



[2024] JMSC Civ 74.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV00236

IN THE MATTER OF all that parcel of land part of **ANGELS PEN** now called **ELTHAM** in the parish of St. Catherine being the Lot numbered **ONE THOUSAND TWO HUNDRED AND TWENTY-NINE** on the plan part of **ANGELS PEN** now called **ELTHAM** and being all that parcel of land comprised in Certificate of Title registered at Volume 1230 Folio 492.

BETWEEN

ANGELLA SMITH

CLAIMANT

AND

KASHEMA ROOFE

DEFENDANT

TRIAL IN CHAMBERS

Mr. Michael Lorne for Claimant

Mr. Steven Jackson for the Defendant

Heard: January 17 and 19, 2024, January 26, 2024, March 8, 2024

Entitlement to Legal and/or Beneficial Interest in Property – Principles to be Considered - the Partition Act – Rules 30.3(1), 30.3(2) and 30.4 (2) of the Civil Procedure Rules

TRACEY-ANN JOHNSON, J (AG.)

THE CLAIM

[1] By a Fixed Date Claim Form filed on January 19, 2011, the Claimant seeks the following Orders:

- “1. A Declaration that the Applicant is the sole owner in law and Equity of All That Parcel of Land part of **ANGELS PEN** now called **ELTHAM** in the parish of **ST. CATHERINE**, being **ONE THOUSAND TWO HUNDRED AND TWENTY NINE** on the plan part of **ANGELS PEN** now called **ELTHAM** and being all that parcel of land comprised in Certificate of Title registered at Volume 1230 Folio 492.
2. A Declaration that the Respondent **KASHEMA ROOFE** holds the said property on trust for the benefit of the Applicant.
3. An Order that the Respondent do execute such documents as are necessary to effect a Transfer of the entire Estate in the said property in the Applicant and/or the Applicant’s nominee.
4. An Order that should the Respondent fail to comply with the Order of the Court to execute all such documents relevant to the transferring of the property to the Applicant, the Registrar of the Supreme Court be empowered to sign all relevant documents necessary to effect the transfer of the said property.
5. The Costs of this Application be borne by the Respondent.
6. Liberty to Apply.
7. Such further and other relief as this Honourable Court deems just.”

THE EVIDENCE AT TRIAL

[2] The evidence of the Claimant and the Defendant is summarized at paragraphs [23] and [24] respectively of the Judgment. It should be pointed out that on the first day

of trial, Counsel for the Claimant sought permission to rely on the Affidavits of Jacqueline Elliott-Bailey and Dahlia Lewis both filed on January 4, 2024. He argued that these witnesses came in late but were pertinent to the case. Counsel for the Defendant objected to permission being granted for the Claimant to call these additional witnesses. He argued that great concession was previously made when Mr. Lorne had made an oral application for the Affidavit of Miss Angella Smith to stand. He further argued that the inclusion of these additional witnesses would necessitate that the Defendant be given an opportunity to respond which would require that he obtain further instructions from his client. He also stated that he would not be able to take instructions during the trial in order to put a response before the Court. The Court considered that Counsel for the Claimant was seeking to obtain such permission in circumstances where on June 21, 2023, Master Miss T. Dickens (Ag.) had ordered that *“the Claimant [was] granted an extension of time to July 21, 2023 to file and serve an Affidavit in response to that of the Defendant filed on November 18, 2022”*. Master Miss Dickens further ordered that *“any objections to any portions of any Affidavit filed in these proceedings are to be raised and dealt with at the further Pre-Trial Review hearing”*. At the further Pre-Trial Review hearing on November 29, 2023, the Claimant’s Affidavit filed on August 25, 2023 was allowed to stand and there was no permission granted for any further Affidavits to be filed in the matter.

- [3] The matter proceeded to trial with two witnesses in the matter, that is, the Claimant and the Defendant and in such circumstances had been scheduled for one day. The Court formed the view that it would be prejudicial to the Defendant to grant such permission on the trial date. The overriding objective of dealing with cases justly and expeditiously was not in favour of a matter of such vintage (having been filed since 2011) being adjourned to have these witnesses called on the Claimant’s case. These were matters that could have been dealt with long before the trial date and certainly at any of the Pre-Trial Review hearings. Therefore, the Court did not grant permission for the Affidavits of Jaqueline Elliott-Bailey and Dahlia Lewis to be relied on or for those witnesses to attend the trial to give evidence.

ISSUES

- 1) Whether the Claimant is solely entitled to the legal and beneficial interest in the property?
- 2) What is the entitlement of the Defendant, if any?
- 3) How are the rental proceeds to be treated with in relation to the Claim?

SUBMISSIONS OF COUNSEL

- [4] Both counsel made submissions in this matter which will be referred to throughout the Judgment as they are relevant to the determination of the issues that are before the Court.

