



[2018] JMSC Civ. 105

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2015 HCV 01104**

**IN THE MATTER of the Property (Rights of Spouses) Act)**

**AND**

**IN THE MATTER of questions arising between ESTHER REBECCA ROSE and KENNETH MANLEY ROSE, concerning property held as joint tenants.**

**BETWEEN ESTHER REBECCA ROSE CLAIMANT**

**AND KENNETH MANLEY ROSE DEFENDANT**

**IN CHAMBERS**

**Mr. Leighton Jackson holding for Ms. Marjorie Shaw instructed by Pollard, Lee Clarke & Associates for the Claimant.**

**Mrs. Yvonne D. Ridguard Harris for the Defendant.**

**Heard: 17<sup>th</sup> December, 2015 & 20<sup>th</sup> July, 2018.**

**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] I would firstly like to apologise for the unfortunate delay in delivering my ruling in this matter. This was partly due to my awaiting of a copy of an authority from the Eastern Caribbean referred to by Counsel for the Claimant, which has yet to be provided to the Court. Nevertheless, the responsibility for the delay is mine.

[2] Mrs. Esther Rose and Mr. Kenneth Rose were married for fifty-six years, and are now retired. Their marriage was terminated by the grant of a Decree Absolute on the 18<sup>th</sup> April, 2013. At the time of the said grant, the Claimant Mrs. Rose resided in the United States of America, while the Defendant Mr. Rose, lived at Zion Hill, Fairy Hill in the parish of Portland, which was the given address for the matrimonial home. He still resides there and has since remarried on the 2<sup>nd</sup> April, 2014. Mrs. Rose continues to reside in the United States of America.

[3] Subsequent to the grant of the Decree Absolute, the Claimant sought Orders regarding the determination of her interest in the matrimonial home. Among the six Orders sought in her Fixed Date Claim Form, filed on the 11<sup>th</sup> February, 2015, in so far as is relevant were the following: -

1. An Order for an extension of time within which to file claim under the Property Rights of Spouses Act;
2. A Declaration that the Claimant and the Defendant are each entitled to an interest each of the matrimonial home and all that parcel of land the matrimonial home is situated on, being all that parcel of land part of Zion Hill, Fairy Hill in the parish of Portland registered at Volume 1083 Folio 298 in the Register Book of Titles in the proportion of 50:50 respectively.

[4] The grounds on which the Claimant relied, as well as her evidence were set out in the Affidavit of Esther Rebecca Rose in Support of Fixed Date Claim Form, and the Supplemental Affidavit of Esther Rebecca Rose both filed on the 11<sup>th</sup> February, 2015. The Defendant's evidence was contained in the Affidavit of Kenneth Rose in Support of

Defendant's Ancillary Claim and in Answer to Claimant's Fixed Date Claim Form filed on the 9<sup>th</sup> October, 2015.

[5] In her evidence, the Claimant stated that she was never made aware of the grant of the Decree Absolute, and her contact with her Attorneys-at-Law was limited to telephone calls and emails. Despite her several telephone conversations and email correspondence with her Attorneys-at-Law regarding the matter, she was not made aware of the grant of the Decree Absolute until the 11<sup>th</sup> April, 2014.

[6] She went on to indicate that on the 10<sup>th</sup> April, 2014, she was informed by her niece that Mr. Rose had remarried. Following this revelation, she contacted her Attorneys-at-Law and requested a copy of the Decree Absolute. This was eventually sent to her on the 9<sup>th</sup> May, 2014. Dissatisfied by their handling of the matter, the Claimant sought and obtained new legal representation on the 3<sup>rd</sup> June, 2014. Her previous Attorneys-at-Law however, did not forward the documents to her new Attorneys-at-Law, until the 22<sup>nd</sup> August, 2014, after which they were able to provide her with comprehensive legal advice as to how to proceed. Subsequently, the instant claim was filed on 11<sup>th</sup> February, 2015, approximately six months after the documents were received by her new Attorneys-at-Law, and served on the Defendant on the 18<sup>th</sup> August, 2015.

[7] Mrs. Ridguard Harris for the Defendant in advancing her case submitted that the Claimant's Application for Extension of Time should be rejected. She argued that the Fixed Date Claim Form is invalid as the Application was made out of time. Further, she argued that no separate Application was made to extend the time within which to file the claim. Counsel relied on section 13 of **The Property (Rights of Spouses) Act (PROSA)**, which reads, so far as is relevant: -

*"(1) 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 a marriage or termination of cohabitation;*

*(2) An application under subsection (1) (a)... shall be made within twelve months of the dissolution of a marriage... or such longer period as the Court may allow after hearing the applicant."*

[8] Counsel further submitted that the Fixed Date Claim Form merely asserted an intention on the part of the Claimant to seek an Order for extension of time. This without more she contended, was not an Application for Extension of Time, and a separate Application must be made to validate the claim which was filed out of time.

