



[2020] JMSC Civ 247

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 M 01948

BETWEEN CLEVELAND FRITZ HERBERT PETITIONER/RESPONDENT
DILWORTH

AND GILLIAN MERJEAN DILWORTH RESPONDENT/APPLICANT

IN CHAMBERS

Miss Nesta-Claire Hunter instructed by Ernest A. Smith and Co., Attorneys-at-Law for the Respondent/Applicant.

Miss Rachael S. Dibbs, Attorney-at-Law for the Petitioner/Respondent.

Heard: December 10 and 18, 2020

Matrimonial Property - Property Rights of Spouses Act (PROSA) - In limine objection - Petition for the Dissolution of Marriage proceeded in default to a grant of Decree Absolute - Notice of Application for Court Orders for division of matrimonial property filed while divorce claim subsisted but not determined before the grant of Decrees Nisi and Absolute - Whether *res judicata* applies - Whether claim for division of matrimonial property must be made by Fixed Date Claim Form.

C. BARNABY J, (AG)

[1] On the 10th December 2020 I heard arguments on a in limine objection raised by the Petitioner/Respondent. It concerned the propriety of the Respondent/Applicant making a claim for the division of matrimonial property under the **Property Rights of Spouses Act (PROSA)** by way of notice of application for court orders.

- [2] By Acknowledgement of Service in Matrimonial Proceedings form filed on the 14th February 2017, the Applicant indicated her receipt on the 18th January 2017, of the Amended Husband's Petition for Dissolution of Marriage filed on 11th August 2016 (the Petition). She did nothing thereafter, and having failed to file a defence or answer to the Petition within the time limited by the Civil Procedure Rules 2002, the claim proceeded in default. The claim is numbered **2016 M 01948**.
- [3] On 16th October 2018, almost two (2) years after being served with the Petition, the Applicant filed a Notice of Application for Court Orders for Division of Matrimonial Property (the "NOACO") together with an Affidavit of Gillian Merjean Dilworth sworn on 21st April 2018. It was fixed for hearing on the 9th March 2020.
- [4] Five (5) days after the filing of the NOACO, but before the date for its hearing, the Petitioner/Respondent obtained a Decree Nisi on the 14th March 2018. A Decree Absolute was granted on 6th February 2019.
- [5] It was Ms. Dibbs' submission, with which I do not agree, that the claim for division of matrimonial property ought to have commenced by way of a Fixed Date Claim Form. Among other things, she seeks to ground her contention on the doctrine of *res judicata*; and that the **PROSA** requires that a claim thereunder be so commenced. Without any intention to disregard Counsel's industry in the presentation of her various arguments, I am of the view that the objection can be resolved by reference to the two grounds which I have specifically mentioned and accordingly, I proceed in that manner.
- [6] In expanding on the argument that *res judicata* applies, Ms. Dibbs contended that the claim comprised in claim **2016 M 01948** was at an end when the Decree Absolute for dissolution of the parties' marriage was granted on 6th February 2019. In these regards she relies on the dicta of Sykes J (as he then was) in the interpleader claim of **O. Augusts Sherriah v DYC Fishing Ltd. and others** [2015] JMSC Civ. 27, [8], the effect of which is that unless a party appeals a judgement,

the determination of issues between them after a trial of their claim is final and conclusive as between them.

[7] The principle espoused by Sykes J is incontrovertible but I am in agreement with Counsel for the Respondent/Applicant that it is inapplicable here.

[8] Pursuant to section 11(1) of the **PROSA**, where any question arises between spouses in relation to the title or possession of property during the subsistence of the marriage, a spouse “... *may apply by summons or otherwise in a summary way to a Judge of the Supreme Court...*” [Emphasis added]

[9] Although not cited by either party in argument before me, it has been helpfully determined by Brooks JA (as he then was) in **Gregory Oniel Gordon v Pauline Victoria Gordon** [2012] JMCA Civ 51, [14] that “... *section 11(1) of the Property (Rights of Spouses) Act does not state that the application should be by an originating process... the formulation does accommodate the use of originating process but does not preclude an application made in the context of other matrimonial proceedings.*”

[10] While the Respondent/Applicant had indicated in her acknowledgment of service form that she intended to defend the claim, as previously stated, she failed to answer or defend it within the time limited by CPR 76.11(2). It is in consequence of the Applicant/Respondent’s failure that the claim for dissolution of the parties’ marriage proceeded in default and was made final on the grant of a Decree Absolute on 6th February 2019. The filing of a NOACO almost two years after being served with the Petition, as argued by Ms. Dibbs cannot therefore be regarded as an answer or defence to the Petition. That is not the end of the matter however.

[11] The NOACO was filed before the marriage between the parties was finally dissolved. It is therefore my view that it could properly be regarded as having been made in the context of the existing matrimonial proceedings comprised in claim **2016 M 01948**, even though the decree absolute was granted before the **PROSA**

application could be heard. Matrimonial proceedings, which include proceedings for the division of property pursuant to CPR 76.2, were therefore not at an end; and the dispute between the parties relating to the division of the property which is the subject of the NOACO remains undetermined. I do not see how the doctrine of *res judicata* would apply in these circumstances.

[12] The claim for the division of matrimonial property having been filed while the matrimonial proceedings in **2016 M 01948** subsisted, it was competent to the Applicant to make that claim by way of the NOACO.

[13] It is in the foregoing premises that I conclude that the in limine objection to the claim for division of matrimonial property being commenced by way of the NOACO is without merit.

ORDER

1. The Notice of Application for Court Orders for Division of Matrimonial Property filed on the 16th October 2018 is to proceed to a hearing on its merits.
2. Costs of the hearing of the in limine objection to the Respondent/Applicant to be taxed if not sooner agreed.
3. The Respondent/Applicant's Attorneys-at-Law are to prepare file and serve this order.