LAW AND ANALYSIS

A Preliminary Point - Treatment of the Affidavit filed in Support of the Fixed Date Claim Form

- [5] At the trial of the Claim, the Claimant was unable to rely on the evidence contained in the Affidavit of Angella Smith in Support of the Fixed Date Claim form filed on January 19, 2011 owing to an issue which arose in relation to the Affidavit that was filed, in that, her brother, Junior Smith swore to the Affidavit on her behalf. This he purported to do by way of a Power of Attorney dated 3rd June 2010. The Affidavit commences with the words, "**I ANGELLA SMITH...**" but by virtue of the language of the document coupled with the fact that Mr. Smith indicates that he signs on Miss Smith's behalf, it is clear that Miss Smith was the maker of the Affidavit (the deponent) although her brother swore to its contents. Therefore, in these circumstances, the Affidavit offended rule 30.4(1)(a) and (b) of the **Civil Procedure Rules** which stipulate that an Affidavit must be signed by each deponent and sworn or affirmed by each deponent. There is no provision under Part 30 of the **Civil Procedure Rules** that allow an individual to sign on behalf of a deponent. When one considers the purpose of the jurat and its effect in terms of

the Court placing reliance on the truth of the contents of the Affidavit, this is impermissible. The legal principles applicable in this regard were considered by Sykes, J (as he then was) in the case of **Sandra Moore v. Patrick Cawley** Claim No. 2006HCV02776 delivered July 19 and 20, 2017 at paragraphs 8 and 9 of the Judgment. There Sykes J (as he then was) stated that:

“8. *Again I turn to Black’s Law Dictionary (8th, 2004) which defines a jurat in these terms:*

A certification added to an Affidavit or deposition stating when and before what authority the Affidavit or deposition was made.

9. *This definition provides important clues of the purpose and importance of a jurat which leads to the meaning of authenticating in rule 30.4(2). The jurat tells us when, where and before whom the Affidavit was sworn. The jurat assists in determining whether the Affidavit was sworn before a person authorized to administer oaths. Thus authentication means giving validity. The jurat therefore gives authenticity to the document purporting to be an Affidavit. When the person before whom the Affidavit is sworn completes the jurat, that person is saying to the Court or tribunal before which the Affidavit is to be used that the Court or tribunal can rely and act on the facts alleged in the Affidavit. The person completing the jurat is certifying to the Court or tribunal that on the stated date, at a stated place, the particular deponent swore or affirmed the truth of the facts alleged in the Affidavit. In other words, the jurat is the seal of authenticity that guarantees that the evidence contained in the Affidavit was properly taken upon oath or affirmation. The jurat, therefore, is not an empty formality. It is little wonder that rule 30.4(1) begins with mandatory words, that is to say, an Affidavit must.”*

[6] Therefore, Mr. Smith not being the deponent to the Affidavit could not swear or affirm to the truth of the facts alleged in the Affidavit. This is also supported by rules 30.3 (1) and (2) of the **Civil Procedure Rules** which provide as follows:

“30.3 (1) The general rule is that an Affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However, an Affidavit may contain statements of information and belief –

(a) Where any of these Rules so allows; and

(b) Where the Affidavit is for use in an application for summary Judgment under Part 15 or any procedural or interlocutory application....”

[7] This being the trial of the Claim, the deponent to any Affidavit to be relied on as part of the trial of the Claim must comply with the general rule provided under rule 30.3 (1) of the **Civil Procedure Rules**.

[8] In these circumstances, Counsel for the Claimant relied on the Affidavit of Angella Smith in Answering Kashema Roofe filed on August 25, 2023. During their closing submissions, counsel for the parties agreed that in light of the issues that were to be determined and the fact that the parties were not disputing certain aspects of the case, the inability of the Claimant to rely on the material contained in the Affidavit filed in support of the Fixed Date Claim Form did not militate against the Court’s ability to determine the issues joined between the parties. It is against this background that the Court proceeded to determine the issues regarding each party’s entitlement to a legal and/or beneficial interest in the disputed property, if any, and how the rental proceeds are to be treated with in relation to the Claim.

Issue 1) - Whether the Claimant is solely entitled to the legal and beneficial interest in the property? and Issue 3) - How are the rental proceeds to be treated with in relation to the Claim?

[9] The Court had regard to the principles relating to the establishment of constructive and resulting trusts as distilled by V. Harris J (as she then was) in the case of **Kameica Afflick-Phinn v. Dwayne Phinn** [2016] JMSC Civ. 155. I had particular regard to the principles relating to a resulting trust, since the Claimant asserts that she is entitled to the sole legal and beneficial interest in the property, she having contributed the full purchase price of the property, paid the property taxes and legal fees. She asserts that although both names are on the Certificate of Title as joint tenants, she acquired the property with the intention that she would have somewhere to live if she was deported. She asked the Court to sever the joint

tenancy and that the Defendant's interest in the property be transferred to her thereby giving her sole interest in the property to the exclusion of the Defendant. Counsel for the Claimant further submitted that if the Court finds otherwise, that the Claimant be given first option to purchase whatever interest is deemed to the Defendant within 90 days of a valuation report being obtained. He, therefore, requested that the Court order that the property be sold with the relevant consequential orders.

[10] On the other hand, the Defendant in this case, asserted a same-sex relationship between herself and the Claimant which she indicated is the premise upon which the property was purchased as they both had the intention of getting married and living together as a couple. However, during the course of the trial, Counsel for the Defendant conceded that the case cannot be assessed based on the same-sex relationship which the Defendant asserts existed between the parties, as this type of relationship is not recognized under Jamaican law. He submitted that the Defendant relies on the existence of trust between them in terms of how they conducted their affairs especially as it related to the purchase of the property in dispute. Counsel for the Defendant, Mr. Jackson, in summary, has asked the Court to make a 60/40 apportionment of the proceeds of the sale in favour of the Defendant on the basis that the Defendant has made a greater contribution to the purchase price and by virtue of her other contributions made (such as the payment of property taxes, maintenance and renovation of the property). By the close of the case, both parties were agreed that the property should be sold and that the Court is, therefore, asked to determine the portion of the proceeds to which each party is entitled. That is, whether all of the proceeds in the case of the Claimant, or in the case of the Defendant, a 60/40 apportionment in favour of the Defendant.

