IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 51/2011

BETWEEN:

FEBIAN PONDE **APPELLANT**

AND

CHARITY BWALYA **RESPONDENT**

CORAM: **Phiri, Muyovwe and Wood JJS**
On 1st March 2016 and 8th October, 2020

For the Appellant: **In Person**
For the Respondent: **No appearance**

J U D G M E N T

Phiri, JS delivered the judgment of the court.

This appeal concerns the sharing of matrimonial property following a divorce granted by the Chilenje Local Court on 23rd November 2007. The Chilenje Local Court ordered the appellant to compensate the respondent K15,000.00 (rebased), gave her custody of the three children and further ordered all household goods to be

shared equally. The respondent was clearly not happy with the judgment so she promptly filed a notice of appeal to the Subordinate Court on 23rd November, 2007.

On appeal to the Subordinate Court, the Subordinate Court saw things differently and ordered that the two houses which were built during the subsistence of the parties' marriage should be shared and ordered that one five roomed house should be given to the respondent. It further ordered that since both houses were on one plot, it should, be valued by Government Valuation Officers and be sold or the appellant could buy it from the respondents. The Subordinate Court did not make any order on property adjustment relating to household property as it was of the view that since the respondent was now an accountant she was sufficiently empowered. The Subordinate Court also granted custody of the three children to the appellant with reasonable access to the respondent.

The appellant was not pleased with the judgement of the Subordinate Court so he appealed to the High Court and raised three grounds of appeal as follows:

[1] The Honourable Court did not consider the circumstances

under which the marriage was dissolved before, awarding the plaintiff (respondent) the said property.

[2] The Honourable Court did not take into account that the plaintiff (respondent) was already awarded compensation of K15,000.00 by the lower court.

[3] The Honourable Court did not consider that the property which was awarded to the plaintiff (respondent) belongs to the children and that's where they currently reside.

In its short judgment the High Court held as follows:

> **"Having heard the arguments of the appellants and the respondent and having the judgment of the lower court, I have noted that the petitioner and the respondent lived together as husband and wife for a period of fifteen (15) years; I have further noted that since their divorce the children have been living with the petitioner. It is therefore my view that the lower court was on firm grounds to order that the petitioner retains the main house since he is staying with the children and the respondent be awarded the small house and the plot to be subdivided and if the petitioner is not comfortable with that the court ordered that the petitioner buys the cottage upon evaluation of the same by the government valuers. For the fore going I find no merit in this appeal and accordingly dismiss it. However, I order no costs in this matter."**

The appellant was again not happy with the judgment of the

High Court and filed a notice of appeal to this court on 9th March, 2011. The appellant relied on the following grounds of appeal:

[1] The Hon. Learned Judge in the court below misdirected herself in fact and at law when she held and ordered that the small quarter which is built on the same plot with the main house be awarded to the respondent leaving the main house for the appellant when she ignored and/or over looked the fact that the two properties are built on a small plot measuring only 20 meters by 30 meters and are in very close proximity separated only by 3 meters in between and situated in a high density area of Twikatane Compound of Lusaka which makes it impractical for subdivision.

[2] The Hon. Learned Judge in the court below misdirected herself when she awarded the appellant an option to buy off the small quarter from the respondent without the Honorable Court giving guidelines on how the Government Evaluation Office was to be co-opted in this matter.

[3] The Hon. Learned Judge fell in error when she acknowledged that the appellant had full custody of the 3 children but ignored

evidence adduced in the Subordinate Court to the effect that appellant is not in gainful employment and therefore the money realized from collection of rentals from the main house goes to fend for the children while the small quarter is used as shelter for the appellant and the children. The respondent is in gainful formal employment as an accountant. (The Honourable Court may wish to take Judicial Notice that the respondent has since re-married and has another child).

[4] The Honourable Court was in error when it did not consider the decision of the Local Court which awarded the respondent an amount of K15 million as compensation.

The thrust of the appellant's argument in respect of the first ground of appeal is that the property which the parties were ordered to share is build on a small plot measuring 20 x 30 metres which made it too small to subdivide. The parties who had differed were being made to live in such close proximity of each other which was not feasible.

We reject this argument because the size of the property is not a basis for refusing to grant an order for property sharing. It the

property is too small to be subdivided any further then the alternative would be for one of the parties to buy out the other at the market value or at a mutually agreed price or sell the property to a third party and distribute the proceeds to both parties as was held in the High Court judgments.

For the reasons we have given above, we equally reject the arguments being advanced in the second ground of appeal that because there is no space then the respondent should be deprived of her fair share of the property. Government Valuation Officers will determine whether or not it is feasible to subdivide the property further.

The appellant has argued in his third ground of appeal that he is not in gainful employment and that his only source of income is the rent realized from the main house and that the respondent is in gainful employment and has since remarried. We take the view that not being in gainful employment is not a bar to the sharing of property acquired during the subsistence of the marriage upon the dissolution of a marriage. There is no merit in this ground of appeal.

The fourth ground of appeal is a complaint against the award of

K15,000.00 in addition to the distribution of the property. On the face of it this appears to be an attractive argument but a closer perusal of the record shows that the property was acquired during the subsistence of the marriage and the appellant was given the bigger house which clearly had more value. It cannot therefore be argued that the lower court erred when it awarded the respondent K15,000.00 to be paid over a period of time. We find no merit in this ground of appeal.

This appeal is dismissed with costs to the respondent to be agreed or taxed in default of agreement.

G. S. PHIRI
SUPREME COURT JUDGE

E. N. C. MUYOVWE
SUPREME COURT JUDGE

A. M. WOOD
SUPREME COURT JUDGE