

FAMILY LAW CASE SUMMARIES

THIS DOCUMENT WAS CREATED FOR PURPOSES OF FINAL EXAM PREPARATIONS BY VANESSA NDHLOVU

TESTATE AND INTESTATE SUCCESSION

Important to take note of the test used in varying of a will which was discussed in the following case.

DIAMOND -VS- STANDARD BANK OF SOUTH AFRICA LIMITED (EXECUTOR) AND FOUR OTHERS (1) in which this Court held that:-

“An objective test is used to determine whether the testator made reasonable provision for a dependant, relevant circumstances to be taken into account include inter alia:

- (1)The size of the net estate;*
- (2)The past, present and future income and capital of the claimant (from any sources);*
- (3)Conduct of the claimant in relation to the deceased; and*
- (4)The deceased reason for the provision made for the claimant.”*

MUTALE V MUBANGA & NYEMBELE

This is an appeal against the Order of the High Court that the Will of the late Lagos Nyembele, be varied and that the widow Marjorie Mumbi Nyembele and the Children Chishiba and Chibwe Nyembele be granted seventy per cent (70%) of the value of the whole estate. The facts leading to the appeal are that, the Respondent filed an Originating Summons in the Principal Registry against the Appellants they sought a declaration that the last Will and Testament of the late Lagos NYEMBELE is unreasonable and must be varied the Respondent was married to the late Lagos NYEMBELE under customary law on, that her husband died and left a Will appointing the Appellants as executors; that she has 2 children with her husband, namely, Chishiba NYEMBELE born on 30th August, 2001, and Chibwe NYEMBELE born on 16th December, 2003; that the Will by her late husband was written in 1999, before their marriage and before any of his two children were born; and that the Will provides that all that the late owned should be shared between the late's mother and sister. The Affidavits further stated that the Will must be adjusted to provide for her and the said children; that her mother-in-law has since taken all the house hold goods in the house; that she lived with the said children and her late husband; that in fact, she simply moved into the house and took over everything and asked her to leave the house. The Court below considering that, there was no opposition, granted, the application as prayed. It varied the Will and ordered, that the Applicant and the two children be granted 70% of the terminal benefits of the deceased from Ellis and Company. The Appellants, not being satisfied with the foregoing Order, appealed to the Supreme Court, advancing one ground of appeal. That the learned High Court Judge erred in law and in fact when he varied the Will of the late Lagos NYEMBELE and granted the widow and children of the family 70% of the value of the whole estate, **that Section 20(1) of the Wills and Administration of Testate Estates Act, Chapter 60 of**

the Laws of Zambia, pursuant to which the action was commenced in the High Court only makes reference to reasonable provision and reasonable maintenance out of the estate; and that no percentage or quantum are provided for.

Issue

whether the Court below properly exercised its discretion to vary the Will of the late Lagos NYEMBELE and to order that the Respondent and the two children of the family be given 70% of the estate; and whether the 70% of the estate could be deemed reasonable in the circumstances.

HOLDING

We are satisfied on the evidence on record that the Court exercised its discretion properly. We agree that Section 20(1) does not provide the figures or percentage. That is left to the discretion of the Court. However, the circumstances of this case, where there is a widow and two minor children of the testator, Lagos NYEMBELE and in the absence of evidence of other children of the testator, we do not find 70% unreasonable. We find no merit in the sole ground of appeal. It is, accordingly, dismissed with costs to be taxed in default of agreement.

MWANASHIKU V MWANASHIKU

The appellants were relatives of the deceased, who he had maintained during his lifetime. The deceased had died leaving a will in which the appellants were excluded. The appellants (brothers sisters and aunt) contended that it was open to the Court to apply the Inheritance (Family Provisions) Act (United Kingdom), which provided for the provision of maintenance for a certain category of persons (in to which the appellants did not fall), to Zambian circumstances and to order that provision be made from the deceased's estate for the maintenance of the appellants, they had prayed for orders for a provision of 25% of the net estate to be made out of the estate of Fredrick Arthur Mwananshiku for their maintenance and for discovery of documents with a view to ascertaining whether the true value of the deceased's estate had been correctly stated. By an originating summons the appellants applied under the Inheritance (Family Provision) Act of 1938 as amended by the Intestate Estate Act of 1952 for reasonable provision to be made for their maintenance out of the net estate of the testator on the ground that they were dependants and are not capable of maintaining themselves. Before the hearing of the summons a preliminary issue was raised on behalf of the respondents to the effect that under the provisions of s.1 of the Inheritance (Family Provision) Act, the appellants did not qualify to apply under that Act. The learned trial judge, after hearing the arguments on the preliminary objection, carefully examined the relevant provisions of the Act and concluded that he could not interfere with the testator's will by enlarging the class of claimants under the Act which action would amount to a legislative Act. He upheld the preliminary objection and dismissed the whole summons with costs. The appellants appealed to this Court against that ruling, the learned trial judge did not take into consideration the 'local circumstances'. Mr Masiye posed the question of whether the local circumstances in Zambia of this particular case would refuse a provision for maintenance to

widowed sisters, a widowed aunt and to a brother sent to London for studies by the deceased himself

HOLDING

The learned trial judge was therefore entitled to make a ruling on that objection after hearing arguments and submissions. If, therefore, that ruling went to the root of the main action it cannot be argued later that the parties against whom the ruling was made had been denied the right to be heard. It follows, therefore, that denial of the right to be heard cannot in the circumstances of this case assist the appellants. Mr Masiye argued that we must enlarge the list in the 1938 Act by including the applicants in order to effect the local circumstances based on size of estate; whether deceased looked after the claimant; kinship and financial claims made on the deceased when alive. We entirely agree with the learned trial judge that to do as suggested by counsel would undoubtedly amount to amending the 1938 Act which power we do not have. We are satisfied that this is not what is envisaged in s. 12 of .Cap. 50. The testator's will specifically excluded the appellants. So did the 1938 Act. It may therefore be said that perhaps this is the essence of making a will: to enable the testator to exclude some of the extended family members.

