



[2023] JMSC Civ. 266

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

**IN THE FAMILY DIVISION**

**CLAIM NO. SU2022FD03053**

<b>BETWEEN</b>	<b>MELEISE KANNISHA CARSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DENNIS ANDREW CARSON</b>	<b>RESPONDENT</b>

**IN CHAMBERS**

**Ms Treveen Little of Counsel for the Claimant**

**Mr Lemar Neale instructed by NEA/LEX for Defendant**

**Heard: July 10, 11 and 12, 2023, August 11, 2023 and September 15, 2023, October 6, 2023 and December 15, 2023**

**Family Law – Entitlement to Property - Claim brought under the Partition Act and the Property (Rights of Spouses) Act - Whether property is the family home – Equal share rule – Other Property.**

**LINDO J.**

**Background**

**[1]** The Claimant Meleise Carson, and the Defendant Dennis Carson (the parties) met in or around 2011. They became engaged in 2015 and were married on August 19, 2019.

[2] On April 12, 2022, the Respondent filed a Petition for dissolution of marriage in Claim No. SU2022FD01417. After the filing of the Petition, a notice of application for court orders was filed by the Respondent in that claim. The Petition was not served on the Respondent and was discontinued. The application filed by the Respondent in that proceeding was therefore rendered nugatory, but for completeness was dismissed by the court.

### **The Claim**

[3] By way of FDCF filed on August 4, 2022, the Claimant is seeking the following declarations and orders as follows:

1. A declaration that 53 Plantation Drive, Red Hills PO in the parish of Saint Andrew (ALL THAT PARCEL OF LAND PART OF CUMBERLAND PEN part of FERRY PEN called PLANTATION HEIGHTS IN THE PARISH OF SAINT ANDREW BEING THE LOT NUMBERED 523 ON THE PLAN AFORESAID AND BEING ALL THE LAND COMPRISED IN CERTIFICATE OF TITLE REGISTERED AT VOLUME 1358 FOLIO 169 OF THE REGISTER BOOK OF TITLES) is the family home.
2. A declaration that the claimant has an equitable one-half interest in the property situated at. 53 Plantation Drive, Red Hills PO in the parish of Saint Andrew (ALL THAT PARCEL OF LAND PART OF CUMBERLAND PEN part of FERRY PEN called PLANTATION HEIGHTS IN THE PARISH OF SAINT ANDREW BEING THE LOT NUMBERED 523 ON THE PLAN AFORESAID AND BEING ALL THE LAND COMPRISED IN CERTIFICATE OF TITLE REGISTERED AT VOLUME 1358 FOLIO 169 OF THE REGISTER BOOK OF TITLES...)
3. Property being 53 Plantation Drive is to be sold on the open market

4. The defendant to be given first option to purchase the Claimant's share of the property before the property is listed
5. Treveen E.K.A. Little, attorney at law is to have carriage of sale.
6. The Claimant is at liberty to list the said property for sale with a reputable real estate agent in Jamaica.
7. The Defendant shall execute all and any relevant documents to sell and transfer his interest in the said land to the Purchaser/s.
8. Should the Defendant fail to comply with the order of the court to execute any document relevant to sell and transfer his interest in the said land to the Claimant within 14 days of the date of receipt of any such document.
9. The costs of such sale to be borne equally between the parties.
10. The parties shall be entitled to an equal share in the net proceeds of sale.
11. Liberty to apply.
12. Such further and/or other relief as the Honourable Court deems just and equitable.
13. Costs and attorneys-at-law costs.

[4] She brings this claim under Section 2(2) of the **Partition Act**, and the **Property (Rights of Spouses) Act**, Section 13(1)(c).

[5] Affidavits in support of and in objection to the claim were filed by the Claimant and Defendant and witnesses in support of their respective claims.

[6] On May 22, 2023, by Notice of Application for court orders, the Defendant sought an extension of time to file further affidavits and for his affidavit filed on April 19, 2023, to stand as if filed in time.

