[2016] JMSC Civ. 132

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION

CLAIM NO. 2011HCV 00772

BETWEEN	**GREGORY MAYNE**	**CLAIMANT**
AND	**JULIE ATHERTON**	**DEFENDANT**
AND	**RICHARD ATHERTON**	**INTERVENER**

John Graham and Peta Gaye Manderson for the claimant
Pauline Brown Rose for the defendant
Kerry Ann Sewell for the intervener

Enforcement of money judgment – application for sale of land – land jointly owned by judgment debtor and another – whether the legislative framework provides for severance

Enforcement of money judgment – application for judgment summons – means of judgment debtor

July 11, 18, August 12, and November 24, 2016

Tie, J. (AG.)

The background

[1] Gregory Mayne obtained judgment against the defendant on June 17, 2011 in the sum of US$178,904.09 and J$24,000 arising from her failure to repay a loan.

Payments have been made but the parties are disagreed as to the amount now outstanding. The claimant asserts that the sum of $211,503.70 remains owing with interest accruing whilst the defendant insists that she is currently indebted in the sum of US$194,354.06.

[2] The claimant has made two applications in a bid to satisfy this judgment. The first is for the sale of property registered at Volume 1248 Folio 479 of the Register Book of Titles which is owned jointly by the defendant and her husband.

[3] In the event that the application for sale is unsuccessful, an application for judgment summons was also filed.

The application for sale of land

[4] The applicant having successfully obtained a final charging order over the property in issue on July 15, 2014 now seeks an order for sale of the said property on the ground that the respondent has deliberately refused to settle the judgment. In support of the respondent's alleged recalcitrance, the applicant asserts that the registered mortgages on the property have been satisfied subsequent to the granting of the charging order.

[5] The applicant contends that the non-payment has caused him severe hardship as he has had to seek loan financing to discharge a number of his obligations at a rate of interest far greater than the interest being awarded on the judgment.

[6] The applicant is therefore seeking an order for sale of the defendant's property registered at volume 1248 folio 479 of the register book of titles. The applicant proposes, as per the Further Amended Notice of Application for Sale of Land filed on June 14, 2016, that after the usual deductions associated with a sale of property are made, that half of the net proceeds of sale which remain be paid to the joint owner of the property. Thereafter, out of the remaining proceeds, the applicant would retain the amount due to him under the judgment and pay the balance, if any, to the respondent.

[7] The applicant also indicates in his affidavit in support of the application that he is prepared to purchase the judgment creditor's half share in the property. He argues that the Mrs. Atherton and her husband would be able to purchase another property from the surplus from the proceeds of the sale.

[8] He depones that the respondent and her husband reside in a town house in the same housing complex in which he himself lives and states the approximate value of their town house to be $70 million, the respondent having not facilitated a valuation of the property itself.

[9] Not surprisingly, the respondent opposes the application and the objection is joined by her husband who filed an application to intervene in the proceedings.

[10] The respondent asserts that her failure to satisfy the judgment has not been intentional but instead was due to a number of personal and economic challenges. She is however willing to make monthly payments to settle the debt.

[11] She maintains that an order for sale of the property would not be feasible as she explains that the mortgages which were previously attached to the property were acquired by a third party, albeit not registered on the title, and that the proceeds from a sale of the property would be inadequate to satisfy her debt to this individual as well as to the applicant.

[12] The issue of whether the court has the jurisdiction to make such an order was also raised given that the property is jointly owned and the judgment does not extend to both joint tenants. It was argued that any order for sale ought properly to relate solely to the judgment debtor, which would require a severing of the joint tenancy which the legislative framework does not facilitate.

[13] In any event the Mrs. Atherton and her husband pray against the making of such an order given that the property in issue is their family home where they raise their children.

The Jurisdiction of the court

[14] The intervener argues that the nature of a joint tenancy is as such that a necessary prerequisite to an order for sale of property jointly owned, in furtherance of the execution of a judgement against one of the joint tenants, is severance of the joint tenancy. Counsel intimates that the legislative provisions are deficient and do not enable the making of an order for severance. In support of this position, the distinction between the provisions of the Judicature (Supreme Court) Act and those contained in the Bankruptcy Act which facilitates severance were highlighted.

