[2014] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**PATSY POWELL**	**APPELLANT**
AND	**COURTNEY POWELL**	**RESPONDENT**

Miss Audrey Clarke instructed by Judith M Clarke & Co for the appellant

Ewan Thompson for the respondent

24 September 2013 and 21 February 2014

MORRISON JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[3] Whatever is attached to the soil becomes part of it. That principle has been established in the law of real property for centuries and was recognised in **Minshall v Lloyd** (1837) 2 M & W 450 at page 459. In the present case, Mr Courtney Powell, claims that he and his wife, Mrs Patsy Powell, together constructed a concrete house on land belonging to Mrs Powell. He asserts that the premises became their family home for the purposes of the Property (Rights of Spouses) Act (the PROSA). How should the court apply the principle, mentioned above, in determining what interest, if any, Mr Powell has in the premises, in light of the provisions of the PROSA?

[4] That is the main question to be decided in this appeal. The learned trial judge ruled in that situation, that Mr Powell obtained no interest in the land but was entitled to a "fifty percent share of the family home". Mrs Powell is aggrieved by that ruling and by the learned judge's order that the house should be valued and that Mrs Powell should pay to Mr Powell, the value of his half interest in it. Mrs Powell has therefore, appealed against the judgment. She asserts that the learned judge erred in a number of her findings of fact, including the finding that Mrs Powell was the sole owner of the land. Mrs Powell's case was that she was not the sole owner.

The orders made

[5] The learned trial judge made the following orders:

> "1. The Claimant is entitled to a fifty percent share in the family home situated at Exton District, Junction, in the parish of Saint Elizabeth;

2. The family home is to be valued by a reputable valuator, agreed on by the parties with instructions that the house and the land are to be separately valued and failing such agreement, by a valuator appointed by the Registrar of the Supreme Court;

3. The cost of the valuation is to be borne equally by the parties;

4. The Defendant is to pay to the Claimant the value of his half interest in the house only, within ninety (90) days of receipt of the valuation report;

5. The valuator is also to include in the valuation report an assessment of what the market rate for rental should be for the period 29th November 2008, to December 17, 2009, the date on which the parties were to have attended to take judgment in this matter but failed to do so and the Claimant is to be credited with that sum when his share of the family home is calculated;

6. The Defendant is to pay to the Claimant the value of his half share in the 1990 Toyota Camry motor car which is jointly owned on their agreement as to its current market value;

7. There is no order to costs;

8. Liberty to apply."

Grounds of appeal

[6] Mrs Powell's grounds of appeal are as follows:

"1. The Learned Judge erred in finding that the dwelling house was wholly owned by the both parties, constructed on land wholly owned by the Defendant [Mr Powell].

2. The Learned Judge erred in finding that the subject property satisfied the definition of 'family home' under the provisions of the Property Rights of Spouses Act.

3. The Learned Judge had no or no sufficient basis upon which to find that there was in existence documents/data evidencing a gift to the Defendant of a demarcated portion of the subject land.

4. The learned Judge erred in finding that the Defendant's sister had no interest in the dwelling house.

5. The Learned Judge erred in her finding that the Claimant was entitled to a **fifty percent (50%)** share of the dwelling house and that there were no such circumstances as could or ought to move the court to alter the fifty-fifty (50-50) rule. **N.B.** This having regard to her findings of fact that the house was started by the Defendant pre-maritally and that the Defendant's sister/relatives contributed financially.

6. The Learned Judge erred in finding that the Claimant was entitled to recover occupation/rent from the Defendant.

7. The learned Judge erred in making the Order mandating that the defendant purchase the Claimant's share of the dwelling house within **ninety (90)** days of valuation which order is unreasonable having regard to the absence of evidence to establish her ability or desire to do so." (Emphasis as in original)

The background facts

[7] There is no dispute that before their marriage and before they came to live together, Mrs Powell had occupied the parcel of land in dispute and had started the construction of a structure thereon. She had had some concrete blocks laid as part of that structure. It does not appear, however, that it was an extensive structure. Mr Powell testified that she had laid about four layers of blocks up to the time of their wedding.

[8] She testified that her stepfather, Mr John Chambers, had given her that parcel of land. Mr Chambers, in turn, testified that the parcel was a portion of a larger plot that he had bought from his sister-in-law, and for which he had received a common law title. He said that he had not given Mrs Powell a title for the parcel that he had given to her.

[9] The Powells, after they got married, built a structure on the land. It included, but expanded upon the structure started by Mrs Powell. They did so with the help of family members and others. They eventually occupied the house until Mrs Powell excluded Mr Powell therefrom. There were no disputes as to fact that the parties continued construction while they lived in the house and that, although they did not have any children, it was their common intention that the house was to be used as the place where they would live together and raise their children as a family. The marriage lasted from 1999 to 2005 when Mrs Powell excluded Mr Powell from the premises.