## **The Trial**

[7] At the commencement of the trial, the following were ordered struck from affidavits as follows:

Affidavit of Meleise Carson filed April 19, 2023: Para 22 and 2<sup>nd</sup> para 22 entirely; para 24; para 25

Affidavit of Olivia Smith-McKenzie filed May 12, 2023: .para 9; 2<sup>nd</sup> para 19; para 25 ; para 26, from 2<sup>nd</sup> sentence to end; para 27; para 28 a, 1<sup>st</sup> sentence; b, entirely, f, entirely; para 32

Re 2<sup>nd</sup> Affidavit of Dennis Carson filed March 15, 2022: para 24...entirely; para 26...entirely; paragraph 34; 1<sup>st</sup> sentence; paragraph 41, paragraphs 43 and 48, entirely; paragraph 62 from “if” to “as” in the 2<sup>nd</sup> and 3<sup>rd</sup> lines; paragraph 63, 1<sup>st</sup> sentence; paragraph 64, entirely; paragraph 65, 1<sup>st</sup> sentence; paragraph 66, entirely.

[8] Exhibit attached to affidavit of the Claimant filed on March 1, 2023, i.e. letter dated February 16, 2023, was marked ‘A’ for identity and all other documents attached to the affidavits of the witnesses were admitted in evidence.

## **Claimant’s Case**

[9] The Claimant gave evidence on her own behalf and called Peta-Gaye Morgan and Olivia Smith McKenzie in support of her case.

[10] The Claimant’s affidavits filed August 4, 2022, March 1, 2023, April 19, 2023, and May 26, 2023, stood as her evidence in chief and she was cross examined.

[11] The evidence of Olivia. Smith-McKenzie, is contained in her affidavit filed May 12, 2023, and the evidence of Peta-Gaye Morgan is contained in her affidavit filed on May 18, 2023. They too were cross examined.

### **Defendant's Case**

[12] The evidence in chief of the Defendant is contained in his affidavits filed January 31, 2023, March 15, 2023, and May 22, 2023. The evidence in chief of his witnesses Ishmael Gordon, Antonio Bennett and Carlton Lindsay is contained in their affidavits filed on May 12, 2023. They were all subject to cross examination.

### **Issues**

[13] The central issue for the court's determination is whether the property at Plantation Heights is the family home of the parties. If this is found to be so, the court must consider whether the Claimant is entitled an equal share or whether the equal share rule ought to be varied. If the court finds that the property is not the family home, the court will still consider whether the Claimant is entitled to an interest in the property, and if so, in what proportion.

[14] Both Counsel provided written submissions to the court and while I do not find it necessary to recite them for the purposes of this ruling, rest assured that they have been duly considered by the court, along with the authorities cited.

### **The Law**

[15] **The Property (Rights of Spouses) Act, 2004, (PROSA) (the Act)** defines the family home under **Section 2(1)**, as follows:

*“Family home” means the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence ... but shall not include such dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit.”*

[16] For the court to consider this claim pursuant to **Section 13(2)**, it had to be made within twelve months of the termination of cohabitation or the separation of the parties where there is no likelihood of reconciliation as there has been no decree of dissolution pronounced. While the fact of separation is not in issue, the date of separation appears to be in dispute. The court however finds that the parties would have been separated in or around March or July 2022 and as such, the claim having been filed in August 2022, is accepted as having been filed within the time stipulated by the Act.

[17] **Section 6(1) of the Act** states:

*“ 6.-(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home ---*

*(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*

*(b) on the grant of a decree of nullity of marriage;*

*(c) where a husband and wife have separated and there is no likelihood of reconciliation”*

[18] **Section 7** of the Act gives the court the discretionary power to vary the equal share rule upon an application by a party where, in the circumstances of the case, the court is of the view that applying the rule would be unjust and unreasonable.

