

NMLS.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV-01024

BETWEEN PETRONA CLARKE CLAIMANT
A N D RUDLEY CLARKE DEFENDANT

Heard: October 27, 2006 & January 18, 2007

Appearances

Miss Judith Clarke instructed by Judith M. Clarke and Co. for the claimant.

Miss Althea D. McBean instructed by Frater, Ennis & Gordon for the defendant.

Williams, J.

Background

Petrona and Rudleigh Clarke were involved in a relationship prior to 1970; their first child was born in that year. They migrated to Canada and were married there in 1974. In 1977 two (2) parcels of land were transferred to the defendant namely lots 7 and 14 Haughton Court in the parish of Hanover registered at Volume 1114 Folio 927 and volume 1114 Folio 934 respectively. The marriage broke down and they were divorced in 2003.

Petrona Clarke is claiming an interest in these properties registered in the name Rudley Clarke and has filed this action seeking a declaration of this interest.

There, having been no request for cross-examination of the parties, was a reliance on their affidavits. However, the affidavit in response from Mr. Clarke was filed and served days before the hearing and it was agreed so as to avoid any further delay that

Mrs. Clarke could be questioned on matters arising from this late affidavit. Further she was allowed to introduce into evidence a copy of a receipt got from Hanover Benefit Building Society

Her Story

Petrona Clarke asserted that in 1975, a decision was taken to return to Jamaica. She said her husband requested his father find them a plot of family land to construct a home for them but she objected and insisted they purchase land to build their matrimonial home.

Mr. Clarke then contacted his father and requested that he find a suitable lot of land which they could buy. Eventually two (2) lots were located in Haughton Court Valley, Hanover and she maintained they were purchased with monies from their joint pool of funds. She made no enquiries as to whether her name was on the titles for these lots. They had been together since she was sixteen (16) years old and “had shared everything since and had mutually determined that the properties were acquired for their joint benefit.”

Mrs. Clarke went on to assert that construction on their matrimonial home was on the lot numbered 7 and commenced while they were still residing in Canada.

She insisted that the construction was financed from their joint pool of funds and by way of two (2) mortgages from the Hanover Benefit Building Society.

When the house was completed, they returned to Jamaica in 1982.

While here, they purchased a bus which was to be operated as a public passenger vehicle. The deposit for this bus she said came from her father, a further sum from sale

of her motor vehicle in Canada and the balance from a loan obtained from the Bank of Nova Scotia Jamaica Limited.

The venture failed and by 1984 they could no longer afford to operate the bus despite the obtaining of other loans.

A decision was made to return to Canada and monies had to be borrowed from her husband's brother to repay the loans. One of the lots – No. 14 was transferred to the brother as security to be re-conveyed to the defendant upon repayment of the loan.

This was done in 2001, after they had separated.

Upon returning to Canada the home was rented out with the proceeds being paid to the Hanover Benefit Building Society, to assist in repayment of the mortgage.

In 1988 Mr. Clarke attempted to sell the matrimonial home but she advised the auctioneer of her interest and the sale was stopped.

The parties separated in 1995. Proceeds from rental were to be collected by the defendant's sister and used to pay mortgage. Her efforts to get an account as to the proceeds of the rental proved futile. Her enquiries as to the status of the mortgage revealed that the mortgage was in arrears. She repaid this mortgage from her personal funds.

In 2001 she made repairs to the home.

In response to questions put to her, Mrs. Clarke explained the her weekly earnings was Canadian \$500.00 as a cook in a Salvation Army nursing home. She estimated her husband's earnings at the time was around Canadian \$700.00 - \$800.00. She insisted construction of the house started in 1975 – 1976; after the birth of her son in 1974.

She agreed a Basil Clarke effected repairs to the house for which he was paid by way of a cheque drawn on their joint account which she personally handed over.

She said that the house has been rented continually for ten years and she knew this based on what she had seen on her visits and what she had been told.

She had locked off a part of the house for the benefit of her children who would have a place to stay when they visited.

Further she admitted seeing the defendant doing some renovation around the house – though she claims they were minor in nature.

Under cross-examination she clarified that for her work at the nursing home she was paid a flat weekly rate of \$500.00. She agreed that Basil Clarke did repairs to the house after hurricane Gilbert. She knows of no Rupert Brown and had no knowledge of his doing repairs to the house.