[11] This Court is guided by the principles enunciated in the case of **Stack v Dowden** [2007] 2 AC 432 where the Court was concerned with "*the effect of the conveyance into the joint names of a cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house which was to become their home*". See paragraph [53] of **Kameica Afflick-Phinn v. Dwayne Phinn**.

In **Stack v Dowden**, at paragraphs 58 and 59 of the Judgment, Baroness Hale stated as follows:

“The issue as it has been framed before us is whether a conveyance into joint names indicates only that each party is intended to have some beneficial interest but says nothing about the nature and extent of that beneficial interest, or whether a conveyance into joint names establishes a prima facie case of joint and equal beneficial interests until the contrary is shown. For the reasons already stated...a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.

The question is how, if at all, is the contrary to be proved? Is the starting point the presumption of resulting trust, under which shares are held in proportion to the parties’ financial contributions to the acquisition of the property, unless the contributor or contributors can be shown to have a contrary intention? Or is that the contrary can be proved by looking at all the relevant circumstances in order to discern the parties’ common intention?”

[12] At paragraph 60 of the Judgment, Baroness Hale answered the questions posed in this way:

“...The search is to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.”

[13] In the case of **Jennifer Johnson v Horace Boswell** [2022] JMCA Civ 31, G Fraser JA (Ag.) stated that, “Where the legal title is in the joint names of the parties, it means that there is a presumption that both parties are beneficially entitled, unless the contrary is shown.” She cited the case of **Stack v Dowden**, where Baroness Hale observed at para. 68 that:

“The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms....”

[14] At paragraph [88] of the Judgment, Edwards JA pointed out that:

“As previously stated, the registration in both names gave rise to the presumption of equal interests. That presumption can be displaced by

*evidence to the contrary, of an agreement that the title was to be held in trust or by an examination of each party's contributions to the acquisition, upkeep, and improvement (see **Stack v Dowden** and **Galloway v Galloway** 1929 SC 160). The question is, therefore, was there evidence of an agreement as to how the property was to be shared?"*

[15] The **Partition Act**, 1873 provides for the partition and sale of property and the distribution of the proceeds of sale. Section 3 of the Act provides that:

"In a suit of partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

[16] In the case of **Cynthia Delores Stephens v. Clemenston George Stephens** [2012] JMSC Civil 134, the parties were brother and sister and the property was bought and registered to them as joint tenants. The relationship between them broke down and the Claimant brought a Claim for the property to be sold and the proceeds of sale divided equally between herself and her brother. The parties disputed how the property came to be purchased, how the property was paid for and how the property was maintained. P.A. Williams, J (as she then was) stated at paragraph [5] of the Judgment that, *"The Claimant as joint tenant is holding an identical interest in the whole land as the Defendant with the interest of each being the same in extant, nature, and duration."* She indicated that section 4 of the **Partition Act** was the section on which the Claimant must rely as her interest is to the extent of one moiety upwards. She further stated at paragraph [6] of the Judgment as follows:

“This section is regarded as making it imperative on the Court, to order a sale unless it sees some good reason to the contrary. The party interested in sale is entitled to such sale as of right unless there is some good reason to the contrary shown the onus then is on the party opposing to show what the Court will consider good reason. It cannot be disputed therefore that a concurrent owner in the position of the Claimant had the right to demand a sale of the property.”

[17] She stated further at paragraph [9] of the Judgment that:

“The Court’s discretion in matters such as this, therefore, is only engaged when addressing the issue of the distribution of the proceeds – the Court has to order a division according to the co-owner’s entitlement.”

[18] The learned Judge further stated that guidance in how to approach this issue had to be had from the approach in matters related to the division of property between couples whether married and unmarried. The Court also placed reliance on the case of **Jones v Kernott** [2012] 1 A.C. 776 where in the joint Judgment of Lord Walker and Lady Hale at paragraph 794 it was stated inter alia –

“In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of cohabiting couple who are responsible for any mortgage, but without express declaration of their beneficial interests.

The starting point is that equity follows the law and they are joint tenants both in law and in equity.

That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home or (b) that they later formed the common intention that their respective share would change.

Then common intention is to be deduced objectively from their conduct...”

*In those circumstances where it is clear either (a) that the parties did not intend joint tenancy at the outset or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property “the answer is that each is entitled to that share which the Court considers fair having regard to the whole course of dealing between them in relation to the property”. **Chadwick L.J in Oxley v. Hiscock [2005] Fam 211 para 69.***

In our Judgment “the whole course of dealing...in relation to the property” should be given a broad meaning enabling a similar range of factors to be

taken into account as may be relevant as ascertaining the parties' actual intentions.

Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the Court to decide what shares were either intended (as in case (3)) or fair (as in case (4))."

[19] At paragraph [12] of the Judgment, she considered the more general pronouncement relating to these matters as found at paragraph 714 Halsbury's Laws of England Fourth edition [2007] Reissue where it stated that:

"Where, however, two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests, and contribute the purchase money or property in equal shares, they hold the property as joint tenants with the benefit of survivorship both at law and in equity unless there is evidence of a contrary intention on their part at the time of the purchase or transfer or there are circumstances from which such common intention can be inferred. If they contributed the purchase money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenancy in common between them in equity, although even in this case the equitable tenancy in common may be rebutted by evidence to the contrary."