The appeal is dismissed with costs. Appeal dismissed.

ISAAC TANTAMENI C. CHALI (Executor of the Will of the late MWALLA MWALLA) v LISELI MWALA (Single woman) (1997) S.J. 22 (S.C.)

The deceased was not married up to the time of his death. He had two children, a son and a daughter, the respondent. The deceased kept the Respondent in his custody and care from the time she was 11 years of age and also kept the brother up to the time of his death. The Respondent was unmarried. She had three children born out of wedlock. In addition to the two children, the deceased was survived by a mother the sole beneficiary of the Will. Under the Will the deceased left no provisions for the Respondent and her brother and further directed that in the event of his mother dying before him the Estate should devolve to his three sisters namely, Grace Kabanda of Lusaka, Pamela Tembo of Mhangura in Zimbabwe and Mrs Margaret Chipoya of Kalulushi to own the Estate jointly and equally. The deceased's death was by way of suicide. There was evidence that the deceased had had sex with the respondent resulting in her getting pregnant while at school. At the time of the deceased's death the two were not on speaking terms. the learned trial judge reproduced Section 20 (1) of the Wills and Administration of Testate Estates Act No. 6 of 1989. She then observed that she had jurisdiction to visit the Will and vary it by making reasonable provisions for the dependants. She observed that the respondent and her children as well as her brother were treated like animals by the deceased. She accepted the decision in the case of *Diamond v The Standard Bank of South Africa Limited (Executors)* and others which according to her decided that if a person has no other serious means of livelihood other than the deceased, that person is a dependant. She held that in terms of Section 3 of Act No. 6 of 1989, a wife, husband, child or parent are dependants at law, and that a child means a child born in or out of marriage or an adopted child, conceived but not yet born. The learned trial judge was satisfied that the respondent, although aged 27 years and working, and her brother aged 25 years were dependant as well as the respondent's first born

child and the deceased's mother. The High Court varied it in favour of the respondent and also included the respondent's child and brother in the order although they were not parties to the action. The appellant appealed against the High Court's decision.

HOLDING

According to the learned trial judge this was a sad case because the evidence disclosed that the deceased did an unnatural thing to the applicant. While we accept that there was some evidence, for that matter from the respondent herself, the evidence was in our view not conclusive and not corroborated. Above all, there was also evidence that the respondent who is unmarried has two other children. The finding that the conduct of the deceased was not only morally unacceptable but also legally reprehensible was in our view not justified. On the available evidence it was not fair to the deceased, when he could not defend himself, to conclude that he was heartless. The observation that the respondent had become permanently disempowered and unable to rise to societal responsibilities was not supported by the evidence which clearly established that the respondent was working and is accommodated by her employers. The determination of whether the deceased's Will had to be varied depended on an interpretation of section 20 (1) and 3 and 21 of Act No. 6 of 1989. according to the Rules of Practice governing joinder of parties and due to non-joinder of parties before trial of the action, other than the respondent, the learned trial judge was legally and effectively precluded from considering the interest of non parties. The orders made by the learned trial judge in relation to the respondent's child and brother were, in our view, wrong in law and are struck out. This ground of appeal therefore succeeds. The contention of Mr. Chali is that this remedy was not pleaded and not prayed for and must therefore be struck out. We agree with counsel. This order requiring the appellant to administer the deceased's estate "in consultation with" the respondent's advocates is struck out. This ground of appeal also succeeds. Our conclusion in this appeal which is based on the law as it stands may appear morally hard. But it must be recognised that section 20 Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the court a jurisdiction to depart from the dispositions of a testator by providing reasonable provision for certain of his dependants if it is of the opinion that he had not done so himself. The court's jurisdiction to make reasonable provision for the dependant only arises if it is of the opinion, that it is satisfied, that such provision has not been made by the testator. For the reasons we have given in dismissing the ground based on statutory provisions and the other grounds, we are satisfied that the respondent is in law not covered by the definitions of "dependant" or "child". APPEAL ALLOWED.

CHARITY OPARAOCHA Vs WINFRIDA MURAMBIWA (2004) Z.R. 141 (S.C.)

This is an appeal against the decision of the High Court which found that an Order of administration of the estate of the late Dr. Christopher Oparaocha, obtained by the appellant, was null and void ab initio and cancelled it post facto. The High Court ordered that the appellant should provide a full inventory of the estate showing how it was distributed, within sixty days of the judgment. It also ordered that all traceable assets should be re-assembled for fresh re-distribution under the Intestate Succession Act No. 5 of 1989. Although the respondent's marriage to the deceased was found by the learned trial Judge to be null and void, because the

late Dr. Christopher Oparaocha had been married to the appellant under the Kenyan Statutory law, the learned trial Judge found that the respondent was a dependant of the deceased and therefore entitled to 10% of the estate. The trial Judge also found that there was cogent evidence to prove that the respondent had children with the late Dr. Christopher Oparaocha. The learned trial Judge went on to state that these children were entitled to the share of their father's estate. Dissatisfied with the judgment of the High Court, the appellant appealed against the Judgment.

HOLDING

The documents on record clearly show that the he portrayed himself as the father of the children in the applications for passports and the children appear to have claimed their status as Nigerian through the deceased. In our view, the deceased duly acknowledged the children as his and we find no basis to hold otherwise. The third ground of appeal fails. Evidence clearly established that the deceased was living with the Respondent and that he actually maintained her. There is also the letter from the Nigerian High Commissioner on page 58 of the record to which we have been referred by Mr. Zulu. According to this letter, both the appellant and the Respondent were known as the deceased wives to the Nigerian High Commission. Mr. Mundia has argued that the intention of the legislature was to cater for close relatives and not every person including mistresses. In our view, the wording of Section 3 of the Act is clear. A dependant is any person who meets the criteria given in the Section. If the Intention was to cater for close relatives, such intention could have been expressed in the language of statute. We uphold the learned trial Judge that the respondent was a dependant within the meaning of Section 3 of the Intestate Succession Act.. The first ground of appeal therefore fails. Appeal dismissed.