[10] There were disputes as to fact concerning the following:

a. what Mr Chambers had given to Mrs Powell;

b. whether he had given it to her alone or jointly with her sister;

c. whether she had shown Mr Powell a title in her name, to that parcel of land; and

d. whether he had contributed in any significant way to the construction of the house.

[11] The learned trial judge found in favour of Mr Powell in respect of all these disputes. She did not find Mrs Powell to be a reliable witness in respect of the matters in issue. She believed Mr Powell's testimony that Mrs Powell had shown him a document concerning the land and had convinced him that she was the sole owner thereof. She believed that Mr Powell had contributed significantly to the construction of the house and that he was not the worthless lay-about that Mrs Powell categorised him to be. The learned trial judge found that there was ample evidence that the premises comprised the family home. She further found that as Mrs Powell was the sole owner of the land before the marriage, Mr Powell was only entitled to an interest in the house.

The submissions

[12] Miss Clarke, on behalf of Mrs Powell, argued that the emphasis that the learned trial judge placed on Mr Powell's evidence that his wife had once shown him a piece of paper amounting to a title to the land, was misplaced. She argued that the effect of the Statute of Frauds prevented reliance on such evidence. In the circumstances, the evidence was that the land did not wholly belong to Mrs Powell and therefore was not capable of being the family home for the purposes of section 6 of the PROSA.

[13] Learned counsel argued that it would not be permissible for Mr Powell to rely on any other provision of the PROSA in the event that the property could not be adjudged to be the family home. She argued that the case had been advanced and contested on that basis and Mr Powell could not seek to "fall-back" on the provisions of section

14(1(b) of the PROSA (concerning property other than the family home) after it had been demonstrated that section 6 was not available to him.

[14] Mr Thompson, on behalf of Mr Powell, stressed the fact that the learned trial judge had arrived at her decision based on a number of findings of fact. It is along those lines, Mr Thompson submitted, that the learned trial judge found that Mrs Powell did have documentary evidence of her ownership of the land and that she did show the document to Mr Powell. Those findings, he argued, essentially rejected Mrs Powell's evidence that she was not the sole owner of the land in question at the time of the marriage.

[15] Even if it were wrong to find that Mrs Powell held documentary proof of ownership of the land, Mr Thompson submitted, the evidence supported a finding that Mrs Powell would have been able to rely on "the equitable principle of promissory (or proprietary) estoppel...in any action by Mr Chambers against her". It was therefore permissible, learned counsel argued, for the learned trial judge to make the orders that she did.

The analysis

[16] It is a precondition for any finding that property constitutes the family home, that it should be a:

> "...dwelling-house that is wholly owned by either or both of the spouses and used...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..."

That requirement is part of the definition of "family home" as set out in section 2 of the PROSA. A party claiming an equal entitlement to the family home under section 6 of the PROSA must first satisfy that requirement.

[17] Miss Clarke submitted that the requirement of ownership of the family home cannot be satisfied in the absence of a paper title or a possessory title based on "adverse possession". It may be rash to agree entirely with this latter submission. In light of the impact of section 4 of the Statute of Frauds 1677, such a submission must, however, have a sympathetic ear. Section 4 states, in part, as follows:

> "...noe action shall be brought... (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them...unlesse the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized."

[18] To ascribe title to land on the basis of what a witness states that he saw on a document purporting to be a common law title, would not be consistent with the rules of evidence or the law relating to title. This, however, may broadly be said to be what the learned trial judge did. She stated, in part, at page 3 of the judgment, that Mrs Powell had documentary proof of ownership of her land. She said:

> "All of this [evidence as to the construction on the land] suggests that there had been a division of the land and on a balance of probabilities, I find that each sister had her own portion of land and that the Defendant [Mrs Powell] had documentary proof of ownership of her portion of the land and did show the document to the Claimant [Mr Powell]. The Claimant was unable to produce the document in this trial. Mr. Chambers also did not produce his common law title to the court but I accept that he did have one."

[19] It may fairly be said that the learned trial judge, in the context of the judgment, was not only relying on the documentary proof of title to the land but also on two other important bits of evidence. Firstly, there was Mrs Powell's occupation of the land both before and after her marriage to Mr Powell and secondly, Mr Chambers' testimony that he had given land to Mrs Powell. These would be sufficient evidence of a possessory title to the land being vested in Mrs Powell as sole proprietor. In those circumstances, the ownership requirement of the definition of family home, that the dwelling-house should be wholly owned by one or both of the spouses, would have been satisfied for the purposes of this claim.

[20] Although there were disputes as to fact on a number of the issues regarding title to the land, there was evidence on which the learned trial judge could have come to the finding that she did. She did so after seeing and hearing the witnesses and assessing their credibility. An appellate court is loath to disturb findings of fact in those circumstances (see **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303). There is no reason to differ from the learned trial judge on those issues or on her conclusion thereon.

