[2019] JMSC Civ. 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 05065

BETWEEN	**BEVERLEY MCMAIN**	**CLAIMANT**
AND	**TREVOR ANTHONY CARBY**	**DEFENDANT**

IN CHAMBERS

Mr. Chukwuemeka Cameron instructed by Carolyn C Reid & Co for the Claimant

Dr. Lloyd Barnett instructed by Gillian Burgess for the Defendant

Heard: 4th, 5th November, 2015 & 20th June, 2019

Family Law – Section 13 of the Property (Rights of Spouses) Act - Fixed Date Claim Form filed seeking division of matrimonial home and an extension of time to make claim out of time - No separate Application filed seeking an extension of time - Validity of Fixed Date Claim Form.

Cor: Rattray, J.

[1] The Claimant, Beverley McMain was married to the Defendant, Trevor Anthony Carby on 27th August, 1977. They subsequently migrated to live in the United States of America in that same year. The marriage however, was of relatively short duration and the parties separated in or about 1982. An Application for the Dissolution of the marriage was filed by Trevor Carby in 1996. In that same year, Beverley McMain also filed an Application for the Division of Property, and the Decree Absolute was granted on 17th October, 1997.

[2] On the 25th June, 2012, the Claimant's Application for Division of Property was referred to mediation. In her Affidavit sworn to on the 19th August, 2013, and filed on the 17th September, 2013, she stated that the Referral to Mediation was sent to the Defendant on the 9th July, 2012. It is important to note that the referral being mentioned was in respect of her 1st Application filed in 1996, as the present claim was filed in 2013. Pursuant to this referral, both parties went to Mediation on the 27th February 2013. At the Mediation however, they were unable to arrive at a resolution of this matter. The Claimant thereafter filed a Fixed Date Claim Form on 16th September, 2013 in this action for the matter to proceed in light of the unsuccessful mediation.

[3] Mrs. McMain, by way of her Fixed Date Claim Form, sought a declaration that she was "beneficially entitled to half share in equity" of the properties which Mr. Carby acquired through the proceeds of the second mortgage, which Mrs. McMain alleges that she paid off on his behalf. Mr. Carby now exercises full ownership of the following properties:

i. 16 Kirkland Crescent, Red Hills, Saint Andrew

ii. 16a Kirkland Crescent, Red Hills, Saint Andrew

iii. Apt. 314 Carib Ocho Rios Condominiums, Ocho Rios, Saint Ann

iv. 6 Lots on Coopers Hill Drive, Coopers Hill, Saint Andrew

v. East Armour Heights, Stony Hill, Saint Andrew

[4] Mr. Carby in response, filed an Application on 25th of September 2014 for an Order that the Fixed Date Claim Form filed herein be struck out as an abuse of process of this Court. Five grounds were filed in support of the Defendant's Application, which reads as follows:-

a) The claim is in respect of matrimonial property but does not purport to be filed under **The Property (Rights of Spouses) Act**;

b) More than seventeen (17) years have elapsed since the Decree Absolute was granted;

c) The Claimant has not sought permission to file this claim out of time under **The Property (Rights of Spouses) Act**;

d) The claim is for equitable relief and is barred by laches;

e) The claim mirrors a claim which was struck out by this Court in 2003 and seeks to re-litigate the same issues raised in that claim and amounts to an abuse of the process of the Court.

[5] Dr. Barnett on behalf of the Defendant, submitted that the Fixed Date Claim Form does not comply with Rules 8.8 (b) and (c) of the Civil Procedure Rules which states: -

> *Where the claimant uses form 2, the claim form must state –*
>
> *(a) ....*
>
> *(b) The remedy which the claimant is seeking and the legal basis for the claim to that remedy;*
>
> *(c) Where the claim is being made under an enactment, what that enactment is;*

Learned Counsel further submitted that the claim is for division of property, but it does not purport to be filed under **The Property (Rights of Spouses) Act**. He argued that this hurdle could not be cleared by stating that the claim was made "in equity". Dr. Barnett further argued that his client, the Defendant, does not know whether the Claimant was claiming under the laws of constructive trust, resulting trust, contract or proprietary estoppel.