[20] The procedure to be adopted where an interested party in the property requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division is outlined in section 5 of the Act: See **Karen Elizabeth Watson-Samuels and Ors v. Michael Samuels** [2021] JMSC Civ 90.

[21] In this case, it is not in dispute that both Miss Smith and Miss Roofe are the registered joint proprietors of all that parcel of land part of **ANGELS PEN** now called **ELTHAM** in the parish of St. Catherine being the Lot numbered **ONE THOUSAND TWO HUNDRED AND TWENTY-NINE** on the plan part of **ANGELS PEN** now called **ELTHAM** and being all that parcel of land comprised in Certificate of Title registered at Volume 1230 Folio 492 of the Register Book of Titles. The legal title being in the joint names of the parties, it means that there is a presumption that both parties are beneficially entitled, unless the contrary is shown. Therefore, the starting point in determining the existence of the beneficial interest in the disputed property is the assumption that the beneficial ownership of

the property follows the legal title, so that the onus of displacing such a presumption, in this case, is cast upon the Claimant. For the purpose of rebutting that presumption, the Claimant's credibility is critical. As pointed out by G Fraser JA (Ag.) in **Jennifer Johnson v Horace Boswell** at paragraph [91] of the Judgment, the first order of business is for this Court to decide whether there is any evidence, express or implied, that demonstrated a discussion leading to an agreement or understanding as to the proportion of the beneficial interest each party was to obtain, if any. Following the guidelines provided by Baroness Hale in the **Stark** case, what was the "*shared intentions*" of the parties "*actual, inferred or imputed with respect to the property in light of their whole conduct to it?*"

[22] Having assessed the parties' evidence, it is not in dispute that both parties were in prison in England, both faced the possibility of being deported. It is also not in dispute that both women saw the need to acquire property in order to secure their future interests and looked towards the acquisition of property in Jamaica. It is not in dispute that the step towards acquisition of the said property in Jamaica started with Miss Roofe's mother who found the property and commenced the process of the sale. What is in dispute is how the property came to be purchased, how the property was paid for and how the property was maintained.

[23] The Claimant asserts that she is solely entitled to the legal and beneficial interest in the property and that the Defendant holds the property on trust for her based on the following factors:

- 1) She had the Defendant buy the property for her as she was in prison and she wanted somewhere to stay if she was deported.
- 2) She sent money through her family member Jaqueline Elliott-Bailey to the Defendant to complete the purchase of the property. She said that the purchase price for the house was \$3,500,000.00 and she gave Miss Roofe 30,000 pounds plus \$2,000,000.00.

- 3) The Claimant's sister, Jacqueline Elliott-Bailey, on the Claimant's behalf, also gave the Defendant a Toyota Corolla. The proceeds from the operation of the taxi was to be used towards the purchase of the property.
- 4) The Defendant who was in prison when she met her, could not afford to send barrels to family members. The Defendant was never a dancer.
- 5) She paid up the taxes from 2017 to 2024 when she was made aware that they are outstanding.
- 6) She sent an amount of \$549,509.37 around September 1, 2007 to the Defendant. In 2007, her sister, Jacqueline Elliott-Bailey, gave the Defendant at least \$2,000,000.00 and 30,000.00 pounds. In that year, she constantly found ways and means to send money to the Defendant.
- 7) The Defendant has been renting the property since 2010 and has gotten the total benefit of the rental proceeds from the property.
- 8) She only purchased the property with the Defendant's name as she was unaware that she could purchase the property without being in Jamaica.

[24] The Defendant asserts that both parties are joint legal owners of the property but that she is entitled to a greater share of the beneficial interest in the property on the basis that:

- 1) She went to England sometime in 2002 and worked as an exotic dancer in a night club earning 500 to 800 pounds per night depending on the night.
- 2) She sent money to her father every week towards her parents' personal care and to put towards savings.
- 3) While she was in England, she sent back money to her father's account and sent money in barrels in relation to the purchase of the property.

- 4) In 2008 when she came home from England, she bought a car which she used to operate as a taxi.
- 5) The Claimant only contributed \$1, 200,000.00 to the purchase price of the property which was \$3,500,000.00 as there was a shortfall when she pooled all the monies she had and paid over to her Attorney-at-Law.
- 6) Her Jamaica National Account for the period ending 5th day of October, 2007 with an amount of \$2,478,052.80 as the remaining balance in her account is proof that she had funds in her account to purchase the property.
- 7) From the property was bought, she paid the property taxes solely.
- 8) She took care of the maintenance of the property from 2008 to present. She spent more than \$1,000,000.00 for renovations of the bedrooms, kitchens, bathrooms and verandah which were in a deplorable condition. She paid a gardener the sum of \$3,000.00 every fortnight to cut the grass and keep the front lawn area tidy.