[19] In **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ. 47, Brooks JA (as he then was) at paragraph 34 of the judgment, in dealing with the issue of whether the equal share rule should be adjusted, states as follows:

*“...the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration...”*

- [20] The Claimant contends that the property is the family home, and she is seeking an equal share of the property. The Defendant's contention is that the Claimant is not entitled to a share of the property.
- [21] There is no formal application in writing by the Defendant indicating that he is applying to the court to vary the rule. I find however, that the substance of his response as contained in his affidavits is that the property is not the family home.
- [22] I find on the evidence that the property at Plantation Heights is a dwelling house that is wholly owned by the Respondent who is registered on title for the property. The land on which the house is constructed was purchased by the Defendant and the undisputed evidence is that it was over a period of about 10 years the dwelling house was constructed.
- [23] Both parties in their 1<sup>st</sup> affidavits which stood as their evidence in chief, initially state that their true place of abode as the Plantation Heights Property address and the Defendant, after being sworn, gave his address as 12 Gunther Place, Brooklyn NY, but in cross examination, agreed that the Plantation Heights property was his true place of abode when in Jamaica.
- [24] The Claimant states that she resided at her sister's home at Innswood Village even after getting married, and that she also lived at Hellshire and that the parties lived at Caribbean Estates as a family, and when the Plantation Heights property became habitable, they moved in.
- [25] I find that on August 15, 2021, a party was held at the property, described as a housewarming party by the Claimant and a house party by the Defendant. At the time of the party, the Claimant was not living there.
- [26] I accept as a fact, that the parties used the property from time to time when the Defendant was in Jamaica, but I do not find that it was used as the only or principal family residence, as on the evidence I have found that they have not resided there as a family but that at times when the Defendant comes to Jamaica, they would stay there together in much the same way as they would stay at hotels on some

of his visits to Jamaica, and whenever he leaves the island, she would also leave the property. I bear in mind that there was no meaningful challenge to this assertion by the witness for the Defendant, who has been described as 'caretaker' and who I find stayed on the property.

- [27] I also find as a fact that the property was used as an income generating asset. This is borne out by the evidence of both the Claimant and the Defendant. Both parties also agreed that professional photographs were taken of the property to list it as an AirBnB. The use of the property for business and entertainment purposes, to host events and to shoot dancehall videos is inconsistent with the property being recognized as the family home.
- [28] During cross examination of the Claimant by Counsel for the Defendant, the following exchange took place:

*Counsel: "... you had discussion with Mr Carson about using the Plantation heights property as an income generating asset?*

*We both had that discussion*

*And you were considering renting this property as an AirBnB charging US\$10,000.00?*

*We both had that discussion ... and those discussions included renting the property as a venue for events. That was my husband's idea. We both had that discussion.*

*And this discussion had the property being used to host private parties and shoot dancehall videos?*

*My husband and I had discussions about using the property to host events*

*Mr Carson would have guests over at the Plantation Heights property?*

*That is correct*

*All this discussion about use to which the property would be put would have happened in what you considered to be the matrimonial home?*

*My husband had discussion about using the home as an income generating property, so weddings, hosting events. In relation to dance hall videos I had*

*no discussion about dancehall videos. The general thing was hosting events...*

*Mr Carson hosted a dance hall video at the property?*

*Hosted? I remember being at the house. Let me start again. The first time I went up to the property and I saw a lot of persons in the yard, it appeared like a music video or dance hall video..."*

- [29] The Claimant's evidence on cross examination, as to going to the property and seeing video shoot taking place, and 'showing up as man and wife' for housewarming party which was a catered event, also leads to a finding that the property was not the family home and was not intended to be the family home.
- [30] Additionally, I do not believe Claimant's evidence that "we [my son, Najay, the Respondent and I] moved in together after what she called the house-opening event, and I do not find that it was being used habitually or from time to time by them as the only or principal family residence, to fall within the definition of family home as defined under PROSA.
- [31] The evidence of the construction workers, in particular Mr Bennett, that Mrs Carson rarely visits or stays at the property I find to be credible, and I find on a balance of probabilities that her presence at the premises coincided with the visits of the Defendant. I also accept as true the evidence of the Defendant that he would visit the Claimant at the Innswood Drive address when he travelled to Jamaica.
- [32] There is therefore sufficient cogent and compelling evidence that leads me to find that the Plantation Heights property does not fall within the definition of family home.

#### **Other property.**

- [33] Even if I am wrong and the Plantation Heights property is in fact or in law, the family home, I will still consider whether the Claimant is entitled to 50% interest in the property as she is claiming.

[34] Having found that the property in the instant is not family home, it falls under property other than the family home.

[35] It was submitted by Counsel for the Defendant that based on the relief sought in the FDCF, if the property is not the family home “that is the end of the matter”, but the court does not find favour with this submission.