[6] Dr. Barnett contended that the Claimant in her Affidavit, clearly identified the properties as "matrimonial" properties. However, her claim was not instituted in accordance with **The Property (Rights of Spouses) Act** having regard to section 4 which reads: -

> *"The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions are made by this Act, between spouses and each of them, and third parties."*

By virtue of this section, Counsel argued that **The Property (Rights of Spouses) Act** supersedes the rules of equity in respect of transactions between spouses relating to property. As this matter related to spousal transactions between the parties in relation to property, Counsel Dr. Barnett contended that the application must be made pursuant to this Act. He also emphasised that a time limit was imposed under the said Act, within which any such application is to be brought.

[7] In that regard, Dr. Barnett relied on section 13(2) of **The Property (Rights of Spouses) Act**, which reads: -

> *(2) An application under section (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.*

The Decree Absolute, Counsel continued, was granted in 1997 while the claim was filed in 2013. This was well past the stipulated twelve month period, and he argued that no step was taken by the Claimant to extend the time within which to file the application. Counsel therefore submitted that these proceedings were a nullity.

[8] With reference to that time frame, Dr. Barnett indicated that the Claimant, at paragraph 3 of her Affidavit, had stated that "this matter has been going on since 1996…". He relied on the House of Lords decision in **Grovit v Doctor** [1997] 1 WLR 640 in which it was held, dismissing the Appeal,

> *"that for a plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings where there was no intention of carrying the case to trial, it was entitled to dismiss the action."*

[9] Counsel Dr. Barnett therefore submitted that commencing litigation with no intention to bring it to a conclusion at trial, can amount to an abuse of process. Mrs. McMain he stated, did not pursue this matter since filing the proceedings in 1996. Further, Dr. Barnett submitted that at paragraph 61 (iv) of Mrs. McMain's Affidavit, she in effect conceded that it would be unfair to proceed to trial due to the long passage of time, when she declared that: -

> *"...if this Court will be forced to go back some fifteen (15) years, listen to all the issues that the parties raise and then come to a conclusion it will not be in submission the fairest"*

[10] Counsel also argued that this claim for equitable relief was barred by **The Limitation of Action Act** and laches. Dr. Barnett relied on section 3 of that Act and submitted that the period within which to bring a claim for the recovery of land is twelve years. The cause of action, he contended, arose at the dissolution of the marriage, which was more than twelve years before this claim was filed.

[11] In relation to laches, Dr. Barnett placed reliance on **Lindsay Petroleum Co. v Hurd** (1874) LR 5 PC 221-239, and made the submission that laches applied where it would be practically unjust to give a remedy. He argued that this principle is twofold: (i) The Claimant has effectively waived her rights, and (ii) by her conduct and neglect, the Claimant has put the Defendant in what would be a difficult position, if the remedy were now to be granted.

[12] He concluded this point with the submission that Mrs. McMain's failure to pursue the claim for sixteen years prejudiced Mr. Carby, and that such claim was barred by laches. Dr. Barnett in closing, submitted that instituting this matter amounted to an abuse of process, as it was struck out at the commencement of the **CPR** in 2003, but was filed again in 2013.

[13] Counsel Mr. Cameron on behalf of Mrs. McMain argued that **The Property (Rights of Spouses) Act** did not apply in these proceedings. He stated that the parties were not cohabitants and were not in a marital relationship. He therefore pointed out that the period stipulated under that Act is not relevant to this case and ought not to be

considered by this Court. He further argued that the first Order sought by his client was an Order for declaratory relief. He relied on **CPR** 8.6, which reads: -

> *8.6 A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed.*

[14] Counsel further relied on **St. George Jackson, Andrew Jackson and Joel Betty v Attorney General** (2009), delivered 4th August, 2010, and argued that the Court has the power to grant a declaration without a sanction or relief. No other cause of action, he submitted, was needed to claim declaratory relief. He also argued that the Fixed Date Claim Form, in any event, complied with **CPR** 8.8 (b) in that it disclosed a claim in equity for beneficial interest in properties. This, he maintained adequately grounded the declaratory relief sought by Mrs. McMain.

