



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 04799 OF 2008

IN THE MATTER OF Caveat No.
1531735 registered on title at Volume
1307 Folio 12
And in the matter of s. 140 of the
Registration of Titles Act

BETWEEN ALPHANSO WADE CLAIMANT
AND GLORIA ELMENA DAVY DEFENDANT

Miss Carol Davis for Claimant
Mrs. Nicole Superville-Hall for Defendant

IN CHAMBERS

Delivered as an Oral Judgment

Heard: June 20, July 4, 2011

**NON-ATTENDANCE OF WITNESSES – AFFIDAVITS STRUCK
OUT – UNSATISFACTORY STATE OF EVIDENCE – RARE CASE
IN WHICH BURDEN OF PROOF DETERMINING WHICH PARTY
SHOULD SUCCEED**

Mangatal, J:

1. This is an application by the Claimant "Mr. Wade" against the Defendant for the following relief:-
 - (a) A declaration that the land registered at Volume 1307 Folio 126 of the Register Book of Titles is 100% owned by Mr. Wade and his mother Thelma Wade as tenants-in-common .
 - (b) An Order that the name Gloria Elmena Davy be deleted as a proprietor as joint tenant of premises registered at Volume 1307 Folio 126 of the Register Book of Titles.
 - (c) That the Caveator Gloria Elmena Davy attend to show cause why caveat No. 1531735 should not be removed.
 - (d) That caveat No. 1531735 be removed.
 - (e) Further or other relief.
 - (f) Costs to the Claimant.
2. The application is supported by two affidavits by Mr. Wade,,sworn to respectively on the 10th September 2008 and 18th January 2010.
3. The application has been contested by Ms. Davy and she filed three affidavits; one sworn to by her on the 2nd February 2009, one sworn to by Narda Dennis, her daughter, on the 29th July 2009, and another sworn to by Joan Wade, Mr. Wade's cousin, on the 31st July 2009. Ms. Davy has also filed a Counterclaim in which she has claimed the following:-
 - (a) A Declaration that the Claimant and the Defendant are the legal and beneficial owners of the subject property.

- (b)(i) An order that the property be sold and the net proceeds of the sale be divided between Mr. Wade and Ms. Davy with $\frac{2}{5}$ th of the proceeds to Mr. Wade and $\frac{3}{5}$ th to Ms. Davy, or in the alternative;
 - (ii) An order that Mr. Wade pay to Ms. Davy such sum as would satisfy Ms. Davy's share and interest in the said property.
 - (c) An order that a reputable valuator be appointed by the Court to value the said property.
 - (d) An order that the costs of the Valuation be borne by the parties in shares aligned to the portion of the property deemed to belong to each of them.
 - (e) An order that the Registrar of the Supreme Court be empowered to sign any document with respect to the Sale or Transfer of the said property should any of the parties refuse to sign same.
 - (f) Mesne profit for rent from 1st October 1999 to the 30th of January 2009, representing rent collected by the Claimant during that period and not shared with the Defendant.
4. The address for both parties are stated in the claim form as being the United States.
- Prior to the hearing date on the 20th of June the matter had been fixed for substantive hearing on four previous occasions, upon which occasions Mr. Wade had to incur travelling expenses in coming to Jamaica from abroad.
5. The matter has on a number of previous occasions been adjourned on the

application of Ms. Davy's attorney-at-law, the last such date being the 10th January 2011. On that occasion it was ordered that Ms. Davy was to pay the costs of the day and to reimburse Mr. Wade's travelling costs to be paid by a particular date. The matter was then fixed for hearing on 20th June and an unless order was also made that unless the costs were paid by Ms. Davy as ordered, Mr. Wade would be at liberty to apply for judgment.

