

**IN THE HIGH COURT FOR ZAMBIA  
2014/HP/1051  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN**

**RITA MILLER**

**APPLICANT**

**AND**

**SAMSON KACHEPA**

**RESPONDENT**

***Before: Hon. Judge B.M.M. Mung'omba on this 14<sup>th</sup> day of May, 2015.***

*For the Applicant: Mr. M. Mukupa of Messrs Isaac & Partners*

*For the Respondent: No Appearance*

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## **JUDGMENT**

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**Cases referred to:**

- 1. Annie Bailes vs Charles Antony Stacey and Anierica Simoes (1986) ZR 83.***
- 2. Cook vs Head (1972) @ All ER 38.***
- 3. Eves vs Eves (1975) ALL 3 ER 768.***
- 4. Gordon vs Douce (1983) 2 ALL ER 228.***
- 5. Hussey vs Palmer (1972) 3 ALL ER 744***
- 6. Soulous vs Korkontzilas (1997) SCR 217.***
- 7. Attorney-General vs Seong San Company Limited - Appeal No.182/2010.***

**Legislation referred to:**

- 1. The High Court Act Chapter 27 of the Laws of Zambia***
- 2. The Rules of the Supreme Court 1965 (White Book) 1999 Edition Volume 1.***

By originating summons dated 4<sup>th</sup> July, 2014, the Applicant, Rita Miller, commenced this action against the Respondent, Samson Kachepa. It was brought pursuant to Order XXX of the High Court Rules of Chapter 27 of the Laws of Zambia as read with Order 7 Rule 1 of the Rules of the Supreme Court 1965 (Whit Book), 1999 Edition Volume 1.

The Applicant claims to be entitled to an equitable interest by way of a constructive trust in the 1.6 hectares property situate in Shifwankula Village of the Chibombo District of the Central Province of Zambia and the mesne profits from the use of trucks. She further seeks the following reliefs, namely:

- (1) An order for the disposal of the properties located at Shifwankula Village in Chibombo which are properties for the trust and sharing of the moneys thereof on a 50-50 basis between the parties herein;
- (2) An Order for disposal of the trucks acquired by the parties when they co-habited at the premises located at Shifwankula Village in Chibombo and sharing of the moneys realized on 50- 50 basis between the parties herein;
- (3) An Order for sole custody of the children;
- (4) An Order for maintenance of the children by the Respondent;
- (5) Any other order that the Court may deem fit and just in the circumstances; and
- (6) Costs.

The application is supported by an affidavit sworn to by the Applicant. She states that in or about October, 2001 the Respondent and herself started cohabiting as an unmarried couple in a quasi-marital arrangement in Emmasdale, Lusaka. As a consequence of the said co-habitation, she gave birth to two children to the Respondent, namely, Shepard Kachepa (Male) born on the 21<sup>st</sup> May 2002 who is currently in Grade 8 and Cecilia Kachepa (Female) born on 24<sup>th</sup> July 2008 and is currently in Grade 1.

Apart from the said children born from the Respondent the Applicant moved into the house with her first born daughter Carol Musanje born on the 9<sup>th</sup> December 1998. She exhibited true copies of birth certificates marked 'RM1' and 'RM2'. She avers that since they moved in together with the Respondent he was responsible for all the Children's up keep and contributed towards their welfare through payment of school fees, providing food, purchase of clothing and the general maintenance of the children.

Whilst living with the Respondent in or about January 2007 she identified a piece of land in chief Mungule's Area in particular Shifwankula's Village in the Chibombo District. They applied for its joint ownership as a couple from the local Chief who gave approval consent for conversion from customary tenure to leasehold tenure as per exhibit marked 'RM3.' The Applicant proceeded to lodge the application with the Central Province Planning Authority for approval after the local district council had also approved the said conversion of the property from customary to state land. Requisite statutory fees were paid as shown by document marked 'RM4'; a paginated exhibit containing the receipt from the Provincial Planning Authority and letter of recommendation from the Chibombo District approving the conversion of the customary land into state land.

In order to develop the said piece of land the applicant obtained a loan from her employers, Total Zambia Limited, in the sum of ZMK110,000,000.00 for the purposes of erecting a house on the said piece of land as per document marked 'RM5.' She continued to service the said loan until the 27<sup>th</sup> May, 2013 as shown by exhibit marked 'RM6'.