[15] The intervener relied on the decision of McDonald Bishop J (Ag) (as she then was), in **Sheila Miller Weston v Paul Miller and Leithia Yvonne Miller** (claim No. 2002M094- unreported, delivered June 22, 2007). Therein the claimant, having obtained judgment against the first defendant, sought to satisfy same by an order for sale of property jointly owned by both defendants. Her Ladyship determined that a severance of the joint tenancy was a necessary prerequisite before such an order could be made. There being no evidence of acts of severance by either joint tenant, the application for an order for sale failed.

[16] Therein her ladyship referred to the celebrated dictum of Sir Page Wood V.C. in **Williams v Hensman** (1861) vol 70 E.R. 862 at 867 which sets out the principles governing the severance of a joint tenancy by the acts of the joint tenants themselves which requires no repetition at this time.

[17] It is evident that severance may also occur outside of the common law principles set out in **Williams v Hensman** (supra) and may come about through operation of law as occurs in the Bankruptcy Act. Under the Bankruptcy Act, where a provisional order has been made, the property of the debtor passes to and vests in the Trustee thus severing the joint tenancy (section 42).

[18] Her ladyship stated thus-

"Re Dennis affirms the principle that a joint tenancy is severed if a joint tenant disposes of his interest inter vivos. It also reaffirms that such a disposition may be voluntary, example by a gift or a sale, or involuntary as occurs upon bankruptcy when the bankrupt's property vests in his trustee (see also Re Gorman (supra). In our jurisdiction, the Bankruptcy Act expressly stipulates that upon a provisional bankruptcy order been (sic) made by the court, the bankrupt's property vests in the without need for any conveyance or transfer to be effected. Clearly, this alienation is by operation of law and, therefore, involuntary. In the case of an adjudged bankrupt joint tenant against whom an order has been made, this would have the effect of severing the joint tenancy.

[19] However even if there might be involuntary alienation upon an act of bankruptcy, it is clear from Re Dennis that it is not the act of bankruptcy, without more, that would sever the joint tenancy but the vesting of the property in the trustee upon the order of the court. In this case, the first defendant is not declared or adjudged bankrupt. As such the Bankruptcy Act does not apply to his situation and so there can be no automatic vesting of his interest in the property in any creditor by virtue of the operation of that statute. The claimant is merely one of his creditors by virtue of the judgment. That situation does not put the first defendant in the position of a bankrupt. And even if it did, the mere fact of him being in such a position would not vest the property in the creditor without more. An order of the court that would operate to vest the property in the creditor would have been needed analogous to that which obtains in bankruptcy proceedings."

[20] Counsel for the intervener submitted that severance of the joint tenancy is essential if an order for sale is to be made in relation to the judgment debtor. In order for this to occur, the law must vest the property of the judgment debtor in the hands of the judgment creditor or some other third party.

[21] The issue is whether, as the applicant maintains, the ambit of the Judicature (Supreme Court) Act as well as the provisions of the Civil Procedure Rules are sufficient to enable the court making an order for sale in relation to property

jointly owned, bearing in mind the added consideration of severance that must take place.

[22] The applicant relies primarily on the authority of **Royes v Campbell et al** Claim No. E 1995/E349. and **First Global Bank Ltd. v D'Oven Williams & Tracey Ann Williams** [2015] JMSC Civ 11 which, in considering an application for a charging order in relation to property jointly owned, referenced the former judgment. Justice Brooks (as he then was) in the case of **Royes** concluded that 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 circumstances where only one joint tenant is the subject of a judgment.