LINDIWE KATE CHINYANTA v DOREEN CHIWELE JUDITH TEMBO

This is an appeal against a High Court judgment whereby the appellant's claim for appointment as administrator for the estate of her late husband was refused. Following the death of the deceased, the respondents, who are younger sisters of the deceased, were appointed joint Administrators of the estate. Appellant contended that it was wrong for the deceased's relatives to appoint the respondent as Administrators without her consent, she should have been informed so that she could have consented or objected to their appointments. would not adequately address the family needs in that it would be difficult for her to ask for all family requirements from them at all times. She stated that she was literate and she understood the obligation of administering an estate and that she would be able to distribute it accordingly; that as a surviving spouse, she was the best person to administer the estate as she was in charge of the family's two school going children and was best placed to attend to their needs.

HOLDING

In practice, siblings, parents or next of kin to the deceased are normally appointed. While in some cases the widow or widower may be appointed as Administrator. There is nothing in the Act to suggest that a surviving spouse has priority eligibility for the office of an Administrator, even though normally, a widow or widower is a beneficiary and may even be a priority beneficiary in the estate. It is also not obligatory under the law to consult the surviving spouse, although in civilized families, information might be given and consultation may be made but this

is not a requirement in law. he appellant is therefore expected to cooperate rather than hinder the winding up of the estate and the distribution of the estate to the beneficiaries by the respondents. To submit that the appellant, not having been informed or consulted before the respondents were appointed, rendered the proceedings of the appointment defective in substance or that the grant was obtained fraudulently, is unattainable. There is no evidence to support such submission. *In the case of Mudenda v Mudenda this court had this to say, “In any case, the duty of the Administrator is not to inherit the estate but to collect the deceased’s assets distribute them to the beneficiaries and render an account”. That in keeping with the provisions of section 19 of the Intestate Succession Act.* There is no merit in this appeal and it is dismissed.

Phiri (Administratrix) v Phiri and Another (Administrator) (2013/HP/0593) [2014] ZMHC 9

Rosemary Musa Phiri, the Applicant herein commenced these proceedings against the 1st and 2nd Respondents namely Comfort Lozililo Phiri and Mike Msanide Phiri, respectively by way of Originating Summons pursuant to Order 30, Rule 12 of the High Court Rules and Section 19 (1) (c) i and ii of the Intestate Succession Act. The 1st and 2nd Respondents herein were appointed by the Local Court to co-administer his estate jointly with the Applicant she applied to the Local Court to seek clarification as regards the inclusion of the mother of the deceased’s late wife as the dependant entitled to twenty per cent (20%) of the deceased’s estate. However, quite contradictory to her own evidence to the effect that the deceased’s mother-in-law was included as a dependant by the Local Court, the Applicant asserts that the said inclusion was made by the 1st and 2nd Respondents. It is her further assertion that the deceased mother-in-law is looked after by her children and grandchildren. It is her assertion that the 1st and 2nd Respondents have become uncooperative and hostile towards her and have deprived her of what she ought to have rightly obtained from the deceased’s estate

Issues

whether or not the decisions and steps thus far taken by the Respondents in the administration of the deceased’s estate make it appropriate for the Court to exercise its powers aforesaid, and whether the deceased’s mother-in-law can be said to be a dependant within the meaning of the law.

HOLDING

It must be noted that the fact that a deceased person was rendering assistance to his relatives prior to his death does not in itself make such relatives his dependants. Therefore, it is immaterial whether or not the deceased used to render assistance to his mother-in-law prior to his death. The law set out above as I understand it is that in order for a person who is not a minor to be considered as a dependant, he must show not only that he was maintained by the deceased but also that he lived with the deceased immediately prior to his death. The evidence on record and the reliefs being sought by the Applicant show that the Applicant’s interest is not necessarily to assert her rights as co-administratrix but rather to assert her rights as a beneficiary of the deceased’s estate. The deceased was only survived by a spouse and three children insofar as the beneficiaries of his estate are concerned. As such, the portion of the estate which the parents and

dependents would have inherited ought to be shared equally among the surviving spouse on the one hand, and the children on the other in accordance with Section 7 (e) of the Act. All the foregoing and the evidence herein show that the Respondents have abused and/or are seeking to abuse their authority in the performance of their duties as majority administrators to the detriment of the Applicant as a beneficiary of the deceased's estate by them ceasing the vehicle and wanting to put matrimonial home on rent as the fell within chattels meant to be inherited by beneficiaries according to section 3 of the act. Leave to appeal is hereby granted

Musopelo (administrator) and Others v Hardson Musopelo

The applicants state that after John Musopelo's death in September, 2006, they were forcibly and illegally evicted from subdivision 11A/19 of Stand No. 19174, Matero, Lusaka which is the only house which forms part of the estate of the late John Musopelo by the respondent who is neither a beneficiary nor an administrator of the estate. The applicants further stated that the respondent is still in possession of the house although he has been advised to give vacant possession of the house to the surviving spouse and children of the deceased. As a result of the respondent's illegal occupation of the house, the 1st applicant who is the administrator of the estate of late John Musopelo has failed to perform his duties as the respondent is in possession of the title deeds to the property. The applicants contend that as a result of the respondent's illegal occupation of the house, they have been deprived of the use and occupation of the house and have suffered loss and damage. The applicants' first claim is for a declaration that Plot No. 11A/19/19174 Matero, Lusaka, being the only house left as part of the estate of the late John Musopelo should belong to the surviving spouse Ruth Musopelo who has a life interest in the property and the children of the deceased as tenants in common according to section 9 of the Intestate Succession Act, Cap. 59 and are entitled to the lawful possession of the said house.