Using the resources from the loans obtained from her employers and the bank, the Applicant engaged the services of a contractor known as Mutambalika Construction who erected the dwelling house on the said property to its completion as per documents collectively marked 'RM7'. The

house was completed in or about 2009 when she paid for the electricity connection to ZESCO Limited as shown by 'RM8' the payment receipt. She avers that the Respondent's contribution was to erect the boundary wall, purchase the iron sheets for the chicken run and he built a grocery shop located in front of the premises.

According to the Applicant, in or about 2006 she obtained a personal loan from Standard Chartered Bank Zambia, which contributed towards the purchase of three (3) Trucks which the Respondent has been using for his business to fulfill the contract he was awarded by a company called Dunavant. A true copy of the loan account statements from Standard Chartered Bank Zambia Plc was produced and marked 'RM9'.

After completion of the construction works for the house the parties shifted from Emmasdale into the said house with the children of the family. They continued to live in harmony until September 2011 when, due to the Respondent's unreasonable behavior and unfaithfulness, differences developed. The said differences led to the parties sleeping in separate rooms since their love relationship had broken down. Eventually in or about June 2013 the Applicant, together with the 3 children of the family decided to move out of the family house to live in a rented flat in the Longacres area of Lusaka. This was due to the failing and uncomfortable relationship with the Respondent.

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 fending for the children despite the Respondent having financial capacity to support and maintain the children of the family. Despite numerous and several demands by herself or from her advocates, the Respondent has failed to provide support and maintenance for the children as shown by 'RM10'. In the meantime, the Respondent has continued to enjoy the benefits of living in the house and the profits of operating the truck business.

The Applicant now believes that the Respondent has willfully refused and or neglected to support and maintain the children despite being their biological father. She feels the Respondent will only do so if ordered to do so by this Honorable Court. According to her the monthly upkeep and groceries for the children are in the region of K3, 000.00 per month and the school fees per child is at K5,500.00 per term which she has been finding hard to meet the due to the lack of support from the Respondent.

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. As such justice can only be served by the Court ordering the disposal of the assets and sharing of the proceeds equally between the parties.

She finally avers that because the Respondent has not shown any interest in the upbringing of the children or their welfare this is a proper case where the Court should grant her sole custody of the children.

I first scheduled the hearing in this matter on 9<sup>th</sup> December, 2014. When the matter came up on that date, Counsel for both parties were present. However, Counsel for the Respondent, Mr. John Chibalabala from Douglas and Partners sought an adjournment on account of insufficient instructions. I granted the application as prayed and adjourned the matter for hearing to 9<sup>th</sup> February, 2015.

On 9<sup>th</sup> February, 2015 Counsel for the Respondent informed me that he had no instructions. He further told me that he had since ceased to act for the Respondent. In the meantime the file revealed that there was a Notice of Motion to adjourn the matter supported by an affidavit sworn to by the

Respondent himself. In the affidavit in support he gave reasons for seeking the adjournment that he was not well and was hospitalized following a road traffic accident in which he was involved.

In agreeing with the concerns raised by Mr. Mukupa, Counsel for the Applicant, I found that indeed the Respondent has neither availed himself nor has he given instructions to his Counsel of record before he ceased to act for him. However, I gave him the benefit of doubt and reluctantly adjourned the matter to 9<sup>th</sup> April, 2015. I indicated that I will proceed to hear the Applicant on her application on this date.

When the matter came up on 9<sup>th</sup> April, 2015, I noted that the Respondent was again not before Court. There was an affidavit of service on file as proof that the Respondent was informed of the hearing scheduled for this day. Indeed, I have had no sight of the Respondent despite the number of times this matter has come up for hearing. It is clear to me that the Respondent is not desirous of defending this matter. He has clearly disregarded the opportunity to appear and participate in this matter. The act of absenting himself is at his own peril. I therefore ordered to hear the matter.

Mr. Mukupa informed me of the Applicant's application brought under Order XXX of the HCR of Cap 27. He sought to rely on the affidavit in support deposed to by the Applicant dated 24<sup>th</sup> July 2014. Counsel submitted that the circumstances of this matter reveal that there is a constructive trust in which the Applicant has beneficial interest. On the principles governing constructive trusts, Counsel drew my attention to the robust decision of the Supreme Court in the case of **Annie Bailes V Charles Antony Stacey and Anierica Simoes (1986) ZR 83.**<sup>(1)</sup> Finally, Mr. Mukupa entreated that the Applicant be granted the reliefs sought.

