ANNIE BAILES v CHARLES ANTONY STACEY AND ANIERICA SIMOES (1986) Z.R. 83 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND SAKALA J.J.S.
10TH AND 11TH JUNE, AND 16TH SEPTEMBER, 1986
(SCZ JUDGMENT NO. 21 OF 1986)

Flynote

Trust law - Inheritance - Unmarried Couple - Beneficial interest of surviving partner - Factors.

Headnote

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 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.

Held:

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 the acquisition.

Cases cited:

(1) Cooke v Head [1972] 2 All E.R. 38
(2) Eves v Eves [1975] All 3 E.R. 768
(3) Richards v Dove [1974] 1 All E.R. 888
(4) Bernard v Josephs [1982] All E.R. 162
(5) Pettitt v Pettitt [1969] 2 All E.R. 385 [1970] A.C. 777
(6) Gissing v Gissing [1970] 2 All E.R. 780 [1971] A.C. 886
(7) Gordon v Douce [1983] 2 All E.R. 228
(8) Burns v Burns [1984] 1 All E.R. 244

For the Appellant: J.B. Sakala and Company .
For the first Respondent: H.K. Smallwood, Smallwood and Company.
For the second Respondent: L.P. Mwanawasa, Mwanawasa & Company.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court: The facts and history of this case can be stated very shortly. The learned trial judge from whose decision this appeal comes either accepted

or did not reject the following salient facts. In 1956 Annie Bales (hereinafter called the plaintiff) met Domingos Assuncao (hereinafter called the deceased). At the time the plaintiff had six children from a previous marriage and was living in a house which she owned. Unknown to the

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plaintiff, the deceased had left a wife and children in Portugal but was living alone in an apparently temporary structure on a property known as S/D D6 of S/D Y4 of Farm 748 "Njo" in Ndola the subject of this suit. The two developed an intimate relationship and paid regular visits to each other. Meanwhile in 1958, the deceased started building the house on the plot referred to and completed construction in 1960. The deceased borrowed 500 pounds from a Building Society to enable him to complete the construction. When the house was completed, the deceased invited the plaintiff to cohabit with him. She moved in with her children and the two parties herein henceforth lived together as an unmarried couple but otherwise to all intents and purposes as man and wife. They so lived together until the deceased died in 1978. 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.

Sometime after and during the time of cohabitation, the plaintiff sold her own house for a sum between 1,500 pounds and 1,700 pounds. She gave the deceased 500 pounds to pay off the mortgage but this amount did not discharge that debt. For five years in alternate months, from 1960 to 1966, she helped the deceased service the mortgage by paying sums between 10 pounds and 20 pounds per month. The learned trial judge found that she must have made at least 30 such payments. Eventually the plaintiff gave the deceased a sum of 200 pounds to finally discharge the mortgage. It was not made very clear exactly when these various sums were paid by the plaintiff but the learned trial judge accepted that she did pay those amounts. The 500 pounds, 200 pounds and the 30 instalments of 10 pounds, or 20 pounds and averaging 15 pounds, that is 450 pounsd, add up to 1,150 pounds.

When the deceased died and the plaintiff - who was then and is now well advanced in age - discovered that she had been excluded from any share of the estate of her consort of many years she commenced the proceedings in this case. In her action, she sought a declaration to the effect that she had a beneficial share in the house which the deceased and, in turn the first respondent, held in trust for their joint benefit as regards any proceeds of sale, rents and profits. She also sought a declaration that all the household goods in the house were her "absolute property". In relation to the latter prayer, the learned trial judge granted a declaration arguing that, even though he found that not all the items were hers, she should have them because of the length of time she lived with the deceased. We say nothing more about these household goods since this appeal was confined to the claim in respect of a share in the house.

In relation to the house, the learned trial judge determined to the effect that there was no evidence of any intention on the part of the unmarried couple that the plaintiff should acquire any beneficial do interest in the deceased's house; that the money which she spent did not entitle her to any share and that such money, though not given as a gift, must have been loans to the deceased. The learned trial judge held that the plaintiff did not contribute anything towards the acquisition of the plot where the house was built nor towards its construction. He

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therefore argued that to the effect that, since the deceased had already completed building the house when the plaintiff moved in with him, the 500 pounds which she paid first was simply a loan and was referred to as such by the plaintiff. He further reasoned that the subsequent payments made towards the mortgage must all have been loans because it was unlikely that the deceased, who had single handedly completed construction, could have received the money with a view to granting a share to the plaintiff.