[23] In considering the respective positions on the issue of the jurisdiction of the court, I reminded myself that the jurisdiction to make an order for sale must emanate from legislation and not the Civil Procedure Rules which is a procedural code. As stated in **Beverley Levy v Ken Sales and Marketing Limited** (P.C. Appeal No 87 of 2006) whilst the Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction. Indeed therein the Privy Council noted that in spite of the fact that for many years it had been the practice in Jamaica for courts to make charging orders, the court had been doing so without the statutory power to so do. This was rectified in 2003 by amendment to the Judicature (Supreme Court) Act. It is recognised that the said legislation was also amended at that time to empower the court to make orders for sale.

[24] The unique features of a joint tenancy are at the core of the contention that an order for sale of property cannot properly be made in satisfaction of a judgment against one of the joint tenants. The nature of a joint tenancy is as such that each joint tenant owns an undivided and unidentified interest in the property. Each is wholly entitled to the whole. Each holds everything and at the same time holds nothing. Since a joint tenant has no distinct and identifiable interest in the property, any order in relation to the judgment debtor impacts on the other joint

tenant who is not subject to the judgment. The predicament is that the interests of the owners of the property are fused but only one of the joint tenants is subject to the judgment. To order the sale of the land owned by a joint tenant amounts to an order for sale against the other joint tenant who is not subject to the judgment.

[25] The treatment of joint tenants in the court of appeal decision of **Gill &Anor v. Lweis & Anor** 1956 1ALL ER 844, at 848B is instructive. That case involved an action for recovery of possession against joint lessees of a property wherein judgment was entered against only one. Jenkins LJ noted, "it seems to me that the right view must be that in order to get an effective judgment for possession against joint tenants judgment must be obtained against both of them. I cannot see that a judgment against one only, both being equally entitled to possession of the whole premises as joint lessees thereof, can have any effect at all."

[26] Given that the interests of the owners of land in a joint tenancy are fused, and since it is the judgment debtor who must be the subject of an order for sale, it is evident that an identification of that interest and severance of same must take place prior.

[27] The legislation upon which the application is based must therefore be scrutinised to determine whether the power to sever is contained therein.

[28] Section 28A of the Judicature (Supreme Court) Act states that,

(1) "The court may, on the application of the person prosecuting a judgment or order for the payment of money, make an order for the sale of the land of a judgment debtor.

(2) The proceeds of the sale of the land of a judgment debtor shall be distributed among the persons found entitled thereto, according to their respective priorities.
(3) The order for sale of the land of a judgment debtor and all proceedings consequent thereon shall bind persons claiming any interest in the land through or under the judgment debtor, by any means, subsequent to the delivery of the

land in execution, or to the commencement of the proceedings for a sale of the land.

28B Subject to rules of court, all sales in execution of judgments or orders under section 28A shall be conducted in accordance with such orders as the Court may make.

28C.-(1) After the sale of the interest of any judgment debtor in any land, the Court shall grant a certificate to the person who has been declared the purchaser to the effect that he has purchased the judgment debtor's right, entitlement to and interest in the property sold."

[29] It is striking that the legislation speaks solely to the land of the judgment debtor. Land is defined to include any legal or equitable estate. It is evident that it is the interest of the judgment debtor that ought to be the subject of an order for sale of land. I am fortified in this view by the provisions of section 28C(1) which speaks to the granting of a certificate to the purchaser 'after the sale of the interest of any judgment debtor in any land…'to the effect that he has purchased the judgment debtor's right, entitlement to and interest in the property sold.'

[30] It seems to me that the power to sever could arise either in a formulae analogous to that of the Bankruptcy Act wherein the judgment creditor is vested with the judgment debtor's interest, or some other formulation which relates to the joint tenants themselves which has the effect of disturbing any of the essential unities which are the foundation of a joint tenancy.

[31] It is apparent that neither type of formulation exists in the Statute. On a reading of the Statute the judgment creditor has no interest in the land itself but rather in the proceeds of sale. There is nothing to suggest that the Statute contemplates the sale of land which is jointly owned by a judgment debtor and another. There are no provisions from which the power to sever could be inferred.

[32] The legislation further dictates that the sale is subject to the rules of court. The rules as expressed in the Civil Procedure Rules must therefore also be examined

to determine whether there are provisions which could firstly facilitate severance and thus the making of an order for sale of property of a judgment debtor which is jointly owned.

