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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E76 OF 1994

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT.

AND

IN THE MATTER OF ALL THAT parcel of land known as 46 Riviera Boulevard, Jamaica Beach in the parish of Saint Mary and being the land comprised in Certificate of Title registered at Volume 1224 Folio 797 of the Register Book of Titles.

BETWEEN	JUDITH ANN ADIB FLIMN	APPLICANT
A N D	OWEN FLIMN	RESPONDENT

Ransford Braham and Peter Depass instructed by Livingston, Alexander & Levy for Applicant.

Margaret Forte and Jackie Cummings instructed by Gaynor & Fraser for Respondent.

Heard: December 5, 6, 1994, March 6, 7, 31, 1995

LANGRIN, J.

This is an application on Originating Summons pursuant to Section 16 of the Married Women's Property Act, seeking a declaration that the applicant is entitled to a one-half interest in all that parcel of land known as 46 Riviera Boulevard, Jamaica Beach in the parish of St. Mary, registered in the name of Owen Flimn.

It is not disputed that the parties were married on the 8th September 1971. At that time the applicant was 19 years old and the respondent was 42 years old.

In her affidavit evidence the applicant said that at Respondent's request she resigned her job at Tower Isle Hotel in June 1971 and started working at "The Ruins" where her husband was a business partner. She effectively managed the business and the office, doing the Accounts Receivable and Payable. The respondent not being a literate person made her job in the business difficult because she had to deputise for other persons like the cashiers

When they were absent. The reason why she left her job at Tower Isle to work for the Respondent was because the Respondent had told her that whatever they acquire as a result of working together in the business would be owned jointly by them. (underlining added)

As a result of the success of "The Ruins" they were able to form another business known as Flimn's Trucking Service which she managed. This business also did very well. They bought 46 Riviera Boulevard, in 1973. Some of the Funds for the purchase of this house came from the business account for "The Ruins" which was held at the C.I.B.C branch in Ocho Rios. The rest of the funds were obtained by way of a loan from C.I.B.C which they paid off over a 3 year period in lump sums from moneys made directly from the two businesses. She recalls that on occasions when a large travel group from overseas came to "The Ruins" for lunch the moneys collected from these visits would go directly to the loan account on the house at C.I.B.C.

On different occasions during the marriage when she mentioned that her name was not on the title to property or any of the business accounts he would always say that everything they have was for both of them and the children.

She designed the ground plans for the remodelling of the house and the expenses came from the business accounts. The parties separated in October 1983 and since that time they lived separately and apart.

Under cross-examination by Mrs. Forte she admitted that when she started working at "The Ruins" she was paid a salary of $30 per week and was on the Pay Roll at the time. Later however, she was taken off the payroll but was paid $30 per week from Petty Cash. She bought clothes from money she collected at the office and the bills were paid by the Respondent. The highest salary she received was $150 per week in 1981.

The Respondent Owen **Flimn**, a businessman deposed that before he met Applicant he had sold all his cars in a Rent-a-Car business and was in the process of selling his limousine business in which

he had several limousine. Part of the proceeds for the sale were used to established "The Ruins" in partnership with one Judy Boyd. The applicant lost her job at Tower Isle Hotel and sought employment in "The Ruins" through his partner. She was employed to work in the Music Room at nights playing records and she was paid a weekly salary of $500 per week. In 1971 he bought his partner's share of the business but because the business was not making much of a profit he allowed his partner to retain the $200,000.00, being the cash assets and he retained the furniture and other equipment. He used funds from his personal account to continue the operation of the business.

A Fargo truck was purchased by him with a loan of $10,000.00 from C.I.B.C to start Flimn's Trucking Services. This business was managed by him with the assistance of Gladstone Dixon who prepared the payroll among other accounts.

In 1973 he bought a home at 46 Riviera Boulevard for $28,000.00 with a loan from the Bank of Nova Scotia. He paid four monthly installments and subsequently paid off the balance out of his Savings Account at the Bank of Nova Scotia which he had before he met the applicant. The money he made from "The Ruins" was brought back in the business which was eventually closed, bankrupt in 1974. I accept the evidence of the respondent that he was a matured businessman who had considerable savings before he met the applicant. If as the applicant depose the loan to purchase the house came from C.I.B.C then in the normal course of things the bank would require the security to the loan to be indorsed on the title. According to the applicant the loan from C.I.B.C. was paid off over a three year period. The Title at Volume 954 Folio 146 reveals the following indorsement.

"Transfer No.297693 dated 4th April and registered on 21st May, 1973 to Owen Flimn for $28,000.00.

Mortgage No.253585 dated 5th and registered on 18th June, 1973 from Owen Flimn to Bank of Nova Scotia to secure $46,727.80.00 with interest."

There is no supporting evidence before the Court that such a loan came from C.I.B.C. Further I accept the respondents evidence

that he paid for the house with a loan from Bank of Nova Scotia and the balance from a savings account which he had in a account in the Bank of Nova Scotia.

In 1975 he made extensions to his house and the expenses for these came from his personal account with the Bank of Nova Scotia. Since the applicant left the matrimonial home he constructed an upstairs bed room as well as a den which he paid for out of his own savings.

He had informed Mrs. Flimn that he was unsuccessful with his first marriage and since he was getting on in age, he had to be careful. He denies ever telling applicant that whatever was acquired would belong to them jointly.