HOLDING

e the house on subdivision No. 11A/19 of Stand No. 19174, Matero, Lusaka being the only house in the estate of the deceased should vest in the applicants as surviving spouse and children of the deceased respectively. I, therefore, grant the applicants the declaration that they are entitled to the possession of Subdivision 11A/19 of Stand No. 19174, Matero, Lusaka which is the only house in the estate of the late John Musopelo in their capacity as surviving spouse and children of the deceased. The 2nd Applicant Ruth Musopelo has a life interest in the property which will determine if she remarries. I further order that the respondent should immediately surrender to the 1st applicant who is the administrator of the estate of the late John Musopelo all the documents relating to the said plot No. 11A/19/19174, Matero, Lusaka which are in the respondent's possession to enable him transfer title in the property to the applicants who shall hold the house as tenants in common. As the respondent is not a beneficiary of the estate of the deceased he has no legal right to occupy the said house I award costs to the applicants which are to be borne by the respondent. The costs are to be agreed and taxed in default of agreement.

CUSTODY

Colange v Chikachi

This is the respondent's application for child custody pursuant to section 72 of the Matrimonial Causes Act No. 20 of 2007 follows the judgment of the court that granted the parties a decree nisi of divorce, the respondent has filed an affidavit in support. The respondent in the affidavit avers that that parties have a male child of the family namely Cholwe Caleb Colange born on November, 2004, who is living with the respondent. The respondent's affidavit deposed that the child is in school in Kafue and would like the child to continue attending the said. The affidavit further deposed that the petitioner, who is a French National would like to go with the child to France thereby discontinuing the child's attendance at the said school. The Respondent further deposed that she was responsible for the school fees and other financial provisions. The Respondent's counsel submitted that the Petitioner has not been in employment since 2007 and therefore, would not be able to look after the child. The petitioner's counsel reiterated what was contained in the affidavit in opposition and prayed that the Court grants the Petitioner reasonable access to the child.

HOLDING

In considering Custody, the welfare of the Child is to be made paramount consideration. This is in conformity with **Article 3 of the Convention on the Rights of the Child**. This Article calls upon the parents and legal guardians to think about how their decisions will affect the children. The court is required to consider: "**Who the father is, who the Mother is; What they are prepared to do, and all the circumstances of the case**" It is clear from the fore going that the Respondent has always been financially responsible for the Petitioner and the Child of the family. It has been demonstrated fully that the Petitioner has never been in any employment since the parties married and therefore, not capable of taking care of the Child. The best interests of the Children principle does not only look at the financial standing of the parties, their status or what they can provide but demands that the children's best interests be considered holistically. In this particular case, the Child is in School in Kafue and lives with the Respondent who is responsible for his well fare and all his needs since birth. Changing the current status quo will not be in the best interests of the Child. From the foregoing, I am satisfied that the Respondent is better suited than the Petitioner to have Custody of Cholwe Caleb Colange. Accordingly, I grant the Respondent Custody the Child. I further order that the Petitioner shall be allowed liberal access to the Child. I make no orders as to costs.

Mponda v Mponda (Appeal 199 of 2015) [2018] ZMSC 350

Background of the case is that following the grant of a decree nisi the Appellant was also granted physical custody of the children of the family with liberal access to the Respondent. A month later, the Respondent took out an application seeking to vary the order for custody. The parties were granted joint custody subject to conditions. Liberty to apply was also granted to both parties in the event of what the judge termed a "**drastic change**" to the **circumstances**, as they were at the material time. the Respondent made her third application to vary the custody order rendered on 21 June 2013 on the ground that there had been a drastic change in the circumstances as the Appellant had been transferred to Lusaka. In a ruling, the judge held that the Court had power to

review any custody order pursuant to section 72 (6) and (7) of the Matrimonial Causes Act. The learned judge found that the circumstances of the parties had indeed changed as anticipated, as both parties were previously of fixed abode resident in Kitwe and it was thus easy for them to access the children. The learned judge concluded that it was not in the best interests of the children to move to Lusaka with the Appellant as the children were already settled down in Kitwe. The learned judge varied her earlier order and awarded custody to the Respondent. The Appellant appealed.

HOLDING

A reading of sections 72 (6) and (7) shows that a judge is given discretionary powers to vary or make a further order with respect to a child's custody and education until they attain the age of twenty five. **Section 72 of the Matrimonial Causes Act of 2007 does not limit the number of times a party can apply for variation of a custody order relating to minor children or to their educational requirements.** The reason is simple, it is generally accepted that circumstances of the children from 0-25 years or those of their parents, are subject to many changes, financial or otherwise which have an impact on the children that may require to be taken into account when considering what would promote their best interests, at a particular time. A holistic consideration of the circumstances in this case disclosed that the children were being relocated to a new town, new home, new school with a new step mother, who herself had new twin babies to take care of. This by any standard was a major break in established bonds which would require drastic adjustments for the children. It is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so. *D v M (Minor Custody Appeal) (1982) 3 All E.R. 897* followed. Appeal dismissed.

MARY LOUISE KAKOMA v BENSON CHITONDU KAKOMA (1979) Z.R. 17 (H.C.)

This was an application by the respondent to vary an order of custody. The parties were married in New Zealand, subsequently they came to Zambia where the child was born. The petitioner was granted a decree nisi of divorce and custody of the child. An application by the respondent to vary custody was dismissed. The petitioner without leave of court took the child out of the jurisdiction to New Zealand, hence this application. The court considered the issues of whether it had jurisdiction in the matter and whether the order it might make would have any effect.