[25] The Court considered the Claimant's evidence as contained in her Affidavit that, "I am the one who told the Defendant about the property in Jamaica because I thought that I was going to be deported from the United Kingdom." She further stated that, "I thought I was going to be deported in 2007, so I spoke to her about buying a property in Jamaica." The Court also considered the Defendant's evidence as contained in her Affidavit, where she stated, "That I told the Applicant about my decision to purchase a home in Jamaica just in case I was deported, and the applicant encouraged me to purchase the home and advised me that she would assist me in whatever way she could whenever I was ready." She later stated that, "Sometime in 2008, the Applicant sent her sister...with some cash to assist me in purchasing the property." Having assessed the evidence of both parties, both are making similar assertions in relation to who started the discussion regarding the acquisition of the property and both assert a similar reason for wanting to acquire the property. On the Claimant's case, she placed the

Defendant's name on the title as a matter of convenience or because of her lack of knowledge of her ability to purchase property in her name while outside of Jamaica. On the Defendant's account, the Claimant merely assisted her with the purchase price for acquiring the property; there was no intention for her to share both the legal and beneficial ownership of the property. Implicit on her account is that she placed the Claimant's name on the title because of her intentions as it related to the future. According to her, her share in the property should be determined having regard to the greater contribution she made towards the purchase price of the property among her other contributions.

- [26] However, there is no evidence as to any discussion, arrangement or agreement between them in relation to whether they would both have an interest in the property and/or how they would hold any such interest. There being no direct evidence of or by inference (documentary or otherwise) on which this Court can rely as to what their actual intention was in relation to the share in which they would own the property, the Court had regard to the whole course of dealing between them in relation to the property. As part of this assessment, the Court considered the evidence as a whole and had particular regard to each party's contributions to the acquisition, upkeep, and improvement of the property to determine whether the presumption of equal interests has been displaced as these are the main factors that the parties sought to place reliance on.

Payments or Contributions toward the Acquisition of the Property

- [27] There is agreement between the parties that Miss Smith contributed to the purchase price for the acquisition of the property. Miss Smith, on the one hand stated that she contributed the full purchase money for the property. On the other hand, Miss Roofe admitted in cross-examination that she collected \$1,200,000.00 from the Claimant and a Toyota Corolla which was to be used to operate as a taxi. She used this money to make up the shortfall in the amount that she had to put towards the purchasing of the property. On Miss Roofe's account, she had the car for at least four (4) to six (6) months which she gave back because she was

spending a lot of money on it, it was not bringing in any money and it also had a lot of faults.

[28] The Claimant asserts that the Defendant's account that she refers to at Jamaica National shows that it was opened on September 1, 2007 with \$549,509.37. She stated that she sent this amount around that time to the Defendant. The account shows that the Defendant deposited \$2,478,052.80 to the account on September 29, 2007. In 2007, Jacqueline Elliott-Bailey gave her at least \$2,000,000.00 and 30,000.00 pounds. I had regard to Miss Smith's evidence in cross-examination that she disagreed that the total sum of money that she put towards the purchase of the property was \$1,200,000.00. She agreed 30,000 pounds and \$2,000,000.00 would far exceed the purchase price for the property. When asked by counsel for the Defendant what happened to the excess money left over, she said that the Defendant opened a restaurant with the money as well. When asked if this was in her Affidavit, she said no but it was mentioned in the case. She also said that she never collected any receipts for the moneys sent for the purchase of the property. Neither did she consider it prudent to ask the persons who gave the Defendant money on her behalf to collect receipts for the moneys paid over to them.

[29] Having assessed this aspect of the Claimant's evidence, there is no evidence before the Court to support a finding that the Claimant sent the amount of \$549,509.37 that was used to open the account. However, in determining whether the Claimant gave the Defendant \$2,000,000.00 or \$1, 200,000.00, the Court considered that the Statement of Account shows that an amount of over \$2,000,000.00 was deposited to the account within the period that Miss Smith says she sent the money to Miss Roofe as well as an amount of \$2,000,000.00 was withdrawn from the account in the same period. Moreover, the Defendant admitted in cross-examination that she did in fact withdraw this amount from her account at that time. What the Court finds curious in terms of the amount withdrawn by the Defendant is that although the Defendant insisted that she only got \$1,200,000.00, she did not withdraw \$800,000.00 to make up the difference of the amount to \$2,000,000.00 which the withdrawal amount suggests was the amount she needed

towards the purchase price. Instead, the Defendant withdrew the exact amount of two million dollars which is the amount that the Claimant said that she had sent to her towards the purchase price. In relation to the 30,000 pounds that the Claimant said that she sent to the Defendant, there is no material before the Court to buttress the Claimant's evidence in this regard and to support a finding that this amount was either sent to or received by the Defendant.

- [30] The Defendant's evidence that her Jamaica National Account for the period ending 5th day of October, 2007 with an amount of \$2,478,052.00 as the remaining balance in her account being proof that she had funds in her account to purchase the property was also tested by counsel for the Defendant. When asked about the closing balance on her account as at 5th October, 2007, she agreed that her Statement of Account (**Exhibit 2**) showed a closing balance of \$19,227.58. However, she said that the bank personnel had made an error in preparing the statement, as at the time, the balance in her account was \$350,000.00. This was in direct contrast to the evidence that she gave in her evidence-in-chief and also detracts from the veracity of her account.

