there was no evidence to support such findings.

At the hearing of the appeal, both Counsel relied on their respective heads of argument and authorities.

In arguing the first ground of appeal, Mrs. Mushota, Counsel for the Appellant, submitted that there is no law that requires parties to a customary marriage to be married or divorced at the local court.

According to Counsel, there is overwhelming evidence on record that the parties divorced in 1984 according to Lozi custom, when the Respondent deserted the Appellant. The letters written thereafter by the Respondent purporting to divorce were as a result of the Respondent's own illusion.

It was Counsel's contention that desertion came first and the incessant letters made it imperative that assessors should have been called upon to determine when the marriage ended.

Counsel further submitted that the failure to recognize the Lozi customary law of the parties as regards the divorce and property rights resulted in a mistrial. The proceedings both in the Subordinate Court and High Court were a nullity and resulted in an absurd outcome.

Counsel relied on the High Court case of **Patricia Banji v Thirera Muamba**[5].

On the need for the court to sit with assessors in a customary marriage, Counsel placed reliance on the **Mwiya**[2] case and **Chibwe**[3] case as being instructive as the assessors would have established the exact date when the marriage ended in the face of the various suggested dates.

In arguing the second ground of appeal, Counsel submitted that the Respondent having deserted and divorced through his letters beginning in 1987, the Kalundu property was therefore never a matrimonial home.

Counsel submitted that the Appellant bought the house as an ordinary purchaser from the Respondent as the bank was going to foreclose owing to the Respondent's failure to service the overdraft facility.

It was Counsel's argument that the **Mwiya[2]** and **Chibwe[3]** cases are distinguishable to this case in that those cases related to property acquired during the subsistence of marriage, whilst in *casu*, the property was acquired after dissolution of marriage and the Respondent did not in any way contribute to its acquisition.

It was submitted that there was in this matter proper conveyancing and a certificate of title issued in the name of the Appellant, which was conclusive proof of ownership.

Counsel further submitted that in *casu*, there is no basis to even consider equity as the parties had long divorced.

As regards the third ground of appeal, Counsel submitted that since the court below did not grant the stay of execution, the Respondent should have applied to the Supreme Court to discharge the stay on account of the outcome of the appeal in the court below.

On the fourth ground of appeal, it was submitted that the court below directed the parties to make written submissions and both parties

made their submissions, and therefore the Judge should have considered and resolved all issues submitted on.

In arguing the fifth ground of appeal, Counsel contended that the court below ignored some of the grounds of appeal by the Appellant in particular as regards the monies owed by the Respondent. That the Appellant demonstrated how she was owed the money and therefore, the court below misapprehended the fact of the non-existence of the marriage and the reasons to the claims for the monies the Respondent owes the Appellant.

In arguing the sixth ground of appeal Counsel submitted that there is nowhere in the record where either the Appellant or the Respondent submitted that the parties lived a luxurious life and that both were bringing in something from their earnings. That this was purely manufactured evidence and clearly speaks to the mischief sought to be corrected by Section 6 of ***The Judicial (Code of Conduct) Act, No. 13 of 1999***[1].

State Counsel Sikota, Counsel for the Respondent, in responding to the first ground of appeal, submitted that the learned Judge analysed the issue at page J8, of the Judgment (page 14 of the record).

That it is evidently clear that this is an attempt to impeach the findings made by the court below and flies in the teeth of a plethora of decided cases such as **Victor Namakando Zaza v Zambia Electricity Supply Corporation Limited**[6] where it was held by the Supreme Court that the findings made by the trial court should not lightly be interfered with in keeping with what the Court had said on numerous occasions in the past.

According to Counsel, the learned Judge gave her reasons for upholding the Judgment of the Subordinate Court. She clearly recognised that the marriage was pursuant to Lozi custom and she went further to distinguish the **Mwiya**[2] case from this case. That in doing so, the learned Judge was guided by what the Supreme Court said in the **Chibwe**[3] case and cannot therefore be faulted for upholding what is clearly a very sound legal position.

As regards the second ground of appeal, Counsel contended that the learned Judge was on *terra firma* when she awarded the Kalundu house to the Respondent after finding that the property was matrimonial property having been acquired by the Appellant during the subsistence of the marriage and that the Respondent did contribute to the acquisition of the matrimonial properties.

