



[2017] JMSC Civ 102

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2013 HCV 02520**

|                |  |                  |
|----------------|--|------------------|
| <b>BETWEEN</b> | <b>WILLIAM RAINFORD</b>  | <b>CLAIMANT</b>  |
| <b>AND</b>     | <b>OPAL RAINFORD</b><br><b>(Personal Representative in the Estate of Lloyd Rainford)</b> | <b>DEFENDANT</b> |

**IN CHAMBERS**

Mr. Garth Taylor for the Claimant.

Mr. Clifford Campbell instructed by Archer, Cummings & Company for the Defendant.

Heard: 29<sup>th</sup> March & 11<sup>th</sup> July, 2017.

***Burden of proof – Equity – Resulting trust – Constructive trust.***

**CALYS WILTSHIRE J. (ACTG)**

**Introduction**

**[1]** The claimant William Rainford seeks, among other things, the following orders from the court:

- (1) A declaration that all that parcel of land part of Glengoffe in the parish of St Catherine being land registered in the name of the deceased Lloyd Rainford at Vol 1311 Folio 143 of the register book of titles is held on trust for the claimant and other beneficiaries of the estate of Malcolm Rainford now deceased.

- (2) Further or alternatively, an order that an account be taken of all the monies received by the Defendant herself and/or servants and agents in relation to the property under or in respect of all necessary enquiries and directions to be taken and made and that provisions be made for the costs of such accounts and enquiries and for an order that the Defendant do pay the Claimant such monies as may be found due upon the taking of such accounts and the making of such inquiries including in relation to interest.
- (3) An injunction to prevent the Defendant either by themselves or their servants/and or agents from settling or otherwise disposing of or transferring the said property to any person other than the Claimant and/or his nominee being the beneficiaries of the estate of Malcolm Rainford now deceased.
- (4) That the Registrar of Titles rectify the Register Book of Titles by effecting a transfer of the title of all that parcel of land part of GlenGoffe in the parish of Saint Catherine being land registered in the name of the deceased Lloyd Rainford at Volume 1311 Folio 143 to the name of the claimant and/or his nominees who must be beneficiaries of the estate of Malcolm Rainford, now deceased.
- (5) That the Registrar of the Supreme Court be empowered to sign any transfer in accordance with the orders of this Honourable court.

**[2]** The claimant's by his affidavit, dated the 15<sup>th</sup> April, 2013, was admitted at the trial as his examination in chief. He asserts that he is one of several children, of Malcolm Rainford now deceased, who grew up on the property in issue. Further that his father died intestate in 1970 leaving his mother. By then he and all his other siblings had moved from the property with the exception of Lloyd Rainford, father of the defendant.

**[3]** He states that,

- (a) *when his mother died, he and his siblings agreed that Lloyd would continue to live on the property rent free.*
- (b) *he, the claimant, visited the property annually and stayed there along with other siblings.*
- (c) *the property is now registered in the sole name of Lloyd Rainford and*
- (d) *he believes that it is in fact trust property and is held by the estate of Lloyd Rainford for the benefit of all the children of Malcolm Rainford.*

**[4]** Under cross exam, the claimant stated that his father wanted the property to remain in the family but admitted that he had no documentary evidence to support the assertion. He however was relying on word of mouth, as he said, “My father told us he didn’t want it sold. It was for Lloyd, William and Colliston” and further “the three of us were together and he told us that”.

**[5]** The defendant, Opal Rainford, by affidavit dated 7<sup>th</sup> April, 2014, which was admitted at the trial as her examination in chief, has responded by stating that the claimant is not entitled to the orders sought. She states that her grandfather, Malcolm Rainford did leave a will and same was entered into evidence. By said will, Malcolm granted a life interest in the property to his wife and thereafter absolutely to her father Lloyd Rainford.

**[6]** She further states that the claimant was aware of his father’s will as she had shown him a copy after her father died. She denies that the property is trust property as it was devised to her father by her grandfather.

**[7]** Under extensive cross examination the defendant was challenged on the issue of falsehoods in her affidavit, her knowledge of her grandfather’s will and whether it was probated, her knowledge of the title to the property which was in her father’s name, and the actions of her father and his siblings in dealing with the property. It

was also revealed by the defendant that she was now the holder of the registered title for the property in question.

## **Issues**

**[8]** The following are the issues:

(1) Was a trust established? And if so does the estate of Lloyd Rainford hold the property on trust for the claimant and other beneficiaries of the estate of Malcolm Rainford?