HOLDING

In the present case although the petitioner is a citizen of New Zealand, the respondent is a citizen of Zambia and the child of the family was born within the jurisdiction. I am satisfied therefore as to my jurisdiction. The question arises however as to what effect any order of this court might have in the matter. In the present case an order for custody was made in favour of the petitioner; an application to vary that order was subsequently dismissed. The situation has now altered however. The petitioner has taken the child of the family out of the jurisdiction without leave of the court. I understand that the respondent wishes to take the matter before the courts of New

Zealand. In such circumstances I consider that the respondent should at least be put on equal terms with the petitioner. I propose to make an order in the form adopted by the Court of Appeal in Wakeham (5). I order therefore that the respondent be granted the custody of the child of the family Tanya Mulusa Kakoma without prejudice to any question of care and control of the said child. Order for custody to respondent

Simbaya v Simbaya

This is a ruling on an application for the child of the family by the respondent pursuant to section 75 of the MCA. This followed after the courts had found the marriage contracted was a nullity. The respondent submitted an affidavit stating that he had been providing financial support for the child and that the child is an American international and would get better health insurance there. He stated that the petitioner had been denying him access to the child and rejecting his financial support. He testified that the petitioner had taken the child to Ndola in attempt to hide the child in which he had to use the us embassy to find the child. He had not seen the child for 5 years and stated that he works 8 hours a day but if granted custody would make a flexible schedule to look after the child. The petitioner had testified that she did deny support for chimwemwe because the one time he met her on the street he didn't even recognize the petitioner and she reached out to him to come see his child and stated that she would only allow him to visit if he provided financial support for school fees.

HOLDING

Section 72(1) of the MCA gives this court powers to grant custody and section 75 states that the court shall regard the best interests of the child as primary consideration. The courts will look at the background of the child the age and sex of the child as well as the characters of the parents and the circumstances surrounding the case. Looking at the fact that he works for 8 hours the situation wouldn't be ideal and the child has been in his mother's care since he was born she has provided for the emotional well-being of the child it would be best that the process of reuniting the respondent and the child be gradual so not to affect that mental well-being of the child and the respondent be granted liberal access to the child with the option of taking the child to America on school holidays. This order be subject to variation as the healthcare in America is better and the child may move sometime in the future when ready. Custody granted to petitioner and respondent shall support the child financially.

CHILEKWA V GOMANI

Appellant sued the respondent in the local court for divorce which was granted and the court ordered he pay k200 per month for maintenance of the children of which he appealed in the court below. The court ordered that the appellant be granted custody and that he should pay k 800 per month instead. It is the appellant's contention that the lower court erred in not considering the respondent's other children by placing the custody of the 3 children on her as they are supposed to look at the expenses of the parties and their responsibilities hence their decision was not in the best interest of the children. The appellant contended that they erred in granting 30 per cent of the house of which she had made no financial contribution and should have considered assets accrued during the marriage.

HOLDING

The court considered the fact that the appellant has not attributed any evidence to show that he is in a better position to take care of the children despite he appeals. The fact that the respondent is a career woman cannot sway this court to consider that she is unsuitable to take care of the needs of the children as the appellant has remarried and it would not be in the interest of the children to place them in the care of someone they barely know. The courts don't look at who's in a better financial position as sole criterion in making a custody order as they can make an order for maintenance. There lower court did infact err in not considering the other children as they fall within the definition of children of the family according to section 5 of the MCA. The lower court did not err when it ordered the lump sum as it looked at the income of the appellant. The matter concerning the house did not take into consideration rules of equity the courts should have considered all property acquired during subsistence of marriage matter be referred to deputy registrar for assessment. Custody of children will continue to be with respondent. Appeal succeeds in part.

CHILD MAINTENANCE

KAYANIKA V KAYANIKA

This is a ruling on an application made by the Applicant for attachment of earnings, pursuant to Section 8 of the Maintenance Act, Chapter 55 of the Laws of Zambia. It was Counsel's submission that it was clear from the affidavit that the Respondent had neglected to maintain the Applicant and the children of the family as provided in the consent order, the Respondent had not been consistent with the payment of the maintenance, and in 2014 he paid the said maintenance from February to December, and in 2015 he only paid maintenance from January to May, and had since failed to pay the said maintenance. , despite being in gainful employment as a Local Court Magistrate at the Matero Local Court. The Respondent in the affidavit in opposition stated that his failure to meet the maintenance agreed in the consent order had been due to the Applicant deliberately creating barriers when it came to communicating the children's actual requirements, and refusing to discuss the same. Further that the Applicant had been insulting him as well as ridiculing him, and had created emotional pain to him by not talking to him, and had been harassing him and denying him use of his personal things such as his laptop.

HOLDING

It is not in dispute that maintenance is due to be paid by the Respondent in this matter, as a consent order was executed on 27th March, 2014 in which it was agreed that the Respondent would be paying K 1, 000.00 per month as maintenance for the Applicant and the children. That the said maintenance has been due to be paid from June, 2015 and therefore the circumstances of the case are such that the matter qualifies for the order to be granted, as there are more than two payments due to be made.**It is imperative to note that reason for failure to pay has to be due to willful refusal as per section 8 of the maintenance order Act.** The Applicant has shown that the Respondent wilfully neglected to pay the maintenance due, and pursuant to Section 8 (3) of the

Maintenance Orders Act I order that the agreed amount of K 1, 000.00 as maintenance per month shall be attached, and be the deducted amount from the Respondent's salary every month and paid to the Applicant commencing January, 2018. I further direct that the arrears of maintenance due from June 2015 to December 2017, being a period of thirty one months, totaling K31, 000.00 shall be secured and paid to the Applicant by way of deduction from the Applicant's salary in the amount of K500 per month starting March, 2018, when the Izwe loan will cease to be deducted.