It was submitted that, although it is the Appellant's argument that the property was acquired in 1999, long after the marriage had ended in 1987, both the Subordinate Court and the High Court had earlier held that the marriage was dissolved on 1st November, 2001 as evidenced by the divorce certificate on record.

Counsel contended that there is no legal basis for disturbing findings of fact. Reliance was placed on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] and submitted that the Appellant had not demonstrated that the finding that the parties divorced on 1st November, 2001 and not 1984, is perverse or was made in the absence of any relevant evidence, nor that it was made on a misapprehension of facts or that it is a finding which on a proper view of evidence, the trial court could not reasonably make.

It was further argued that the appeal before the High Court was from the Judgment of the Subordinate Court.

That in dealing with the appeal the learned Judge considered the facts on record and it cannot be disputed that it is on record that the marriage between the parties ended on 1st November, 2001.

Counsel submitted that in holding as such, the learned Judge was merely keeping in line with the guidance of the Supreme Court in the **Chibwe**[3] case, where it was held that:

> *"it is a cardinal principle supported by a plethora of authorities that courts' conclusions must be based on facts stated on record."*

According to Counsel there was no legal basis for the learned Judge to disturb conclusions by the magistrate which were based on facts stated on record.

As regards the third ground of appeal, it was submitted that the learned Judge did not discharge the stay of execution of a single Judge of the Supreme Court, but the stay of execution in the High Court.

It was further submitted that in any case, a stay of execution cannot be the basis for disturbing findings of the lower court. That the stay of execution by the single Judge of the Supreme Court was only granted pending the hearing of the appeal in the High Court.

Upon the High Court determining the appeal, the stay of execution which was granted by the single Judge of the Supreme Court automatically fell away.

In responding to the fifth ground of appeal, Counsel submitted that it was devoid of any merit. That the issue was being raised for the first time on appeal in the High Court as it was not raised before the Subordinate Court and it was therefore not competent to raise the issue of bias against the magistrate.

It was submitted that, even then, the learned Judge still dealt with the issue at page 11 of the record when she stated as follows:

> *"In this instant case, I will not speculate on whether or not the learned magistrate was aware that her husband was related to the Respondent. The onus was on the parties particularly the Appellant who is aggrieved, to have raised it in the court below.*
>
> *My perusal of the Judgment does not reveal any obvious bias of the learned magistrate."*

Counsel submitted that the learned Judge considered and evaluated all the evidence on record and gave reasons for upholding the magistrates' decision and cannot therefore be faulted for coming to the conclusion she did.

It was further submitted that these were findings of fact which cannot be disturbed without any legal basis.

In responding to the sixth ground of appeal, Counsel submitted that it is not clear what the Appellant is seeking to achieve by advancing this ground of appeal as the learned Judge upheld this ground as shown at page 23 of the record. That the Respondent is therefore at a loss as regards this ground of appeal.

In reply, Mrs. Mushota, Counsel for the Appellant submitted on the first ground of appeal that the court failed to recognise the perimeters, precincts or characteristics of a customary marriage, thereby failing, neglecting or refusing to recognise the effect of such a marriage. That if the court had recognised that, the result would have been efficacious as to when the marriage ended.

As regards the second ground of appeal, it was contended that the misapprehension of facts argued in the first ground of appeal led to the argument in the second ground that the court erred in awarding the Kalundu house to the Respondent, which property was purchased long after the dissolution of the marriage.

On the third ground of appeal, it was submitted that as long as the matter was continuing on appeal, the stay ought to have remained in place until the final appeal. That there should have been an application by the Respondent to discharge it.

In reply to the fourth and fifth grounds of appeal, Counsel reiterated her earlier arguments, in support of the respective grounds of appeal.

We have carefully considered the Judgment of the court below and the submissions by both learned Counsel.

The first ground of appeal gravitates on the determination of when the marriage between the parties was dissolved, or simply put, came to an end.

The Appellant's argument in short, is that had the court below recognised that the parties' marriage was governed by Lozi customary law, it would have applied the same in determining when the marriage was dissolved.

The submissions by Counsel for the Appellant on this point are quite hazy and also seem to contradict the Appellant's evidence, her own client as to when the marriage came to an end.

In one breath, Counsel submits that the marriage came to an end in 1984 when the Respondent deserted the Appellant whilst suggesting in the first ground of appeal that the parties divorced in 1987 when the Respondent wrote the first letter of divorce as per the Lozi custom.

