

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2016/HPD/118



BETWEEN:

CHRISTOPHER MWAMBAZI : PETITIONER

AND

CYNTHIA MELEKI MWAMBAZI : RESPONDENT

For the Petitioner: Mrs. L. Mushota from Mushota and Associates.

For the Respondent: Liyando Shiwaluke from National Legal Aid Clinic for Women.

Before: Mrs. A. M. Chulu Registrar – Chambers

JUDGMENT ON PROPERTY ADJUSTMENT

STATUTES REFFERED TO:

1. Authors: Stephen M. Cretney and J. M. Masson in Principles of Family Law in Paragraph 4 -002.
2. Section 55 (1) of the Matrimonial Causes Act Number 20 of 2007.

CASES REFERRED TO:

- 1. Martin VS Martin (1977) 3 All ER 762 at 296.**
- 2. Violet Kambole Tembo V David Lastone Tembo (2004) ZR 79 (SC).**

This is the Applicant's (the Respondent in the Petition) application for property settlement. She solely relied on her Affidavit in Support filed into Court on 5th December, 2017 and her Affidavit in reply filed into Court on 11th July, 2018.

The Applicant referred to the case of **Rosemary Chibwe** Supreme Court Judgment of 2000 where the Court stated that property acquired during the marriage is termed as matrimonial property and each party shall be entitled to equal share.

It was contended that the Court should make an order for property settlement in light of the fact that the listed properties were acquired during the subsistence of the marriage.

The Respondent who is the Petitioner in the main matter augmented his affidavit evidence with oral evidence. According to him he stated that they have three properties. One of the three properties is a three bedroomed house, it is under construction. A few touches remain to be done before its completion. He admitted that it is habitable. It is situated in Makeni Simoson area in Kanyama. The second property is a semi-detached two bedroomed Flat. This property is incomplete. It is at roof level. The property is within Makeni Simoson area too. The third property is an eight (8) two-bedroomed Flat. It is also located within the same Makeni Simoson area. He explained that the

two semi-detached Flats and the 8 two-roomed Flats are on two plots which are adjacent to each other.

He informed the Court that all the properties are in his name, but he is now in the process of changing them in the children's names and that of his nephew named Fredrick Mwambazi. He is in the process of setting a Trust for his children. He stated that between 2010 and 2011 he got his gratuity which he used to build the properties. He also got a loan from the Bank to build his first three bedroomed house. The Respondent admitted that the properties were all acquired during the subsistence of the marriage.

The children are all in his custody. They are aged 15, 14, 12 and 10 years, while his nephew is aged 25 years. The Respondent acknowledged that the Applicant cannot walk away with nothing. He therefore proposed to surrender the uncompleted semi-detached two-bedroomed Flat to the Applicant.

When cross-examined, the Respondent admitted that all the properties were acquired during the subsistence of their marriage. He admitted that he received his gratuity during the subsistence of their marriage. When further cross-examined the Respondent admitted that the Title Deeds are still in his name although he has filed the documents to have the names changed into his children's names through his lawyers.

He further admitted that his wife contributed about K40, 000.00 towards electrifying the properties. So far this is the evidence before the Court.

I am indebted to both learned Counsel for the submissions availed to me. I have noted the comments by the learned **Authors: Stephen M. Cretney and J. M. Masson in Principles of Family Law in Paragraph 4 -002** wherein they stated that;

“The expression” “family assets” itself has no single or agreed meaning in English law. It is sometimes used to describe “Those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole ...a matrimonial property regime is an institution unknown to English law and the phrase “family assets” has been said to have no legal meaning as a method of solving questions of title”.

I have also referred to **Section 55 (1) of the Matrimonial Causes Act Number 20 of 2007** which explicitly 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 Court Order, being property to which the fore-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;

(c) An Order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial settlement, including a settlement made by will or codicil, made by the parties to the marriage.

It is a fact that the Applicant in the Affidavit in Support of the Summons for property adjustment named the properties acquired during the subsistence of the marriage as follows:-

- (1) A 3 bedroomed house,
- (2) 2 semi-detached 2 bedroomed Flat which is at roof level,
- (3) 8 – 2 bedroomed semi-detached Flats,
- (4) A grey corolla,
- (5) Household goods.

I further referred to **Sections 55 and 56 of the Matrimonial Causes Act Number 20 of 2007**. In terms of the above provisions, the Court is obliged among other things, to have

regard to all the circumstances of the case and so exercise its power.

Section 65 (2) stipulates that,

“In making an order under subsection (1) the Court shall seek to place the parties so far as it is practicable and just to do so, having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each had properly discharged their financial obligations and responsibilities towards the other.”

It was further stated in the case of **Violet Kambole Tembo V David Lastone Tembo (2004) ZR 79 (SC)** that;

“In such settlement, the Court looks at the intention of the parties and their contributions 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 going on in their minds at the time of the acquisition of the property.”

It is on record that the Respondent informed the Court that he is in the process of drawing up of a Trust in the names of the children. It is my view that such a move is calculated to deprive the Applicant of her share which is against the principle of equity and law which must be invoked concurrently as adumbrated in the case of **Chibwe vs. Chibwe**.

A perusal of the record shows that there are basically three properties that were acquired during the subsistence of their marriage.

It is the Court's view that upon the dissolution of the marriage the parties should, if possible, each have a roof over his or her head as was stated in the case of **Martin Vs. Martin (1977) 3 All ER 762 at 296.**

I have noted that the Respondent has no problems to give the Applicant the two (2) 2 bedroomed Flats which are at roof level. It is clear that the Respondent will remain with a large share of one 3 bedroomed house which is habitable and 8-2 bedroomed Flats which are fully completed.

Section 56 (2) is very instructive, ***"it seeks to place the parties so far as it is practicable and just to do so...."***

It is therefore my view and in all fairness that the Applicant acquire the 8-2 bedroomed Flats while the Respondent should acquire the 3 bedroomed house which is on a separate title. The unfinished 2 (2)-bedroomed Flats should be sold and the money realised therefrom should be shared equally.

For avoidance of doubt, the Applicant shall get the 8 (2) bedroomed Flats, while the Respondent shall get the 3 bedroomed house. The 2 (2) bedroomed semi-detached Flats shall be sold and the proceeds from the sale shall be shared equally. The intended Trust for the children should not take place as it is only intended to deprive the Applicant.

I will not order any property adjustment for the household goods because I was not provided with sufficient information as to what type of goods the family acquired during the subsistence of their marriage.

Likewise, I will not make any pronouncement on the car since there was not enough information of its acquisition.

Each party shall bear his/her own costs.

Leave to appeal is granted.

DELIVERED ON^{12th}..... **DAY OF**.....^{September}....., **2018**