RIGHTS IN PROPERTY AFFECTED BY MARRIAGE

Annie Bailes V Charles Antony Stacey and Anierica Simoes (1986) ZR 83

The appellant cohabitated with one Domingos Assuncao (now deceased) for many years. The appellant sold her house and out of the sale she gave the deceased 500 pounds to pay off the mortgage on the property in issue but this did not discharge the mortgage. For five years she helped the deceased service the mortgage and finally the deceased discharged the mortgage with 200 pounds given by the Appellant. The deceased left a Will made on 28th January, 1971, in which he left everything he had to his lawful wife whom he had left in Portugal and of whom the plaintiff had been unaware.. The Court below held that she did not contribute in the actual acquisition of the house, that it was not the intention of deceased at the time of the purchase to create any beneficial interest for the Appellant and that the moneys given to the deceased by the Appellant were but loans.

HOLDING

The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience. In a case such as this, the authorities indicate that evidence is required to show a number of relevant factors. Thus, quite apart from cases where there was obvious agreement, there must be evidence of an intention that the property acquired is so acquired for the purpose of providing a home for the unmarried couple who intend to live together in a stable relationship which has all the commitment of a marriage. There must also be evidence of a joint effort in the acquisition, that is to say, evidence that the claimant has made a substantial contribution whether in cash or, as in some of the cases reviewed, in personal exertion and toil then the sacrifice of her own house and the devotion to the union which we have described must weigh heavily in her favour. Then there is the aspect of her cash contributions in the sum of about 1, 150. That was certainly a substantial sum of money. It is to be observed too that all the amounts paid were given, oddly enough, specifically towards the repayment of the mortgage; she gave the initial amount in an effort to pay off the mortgage then paid the monthly repayments in alternate months over a period of five years; finally, she paid off the entire outstanding mortgage debt. That circumstance hardly supports the loan theory. Viewed in the overall context and setting of the affairs, the conduct, and the relationship disclosed and especially having regard to the fact that the payments were made after the deceased had talked to her into giving up her own house which she sold, the payments must have been deliberately made with full knowledge of both parties to free their home from the mortgage for their joint benefit and enjoyment Undoubtedly, we have before us material from which to impute a

common intention that the plaintiff was to have a beneficial interest in this property. Because of the special circumstances to which we have referred, and for the reasons discussed, we hold and find that this appeal must succeed. We reverse the decision below and declare that the plaintiff is entitled to a beneficial interest in the house. We hold that the plaintiff is entitled to a one-third share. The property is held on trust for sale and the proceeds of such sale are to be divided between the parties accordingly.

Banda v Mulunda (2013/HP/0490) [2014] ZMHC 188 (9 December 2014);

By originating summons dated 4th July, 2014, the Applicant, Rita Miller, commenced this action against the Respondent, Samson Kachepe. The Applicant claims to be entitled to an equitable interest by way of a constructive trust in the 1.6 hectares property situated in Shifwankula Village of the Chibombo District of the Central Province of Zambia and the mesne profits from the use of trucks. She states that the Respondent and herself started cohabiting as an unmarried couple in a quasi-marital arrangement as a consequence of the said co-habitation, she gave birth to two children to the Respondent. She avers that since they moved in together with the Respondent he was responsible for all the children's upkeep and contributed towards their welfare through payment of school fees, providing food, purchase of clothing and the general maintenance of the children. They applied for joint ownership as a couple from the local Chief for land who gave approval consent for conversion from customary tenure to leasehold tenure it was converted to state land. She had gotten loans for purchasing 3 trucks and the respondent had only contributed to erecting a wall on the said property and building a grocery store the appellant had been in charge of building the house with the loan she had obtained. From the breakdown of the relationship she avers that from the time she left the family house the Respondent has not contributed to the welfare of the children. She has alone been feeding for the children despite the Respondent having financial capacity to support and maintain the children of the family. The Respondent has continued to enjoy the benefits of living in the house and the profits of operating the truck business. The Applicant strongly believes that there is a constructive trust in the property they built at Shifwankula Village and the trucks purchased during the period of cohabitation. She claims to be entitled to fifty percent (50%) of the said properties and/or payout of 50% of their value. In her view, they are no longer capable of staying or doing business in harmony together.

ISSUE

whether from the facts a constructive trust has been created entitling the Applicant to a share of the property acquired by the couple whilst in a stable relationship.

HOLDING

“To establish a constructive trust there must be evidence that the property was acquired to provide a home for a couple who intended to live together in a stable relationship, and that the claimant made a substantial contribution towards its acquisition.”

After considering the above facts in light of the authorities I alluded to earlier I have arrived at the inescapable conclusion that a constructive trust must be created. The Applicant has satisfied

me on a balance of probability which is the standard required in civil matters that she is entitled to this equitable remedy. The Applicant and the Respondent own the property jointly and neither one has a superior claim over the other in respect of the property. Notwithstanding that, these people cannot be forced to continue owning this property jointly, the ends of justice are I order that the property at Shifwankula village in Chibombo be sold and the parties share the proceeds on a 50 – 50 basis. taking into account that the best interest of the children is of paramount importance, I make an order for the sole custody of the children to the Applicant with reasonable access by the Respondent.

FINANCIAL PROVISIONS ON DIVORCE NULLITY AND JUCIAL SEPERATION

ANNETTE CHILIMA v PETER CHILIMA

The parties contracted a customary law marriage and were given a marriage certificate by a Mindolo local court. After marriage they acquired immovable properties namely plot 120 Itimpi, Kitwe which is in their joint names and D14 Old Ndeke Township, also in Kitwe in the name of the respondent. They also own various moveable and household properties. In February 1999, the respondent left the matrimonial home to cohabit with his girlfriend. On occasions when he went to the matrimonial home he slept in a separate bedroom. This prompted the appellant to bring an action against the respondent under Section 17 of the married women's property Act 1882 for an order for the share of the matrimonial properties. When the matter came up for hearing the then Counsel for the respondent, raised a preliminary objection that as the marriage between the parties was contracted under customary law, the High Court had no original jurisdiction to hear the matter. The court upheld the objection and dismissed the application.

