Judgment Book

46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F108 OF 1978

BETWEEN	LURLINE FORRESTER	PLAINTIFF
AND	KENNETH FORRESTER	DEFENDANT

Mr. Norman O. Samuels for Plaintiff.

Mr. W. Bentley Brown for Defendant.

Heard: 26th, 27th, and 28th January.

Delivered: 12th November, 1982.

J U D G M E N T

Theobalds J:

The Plaintiff and the Defendant were married on the 26th October 1947, the marriage was dissolved on the wife's petition filed in California United States of America where she now resides; she had left the matrimonial home at Long Road in the parish of St. Mary on the 23rd January 1973 to take up residence in the United States of America. She is now a part time factory worker there. She states in her evidence that she would like to return to reside in Jamaica but has no where to live. Her former husband (the defendant) is a shop keeper and Justice of the Peace residing at Long Road in the parish of St. Mary. The Plaintiff has now applied to this court by Writ of Summons for an order for the sale and division of certain real and personal property which she claims were acquired during the course of their marriage by their joint efforts. She also seeks an account of the rents and profits received by the Defendant from his use and operation of a Leyland 10 ton truck from the 22nd day of January 1973 to the present time and also from the operation of a bar and grocery business at Long Road in the parish of St. Mary. The Plaintiff also claims that it was by their joint efforts that the matrimonial home was repaired remodelled and improved and she therefore now desires to obtain a half share of the market value of

of these premises. The Plaintiff also claims a order for the sale or division of property situate at No. 2 Relay Road, Hughenden in the parish of St. Andrew and a division of the proceeds of the said sale (less all reasonable expenses connected with the said sale) equally between the Plaintiff and the Defendant.

The Plaintiff also asks for similar orders in respect of certain furniture acquired for the matrimonial home during the course of the marriage and in respect of a Morris Oxford Motor Car purchased by the Defendant from their joint savings and now being solely used by the Defendant.

The Defendant denies that any improvements to the matrimonial home at Long Road were at their joint expense. His contention is that such improvements were at his sole expense and that the grocery and hardware business was wholly owned and operated by the Defendant, exclusive of the Plaintiff's contribution, financial or otherwise. In his filed defence to case on Motion and Statement of Claim the Defendant admits that the "eight (8) acres of land at Long Road was purchased by the Defendant in 1965 at the request of the Plaintiff and the house and land were registered as a gift in the sole name of Lurline Forrester who is still paying taxes on these lands in her name." There appears to be an error here. What apparently was intended is "Fort Stewart" and not "Long Road." It is therefore unnecessary for me to make any order in respect thereto, particularly as the Statement of Claim did not seek such an order. I shall however bear this generosity on the part of the Defendant in mind when I come to deal with the motor car later on in this judgment. The Defendant joins issue in relation to the other orders sought by the Plaintiff in respect of the furniture and another item of real estate, namely 2 Relay Road, Hughenden in the parish of St. Andrew.

I propose in the interest of clarity to deal with each item of property separately starting with the real estate. Before doing so however certain comments on the pleadings and evidence would not be out of place.

The pleadings are to a large extent etiose. Paragraph 9 of the Statement of Claim avers that "the Defendant.....have (sic) neglected and or refused to divide the aforesaid properties between himself and the Plaintiff." No evidence was led of any demand or request for division having ever been made of the Defendant. Indeed the evidence is that he went to the United States in search of the Plaintiff to see if he could bring about a resumption of cohabitation and was seeing her in the witness box for the first time in seven years.

Further paragraph 10(b) claims on behalf of the Plaintiff "a valuation of the premises situate at Long Road and where the said business was being operated and the costs of rebuilding and remodelling the said premises to be equally divided between the Plaintiff and the Defendant." A close scrutiny of this paragraph would indicate that this is the last thing the Plaintiff would want for she would then for the first time during the 27 years of its duration be making a financial contribution towards the marriage. Happily paragraph 10 (f) of the same Statement of Claim corrects this situation by claiming a "sale of the said property situate at Long Road in the parish of St. Mary and the proceeds there from (less all reasonable expenses connected with such sale) divided equally between the Plaintiff and the Defendant."

In so far as the Plaintiff in her evidence in chief stated that she had left the matrimonial home on the 23rd January 1973 after a quarrel with the Defendant in the course of which he had threatened to shoot her it becomes desirable for me to deal briefly with that aspect of the matter. The Defendant denied that on the 23rd January 1973 any such quarrel took place and he further stated that he was not at home that day. Whether through disgust at the husband's irascible quarrel some behaviour, a well recognized sympton of a diabetic complaint, or through annoyance with his romantic interludes outside of the marriage, it is clear to me and I so find

that it was a preconcieved plan on the Plaintiff's part to leave the matrimonial home. I am assisted in coming to this conclusion by the Defendant's statement that the Plaintiff "took furniture and furnish daughter room in town." She was preparing for her departure whenever the opportunity presented itself and so it did on the 23rd January 1973 when the husband was out. I feel obliged to dwell briefly on this aspect of the evidence because it was dealt with somewhat lengthily in final addresses by counsel, but it should be quite clear that this behaviour on the Plaintiff's part would not affect the issues, that is her claim to a share in the property acquired during the marriage.