Contributions by the Defendant from other Sources of Income

- [31] I considered her evidence-in-chief that she came from England in 2008 and when she came home she purchased a Nissan B15 for \$800,000.00 and used it to operate a taxi. She also stated that from her savings she bought another car, a Toyota Corolla for \$280,000.00 which was also used to operate a taxi. However, in cross-examination, when she was confronted about being given a Toyota Corolla by Miss Smith to operate as a taxi as against what she had said in her Affidavit, she stated that there was an error in her Affidavit when she said that she bought a Toyota Corolla for \$280,000.00. It was a Nissan Sunny. She also said that it was not true when she said that she bought a Nissan Sunny for \$800,000.00. She never bought a Toyota Corolla. One was given to her to operate as a taxi and she gave it back. Miss Smith had told her to go for the car. The Court notes that nowhere in her Affidavit did she indicate that a Toyota Corolla was given to her to

operate as a taxi. However, the admission by the Defendant that she had the Toyota Corolla for four (4) to (6) months supports the Court's view that there was potential for an amount to have been earned from the operation of this vehicle as a taxi which may very well have been used to assist with the purchasing of the property. However, the Court notes that this was a short period of time within which to have acquired any substantial sums from the operation of the vehicle as a taxi. Also, based on the Defendant's account, she returned the car because it was giving trouble. It is, therefore, questionable how much money she could have generated from the operation of the vehicle as a taxi in those circumstances. Additionally, there is no evidence before the Court to assist with quantifying any such sums, or the extent to which such sums would have contributed to the acquisition of the property.

[32] Another aspect of the evidence which the Court considered was Miss Roofe's ability to work and contribute sums towards the purchase of the property during the period when she said she went to England and when she said she was deported. The Court noted that her evidence in relation to when she went to England and when she was deported is unclear. In her evidence-in-chief, she stated that she went to England in 2002. She developed a relationship with Miss Smith from 2003 to 2014 when they both resided in England together. Later in her evidence, she stated that she came from England sometime in 2008. In cross-examination, she was asked whether she met Miss Smith in 2006. She said that she did not meet her in 2006, she said that it was before that. She was asked whether she was deported in 2007. She said that it was not in 2007. It was before that. It was about 2002. It was suggested to her that it was not 2002 that she met her. She said that it was 2002 and if not, it was somewhere there. She was asked how long she was in prison. She said 4 years and that she could not meet Miss Smith in 2006 and then get deported in 2007. She met her before she went to prison.

[33] What can be clearly gleaned from her account is that she went to England in 2002, spent four (4) years in prison and then returned to Jamaica in 2008. If this is

accepted, then she could not have been deported in 2002 and it also follows that she could not have been residing in England in 2014. Her acceptance that a withdrawal was made from her account in September 2007 and that in October of that year, she got a cheque made payable to the lawyers who were handling the sale suggests that she was deported in 2007 and not 2008 as she was doing transactions on her bank account in 2007. Therefore, she would have come to know or associate with Miss Smith between 2002 and 2007 when she was deported. Additionally, if she spent four (4) years in prison, then going backwards from 2007 when she returned to Jamaica, it is not unreasonable to conclude, based on her account, that she was in prison from 2003 to 2007.

[34] On this assessment, it means that Miss Roofe would only have worked as an exotic dancer for approximately one (1) year. On her account, she asserts that during this one-year period, she was able to save the funds that she needed for the purchase of the property. When confronted by counsel for the Claimant about not being able to earn 500 to 800 pounds per night for exotic dancing, she indicated that she could because she was doing tasks off the stage. She also gave her Nissan Sunny motor car which she used to operate as a taxi as part of her means of acquiring funds. However, if the sale was concluded in January 2008, then this would have presented a short period of time within which to acquire sums to be used towards the purchasing of the property. Additionally, if she had earned that amount of money as an exotic dancer in England, then there would be no need to operate a taxi to make up any shortfall in the funds she had to purchase the property.

Payment of Property Taxes

[35] The Court considered the Defendant's evidence-in-chief that she solely paid property taxes from she bought the property. However, it was revealed in cross-examination that this was not quite the position.

She was shown **Exhibit 1 (a receipt for the payment of property taxes)**. Miss Roofe agreed that it is a receipt for \$2,000.00 and stated that she paid this amount to the Tax Office on November 18, 2022. She agreed that the Tax Office sent her a reminder in May 2022 saying that she owed taxes of \$30,000.00. She agreed that she had not paid any taxes from 2015 to 2023. She said that she was not aware that Angella Smith paid off these outstanding taxes up until the year 2020. She then explained that it was the tenants who were to pay the taxes. However, she did not check if they had paid it. She went to find out about the taxes at the Tax Office when she saw the final notice in the rubbish bin and that is how she came to pay the \$2,000.00. This was the first time she was getting one so she did not know what it meant when she got it. What the Court found interesting is that when she was asked if she agreed that this was a minimal sum, her response was that "at least she tried". This is in circumstances, where in her evidence in chief, Miss Roofe painted the picture of having an operative restaurant, which earned her up to \$20,000.00 per week, she had a balance of about \$350,000.00 on her account, even after making the withdrawal for the purchase of the property. This was also against the background of her agreement that she was collecting rent from two tenants of \$25,000.00 each per month. In these circumstances, this was an unexpected response. What is clear, is that she had not been truthful about the position in relation to the property taxes and obviously had difficulty explaining when confronted.

