C.A. Civil ORIGINATING SUMMONS — Declaration of Ownership sought — Property bought by mother — For convenience property transfer to mother, daughter and son in law as tenants in common and subsequently to mother and daughter as joint tenants — Morgan J on O/S held as mother entitled to full beneficial ownership of property. APPEAL DISMISSED

NB Comments of Carberry J re use of Originating Summons in this matter. S532-546 CPC. — Inappropriate.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42 of 1986

Civil Procedure (Observations of Carberry J re use of Originating Summons)

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	NOLA GOWE	PLAINTIFF/RESPONDENT
AND	FAY LURCH	DEFENDANT/APPELLANT

Mr. K. D. Knight and Mr. B. Samuels for appellant

Mr. E. H. Jones and Mr. R. S. Sinclair for respondent

October 5, 6, 7 and December 18, 1987

CAMPBELL, J.A.:

On 7th October, 1986 we delivered judgment dismissing the appeal and promised then to put our reasons in writing which promise is now implemented.

The matter came before the Court on an Originating Summons sometime in March 1983 seeking a declaration of ownership of property situated at No. 2 Caribbean Avenue, Kingston 10 in the parish of Saint Andrew registered at Volume 965 Folio 587 of the Register Book of Titles. The contestants are mother and daughter.

The facts found by the learned trial judge, Miss Morgan J, on the affidavits and viva voce evidence adduced, were that Mrs. Nola Gowe, the mother, then residing and working in the U.S.A., being minded to retire and to return to live in Jamaica, her homeland, solicited the assistance of one of her children namely, her married daughter Mrs. Fay Lurch to identify

a suitable residence and to represent her in the sale procedures culminating in the transfer to her of any such identified residence. It was agreed between mother and daughter that to facilitate the securing of a mortgage, and for that purpose only, her name together with the names of the daughter and the latter's husband would be entered on the registered transfer as the registered proprietors. A mortgage of $25,000.00 in favour of the said three persons was secured from Life of Jamaica Company Limited. Mr. Allan Deans, an Attorney-at-law, processed the mortgage on behalf of Life of Jamaica Company Limited. The transfer and mortgage were registered on March 22, 1979. The registered transfer of title was to the three persons as Tenants in Common. The deposit of £5,000.00 together with a further amount of £17,000.00, making a total of £22,000.00, was paid by the mother through her daughter, out of funds wholly provided by the mother. A further agreement was reached between mother and daughter that the latter who needed a secure tenancy would occupy the purchased premises and pay as rent therefor an amount equal to the monthly mortgage payment which was much less than the rent which the premises could command having regard to what the previous tenants were paying. To guard against her daughter's default in utilising the rent for the payment of the mortgage instalment, the mother required that the daughter should effect payment by Standing Order on her bank into which her emoluments from employment were paid. The mother was desirous of reducing the mortgage sum owing. She therefore remitted sums from the U.S.A. totalling $9,375.00 in reduction of the said mortgage. This sum was additional to the payments through her daughter's Standing Order. Consistent with the agreement that the names of her daughter and the latter's husband were entered on the transfer solely to facilitate the grant of the mortgage, Mr. Allan Lurch the daughter's husband secured a release from the mortgage in November 1980. The strategy

adopted to effect his release was by transfering his legal interest in the property to mother and daughter.

Mr. Allan Deans dealt with this release of mortgage. Apparently on this occasion he acted both for Life of Jamaica Company Limited and for the mortgagors. He effected a transfer of the registered title from the existing proprietors as tenants in common to mother and daughter as joint tenants on 25th November, 1980.

The mother returned to Jamaica in June, 1982. She resided with her daughter at the purchased premises. Relationship between mother and daughter steadily declined. The mother demanded that the daughter transfer to her the legal interest which she the daughter had acquired solely to facilitate the grant of the mortgage. The daughter refused to join in any such transfer. She strenuously denied the existence of any agreement whereunder she would be a mere legal transferee. She contended that the whole idea of purchasing a home originated with her. She had the means to provide the down-payment and the credit to obtain a mortgage. It was her mother who expressed a wish to join in the venture and was allowed to join as a tenant in common. Subsequently, on the release of Mr. Lurch as a mortgagor, she and her mother agreed to change and changed their estate in the property from tenants in common to a joint tenancy.

The learned trial judge roundly rejected the daughter's version. She adjudged the mother to be entitled to the full beneficial ownership of the property.

The daughter has appealed to this Court on the undermentioned grounds, namely:

> "1. That the learned trial judge failed to adequately or at all assess the affidavits of Mr. Allan Deans, Attorney-at-law, sworn to on the 18th day of September, 1985 and Mr. Allan Lurch sworn to on 26/6/85 as they would affect the intention of the Plaintiff/Respondent at the time the nature of the holding had

" been changed and the parties held the property as joint tenants between the Plaintiff/Respondent and the Defendant/ Appellant.