Among the reasons for the protracted delay in the writing of the judgment in this case is the complexity of the arguments raised at the trial and the appalling lack of assistance provided to the court in cross examination of the several witnesses. It is axiomatic that it is by pointed, skillful cross examination that a witness' credibility is destroyed. For example if A says that she was threatened by B with a gun or a particular date and in fact B had turned in his firearm(s) some years before that date when the licence had expired, should not this have been put to A when she was being cross examined? Not only was this not put to A but indeed B could have proved conclusively that A was lying by producing the relevant record from the Firearm Registry to prove that he was not likely to have been in lawful possession of any firearm on the 23rd January 1973. Again B claimed in his evidence that A left him because of the deterioration in his health which was attributable to a diabetic complaint; B also swore that diabetes had left him impotent. Yet the trial judge it was who illicited from B that he fathered a child in 1974 a year after the Plaintiff's departure - the same man who claimed that the Plaintiff left him as a result of his own impotence resulting from the diabetic attack.

Additionally the appalling conditions in terms of accomodation under which the particular judge has to work should be well known to the private bar in general and to at least one attorney appearing in this case. The situation remains unchanged after several months.

Property at Long Road, St. Mary

This property formed the matrimonial home and consists in addition to a residence of a shop, dance hall and engine room situate on approximately 3 acres of land. Mr. Allan Waters McCalla a well-known city realtor, who, at the instance of the Plaintiff, carried out a valuation in 1978 testified that that there was also a residence annexed. This consisted of 2 bedrooms, living and dining room, verandah, kitchen and bathroom. It was Mr. McCalla's evidence that at today's values these entire premises are worth $15,308. The Plaintiff herself placed a value of $2,000.00 on the house at the time of her marriage in 1947. In view of Mr. McCalla's unchallenged evidence this figure of $2,000.00 does not seem unreasonable. In any event it is the only valuation given to the Court. The Defendant inherited this house on his father's death. It was the Plaintiff's contention that she had contributed indirectly through her efforts in the business to the expansion, remodelling and improving of the original structure. The Defendant while not denying that the structure was repaired or remodelled swore that the Plaintiff never contributed anything towards the costs thereof. It seems clear to me that the Plaintiff did assist in the running of that shop and not to the limited extent of just serving in the business as the Defendant would have me believe. Even if it was to a limited extent, she testified and I so find, that she was not paid for her services. The Defendant himself later confirmed that she was never paid. She is therefore entitled to some compensation. The Plaintiff by her presence and as a result of her efforts made an indirect contribution to the Defendant's undoubted success in his business. The extent of

that indirect contribution though difficult to evaluate must still be quantified for the purpose of this action. The Defendant undoubtedly provided the start, for the Plaintiff herself states that at the time of marriage he was operating a small shop at Long Road. The effect of the evidence and I so find, is that since the Plaintiff's departure in 1973 the business has run down. Could anything testify more loudly or more eloquently as to the extent of the Plaintiff's contribution? When she is present, the business prospers and expands, when she leaves the same business collapses. Fully mindful of the admitted fact that she brought no capital into the business and contributed none towards the matrimonial home at the commencement of the marriage, I am of the opinion that her zest energy or enterprise entitles her to a ½ share in the present value of the matrimonial home and business premises. Of course the only figure given in evidence as to the value of the premises before marriage is $2, 000 and the Defendant who acquired same by inheritance from his father would be entitled to have his ½ share increased by the amount of $2,000.00 (the unchallenged original value of the premises). An order is so made accordingly and if the Defendant wishes he may avail himself of the opportunity to acquire the sole interest in the property by payment to the Plaintiff of her portion in the terms above mentioned. It is, of course naturally open to nim to sell the premises outright to any interested party but from the proceeds of sale the Plaintiff would have to be compensated in the above proportions. On further consideration the $2,000.00 valuation mentioned above is based on 1947 values in real estate. That figure bears no reality to the situation today. It is therefore part of my order that a new value be arrived at either by agreement between the parties or by a valuation to be agreed between them and the husband's ½ share would be increased by whatever figure is arrived at.

Be it observed that at the commencement of this judgment started several months ago but unhappily interupted by power cuts, country circuits, inadequate chamber accomodation and vacation leave abroad I had expressed an intention in the interest of clarity of dealing with each item of property separately. The passage of time has however changed this approach and lest it be wrongly concluded that this change is attributable to my having yielded to obvious temptation to shirk difficult computations let me adopt as my own the words of Bucknill L. J. in Newgrosh v. Newgrosh [1950] 210 L.T. JO 108 where he said that a judge has...

> "A wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have though that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as 'palm tree justice'. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case."

What are the special circumstances in this case? Naturally these revolve around by findings of fact which are as follows:

(1) The Plaintiff/Wife contributed nought in terms of money at the commencement of the marriage either to the business or to the matrimonial home.