The evidence of the Appellant was explicit, that she took the several letters which had been written by the Respondent and used them as

the basis for the dissolution of the marriage, which was granted on 1st November, 2001 as evidenced by the divorce certificate appearing at page 81 of the record.

We are in agreement with Counsel for the Respondent, that the court below recognised that the parties' marriage was pursuant to Lozi custom, hence its reference to the **Mwiya[2]** case and distinguishing the same from this case.

Further the court below made a finding of fact based on the evidence on record, which was before it that the marriage was dissolved by the Chilenje local court on 1st November, 2001.

The court below cannot be faulted on that finding. We find no basis to interfere as the same was made on the basis of the relevant evidence before the court.

On the issue of the failure to sit with assessors, we are in agreement with the learned Judge, that, that cannot be the basis for setting aside the Judgment of the court below in the absence of proof that the substantive decision was erroneous.

In any case, as provided by Section 8 of ***The Subordinate Court Act[2]***, a trial with assessors is discretional and not mandatory and neither did the **Mwiya[2]** case hold that it was mandatory.

We also note that both parties were represented by Counsel before the Subordinate Court. Mrs. Mushota represented the Appellant herein. She however did not ask the court to sit with assessors.

We therefore find no merit in this ground of appeal.

As regards the second ground of appeal, which is the main issue bordering on property settlement, the subject of contention, being the Kalundu house.

We will from the onset as earlier found and established proceed on the basis that the marriage was dissolved on 1st November, 2001.

It is common cause from the evidence on record that the Kalundu house was acquired by the Respondent in 1977, long before the parties' marriage. The Respondent constructed the house and it was never occupied by the parties as a matrimonial home. The house had always been rented out. The learned Judge in the court below at page 18 line 24 of the record made the following finding:

> *"I have duly considered the argument and the evidence on record and find that the Kalundu property was originally acquired by the Respondent in 1977... it had been on rent throughout the marriage of the parties to date."*

The learned Judge however, at page 19 line 3 of the record goes on to state as follows:

> *"It is clear from the evidence on record that the Appellant made contributions to the Kalundu property in terms of some loan repayments and it is stated that from those contributions she felt entitled to it and prompted the Respondent to prepare a Deed of Gift in her favour in 1999."*

It is not in dispute that the property was subject of many loan or mortgage transactions.

However, there is no evidence on record to support the finding that the Appellant made contributions to the Kalundu property. That conclusion is perverse as it is not supported by evidence and we are duty bound to overturn the same.

In any case, the Appellant's contention is that she outrightly purchased the Kalundu house from the Respondent after dissolution of the marriage. The property was changed into her name and she is therefore entitled to the same as a purchaser it was never a matrimonial property.

We note from the record at page 27, that the Appellant gave instructions to her employer, the bank, to issue a cheque for

K61,000,000.00 to Mabutwe and Associates, a law firm from her 30 days Notice Deposit account on 21st May, 1999.

On 24th May 1999 the Respondent, in a letter appearing at page 28 of the record addressed to the same law firm, gave instructions to the firm to prepare a Deed of Gift in favour of the Appellant for her benefit and that of the two children from the marriage.

This is what the 2nd and 3rd paragraphs of the said letter stated:

> *"I have taken this decision in consideration of Mrs. Kongwa having settled my indebtedness under Pelican Marketing Enterprises at Premium House Branch of Zambia National Commercial Bank Limited in the range of K48 Million. She has also given me K12 Million and I have further had the benefit of her Mercedes Benz Salon Car Registration number AAP 3328.*
>
> *I consider this as sufficient consideration to cover the value of my property which is to be conveyed as herein stated."*

It is evident from the wording of the letter that the intention of the Respondent was to outrightly convey the property to the Appellant without retaining any interest.

The Deed of Gift was prepared in 1999. Although the change of ownership was only done in 2002/2003, it is our view that the conveying of the property to the Appellant was done in 1999 during the subsistence of the marriage.

The intention of the Respondent was later fortified by the agreement titled *"Memorandum of Agreement"* dated 28th January 2003 appearing on page 33 of the record of appeal in which the Respondent agreed to discontinue litigation concerning ownership of the Kalundu property and that as sufficient consideration of the same had already been agreed, ownership could be changed to the Appellant.