[36] The FDCF was brought under Section 13 1(c) of the Act. The section provides for the application for division of property. By her Fixed Date Claim Form, this is what the Claimant has in fact applied for and it specifically states it is under Sec 13 1 (c) notwithstanding her claim also being for a declaration that the property is the family home and that she is entitled to a one-half share.

[37] In this regard, I find that consideration must be given to **Section 14** which indicates the orders the court may make when an application is made under **section 13**.

[38] Section **14(1) (b) of the Act** provides for the division of property that is not the family home. Subsection (2) lists matters for consideration in determining how such property may be divided as follows:

*“14(2) (a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;*

*(b) that there is no family home;*

*(c) the duration of the marriage or period of co-habitation*

*(d) that there is an agreement with respect to the ownership and division of property;*

*(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account*

[39] **Section 14(4)** states that:

*“For the avoidance of doubt, there shall be no presumption that a monetary contribution is of a greater value than a non- monetary contribution”*

[40] **Section 14 along with section 15 of the Act** allows the court to alter property interests, other than the family home and to divide, alter or transfer such interest for the benefit of either spouse (or for the benefit of a relevant child), as it thinks fit, if satisfied that it is just and equitable to do so, and the court must have regard to matters stated in s14(2), among other things, so far as they are relevant. .

[41] The Claimant's evidence is that she provided major financial investment and self-sacrificial labour through the constant micro-management to satisfy her husband while he was primarily overseas. I have no reason to doubt that she invested her time doing errands concerning the property and on the instructions or directions of the Defendant and on his behalf. as the evidence is clear that she paid some of the bills associated with the construction of the house and this could well be part of her self-sacrificial labour, which the court considers a non-financial contribution.

[42] Additionally, I find that her non-monetary contributions include collecting money and paying suppliers as well as making mortgage payments to NHT on behalf of the Defendant, clearing items from the wharf, visiting the property and providing photographs of the progress of the construction of the building on the property.

[43] With regard to monetary contribution, I find that the Claimant was a "kept woman" and that the Defendant shouldered all the financial expenses of the property including the payment for utilities. Although the Claimant would have the court believe she made payments to NWC and JPS, I find that these, much like the payment for the cooking gas, would be a one-time act, as by her own evidence she has also indicated that "the Respondent always paid our bills".

[44] It is not disputed that the property was already owned by the Defendant at the time of the marriage and that the dwelling house took about ten years to be constructed, and I find on the evidence that construction started prior to the commencement of the parties' relationship. There is no evidence of any financial contribution towards the construction of the house by the Claimant or towards the payment for utilities as the evidence led indicates that even the payments made by the Claimant were from funds received from the Defendant. It is however not disputed that the

Claimant assisted with business transactions concerning the home including the purchase of furniture and small appliances as the Defendant resided overseas.

- [45] There is also no dispute that the marriage was of short duration. They were married on August 19, 2019, the marriage has broken down from at least early 2022 and there appears to be no likelihood of reconciliation.
- [46] Although the marriage was of short duration, the parties were in a relationship from about 2012 and had been engaged from 2015, before being married in 2019. The Defendant is much older than the Claimant. He retired in July 2020, and the Claimant left her job in October 2020. Although the Defendant denies that he told her to give up her job to attend to his business of construction of the house I find that in his absence she did transactions relating to the property.
- [47] I find on a balance of probabilities that for the short duration of the marriage as well as prior to the marriage, the Defendant bore the expenses of the Claimant, bore expenses for her son, and bore all the expenses in relation to the construction of the house on the Plantation Heights property. I do not find that in the circumstances the Claimant provided any major financial investment. It was the Defendant alone whose money was expended, and the evidence of his substantial expenditure in comparison to minuscule financial and non-financial contribution by the Claimant is indicative that she would not be entitled to 50% as claimed.
- [48] At the time the parties met, the Defendant already owned the property and had started construction of the house and he also owned properties in the USA. Although the Claimant did not shoulder any financial obligations of the Defendant, her non-financial contribution included assisting in carrying out business transactions in relation to the home while he was overseas and although she did not have the resources he had, her contribution to mortgage payments, utilities at some stage, acquisition of small appliances and other items for the home are not so insignificant as to be rendered inconsequential as her input formed part of the activities which would result in the home becoming habitable.