She finally explained that the house was rented to at least three (3) or four (4) different tenants. The separation she had made in the house had been done some six (6) years ago.

His Story

Mr. Clarke agreed they were married in 1974 after migrating to Canada. He also agreed they were divorced in 2003. These are perhaps the only basic facts on which the parties are now agreed.

While agreeing she worked at the Salvation Army, he said she earned Canadian \$120.00 per week whereas he owned and operated a truck purchased with money given him by his father. From this he earned Canadian \$4000.00 per month.

His recollection is that the properties now in dispute were bought by his father in 1972 with monies earned as a farmer. He also stated that it was his father who commenced construction of a house on lot 7 in or around 1972.

When his father became ill in or around 1976 the title had not been received by him from the person who sold him the property. Mr. Clarke said his father wished for him, Rudley, to put his name on the titles on condition that he would keep the lands in the family. When his father died in 1976, the house was partially completed. Mr. Clarke said he completed construction from his personal funds and from a mortgage obtained from Hanover Benefit Building Society in 1979. The mortgage payments were made solely by him and his wife made payments only on his behalf. However, she had receipts issued in her name and would not give them to him. He never informed the claimant that the land would belong to both of them as he wished to fulfill his father's desire that the lands remain with the family.

He is in agreement that they returned to Jamaica in 1983, lived in the house and tried to operate a bus. However, his wife made no contribution either to the purchase or Maintenance of the bus. The venture did indeed prove not profitable and they were forced to return to Canada.

He is also in agreement that lot 14 was transferred to his brother as security for a loan to repay the outstanding mortgage.

He agrees that Bill Clarke did repairs in 1989 but say the funds for this was solely from his personal fund. He said the claimant did in fact partition part of the house while the other part was rented. However, due to behaviour of the claimant's family the premises is vacant and he is unable to have it rented.

The house was further repaired in 2005 by Mr. Rupert Brown. Finally, he said his now ex-wife had no need to repay any mortgage as he did the repayments himself.

Documentary Evidence

In matters of this nature there is often a paucity of documentary evidence. However, in this case both parties have relied on documents which are largely unchallenged and some of these documents merit separate mention.

Mrs. Clarke exhibits the titles for the properties. They were clearly registered as being transferred from Rellimco Ltd. to Rudley Clarke in 1977. As regards lot #7 there were registered mortgages obtained from Hanover Benefit Building Society in 1979, 1981 and 1982 which were all discharged in 1999.

As regards lot #14 there were various mortgages from Bank of Nova Scotia endorsed on it – in 1982, 1983 and 1984, which were discharged within months of them being obtained.

In 1986 this property was indeed transferred to Hugh Clarke in consideration of \$10,000.00 and re transferred to the defendant in 2001.

She also exhibited a copy of a letter written to Mr. Clarke in 1988 from an auctioneer who had been apparently authorized by the defendant to sell the house on the property at lot #7.

Finally she exhibited a receipt evidencing repayment of the mortgage in 1996 in the amount of \$18,420.06.

Mr. Clarke exhibited bills relating to repairs done on the house in 1989 and 2005 by Basil Clarke and Mr. Rupert Brown respectively. These bills do not bear the dates of

payment and are in pristine condition. The bill for repairs from Mr. Brown includes such items as maintaining the yard by clearing, watchman pay and for the maintenance man.

The submissions

For the claimant Miss Clarke has urged the court to find the claimant's account of the facts far more credible. She has highlighted that Mrs. Clarke is able to say with precision that certain events coincided with such happenings as the year of her children's birth or the passage of hurricane Gilbert, but the documentary data supplied enhance her credibility. She pointed to the endorsements on the certificates of title as significant as both were issued in 1975 with transfers to the defendant in 1977. This she opines renders untruthful the defendant's claim that his father purchased the property in 1972. She also notes the total disregard for his father's alleged desire that the property remain in the family when he attempted to sell the house in 1988.

She urged the court to accept the claimant's claim that the land was acquired to build a matrimonial home at a time when they intended to resettle and invest here in Jamaica.