[9] In his response, Counsel for the Claimant Mr. Jackson argued that the absence of an independent Application does not prejudice the Defendant in any way. He further argued that the bulk of the Claimant's evidence outlined the reasons for the delay in making the claim within the twelve-month period allotted under section 13(2) of **PROSA**. He urged the Court to be satisfied that there was sufficient evidence for it to consider an Application for leave to make this claim.

[10] The contention in this matter is the manner in which the claim was brought by Mrs. Rose. Counsel for Mr. Rose took issue with the Claimant's failure to file a separate Application seeking leave for an extension of time within which to file her claim under **PROSA**. Consequently, she contended that the Fixed Date Claim Form was therefore invalid. The issue then for the Court's determination is whether it is necessary to file a separate Application for an extension of time under section 13(2) of **PROSA**, where the twelve-month period for making such a claim has passed.

[11] Before addressing that issue however, it is necessary to point out that section 13(2) of **PROSA**, does not impose a requirement for leave to be obtained. That section however, gives the Court the power to exercise its discretion to hear claims which are filed later than the stipulated twelve-month period provided the circumstances of the case warrants an extension. The following words of that section "*...or such longer period as the Court may allow after hearing the applicant*" gives the Court that discretion.

[12] In the case of **Saddler v Saddler and Hoilette v Hoilette & Ors** [2013] JMCA Civ. 11, Phillips JA delivering the judgment of the Court, stated at paragraph 42: -

*"It is therefore my view that the words in section 13 are plain and unequivocal and must be given their ordinary and natural meanings. **Once a spouse as defined in PROSA applies to the court on the basis of the matters set out in section 13(1)(a) - (d) in accordance with section 13(2) of PROSA, and the claim form***

*is in compliance with Part 8 of the Civil Procedure Rules relating to the commencement of the proceedings, the claim would be valid.”*

[Emphasis supplied]

[13] The learned Judge of Appeal further expressed at paragraph 45 the following sentiments: -

*“...a claim form which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted under PROSA to the date of the filing of the claim, for the claim originally filed to stand, or if the claim is not yet filed, to a determined date for the filing of the same.”*

[14] It is clear based on the comments expressed by Phillips JA earlier, that Mrs. Rose’s claim is not invalid by virtue of the fact that it was filed out of time. The claim may be described as irregular, and cannot proceed until an Application for Extension of Time is both made and granted for the claim to stand. However, the claim cannot be said to be invalid.

[15] The final issue for determination is whether a separate Application was necessary to seek the Order to extend time. As indicated earlier, section 13(2) of **PROSA**, identifies the time within which a claim for division of property must be made. It is undisputed that the time may be extended by the Court, as the wording of the section is clear.

[16] Phillips JA in **Saddler v Saddler and Hoilette v Hoilette & Ors**, after considering a number of authorities, and the history and intent of **PROSA**, concluded the following at paragraph 86: -

*“(xi) If the claim is filed outside the 12 month time period set out in the statute, extension of time must be obtained from the court for the matter to proceed, but no leave is required, and so no application for leave and extension is required.*

*(xii) There are no words indicating that the application for extension of time must be filed before the claim form is filed, if the claim form is filed outside the time limited in PROSA. There is no indication that the application for extension cannot be filed after the claim is filed, and the order granted nunc pro tunc.”*

[17] In light of that finding by the learned Judge of Appeal, the correct approach in my view is that an Application for Extension of Time ought to be made separately so as to regularize the claim. As previously indicated, the claim having been filed out of time was

not invalid but irregular. An irregular claim however, cannot regularize itself. In commenting on the state of such a claim, Phillips JA observed at paragraph 86(v) that *“the claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted.”*

**[18]** The Court is empowered to grant Orders *nunc pro tunc* so as to cure a defect on the Fixed Date Claim Form. In this case, no separate Application was made to regularize the claim which was filed 11<sup>th</sup> February, 2015, outside the stipulated twelve-month period. Although the Fixed Date Claim Form sought an Order seeking an extension of time to file the claim, the claim nevertheless is irregular. I can do no better than to adopt the language of Phillips JA, and to consider these proceedings to be in a state of suspended validity until a separate Application for Extension of Time is granted. That Application is yet to be made.

**[19]** I therefore agree with Counsel for the Defendant Mrs. Ridguard Harris that the Claimant ought to have filed a separate Application seeking an extension of time. This claim is not invalid, but irregular and is currently in a state of suspended validity until the Order to extend time is granted to validate the claim.

**[20]** In the circumstances it is hereby ordered: -

- a) Application for Extension of Time contained within the Fixed Date Claim Form is refused;
- b) Costs awarded to the Defendant, such costs to be taxed if not agreed.