

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

CLAIM NO E.1995/E349

BETWEEN CLARENCE G. ROYES CLAIMANT

A N D CARLTON C. CAMPBELL FIRST DEFENDANT

A N D YVONNE A. CAMPBELL SECOND DEFENDANT

A N D CAROL ROYES INTERVENOR

Miss Carol Davis for 1st Defendant/Applicant

Miss Hilary Phillips Q.C. & Miss Nesta Claire Smith instructed by
Ernest A. Smith & Co. for Claimant/Respondent.

Miss Georgia Gibson-Henlin & Miss Catherine Minto instructed by
Nunes Scholefield DeLeon & Co. for Intervenor.

Application for Order for Sale of Land

Heard: 28th January and 16th March, 2004

Coram: Brooks, J.

The following questions arise for resolution by this court in assessing
this case:

Firstly:

“Should a judgment creditor be obliged to stand
haplessly and helplessly outside the gates of premises
while his judgment debtor basks in those premises

enjoying the amenities thereof, simply because the debtor owns the property jointly along with another?”

Secondly:

“Should the spouse of such a judgment debtor who owns premises jointly with the debtor be obliged to have the premises sold against his or her will in order to satisfy the judgment debt?”

These questions arise from the following scenario:

1. Mr. Clarence Royes owes to Mr. Carlton Campbell a sum of just under \$8,000,000.00 arising from a judgment against Mr. Royes in favour of Mr. Campbell which judgment was handed down in December 2002.
2. Mr. Royes has made no effort to satisfy the debt, though he has filed an appeal against the judgment.
3. Mr. Campbell wishes to collect the fruits of his judgment and asks the court in this application to facilitate this and to order the sale of a piece of real property which Mr. Royes owns an interest in.
4. The property has a market value of approximately \$10.00M based upon the appraisal of a valuator who was not afforded an opportunity to enter and inspect the premises.
5. Mrs. Carol Royes has sought and obtained permission to intervene in these proceedings on the basis that she is a joint owner along

with Mr. Royes of the real property mentioned above, which she says, is her home and is where she lives with Mr. Royes.

6. Both Mr. & Mrs. Royes have resisted the present application stating in essence that the court does not have the power to order the sale of property that is owned by a person who is not a judgment debtor in this action and who, for all purposes, is an innocent bystander.

The issues, which arise to be considered from the submissions made by the respective parties, may be summarized as follows:

1. Does Part 55 of the Civil Procedure Rules 2002 seek to give the court a power of sale, which power it cannot properly exercise in respect of jointly owned property, if one or more of the joint owners is not a judgment debtor?
2. If the court can properly order a sale in those circumstances what would be the subject of the order; would it be the entire property or only the interest therein of the judgment debtor?
3. If it is only the interest of the judgment debtor, which may be ordered sold; (a) what other orders ought to be made and (b) is there any real likelihood of such a sale being realized?

I shall deal with each question in turn.

1. Does Part 55 of the Civil Procedure Rules 2002 seek to give the court a power of sale, which power it cannot properly exercise in respect of jointly owned property, if one or more of the joint owners is not a judgment debtor?

Both Mrs. Gibson-Henlin on behalf of Mrs. Royes and Miss Phillips Q.C. on behalf of Mr. Royes have submitted that the authority granted to the court by Part 55, being based on procedural law must be subject to, or circumscribed by, the substantive law dealing with joint ownership.

In summary they submit that Jamaican law, though it allows for one of a number of joint tenants to unilaterally sever that joint tenancy by some sufficient act, does not allow for any person outside of their number to effect severance. The submission continues, by my summation, as follows:

- (a) Joint tenants hold an interest in land and not an interest in the proceeds of the sale of land, as is the case under the post-1925 United Kingdom Legislation.
- (b) Joint tenants have a unity of possession, interest, time of acquisition and title, as well as a right of survivorship in the interest of any joint tenant who dies. This intimate union has been long recognized in

law and courts have resisted breaking it by judicial action.

- (c) Part 55 of the rules therefore ought to be interpreted against that background.

A number of authorities were cited in support of the submissions, the majority of which were post-1925 English cases. The bulk of these were authority for the point that the 1925 Law of Property Act in England created a mandatory legal joint tenancy in all cases of co-ownership of real property. Further that each such joint tenancy was deemed held on a trust for sale for the beneficial owners. The result was that the beneficial owners (whether they be also the legal owners or not) merely had an interest in the proceeds of sale of the property and not in the property itself. For that reason the court could properly, (based on some other legislative provisions in that country) order the sale of real property and a charge on the proceeds of sale.

The cases of Irani Finance Ltd. Vs. Singh [1970] 3 All E.R. 199 and National Westminster Bank v. Stockman [1981] 1 All E.R. 800 featured heavily in these submissions.

