

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E-139 OF 1988

BETWEEN

CAROL PAMELA KASSIM

PLAINTIFF

A N D

MOHAMMED SAIEED KASSIM

DEFENDANT

Mr. D. Muirhead Q.C. and Mrs. Priya Levers for the Plaintiff

Mrs. M. MacCaulay for the Defendant.

HEARD: 23rd October, 1991, 22nd, 23rd
April, 1992, 22nd, 23rd October,
1992, 16th July, 1993, 7th March,
1994 and 22nd August, 1994.

SMITH J.

The parties were married on the 20th day of October, 1966. The marriage was dissolved in June, 1988 and the plaintiff has since remarried and is now Mrs. Adams.

In July, 1970 premises known as 3 Foster Davis Drive, Kingston 6 in the parish of Saint Andrew were purchased and registered in the joint names of the parties at Volume 1111 Folio 511 of the Register Book of Titles. The parties lived at this address as the matrimonial home from the time of purchase until 1977 when the defendant left the matrimonial home.

The said premises were purchased for \$15,000.00 and a deposit of \$5,000.00 was paid. By Originating Summons dated 17th May, 1988 the plaintiff seeks a declaration that she is the sole owner of the said premises 3 Foster Davis Drive. The wife/plaintiff is claiming that the entire deposit was paid by her. That it was she who purchased the house and that the defendant's name was only placed on the title to facilitate her securing a mortgage of \$10,000.00. So the plaintiff is claiming sole beneficial interest in the premises. On the other hand the husband/defendant, is asserting that the premises were bought by them jointly. That they both executed the Agreement for Sale and the deposit was made by both. The defendant also claims that the instalments were paid by him from 1971 to 1977 when he left the matrimonial home.

The plaintiff had also sought a declaration that she had a share in property situated at Rock Hall in the parish of Saint Andrew. In her affidavit in support the plaintiff stated that "during the period 1971 to 1977" the defendant bought property situated at Rock Hall in the parish of Saint Andrew. She admitted she "knew nothing about the purchase or the time and she did not contribute directly to the purchase price."

Her name was not placed on the Title and she frankly stated that she "verily believes the defendant is the sole owner of the property." But she is claiming that since she "shared all the household expense with the defendant during 1971 to 1977 thus allowing the defendant to have funds available to purchase the said property" she verily believes that she has a share in the ownership of the said property. This claim was not pursued by Counsel for the plaintiff, and for good reason.

There is "a prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate" - per Lord Diplock in Gissing v. Gissing (1970) 2 ALL ER at 793 (1). It was Lord Diplock's view that this presumption could not be displaced by indirect contribution which was ^{not} referable to the acquisition of the property merely because a party continued to contribute out of her own income to other expenses of the household is not sufficient to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in the property.

Indeed the plaintiff is not claiming that the common intention of the parties was that she should have any beneficial interest. She did not conceal her reason for making such a claim for in the second affidavit dated 21st September, 1991 she stated "the sole purpose of my claim is, if, contrary to what I assert, the defendant was to be declared as having an interest in my property, then in like manner I would expect to be declared, I verily believe, as having an interest in his....."

That clearly is no legal or factual basis for such a claim and compels me to make short shrift of such a claim. I accordingly declare that the defendant is the legal owner and solely entitled to the beneficial interest in the property bought by him in Rock Hall in the parish of Saint Andrew.

3 Foster Davis Drive

It was over this property that Counsel for the parties did battle.

As stated before 3 Foster Davis Drive was registered in the joint names of the parties. It is not in dispute that where the legal estate is conveyed to both parties jointly there is a presumption that both parties have a beneficial interest therein. This presumption is, however, rebuttable. If there is an express intention of the parties, the court will give effect to it. If no express intention, the court must seek to ascertain the common intention of the parties at the time of acquisition.

In seeking to rebut this presumption the plaintiff contends that she purchased the premises and "placed the defendant on the title as a joint tenant in order to secure a mortgage of \$10,000.00." She later amplified this by stating that the "only reason the defendant's name was placed as joint tenant with me on the title was to enable^{me} to satisfy the requirement of the mortgage company."

On the other hand the defendant is claiming that the premises were bought by both parties for the benefit of both. It is not disputed that the mortgage was in both names.

The plaintiff said "we obtained a mortgage for the remainder of the purchase price from the Jamaica National Building Society." The defendant did not disagree.

In her first affidavit the plaintiff claimed that both parties "contributed in equal shares to the monthly instalment." However, in response to the defendant's affidavit in which the defendant claimed that he alone paid the monthly instalment from 1971 to 1977 and that he intended "to produce and rely on various cheques in proof thereof" the plaintiff recanted. In her second affidavit dated 25th September, 1991 she admitted "that the defendant made the mortgage payments from November, 1971 to September, 1977." Accordingly, even if belatedly, there is consensus that the defendant paid the mortgage instalments up to the time when he left the matrimonial home.

It might be helpful to restate here that there is agreement in respect of the following:-

- (a) The mortgage was in both names;
- (b) The property was registered in the joint names of the parties and used as the matrimonial home;
- (c) The defendant alone paid the mortgage instalments from 1971 to 1977 when he left the matrimonial home.

Also the plaintiff admitted that the defendant paid the electricity bills, the medical expenses of the family and the property taxes, but there is no agreement as to who bore responsibility for other household expenses and the maintenance of the children. It is against this background that both counsel ask me to make a finding of fact as regards the payment of the deposit of \$5,000.00.

I understand both Counsel to be ad idem that in the circumstances of this case if I should find that the deposit was paid by both parties then both would be beneficially entitled. If, on the other hand, I should find that the deposit was made by

the plaintiff alone then the only consideration would be whether any beneficial entitlement could arise by the payments of the mortgage by the defendant for the period 1971 to 1977.

I will therefore proceed to examine the evidence of the parties in this regard. The plaintiffⁱⁿ/her affidavit of May, 1988, in support of the Originating Summons stated "the entire deposit was paid by me from money received from my parents. A house was sold by my mother at that time and she gave me \$3,000.00 from the proceeds of that sale. My father gave me the rest of the deposit."

The defendant in his affidavit in reply asserted that he contributed the sum of \$3,000.00 which he obtained as a loan from the plaintiff's then brother-in-law Mr. Gavin Sanguinette. The plaintiff, he is claiming, contributed \$2,000.00 which she got as a gift from her parents.

In her second affidavit dated 25th September, 1991 made in response to the defendant's claim that he contributed \$3,000.00 towards the deposit, the plaintiff swore that "the whole of the deposit in the sum of Five Thousand Dollars (\$5,000.00) was provided entirely by me as hereafter appears. One Thousand Dollars (\$1,000.00) was obtained by way of gift from my father Norris Clarke. One Thousand Dollars (\$1,000.00) from my personal savings account at the Royal Bank of Canada, Cross Roads. Three Thousand Dollars (\$3,000.00), the remainder, was advanced to me by Messrs. Lake, Nunes, Scholefield and Company, Attorneys-at-Law against the expected proceeds of the sale of my mother's home at 11 Saint James Avenue, Kingston 10 including One Thousand (\$1,000.00) by way of loan. My mother Mrs. Gloria Clarke had promised each of her five children the sum of Two Thousand Dollars (\$2,000.00) from the proceeds of the said sale. Pending completion of this sale I undertook to commence repayments of the advance on a monthly basis. It is untrue that the defendant contributed Three Thousand Dollars (\$3,000.00) or any sum towards the deposit."

This statement clearly contradicts the plaintiff's evidence contained in her May 1988 affidavit. We must return to this anon. But first let us refer to the evidence of the defendant in this regard. In his undated affidavit in reply filed on 10th August, 1989 he said ".....the said premises were purchased by the plaintiff and I (sic) jointly with both of us contributing in the following way, that is to say, her then brother-in-law Gavin Sanguinette loaned me the sum of \$3,000.00 by way of a cheque in the sum made out to Uni Homes which sum I alone later repaid to him and we received

the sum of \$2,000.00 from the plaintiff's parents as a gift which made up the deposit of \$5,000.00 paid by us for the purchase of the said premises at the time we both executed the Agreement for Sale."

An affidavit was also sworn to by Mr. Sanguinette. Both Sanguinette and the defendant appeared in chambers and were cross-examined by Counsel for the plaintiff. A late application was made by Counsel for the defendant to cross-examine the plaintiff. This was strongly **resisted** by Counsel for the plaintiff and in the end refused by the Court.

In his affidavit Mr. Gavin Sanguinette, who now resides in Ontario, Canada stated that he "knew of the circumstances in (sic) which No. 3 Foster Davis Drive, Kingston 6 was purchased by Saieed and Carol Kassim in 1970 and I, having purchased No. 5 Foster Davis Drive, encouraged Saieed Kassim to purchase No. 3; that I was at the time married to Carol Kassim's sister." He further went on to say that "Saieed Kassim not having the full deposit asked me for a loan of \$3,000.00, when I agreed, he requested that I draw the cheque in favour of Uni Homes Limited and I did so." He ended by saying that the loan was repaid by Saieed Kassim, the defendant himself.

The effect of this, if believed, is to give full support to the evidence of the defendant. He journeyed from Canada for the purpose of being cross-examined. Under cross-examination Mr. Sanguinette said he no longer has the returned cheque in relation to the deposit paid to Uni Homes Limited. He was at the time of the purchase, married to the plaintiff's sister. He agreed that he could not say as a fact that the proceeds of the cheque were applied as part of the deposit for 3 Foster Davis Drive, but said he discussed the purchase of the premises with both parties and that it was in the presence of the plaintiff that he gave the defendant the cheque. He said that his house at 5 Foster Davis Drive was purchased in 1969. He paid a deposit and raised a mortgage from Westmoreland Building Society. He asserted that he could have paid down more but that it did not suit him.

It may be convenient here to go back to the evidence of the defendant as it related to the deposit. Under cross-examination he admitted that he did not have the money to pay the deposit. He said he knew that the plaintiff got \$2,000.00 from her mother. He knew that money was advanced by Lake, Nunes and Scholefield which he was repaying. He did not remember the exact amount. He knew the plaintiff had a savings account and agreed that she "could have withdrawn \$1,000.00" from her account. He

knew the plaintiff's father Norris Clarke and knew that the plaintiff got assistance from him.

When re-examined he said he had no knowledge of the plaintiff withdrawing \$1,000.00 from her bank account to make up the deposit. When he said he knew that she got assistance from her father he meant "monetary assistance from father to daughter from time to time."

At the time of the payment of the deposit the plaintiff, he said, had not received the \$2,000.00 from the sale of her mother's property. The advance by Lake, Nunes and Scholefield was necessary to make up the down payment of \$5,000.00. He insisted that he borrowed \$3,000.00 which he put towards the down payment.

By consent 22 cheques each reflecting a payment of \$58.75 by the defendant to Lake, Nunes and Scholefield were received in evidence as Exhibit 2A. This exhibit covers period June 1970 - June 1973.

In his submissions Counsel for the plaintiff asked the Court to accept the plaintiff's evidence that the deposit was made up as follows:-

\$1,000.00	-	obtained as a gift from plaintiff's father
\$1,000.00	-	from plaintiff's personal account
\$3,000.00	-	advanced by Lake, Nunes and Scholefield (\$2,000.00 against the expected sale of plaintiff's mother's house and \$1,000.00 by way of loan).

There was no dispute, Counsel submitted that the plaintiff obtained \$2,000.00 from her mother and that \$1,000.00 (which the defendant repaid at the request of plaintiff) was obtained from Lake, Nunes and Scholefield). Thus, he argued all that would remain to be provided for the deposit must be \$2,000.00. Accordingly, he urged, the falsity of Mr. Sanguinette's evidence as regards the \$3,000.00 loan would be transparent. So too, he continued, the evidence of the defendant in so far as he concurred with Mr. Sanguinette would be clearly and manifestly false. Mr. Muirhead contended that if the court rejects the defendant's and Mr. Sanguinette's evidence as to the loan of \$3,000.00 and finds that \$3,000.00 was advance by Lake, Nunes and Scholefield then in light of the defendant's admission that he had no fund of his own to make a contribution to the down payment it would follow that the balance of \$2,000.00 must have come from the plaintiff as she claimed in her second affidavit.

Mrs. MacCaulay for the defendant asks the court not to accept the plaintiff as a witness of truth and to reject her evidence as to the deposit for the following reasons:-

- (i) The plaintiff on oath made two contradictory statements as to the funding of the deposits and there is no explanation for this contradiction. She referred to the plaintiff's first affidavit where the plaintiff stated how she funded the entire deposit - \$3,000.00 from her mother and \$2,000.00 from her father. Yet, Counsel argued, two years after the plaintiff received the defendant's affidavit in reply in which he stated that she received only \$2,000.00 from her parents and that he provided \$3,000.00 by way of a loan, she gave a completely different account.
- (ii) The plaintiff deliberately lied on oath when she stated in her first affidavit that both parties contributed in equal shares to the monthly installment from October, 1971 to September 1977. Counsel for defendant referred to the affidavits of both parties and pointed out that it was only after the defendant threatened to "produce and rely on various cheques....." that the plaintiff admitted that the defendant made the mortgage payments for the period November, 1971 to September, 1977.

Mrs. Macaulay argued forcefully that the plaintiff in her affidavit in support sought to mislead the court.

I agree with Mrs. Macaulay that there are material discrepancies^{and} that the plaintiff had not attempted to explain them. In my view these unexplained contradictions serve to warn of the potential danger of accepting without caution the plaintiff's evidence as credible and/or reliable.

On the evidence it is clear that neither of the parties had the wherewithal to make the deposit.

It is conceded by Mr. Muirhead that for the plaintiff to succeed in her claim for the whole beneficial interest she must satisfy the court on the balance of probabilities that she alone funded the deposit of \$5,000.00.

In her first affidavit, the plaintiff, as said before, mentioned her parents as the only source of the deposit. In his reply, the defendant pointed to the plaintiff's parents and himself as the sources. In her second affidavit the plaintiff mentioned her parents and herself. It seems reasonable to me to conclude that on a balance of probabilities the plaintiff's parents were a source of funding but not the only source. To what extent did they help?

Let me repeat the evidence for convenience. In her first affidavit the plaintiff said her parents provided the whole deposit. The defendant disputed this and claimed that they contributed \$2,000.00. In her second affidavit the plaintiff adjusted the figures and claimed that her father gave \$1,000.00 and her mother promised her

\$2,000.00 on the sale of mother's house.

My understanding of the defendant's evidence is that there is no real dispute that the plaintiff's father assisted her. On the balance of probabilities it is reasonable to conclude that the plaintiff's father contributed \$1,000.00. The next question then is how much did the plaintiff's mother contribute. The evidence is that Mrs. Clarke the plaintiff's mother ~~promised~~ her \$2,000.00 on the sale of a house. When was this house sold? In her affidavit the plaintiff stated "a house was sold by my mother at that time and she gave me \$3,000.00 from the proceeds....." (emphasis mine)

"At that time" in its context clearly refers to the time of the purchase of 3 Foster Davis Drive. However, in her second affidavit she stated "Three Thousand Dollars (\$3,000.00)..... was advanced to me by Messrs. Lake, Nunes and Scholefield.....against the expected proceeds of the sale of my mother's home at 11 Saint James Avenue..... including One Thousand Dollars (\$1,000.00) by way of loan. She went to state in the same breath "pending the completion of this sale I undertook to commence repayments of the advance on a monthly basis....."

It is clear from this that at the time of the payment of the deposit ^{on} 3 Foster Davis Drive the sale of her mother's house was not complete and she did not yet receive her promised part of the proceeds of sale.

There is no evidence of her repaying an advance of \$2,000.00 and indeed she admitted that the monthly amount of \$58.75 paid by the defendant from 1971 to 1977 was "essentially in respect of the \$1,000.00 by way of loan in excess of the \$2,000.00 expectation from the proceeds of sale of home owned by my mother." So then it is as clear as crystal that at the time of the payment of the deposit the "\$2,000.00 from my mother" was just an "expectation" and nothing more. It is also clear that \$1,000.00 was received from Lake, Nunes and Scholefield and formed part of the deposit.