(2) Can the registered title held by the defendant be defeated if the property is held on trust?

**[9]** Mr. Taylor has submitted that, since the Defendant exhibited the will in her defence, then she is “in essence” asking the court to determine its validity. Counsel concedes that such a quest would not be undertaken by the court but then further submits that the defendant must satisfy the court that her father obtained a legitimate grant in the estate of Malcolm Rainford through which he became the registered proprietor.

**[10]** In other words Counsel for the claimant has submitted that the burden of proof has shifted and the defendant must now prove that she is not holding the property on trust for the claimant and his siblings. The court finds no merit in counsel’s submissions on this shifting of the burden of proof. The claimant’s assertions have challenged the validity of the registered title now held by the defendant and the burden rests on him to prove said assertions.

## **The Law**

### **Burden of proof**

**[11]** The general rule in civil cases is that he who asserts must prove. There are issues that are so essential to a party’s case that he must prove them in order to

succeed in the action. Hence the burden of proof usually lies on the party asserting the affirmative of such an issue. Mr. Taylor has correctly submitted that if a defendant asserts a defence which goes beyond a mere denial, the defendant must assume the legal burden of proving such defence.

[12] Counsel in his submission has sought to rely on the dicta of Anderson K. J in **Thompson v The Attorney General & Anor** [2016] JMSC Civ. 78. Anderson J. in that case relied on the definition of an affirmative defence from **Murphy on Evidence, 11<sup>th</sup> Ed.** to make his point that the defence raised in the claim of false imprisonment fell within said definition and when that occurs, the burden of proof shifted to the defendant. Murphy stated that, “An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form part of the claimant’s case.”

[13] The claimant’s case is undergirded by an assertion of intestacy which Mr. Taylor submits gave rise to a trust relationship “because whoever holds an intestates’ property prior to a grant does so on trust for the beneficiaries”. Counsel therefore submits that the burden is now on the Defendant “to satisfy this court by evidence to prove the affirmative defence which she has raised, which is that she is not holding the property on trust for the claimant and his siblings”.

[14] In this court’s view there is no issue regarding the validity of the last will and testament of Malcolm Rainford. Mr. Taylor in referencing said will and the defendant’s inclusion of it as an action akin to raising an affirmative defence, is really employing a diversionary tactic and same has no merit. The legal burden of proof remains on the Claimant to satisfy this court that not only was a trust created for him and his siblings but also that said trust defeats the title held by Lloyd Rainford and subsequently the Defendant.

## Trusts

[15] The claimant has not specifically identified the type of trust which he wants the court to declare for the benefit of himself and his siblings. In light of the obvious absence of any written instructions to that effect then it can be surmised that it would be either a resulting or a constructive trust. The fourth edition of the **Halsburys Laws of England** states as follows,

*“Resulting trusts and constructive trusts arise or are implied by operation of law, and may or may not reflect the intention of the persons concerned”. “A resulting trust may arise solely by the operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a resulting trust in favour of the person providing the money unless from the relationship between the two, or from other circumstances, it appears that a gift was intended”.*

[16] The creation of resulting trusts does not depend upon formalities such as writing and their objects do not need to be immediately identifiable. Said trusts will also arise where an express trust for any reason fails. The constructive trust, according to **Halsbury’s**, is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of particular property to hold it purely for his own benefit. On constructive trusts, McIntosh JA, in delivering the judgement in **McCalla v. McCalla** [2012] JMCA Civ 31, said as follows:-

*“It is settled law, approved and applied in this jurisdiction in cases such as Azan v Azan (1985) 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.”*

[17] The law has so evolved however that there is imperceptible differences between these types of trusts. In **Gissing v Gissing** [1970] 2 All ER 780 Lord Diplock

expressed the view that it was unnecessary to distinguish between resulting, implied and constructive trusts.

[18] In the case at bar there would be no issue regarding any of the parties contributing to the acquisition of the property, but the claimant would need to satisfy this court of:

(1) The existence of a common intention that he and his siblings were to own the property and have a beneficial interest in same.

(2) His reliance on that common intention which resulted in him acting to his detriment.