6. The costs, I am advised by the parties, were paid. However, on the 20th June when the matter came before me, Ms. Davy's Attorney-at-law again applied for an adjournment. This time the basis of the application was that a Notice had been filed, just the Friday before this Monday hearing, i.e. on the 17th of June 2011, seeking an extension of time within which "to give notice of appeal" against the ruling made by my sister Simmons, J (Ag.). On the 2nd of December 2010, my learned sister refused an application by Ms. Davy that she be permitted to give evidence by way of video link made on the grounds that amongst other matters, she has a pending application for asylum in the United States that prevents her by United States Law from travelling to Jamaica. She also claimed that she fears for her life and safety should she return to Jamaica. The application for extension of time was fixed for hearing on the 28th of October, 2011.
7. Ms. Davis, who appears for Mr. Wade, opposed the application on the basis that, amongst other matters, this was the fourth time that her client

- was travelling to Jamaica for the hearing and, also the lateness of the application.
8. I refused the application for an adjournment since I considered it quite unreasonable for an application for an extension of time to appeal from an interlocutory order made from as long ago as December 2, 2010, only one working day before the hearing date of the substantive application. The 14 day time limit for applying for permission to appeal expired in December 2010. Further, I considered the fact that there have already been four previous substantive hearing dates. Bearing in mind the overriding objective of dealing with cases justly, including the court's duty to see that an appropriate share of the Court's resources are allocated to this case, at the same time bearing in mind the need to allocate resources to other matters, in my judgment it was just to refuse the adjournment and to have the parties get on with the hearing as scheduled.
 9. On the 1st of May 2009, my sister McDonald-Bishop, J made amongst others, the following order "All affiants to attend for cross-examination if required upon service by either party of notice to attend for cross-examination, such notice to be served on or before 30th October, 2009." Time for service of notice to attend for cross-examination was extended to the 29th of January 2010.
 10. Mr. Wade's Attorneys filed and served notice requesting Ms. Davy to attend for cross-examination on the 5th and 11th May 2009 respectively. They also filed and served on the 10th December, 2009 a notice requiring

- the attendance of Joan Wade and Narda Dennis for cross-examination. There was no notice ever served by Ms. Davy or her Attorney requesting cross-examination of Mr. Wade.
11. At the start of the hearing, Ms. Davis submitted that pursuant to Rule 30.1(5) of the C.P.R., Ms. Davy ought not to be permitted to rely upon either her Affidavit or that of Narda Dennis. No proper explanation for their absence was afforded to the Court. Mrs. Superville-Hall indicated to the Court that Joan Wade would be available for cross-examination.
 12. I agreed with Ms. Davis' submission. Rule 30.1(5) states that where the Deponent of an affidavit does not attend as required by the court order, the affidavit may not be used as evidence unless the court permits. I saw no good reason to permit Ms. Davy such use, and in particular, as Simmons, J(Ag.) had already refused the application for cross-examination of Ms. Davy by way of video-link, Mrs. Superville-Hall could not reasonably advance as sufficient, reasons of fear and asylum application as an explanation for Ms. Davy not attending this hearing in person. I therefore struck out the Affidavits of Ms. Davy and also the Affidavit of Narda Dennis.
 13. Mrs. Superville-Hall, seemingly to have been suddenly struck by the desirability of cross-examination, now at this late stage applied to cross-examine the already present Mr. Wade. Ms. Davis indicated that she had no objection to such a course. I allowed Mrs. Superville-Hall to cross-examine Mr. Wade as I considered it just to do so.

Mr. Wade's Case

14. In his Affidavit evidence, Mr. Wade stated that he resides and has his true place of abode at 839 East 228 Street, Bronx, N.Y. 10466 in the United States of America. He together with his mother Thelma Wade in 1999 purchased the subject property. The names of Ms. Davy, Mr. Wade and Thelma Wade are registered on the Certificate of Title as Tenants-in-Common. Although Thelma Wade is included on the Title, Mr. Wade states that he purchased the property entirely from his own resources and authorized the inclusion of his mother's name.
15. Mr. Wade states that he knows Ms. Davy and he and Ms. Davy had a relationship many years ago. However at the time of the purchase they were no longer together.
16. The purchase price for the Land was \$1,800,000.00. Mr. Wade states that he paid the whole sum. However, at this stage he states that he is only able to locate a receipt for the deposit of \$1,406,500.00. The receipt is issued to A. Wade and appears to be signed by Ms. Laud who was at the time a Secretary in Attorney-at-law Norma Linton's office.
17. At the time of signing the Transfer Mr. Wade states that the document only had his name and that of his mother and that it was he alone who signed before a Notary Public. However, he was recently shown a copy of a document entitled "Transfer of Land" attained from the offices of the Registrar of Titles. This document has Ms. Davy's name, then Mr. Wade and then Thelma Wade's name stated as being transferees. Mr. Wade