[21] The learned trial judge found, as an issue of fact, that both parties had contributed to the construction of a concrete structure on land in which Mrs Powell held the sole legal interest. If a concrete structure, which cannot be removed as a whole, is placed on land wholly owned by Mrs Powell, then according to the principle stated in **Minshall v Lloyd**, the structure becomes Mrs Powell's property as well. It follows,

therefore, that the learned trial judge was in error in finding that the structure was wholly owned by both Mr and Mrs Powell whilst being located on land wholly owned by Mrs Powell, as she did at page 6 of her judgment:

> "Returning to the definition of family home in section 2 of the PRSA, I find that the Claimant has established on the evidence presented, that the dwelling house **is wholly owned by both parties**, constructed on land wholly owned by the Defendant and was used habitually by them as the only family residence." (Emphasis supplied)

[22] The error is not fatal to the judgment however. The evidence of the sole ownership of the land by Mrs Powell and the parties' use of the premises, including the dwelling house, was sufficient for the learned trial judge to find that this was the family home for the purposes of the PROSA. That finding allowed her to allocate entitlement thereto between the parties, according to sections 6 and 7 of the PROSA.

[23] Section 6, as is now well known, prescribes that, barring special circumstances, each spouse is entitled to one-half of the interest in the family home. Section 7 stipulates that, upon application by an interested party, the court may depart, in certain specified circumstances, from the requirement of equal division. Section 7(1)(b) allows for departure from the principle of equal entitlement, in the event that "the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation".

[24] The learned trial judge decided that section 7 did not apply in this case. The finding that sole ownership of the land was vested in Mrs Powell was, however, in effect, an invocation of the exception created by section 7(1)(b). This results in an

inconsistency but, there is no counter-appeal by Mr Powell and therefore the learned trial judge's allocation must stand.

[25] It must be noted that the learned trial judge rejected any attempt to grant an equitable remedy to Mr Powell. She stated that the issue had not been raised until closing submissions and therefore could not have been entertained at that stage. As it was not argued below, and there is no counter-notice of appeal in this regard, Mr Powell cannot advance the issue of an equitable remedy before this court.

[26] Based on all the above, despite the errors made by the learned trial judge, she was entitled to make the findings of fact that she did. There was no miscarriage of justice in these findings or in the conclusions thereon. The judgment of the court below should, therefore, stand. The appeal should be dismissed with costs to the respondent to be taxed if not agreed.

[27] Before concluding this judgment, it should be noted that Mrs Powell, in addition to the grounds concerning the allocation of an interest in the house to Mr Powell, made two additional complaints. They are contained in grounds of appeal numbered 6 and 7:

> "6. The Learned Judge erred in finding that the Claimant was entitled to recover occupation/rent [sic] from the Defendant.
>
> 7. The learned Judge erred in making the Order mandating that the defendant [Mrs Powell] purchase the Claimant's [Mr Powell's] share of the dwelling house within **ninety (90) days** of valuation which order is unreasonable having regard to the absence of evidence to establish her ability or desire to do so." (Emphasis as in original)

[28] Miss Clarke, perhaps rightly, did not make any submissions about these grounds. Indeed, they are without merit. Section 23 of the PROSA gives the court wide powers to order the sale of property, the partition and vesting of property and the payment of a sum of money by one spouse to the other. In addition, there is ample precedent for the court ordering one spouse, who has excluded the other from the matrimonial home, to pay occupation rent to the excluded spouse. The learned trial judge was entitled, in the face of the evidence that Mrs Powell had excluded Mr Powell from the family home, to order the payment of occupation rent. She ordered that that rental should be ascertained by professionals. Her order, in this regard, cannot be faulted.

[29] It is not unusual for the court, in cases such as these, to give the spouse in possession of the former matrimonial home an option to purchase the former matrimonial home. These orders are sometimes supplemented by orders allowing for sale on the open market in the event that the spouse given the option either refuses or is unable to purchase the remaining interest in the property. This was not done in this case, but that is not a fatal flaw in the judgment. The situation may be easily resolved. In the event that Mrs Powell is either unwilling or unable to purchase Mr Powell's interest, then she could apply to the court for directions as to the steps to be taken thereafter. It is also to be noted that the learned trial judge gave liberty to apply. That order would have allowed such an application to be made.

Conclusion

[30] The learned trial judge's finding that Mr Powell had an interest in the dwelling-house, which is a fixture, without having an interest in the land to which it is affixed, is

not consistent with the principle that what is affixed to the soil becomes part of it. Her finding that Mrs Powell is the sole owner of the land would, however, allow a finding that the property was the family home for the purposes of the PROSA. The learned trial judge was therefore entitled to make the orders that she did.

[31] The appeal against her decision and her orders should, therefore, fail.

MORRISON JA

ORDER

a. The appeal is dismissed.

b. The judgment and orders made in the court below on 9 February 2010 are affirmed.

c. Costs to the respondent to be taxed if not agreed.