IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. E163 OF 2002

BETWEEN	*MAXINE WALKER*	*RESPONDENT/APPLICANT*
A N D	*HIRAM WALKER*	*APPLICANT/RESPONDENT*

IN CHAMBERS

Appearances

Ms. V. Green for the applicant/Respondent.

Ms. K. Balli for the respondent/applicant.

Application to set aside under CPR 39.6

Heard: 8.10.08, 11.11.08 and 19.11.08

Williams, J.

Background

On March 14, 2002 Maxine Walker instituted proceedings by way of Originating Summons for the determination of issues between herself and Hiram Walker with respect to property situated at Lot 473 Charlemont, Linstead in the parish of St. Catherine. She asked inter alia for a declaration that she was entitled to 95% share of the value of the said property and Mr. Walker to 5%.

On the 20th of June 2002 she obtained an order exparte, before the Master for Substituted Service of the Originating Summons and Notice of appointment to hear the summons on Mr. Walker by two (2) publications of the said notice in the North American Edition of the Jamaica Weekly Gleaner Newspaper seven (7) days apart.

This order was complied with and on the 26th of November, 2002 an order was made by Mr. Justice Jones largely in accordance with what Maxine Walker had requested in her Originating Summons. This order was:-

1. That the property situated at Lot 473 Charlemont, Linstead in the parish of St. Catherine, be valued by a reputable valuator and apportioned 95% and 5% respectively.
2. That it is declared that the applicant is entitled to 95% share of the value of the property situated at Lot 473 Charlemont, Linstead Post Office in the parish of St. Catherine.
3. That the respondent be entitled to 5% share of the value of the said property situated at Lot 473 Charlemont, Linstead Post Office in the parish of St. Catherine.
4. That the costs incidental to the valuation of the said property be borne by the respondent and shall be deducted from his share.
5. That the applicant pays the respondent the sum equivalent to his 5% share in said property at 473 Charlemont, Linstead Post Office in the parish of St. Catherine less all deductibles.

6. That in the event of the respondent refusing to sign the transfer or any other document necessary to give effect to this order that the Registrar of the Supreme Court be empowered to sign same.
7. That the costs of this application be borne by the respondent and shall be deducted from his share.

In January 2004 Maxine Walker filed an affidavit seeking to have the Registrar sign the instrument of transfer. She said that efforts made to locate the respondent proved futile. Her request was granted, the documents duly signed and the property transferred with transfer registered on the 4th of May 2006.

The application

Hiram Walker now applies to have set aside the order made by Mr. Justice Jones on the 20th of November 2002 and the transfer cancelled.

This application is pursuant to 11.18 and 39.6 of the Civil Procedure Rules. This is another of those matters which commenced under the old Civil Procedure Code and must now be considered under the new rules.

Rule 11.18 applies to the setting aside of court order and hence it is 39.6 of the CPR which ultimately would apply to this application.

Rule 39.6 states:-

(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
(2) The application must be made within fourteen (14) days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing:-

(a) a good reason for failing to attend the hearing and

(b) that it is likely that had the applicant attended, some other judgment or order might have been given or made.

Hiram Walker, the applicant/respondent asserts he was not aware of the proceedings before the Court and had in effect been denied his day in court which he now seeks.

The first matter to be considered is the timing of the applicant/respondent's application. It is now some six (6) years after the order being sought to set aside was granted.

Mr. Walker asserts he was not made aware of the order till the 9th of March 2006. This is not challenged by Mrs. Walker, the respondent/applicant, neither is there any assertion that Mr. Walker was at any time served with the judgment or made aware of the orders contained therein.

This raised the issue as to whether there was any specific requirement for the judgment to have been served.

Both counsel agreed that there was no clear statement of such a requirement under the Civil Procedure Code in existence at the time the order was made.

The only express provision that made reference to this was found at Section 588 which stated:

Where any person is by any judgment or order directed to pay any money

> or to deliver up or transfer any property real, or personal to another, it shall not be necessary to make any demand thereof but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand.

Ms. Balli argues that the judgment in this matter was a declaratory judgment with consequential orders being made thereto. Such an order has no requirement for service she urges.

The Court, she further argues, in this case was empowered by virtue of section 16 of the Married Women's Property Act (now repealed); to declare the existing interests in property as between husband and wife. Hence the determination having been made that Mrs. Walker was owner of 95% of the property, "such a declaration was not required to be served on the defendant, having been properly served with the originating summons as it contained no direction to him or any other person interested in the matter to do any act so as to ensure that the court's ruling was carried out."

Following on this argument of Miss Balli's it appears Mr. Walker need not be informed of his 5% share in the property as declared by the court.