[15] Mr. Cameron also submitted that it was unfair for the Defendant to contend that the matter was struck out by the transitional provisions of the **CPR**. He relied on Exhibit **BM1** of the said affidavit of Mrs. McMain which exhibited two letters marked Exhibit **BM1**. These were: (i) a letter dated 24th September, 1997, from Mrs. McMain's Attorneys-at-Law to Mr. Carby's Attorneys, and (ii) a letter dated 25th September, 1997, from Mr. Carby's Attorneys-at-Law in response.

[16] In the letter dated 24th September, 1997, Mrs. McMain's Attorneys acknowledged receipt of the Notice of Application for Decree Absolute. They also expressed their client's desire to have the issue of property division and maintenance, which remain unsettled, finalised before any steps are taken to obtain the Decree Absolute. The letter in response, dated 25th September, 1997, from the Defendant's Attorneys-at-Law, expressed with regret, that they have specific instructions to pursue the Application for Decree Absolute. They also indicated their view that the Claimant's Application for Ancillary Reliefs would not be prejudiced.

[17] In light of that correspondence, Counsel Mr. Cameron contended that there was an implicit understanding that the property division would be dealt with after the Decree was granted. Counsel maintained that Mrs. McMain became emotionally incapable

of dealing with the matter after the grant of the Decree Absolute in 1997. Her Attorneys argued that she regained strength by 2008, and has now continued this matter pursuant to the implicit understanding in 1996. Counsel then concluded by urging the Court to not exercise one of its most draconian powers of having this matter struck out.

[18] The gravamen of this matter lies in whether the claim for division of property, filed by the Claimant in 1996, existed after the commencement of the **CPR** in 2003. There was no dispute that in 1996, Mrs. McMain filed the Application for the Division of the Properties. Equally, there was no dispute that the properties relating to the 1996 claim were also the subject of the substantive matter in this claim. This fact was palpably clear in the Affidavit of Mrs. McMain at paragraph 3, where she stated: -

> *That as this Honourable Court will recognize this matter has been on going from 1996 and the delay I humbly submit is through no fault of mine. Below I set the reasons for this matter taking so long to come back before the Court.*

In applying a literal interpretation to the words used in this paragraph, Mrs. McMain considered this matter to amount to a continuation of those proceedings in 1996.

[19] Bearing in mind that the **CPR** came into effect on 1st January, 2003, I am of the view that this matter touches and concerns the transitional provisions of part 73. In particular, whether certain provisions of Part 73 were fulfilled, thereby avoiding the draconian consequences of failing to do so. The relevant provisions of Rule 73.3 of the **CPR** state as follows: -

> *73.1 (3) In this part-*
>
> > *"commencement date" means the 1st January 2003*
> >
> > *"old proceedings" means any proceedings commenced before the commencement date.*
>
> ...
>
> *73.3 (4) where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed.*

5. A defendant has a duty to apply for a case management conference if he has an ancillary claim under Part 18.

6. When an application under paragraph (4) is received, the registry must fix a date, time and place for a case management conference under Part 27 and the claimant must give all parties at least 28 days notice of the date, time and place fixed for the case management conference.

7. These Rules apply to old proceedings from the date that notice of the case management conference is given.

8. Where no application for a case management conference to be fixed is made by 31st December 2003 the proceedings (including any counterclaim, third party or similar proceedings) are struck out without the need for an application by any party.

9. A striking out pursuant to rule 73.3 (8) will be without prejudice to the defendant's ability to claim costs.

[20] The principle stated pursuant to Rule 73.1 (3) is that, "old proceedings" are proceedings that were instituted before the commencement date of the **CPR**. The "commencement date", according to rule 73.1(3), meant 1st January, 2003. The 1996 claim fell clearly within the meaning of "old proceedings."