At the close of the hearing I adjourned the matter to 30<sup>th</sup> April, 2015 for judgment. I now deliver the same.

The issue for determination before me is 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.

I turn to first consider what is meant by a constructive trust.

Lord Denning in the case of **Hussey vs Palmer** had this to say:

*“By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it..... it is an equitable remedy where the Court can enable an aggrieved party to obtain restitution.”*

The Supreme Court had occasion to pronounce itself on what a constructive trust entails in the case of **Annie Bailes vs Charles Anthony Stacy & Another**.<sup>(1)</sup> I consider that it is important to outline the facts in a nutshell.

The Appellant cohabited with the Defendant (who was now deceased) for many years. The Appellant sold her house and out of the sale she gave the deceased £.500 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 given by the Appellant. The Court below held that she did not contribute in the actual acquisition of the house, that it was not the intention of the 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.

On Appeal Ngulube DCJ (then) delivering the Judgment on behalf of the Supreme Court held that:

*“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.”*

Various English authorities were referred to in the aforesaid judgment where a mistress can in certain circumstances be granted a share in the unmarried couple's home.

The principle articulated in English case law, such as **Cook vs Head**,<sup>(2)</sup> **Eves vs Eves**,<sup>(3)</sup> is that in the case of an unmarried couple, where, by their joint efforts acquired property to be used for their joint benefit with the intention of setting up home together, the man held the property in trust for himself and mistress beneficiary.

The long and short of it in my understanding is that, a couple who have been in an unmarried union and have acquired property together by their joint effort, each party should be able to gain a share of the property. A constructive trust therefore is an equitable remedy where one party in fairness should not be permitted to retain it. It is a remedial device available to a Plaintiff to compel the Defendant to convey property by way of a constructive trust. It is aimed at redressing wrong or unjust enrichment in keeping with the basic principles of equity or justice.

Much wisdom is to be gleaned from the case of **Gordon vs Douce &**<sup>(4)</sup> where **Fox L.J** had this to say at page 230.

*“As the first question, what the Court is concerned with in such a case as this is, whether, by reason of an implied or resulting trust, the Applicant is entitled to a share in property vested in the other party. That is dependent on whether the parties have so conducted themselves, that it would be inequitable to permit the party in whom the property is vested in law to deny that the other party has a beneficial interest. In deciding that matter, it seems to be that exactly*



*the same principles would apply, whatever the relationship between the parties.”*

The erstwhile Ngulube DCJ (as he then was) eloquently summed up these authorities in ***Bailes vs Stacey & Simoes***<sup>(1)</sup> as follows:

*“On the authorities, it is clear that the principles to be applied in ascertaining the existence or otherwise of any alleged resulting or constructive trust in a case of this nature are the same which would apply to any relationship be it man and wife, man and mistress or even friends or brothers. That the actual relationship is a factor to be taken into account cannot be disputed. The nature of a constructive trust is such that every ascertainable circumstance and every relevant fact should be taken into account if, by imputation of equity, a transaction which the parties may have entered into without thought or realization of legal consequences becomes the subject of a claim against the party in whom the legal title to property is vested by the other who asserts that he has acquired a beneficial interest. 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. All the surrounding circumstances should be considered as well if the claimant is to be granted a share by*

*presumption of equity and the imputation of any common intention which results in the impositions of the constructive trust.*

*Broadly speaking, the plaintiff in this case did adduce evidence which, subject to our comment later on regarding Mr. Mwananwasa's submission, revealed both a substantial cash contribution and a lengthy cohabitation which spoke for itself: At the deceased's invitation, the plaintiff gave up her own house and later sold it. She lived with the deceased, not just alone but with her children as well. She moved in with the deceased virtually as man and wife for more than twenty years, in fact until death parted them. If we are to look at such a stable union in the same way as we would at a husband and wife situation, as some of the authorities discussed suggest, then the sacrifice of her own house and the devotion to the union which we have described must weigh heavily in her favour."*

The Supreme Court is a sure recent case, **Attorney-General vs Seong San Company Limited**<sup>(7)</sup> did not depart from the principle enunciated in the above cited case of **Bailes vs Stacey & Simoes** that a constructive trust is a creature of equity. They reiterated that:

*"Constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience."*

I must hasten to point out that there have been some developments in the doctrine of constructive trusts. In appropriating the discourse on whether and constructive trusts can be imposed in the absence of unjust enrichment the Court observed that the doctrine of constructive trust has evolved rapidly, Chibesakunda JS, in delivering Judgment on behalf of the Supreme Court stated that:

*"More recent case law has shown that Anglo - Canadian Courts have tended to impose constructive trusts in the absence of enrichment and*

*corresponding deprivation or without the Defendant obtaining a benefit or even the Plaintiff suffering loss. "The case of **Soulous vs Korkontzilas** was cited as a perfect example."*

Turning to the case at hand I find the following to be undisputed facts, the Applicant and the Respondent were living together in Emmasdale Lusaka from about 2001. Arising out of the cohabitation two children were born namely Shepard Kachepa and Cecilia Kachepa.

This unmarried couple applied for joint ownership of land in Shifwankula's Village in Chibombo District as exhibit RM3 shows. Upon approval of their application which was also for the conversion of the customary land into statutory land, I find as a fact that the Applicant obtained a loan of ZMK110, 000 for development of the same land. Proof of the loan is exhibited as "RM5". Documents have been produced which attest to the fact that the Applicant had engaged a contractor to erect a dwelling house (see RM7). When the house was completed the Applicant paid ZESCO for electricity supply (see exhibit RM8).

According to the Applicant the Respondent's contribution was erection of the boundary wall as well as the purchasing of iron steels for the chicken run. In addition built a grocery store.

Having perused the record very carefully I have had sight of the loan documents the Applicant obtained from her employers (RM9).

I am satisfied that this money was applied to the purchase of three trucks which the Respondent is currently using for his business.

The relationship of the parties broke down and as a result the Applicant was compelled to move out of their jointly owned property together with their children in June, 2013 and is currently renting a flat in Longacres.

After considering the above facts in light of the authorities I alluded to earlier in this Judgment 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. This has been borne out by the overwhelming evidence placed before me. The Applicant had been in a stable relationship with the Respondent from 2001 to 2013 when problems arose. There were children born as a result of the relationship. Property at Shifwankula was jointly developed and proof of what the Applicant did in furtherance of this joint enterprise has been demonstrated by the documentation exhibited before Court (RM3, RM4, RM5, RM6, RM7 and RM8). I must hasten to mention here that as regards the property at Shifwankula the documentary evidence reveals that title vests in both the Applicant and the Respondent as it was jointly applied for. What this means therefore is that the recourse which Applicant has is her entitlement under joint ownership. It is a legal estate as opposed to an equitable estate. 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.

Regarding the purchase of the trucks there is evidence of her obtaining a loan (RM9).

There was indeed joint effort in acquisition of the properties. I stand guided by the plethora of authorities I have referred to in the course of this Judgment. I make particular reference to the eloquent words of Ngulube DCJ, as he then was, when he stated that:

*“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.”*

I take the view that I am obliged in equity to consider what would be just and fair in the circumstances of this case. On account of the preceding paragraphs I find and hold that the Applicant has satisfied me that a constructive trust must be created on the basis that retention of the property by the Respondent is wrongful and would unjustly enrich him if he were allowed to retain it. This would satisfy the demands of justice and good conscience.

The sum of my decision is that the Applicant is entitled to a 50 percent share in property vested in the Respondent which was jointly acquired with the Applicant. I accordingly grant her the reliefs prayed for, namely:

- (1) An order for the disposal of the properties located at Shifwankula village in Chibombo and sharing of the money thereof on a 50-50 basis between the parties.
- (2) An Order for disposal of the trucks acquired by the parties when they co-habited at the premises located at Shifwankula Village in Chibombo and sharing of the money realized on 50- 50 basis between the parties.

Turning to custody of the children I am guided by the Affiliation and Maintenance of Children’s Act Chapter 15 (2) which provides as follows:

*“In making any order as to custody or access, the court shall regard the welfare of the child as the paramount consideration, and shall not take into account whether from any other point of view the claim of the father in respect of custody is superior to that of the mother, or vice versa.”*

In view of the above, 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.

Costs to follow the event to be taxed in default of agreement.

***Dated at Lusaka this 14<sup>th</sup> day of May, 2015***

***Judge Betty Majula-Mung'omba***  
**HIGH COURT**