[19] Mr. Taylor has submitted that a registered title is not indefeasible against a trust, any kind of trust. Both counsel for the claimant and the defendant made reference to section 68 of the **Registration of Titles Act (RTA)** and the indefeasible nature of the registered title. It states:-

*No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.*

[20] Mr. Taylor went on to refer to the judgement of Simmons J in the case of **Leroy McGregor v Verda Francis** [2013] JMSC Civ. 172 which had established that where a Trust relationship exists, a registered title does not deny the *cestui que* trust of their beneficial interest and hence a registered title is not indefeasible against a Trust. Counsel further relied on the dictum of Simmons J. in **McGregor v Francis** (supra) which referenced the Court of Appeal's acceptance in **McCalla v McCalla**, (supra) that the criteria required to prove a constructive trust was

“equally applicable where the property in question is not the matrimonial home and the issue to be determined is not as between parties to a marriage”. Counsel went further to highlight that section 161 of the RTA made it clear that where a party obtains a registered title by fraudulent means there is an exception to the indefeasibility of a registered title.

### **Analysis of the evidence**

- [21] The claimant was asked if he had any evidence that supported his assertion that the property in question was trust property, to which he responded, “My father told us he didn’t want it sold. It was for Lloyd, William and Colliston”. When pressed again by counsel for the defendant as to whether he had any documentary evidence, the claimant answered, “No, just word of mouth. The three of us were together and he told us that”. No other witness was called on the claimant’s case. The presumption of a trust is rebuttable.
- [22] On the defendant’s case, a will was produced which manifested a different intention on the part of the claimant’s father. The validity of this will has not been contested. The claimant denied knowledge of the existence of this will but the defendant states that she did show same to him after her father died. That has not been challenged by the claimant. Under cross examination the defendant admitted that she was not the only child of Lloyd Rainford, contrary to her affidavit. Counsel for the claimant has submitted that the defendant has discredited herself and hence her evidence regarding the will should not be accepted by the court.
- [23] The court is at liberty in its analysis of evidence to determine whether only part or the whole of a witnesses’ evidence should be accepted or rejected. I ask myself whether the witness’ false assertion about being an only child is such as to render her evidence about the copy will unacceptable by the court. I find that it is not.

- [24] Counsel further questioned the defendant about her knowledge or lack thereof of the probate of her grandfather's will and submitted that "in saying she doesn't know if the will was probated completely obliterates her defence." In response to counsel's further question, "You have not taken steps to find out if this will was probated?" the defendant answered, "Why would I do so.....he should have been aware that his dad's will was probated and that dad had a title." Counsel's submission that the defence has been obliterated by these responses finds no merit with the court, especially as it is premised on his 'shifting of the burden of proof', which this court has already rejected.
- [25] The claimant having given virtually no evidence to support his claim that the property was held on trust, Counsel continued to make submissions on the Defendant's failure to discharge this burden of proof which he shifted to her. He has submitted that because the defendant did not know if Lloyd Rainford was holding the property on trust for his siblings that same was fatal to her defence. The line of questions regarding the defendant's knowledge of her father's actions and mind set, appears to be an attempt to elicit from the defendant some corroboration of his evidence of Malcolm Rainford's intent. This attempt was unsuccessful and the court finds no merit in said submission.
- [26] Counsel further submitted that the evidence that the claimant gave permission to build a cell phone tower on the property and that the claimant convened a meeting after Lloyd Rainford's death to discuss how the property would be treated, suggests that the property was being treated as trust property after the death of Lloyd Rainford. The court does not draw any such inference from the actions of the claimant who as Counsel submits may have been exerting control over the property. However seeking to exert control does not evidence ownership or a beneficial interest in property.
- [27] Mr. Campbell has made submissions on the indefeasibility of the title under the **RTA**, that is, that it can be set aside when fraud or mistake is alleged and proven. He has however conceded that the claimant has not alleged either fraud

or mistake. The court also accepts that the claimant's evidence has not proved either fraud or mistake in relation to the title which was issued to Lloyd Rainford and subsequently to the defendant.

**[28]** The claimant has failed to satisfy the court that there was in existence a common intention that he and his siblings were to own/have a beneficial interest in the property. He has failed to establish that the property in question is held on trust for him and other beneficiaries of the estate of Malcolm Rainford. He has produced no evidence that could defeat the registered title of either Lloyd Rainford or the defendant.

**[29]** Based on the findings there is also no reason for me to address the issue of the taking of any account of any monies received by the Defendant and/or her servants and agents in relation to the property. Further the interim injunction which was ordered until the determination of this matter is hereby revoked.

**[30]** In the circumstances Judgment is awarded to the Defendant.

**[31]** The interim injunction which was ordered until the determination of this matter is hereby discharged.

**[32]** Costs to the Defendant to be taxed, if not agreed.