says he at no time authorized Ms. Davy's name to be included as a purchaser and that she made no contribution to the purchase price. He was advised by Ms. Nola Wade, who is his cousin and who at the material time worked in Miss Linton's office, that Ms. Davy had called her and told her that he had agreed for her name to be included on the Title. However, Mr. Wade states that he did not so agree and that Ms. Davy's name was included without his knowledge or consent. He also indicated that in or about June, 2008, he received a Notice from the Titles Office that Ms. Davy had filed a Caveat against dealings in the land.

Ms. Davy's Case

18. As I have struck out the Affidavits of Ms. Davy and Ms. Dennis because of their failure to attend court for cross-examination as ordered by the Court, the remaining Affidavit evidence filed on behalf of Ms. Davy is that of Joan Wade. Ms. Wade's Affidavit is replete with hearsay statements and I have attached little or no weight to such statements. Joan Wade is the same person that Mr. Wade refers to as Nola Wade.
19. Ms. Wade states that she is a paralegal and is Mr. Wade's cousin. She was employed as a Legal Secretary by Ms. Norma Linton for about 8 years from sometime in 1997 until February 2005.

She claims that sometime in 2002 she was looking for a house to purchase for herself and Ms. Laud, one of Miss Linton's secretaries, indicated that a house was for sale in Portmore at a favourable price of \$1,300,000.00. Ms. Wade wanted to buy the house but she did not have

the money so she decided to ask her cousin Mr. Wade to loan her the money for the deposit.

Sometime in 2002 (it is 2002 that she states in her Affidavit and as far as I can trace, there was no contest or correction about that) she called Mr. Wade but he was not at home so she spoke to his girlfriend Ms. Davy about the house in Portmore. It should be noted that the registration of Mr. Wade, Ms. Davy and Thelma Wade as owners on the Title took place in 1999. She states that Ms. Davy said that she would speak to Mr. Wade about making a joint purchase of the house. She states that that same night Mr. Wade phoned her and said, amongst other things that he and Ms. Davy had decided to buy the house and they would let her live in the house until she got something for herself.

20. One week after these telephone conversations, Mr. Wade and Ms Davy's daughter Narda came to Ms. Linton's office. Mr. Wade said he and Narda had only brought with them a portion of the funds required to purchase the property and that Ms. Davy would send the remaining portion when it was required.
21. Ms. Wade stated that although they, Mr. Wade and Narda each handed her US\$20,000.00 she did not handle the transaction directly, as she was Ms. Linton's Legal Secretary for criminal matters at that time and it was Ms Laud who handled conveyancing matters and dealt with Mr. Wade and Narda.

22. Only one receipt was given to Mr. Wade and Narda. While Ms. Laud was preparing the Agreement for Sale, Ms. Wade says that she advised Mr. Wade that as both he and Ms. Davy were resident in the United States, they should add the name of someone resident in Jamaica. It was at that point that Mr. Wade called his mother and ascertained her information to put into the Agreement for Sale.
23. Ms. Wade states that sometime after Mr. Wade and Narda took the documents relating to the sale away with them, a woman named Juliet Lewis came to the office with the signed Agreement and the balance of the purchase proceeds.
24. From time to time both Mr. Wade and Ms. Davy would call her for updates on how the matter was progressing.
25. Juliet Lewis came to the office to collect the Title and keys. However she was not able to collect these items until approximately one week later when she returned with a notarized letter from Mr. Wade and Ms. Davy.
26. After the sale was over Ms. Wade remained in contact with Ms. Davy but Mr. Wade became distant towards her.
27. Ms. Davy's Affidavit closes with a paragraph of belief:-
"23. ... I believe Gloria Davy is entitled to more than a half share in the subject property as she contributed U.S. \$30,000.00 towards the purchase and Mr. Wade contributed only U.S. \$20,000.00" ...