ISSUE

whether or not there can be a share of matrimonial property when a marriage is still subsisting?

HOLDING

The parties are not in dispute as to who owns what property therefore act does not apply. When man and woman join in (Holy) matrimony they become one body, one flesh and during the subsistence of their marriage they acquire and own property jointly and indivisibly and until the marriage is put asunder, none of them should be heard to say he owns this or that property. It necessarily follows that the court is not competent to order distribution or share of matrimonial property between the parties where a marriage is still subsisting. This is so even where the parties are on separation. To hold otherwise would not only be striking a death nail in a principle which is sacrosanct but would also be opening a Pandora box in this era of greed for wealth. This would inevitably lead to unstable marriages. Had the learned trial Judge addressed his mind to this issue, we have no doubt that he would have come to the same conclusion the appeal fails.

TAKE NOTE Watchel v Watchel defines family assets

“The phrase “family assets” has been described as a convenient way of expressing an important concept; it refers to 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. The family assets can be divided into two parts: (1) those which are of a capital nature, such as the matrimonial home and the furniture in it, (2) those which are of a revenue producing nature, such as the earning power of husband and wife. When the marriage comes to an end, the capital assets have to be divided; the earning power of each has to be allocated.”

CHIYUNNJI V CHIYUNJI

Following the dissolution of marriage for unreasonable behaviour the petitioner filed for an application for maintenance and property settlement pursuant to sections 55 and 56 of the Matrimonial Causes Act 2007 (the Act). In which the petitioner was given judgment by the trial judge of which she is now appealing on the following grounds: That the learned Deputy Registrar erred in law and fact in not awarding 50% of the property to the petitioner, that the learned Deputy Registrar erred in law and fact in not awarding the Jaguar, a motor vehicle which in fact the respondent himself had agreed that the same be given to the petitioner that the learned Deputy Registrar erred in law and fact in not finding as a fact that behaviour of the respondent was the main cause of the breakdown of the marriage, that the learned Deputy Registrar erred in law and fact when he failed to award to the petitioner a sum of money from the other properties acquired in the marriage that the learned Deputy Registrar erred in law and fact in not granting the petitioner the costs of the application. Counsel for respondent contended that it is fundamental that both parties must disclose all their resources to the court. He contended that according to the respondent's evidence the petitioner obtained K100,000,000.00 from Contromatic Automation Limited to run Dorandy Fashions at Parklands Shopping Complex and that she runs a bar in Ndeke called “Signature Bar”, but the sum total of her earnings is not disclosed.

HOLDING

There was no need for him to hold that behaviour of the respondent was the main cause of the breakdown of the marriage or to apportion blame. the court should not hold the respondent's conduct against him when it comes to distribution of assets the whole concept of apportioning blame was removed when a marriage has broken down irretrievably. The third ground of appeal has no merit and it fails. the petitioner should have been awarded 50% share of the matrimonial house if the mortgage is redeemed and 50% of the balance of proceeds of sale if there is foreclosure by the bank and 50% of the balance of the proceeds of the sale of Flat 9 Chandamali Avenue. Accordingly I set aside the award of 30% on both items and I impose an award of 50% in favour of the petitioner. Zambian courts must invoke both the principles of equity and law concurrently; and that in making property adjustment or awarding maintenance after divorce the court is guided by the need to do justice taking into account the circumstances of the case. the parties are entitled to 50:50 share of the vehicle. In my view the best option is to sell the vehicle for each party to get 50% of the proceeds of sale considering the respondent's huge financial obligations as found by the Deputy Registrar, it would not be just to transfer any of the assets of Contromatic Automation Limited to the petitioner or to award her 50% of the shares held by the respondent as the petitioner is running her own cosmetic business and a bar while Contromatic

Automation Limited appears to be the only viable company that should support the respondent and the children of the marriage and also help to maintain the petitioner. The Deputy Registrar was on firm ground when he declined to give any of the assets of the company to the petitioner. In the result the fourth ground of appeal fails.

VIOLET KAMBOLE TEMBO Vs DAVID LASTONE TEMBO Z.R. 79 (S.C.)

This is an appeal against the judgment of the High Court, sitting at Lusaka, in respect of property settlement following a divorce. The record of appeal reveals that in 1996, the learned Deputy Registrar entertained an application from the appellant for property settlement, which was contested by the respondent. Upon hearing evidence from both parties and upon consideration of the written submissions from counsel, the learned Deputy Registrar came to the conclusion that most, if not all, of the matrimonial property both in and outside Zambia, was acquired by the respondent. Even though the appellant's contribution could be ascertained, the learned Deputy Registrar found that her contribution compared to the respondent had put in, was negligible. The appellant was not satisfied with the award of the learned Deputy Registrar, the learned trial Judge and hence this appeal.

HOLDING

In Section 25 of the Matrimonial Causes Act, 1973, which re-enacts provisions introduced by the Matrimonial Proceedings and Property Act in 1970, the court is obliged, among other things, to have regard to all the circumstances of the case and so exercise its powers "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other. In our judgment, we think that after being awarded assets, through the ruling of the learned Deputy Registrar, which in most cases she had already consumed, the appellant cannot qualify for some more. We are, therefore, at pains to appreciate the learned trial Judge's award, on a 50-50 sharing basis, of all the movable assets sold and consumed by the appellant and the respondent. we have said that Stand No. 1001, Lilanda, will revert to the appellant as decreed by the learned Deputy Registrar, even though the appellant did not appeal against the order of the learned Judge reversing the learned Deputy Registrar Stand No. 7677, Woodlands Extension and the Namibian salon, should not be given values and shared equally; instead we have said that they should revert to the appellant as per the learned Deputy Registrar's award. Even though the appellant has partially succeeded under grounds 4 and 7 we have no choice but to dismiss the appeal with no order for costs. Having rendered our judgment in the manner we have done, the preliminary issues raised at the beginning of the judgment cannot be maintained. The preliminary application is accordingly dismissed, again with no order for costs.