Further as regards the contributions towards acquisition of the property, Miss Clarke points to the endorsements on the title; which supports the claimant's assertions that there was more than one mortgage; and the receipt from Hanover Benefit Building Society. These bits of evidence she urges proves that the claimant did pay off the mortgage and the defendant's claim she had nothing to do with the mortgage must be disbelieved.

Thus Miss Clarke urges that the claimant's evidence should be accepted as to how, when and for what purposes both properties were acquired. The inescapable

inference from the conduct as described by the claimant must be that at the time of acquisition of both properties it was their mutual intention that the properties were acquired for their joint benefit.

The case of **Forrest v. Forrest SCCA 78/93** is relied on for establishing the principle that the intention is to be determined as from the time of acquisition.

Dicta in **Prestwidge v. Prestwidge SCCA 60/1999** is relied on for establishing the principle that once the parties have acquired the property by their joint efforts intended as a continuing provision for them both, the proper inference is that it belongs to them both, no matter it stands in the name of one only.

She submits ultimately that the claimant is entitled to one-half of the beneficial interest in both properties. Mr. Clarke should be found liable for one-half the amounts which were paid to clear up the mortgage with interest.

Finally she concludes the defendant should be called upon for an account of the rental collected over the years.

For the defendant Miss McBean has urged the court to note that the claimant has failed to provide any evidence of the amounts paid for the deposit towards the acquisition of the properties nor has she stated the amount the properties were purchased for. This she says lends credence to the defendant's position that the claimant had nothing to do with the process. As regards the claimant's assertion that the purchase was from a joint account Miss McBean points out there is no reference to what form it took, how much it was, where it was held and no evidence as to the source of these funds. She referred to the following cases for guidance as to the approach this court should take in determining

the issues:- **Harris v. Harris [1983] 19 JLR 319; Jones v. Maynard [1951] 1 All ER 802; Azan v. Azan [1988] 25 JLR 301.**

She urges the court to accept the defendant's evidence and find there was no common intention for the claimant to have an interest in the properties.

Hence the claimant cannot be found to have acted to her detriment by doing things pursuant to a non-existent interest.

Miss McBean again points to the absence of any documentary evidence to support the claimant's assertion that she had made contributions to the mortgage. Miss McBean also points to the fact that there is a mere assertion that the claimant made repairs to the house – no figure is given and no supporting documentation.

The court is asked to find the claimant to be not a credible witness and her testimony should not be relied on as aspects of it are contradictory.

The court is urged to find, on a balance of probabilities, the defendant's account to be the truth.

The case of **Allen v. Allen Supreme Court Suit No. E. 297/1991** is pointed to as instructive. The claimant in that case was held to be entitled to one fifth share of a property registered in the name of his wife alone. He was able to provide the court with proof of payments, towards the deposit as well as the mortgage made by him. Further he had cleared off the mortgage debt. Miss McLean submits his case was far stronger than the claimant's in this case.

She concludes therefore that the defendant ought to be declared the sole legal and equitable owner of both properties.

The issue

In determining if the claimant has an interest in the properties, the paramount issue in law is whether at the time of the acquisition there was any agreement, expressed or implied as to what their respective shares were.

In the absence of any expressed agreement factors relating to the acquisition of the properties will have to be considered. The most important consideration relates to questions as to the purpose for which the properties were acquired; the source of the funding for the purchase and what contributions if any were made by the parties to the purchase price for the properties and the construction of the house.

The Law

Mr. Justice Forte, J.A., as he then was, stated clearly the problems to be expected in matters such as this and how they are to be approached in **Azan v. Azan (1988) 25 JLR 301**. At page 302 paragraphs F & G he had this to say.

“The determination of the beneficial interest in property of one party to a marriage, where that property is registered in the name of the other party, is in most cases difficult to resolve because of the nature of the relationship of husband and wife, which in the days when the property is acquired usually enjoys a degree of trust which results in the acceptance of verbal or implied promises made without any consideration of any possible dispute arising thereafter. In spite of this, the law does not make any presumption of beneficial interest because of the marital relationship, and

therefore, the party in whom the legal estate is not vested must resort to the law of trust to establish a beneficial interest.”