Rent Collected by the Defendant

- [36] The Claimant's evidence regarding the Defendant's collection of rent from the property and benefitting from the proceeds to her exclusion was buttressed by the Defendant's account. According to Miss Smith, the Defendant is not living at the address in question and has been renting out the subject property since 2010 and has been the sole beneficiary of the rent. She has never turned over any of the amount of the rent that she collected, neither has the Defendant turned over any

of the proceeds to the her. Miss Roofe's evidence in cross-examination was that she has two tenants at the property and they pay \$25,000.00 each per month. She has never given any of the rent to Miss Smith. She says that she has been in charge of the house from it was bought. She issues receipts to the tenants when they pay rent. She does not have all the receipts from 2008. The Court notes the disparity in the two accounts in relation to when the Defendant started to rent the property. However, Miss Roofe being the person that is engaged in the rental of the property is in the Court's view the better witness in this regard.

[37] The Court notes that her Affidavit does not contain any evidence relating to the rental of the property and the collection of rent. It is in cross-examination that this issue was raised. Her evidence as borne out in cross-examination is that she has two tenants at the property and they pay \$25,000.00 each per month. She has never given any of the rent to Miss Smith. She says that she has been in charge of the house from it was bought. She issues receipts to the tenants when they pay rent. She does not have all the receipts from 2008. In relation to her evidence-in-chief that she spent more than \$1,000,000.00 for the renovations of the bedrooms, kitchens, bathrooms and verandah which were in a deplorable condition, Miss Roofe agreed that she submitted no receipts for the \$1,000,000.00 she said that she spent to fix up the house. The Court notes her evidence that she paid a gardener \$3,000.00 every fortnight to cut the grass and keep the front lawn area tidy. I also note her evidence that no receipts were issued for the job that was done.

The Court's Position

[38] Having assessed the Defendant's evidence, I found her to be shifty in the way that she gave her evidence. I did not consider her to be a very credible witness having particular regard to the aspects of her evidence that was previously highlighted. I reject her evidence that Miss Smith only gave her \$1,200,000.00 towards the purchasing of the property. I do not find her evidence credible with regard to her having earned significant sums as an exotic dancer during the short period that her evidence suggests that she would have been able to work based on when she

went to England, the amount of time she spent in prison and when she was deported.

[39] The Court also finds it noteworthy that in her evidence-in-chief, she made no mention of having received a car from Miss Smith to operate as a taxi and neither did she mention that she had gotten sums through money transfer, whether towards the purchasing of the property or otherwise. In these circumstances, the Court does not accept her evidence as to the purpose for which she received these sums, that is, for the sole purpose of assisting with the maintenance of the Claimant's son who was living with her at the time.

[40] The following factors support the Court's position that Miss Roofe was not in a financial position to purchase the property on her own:

(i) Her approach towards the payment of property taxes;

(ii) The minimal balance in her account (as evidenced by her Statement of Account (Exhibit 2)); and

(iii) Her evidence of selling her Nissan Sunny to clear the balance she had for the Attorney-at-Law who had done the sale.

[41] These factors are contradictory to Miss Roofe's evidence that she rented out a restaurant and bar which was earning approximately \$20,000.00 per week. On the other hand, they lend credence to the Claimant's evidence that she had encouraged the Defendant to open a restaurant but that the business '*ran to the ground*' and was eventually closed.

[42] Having assessed the Claimant's account, I find Miss Smith to be a credible and reliable witness. Having examined her account and especially her evidence in cross-examination, I do not find that she was discredited in any material particular. However, based on the evidence presented before the Court, there is no support for a finding that she solely purchased the property. Her substantiated evidence before the Court, which I accept and find is that the Claimant sent \$2,000,000.00

to Miss Roofe, which was used towards the purchase of the property. I also accept her evidence that she contributed other sums by way of moneys the Defendant gained from the operation of a Toyota Corolla that she had given to her and through money transfer, which were used towards the acquisition of the property. However, the Court can place no substantial reliance on this aspect of her evidence in relation to these other monetary contributions made, as there is no evidence presented before the Court that can be used to quantify these sums and, therefore, determine the extent of any such contributions.

[43] In relation to rental collected from the property, both parties are agreed and, therefore, it is not in dispute that Miss Roofe has been collecting rent from the property. I accept Miss Roofe's evidence that she has collected rent from the property from 2008 to present. I also accept her evidence that she has two tenants and that they each pay a monthly rent of \$25,000.00. Using simple mathematical calculation, this evidence prima facie suggests that Miss Roofe collected \$50,000.00 for a period of one hundred and eighty (180) months, which would amount to an approximate rental income of \$9,000,000.00 from the property over the period. In these circumstances, it is probable that Miss Roofe solely acquired and benefitted from this amount. However, the Court cannot arrive at an actual figure as to the amount of rent collected over the period, as there were no receipts provided. Additionally, there is no evidence before the Court as to whether the rent remained consistent over the years, that is, from 2008 to present and whether the tenants were consistent with the payment of the rent. Therefore, the Court cannot conclusively determine the portion of the rental sums to which the Claimant would be entitled. Neither can the Court definitively assess how these sums would affect any interest that either party has in the property. The Court considered that, by the effluxion of time, there would be 'wear and tear' to the property. In addition, it is likely that renovations to the property became necessary, as the Defendant has said in her evidence. However, there were no receipts presented to buttress the Defendant's assertions in relation to maintenance and renovation of the property and her evidence was discredited in relation to the payment of property taxes. The

Court notes that there was no significant challenge mounted to her payment of legal fees associated with the purchase of the property.