[33] As regards the Rules there is clearly no provision comparable to that contained in the Bankruptcy Act. There is nothing contained therein which would facilitate the vesting of an interest in the land in the judgment creditor or someone else.

[34] The issue is therefore whether the Rules are so configured to otherwise enable the severance of the joint tenancy.

[35] A convenient starting point may be Part 48 which deals with charging orders, given that an application for the sale of land is often preceded by an application for a charging order. It has been determined in these courts that the charging of property which is jointly owned is permissible (**First Global Bank Limited v Rohan Rose; First Global Bank Ltd. V. D'Oyen Williams and Tracey Ann Williams; Air Jamaica Limited v Stuart's Travel Services Limited**).

[36] It must however be recognised that the fact that provisions may exist for the granting of charging orders in relation to property jointly owned where only one joint tenant is the subject of an unsatisfied judgment, does not mean that the legislative framework or rules also exist for the granting of orders for sale on such property. Also, whilst it is true that such orders generally pave the way for an application for the sale of land, a charging order in relation to land does not necessarily lead to an application for an order for sale of same. A charging order has a utility of its own as a means of preventing the disposal of property before a judgment can be satisfied.

[37] It is note worthy that under part 48 which deals with charging orders, rule 48.11(5) stipulates that "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."

[38] This gives credence to the interpretation that only the interest of the judgment debtor is to be affected. It is also clear that there are no provisions in part 48 which enable severance.

[39] Part 55 of the Civil Procedure Rules deals with the sale of land "Under any enactment which authorises the court to order a sale' or '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.'

[40] The learned judge in **Royes** delved into the various provisions of the Civil Procedure Rules and noted that part 55 gives the court the power to sell property but that this did not extend to property of a person who is not a judgment debtor. He indicated that only the interest of the judgment debtor may be affected by the order for sale and hence only that interest may properly be the subject of such an order. He concluded that "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."

[41] The rules make reference to 'persons who have an interest in the land' as well as to 'interested persons'. Part 48 of the rules includes persons who jointly own land under the term interested persons.

[42] The various provisions which relate to such persons must be examined to determine whether there are provisions which facilitate the severing of the tenancy. The Rules regarding such persons pertain primarily to their interests being declared in the application as well as requiring that they be notified of the application for sale.

[43] Rule 55.5(f) further stipulates that the court may give directions for the purpose of the sale, including '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.'

[44] His lordship in Royes in concluding that an order for sale will operate as a severance of the joint tenancy and therefore may be properly made by the court

in those circumstances, determined that this rule was designed to ensure that no more than the judgment debtor's entitlement was affected by the order for sale.

[45] My interpretation of this Rule differs from that of the learned judge. Given that it is the interest of the judgment debtor that ought to be the subject of an order for sale, I am of the view that any reference to the interests of interested persons in the net proceeds of sale could not relate to the other joint tenant.

[46] I am of the view that given the nature of a joint tenancy, before an order for sale can be made in relation to the interest of one joint tenant, the tenancy must be severed. The order for sale must relate to the judgment debtor only and hence the severance must take place prior. There is nothing in the rules which enable this.

[47] On a review of the Rules I am of the view that there is nothing analogous to the provisions in the Bankruptcy Act or otherwise that would enable disturbing any of the essential unities which are the foundation of a joint tenancy, thus severing the tenancy.

[48] Having concluded that-

- the legislation and Rules provide for the interest of the judgment debtor solely to be the subject of an order for sale of land,

-the nature of a joint tenancy is as such that severance of the joint tenancy is an essential prerequisite

-severance of a joint tenancy is not contemplated by either the legislation or the Civil Procedure Rules,

I am of the view that the court does not have the jurisdiction to make orders for sale in these circumstances.

[49] Even if I am incorrect in this assessment, I am of the opinion that the case at bar would not be an appropriate case for such an order.

