

*Judgment Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E351/91

BETWEEN	PAULINE EUNICE OWEN	PLAINTIFF
A N D	ALVIN BURNETT	1ST DEFENDANT
A N D	HAROLD GREEN (Executors of the Estate of Eric Milo Rock Owen, Deceased).	2ND DEFENDANT

HEARD: June 1, 2, 3, 4, 1999 and February 25, 2000

Mr. Maurice Frankson for the plaintiff  
instructed by Messrs Gaynair & Fraser.

Miss Hilary Phillips Q.C. and Rajendra Ramsaran  
for the defendants instructed by Messrs.  
Grant, Stewart, Phillips & Co.

RECKORD, J.

The plaintiff and the deceased were married in February, 1955. She was employed to a commission agent and he a civil servant. He was the father of three children from a previous marriage and two with the plaintiff.

In early 1969, they bought a house at 30 Havendale Drive and occupied same along with the five children. The purchase price was £9,500.0.0. It was registered in their names as joint tenants. They paid a deposit and obtained a mortgage from Canadian Imperial Bank of Commerce for the balance. The plaintiff claims that before they negotiated the mortgage she paid £1000.0.0 and bought carpet and drapes for the house.

Both parties arranged that she would take care of the household expenses while he made the mortgage payments of under £50.0.0 per month. Household expenses then was about £70.0.0 per month.

After the deceased retired from the civil service he worked at National Family Planning Agency as Accountant and subsequently as Secretary Manager. He was asthmatic and enjoyed poor health which resulted in him being hospitalized; at one time for twenty one days. He received specialist treatment from Dr. Barrow and Dr. Christian. She paid the medical expenses a lot of times. Up to the time of his death in 1990 his pension was \$800.00 per month. He also received money from the National Insurance Scheme and a gratuity when he left the Family Planning Board.

In order to assist in running the home she sold the Grafton Road house and paid her husband's medical expenses. Although he continued paying the mortgage instalments, she had to pay at times. Mortgage payments were completed in 1984.

In June 1976, at the request of her husband, they had the house transferred to them as tenants in common. She never received any contribution from the children towards their father's medical expenses. When a new drug came on the market they would send some for him to try. They sent a nebulizer to relieve his breathing problems.

They had improved the house by building a roof and a back car port. She had grilled the front porch since his death and has had the house painted nearly every other year. The children never contributed towards the repairs and improvements to the house except that \$1,000.00 was given by one to assist in purchasing a carpet. The reason why her husband asked to change the title from joint tenancy to tenancy in common was because he wanted his share to be given to the children while she would have a life interest.

The deceased made a new will eleven days before his death which she discovered in his bank vault after his death along with the title.

Under cross-examination, the plaintiff admitted they had 35 years of a long and good marriage. She has been the bursar at Calabar High School since 1972. They lived in rented premises when they got married. They both contributed towards the purchase of this house. Most of the time after the husband had retired she had to pay the mortgage as he had heavy hospital and doctors bill to pay. They pooled together and paid all expenses. She identified the certificate of transfer which was tendered in evidence and said:- "This is my death warrant. That is why I am here today."

Although she had made a much larger contribution towards the purchase of the property, she had equal share with her husband.

The deceased was concerned about all his children having a good education. He took a personal interest in their schooling, financial and otherwise. The three girls of his first marriage went abroad and completed their tertiary education. Their father made financial contribution to them. When her husband went abroad on government trips she went with him and benefitted from them. They pooled together and bought furnishings for the house - It was fully insured. She had a good relationship with her husband's three daughters by his first marriage. She was unhappy about his bequeating his share of the house to the children. She felt "he was putting me out of the house as his will said the estate must be finished within one year of his death." Her husband had told her that the change in the title was to protect her from being thrown out of the house. "The only reason I am here today is that husband in his will left nowhere for me to live." The first will with a codicial and last will were tendered in evidence by consent.

This was the case for the plaintiff.

Mrs. Eleanor Lee testified on behalf of the defence. The deceased was her father by his first marriage and she now lived in the United States of America. She was only 7½ years old when her mother died and she met the plaintiff when she was 9 years old and at 11 years old her father and the plaintiff got married. Her father retired from the civil service after serving 33½ years. He next went to the National Insurance Scheme and then on to the Family Planning Board and retired finally as

as Executive Director and Chairman of the Board.