[49] In keeping with the statute, such other fact or circumstance which the court is of opinion that the justice of the case requires to be taken into account would include the fact of the way the parties operated and managed their affairs during the course of their marriage. I find as a fact that the Claimant was a “kept woman” although the Defendant would want the court to believe otherwise, and as such the court is of the view that this must be taken into account in determining the interest she is entitled to as the Defendant is the sole registered proprietor and will enjoy the benefit of whatever contribution, however minimal, she made towards the property.

[50] The court has also considered whether on the part of the Claimant there was the giving up of a higher standard of living than would otherwise have been available and bear in mind that on her own evidence her standard of living is higher since her relationship and marriage to the Defendant.

[51] A factor of note, which has already been addressed is that it is clear on the evidence that the Claimant made an input of carrying out services in respect of the property during the construction

### **The Partition Act**

[52] The Claim was brought under the Partition Act as well as under PROSA.

[53] Pursuant to **section 2(2) of the Partition Act**, the court is empowered to order the partition and sale of property and make orders for the distribution of the proceeds of sale. **Section 23 of PROSA** allows the court to order the partition, sale, division of property and the payment of a sum of money by one spouse to another.

[54] The manner in which the case was presented and the evidence led in support of and in objection to the orders sought in my view did not necessitate resorting to the provisions of the Partition Act to provide a just resolution.

### **Conclusion**

[55] The Claimant has not shown, on a balance of probabilities that the subject property is the family home whether in law, or in fact and neither has she established, that she is entitled to an equal share of the property.

[56] The circumstances surrounding the acquisition of land and the construction of the house as well as the parties' conduct makes it clear that the property at Plantation Heights is not the family home. There is no cogent and compelling evidence that I have found to suggest that the parties operated as a family at the property by using it habitually or from time to time as the only or principal family residence.

[57] It is accepted that the Claimant contributed to the property. While her contribution cannot be treated as insignificant, even when compared to the contribution of the Defendant, I am of the view that they are sufficient to show that she is entitled to an interest in the property. The court finds however that the contributions ascribed to the Claimant were made while the Defendant was overseas and it is accepted that when he is in Jamaica he performed some of the very tasks connected to the construction and or maintenance of the property. It is as a result of this that the court finds that the Claimant should be awarded an interest in the property because of her non-monetary contribution towards the construction of the dwelling but that this should be very modest award.

[58] Her contribution is therefore assessed at 10% of the value of the house as I had considered that there is no family home and the marriage was of very short duration. The contribution of the Claimant over the few years is to be compensated by a lump sum payment. As a result, the property is to be valued and the value of her interest paid to her by the Defendant by way of a lump sum.

**Disposition:**

[59] It is therefore declared and ordered as follows, that:

1. The property known as 53 Plantation Drive, Red Hills P.O., in the parish of Saint Andrew comprised in Certificate of Title registered at Volume 1358 Folio 169 of the Register Book of Titles is property other than the family home.

2. The Claimant is entitled to 10% beneficial interest in the said property.
3. The property is to be valued by a valuator agreed on by the parties within 28 days of this order. If the parties fail to agree, any one of the Registrars of the Supreme Court is empowered to appoint a valuator on the application of either party. The costs of such valuation are to be borne by the parties in accordance with their respective share.
4. The Respondent shall pay to the Claimant the sum equivalent to 10% of the market value of the property as determined by the valuator within 90 days of receipt of the valuation report.
5. If the Respondent fails to pay over the sum equivalent to 10% of the market value of the property, the property shall be sold on the open market and the net proceeds of sale apportioned according to each party's percentage entitlement.
6. The attorneys at law for the parties shall have joint carriage of sale.
7. The Registrar of the Supreme Court is empowered to sign all necessary documents to give effect to the order in relation to the sale of the property in the event that the Defendant fails, neglects or refuses to sign such documents within 30 days of being required to do so.
8. There shall be liberty to apply.
9. Each party shall bear his/her costs of the proceedings
10. The Claimant's attorney at law is to prepare, file and serve the formal order