The submission of Miss Balli seems to fail to recognize that Mr. Walker was to sign the instrument of transfer and the Registrar was empowered to do so only on his refusal.

Ms. Green limited her submission on this point to the fact that Section 588 by its very nature presumes the judgment or order being duly served. This submission to my mind is correctly made and is the proper approach.

Miss Balli goes on to submit however, that in any event under the old rule 354 of the Civil Procedure Code one was required to file an application to set aside the judgment granted in his absence within ten (10) days. She recognizes that having not made such an application while the Civil Procedure Code was in operation his present application is governed by the Civil Procedure Rules. She concludes that Mr. Walker's application must fail as he has not provided the evidence required to activate the Court's discretion.

It almost goes without saying but apparently needs be said, if Mr. Walker was never served with the judgment how would he have been aware of his need to apply to set aside?

He is unchallenged in his assertion that he was made aware of what had happened in respect to the property on the 9th of March 2006 and some eight (8) days later he made his application. It is safe to say he acted promptly after learning of the judgment made against him.

The next matter to be considered is whether Mr. Walker has shown that he had a good reason for failing to attend the hearing.

He is submitting that the originating summons was never served on him or indeed brought to his attention. He seeks to attack the order for substituted service granted by the Master.

He asserts no real attempt was made to serve notice on him and that false statements were made to the court to obtain the order.

He asserts that at the time the summons was issued his address was given as 137 Jefferson Street, Somerset, New Jersey 008873 in the United States of America. He points to the fact that he had sent Mrs. Walker the petition for dissolution of marriage by

registered mail with his return address set out on the delivery receipt which he says was signed by her. She acknowledges receiving it in December 2001 and agrees she became aware of a possible address for him. She however maintains she had not been in contact with him and could not verify if the address and telephone number therein were correct.

Exactly what efforts were made for such verification – is not stated.

Mr. Walker exhibits a document which he ways is the delivery receipt for the petition. It bears a name and signature of the receiver:- name Maxine Walker and the signature is similar to that which appears on her affidavits.

The date of the receipt is 2.1.02.

It was in February she sought to retain an attorney to file the originating summons. It was by March the summons was filed and by April the application for substituted service made and granted.

No order was sought for service out of jurisdiction. The practice was that, where the defendant was abroad on the date of issue an order for substituted service would not normally be made unless the plaintiff had obtained an order for service out of jurisdiction.

Miss Balli submits that all the relevant papers put before the Master had given the same overseas address for Mr. Walker. It was therefore not hidden that he was outside of the jurisdiction of the Court.

The Master was clearly satisfied that on what was presented, the plaintiff was unable promptly to effect service by way of personal service, hence the order was made for the substitution of service by advertisement.

Mr. Walker now says there were other persons Mrs. Walker could have contacted for his address or who would have brought notice of the proceedings to his attention. It is to be remembered that-

> "the primary consideration is as to how the matter can be best brought to the attention of the person in question himself"

Re: McLaughlin 1905 AC 343 at page 347

So while it is now being urged that there were possibly persons who could have brought matter to his attention, Mrs. Walker has countered each suggestion with why she did not think the person could have been able to do so and the fact that she herself may not have indeed had contact with the person.

It is apparent therefore there is now no plausible evidence for asserting that methods suggested by Mr. Walker five (5) years after the fact would have the desired effect of bringing matter to his attention.

Failure of Mrs. Walker to propose service by these other means does not, to my mind, fall into the category as in **Gatherner v. Gatherner 1967 10 JLR 187** where it was held that there was a failure to make sufficient or candid disclosure thus the order made was voidable.

Mrs. Walker had asserted in her affidavit in support of her exparte summons for substituted service that the respondent had moved from the address she had, she was unable to ascertain his whereabouts. When he spoke to her once after their separation he refused to give his address. She stated that he was always an ardent reader of the North American Edition of the Jamaica Weekly Gleaner Newspaper and she was of "the strong opinion" that he still reads the said newspaper.

Prima facie, these assertions would be sufficient to satisfy the Master that service by means of advertisement in the said newspaper would have been appropriate in the circumstances.

Hence I am satisfied that on the facts then before the court the Master exercised her discretion to grant the application and order service as thought just.

The argument that the appropriate order for service was made and then complied with, thus thereafter the Court proceeded on the assumption that having been complied with, the defendant was properly served and had notice of the hearing is well made.

Mr. Walker having attacked the making of the order goes on to say that although complied with, he did not in fact see the advertisement, hence had no notice of the proceedings.

He points to the fact that he has remained at the same address originally given by Mrs. Walker. He says he had never been an ardent reader of the newspaper mentioned.