[50] As indicated above, the applicant relies on the authorities of **First Global Bank Ltd. v D'Oven Williams & Tracey Ann Williams** [2015] JMSC Civ 11 and **Royes v Campbell et al** Claim No. E 1995/E349.

[51] The case of **First Global Bank Ltd. v D'Oven Williams & Tracey Ann Williams** involved the granting of a final charging order over property owned jointly by the defendant and another. In granting the application the learned judge therein examined the decision of the Justice Brooks (as he then was) in **Royes**.

[52] The case of **Royes** involved an application for the sale of land jointly owned by a judgment debtor and another. The learned judge having concluded that the court may make an order for sale of property jointly owned by a judgment debtor and another, thereafter gave due consideration to the practicality of making an order for sale. Having determined that only the interest of the judgment debtor could be affected by an order of the court, his lordship considered whether a physical division of the property was possible, thus enabling applications for sub division approval or applications for strata lots and in due course applications for separate titles. The property therein being a dwelling house, the issue of a convenient partitioning of the property was considered. It was concluded that it was unlikely that a stranger would be inclined to make such a purchase.

[53] On the authority on which the applicant relies, their request for the property to be sold and for the applicant "to pay half net proceeds due to any joint owner" cannot be countenanced since it is the interest of the judgment debtor solely which ought to be the subject of the order for sale.

[54] In considering the proposal of the applicant to purchase the interest of the judgment debtor, I weighed the evidence in its entirety and utilising the analytical approach employed in **Royes,** determined that an order for sale would be impractical in all the circumstances.

[55] In assessing whether it was 'necessary or expedient' for the land to be sold, inter alia, the following factors were taken into account-

-That the property in issue is a townhouse that is jointly owned by the judgment debtor and her husband and is used as the family home where they raise their children.

-The possibility of a physical division of the property which would enable applications for sub division and thereafter applications for separate registered titles.

-The proposal of the applicant to purchase the interest of the judgment debtor.

[56] I was also mindful of the fact that the applicant has been deprived of the fruits of his judgment and has experienced hardship as a result. Further that there is an application for judgment summons which has also been heard for which severe consequences can be invoked in the event of non compliance.

[57] Having weighed and assessed the various factors, I concluded that an order for sale would not be necessary or expedient. I am of the view that the satisfaction of the judgment can be achieved through an order on the application for judgment summons.

[58] Firstly, there is nothing to suggest on the evidence that there can be a convenient physical partitioning of the property. I am also of the view that the notion of the applicant purchasing the interest of the judgment debtor in the property is impractical and untenable. The end result would be the applicant owning the property together with the husband of the judgment debtor. As co-owners each would be entitled to possession of the property which is at present the dwelling house of the judgment debtor and her family. Consensus of these two strangers as regards decision making in relation to the property would be near impossible. The court could not sanction such an approach that would invariably lead to discord.

[59] Based on the authority upon which the applicant relies, I am of the view that an order for sale in these circumstances would be anything but expedient. In so

concluding I placed no weight on the judgment debtor's contention that there is an unregistered mortgage on the property.

[60] The court is therefore inclined to make an order on the judgment summons application.

[61] The judgment summons application

[62] Section 3 of the Debtors Act, gives the court the power to commit to prison a judgment debtor for the non-payment of a debt.

Section 3 states that:-

'Subject to provisions hereinafter mentioned, any court having civil jurisdiction may commit to prison with or without hard labour, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or installment of any debt due from him in pursuance of any order or judgment of that or any other competent court.'

[63] It stipulates further in subsection 3

'That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same.'

[64] Rule 52 of the Civil Procedure Rules circumscribes the various options open to the court where the court is "satisfied that the judgment debtor has had, since the making of the judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same."

[65] The judgment debtor proposes a monthly payment of US$5000 between August 2016 until January 2017 and thereafter US$10,000 per month until the debt is settled.

[66] The judgment debtor gives her employment history as being an entrepreneur having been involved in various personal business ventures for over fourteen years. She testified that she is now a house wife and no longer earns.