Appeal dismissed

MPONDE V BWALYA

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. 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 compensation monthly instalments of K500,000. 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. 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 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. Appealed to high court but all grounds of appeal failed hence this appeal before the supreme court. **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.**

HOLDING

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(I), 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 JII 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. 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.

KISEMBO V KISEMBO

Appeal against the ruling in the high court in awarding k 11.5million as maintenance pending suit. The appellant and the respondent had filed for divorce of the respondent had made an application for monthly maintenance pending suit. Dissatisfied with the ruling he appealed. Contended that the lower court did not provide reasons for placing such an amount. The appellant that he had been up to date and sees no reason why he also pay for arrears for maintenance in order for maintenance pending suit to be granted it must be proved that a matrimonial offence must be proved and that the appellant has willfully refused to provide maintenance for the children of the family and the respondent

ISSUE

Whether or not the trial judge was on firm ground in awarding the sum of k11,500,000 as maintenance pending suit and by ordering payments of maintenance in arrears effective from the day of filing petition for divorce.

HOLDING

The overriding consideration when awarding maintenance pending suit is the actual needs of the parties pending suit. The learned trial judge should have taken note of what the parties themselves had proposed and should not have merely made an award. The trial judge did not consider the monthly expenditure by the appellant and only accepted the monthly income that he would receive from his businesses as was submitted by the respondent she cast a blind eye to the fact that the respondent had been paying maintenance for the family as well as paying the children's school fees. The judge had made an award which was not pleaded by the parties themselves with no justification in doing we therefore order that the sum agreed by both parties be substituted instead which is k8,800,000. Each party to bear its own costs appeal wholly succeeds.

ROSEMARY CHIBWE v AUSTIN CHIBWE

This is an appeal from the Local Court to the Magistrate's Court, then to the High Court and eventually to the Supreme Court. The appellant, Rosemary Chibwe was originally in the Local Court the respondent in a divorce petition brought by her former husband Austin Chibwe now the respondent. The respondent sued the appellant for divorce before the local court in Mufulira

under customary law alleging inter alia, unreasonable behaviour and adultery with some unknown person. The local court granted as prayed the said prayer on the said grounds.

The appellant appealed to the Magistrates court on the grounds that the local court justices had misdirected themselves by dissolving the marriage on unestablished grounds and that the local court Justices had not addressed their minds to the question of maintenance and property adjustment of the property acquired by the respondent during the subsistence of their marriage. The learned Magistrate heard de novo the evidence and sat with assessors in Ushi customary law. At the end of the trial, he dismissed the appeal as being without merit and confirmed the decision of the local court. The appellant then appealed to the High Court. The Learned High Court Commissioner considered Ushi Customary Law, and directed the respondent to pay the appellant the sum of K10,000,000 with simple interest at the rate of ten per cent from 8th July, 1991, to the date of Judgment which was 25th June 1998, the appellant appealed against the decision of the learned trial commissioner. She averred that although the learned commissioner was on firm ground in law and fact when he held that she was entitled to property adjustment and maintenance in accordance with the evidence on record and Ushi customary law and the doctrine of equity (fairness), surprisingly the sum he awarded of K10,000,000 plus interest for both entitlements was totally inadequate and thus erroneous in law and fact according to Ushi customary law a divorced woman, regardless of any accusation of any matrimonial offence, is entitled to a reasonable share of matrimonial property acquired before and during the subsistence of the marriage. That the respondent being aware of these proceeding before the court, transferred some properties registered in his name to AMC Contractors Limited, a company incorporated by him, and in which he had fifty per cent shares. Her argument is therefore that the transfers were done mala fide and a deliberate maneuver to deprive the appellant of her share of that property acquired during the marriage.

HOLDING

We are therefore surprised that both the Local and Magistrate Courts which sat with the assessors who are the experts of the Ushi customary law, made no reference to Ushi customary law in dissolving the marriage and in property adjustments. The appellant devoted her energies every time she was not working to the welfare of the family. We are satisfied that she contributed in kind even as a mother to five of the children. She contributed in kind to the acquisition of the properties listed. **Financial arrangements are inter-related. They are not meant to cripple the other side. They are meant to support the divorced party to maintain the standards she/he had during the marriage.** The learned high court commissioner is at liberty to choose either periodical payment or lump sum having taken into account all the circumstances of the case. . However, we are not satisfied that he did take into account all the circumstances of the case. We are satisfied that he misdirected himself in awarding only a lump sum of K10,000,000.00 in light of the number of properties acquired during the marriage and the fact that the appellant led a life of comfort with him we order the transfer of one viable income generating property to be specifically named by the learned Deputy Registrar. We also order a lump sum to be assessed by the learned Deputy Registrar to meet all the educational expenses of any of the five children of the family if any of them would not have completed their education

and training. We also hold the view that all properties which were listed at pages 40 to 47 belonged to the respondent and that those which were transferred during the proceedings to AMC Contractors, a company owned by the respondent, cannot escape the order of this court as the transfer of such properties must have been done to avoid the outcome of these proceedings. In our view those transfers have no effect on our order. In conclusion we uphold the appeal and we order costs in this appeal and High Court costs to be borne by the respondent and to be taxed in default of an agreement.

Appeal allowed