On behalf of the plaintiff, Mr Sakala has armed to the effect that, on the facts which we have set out and on the authorities to which we shall shortly turn, the plaintiff had a beneficial interest in the house. His submission was that on the facts and in the circumstances of this case, the plaintiff had made substantial contributions towards the acquisition of the house and that the deceased must be found to have become a constructive trustee of her beneficial interest. He therefore urged us to reverse the learned trial judge and to find for the plaintiff. On behalf of the second respondent, the wife in Portugal, Mr Mwanawasa supported the determination below. The gravamen of Mr Mwanawasa's argument was that there was, in his case, no evidence of any joint effort in the acquisition of the house nor any intention at the time of such acquisition of the two setting up home together. He submitted to the effect that, as the deceased had already acquired her house before the parties began to live together her financial contributions could not imply an agreement between the parties to confer on the plaintiff any beneficial interest. Mr. Mwanawasa contended that for a mistress to acquire any beneficial interest in the quasi-matrimonial home, there must be not only a joint effort but also an initial intention that the house is to be acquired by the parties for the purpose of providing a home for them in their unmarried union. It was, therefore, Mr Mwanawasa's submission that a mistress who moves into a house after it has already been acquired can never acquire a beneficial interest. He relies on the authorities to be discussed shortly where the facts were that the unmarried couple had agreed and deliberately set out to acquire a house with a view to set up home in it.

It is quite possible that this may be the first time when this court has been called upon to decide a case of this nature. However, we observe that in England at any rate such cases are fairly common and we have sought assistance from the English cases including those cited both in this court and at the trial. That a mistress can in certain circumstances be granted a share in the unmarried couple's house seems to have been settled by a number of decisions. Thus in *Cook v Head* (1), a man and his mistress together decided to acquire land and build a bungalow. The plot was purchased by the man in his own name and he raised some money on a mortgage. The mistress did not contribute any money. Together they planned the bungalow and together they built it with the help of some labour. The mistress put in a lot of physical world personally. Both parties in that case saved all the money they could from their separate earnings which they pooled together and which was used, among other things, to service the mortgage repayments. The mistress was given a one-third share in the

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proceeds of sale. The court held in that case that the constructive or resulting trust imposed by the courts on the legal owner in the case of husband and wife who by their joint efforts acquired

property to be used for their joint benefit applied to a man and his mistress who acquired peppery by their joint efforts with the intention of setting up home together and, accordingly, the man held the property on trust for himself and the mistress beneficially. In that case a view was expressed that the correct approach was not to look at the money contributions of each and dividing the beneficial interest according to those shares but look at the matter more broadly in the same manner as the court would in a hushed and wife case. Cases where a mistress was given a share because the parties had together agreed to acquire property and by their jolt efforts did acquire such property with a view to set up home include *Eves v Eves* (2). In this case the man raised the entire purchase price. But it was in evidence that they had specifically agreed to acquire to the property as their home and that both would have beneficial interest. The man had led the mistress into accepting that the house should be in his sole name because, as he told her, she was under age. The mistress did a lot of physical work to effect major repairs and improvements to the house. She was awarded a beneficial interest of one-quarter, the court holding, among over things, that because of the man's conduct and because of all she had done for him and their children, it was just and fair that she should have a beneficial interest. Thus where an intention to set up home is coupled with a joint effort which is of a substantial nature, a party to an unmarried union has been able to gain a share. But where the contribution is absent or is not such as to amount to joint effort by both parties, a share must be denied: See for instance *Richards v Dove* (3). We have also had occasion to peruse the case of *Bernard v Joseph* (4), a more straight forward case where the unmarried couple bought a house in their joint names and on a joint mortgage which each helped to service. It was held, among other things, to the effect that where the couple lived in the house as if married and where there is evidence that the parties had conducted their affairs in such a way that the court is satisfied the relationship was intended to involve the same degree of commitment as a marriage, the share of the beneficial interest in the house to which each was entitled can be ascertained according to the same principles applicable to a married couple. On that basis, the court in *Bernard* freely referred to the decisions and dicta in husband and wife cases to resolve the issue in that case. In the course of delivering his judgment in *Bernard, Griffiths,* L.J., said something which may well be useful in our present case. He said at page 170 to page. 171:

> "It emerges clearly from the speeches in *Pettitt v Pettitt* (5) and *Gissing v Gissing* (6) that it is the intention as to the beneficial ownership at the time the house is bought that is crucial and the contributions made by the parties to the acquisition are examined to establish that intention: See *Pettitt v Pettitt* (1969) 2 ALL E.R. 385 at 394, 400, 408, (1970) A.C. 777 at 800, 807, 816 per Lord Morris. Lord Hodson and Lord Upjohn: and see also *Gissing v Gissing* (1970) 2 ALL E.R. 780 at 783, 786, 787, (1971) A.C. 886 at 898, 900, 902 per Lord Morris, Viscount Dilhorne and Lord Pearson. It might in exceptional circumstances be inferred that the parties

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> agreed to alter their beneficial interests after the house was bought; an example would be if the man bought the house in the first place and the woman years later used a legacy to build an extra floor to make more room for their children. In such circumstances the obvious inference would be that the parties agreed that the woman should acquire a share in the greatly increased value of the house produced by her money. But this depends on the court being able to infer an intention to alter the share in which the beneficial interest was previously held; the mere fact that one party has spent time and money on improving the

property will not normally be sufficient to draw such an interference: see *Pettitt v Pettitt*."