In the **Scott**[4] case, the Supreme Court held that:

> *"Any property purchased by one spouse with his or her own money presumptively belongs exclusively to the purchaser (per Bromley's Family Law, 5th edition at page 447)"*

In *casu*, the Kalundu house was registered in the Appellant's name after an outright purchase. She is therefore the legal owner of the Kalundu house.

The Respondent has to rebut the presumption that the house belongs exclusively to the Appellant to the court's satisfaction in order to have

a beneficial entitlement by way of implied, resulting or constructive trust.

In the English case of **Eves v Eves**[8] the Court of Appeal held that the law would impute or impose a constructive trust whereby the defendant held the house on trust for himself and the plaintiff because from the circumstances it could be inferred that there was an arrangement between the parties whereby the plaintiff was to acquire a beneficial interest in the house in return for his contributions.

From the circumstances of this case we find no basis for making any imputation so as to impose a constructive trust.

If anything, the case of **Goodman v Gallant**[9] would put the Respondent's contention to an end. In that case, the Court of Appeal held as follows:

> *"The doctrine of resulting, implied or constructive trust could not be invoked where there was an express declaration which comprehensively declared what were the beneficial interest in the property or its proceeds of sale since a declaration was exhaustive and conclusive of the position unless and until the conveyance was set aside or rectified."*

In the case of **Violet Kambole Tembo v David Lastone Tembo**[10], the Supreme Court held that:

"The court examines the intention of the parties and their contribution to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement, then the court must make a finding as to what was intended at the time of acquisition."

We find such exhaustive and conclusive intention in the declaration in the Respondent's letter to Mabutwe and Company and the Memorandum of Agreement aforestated. Accordingly, we overturn the finding of the court below that the Respondent had an interest in the Kalundu house by way of constructive trust.

The third ground of appeal attacks the learned Judge's Order in the Judgment to discharge the stay of execution which was granted by a single Judge of the Supreme Court. The said Order appears at page 99 of the supplementary record of appeal.

A perusal of the said Order reveals that the Judge of the Supreme Court merely reaffirmed the Order of the learned High Court Judge and went on to state that it in fact amounts to an Order for stay of execution of the Judgement of the Subordinate Court pending the hearing and determination of the appeal.

Our understanding is that the Order was granted pending hearing and determination of the appeal and it automatically fell off upon delivery of the Judgment.

We cannot therefore, fault the learned Judge for discharging the same on delivery of the Judgment which determined the appeal, as it was within her powers.

This ground of appeal has no merit.

The fourth ground of appeal alleges that the trial magistrate should have recused herself as she is married to the Respondent's cousin and business partner.

We are in agreement with the learned Judge that this matter was never raised before the learned magistrate.

Our perusal of the record reveals that this issue was raised by the Appellant's Counsel for the first time in the submissions before the learned Judge of the High Court.

The purpose of submissions in respect to an appeal, is to make a representation based on the facts and evidence on record as an appeal is a re-hearing of a case based on the evidence on record.

It is not an opportunity for any party or Counsel to tender or adduce evidence. That defeats the whole purpose of submissions and/or arguments.

Therefore, this issue, not having been raised before, could not be raised on appeal as has been held by the Supreme Court in a number of cases including the case of **Mususu Kalenga**[1], which was cited by Counsel for the Respondent.

As regards the fifth ground of appeal, equally this issue was not raised before the learned magistrate as the record will show. It was equally raised for the first time in the Appellant's submissions in the High Court.

In any case, the dispute for determination before the magistrate court, was for property settlement and not debt recovery or collection.

Equally as in ground four, this issue was not competently before the court, although both parties fell prey and submitted on the same.

This ground equally has no merit and it fails.

The sixth ground of appeal as rightly observed by Counsel for the Respondent is obscure on the first limb and it is not evident as to what Counsel for the Appellant intends to achieve as the learned Judge did agree with the Appellant that indeed the fact of luxurious living was

not supported by facts. She went on to state that, what was apparent is that they had a relatively comfortable life.

On the issue of both parties bringing in something from their respective earning, this was a finding of fact which is supported by the evidence which was before the court below. We find no basis for tampering with this.

The sum total of this appeal is that ground one, three, four, five and six are dismissed for lack of merit, whilst the second ground of appeal is upheld and we accordingly overturn the finding of the court below on that ground and Order that the Kalundu property be given to the Appellant as the legal and beneficial owner.

Each party is to bear its own costs in this Court and in the court below.

F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE