



[2016] JMSC Civ.108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM No. 2008 HCV 03064

IN CHAMBERS

BETWEEN	LILLIETH MARRIOT	CLAIMANT
AND	SEGREE JACKSON	DEFENDANT

Leslie Campbell instructed by Campbell and Campbell for Claimant

Miss Hilma McNeil for Defendant

**Property (Right of Spouses) Act 2004 - Sections 2,
4,6,7,13,14 - Application for Declaration for Share
Family Home Sale and Distribution of Proceeds of
Home - Partition Act**

Heard: December 7 and 17, 2010 and June 24, 2016

DAYE J

Background

[1] The claimant Lillieth Marriott is a bank officer and resides in New York, United States of America (USA). She migrated to the USA in 2005 with her son Stephen Rae Jackson. The child was eight (8) years old at that time.

[2] Prior to that, she and the defendant, Segree Jackson, a Project Manager of 134 Port Way, Cumberland Meadows, Gregory Park in the parish of St. Catherine, lived as man and wife.

[3] The premises was a single storey co-joined unit. It consisted of two bedrooms, one bathroom, living/dining area and kitchen. The floor area was approximately 498.75 square feet. It is part of a housing scheme comprising a total of 170 housing units.

[4] This home was purchased on the 2nd May 2000, by both parties from the National Housing Trust for the sum of \$1,752,250.00. The parties obtained a mortgage from the National Housing Trust for the balance of the purchase price in the sum of \$1,262,000.00. The title for this home was transferred in the joint names of both parties as tenants-in common. The title was registered at Volume 1308, Folio 681. The copy of the duplicate Certificate of Title disclosed that both parties were living at 7A Lawrence Avenue, Kingston 8, St. Andrew at the time of the purchase. The claimant in her evidence and in her further affidavit says before she moved to the home they purchased, she and the defendant along with their son lived at the home at 7A Lawrence Avenue for upwards of three years.

[5] The claimant filed her claim on June 7, 2008 under the Partition Act seeking a determination “the respective share interest in the property”. i.e. Lot 134 Pathway, Cumberland Meadows, Gregory Park, St. Catherine. In addition, she sought an order from the Court that the said home be sold and that the net proceeds be divided in accordance with the respective shares of the parties.

[6] The market value of the home in 2010 was \$5,500.00. This claim was not served on the defendant until July 5, 2010. Although the claim was filed under the **Partition Act** in 2008, the claimant’s written submissions were based on the **Property (Rights of Spouses) Act** 2004. This Act, though passed by Parliament in 2004 did not come into operation until 1st April. 2006.

[7] The claimant gave evidence on her affidavit of the following:

- (a) her monetary contribution to deposit of the purchase price of the house;
- (b) her monetary contribution to the improvement of the home;
- (c) her contribution to the household expenses;

(d) her lump sum payment of the arrears of the mortgage between 2005 to 2007 when the property was put up for public auction.

[8] Based on her contribution, the claimant claims sixty-five (65%) percent share in the premises (paragraph 7 of Further Affidavit dated 25th October, 2010).

[9] The defendant challenged the claim specifically on the grounds that the claimant is only entitled to twenty-five (25%) percent interest in the property. He based his position on the following: (paras. 13 and 14 of Affidavit in reply para 10 of reply to a further affidavit dated 23rd September, 2010 and para 10 of reply to further an Affidavit dated 22nd November 2010. He claims the following:

- (a) He contributed to the fifteen (15%) percent deposit to the mortgage
- (b) He paid all the monthly mortgage instalments up to 2005 when he had his job; and
- (c) He made a greater monetary contribution to the improvement of the home i.e. building of a wall to enclose property.

[10] Both parties are relying on an unequal monetary contribution made by the other to the purchase, maintenance and improvement of the home. This was a home acquired for the benefit of both parties and at the time their family included a son. It is evident that by 2005, this couple had finally ceased cohabitation.

[11] The **Property (Rights of Spouses) Act 2004** ushered in a new regime. Among other things it abolished the presumptions of the common law rules and equity (Sec. 4). It extended the right to couples in common law unions to commence proceedings in courts to establish their rights to property jointly required (Sec. 13). Then it introduced new provisions of the “family home” (Sec. 2 (1)).

Spouses

[12] Section 2(1) which is the Interpretation section of the Act defines the following:

“spouse” includes:

- (a) a single woman who has cohabited with a single man as if she were in law his wife for a period not less than five years;

(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years;

Immediately preceding the institution of proceedings under this Act on the termination of the cohabitation as the case may be”.

[13] Then the section defines:

“cohabit” means to live together in a conjugal relationship outside of marriage and “cohabitation” shall be construed accordingly.

[14] And then again, the section defines:

“family home” means the dwelling home that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, building or improvements, appurtenants to such dwelling house and used wholly or mainly for the purpose of the household, but shall not include such a dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit.”

[15] Under Sec 13 (1) (a) a spouse shall be entitled to apply to the Court for a division of property.

(a) “on the grant of a decree of dissolution of marriage or termination of cohabitation”

Such application should be brought within twelve (12) month of the dissolution of a marriage or termination of a cohabitation or separation (see 13 (2)). In other words, there is a limitation period to bring any such application.

[16] When a spouse brings an application under Section 13, the Court may make an order for the division of the family home in accordance with Section 6 and Section 7 of the Act.

Division Family Home

[17] In relation to family home, Section 6 (1) provides:

6 – (1) subject to Subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half of the family home –

- (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation;
- (b) on the grant of decree of nullity of marriage;
- (c) where a husband and wife have separated and there is no likelihood of reconciliation;

In other words, this statute or legislation created a presumption that each spouse is entitled to equal share in the family home. It is described as the equal share rule or the 50:50 rule.

Variation of Equal Share Rule

[18] The Court is empowered to vary this rule under Section 7 of the Act. The Section reads:

“7 (i) Where in the circumstances in any particular case, the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one half of the family home, the Court may upon application by an interested party, make such order as it think reasonable, taking into consideration such factors as the Court thinks relevant including the following:

- (a) That the family house was inherited by one spouse.
- (b) That the family home was already owned by one spouse at the time of the marriage or the beginning of the cohabitation;
- (c) That the marriage is of short duration;

Issues

[19] It is necessary therefore to look at the application and determine if:

- (1) Either the claimant or the defendant satisfy the meaning of “spouse”
- (2) Lot 123 Port Way, Cumberland Meadows, Gregory Park, St. Catherine was the “family home”
- (3) The equal share rule applies;
- (4) and that there are circumstances that would make it unjust and unreasonable to apply the equal share rule. In other words, should the Court exercise its discretion and vary this equal share rule in the circumstances of the case

Discussion and Analysis

[20] The defendant does not dispute in any of his affidavits in reply to claimant’s affidavits that after the house was purchased in 2000, he and the claimant lived as man and wife. He takes issue as to the duration of time that they lived amicably as husband and wife prior to the claimant migrating on or around 2005. He says they were separated before the claimant migrated but does not say exactly when. Neither does the defendant dispute that he lived with the claimant at Lawrence Avenue as husband and wife for over three (3) years before the premises was purchased in 2000. Neither does he deny that Stephen Rae Jackson is his child born in the union between himself and the claimant, while they lived together at Lawrence Avenue, St. Andrew.

[21] On this evidence, the defendant would be a single man cohabiting with a single woman, the claimant. The parties would be cohabiting for over eight (8) years. If they separated on/or around 2005, they would not be living continuously for five (5) years immediately prior to the termination of their cohabitation within the terms of the **Property (Rights of Spouses) Act 2004** which came into force in 2006. The claimant’s application was filed in 2008. This raises the issue of whether the second limb of the definition of spouse is satisfied much further than that is the issue whether the **Property (Rights of Spouses) Act 2004** should have retrospective effect.

Retrospective Application of Act

[22] Morrison JA (as he then was), in **Brown v Brown** [2010] JMCA Civ. p2. at [73], is of the view that “there are a number of indicia some larger than others that compel the conclusion that it was intended he have retrospective effect”. He came to this view after reading the 2004 Act as a whole.

[23] On the matter of the definition of a “spouse” he explained at [para. 4]:

“..... this provision [Sec. 2 (1) and the expanded definition of a spouse] must have intended to operate retrospectively, in the sense that as of the date when the Act came into force all persons who satisfy the statutory criteria would become immediately entitled to the benefit of the new provisions, notwithstanding the fact that the requisite five (5) year period had already elapsed from before the Act came into force. It would also follow from this, that persons who has not yet completed the five (5) year period as of that date, would be able to count the time already elapsed in calculating the end of that period”.

[24] Morrison JA went further to comment at [para.76].

..... “I have been unable to discover anything in the language of the 2004 Act that can be construed as restrictive of the applicability of the concept of the family home, for instance, which is arguably the cornerstone of the ameliorative architecture of the new regime, to cases in which the parties divorce or separation occurred after the effective date of the Act. Indeed, it seems to me, that to so limit the operation of the Act, is contrary to the plain language of Section 4 which mandates the substitution of its provision in place of the old rules and presumption which were equally central to the old regime”.

[25] With these observations in mind, I address the issue whether the claimant and defendant satisfy the definition of “spouse”. I hold that they both satisfy this definition. Also, I hold that even though there was a separation between the claimant and defendant (on or around 2005) before the 2004 Act came into operation in 2006,

nonetheless the claimant was entitled in 2008, to apply to the Court for division of property on termination of their cohabitation.