Mr. Wade's Second Affidavit

28. I note that Mr. Wade did not respond to the Affidavit of Ms. Wade although it was sworn to on the 31st July, 2009. Indeed the only Affidavit filed on behalf of Mr. Wade after that date was one in which he responded to Ms. Davey's Affidavit in which she set out the basis for her application that she be allowed to be cross-examined by way of video conference.
29. In his second Affidavit Mr. Wade indicates, amongst other matters, that whilst Narda did travel to Jamaica when he did, this was done as a favour to Narda, since she was not familiar with Jamaica.
30. Mr. Wade denies that Narda participated in the sale transaction and denied that Narda paid any money on behalf of Ms. Davy. In fact, he stated that he was the person who gave Narda J\$5,000.00 so that she would have some money to spend while she was in Jamaica. Mr. Wade reiterates that all the money paid to Ms. Linton's office was his, and that since the purchase of the premises, Ms. Davy has taken no interest in it. When he comes to Jamaica he lives at the premises and he takes care of all the outgoings, including paying the taxes on the property.
31. Mr. Wade states that Ms. Davy was involved in illegal activities and has twice been deported from the United States. He further stated that she currently has a passport in the name of "Pauline Simpson." He asserts Ms. Davy was involved in illegal activities but "is seeking to make a deal whereby she gives evidence for the prosecution to save her own skin". In

the circumstances he states that he verily believes that Ms. Davy is unable to travel to Jamaica through her own default.

Cross-Examination of Mr. Wade

32. In cross-examination Mr. Wade indicated that he had been working as a security guard from 1996 and that it was from his income as a security guard that he paid for the property. He also denied that Narda had come with him to Ms. Linton's office.
33. He agreed that whilst in his Affidavit he had stated that he signed the Transfer in Jamaica, he in fact signed the Transfer in the United States in the presence of a Notary Public. He said that he does not remember Ms. Davy being with him when he signed the Transfer.
34. Mr. Wade also said he did not sign an Agreement for Sale. He became aware that Ms. Davy's name was on the Title about 1 year after he had come to Jamaica. He discovered this in about the year 2000. He said he knows Juliet Lewis, she is just a friend and she had nothing to do with this property.
35. In the course of her cross-examination, Mrs. Superville-Hall put a most curious suggestion to Mr. Wade. She suggested that Mr. Wade was aware of Ms. Davy's troubles and her illegal activities, and that he was taking advantage of her inability to travel to Jamaica to make the claim in this lawsuit. Mr. Wade denied that this was so.

Cross-Examination of Ms. Wade

36. When Ms. Wade was being cross-examined by Ms. Davis she stated that she has not met Ms. Davy in person only spoken to her on the telephone.
37. She denied that she and Ms. Davy were friends or that Ms. Davy from time to time sends her barrels.
38. Significantly, in direct contradiction to what is stated in her Affidavit, Ms. Wade states that she was not present at the time when Mr. Wade handed over the purchase money to Ms. Laud. She said that Mr. Wade and Ms. Laud were alone at the time that the money was paid.
39. Interestingly, in response to a suggestion that Ms. Davy did not contribute U.S.\$30,000.00 to the purchase price, Ms. Wade stated that she is not in court to say who contributed to the purchase price, she was just here to say that Mr. Wade is lying when he says that he does not know about Ms. Davy's name being on the Title.
40. She states that Ms. Lewis also paid money towards the purchase price on behalf of Ms. Davy and she was present when this occurred. She also said that at the time when Mr. Wade came to Ms. Linton's office he was accompanied by a young lady who she understood was Ms. Davy's daughter.

