

DELIVERED AS AN ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MATRIMONIAL DIVISION
CLAIM NO 2008 M 2885

IN CHAMBERS

BETWEEN RUDOLPH ANTHONY SHAND PETITIONER/ RESPONDENT
AND RUTH MARY SHAND RESPONDENT/APPLICANT

Mr. Leroy Equiano for Petitioner/Respondent

Mr. Ruel Woolcock for the Respondent/Applicant

8th April, 2010

BROOKS, J.

This is an application by Mrs. Ruth Mary Shand for a declaration that she is entitled to the entire legal and beneficial interest in all that parcel of land known as 77D Keystone Drive, Mount View Estate, in the parish of Saint Catherine. The application is made under the auspices of a petition for dissolution of marriage filed by Mr. Rudolph Shand, her husband. The property is comprised in a registered title and I shall refer to it hereafter as “the property”.

The property was acquired by Mrs. Shand and her husband as their matrimonial home. This was in June 1981. At the time the couple had had one child. There is a dispute as to whether Mrs. Shand contributed to the initial cost of acquisition but I find that that dispute is not relevant except, perhaps, to the question of the credibility of the parties. This is because there is no issue that the property was bought in their names as joint tenants with the intention that it was to be their home and that of their children.

If needs be I will say that I do find that the evidence indicates that it is more probable that Mrs. Shand did contribute financially to the cost of acquisition by virtue of monies she received from a relative.

At the time therefore, that the parties separated in 1987, the property was undoubtedly held jointly by them both at law and in equity.

The crux of this case concerns Mr. Shand leaving the property in 1987 and whether thereafter Mrs. Shand exercised such sole control to his exclusion that she has dispossessed him of his interest in the property. In so far as the facts are concerned the dispute is on very narrow bases.

The main one is the cause of Mr. Shand leaving the property. There is no dispute that the parties had difficulties; their relationship became stormy leading to quarrels and fights. One particular fight led to an appearance in the Resident Magistrate's Court in St. Catherine. The basis on which it was before the court has not been stated but it is Mrs. Shand's uncontroverted evidence that when they went to court the court referred them to a counsellor and that the counsellor recommended that Mr. Shand leave the home. She says that she made no application for him to leave the home and she saw no document ordering him to do so.

Mr. Shand, on the contrary, says that he was ordered by the court to leave the home as a result of an application for a restraining order applied for by Mrs. Shand. Mr. Shand also says that one of his daughters, on one occasion after the separation, on which he visited the property, told him that he was not allowed on the property because he was restrained.

Whereas Mr. Shand produced no documentary evidence to support his claim that he left the property because of a restraining order and in his petition for divorce indicated that he left because of the deterioration of the marriage relationship, I am prepared to find that at some stage, either before he left or shortly thereafter, he was given the impression that there was a restraining order against him.

He was also physically barred from the property by Mrs. Shand's changing the locks to the doors. Although she says that she changed the locks after he had broken others, I find that she had secured the property against him and that is what led him to break the locks. His entry to the premises then and prior to that time was against her will.

It is the behaviour of the parties after the separation this is the most important aspect of this case.

Mr. Woolcock, for Mrs. Shand states that the evidence is clear, that Mrs. Shand:

- a. excluded Mr. Shand from the property;
- b. solely paid all the outgoings in respect of the property and in particular the mortgage repayment instalments and property taxes;
- c. developed the property without Mr. Shand's assistance or permission;
- d. settled the mortgage herself without his input; and,
- e. supported the children of the marriage without any assistance from Mr. Shand.

These factors, he says, establishes sole possession in Mrs. Shand for a period in excess of 12 years.

Mr. Equiano, for Mr. Shand, submitted that although Mr. Shand submitted that although Mr. Shand did not contribute to the property or the family after he left, he had

not been dispossessed, for the purposes of being deprived of his interest, for the following reasons:

- a. The property was purchased to provide a home for the Shand family; for Mrs. Shand and the children of the marriage;
- b. That purpose continues to be fulfilled as the children and Mrs. Shand still reside there;
- c. Mr. Shand's obligation to maintain his children continued at least until the year 2000 when the younger child attained the age of 18 years;

Mr. Equiano, perhaps rightly, did not stress the matter of the restraining order, because other than for Mr. Shand's say-so, which is contradicted by Mrs. Shand, there is no evidence of any such court order, as opposed to a counsellor's recommendation, being in place.