[21] Those principles emanating from Part 73.3 were examined and succinctly set out in **The Attorney General of Jamaica and Benjamin Lewin v Shane Paharsingh** [2012] JMCA Civ 6, where Phillips JA at paragraph 5 stated, so far as is relevant: -

1. *Proceedings commenced before 1 January 2003 were "old proceedings".*

2. *There were two groups of "old proceedings": those in which trial dates had been fixed in the Hilary term 2003, and those in which no trial dates were in existence as of January 2003.*

3. *The CPR did not apply to "old proceedings" in which a trial date had been fixed in the Hilary term 2003. If the trial was not heard, or was adjourned, then the matter was generally governed, thereafter, by the CPR.*

4. *It was the duty of the claimant to apply for a case management conference date to be fixed in "old proceedings" in which no trial date had been fixed in the Hilary term.*

5. *If no date for the case management conference was fixed, the claim stood automatically struck out without any application having to be made to obtain that order.*

> 6. *The defendant also had a duty to apply for a case management conference if he had an ancillary claim under Part 18. However, once there was an application for a case management conference from either a claimant or a defendant with an ancillary claim, there had to be a consideration of the whole case. Neither party could apply for the case management conference limited to his own claim.*
>
> 7. *Once the application for the case management was received, the registrar had to fix a date, time and place for the same.*
>
> 8. *The claim could be revived if struck out, if an application was made to do so by 1st April 2004, which application had to be served, but the court had no discretion to enlarge that time.*
>
> 9. *Where a judgment existed in a claim as at 31st December 2003, rule 73 could not and did not seek to strike out the claim. The judgment remained valid until set aside.*
>
> ...

[22] As previously indicated, Mrs. McMain commenced her claim initially in 1996, on the same basis as this present claim. Mr. Carby, in his Affidavit sworn on the 11th June, 2014 and filed on the 18th June, 2014, indicated at paragraph 6 that that claim was Suit No. E261 of 1996. It was filed on 11th June, 1996 by way of Originating Summons, and sought orders pursuant to the now repealed **Married Women's Property Act,** which was replaced by **The Property (Rights of Spouses) Act 2004.**

[23] In his said Affidavit at paragraph 6, the Defendant further stated that he filed both an Affidavit and a Supplemental Affidavit on the 2nd July, 1996 and on the 30th October, 1997 respectively, responding to that claim. The Claimant did not dispute this and nothing further was done with respect to that claim. No trial date was set and the matter was left dormant. Neither the Claimant nor her Attorneys-at-Law enquired into the progress of the matter after Mr. Carby filed those Affidavits in Reply.

[24] The Claimants proffered an explanation for the inactivity with respect to her claim. She stated at paragraph 7 of her Affidavit, that she became distraught and despondent on the grant of the Decree Absolute in 1997. As a result, she indicated

that she was not in "a mental or emotional position to deal with the matrimonial property right away". She stated at paragraphs 10 to 11:

> *10. That having pulled myself together and now being mentally and emotionally prepared to get what was rightfully mine I retained the services of an Attorney at law.*
>
> *11. That my attorneys and I have been endeavouring to negotiate a settlement since 2008.*

[25] As previously indicated, those proceedings were instituted before 1st January, 2003 and therefore fell within the definition of an "old proceeding". Since no trial date had been set in the Hilary term 2003, for those proceedings, it was therefore the Claimant's obligation to apply for a Case Management Conference date to be fixed. Rule 73.3(4) of the CPR squarely places this responsibility on the shoulders of the Claimant, Beverley McMain.

[26] The consequence outlined by Part 73.3 on a Claimant's failure to obtain a Case Management Conference date, within the time stated by the Rules, was that of striking out. Such proceedings stood struck out automatically. Beverley McMain failed to apply for a Case Management Conference date within the time specified by the Rules. That Application, according to Rule 73.3 (8), ought to have been made by the 31st December, 2003. In the absence of such an Application, that matter including all proceedings incidental to it, stood struck out as of 1st January, 2004. The 1996 claim therefore was struck out in accordance with the operation of the Civil Procedure Rules, there being no evidence that the Claimant had in fact applied for a date, within the time specified for the hearing of the Case Management Conference.