After restating the words of Lord Diplock in the case of **Gissing v. Gissing** [1970] 2 All ER 780 at page 789; and that of Sir Nicholas Browne – Wilkinson in the case of **Grant v. Edwards** [1986] 2 All ER 426 at page 237, Mr. Justice Forte stated:

“In determining whether there was a common intention to share the beneficial interest an express agreement would be sufficient, however, where, as in most cases there is no such agreement the common intention of the parties may be inferred from their words or conduct.....”

..... Substantial contributions to the acquisition of the property, made by the party not vested with the legal estate is evidence upon which an inference may be drawn that the parties had a common intention to share in the beneficial interest of the property.”

In the instant case the claimant asserts the monies to purchase the property came from a joint pool of their savings. She also asserts she made her own direct contributions to the mortgage payments.

The words of Lord Denning M.R. in **Nixon v. Nixon** 1969 3 All ER 1133 at page 1137 prove instructive:-

“When husband and wife by their joint efforts acquire property which is intended to be a continuing provision for them both for their future, such as the matrimonial home or the furniture in it the

proper inference it that it belongs to them but jointly, no matter that it stands in the name of one only. It is sometimes a question of what is the extent of their respective interest, but if there is no other appropriate decision, the proper inference is that they hold in equal shares.”

In **Joseph v. Joseph RMCA 13/84** unrep. Delivered in October 1985, Carey J.A. declared:-

“In the absence of express agreement on the part of the spouses the court will preserve or impute that having jointly contributed they intended to share equally. That proportion will be altered only where either share can be precisely ascertained or the contribution is trifling.”

As regards the question of mortgage payments in **Prestwidge v. Prestwidge SCCA 60/1999** Mr. Justice Bingham J.A. summed up the law to be applied thus:-

“In any event as the decided case show, unequal contributions towards meeting the mortgage installments would not alter the beneficial interest of the parties where the common intention of the parties at the acquisition of the property establishes that it was intended to be a continuing provision for them during their joint lives.

Finally the dictum of Mr. Justice Wolfe J.A, as he then was in **Forrest v. Forrest SCCA 78/93** proves relevant.

Once the interests of the parties are defined at the time of acquisition it is my view that the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore diminish or increase the proportions in which the parties intended to hold at the time of acquisition. In the redemption of the mortgage the respondent must be regarded as having made a loan to the appellant to the extent of the proportions of his interest in the property. The amount is a debt recoverable on the order for account to be taken made by the judge.

One other matter which needs be considered is that of the law as it relates to repairs being made. Lord Reid in **Pettit v. Pettit [1969] 2 All ER 385 at page 390** had this to say on the issue.

“But it is, I think proper to consider whether, without departing from the principles of the common law we can give effect to the view that, even where there is in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should not

there not be a similar presumption where one spouse has contributed to the improvement of the property of the other?..."

.....The improvement is made for the common enjoyment of both spouses during the marriage....

But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.

Application of the law to the facts as found:-

As is to be expected in matters of this nature, a resolution will firstly involve consideration of the credibility of the parties.

Their memories and recollections are surely clouded not only by the passage of time but the fact that their interests seem now diametrically opposed especially given the events which occurred resulting in an obviously acrimonious breakdown in their marriage. They are no longer the loving couple they were thirty (30) years ago when they were focused on building a life together with no thought to a parting of ways.

It is against this background that their credibility must be assessed and their stories considered in an effort to determine on a balance of probabilities where the truth lies.

For what purpose was these properties acquired? Was it to build a matrimonial home and to provide an investment for the future of the family?. Was it the defendant's

family lands which were to remain as such given the wishes of his sick father?. Was the house constructed thereon, built by a couple together as a continuing provision for their growing family?. Was it built by the defendant's father and the defendant with the intention that it remain in that family?.

It is recognized that much of the claimant's assertions as to the purchase of the property is not supported by figures or documentary evidence. She baldly states that they decided to purchase two (2) lots and sent money from their joint pool of funds to the defendant's father and her sister to pay for the lots.

The defendant says the lots were purchased by his father. He too does not provide details as to the purchase price.

Given my recognition earlier of the difficulties involved in relying on either side providing accurate recollections and reliable details as to what happened at the time of acquisition, I find my decision must be guided by an independent source – the documentary evidence.