2. That the learned trial judge erred in her application of the law by (sic) the facts found by her.

3. That the learned trial judge wrongly exercised her discretion in favour of the Plaintiff/Respondent when she allowed costs to be awarded in favour of the Plaintiff/Respondent."

Before us Mr. Knight properly abandoned ground 3 and concentrated his submissions on ground 1. This he did because ground 2 depended on this Court making a favourable determination in his favour on ground 1.

The gist of Mr. Knight's submission is that the learned trial judge's finding that all payments towards the purchase price were made by Mrs. Gowe, did not foreclose Mrs. Lurch's right to a beneficial interest in the property because there was evidence contained in the affidavit of Messrs. Deans and Lurch, that Mrs. Gowe from the beginning of the purchase negotiation manifested a clear intention to benefit her daughter and this was made even more manifest in November 1980, when Mr. Lurch was relieved of the mortgage and deleted from the Title and she had an opportunity of having the Title changed from tenants in common to a transfer exclusively in her name but instead effected a transfer to herself and her daughter as joint tenants from the existing Tenants in Common. It was the further submission of Mr. Knight that the only reason why the learned trial judge failed to arrive at this conclusion is because she failed to adequately assess the affidavit evidence of Messrs. Deans and Lurch.

Mr. Deans in an affidavit dated September 18, 1985, deponed to facts which he said took place in 1979 and 1980. He deponed that as a member of the legal firm of O. G. Harding and Company he processed and registered a mortgage on the

property in question with Life of Jamaica Company Limited as mortgagee and Fay Lurch, Allan Lurch and Nola Gowe the tenants in common as mortgagors. The mortgage was registered on 22nd March, 1979. This aspect of the matter is not disputed. He however further deponed as hereunder:

> "6. That in the month of November 1980, all three parties namely Allan Lurch, Fay Lurch and Nola Gowe visited my office and the said Allan Lurch, stated that he wished to have the mortgage granted to him released and to transfer his share in the premises to Fay Lurch and Nola Gowe respectively.
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> 7. That it was agreed between Fay Lurch and Nola Gowe that the nature of the joint holding would be changed from Tenants in Common to that of Joint Tenants.
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> 8. That in the course of the aforesaid meeting I explained fully the nature of a joint tenancy holding to Mrs. Fay Lurch and Mrs. Nola Gowe including the right of survivorship entailed in that holding. That with their agreement the land was registered in the names of Fay Lurch and Nola Gowe as Joint Tenants on the 25th day of November, 1980."

Mrs. Gowe in her affidavit in reply to Mr. Dean's affidavit deponed as hereunder:

> "5. Relative to paragraphs 7 and 8 of the affidavit of Allan Deans I was completely unaware that the Document that I had signed would change the holding in premises situate at No. 2 Caribbean Avenue from Tenants in Common to Joint Tenants. I was informed by the Defendant that the documents were ready for signature and that we should both attend to sign.
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> 6. Further that on the day in question when I attended at the office of Mr. Allan Deans, Mr. Deans informed me that 'your daughter has already signed, all you have to do is sign here' and he indicated the section in which I should sign.
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> 7. There was no meeting as alleged by Mr. Deans between him, the Defendant and me, and I state emphatically that

> " the nature of the change of our status on the Title was never then or afterwards explained to me by Mr. Deans, and I was never invited to read the document which I had signed."

The affidavit of Mr. Lurch so far as is pertinent is as follows:

> "12. That the arrangements for the acquisition of premises situated at No. 2 Caribbean Avenue, Trafalgar Park, Kingston 10, Registered at Volume 965 Folio 587 was that Mrs. Nola Gowe would contribute as a Joint Owner. That Mrs. Lurch based on her salary at that time was unable to obtain a mortgage, so I volunteered to obtain a mortgage using my Insurance Policy with the Life of Jamaica Limited, as a collateral.
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> 13. That the clear understanding was that I would surrender my mortgage as soon as Mrs. Lurch was able to obtain a salary sufficient to obtain a mortgage and thereafter Mrs. Nola Gowe and Mrs. Fay Lurch would become sole Joint Owners."

The learned trial judge clearly considered these two affidavits and found as a fact that, contrary to what is stated in these affidavits relevant to the intention of Mrs. Gowe at the time of the acquisition of the property, she had not expressly or impliedly intended to share the beneficial ownership of the property with anyone.

