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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/98

**COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (Ag)**

BETWEEN	EILEEN MAUREEN WEDDERBURN	PLAINTIFF/ APPELLANT
AND	CAPITAL ASSURANCE BUILDING SOCIETY LIMITED	DEFENDANT/ RESPONDENT

**David Henry, instructed by Nunes, Scholefield, DeLeon & Co for the Appellant
Sandra Minott-Phillips instructed by Myers Fletcher & Gordon for the Respondent**

18th, 19th November, 1998 and 15th March, 1999

LANGRIN, J.A. (Ag).

This is an appeal from a decision of Ellis J, given on 15th July, 1998 in which he dismissed the appellant's application for an interlocutory injunction and granted the respondent's application striking out the action, on the basis that the appellant's allegations and contentions were untenable given the clear provisions and purpose of the Jamaican Registration of Titles Act.

After hearing full arguments, this Court concluded that the appeal must be dismissed with costs to the respondent.

The facts were not disputed. Eileen Maureen Wedderburn was married on the 26th November, 1981. About 1986 the couple agreed to purchase a matrimonial home

together and agreed that they would be jointly entitled to ownership of the home. Her name was not on the registered title.

With the help of a mortgage from Life of Jamaica for \$300,000 the property was purchased. The mortgage was paid off and discharged on May 20, 1997.

The appellant was unaware that her husband subsequently sought additional loans and pledged the matrimonial home as security by way of mortgage until November, 1997 when the property was advertised in the newspaper for public auction by the respondent.

She enquired as to the status of the matter and discovered that the respondent held a mortgage over the property to secure an initial loan of Four Million Three Hundred and Sixty Four Thousand Four Hundred and Forty Dollars (\$4,364,440). That was the first time she realised that her husband had not registered her joint ownership of the property on the Title. The reason he gave for his failure to put her name on the title was her absence abroad on a course of study when the papers were finalised. She made a payment on account and the respondent withdrew the property from the auction.

She asserts an entitlement to an interest in the said property pursuant to the provisions of the Married Women's Property Act based on her contribution to the purchase thereof from their joint savings.

The essential question in this appeal is: If the intended mortgagee upon receiving an application fails to investigate whether the spouse of the intended mortgagor has an interest in the matrimonial property or fails to obtain the consent of the spouse to the pledging of the intended security (the matrimonial home) is the said mortgage voidable and is the Court entitled to declare the said mortgage void?

Counsel for the appellant, Mr. David Henry made the following submissions:

- (1) Section 16 of the Married Women's Property Act gives a general power in relation to the determination of the interest of either spouse in the property even though that interest has not been registered on the title.
- (2) If by this expressed statutory provision the law contemplates and guarantees the protection of the rights of married persons in property, though the interest is unregistered, can the provisions of Section 71 of the Registration of Titles Act which is a law not superior to the Married Women's Property Act deny the married woman of her interest in the property?.

Essentially, the appellant's case is an action in tort by the proprietor of an unregistered interest in real property against the proprietor of a registered mortgage over the said property. The matter does not concern the validity of the registered title but touches and concerns the validity of the mortgage held by the mortgagee which was obtained in circumstances where the mortgagee knew or ought to have known (if there was due diligence) of the interest of the proprietor of the unregistered interest in the property.

The Registration of Titles Act confers on the proprietor indefeasibility of his title, save for fraud. This is the fundamental basis of the Torrens System of registration of land and is a matter of settled law.

Section 70 of the Registration of Titles Act provides as follows:

" 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might

be held to be paramount, or to have priority, the proprietor of land or of any estates or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser".(emphasis added)".

The claim to the interest in the house is based on the fact that the appellant contributed substantially to the purchase price of the matrimonial home. This claim whether established or not has not been specified or identified in the certificate of title as provided in the section. Hence the mortgagee takes free from any such interests arising from the claim.

Counsel submitted that there is an obligation or duty cast on an intended creditor prior to obtaining security from an intended borrower to ascertain or investigate whether there are third party rights or interest in respect of the security intended to be pledged. In particular there is a duty on an intended mortgagagee upon receiving an application for a mortgage loan to ascertain or investigate whether the spouse of the intended mortgagor has an interest in the property being pledged as security for the loan.

Section 71 of the Registration of Titles Act provides as follows:

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances

under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest in existence shall not of itself be imputed as fraud."(emphasis added).

It is abundantly clear from the underlined words in the cited provision that even knowledge of the existence of a trust or other unregistered interest does not constitute fraud. This section provides adequate protection to parties dealing with the registered proprietor. The law in relation to notice as it may affect purchasers or mortgagees of unregistered land has no application to registered land. The system of registration of title is designed to free the purchaser or mortgagee from the hazards of notice real or constructive which in the case of unregistered land involved him in enquiries failing which he might be bound by equities.

Even knowledge that a claim is being asserted by Court action as shown by the appellant filing suit under the Married Women's Property Act against her husband can have no legal consequence against the validity of the mortgage since her right would have to be postponed to the rights of the mortgagee. Lord Buckmaster L.C. in the case of *Waimiha Sawmilling Co. Ltd v Waione Timber Co. Ltd*. [1926] A.C. 101 at pg. 108 had this to say:

"Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor, knowledge that steps are being taken to assert that interest can have no more serious effect".

We do not agree that "it was unjust, inequitable and unreasonable for the learned trial judge to strike out the plaintiff/appellant's legitimate claim". She is not

precluded from pursuing her claim to establish her interest in the said matrimonial property.

We accept the useful arguments of Mrs. Sandra Minott-Phillips , Counsel for respondent and it follows from the above that there was not a serious question to be tried which should be left for adjudication. Accordingly, Ellis J, was correct in dismissing the summons for the interlocutory injunctions; and further ordered that the order be struck out. There was no basis on which this Court could legitimately interfere with the decision of the Court below and indeed no substantial reason was given for doing so. It was for these reasons that we dismissed the appeal with costs to the respondent to be taxed if not agreed.