The titles to these properties therefore prove enlightening. The endorsements thereon speak to the property being transferred to Mr. Clarke in 1977 from a Rellimco Limited – a company which was proprietor of the estates in fee simple. This company's ownership of these properties were registered in June of 1975. In the absence of any further explanation, how then can Mr. Clarke's claim that the properties were purchased by his father from 1972 be accepted?

These endorsements further cast doubt on his assertion that in 1976 his father claimed not to have received the title from the person who sold him the property and therefore he was to have his name i.e Rudley's name placed on the title. Without more,

in the face of the endorsements on these titles, there seems to be more credence to the assertions of the claimant's.

It is also curious that some twelve (12) years after his father's death the defendant should have sought to part with the family asset. The letter exhibited by the claimant show that from then she felt she had an interest in the property and the auctioneer was forced to question the authority of the defendant to sell the house.

It is true that the claimant has failed to provide details or proof as to how much the property cost, what was the deposit paid and as to the joint pool of funds. The endorsement on the title do support her assertion that more than one (1) mortgage was obtained to construct the home.

The receipt exhibited from the Hanover Benefit Building Society supports her assertions that she did in fact have something to do with the payment of mortgage. The fact that this payment was made after they were separated, to my mind points to the fact that she had the belief she had an interest in the property which she was protecting.

As to the question of repairs, I accept both parties may have effected such over the years to preserve their interest. The claimant has not been able to provide the court with evidence as to the exact amounts she expended – she refers to using insurance money at one point.

Mr. Clarke on the other hand exhibits bills to support his claims. These are bills not receipts and as such they provide no indication as to when these monies were paid. It is noted the bill from Bill Clarke refers to repairs from 1989 and is not dated as to when it was signed. Given its pristine nature and the fact that Mr. Clarke's affidavit to which it is attached is dated October 24, 2006, one has to question when it was in fact signed by Mr.

Clarke. This is especially interesting given the evidence that Mr. Clarke is now deceased although there was no evidence as to when he died.

The bill from Mr. Brown cannot be relied upon to my mind especially since they include items not related to repairs.

On the balance of probabilities, I accept the claimant's assertions as to how these properties were acquired. I find that there was a common intention at the time of the acquisition for these properties that the home was to be the matrimonial home and the other property a family investment. I find that there existed a common intention that she have a beneficial interest in the properties. She contributed to the acquisition of the properties from her weekly earnings through the common pool of funds they shared. She continued to contribute to the payment of the mortgage and to expend monies to repair the home.

Applying the well established principles of law therefore, I find the claimant is entitled to one half beneficial interest in both properties.

Neither side presented satisfactory evidence as regard the repairs effected to disturb this determination. Further the mortgage payments she made becomes a debt to be recovered.

There will be judgment for the claimant.

It is hereby declared that:-

1. The claimant is entitled to a one half beneficial interest in the matrimonial home at lot 7 Haughton Court Valley in the parish of Hanover registered at Volume 114 Folio 927 of the Register Book of Titles.

2. The claimant is entitled to one half beneficial interest in the land at Lot 14 Haughton Court Valley in the parish of Hanover registered at Volume 114 Folio 934 of the Register Book of Titles.
3. The defendant holds the said one half shares in the said properties on trust for the claimant.

It is ordered that:-

1. There be valuations of both properties by a reputable valuator to be appointed by the Registrar of the Supreme Court, if one cannot be agreed between the parties.
2. The cost of such valuation shall be borne equally between the parties.
3. Either party shall be entitled to purchase the share of the other party within six (6) months of the said valuations in respect to both properties failing which the property shall be sold at public auction or private treaty and the net proceeds of sale divided equally between the parties.
4. The defendant shall repay the claimant the sum of nine thousand two hundred and ten dollars and six cents (\$9210.06) being one half of the amount paid by the claimant to settle the mortgage debt in March 1996 with interest thereon at the rate of 6% per annum from April 1996 to today's date.
5. The claimant is entitled to deduct the said sum owed from the proceeds of the defendant's share of the properties

6. Shall either party fail or refuse to sign any document necessary to give effect to the orders herein, the Registrar of the Supreme Court is hereby empowered to sign same.
7. The defendant is to give account of all rentals collected from the house on the property known as Lot #7 from 1995 to present time.
8. Cost to the claimant to be taxed if not greed.
9. Liberty to apply.