In her submissions Miss Green made the point that the parties had never resided together in the United States. He migrated there in 2001. She never lived with him. They had no communication on his leaving. This now begs the question how then could she have knowledge of him being an ardent reader of the newspaper mentioned therein. Herein lies what could be viewed as a less than candid assertion on Mrs. Walker's part.

The fact that she was not in a position to speak to his reading habits may not have been apparent to the Master when she exercised her discretion.

It now becomes significant as Mr. Walker seeks to explain his absence from the hearing. This is his good reason for being absent at trial, he was never made aware of it.

In **Shocked and Another vs Goldschmidt and Another 1981 All ER 372** Lord Justice Legatt at page 381 outlined propositions to be considered on an application such as this. He stated inter alia:

( ) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important, unless the absence was not deliberate and not due to accident or mistake, the court will be unlikely to allow a rehearing.....

In considering this application therefore the court must be satisfied the reason put forward must be genuine and honest and sufficient for the court to exercise its discretion in favour of the defaulting party.

The third and final consideration must be whether the applicant has shown that it is likely that had the applicant attended some other judgment or order might have been given or made.

Consideration of this issue is perhaps best dealt with by first reviewing the applicable law

In matters such as this under the Married Woman Property Act [now repealed] the foremost authority is **Pettitt v. Pettitt 1970 AC 777 Lord Upjohn** at page 813 said:

> "In the first place the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property is land there must be some lease or conveyance which shows how it was acquired. But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both jointly in which case parol

> evidence as to the beneficial ownership that was intended by them at time of acquisition and if as very frequently happen as between husband and wife such evidence is not forthcoming, the court may draw inferences as to their intentions from their conduct. If there is no such available evidence then what are called the presumptions come into play"

In our Courts in **Harris v. Harris 1982 [19] 19 JLR 319** Mr. Justice Carey said at page 323:-

> "As I understand the law in relation to this matter of this king, two propositions can be stated where property is transferred into the joint names of husband and wife. The first is plainly stated in **Cobb v Cobb [1955] 2 All ER 696** namely that prima facie the parties are to be treated as beneficially entitled in equal shares.....
>
> The second is that where the intention of the parties as to whom the property is to belong to or in what definite shares each should hold is ascertainable, effect will be given to that intention".

Miss Balli in her submission points to the assertion of Mr. Walker that there was an intention that the home be the matrimonial home and states that it is generally accepted that an intention to occupy premises as the matrimonial home does not confer an interest in such property.

This is not an accurate statement as to the law and the principles that have arisen from the cases.

The Court considers the conveyance which shows how property was acquired. In this case the title speaks to the parties being joint tenant which would be prima facie

proof that the parties are to be treated as beneficially entitled in equal shares. It would therefore be for the court to determine the intention of the parties at time the property was acquired.

The Court's assessment of the parties and their evidence would than have to be determined. Miss Balli says the proposed evidence of Mr. Walker is contradictory and not believable.

I an not prepared to presume this is the only possible view that could be formed of his evidence without it being tested.

The test in the rule at 39.6 (b) is whether some other order **MIGHT** have been made. [emphasis mine].

The fact of the title naming Mr. and Mrs. Walker as joint tenants and his assertion that the property was to be the matrimonial home means that if he was believed he might have been adjudged to have a greater than 5% beneficial interest in the property.

In her original affidavit Mrs. Walker speaks to her paying the mortgage and assistance from Mr. Walker. The law is clear that these acts do not defeat, increase of decrease the interests of the parties as defined at the time of acquisition.

See **Forrest v Forrest SCCA 79/93**

Muetzel v. Muetzel [1970] 1All ER 443

Before concluding I need to address the proposition of Miss Balli that the judgment obtained was determined on the merits – the merits of Mrs. Walker's case hence is not exparte or in default. This she seems to be saying means it ought properly not be disturbed.

The comments of Jenkins L.J. in **Grimshaw v. Dunbar [1953] 1All ER 350** at page 355 is instructive.

> "A party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, common justice demands, so far as it can be given effect to without injustice to other parties, that the litigant who is accidentally absent should be allowed to come to court and present his case....."

The case cannot be said to have been decided on its merit – both sides.

Conclusion

In the circumstances it is not unreasonable that Mr. Walker did not in fact see the advertisement in the North American Gleaner.

He cannot therefore be said to have been served and had notice of a hearing which he deliberately absented himself from.

His reason for absence is therefore a good one. His proposed defence supports a finding that is likely some other order might have been made if he had attended.

Accordingly, I am granting an order in terms of paragraph 1(a) and (2) of the Notice of application for court orders. Given what it may entail, I am not minded to grant 1(c) as in the event that Mr. Walker's interest is determined to be more that 5% he can be paid for his interest.