[26] Next consideration is whether Lot 134 Port Way, Cumberland Meadows, was the family home. This dwelling house was the habitual and principal place of living for the claimant and the defendant and their son from 2000 to 2005. It was owned jointly by both parties and was used wholly or mainly for the purpose of their household. There was no other house owned by either party. This family lived nowhere else after this house was purchased. I hold that this was the “family home”.

[27] The only issue now, is should the Court vary the equal share rule established by Section 6 of the Act. The consideration that ought to guide the Court in applying Section 7 to the “family home” was discussed in the judgment of Brooks JA in **Stewart v Stewart** [2013] JMCA CIV 4] who referred with approval to **Graham v Graham** Claim No. 2006 HCV 0753.

[28] The following passages in Brooks J.A’s indicate the Court of Appeal’s view of Section 7 (delivered 8th April, 2008) judgment:

“[26] Section 7 (i) explains the method by which the statutory rule may be displaced. It authorises the Court to vary the equal share rule at the request of a party wishing to dispute the application of that rule. Section 7 (i) also sets out some of the circumstances that could displace that statutory rule”.

“[27] At least three (3) things are apparent from Section 7 (i):

- (a) The section requires the party who disputes the application of the statutory rule to apply for its displacement.
- (b) The use of the word “including” implies that the Court is entitled to consider factors other than those listed in Section 7 (i)

(c) The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.”

“[31]

Based on the above analysis, it may be said that if the door is open, by the existence of the Section 7 factor, for the consideration of displacement of the statutory rule, then very cogent evidence would be required to satisfy the Court that the rule should be displaced. The level of cogency required may not be as high, however as that required by the claimant [by the criminal law]”.

“[34] The third point to be noted is that the existence of one of those factors listed in Section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the situation, is that each of the three factors provides a gateway whereby the Court may consider other elements to the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at this stage of assessing one or other of these factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviours and other property holdings become relevant for consideration

..... If therefore, a Section 7 factor existed, fairness would require our Courts to have regard to all the circumstances of the case, to decide whether an unreasonable or unjust situation existed that should lead to a departure from the equal share division.”

[51] If a Section 7 factor is credibly shown to exist, a Court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule.... Before the Court makes any order that displace the equal entitlement rule, it should be

careful to be satisfied that an application of that rule would be unjust or unreasonable.”

Analysis

[29] In this trial between the claimant and the defendant, none of the three Section 7 factors exist that bring into play a consideration for the displacement of the equal share rule. The cohabitation of this couple was not of short duration, for example, a month. It was for years. The home was not owned before by either of the parties before cohabitation. Nor is this a case where the proceeds of a home previously owned by one of the parties were used up to acquire a new home. And the question that this home was inherited by one of the parties does not arise. So the threshold to consider a variation of the equal share is not satisfied.

[30] But both parties have sought a declaration of any interest or share in the “family home” of either 65 (%) percent or 75 (%) percent. Without making any detailed findings as to specific contribution made by each party to the acquisition, maintenance and improvement of this “family home”, I find the range of dispute between the parties about their respective individual contribution is no more than between five (5%) percent to twenty-five (25%) percent. This is not such an extraordinary difference that makes it unjust and unreasonable to not apply the equal rule. There is no cogent evidence to displace the statutory equal share rule.

[310] Rather the affidavit evidence discloses a number of indicia that support and confirm the application of the equal share rule to this family home. The title was transferred in the parties joint names in tenancy in common. This is conduct quite consistent with a partnership of equal in the relationship between the parties. The respective contribution to the deposit, building of the fence and payment of the mortgage instalment by the defendant while the claimant met the household expenses is another indicia that the couple was acting in a partnership and acquired the family home as an asset for the partnership.

[32] There was the agreement in 2005 that, when the claimant migrated from Jamaica to New York with their son, the family home should be rented and the rental income

should be used to maintain the monthly mortgage instalment. The home was in fact, rented out in 2005 to 2007, but the defendant has not accounted for this rental income. His only explanation is that he had to move elsewhere and pay rent. The departure from this agreement does not exclude the inference that the parties intended the acquisition of this home to be an asset for the family. It also must be that a reasonable intention that on termination of cohabitation, the home should be share equally between the parties.

[33] Accordingly, this is the Court's ruling:

- (a) the claimant and the defendant have a 50-50 share in the home Lot 134 Port Way, Cumberland Meadows, St. Catherine
- (b) the said home be sold and the net proceeds be divided equally between the claimant and defendant;
- (c) That there be an update of the valuation report of property by the same valuator that the defendant be granted first option to purchase the claimant's share exercisable within (30) days of this order;
- (d) That should either party fail to execute the sale agreement and transfer touching his respective share that Registrar be empowered to execute such transfer
- (e) There should be enquiry and account for rental of family house from 2005 to date of Judgment.

No Order as to costs

Liberty to apply.