(2) Notwithstanding by her interest, sweat, zeal and enterprise she was largely responsible for the growth and success of the Defendant's business.

(3) She received no direct or personal remuneration for her services.

(4) 27 years of unpaid service whether inside or outside of the sanctity of marriage is a long time and can be likened to a life sentence in less commodious quarters.

With this substrata of fact I apply the reasoning of Sir Raymond Evershed MR in Rimmer v. Rimmer [1952] 2 ALL E.R. 687 when he said:

> "When the Court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise culculation of their shares. I think that equality almost necessarily follows."

When two parties are about to enter into the bonds of holy matrimony and even in the years preceding an actual coming to grief of a marriage it is most unnatural for either party to keep any record of actual expenditure or financial contribution made towards the marriage. It sometimes does happen that such records are available but this certainly has not been the case here. Fully mindful that the onus probandi rests on the Plaintiff, I find it my duty none the less, after seeing and hearing the witnesses to come to a conclusion as to what would be a fair contribution in the particular circumstances of this particular case. What figures would one reasonably expect Mrs. Forrester to produce? Indeed she has produced none. In these circumstances I venture to apply the reasoning of Maugham L.J. in Re Dickens [1935] Ch 309 when he said:

> "In these circumstances, my opinion is that part of the sum realized properly belongs to the estate of Sir Henry Dickens and part to the estate of Charles Dickens. <u>There are no materials for apportioning the sum otherwise than in equal shares</u> between the two estates and that is, in my opinion, the proper conclusion, not only because, according to the language of Lord Somers (Petit v. Smith) (I.P. Wins. 9) 'equity did delight in equality', but also because, <u>in the exceptional circumstances of the present case, the 2 contending parties have equal rights</u> to share in the proceed of sale." The underlinings are mine.

I have already outlined by my findings of fact above what, in my view, are the special circumstances in this case.

In respect of Leyland 10 ton truck No. E5468 the Plaintiff seeks: (1) An order for the sale of the truck and that the proceeds

of sale (less all reasonable expenses connected with the said sale) divided equally between the Plaintiff and the Defendant.

(2) An account of all profits received by the Defendant from his sole use and operation of the said truck from the 22nd January 1973 until the present time.

The Plaintiff's case in relation to this truck is sketchy. It appears that an Austin truck was originally purchased during the early days of the marriage and for some time this unit was operated solely by the Defendant. These were during the good days for according to the Plaintiff her husband always brought home to her what ever profits he made off the truck. This unit was sold and eventually E5468 (the subject of this claim) acquired in 1971 for £10,000. It appears that this is a mistake, for dollars were then current coin of the realm. In any event the records from the Collector of Taxes Office in St. Mary and produced by the Plaintiff show that the Leyland Truck E5468 was on 6th October 1971 first registered in the name of Lurline Forrester the Plaintiff. There was a Transfer subsequently and the unit is now registered in the name of Kenneth G. Forrester the Plaintiff's son. The date of this Transfer is not recorded in the Motor Vehicle Register. I believe the Defendant when he deponed that the Transfer was effected before the Plaintiff left for U.S.A. and that he (Defendant) subsequently seized the truck from his son who was then operating it. It follows then that in respect of (1) above it would be idle for the court to order the sale of a truck which is not registered at the hearing of the suit in the names of either of the parties to this action and in respect of (ii), the Plaintiff has failed to satisfy me on a balance of probability or at all that the unit was solely used and operated by the Defendant from the 22nd January 1973 to the present time. Her claim for an account of all profits received by the Defendant in relation to this truck is therefore refused.

In respect of 2 Relay Road, Hughenden in the parish of St. Andrew similar principles would apply. An order is accordingly made for that premises to be sold and the proceeds of sale (less all reasonable expenses connected with the said sale) divided equally between the Plaintiff and the Defendant. The Plaintiff alone has been in receipt of rental for this premises over the years. She will therefore have to account to the Defendant for all rents and profits received since the premises was let. He is entitled to a ½ share she would of course be entitled to deduct any sums expended by her for water rates, taxes, repairs and other outgoings over the years. An order is made accordingly.

In respect of the furniture an order for sale thereof is made and the proceeds of such sale (less all removable expenses connected thereto) be divided equally between the Plaintiff and the Defendant. This order naturally would only apply to furniture acquired since the marriage. Whatever was in the matrimonial home prior to the marriage would remain the sole property of the Defendant.

In respect to the Morris Oxford Motor Car I made no order. The evidence has disclosed that the Defendant, now a man stricken with diabetis, still gets around in this car acquired from as far back as 1971. It seems to me to be only fair that this state of affairs should remain undisturbed. In any event he waived any claim to the 8 acres at Fort Stewart in St. Mary. He made the Plaintiff a gift of this holding out of their savings. He should retain the use of the car for his comfort and solace.

If the parties cannot agree on the valuations in respect of the original holding at Long Road, and the furniture in the matrimonial home then the services of competant valuators should be secured. The costs of such valuators to be borne by the parties equally.

It is further ordered that the Husband/Defendant pay the costs of this trial when agreed or taxed.