Both Miss Phillips and Mrs. Gibson-Henlin have identified that the unilateral act of severance by one of two or more joint tenants has been recognized in the long-standing case of Williams v. Hensman 1 Johns. and

Hem. 546. In Jamaica, cases such as Gamble v. Hankle (1990) 27 JLR 115 have supported the principle.

To effect severance however, the authorities suggest that the joint tenant so acting, must seek to deal with his interest only and not the entire property, or else severance will not be effected. See Lumley v. Ravenscroft [1895] 1 Q.B. 683 at p 685 (per Lindley L.J.).

How else may a joint tenancy be severed?

In the 23rd Edition of Williams on Real Property (1920) the learned author at p 147 states:

“It is in the power of any one of the joint tenants to sever the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy.”

After expanding on that principle the learned author at p.148 goes on to say:

“joint tenancy may also be severed by operation of law, as upon the bankruptcy of a joint tenant.”

The case of Thomason & others v. Frere & others (1809) 10

East's Reports 418 is cited in support of the principle. At page 425 of that report, Bailey J. is quoted as follows:

“And I take it to be now clear that where one of several partners commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any property in the partnership effects, but the property is from the time of such act of bankruptcy in his assigns by relation and in the solvent partners.”

Section 42 of Jamaica's Bankruptcy Act states as follows:

“42. When a provisional order has been made against a debtor, the property of the debtor shall immediately pass to and vest in the Trustee, without any conveyance or assignment or transfer whatever, to be by him in due course, either under an absolute order for bankruptcy, or under a deed of arrangement as hereinafter provided by this Act, realized, administered and distributed with as much dispatch as is reasonably practicable for the benefit of the creditors:”

Provided, that until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property seized permits, to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order:

Provided always, that it shall be lawful for the Trustee, before any such order is made absolute, to make sales of any part of the debtor's stock-in-trade, or other property, and take such other action in the interests of the debtor's estate, as in the ordinary course of the debtor's business may seem expedient.”

The section makes it clear, I believe, that when the court makes a provisional order bankruptcy in Jamaica, all the debtor's property, including, (juxtaposing the learning from Williams on Real Property (supra)), even his or her jointly owned property, is affected.

The trustee replaces the debtor but as he has no unity of time with the other joint tenants the joint tenancy is severed by the order of the court as authorized by the statute. The entitlement to survivorship, which itself is never a certainty, is also necessarily lost.

If the joint tenancy may be so severed by operation of law does Part 55 also provide that opportunity?

To answer that question, two provisions of Part 55 need to be examined.

Rule 55.1 states as follows:

- “(1) This Part deals with the sale of land –
- (a) under any enactment which authorises the court to order a sale; or
 - (b) when it appears to the court to be necessary or expedient that the land should be sold whether to enforce a judgment or for any other reason.

- (2) In this Part “land” includes any interest in or right over, land.”

After stipulating how the application for sale should be made, Part 55 in Rule 55.3 then states, in part, as follows:

“The court on hearing the application may-

- (b) order the sale of the land or a specified part of the land.”

Read together these provisions authorize the sale of land and interests in land, but nothing in the provisions of Part 55 authorises the sale of land of a person who is not a judgment debtor. This is so despite the provisions in Part 55, (namely 55.2 (4), and 55.3(a)), which require that persons other than the judgment debtor who have an interest in the property be served with notice of the application for the order for sale. Rule 55.5 also recognizes the interest of persons other than the judgment debtor when it stipulates that the “court may give directions for the purpose of the sale, including-...

- (f) an enquiry into what interests any interested persons may have in the land and the extent of such interests in the net proceeds of sale;”

I find that, as in the case of a provisional order in bankruptcy, an order for sale pursuant to Part 55 will operate as a severance of the joint tenancy and therefore may be properly made by the court in those circumstances.

I draw support for this view from the fact that Part 48 of the rules which deals with charging orders made by the court against, among other things, land, specifically speaks to land held on a joint tenancy.

Rule 48.1 states in part:

“(1) This Part deals with the enforcement of a judgment debt by charging
(a) land;...

(2) In this Part-

“land” includes any interest in land;...”

The similarity to Part 55 is striking.

Rule 48.6 (1) states as follows:

“The persons specified in paragraph (2) have an interest in the charging order proceedings as well as the judgment creditor and the judgement debtor and are referred to in this Part as “the interested persons.”

Rule 48.6 (2) states in part:

“The interested persons are –

(a) any person who owns the land, stock or assets to be charged jointly with the judgment debtor;”

And finally, in dealing with enforcement Rule 48.11 (5) states:

“The court may give such directions as seem appropriate to secure the expeditious sale of the land, stock or property charged at a price that is fair to both judgment creditor and debtor.”

The authority to order the sale of the interest of the judgment debtor in jointly owned land may easily be gleaned from these provisions.

I find that the absence of a specific reference to joint tenancies in Part 55 does not restrict the authority given to the court by that Part to order the sale of an interest in land.

The above reasoning dictates a short answer to question 2.