We have also referred ourselves to - *Gordon v Douce* (7) where Fox, L.J., said at page 230:

> "As to 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 me that exactly the same principles would apply, whatever the relationship between the parties. As Lord Dilhorne observed in *Gissing v Gissing* [1970] 2 All E.R. 780 at 785, [1971] A.C. 886 at 899, there is not one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property where the dispute is between others."

We should also mention that the learned trial judge made reference to *Burns v Burns* (8). We propose to quote from the summary of the appellant decision which the learned trial judge set in his judgement. This reads:

> "It was HELD that when an unmarried couple separated, the powers conferred by the Matrimonial Causes Act 1973 in relation to division of the property of married couples on divorce did not apply, and accordingly the court had no jurisdiction on the basis of the fair and reasonable division of property. Instead where property had been purchased in the man's sole name without the woman making any direct contribution to the purchase price or without the parties making an agreement or a declaration regarding the beneficial interest in the property, there was a prima facie inference that the man was the sole legal and beneficial owner. That inference could only be displaced if the court imputed, from the conduct of the couple down to the date of their separation, a common intention that the woman was to have beneficial interest in the property, and that in turn depended on whether the woman had made a substantial financial contribution towards the expenses of the couple's household which could be related o the acquisition to the property, e.g.,

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> where her financial contribution to the household expenses enabled the man to pay the mortgage instalments. The court would not impute a common intention that the Plaintiff was to have a beneficial interest in the property merely from the fact that she had lived with the Defendant for 19 years, had looked after the family's well - being by performing the domestic duties of the household and had brought up their children, or from the fact that she had bought chattels for the household out of her earnings and had redecorated the house."

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 parries may have entered into without thought or realisation 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 stay 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. Then there is the aspect of her cash contributions in the sum of about ú1,150. 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.

The learned trial judge found the amounts to have been advanced as loans. We respectfully disagree with this interpretation of the transaction and which we find was taken on a view of the events which cannot be supported by the evidence. Though she may have referred to the first amount as a loan, yet it was not in dispute that the question of repayment by the deceased was never at any time raised of even considered. In our considered opinion, the fact that the plaintiff and the deceased were content the one to pay and the other to be so assisted is highly significant and is a circumstance which we are entitled to take into account in the interpretation of the probable intentions of the parties. 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.

Mr Mwanawasa argued that acquisition relates to the initial stage when the property vests in the person acquiring so that subsequent contributions, even if substantial, can never confer a beneficial interest. An argument of this type could not go very far in a husband and wife situation. If, for example, a newly wed wife came and paid off a large portion of a mortgage which she found standing in the husband's name, would a court dealing with an application for a share, on the wife's part, ignore that fact? But in fact acquisition of a house cannot be said to begin and to end with the purchase of the plot and the construction of a house simpliciter as was suggested. We can find no authority for the proposition that subsequent events, in the form of very substantial contributions towards the price or the cost still owed by the party vested with legal title cannot be considered. Constructive trusts, as already noted, are concerned with what the courts in equity consider to be just and fair in the circumstances of any given case. The plaintiff made tremendous sacrifices and substantial contribution while the deceased received very valuable benefits which enabled him to retain the mortgaged property and finally to redeem the mortgage altogether. In point of fact the dicta in *Burns v Burns* (8) supports the plaintiff's case She made substantial contributions directly related to the acquisition of the property not just by enabling the deceased to pay but by herself actually paying. 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. Mr Mwanawasa strongly submitted that a man's Will should be respected. We agree. But by the same token, equity demands that we interfere when, as in this case, not to do so would result in gross injustice being visited upon the plaintiff.

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.

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The learned trial judge had held, in the alternative, that should he be adjudged wrong on an appeal, he would assess the plaintiff's beneficial interest at one-eighth of the net proceeds of sale. No indication was given for arriving at this share other than that the learned trial judge was excluding the sum of 500 pound because it was a loan. We have already indicated the contrary. The learned trial judge also took into consideration that for some twenty-four years the plaintiff has had the benefit of living in the house; but then so did the deceased before his demise. We do not consider the fact of living in the house per se as a proper basis for reducing the plaintiff's share. In any case, as already noted, *Cooke vs Head* (1) does not seem to suggest the sort of arithmetical calculation attempted by the learned trial judge who did not even have the benefit of evidence giving the figures representing either the cost or the value of the house. On the contrary that case suggests that the matter be looked at more broadly. In all the circumstances of the case, and having regard to all the matters which we have discussed, 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.

In view of the subject matter of the case, we make no order as to costs.
Appeal allowed.