[44] Having considered the evidence as a whole and having regard to the course of dealings of the parties in relation to the property, the Court is satisfied that the Claimant has rebutted the presumption that the parties are entitled to an equal share in the legal and equitable interest in the property. The Court finds that the disparity in each party's contributions to the acquisition, upkeep, and payment of costs associated with the property favours a conclusion that they intended to share the beneficial interest in accordance with each party's contributions to the property. Thus, the Court further finds that the presumption of equal interests has been displaced.

Issue (2) - What is the entitlement of the Defendant, if any?

[45] In the circumstances of this case and having regard to the current state of the relationship between the parties, it is clear that an order for sale of the property is most appropriate in these circumstances and that the property is to be distributed according to each party's entitlement. In determining each party's entitlement, the Court finds that the Claimant's contribution of \$2,000,000.00 to the purchase price without more, would entitle her to a 57% interest in the property. The Court attributes the 43% difference in the contribution to the purchase price, to the Defendant, as there is clear evidence that she contributed. There was no valuation report presented in relation to the current market value of the property but this would equate to the respective percent shares of the current market value of the property. The Court considered further that Miss Rooft benefitted solely from the rental income earned from the property. The Court also took into account the Defendant's likely payment of costs associated with the rental of the property, maintenance and renovation costs and the evidence of her single payment of property tax and legal fees. However, these costs are questionable and cannot be definitively quantified due to the lack of evidence supporting the Defendant's assertions of actual amounts expended. The Court also considered the

Defendant's evidence that she does not have some of the receipts for the rent collected from the property. This would pose a significant challenge in terms of giving an accurate account of the rental sums collected from the property over the period. Therefore, while the Court has the power to order her to do so, in the Court's view, there would be little utility in doing so based on the challenges that would be posed by the absence of record and the effluxion of time. This would make it difficult for the Claimant to verify any amount asserted in this regard.

[46] The Court considered Counsel for the Defendant's submission that the property be apportioned 60/40 in favour of the Defendant. In this case, having regard to the admitted benefit that the Defendant gained from the rental of the property, such an apportionment would be unjust in the circumstances of this case. The Court finds that to do justice in this case, a 70/30 apportionment in favour of the Claimant is equitable. Therefore, the Court finds that the Claimant, Miss Smith is entitled to a 70% legal and beneficial interest in the disputed property.

ORDERS AND DISPOSITION

[47] Having regard to the foregoing and in all the circumstances of this case, the Court enters Judgment for the Claimant in the following terms:

- 1) The joint tenancy between Angella Smith and Kashema Roofoe in All That Parcel of Land part of **ANGELS PEN** now called **ELTHAM** in the parish of **ST. CATHERINE** being the lot numbered **ONE THOUSAND TWO HUNDRED AND TWENTY-NINE** on the plan of part of **ANGELS PEN** now called **ELTHAM** and being all that parcel of land comprised in Certificate of Title registered at Volume 1230 Folio 492 of the Register Book of Titles is severed.
- 2) It is declared that the Claimant, Angella Smith is entitled to 70% of the legal and beneficial interest in All That Parcel of Land part of **ANGELS PEN** now called **ELTHAM** in the parish of **ST. CATHERINE** being the lot numbered **ONE THOUSAND TWO HUNDRED AND TWENTY-NINE** on the plan of

part of **ANGELS PEN** now called **ELTHAM** and being all that parcel of land comprised in Certificate of Title registered at Volume 1230 Folio 492 of the Register Book of Titles is severed.

- 3) The property is to be valued by a reputable valuator to be agreed by the parties within forty-two (42) days of the date hereof and the cost of the valuation is to be borne by the parties, in accordance with their respective shares in the property being the land comprised in Certificate of Title registered at Volume 1230 Folio 492 of the Register Book of Titles. If the parties are unable to agree on a valuator within the time stipulated by the Court, then a valuator is to be appointed by the Registrar of the Supreme Court.
- 4) The property is to be sold on the open market and the Claimant is to be given the first option to purchase the Defendant's share in the property. In the event that the Claimant fails to execute an Agreement for Sale, in exercise of the option to purchase within one hundred and eighty (180) days of the date hereof, then the Defendant shall be at liberty to purchase the Claimant's share in the said property. If no action is taken by either party to execute an Agreement for Sale, in exercise of the option to purchase, within three hundred and sixty (360) days of the date hereof, then the said property is to be sold on the open market.
- 5) The Claimant's Attorney-at-Law, Michael A. Lorne shall have carriage of sale of the said property.
- 6) The Claimant shall apply the proceeds of the sale of the property as follows:
 - i. To pay the costs and expenses of effecting the sale;
 - ii. To pay the balance of the net proceeds of the sale of the property to the Claimant and the Defendant in accordance with their respective shares in the property.

- 7) The Registrar of the Supreme Court is empowered to sign all documents necessary to complete the sale of the property if the Defendant fails, neglects and/or refuses to do so within fourteen (14) days of the request being made.
- 8) The Registrar of Titles shall be at liberty to dispense with the production of the duplicate Certificate of Title registered at Volume 1230 Folio 669 of the Register Book of Titles in order to register the relevant instrument of transfer, if the Defendant fails, neglects and/or refuses to produce same within fourteen (14) days of the request being made by the Attorney-at-Law having carriage of sale, and cancel the said Certificate of Title and issue a new Certificate of Title in the name(s) of the purchaser(s) and/or his or their nominee(s).
- 9) Costs of the Claim are awarded to the Claimant to be agreed or taxed.
- 10) The Claimant's Attorney-at-Law is to prepare, file and serve the Formal Order herein.