2. If the court can properly order a sale in those circumstances what would be the subject of the order; would it be the entire property or only the interest therein of the judgment debtor?

The answer must be that only the interest of the judgment debtor may be affected by the order for sale. Therefore only that interest may properly be the subject of such an order.

3. If it is only the interest of the judgment debtor that may be ordered sold; (a) what other orders ought to be made and (b) is there any real likelihood of such a sale being realized?

Having answered question 2 as I have, guidance must again be sought from the provisions of Part 55. Rule 55.5 (f) quoted above is, in my view, designed to ensure that no more than the judgment debtor's entitlement is affected by the order for sale. If the court is therefore minded to make the order for sale, an inquiry into the respective interest of each of the joint tenants will be required.

Mrs. Gibson-Henlin has submitted that in this case the inquiry would be akin to that normally exercised by the court in a hearing conducted under the auspices of Section 16 of the Married Women's Property Act. Such an inquiry however, she submits, is not designed to meet that need. She concludes that an inquiry made pursuant to a Rule 55.5 (f) direction would be a "short-circuit" of the appropriate process and would lead to injustice.

Miss Davis on this point submitted that the intention of the legislature was to give the court wide powers to order a sale and in exercise of that power has also authorized the court to conduct such enquiries as is necessary to achieve the objective of the sale.

I find that there is nothing in the rules that limits the exercise of the court's power as to the nature of the inquiries to be conducted. If therefore the court is of the view that a more formal inquiry, along the lines of a Married Women's Property Act hearing, is required to achieve the overriding objective, then such a hearing may be ordered.

The answer to question 3(a) in this context would therefore be that in addition to ordering inquiries as to creditors and other persons holding charges against the property the court would be entitled to order an inquiry as to the beneficial interest of each joint tenant in the property.

The second part of this question requires the court to explore the practical aspect of making an order for sale.

Undoubtedly, there are cases where, as in some applications for partition, a physical division of the property is possible and therefore orders for sale may be properly made. They would be followed by applications for subdivision approval or, applications for strata lots, and in due course applications for separate registered titles. This would occur where, for instance, there is involved a large tract of land, or an office complex or an apartment building.

An investor may be willing to purchase an interest in land where, at least initially, he holds the property as tenants in common with a person with whom he has no other bond or connection.

In the case of a private dwelling house however, such as in the instant case, is it likely that that will occur? In this case because of the abovementioned limitations in the valuator's report the court has not been able to determine whether any convenient partitioning of the property is possible. In the vast majority of cases however a private dwelling house will not allow such division.

In those circumstances is it likely that any 'stranger' will purchase such an interest? I think not. A court in considering the application for sale

in this context, bearing in mind the guidelines of rule 1.1 (2) (the overriding objective) may well be of the view that if the practical reality is that a sale is not likely, the order ought not to be made. The court may find that the resources of the parties to the application and of the court would not be well spent in pursuing the inquiries, applications and administrative process involved in giving effect to such an order.

I find myself compelled to that view in this present application. It may be that if Mr. Campbell were to identify a buyer, ready, willing and able to purchase Mr. Royes' interest in the house, whatever that interest may eventually prove to be, then the application may properly be renewed.

Conclusion

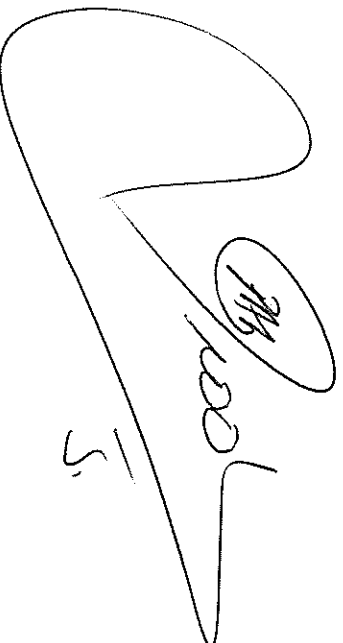
Though it may seem unjust that a judgment creditor languishes in the "cold" while his judgment debtor is able to enjoy the comfort of real property jointly owned with one or more persons, our law does not allow a sale, which affects the interest of the innocent joint holder.

Where the nature of the property is amenable to such an order the court may order a sale of the interest of the judgment debtor in the property. The result would be a severance of the joint tenancy in so far as the interest of the judgment debtor is concerned. The subsequent sale, if there be one,

would see the purchaser holding as a tenant in common with the remaining co-owners.

In the case of a private dwelling house not capable of a convenient physical division reflecting the interest of the judgment debtor, orders for sale are not appropriate. They are not practicable. This is the position in this case and the application is therefore refused.

In the circumstances I shall not add to the burden of the judgment creditor, he is only to bear his own costs. Mrs. Royes' costs are to be paid by Mr. Royes, who will bear his own costs. The costs are to be taxed if not agreed.

A handwritten signature in black ink, appearing to read "Mr. Royes", with a large, sweeping flourish underneath. The signature is written over a horizontal line.