[2013] JMSC Civ.140

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 M00748

BETWEEN VALOMIA MONTROSE MOSS-WEIR APPLICANT/PETITIONER

AND NOEL WEIR RESPONDENT

Ms Faith Hall instructed by Fullerton Delisser & Co., for Applicant
Ms Tamara Powell-Francis instructed by Tamara Powell-Francis for the Respondent.

Heard on: 23rd April, 2013 and 6th December 2013

Notice of Application for Court Orders – Matrimonial property – Whether Applicant entitled to 100% of share and interest in property – What are respective interest of parties in property – Property (Rights of Spouses) Act – Common Intention - Construction

Coram: Morrison, J.

The uncomplicated facts may be tersely set forth

[1] The parties who met sometime in 1988, subsequently entered into the domestic arrangement of living together in 1989. They lived in the parish of St. Andrew with the Applicant being a Teacher and the Respondent an Electrical Engineer. Later, in March 1991, they exchanged nuptial vows and the marriage produced two children. Sadly, the fervour of matrimonial bliss lost its passion which resulted in their separation in or about March 2009. The marriage laboured under afflictions resulting in its final dissolution by the grant of a decree absolute, at the instance of the Applicant on August 28, 2012.

[2] Even before that noteworthy fact the parties had acquired and lived at Lot 228 Eltham View, Spanish Town, St. Catherine. They have occupied the matrimonial home since 1992 to the present.

[3] Irreconcilable differences between the parties which led to the irretrievable breakdown of their marriage have now spawned disagreement as to their respective proprietary share and interest in the subject matrimonial property.

THE ISSUES

[4] The legal issue created herein is how should the Property (Rights of Spouses) Act "PROSA" be applied in resolving the dispute.

THE LAW

[5] As has been observed above, the legislation which address the issue at hand is PROSA. In this Act the meaning of the family home is given by Section 2(1). It is described therein as "the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit" – (emphasis mine).

[6] It is evident then that the only bar to a dwelling-house being so regarded is one "...which is a gift to one spouse by a donor who intended that spouse alone to benefit". From this it follows that Lot 228 Eltham View, Spanish Town, St. Catherine is deemed to be the family home of the parties.

[7] The next question to be answered is each litigant's entitlement to the family home. The pertinent provisions here are Sections 6 and 7 of PROSA

[8] Section 6 (1) declares: "Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one half share of the family home –

(a) On the grant of a decree of dissolution of a marriage or the termination of cohabitation

(b) ...

(c) ..."

However, says Section 7(1), "where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one half of the family home, the Court may, upon Application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following –

(a) The family home was inherited by one spouse
(b) That the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
(c) That the marriage is of short duration."

The words, "Interested person" as used above means a spouse, or relevant child or any other person within whom the Court is satisfied has sufficient interest in the matter: See Section 7(2) (a) (b) and (c).

[9] In this case, it is the Respondent who is legislatively recognised as one of the group of persons who can apply to the Court to vary the equal share rule.

[10] Notwithstanding the circumstances that must obtain in order for each person to be entitled to the one-half share other dwelling-home, Section 10 allows, inter alia, for the parties to make an agreement with respect to the ownership and division of their property either in contemplation of their marriage to each other or of cohabitating, for the purpose of contracting out of the provisions of the Act.

[11] They are also allowed to make any such agreement with respect to the ownership and division of that property subject to its advisisibility and other relevant considerations.

However, I digress in that Section 10 is not relevant to these proceedings.

To rejoin, I now move to a consideration of the factors and nature of the contributions to be assessed which are to guide the Court in the exercise of its discretion to make orders for the division of property.

By Section 13, a spouse shall be entitled to apply to the Court for a division of property -

(a) On the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) ...

(c) Where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) ...

[12] In applying Section 13, Section 14 mandates that where a spouse applies to the Court for division of property the Court may –

(a) Make an order for the division of family home in accordance with Section 6 or 7, as the case may require; or

(b) ..."

However, by subsection 2 of Section 14, the factors referred to in subsection (1) are –

(a) The contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property ...

(b) ...

(c) ...

(d) ...

(e) ...

At Section 14 (3) the legal description, "contribution", means –

(a) The acquisition or creation of property including the payment of money for that purpose;

(b) The care of any relevant child ...,

(c) ...