Before they got married his father had introduced the children to the plaintiff as going to be their new mother and that he wanted them to be a family. Their father took care of them until he died - He took them to and from school; took them shopping; buying material for school uniforms; having them made. The plaintiff did not accompany her father on these occasions. The relationship between herself and the plaintiff was not very loving - within earshot she would make derogatory remarks about her and her sisters on a regular basis to the helpers. She concluded that the plaintiff never liked them. "There was a general air of under current hostility."

Her father was asthmatic all his life. The attacks became more frequent as he grew older. The children would make several purchases of medication and sent for him including a nebulizer. She was shown exhibit 3 (c) she said. "This is copy of father's will dated 22/1/90. I wish that everything that father put in his will be carried out - no more, no less."

When she was cross-examined Mrs. Lee admitted that she and the plaintiff never developed a close relationship. The plaintiff had made it clear that she did not like her and her sisters. She believe that her father and the plaintiff loved each other. It was because of the plaintiff why she and the plaintiff's children never had a close relationship. She agreed

that the plaintiff took care of her father as also herself. She saw the codical to the first will. It provided for the plaintiff to occupy the house for as long as she lived - plaintiff was now about 69 years old. She denied that she received any presents of any significance or lasting quality from the plaintiff at Christmas or on her birthdays.

This was the case for the defendants.

#### Submissions

Miss Phillips pointed out that there was no dispute between the plaintiff and the executors - the issue was about the true legal and beneficial ownership of 30 Havendale Drive. She referred to paragraph 26 of the plaintiff's affidavit asking for a share in the house proportionate to her contribution and suggested that there was no assistance from the evidence as to what the increase should be. This was a claim in equity and there must be a resulting, implied or constructive trusts. Counsel submitted that the evidence of the plaintiff fell far short. She had completely failed to prove that she had made any substantial improvement to the property in excess of the agreement with her husband over the years.

As to the acquisition of the property, the plaintiff had said she paid \$1,000.0.0 from her savings. In cross-examination she said it came from mortgage of the Vineyard Town house. On the question of later contribution it was the plaintiff's evidence that her husband's contribution was about £50.0.0 while hers was about £75.0.0. This was the agreement

that was made and which was fulfilled. The husband made further contributions when they travelled abroad. He bought presents, paid for all expenses including the children.

On the matter of the medical expenses, Miss Phillips said the plaintiff had claimed that she picked up most of these. However, in cross-examination she said she had to pay the mortgage as her husband had to pay the medical expenses. After his retirement she said his pension paid the mortgage.

A profile of both plaintiff and her husband showed they were both hard working. Both wife and daughter referred to the deceased as a dedicated family man - he took care of his five children. They had both acquired a house through their joint contributions and should therefore have equal shares in the matrimonial home as is registered on the certificate of title.

In respect of the substantial contribution that the plaintiff's claims she made, Miss Phillips said this has not been manifested in the evidence. Her evidence was not credible.

Miss Phillips submitted that there was no evidence of an agreement between the parties subsequent to the instrument of transfer in 1976, to alter the beneficial interest of the parties - she referred to the case of Jackson v Jackson (1990) 27 JLR. P.1.

Counsel further submitted that there was no evidence of any common intention expressed or implied by way of conduct or otherwise to indicate that the deceased held any part of his share in the property in trust for his wife. The wills and in particular, the codicil showed that up to 1989 the deceased was referring to his one half share of the property. In determining

the common intention of the parties, the evidence shows that some 7 months before his death that the deceased was disposing of his half share. This was in the presence of the plaintiff who said she then realized that she too could dispose of her half-share. The plaintiff was now claiming that she is entitled to a further interest in her husband's share and that the husband holds it in trust for her.

In her address on the law, counsel referred to Mowatt v Mowatt (1979) 16JLR. P. 362 - under the married woman's Property Act benefits only available when the parties are alive.

Reference was also made to the case of Jackson v Jackson (1990) 27JLR. page 1.

The parties are registered on the certificate of title jointly as tenants in common. There is a presumption in law that the ownership is in equal shares. This presumption can be rebutted but it must be done by agreement between the parties that is sufficiently certain and for good consideration and indicating that they intend legal relations. If the parties intended that they should own the property otherwise than equally it should have been recorded in a deed contemporaneously with the record of their ownership.

See Cobb v Cobb (1955) 2 AER. page 696 - The Court has no right to vary agreed or established titles to property.

See also Rimmer v Rimmer (1952). 2 AER p. 863.

Merritt v Merritt (1970) 2 AER. p. 760.

Azan v Azan (1988) 25JLR. page 301 at 302 F.