Clinton Headman, the Accountant for the Restaurant and Night Club as well as Trucking business testified that the applicant was employed in the business and paid a weekly salary like other employees. In auditing those accounts he never saw any indication of funds being used from these accounts to purchase the house at 46 Riviera Boulevard. He went on to say that if funds from the account were used for that purpose he would have had to advise the Respondent that he would be liable to pay Income Tax on those funds. However he could not recall having had to do so. He recalled that when "The Ruins" was closed down the Respondent moved his office to Carib Ocho Rios where applicant also worked. He recommended that the applicant's salary be increased and it was in fact increased.

Mrs. Forte Learned Counsel for the Respondent submitted with considerable force and clarity that the evidence adduced did not support the applicant's contention that there was a common intention that she had a beneficial interest in the property. She cited several relevant authorities in support of her submissions.

The Law

Two fundamental principles emerge from the law governing this matter and they may be found in the leading cases of Pettit v. Pettit 1970 A.C.777 and Gissing v. Gissing 1971 AC 886 and stated in Bromley Family Law 7th Edition 530.

> "It is clear from Pettit v. Pettit that English Law has no doctrine of community of property or any separate rules of law applicable to family assets. Consequently if one spouse buys property intended for common use with the other - whether it is a house, furniture or a car - this cannot per se give the latter any proprietory interest. From this follows the second principle stated in Gissing v. Gissing, that if either of them seeks to establish a beneficial interest in property, the legal title to which is invested in the other, he or she can do so only by establishing that the legal owner holds the property on trust for the claimant."

In determining the beneficial interest where property is vested in one party only the difficulty to resolve the issues involved can hardly be overstated in the case of husband and wife. In Azan v. Azan (1988) S.C.C.A. 53/87 Forte, J.A. adopted the analysis of the Judgment in Grant v. Edwards as stated:

> "If the legal estate in the joint name is vested in only one of the parties (the legal owner) the other party (the claimant) in order to establish a beneficial interest has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated.
>
> (a) that there was a common intention that both should have a beneficial interest; and
>
> (b) that the claimant has acted to his detriment on the basis of that common intention."

Lord Dening in Nixon v. Nixon (1969) 3 AER 1133 at p.1136 observed:-

> "What is the position of a wife who helps in the business? Up and down the Country a man's wife helps her husband in the business, she serves in the shops, he does the travelling around. Test it this way, if the wife had gone out to work and had earned wages which she brought into the family pool out of which the shop and business were bought she would certainly be entitled to a share. She should be in just as good a position when she serves in the shop and receives no wages, but the profits go into the business. The wife's services are equivalent to a financial contribution and it has repeatedly been held that when a wife makes a substantial financial contribution, she gets an interest in the asset that is acquired."
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> (underlining added)

Three broad questions arise for consideration:

1. Was there an express agreement that the applicant should have an interest in the matrimonial property?

2. Was there a common intention between the parties that both parties should have a share?

3. Did the applicant act to her detriment on the basis of that common intention?

I now turn to an examination of these questions.

I. Was there an express agreement?

There was no express agreement between the parties that the applicant should have a beneficial interest in the matrimonial property. The statements relied on by Mr. Braham in his submission as made by respondent are too general to found a common intention and I so find.

II. Was there a common intention between the Parties that both should have a share in the property?

In the case of Gissing v. Gissing (supra) Viscount Delhorne had this to say:-

> "..... In determining whether or not there was a common intention, regard can of course be had to the conduct of the parties. If the wife provided part of the purchase price of the house either initially or subsequently by paying or sharing in the mortgage payments the inference may well arise that it was the common intention that she should have an interest in the home. To establish this intention there must be some evidence which points to its existence ..... In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive trust in favour of the claimant or a beneficial interest or a share in it."
>
> (underlining added)

Applying this dictum, I find that there is no evidence that there was a common intention between the parties or any evidence upon which I could infer such common intention.

The evidence as to whether money was used from the funds in any of the businesses operated by the respondent to purchase the house at 46 Riveira Boulevard is tenuous. The applicant contends that some of the money came from the business account held at C.I.B.C

Ocho Rios, while the rest of the loan was obtained by way of a loan from C.I.B.C which was paid off over a three year period. I prefer the evidence of the Respondent and his accountant on this point. Additionally the entry of transfer on the Register of Titles does not support the applicant's testimony. All the transactions are with Bank of Nova Scocia. The same applies to the trucking business because both businesses were under one umbrella of management.

I found the applicant very unconvincing in her evidence that she did not receive any salary while working at "The Ruins". Under cross-examination she testified that the highest salary she received was in 1981 when she received $150 per week. In the absence of an express agreement the payment of wages would negate any common intention.

I find as a fact that there was no common intention.

Did the applicant act to her detriment on the basis of that common intention?

I am satisfied that the applicant did not act to her detriment since it is my finding that there was no common intention that the applicant should have an interest in the property. The evidence is clear and I accept it that the applicant received wages while working in the business. In addition the husband paid all the expenses for running the home. That being so she could not have acted to her detriment.

In my judgment, there is nothing in the evidence to satisfy me on a balance of probabilities that there was a common intention between the parties that both of them should share in the matrimonial property.

The applicantion under the Married Women's Property Act was made on February 23, 1994, a period of 11 years after the applicant left the matrimonial home.

Mrs. Forte submitted that the applicant's delay in not bringing the claim until 11 years later would render it unjust to give her a remedy now. Laches essentially consists of the lapse of time coupled with the existence of circumstances which make it

inequitable to enforce the claim. However, there has been a conspicuous absence of any evidence to show that if the applicant had succeeded in her claim it would be unjust to grant the remedy against the respondent.

Accordingly, the application is refused with costs to the Respondent to be agreed or taxed.