(d) The giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) Enables the other spouse to acquire qualifications; or

(ii) Aids the other spouse in the carrying on of that spouse's occupation or business;

(e) The management of the household and the performance of household duties;

(f) The payment of money to maintain or increase the value of the property or part thereof;

(g) The performance of work or services in respect of the property or part thereof;

(h) The provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) The effect of any proposed order upon the earning capacity of either spouse.

[13] Lastly, by Section 14(4), doubt is dissolved by this section as to what constitutes a contribution: "For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution".

[14] Clearly, the whole ambit and gamut of the policy of this legislation is designed to recognise all efforts, material or non-material, which contribute to the acquisition, conservation and improvement of the family asset. It needs to be said that such contributions are gender neutral.

THE EVIDENCE

[15] The evidence in this case is comprised of four affidavits from the Applicant and two affidavits from the Respondent along with supporting documentation.

THE APPLICANT

[16] She depones to having made an application through the Jamaica Teachers Association (JTA) (to purchase property located at Lot 228, Eltham View, Spanish Town, St. Catherine ("the relevant property") registered at Volume 1231 Folio 234 of the Register Book of Titles. She exhibits a letter from the JTA dated July 30,

1990, attesting to the approval of the loan. She also exhibits a copy of the Duplicate Certificate of Title: See affidavit of June 13, 2011. Thereafter, she says, she applied to the National Housing Trust (NHT) as a single applicant for the said lot and that her application was approved. She attached a letter from the NHT, dated September 4, 1990, in proof of her assertion. Not insignificantly, she affirms that, "I place the name of the Respondent on the title because I thought banks and other lending institutions will look on my application more favourably if I want to apply for a loan against said title for the said land in the future".

[17] With unilateral purposiveness, she asserts, she paid the initial deposit on the purchase price for the said land. The balance of the purchase price was secured by way of mortgage from the NHT. Payment of the said mortgage, she dilates, "was facilitated by way of salary deductions from my wages". Exhibits were offered in respect of the initial deposit and of deductions from her salary pay slips. Emphatically and categorically and in captious language she declares that "the Respondent did not contribute to the deposit, closing cost or mortgage payment for the said property".

[18] Still further, this affiant, proclaims that improvement were made to the property and for which she paid all the costs. She reaffirms that "the Respondent never made any contributions to the deposit, closing costs, mortgage payments or improvements to property". However, she was to concede in a subsequent affidavit, dated September 24, 2012, that, "the Respondent has made some improvements on the property" but re-iterates that she was solely responsible for the majority of improvements done to the property. In addition, she refutes the assertion of the Respondent by advancing that "I also paid for the utilities and continue to pay school fees and other expenses for our two children along with being responsible for the maintenance and general upkeep of the property (sic)".

NOEL WEIR

[19] Yes, says this affiant, we "...took the decision jointly for the Applicant to use her office as teacher to obtain the loan. The application process did not allow a joint application by both of us and so the application was made solely by her". However,

answers this deponent, "...even though the applicant made a single application to the National Housing Trust this could not be done without the addition of my points to hers. At the time I worked with (Homelectrix) and earned more than the Applicant who did not have the requisite points nor could her salary carry the required amount to enable her to receive the loan on her own. I had acquired enough points to obtain the loan but because application to purchase the property was made through the Jamaica Teacher Association with which she worked her name was used on the documents".

[20] In typical traverse fashion this affiant denied the assembled array of the unilateral claims of the Applicant and deponed, first, that his name was placed on the duplicate certificate of title as both he and the Applicant contributed to the acquisition of the relevant property. Second, he proclaims, that the initial deposit was paid by both the Applicant and himself. This was made possible, he asserts, as they both had the sum of $300,000.00 which they took to the JTA Housing Co-operative Limited and got three times that amount to borrow from the entity. Following on that transaction with the Teachers' Cooperative that entity and the Jamaica Teachers' Association Co-operative Credit Union, "further monies were acquired totalling $41,000.00. The cheque was made out to the Applicant because she was the member of the JTA"

[21] Third, without denying that the mortgage payment were done through being deducted from the Applicant's salary, he remonstrates that his was facilitated through a lump sum payment in excess of $10,000.00 that was taken from his NHT refund and applied to the principal. Fourth, this deponent refuted the assertion of the Applicant by asserting that he contributed to the improvement of the property by purchasing building materials. He completed all the original grille and electrical work and to date is still purchasing furniture for the property. He also pays the property taxes for the property. Further he agreed to be responsible for the payments of the utilities and other household bills so as to enable the Applicant to deal with the mortgage payments. Still further and gratuitously, he purchased a motor car for the Applicant from the proceeds of his redundancy pay from his former employer, LS Duhaney.