[27] It therefore follows that all implicit understandings to continue the claim after the granting of the Decree Absolute were of no legal effect. This was the logical effect which flowed from the failure of the Claimant to obtain a Case Management Conference Date, as provided by the rules. Any application to restore the claim would have had to have been made by 1st April 2004. The Court had no discretion

to enlarge that time outside of the stipulated period: - see **The Attorney General of Jamaica and Benjamin Lewin v Shane Paharsingh** [2012] supra.

[28] According to Part 73.4(5) -(7), the application must be made on notice to all parties and must be supported by Affidavit evidence. The Court may then restore proceedings only if: (i) the applicant presented a good reason for its failure to apply for case management conference under rule 73.3(4), (ii) the applicant has a realistic prospect of success in the proceedings, and (iii) the other parties would not be more prejudiced by the application being granted, than the applicant by its refusal. Where the Court decides to restore the matter, it may do so on such terms as it thinks fit.

[29] The restoration of the matter was ultimately at the Court's discretion. In the case before this Court, no Application was made pursuant to Rule 73.4 for the restoration of this matter. Mrs. McMain returned to the Court in 2013 on her own volition. At the time of her return, the window permitting the restoration of the proceedings had already been firmly shut. The matter, in my view, was therefore struck out by the operation of Part 73. Additionally, pursuant to Rule 73.4, it was barred from being restored, as any such Application for Restoration would have had to have been made by the 1st April 2004.

[30] I agree with Dr. Barnett's submission that Mrs. McMain's conduct of the matter, amounted to an abuse of the process of the Court. She filed Suit No. E261 of 1996 and has not taken any steps to manifest a willingness to bring the matter to a complete closure. Those proceedings were left in a state of quietude for some **sixteen (16) years** before Mrs. McMain showed any apparent interest in bringing the matter to a conclusion.

[31] The Court of Appeal in **Ronham & Associates Ltd v Christopher Gayle & others** [2010] JMCA App 17, at paragraph 29, decided that the plaintiff in that case took very few steps in its Appeal since it was filed. Those steps, the Court continued, were purely defensive and did not evince any real intention to bring the Appeal to a conclusion. The Court of Appeal concluded that that behaviour amounted to an

abuse of the process of the Court. Unlike the **Ronham** case, Mrs. McMain took no steps whatsoever to proceed with her matter. Although the Plaintiff in the **Ronham** case initiated some steps in an attempt to save its Appeal, the Court nevertheless refused the Application. The present case in my view, was more egregious than that reflected in the **Ronham** case. Mrs. McMain did nothing to secure her claim. The claim therefore suffered the draconian consequences of being struck out, pursuant to part 73 of the CPR.

[32] The other concern raised in these proceedings was the referral of the matter to mediation on the 25th June, 2012. Rule 74.3(3) provided that in any proceedings where the Case Management Conference has not been fixed before the 18th September, 2006, the matter shall be automatically referred to mediation. As the matter was struck out by 31st December, 2003, the question remains: Was the matter properly referred to mediation?

[33] Hibbert JA (Ag) (as he then was) in **Stewart (Gordon) et al v Independent Radio Co. & Anor** [2012] JMCA Civ. 2, paragraph 17, reasoned that the striking out of a matter will indirectly affect the operation of rule 74.3(3). The learned judge reasoned that if a Statement of Case is struck out, there would be nothing to be referred to mediation. Following that reasoning, I am of the view that in the circumstances of the present case, Mrs. McMain had no proceedings to refer to mediation. As such, both the reference to mediation and the institution of these proceedings are a nullity.

[34] Having found that these proceedings were a nullity, it is therefore unnecessary to consider whether the Fixed Date Claim Form disclosed a cause of action. It is also irrelevant to consider whether the matter was statute barred, since it was struck out by the operation of Rule 73.3(8).

IT IS HEREBY ORDERED THAT:

1. The Defendant's Application to Strike Out the Claimant's Fixed Date Claim Form as an abuse of process of this Honourable Court is hereby granted.

2. Costs are awarded to the Defendant, such costs to be taxed if not agreed.

J.

June 20, 2019