Finally, Miss Phillips submitted that the plaintiff has not given any evidence to suggest that there was any change of the original intention - The defendant has documentary evidence - certificate of title 1969; Instrument of Transfer 1976 and codicil 1989. This covers their entire married life and evidences their intention to share the property equally as tenants in common.

On behalf of the plaintiff Mr. Frankson submitted that she was entitled to a beneficial interest in the property that was divided by her deceased husband. Counsel asked the Court to say that as between the parties there was an agreement whether expressed or implied that each would have at least a life interest in the share of the other. The plaintiff was seeking to invoke the provisions of Section 10 of the Partition Act in support of her claim. By this it was open to the Court to find that Mr. Owen became a trustee in respect of the share of the premises that was legally owned by him - such trust to be in favour of Mrs. Owen.

Counsel further submitted that the expenditure made by the plaintiff after 1976 when the transfer was signed is sufficient evidence for Court to find that Mrs. Owen made contributions which would give her interest in excess of 50% e.g. painting of house, payment of mortgage - such expenditures would be against her interest.

In the event that the Court finds that her additional contributions does not entitle her any further beneficial interest, then in the circumstances the Court should consider what, if any, value is to be placed on her contributions in respect of the maintenance and additional work that she did and accordingly to make an order that the defendants pay to the plaintiff an amount of money to reflect the value of same.

#### FINDINGS

This matter was began by the plaintiff filing an originating summons in the Supreme Court asking for an order that :-

1. The said Pauline Eunice Owen is beneficially entitled to a share in her husbands interest in the above mentioned land proportionate to her contribution to the acquisition thereof.
2. In the alternative the defendants to pay to the plaintiff the value of the extensions, alterations and modifications effected by the plaintiff to the building on the above mentioned land such value to be assessed by the Court.

However the Court subsequently ordered that the proceedings continue as if action had been commenced by writ of summons and that the affidavits filed should stand as pleadings.

As pointed out by Miss Phillips at the beginning of her submissions there was no dispute between the plaintiff and the defendants who are the executors of the estate of her deceased

husband. The issue is simply this. Whether the plaintiff is entitled to an interest in her husband's share of the matrimonial home for the reason that she made greater contribution than her husband did in purchasing the house.

It appears that they paid a deposit. She contributed £2,900.0.0 while her husband contributed £2,200.0.0. The balance was obtained by way of a mortgage. They made an arrangement that she would be responsible for paying the household expenses which amounted to about £70.0.0 per month while the husband paid the mortgage instalments of just under £50.0.0 per month. This was what the parties agreed upon when they acquired the house. These figures given by the plaintiff were not challenged by the defendants. In Cobb v Cobb (supra), Lord Justice Denning as he then was, said :-

"In the case of family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property was intended to be a continuing provision for them during their joint lives, the Court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal, and all the more so when the property is taken, as here, in their joint names, and was intended to be owned by them in equal shares. The legal title is in them both jointly and the beneficial

interest is in them both as equitable tenants in common in equal shares."

I respectfully wish to adopt these words as my own; I agree with them and apply them to the instant case. I should add that the other two judges of the Court of Appeal agreed with the judgment of Denning L.J.

In his judgment, Romer L.J. said at page 700,

"although the husband's contributions did in fact considerably exceed those of the wife, the payments which he made were precisely those which were originally contemplated and no more."

"See also Francis Jackson v Lawrence Jackson (1990) 27 J.L.R. page 1 there is a rebuttable presumption of ownership in equal shares when property is conveyed to tenants in common."

From the evidence before the Court I find that the parties intended the house to be their matrimonial home; that it was intended to be a continuing provision for them during their joint lives; that it was taken in their joint names and was intended to be owned by them in equal shares. Accordingly, the first declaration sought by the plaintiff is refused.

The plaintiff has asked in the alternative for the Court to value the extensions, alterations and modifications effected by the plaintiff to the building. I take it that this refers to expenses incurred since the death of her husband on 2nd May, 1990.

From the evidence before me the plaintiff griled the front porch and painted the house about every two years since her husband's death. The evidence does not disclose what was the total costs of these improvements. This would have been bourne by both the plaintiff and her husband. Since the parties had legal interest of half and half each in the house, perhaps each party should bear these improvement equally, notwithstanding that the proportion of their payments in the past was different.

In response to the alternative claim by the plaintiff, the Court orders the defendants to pay to the plaintiff one half of the value of the improvements to the house since the death of the husband, such sum to be assessed by the Court.

Costs to be paid from the estate of the said Eric Milo Rock Owen.