Mr. Woolcock placed heavy reliance on the case of *Wills v Wills* PCA 50 of 2002 (delivered 1/12/2003). He submitted that it is on all fours with this case and should be applied. Mr. Equiano sought to distinguish *Wills* on the basis that the fact situation was different and that their Lordships themselves stated that it was an exceptional case.

I find that *Wills* is materially indistinguishable from the instant case. In fact, these circumstances are even clearer, as Mr. Shand was effectively barred from the property while Mrs. Elma Wills was allowed to visit the premises the subject of that case.

I find that Mr. Shand's attitude toward this property was one of total abandonment. He paid no outgoings, did not visit the property at all after 1994 and made no contact at all with Mrs. Shand concerning the property.

Mr. Equiano's submission that Mr. Shand was fulfilling his obligation to his children by providing shelter is totally undermined by the fact that Mr. Shand provided no maintenance whatsoever for the children. Mr. Shand says that he tried his best to provide for his children and to be a part of their lives but that Mrs. Shand made that impossible. He does not however depose to giving the children or Mrs. Shand, for the children, any money or assistance whatsoever after leaving the property.

Mr. Shand gave an explanation for not contributing to the outgoings for the property. He said at paragraph 26 of his affidavit that this was because it was Mrs. Shand who was enjoying the benefit of the property, while barring him from it. He also said that he has not been gainfully employed since 1999.

I find that these reasons do not assist Mr. Shand. His total absence and his failure to take any step toward having his interest recognized, indicate a relinquishment of his interest to Mrs. Shand.

I find, therefore, that Mr. Shand did not indicate that he still had an interest in the property and that it was still fulfilling his original intention for its acquisition. On the other hand, Mrs. Shand has shown that she totally excluded Mr. Shand and that she exercised sole dominion over the property.

The points made by Mr. Woolcock (which I have referred to above) concerning those issues, are all without doubt and I adopt them as part of this decision. I also rely on the fact that, between 1987 and 1994, when Mr. Shand visited the property he was treated, according to him, as a visitor and not as a guest. It is also clear that there was no accounting by Mrs. Shand to Mr. Shand about the property. There was no contact, no

discussion. There was no recognition or acknowledgement of his interest. She acted as if it were solely her own.

In *Wills*, their Lordships made it clear that the law no longer is that it is the intention of the holder of the paper title that must be considered in preference to that of the person in possession, when considering whether a possessory title had been acquired. Indeed, they say, it is the contrary. At paragraph 21 of their judgment, their Lordships state, quoting from *JA Pye (Oxford) Ltd. v Graham* [2003] 1 A.C. 419, that if the possessor continues to use the property for the same purpose as that which the holder of the paper title intended, then it may lead to an inference that the possessor did not intend to possess the land to the exclusion of the holder of the paper title.

This is not the case here, however. Mrs. Shand not only used the property as a home for herself and her daughters but she also used it for her business place. She extended the building for that purpose, that is, to accommodate employees as well as sewing and crocheting equipment.

Conclusion

Although I found that she was a less than forthright witness, I am of the view that the uncontraverted evidence leads me to find that Mrs. Shand intended to use this property as her own. Mr. Shand was permanently and effectively barred from it and he made no contribution to it.

In respect of Mr. Equiano's submission that these circumstances are not exceptional, I find that they are very much in line with those of *Wills* and in the circumstances:

It is declared that the applicant Ruth Mary Shand is entitled to the entire legal and beneficial interest in all that parcel of land part of Keystone Farm, formerly part of Waterloo Pen and Tredegar Park in the parish of Saint Catherine, now known as No. 77D Keystone Drive, Mount View Estate, being all the land comprised in Certificate of Title registered at Volume 1092 Folio 604 of the Register Book of Titles.

It is further ordered that:

1. Subject to any existing mortgages, the Registrar of Titles is hereby directed, pursuant to section 158 (2) (a) of the Registration of Titles Act to cancel the Certificate of Title registered at Volume 1092 Folio 604 of the Register Book of Titles and to issue a new Certificate of Title in duplicate in the name of the applicant Ruth Mary Shand, Reflexologist, of No. 77D Keystone Drive, Mount View Estate, Spanish Town P. O. in the parish of Saint Catherine;
2. Costs to the applicant to be taxed if not agreed.