ANALYSIS OF EVIDENCE

[22] The parties are dissonant in their conjunction of arguments and submissions. Generally speaking, the Applicant was able to support her claim with the aid of documents. Conversely, the Respondent was not able to do so, relying as he did on his credibility. In one telling reply under cross-examination this answer was given by him: "I have no proof, no receipts as the Applicant kept all of them". Still, it has to be said that despite the Respondent's explanation for the lack of documentary proof, he delivered himself with equable frankness. As to the Applicant, her evidence stoutly suggested, at first, that the Respondent had no inward monitor in the observation and performance of his connubial and financial expectations, as typified by her statement that, "he never made any contributions to the deposit, closing costs, mortgage payments or improvements to the property". However, later in re-examination, by her concession that, "yes, he made improvements to the property...", I am not reluctant to say that her evidence was given "with an eye towards the loaves and fishes", or in a word, opportunely.

[23] Let me now bring into relief the undisputed facts.

(a) The Applicant is a member of the JTA and as between them both she was the person who could have applied for housing through that entity.

(b) The lot which the applicant got was chosen by her and the Respondent together.

(c) The Applicant did not have all the money required for the initial deposit. Neither did the Respondent. The Applicant's name is the only name on the formal application to the JTA as, "It was only my name that could go on the application".

(d) While they lived together at Oakridge, according to the Applicant "we pooled our finances in the past to pay rent for Oakridge and at Wilsbury Avenue, Barbican".

(e) The Respondent was employed at the time of the Applicant's formal application to JTA.

(f) The housing development scheme from which the Applicant came to be chosen for the subject lot was a, "joint venture between the JTA and NHT in providing the mortgage though the process was initiated through the JTA", says the Applicant.

(g) The Applicant says she doubted her ability to repay the loan which accounts for the fact of her putting the Respondent name on the title as joint tenant.

(h) The Applicant agrees that she intended that the Respondent "should share in the mortgage payments". "He would pay for the mortgage if he gave back money towards other areas", dilates the Applicant.

(i) From a net salary of $2,000.00 per month in in 1990 say the Applicant, that was when she first started paying the mortgage, "it was $3,000.00 plus". Her salary was taxed with automatic deductions and from which she was also servicing two loans from the JTA and the NHT.

(j) The Applicant has agreed that the Respondent applied some of his earnings for the benefit of the household.

(k) The Applicant has agreed that, "yes, the intention was for us to share in the property".

(l) The Respondent contributed to the improvement of the property. He paid the utility bills as well as the property taxes.

[24] The areas of disagreement can be shortly stated. First, that the Respondent did not contribute to the deposit; the Respondent did not take care of the household expenses and the expenses of the children; that the Respondent has always been

responsible for the bills generated by the subject property, for payments of the bills pertaining thereto thereby giving the Applicant the financial space to take care of the mortgage payments; that the Respondent did not make any contributions towards the mortgage payments.

[25] In the final analysis I fail to see in the face of some pivotal admissions, how it is that the Applicant can maintain that from her scantling salary she was unilaterally able to assemble the initial deposit, engage the mortgage payments and undertake the costs of improvements done to the property. It defies the calculus of probabilities how she would have been able to do so on such a salary.

[26] When one stacks the stark admissions from the Applicant that she did not have all the money for the deposit; that she had some of the money that she used to join the Credit Union; that she does not remember how much she came up with; that they both started the joint account, then it challenges credibility how she was able to manoeuvre around such formidable financial obstacles without the input of the Respondent.

[27] If it is, as admitted by her, that their living arrangements prior to moving on the the subject property, saw them pooling their resources, why of a sudden did the Respondent recoil from his financial obligations? The Applicant's lack of a response to the above bolsters suspicion of a lack of candour on her part. By the above when taken in concert with the fact that she intended the Respondent to share in the property; that the Respondent was made a joint tenant to the property; that he took care of the utility bills albeit falteringly, that he undertook improvements to the property, I am led on to accept the Respondent as being the more credible of the two. I find that the Respondent did in fact make significant contributions according to the law toward the acquisition and maintenance of the property

[28] In every respect I find that the one-half share presumptive rule has not been displaced by the Applicant. Accordingly, on the facts and on a balance of probabilities when the standard of the law is applied thereto, the Claimant is not entitled to a 100% share in the property.

[29] The property is to be shared in half. The parties are to file the appropriate orders in concert with this judgment.