

LUCIA GOVERA

Versus

ALOUIS GOVERA

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 6 October 2003 and 28 January 2004

Mr *Mugwaliba*, for the plaintiff renounced agency
Mr *Mutamangira*, for the respondent

BHUNU J: The parties were *married* in terms of the Marriage Act [Chapter 39] now [Chapter 5:11]. The marriage was solemnised on the 22nd May 1987.

The parties have 3 minor children of the marriage namely:

- (1) N.T. (born [day/month] 1988)
- (2) L.C. (born [day/month] 1991)
- (3) A.C. (born [day/month] 1994)

During the subsistence of the marriage the parties acquired two residential properties:

- 1) Stand number 203 Chamba, Westwood, Kambuzuma and
- 2) Stand Number 6 Pomona North, Harare

The property in Westwood is the matrimonial home whereas the property in Pomona is registered in the name of Givemore Kapesa the defendant's cousin.

On the 20th January 1999 the plaintiff issued summons in this court seeking

- a) a decree of divorce
- b) custody of the three minor children and maintenance
- c) division of the matrimonial assets.

The parties are agreed that the marriage has irretrievably broken

down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship.

The issue of custody of the three minor children has been settled by mutual agreement. The defendant is to retain custody of the three minor children subject to the plaintiff being accorded right of access for a weekend once every fortnight during school term. The plaintiff is to have access to the children on alternate public holidays.

Apart from the above three mentioned children a fourth child was born during the subsistence of the marriage. The defendant denied paternity for that child claiming that she was fathered by his cousin Givemore Kapesa.

The circumstances leading to the breakup of the parties' marriage are to a large extent common cause.

Prior to the breakdown of their marriage the parties were living with Givemore Kapesa the defendant's cousin.

During that period the defendant acquired the Pomona property in fraud of the law. To avoid detection he dishonestly registered the property in the name of his cousin Givemore Kapesa. To protect his position the defendant caused Givemore to sign cession papers authorising transfer of the property to himself at an opportune time as and when it became necessary.

As time went on a sexual relationship developed between the plaintiff and Givemore resulting in the birth of the fourth child. The plaintiff initially made a feeble attempt to deny these facts. The evidence against her was however simply overwhelming. This caused her to abandon her claim for maintenance for the fourth child and opting to take custody of this particular child and surrendering custody of the other 3 children to the defendant.

She now lives with Givemore at the Pomona house in circumstances which clearly disclose an adulterous relationship between the two.

Upon taking legal advice the defendant acknowledged that the

circumstances under which he acquired the Pomona property and registered it in Givemore's name were unlawful. That being the case he cannot recover the property from Givemore through the courts. Upon that realization he has abandoned all claims to the Pomona house electing to retain the Westwood house as his sole property. He reasoned that the plaintiff is benefiting from the Pomona house which he acquired and built although it is now registered in her paramour's name.

The plaintiff countered that the defendant donated the Pomona house to his cousin. She has no claim to the Pomona House as it is not the matrimonial home but the Westwood house.

Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] provides guidelines in distributing matrimonial property upon divorce. Among other things the court is authorised to take into consideration the conduct of the parties during the subsistence of the marriage. In the case of *Marimba vs Marimba 1999 (1) ZLR 87 GILLISPIE J* was quick to sound a warning that the idea is not to penalise either party for marital misconduct but to effect a fair and equitable division of the matrimonial estate.

In this case the evidence on record establish that the defendant made the bulk of the contributions in acquiring both the Westwood and Pomona properties. He single handedly made further extensive renovations to the Westwood property after the parties were already on separation.

Although the Pomona house through a technicality of the law cannot form part of the matrimonial estate the fact still remains that it is the defendant who acquired and developed the property. That being the case one cannot turn a blind eye to the stuck reality that the plaintiff will continue to benefit from the defendant's sweat and effort as long as she continuous to be in good books with her paramour. It will therefore be manifestly unjust to allow the plaintiff to benefit from both the Pomona and Westwood properties while restricting the defendant and the 3 minor children of the marriage to

a half share of the Westwood property.

The plaintiff cannot have the best of both worlds. By her conduct she elected to abandon the Westwood matrimonial home to live in adultery at the Pomona property.

That being the case it is accordingly ordered:

- 1) that a decree of divorce is granted
- 2) that custody of the 3 minor children
 - 1) N.T.G., born [day/month] 1998;
 - 2) L.C.G., born [day/month] 1991 and
 - 3) A.C.G., born [day/month] 1994 is awarded to the defendant.
- 3) that the plaintiff is granted reasonable access to the 3 minor children for a weekend once every fortnight during school terms. The plaintiff is to have custody of the children every alternate school holiday and every alternate public holidays.
- 4) That the defendant is awarded sole ownership of the matrimonial home being sand number 203 Chamba Road, Westwood Kambuzuma.
- 5) Each party is to meet its own costs.

Harare Legal Projects Centre, the applicant's legal practitioner
Mudambanuki and Associates, the defendant's legal practitioner