Bearing in mind the need for caution when considering the plaintiff's evidence I am not inclined to find as a fact that \$2,000.00 was advanced by Lake, Nunes and Scholefield against the sale of the plaintiff's mother's house and used to make up the deposit. The plaintiff said she made payments on the suit by the vendors for interest and she paid other mortgage debts. She did not state the source of the funds, was it from the proceeds of sale?

The defendant's affidavit evidence that the plaintiff received \$2,000.00 from her

parents is consistent with the plaintiff's father's contribution of \$1,000.00 and the advance of \$1,000.00 secured by the mother's house by way of a loan from Lake, Nunes and Scholefield.

I do not agree with Counsel for the plaintiff that the defendant's evidence in that he knew that the plaintiff got \$2,000.00 from her mother must necessarily support the plaintiff's contention that altogether \$3,000.00 was advanced by Lake, Nunes and Scholefield to make up the balance of deposit. I must add that I was impressed by Mr. Sanguinette as a witness of truth. He certainly did not give me the impression that he came all the way from Canada to support the defendant at all cost and without regard to the truth.

In sum I find on the balance of probabilities that the deposit in respect of the purchase of 3 Foster Davis Drive was made by both parties. I also accept the defendant's evidence that both parties executed the Agreement for Sale.

What we have then is a situation where both parties sign Agreement for Sale, both sign a mortgage deed, they executed a transfer in their joint names, both contributed to the deposit, the house was used as the matrimonial home, and the husband/defendant paid the mortgage instalments up to 1977. The only reasonable inference to be drawn from these facts is that at the time of acquisition the common intention of the parties was that both should be the legal and beneficial owners.

I accordingly reject the plaintiff's evidence that the defendant's name was placed on the title as a joint tenant in order to secure a mortgage.

Improvement of Property

In her first affidavit the plaintiff stated "that during the period 1976 to 1988 I had undertaken extensive repairs and expansion to the premises at a cost exceeding Ten Thousand Dollars (\$10,000.00) as a result of which the value of the premises has been greatly enhanced."

The defendant rejected this claim and countered it with "the plaintiff did not do extensive repairs and expansion of the premises she merely enclosed the car port for the purpose of carrying on her hairdressing businessfor her sole benefit and enjoyment....."

In her reply, as per second affidavit, the plaintiff seemed to be modifying her claim. She therein stated that "in or about 1979 I spent approximately One Thousand Dollars (\$1,000.00) in grilling the house..... In 1982 around April....."

I enclosed the garage at a cost of Five Thousand Dollars (\$5,000.00)." This was done because "I intended to use same for my hairdressing business....."

Here again we have discrepant statements from the plaintiff. This underscores the need to approach the plaintiff's evidence with great caution.

I accept the defendant's evidence that the improvement was done solely for the benefit of the plaintiff in pursuit of her hairdressing business. Expenditure on such improvement, cannot, in my view, have the effect of enlarging the beneficial share of the plaintiff see Pettit v. Pettit (1969) 2 ALL ER 385 or [1970] A.C. 777.

I therefore make the following Declarations and Order:-

- (1) That the plaintiff and defendant are jointly entitled to the beneficial interest each holding one half undivided share in the property 3 Foster Davis Drive, Kingston 6 in the parish of Saint Andrew, registered at Volume 1111 Folio 511 of the Register Book of Titles.
- (2) That there be an up to date valuation of the aforesaid property by a valuator agreed by both parties, failing such agreement that the Registrar appoints a valuator.
- (3) That there be a partition and sale of the aforesaid premises.
- (4) That there be Accounts and Enquiries taken by the Registrar as to incomes derived from rental of property and the outgoings.
- (5) That either party be at liberty to purchase the other's share on partition failing which that the property be sold on public auction.
- (6) That the costs of Mr. Sanguinette's attendance for cross-examination be borne by the Plaintiff.