Resolution Of The Issues

41. This is a strange case. I note that whilst Mr. Wade claims that he did not know about Ms. Davy's name being on the Title he has not made any claim of fraud on her part or anyone else's. Ms. Davy's name is clearly

- stated on the Instrument of Transfer which is exhibited to Mr. Wade's Affidavit and her name appears before his name and that of Thelma Wade.
42. I have had the opportunity of observing the demeanour of Mr. Wade and Ms. Wade, and on this point, I do not believe Mr. Wade is speaking the truth when he says that he did not know of Ms. Davy's name being on the Transfer or that she was not one of the named purchasers. I believe Ms. Wade when she claims to have spoken to Mr. Wade and that he indicated to her that both himself and Ms. Davy were interested in purchasing the property. I accept on a balance of probabilities that Mr. Wade did sign the Transfer on the same occasion in the United States when Ms. Davy signed the Transfer before Notary Public Seymour Brown.
43. I further accept that a young lady, Ms. Davy's daughter Narda Dennis did attend at Ms. Linton's office with Mr. Wade on the date when purchase proceeds were handed over.
44. Now I will have to consider how the fact that I have found that Mr. Wade was not speaking the truth when he says he did not know of Ms. Davy's name being on the sale documents should be treated. I remind myself that parties may lie for a number of reasons; they may lie because of panic, or Mr. Wade may have lied in the mistaken belief that if he acknowledges that Ms. Davy's name was on the documentation, he could not claim that sole entitlement to the property rests in his mother and

- himself. In other words, this lying by itself is not proof that it was not Mr. Wade alone that provided the purchase proceeds.
45. I find it interesting also and significant that Mr. Wade says that although he paid the whole purchase price, he can only find the one receipt for \$1,406,500.00 admittedly obtained at a time when both he and Ms. Davy's daughter were in Jamaica.
 46. Mr. Wade did not in his Affidavit respond expressly to what Ms. Wade stated in her Affidavits. For example, he has not denied that Ms. Lewis collected the Title and keys to the house as stated by Ms. Wade, although he did in his evidence in cross-examination state that Ms. Lewis had nothing to do with this transaction.
 47. It is true, as Ms. Davis has submitted to me, that whilst the counter claim is saying that Ms. Davy is entitled to a $\frac{3}{5}$ share in the property, and Mr. Wade $\frac{2}{5}$, on the evidence before me it is not clear how the Court would arrive at that division. This is because there are three persons named on the Title, and importantly, although Ms. Wade in her Affidavit stated that Ms. Davy contributed US\$30,000.00 and Mr. Wade US\$20,000.00 towards the purchase price, she now says in cross-examination that she is not here to say who contributed what sums to the purchase price. In any event, Ms. Davy could not obtain that kind of relief without making Thelma Wade a party.
 48. Ms. Davis has therefore submitted that the central issue is whether or not there is a resulting trust in favour of Mr. Wade by reason of his

contributing the entire purchase proceeds. She submitted that all the evidence points to money coming from Mr. Wade alone. She asked me to accept his evidence that he had a receipt for the balance proceeds but he cannot locate it. She submitted there is no receipt produced in respect of monies which Mr. Wade says Ms. Lewis paid and nor is Ms. Lewis herself making any claim to the property.

49. Ms. Davis referred me to Halsbury's Laws of England, 4th ed. 2000 Re-issue, Volume 48, para. 525 where it is stated:-

“... A presumed resulting trust arises from the application of a rebuttable presumption of intention that property purchased wholly or partly by X but vested in Y's name should be held by Y on trust for X to the extent of X's share in the purchase; likewise, where there is a voluntary transfer by X into the name of Y or the joint names of X and Y, there is a presumption of a resulting trust for X.”