The learned trial judge's finding in this regard is stated thus:

> "I find that as a result of the request of Life of Jamaica the names of the defendant and her husband, Allan, were added to the title as tenants in common to satisfy the requirements of the lending agency i.e. as convenience and not because the plaintiff desired to part with any of the beneficial interest. This is signified by the promptness of Allan in removing his name from the deed when requested. It is at this time that the names of plaintiff and defendant appear as joint tenants a matter to which I shall later refer."

Dealing specifically with the matter of the subsequent registration as joint tenants which necessarily involved a

consideration of paragraphs 7 and 8 of Mr. Dean's affidavit and Mrs. Gowe's answer thereto, the learned trial judge said thus:

> "On the Certificate of Title the names of plaintiff and defendant appear as joint tenants. The plaintiff says that when she came to Jamaica to sign the document she was of the belief that she was signing a document consequent on Allan Lurch releasing his obligation and leaving her daughter and herself to continue with the understanding as they had started i.e. that her name was on the title for convenience only. It was after she went back to U.S.A. and returned to Jamaica that she discovered that defendant's name was on as joint tenant. It was the request by plaintiff of the defendant to remove her name and abide by their initial agreement and her refusal which caused the deterioration in their relationship. I believe every word of this and find that plaintiff at no time intended to pass any beneficial interest to the defendant and that defendant's name was put on the Title for mere convenience."

I have set out the relevant parts of Mr. Deans' affidavit and the relevant parts of Mrs. Gowe's affidavit in answer thereto for the purpose of highlighting the fact that what the learned trial judge did in the above quoted abstract from her judgment was to consider Mrs. Gowe's answer to the facts deponed by Mr. Deans and Mr. Lurch. Neither Mrs. Gowe nor Mr. Deans was called for cross-examination on their respective affidavits. There was nothing in Mr. Deans' affidavit which rendered it more credible than Mrs. Gowe's. When Mrs. Gowe's affidavit evidence is considered in the context of the credible corroborative oral and documentary evidence tendered and admitted on her behalf in proof of the fact that Mrs. Lurch contributed nothing whatsoever to the purchase price of the property, it is not the least surprising that the learned trial judge unhesitatingly accepted her in preference to Mr. Deans on the issue as to whether she had evinced any intention in his presence to make her daughter a joint tenant or otherwise to confer on her a beneficial interest in the property. The evidence was overwhelmingly all one way in favour of Mrs. Gowe. The learned trial judge carefully

considered and analysed the evidence, and her reasoning cannot be faulted. She came to the right conclusion. For this reason the appeal was dismissed with costs to the respondents on October 7, 1987. I would add that I have read the draft judgment of Carberry, J.A. and I agree with it.

CARBERRY, J.A.:

We all agreed that this appeal should be dismissed, and I have had the opportunity of reading the draft judgment of Campbell, J.A. herein and I agree with it. I desire however to add two short comments of my own.

The proceedings in this case were begun by an Originating Summons, and unfortunately no copy of that summons was included in the bundle of documents filed in this appeal. I do not understand how this omission came about, but it adds point to the first comment that should be made.

The provisions in Jamaica governing the use of the Originating Summons are governed by the provisions of sections 532-546 of the Civil Procedure Code. We have not yet had made out here any of the modern provisions that appear in the U.K. White Book, in Order 5, Order 7, Order 8 and Order 28. In England an Originating Summons has a much wider scope than it does in Jamaica. It was not appropriate to use an originating

summons as a means of bringing this contentious dispute between mother and daughter before the court. It was obviously a situation in which oral evidence was likely to be necessary on either side, and presentation of the dispute by affidavits even if there might be cross-examination upon them was a clumsy and inappropriate method to be used. When the matter first came before the Judge it should have been dealt with under the provisions of section 539 of the Code, and directions given as to the trial of the questions arising therefrom, e.g. by ordering pleadings and the taking of viva voce evidence.

Even had we had the English provisions in force here, this was a case that ought to have been begun by writ: see the remarks of Buckley J in re Sir Lindsey Parkinson & Co. Ltd. Trust Deed [1965] 1 All E.R. 609 cited in the 1982 White Book at 5/4/1.

The other comment that I would make is to observe that the doctrines of resulting trust and presumption of advancement all raise presumptions that may be rebutted, and are most useful in a situation in which one or other of the parties have died and the court is faced with the problem of dealing with the situation left behind. In this situation however, both parties here were alive and able to give evidence, for what it was worth, of what they intended in the transactions that took place between them. In any event, as between mother and daughter no presumption of advancement arises, and it is useful to refer to the remarks of Jessell M.R. in Bennett v Bennett (1879) 10 Ch D 474.

BINGHAM, J.A. (Ag.):

I have read in draft the judgment prepared by my learned brother Campbell, J.A. setting out our reasons for the dismissal of this appeal. In this regard I entirely agree with his reasoning and there is nothing further that I can usefully add.