[67] Her evidence as regards her past business ventures was unreliable as she gave the impression that she had no records for reference and also claimed to have an inability to recall information as regards these entities and earnings there from. She came across as less than forthright and at times disingenuous. She for instance initially indicated that she closed all business operations in 2006 to 2007. She however admitted under cross examination that she started another business involving the bottling of water with her husband in 2008 which remained in operation until 2011. Further probing revealed that this business was actually in operation beyond that stated date.

[68] It also became evident that her husband formed another company, Atherton Construction, in 2015 wherein she was the company secretary and owned shares therein. She admitted under cross examination that this company had acquired the mortgage in the sum of US$128,239.13 over property and subsequently sold the property for US$1 million. She however claims to have received no money from this. This did not ring true given her status in the company.

[69] The judgment in issue was entered on June 17, 2011. The judgment debtor asserts that she has paid a total of US$36,113.29 since the judgment. She indicates that the judgment creditor is her neighbour and she would often deliver cheques to his home. There has been no evidence to support this bald assertion, which is denied by the judgment creditor. She also presented a statement of payments made to International Assets Services and a letter from that entity confirming payments made to it on behalf of Mr. Mayne. These sums

total US$18,113.29, which he accepts as accurate. Based on these payments the judgment creditor calculates the amount outstanding to be US$211,503.70. I am inclined to accept this figure as accurate. It seems unlikely that Mrs. Atherton would have made payments directly to him after judgment was obtained given the apparent deterioration in their relationship. In addition to a lack of specificity as regards these alleged payments, there is also nothing to support her contention of these payments by way of cheque.

[70] The last payment of the judgment debtor was on June 5, 2014. Thereafter a number of promises ensued. On August 12, 2014, the defendant wrote to counsel for Mr. Mayne regarding the judgment and indicated that she was making an offer of US$100,000.00 as full and final settlement of the matter. That correspondence gave no indication of constraints or limitations as regarding paying the proposed US$100,000.00

[71] She admitted under cross examination that she had promised to satisfy the judgment by September 30, 2014, even though, according to her, she did not know the outstanding amount. This suggests either dishonesty or confidence that she had access to funds sufficient to cover the debt. A letter dated October 24, 2014, over the hand of her then attorney advised Mr. Mayne that she would discharge her obligations in full within six months.

[72] Her evidence did not impress the court as true. It is evident that she either has or has had the means by which to satisfy the debt. Her very contention that she earns no income but proposes to pay the sum of US$5,000 per month for the period August 2016 to January 2017 and thereafter the monthly sum of US$10,000, suggests that she has not been candid to the court.

[73] I have noted the various business ventures the judgment debtor has engaged in, including that owned by her husband and the lucrative real estate transaction that the company engaged in, as well as the dearth of evidence presented by her as regards the earnings of these companies. I regarded the estimated value of the home in which she lives and the fact that the mortgages were cleared

subsequent to the judgment being entered with no cogent evidence of any existing mortgage thereon. I also have taken into account the school that her children attend and concluded that on a balance of the probabilities that this is a person of means.

[74] A totality of the evidence suggests that she is able to clear the outstanding amount on terms much more favourable than her proposal. It is apparent that her indication of her ability to pay may be influenced by her position as stated in her affidavit that the applicant is unreasonable and has refused to settle the debt on her terms, that is in the sum of US$100,000.

Having considered the evidence in its entirety I am inclined to make an order pursuant to rule 52.4(c)(iii) which states that the court may-

'(iii) make an order for payment of the judgment debt by a particular date or by specified instalments and adjourn the hearing of the judgment summons to a date to be fixed on the application of the judgment creditor.'

[75] I hereby order payment of the sum of US$100,000 by February 28, 2017 (taking into account those sums which may have been paid since August 2016), with the balance to be paid on or before July 31, 2017. The matter will now be set for a date agreed by the parties subsequent to the ordered completion date to ensure compliance and to entertain any appropriate application in the event of non compliance.

[76] Cost to the judgment creditor to be agreed or taxed.

[77] Cost to the intervener against the judgment creditor to be agreed or taxed.