50. I accept those principles of law as being correctly stated. However before I can apply such law, I would have to first find as a fact that I accept on a balance of probabilities that all of the proceeds for the purchase of the property came from Mr. Wade. This is because as Ms. Davy's name appears on the Title, she would be presumed, without more, to have both legal and equitable interests in the property.
51. Mr. Wade has not asked me to determine the respective interests of the parties, nor has he asked for the Court to order a sale of the premises. Thelma Wade is not a party to this Claim. He is asking the Court to

determine that the property is 100% owned by himself and his mother. He who alleges must prove. It is just that, as stated in Phipson on The Law of Evidence, paragraph 4.03 – “if, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him. While a judge or tribunal of fact should make findings of fact if they can, in the exceptional case in which they are forced to the conclusion that they do not know which side of the decision ought to be, the principle of the burden of proof determines which party should succeed.

A striking example of this was *The Popi M (Rhesa Shipping Co. S.A. v Edwards* [1985] 2 All. E.R. 712, H.L.). The vessel sunk in good weather during a voyage in the Mediterranean as a result of water entering a hole in the shell-plating on her port side and flooding the engine room and holds. Shipowners contended the vessel collided with a submarine, underwriters contended the cause was prolonged wear and tear of the ship's hull. The judge thought the submarine explanation was improbable but more likely than the wear and tear explanation and thus gave judgment for the owners. The House of Lords held that in the circumstances the true cause of the loss was in doubt and it was one of those rare cases which fell to be decided on the burden of proof, which lay on the owners. Lord Brandon said, in characterising the reasoning of the judge as that of Sherlock Holmes rejecting it for that reason said: (p. 718)

“The first reason is one which I have already sought to emphasize as being of great importance, namely that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take ...

The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not.

If such a judge concludes, on a whole series of cogent grounds, that the occurrence of such an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leads him to doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred has therefore failed to discharge such burden.” (my emphasis)

52. In my judgment, this case is one of those rare cases which falls to be decided on the burden of proof and that burden falls on Mr. Wade in relation to the fixed date claim form. Ms. Davy's name is on the Title, Mr. Wade I have found knew of this. Mr. Wade has not produced receipts for all the purchase proceeds. Ms. Wade states that Ms. Lewis brought a portion of the purchase proceeds on behalf of Ms. Davy. Whilst it is possible that Mr. Wade cannot find the receipt for the difference between the total purchase price of \$1.8m, and the \$1,406,500.00 because he had it, but simply cannot locate it, it is equally consistent with payment having been made by Ms. Davy or by Ms. Lewis on her behalf. I am also of the view that the reason that Mr. Wade lied about knowing of Ms. Davy's name on the documentation is because he is aware that she did contribute money towards the purchase price. It was only in cross-examination that Mr. Wade for the first time said that Ms. Lewis had nothing to do with this transaction. I did not find him very convincing. I must say also that whilst Ms. Wade impressed me in terms of her evidence in cross-examination, I found that some of the evidence stated in her Affidavit was dubious, and consisted to a large extent of hearsay.
53. I find that the evidence leads me to doubt whether Mr. Wade did contribute the entire purchase proceeds and I am not satisfied on a balance of probabilities, or that it is more probable than not, that he contributed the whole purchase sum of \$1.8m. Consequently, Mr. Wade has failed to discharge the burden resting upon him. For this reason, the

- relief claimed in paras. 1 and 2 of the Fixed Date Claim Form is refused. With regard to the claim in relation to the caveat, Ms. Davy is a registered legal owner and a caveat therefore serves no useful purpose. She is not claiming under any “unregistered interest, or by devolution in law or otherwise” – see sections 139 – 243 of the Registration of Titles Act. The caveat ought therefore to be removed. In any event Ms. Davy has not attended and/or shown cause why the caveat should not be removed.
54. The Counterclaim is dismissed, since Ms. Davy has not discharged the burden that would rest on her in relation to the Counterclaim, and also, such a claim could not be dealt with without Thelma Wade, whose name also appears on the Title as a tenant in common, being named as a party.
55. Consequently, in relation to the Fixed Date Claim Form, there will be an order –
- That the Caveat No. 1531735 be removed from the Certificate of Title registered at Volume 1307 Folio 126 of the Register Book of Titles. One third Costs to the Claimant to be taxed if not agreed.
56. The Counterclaim is dismissed, with one half Costs to the Claimant to be taxed if not agreed.