



[2022] JMSC Civ 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV04105

BETWEEN	GILBERT AGUSTUS DAVIS	CLAIMANT
AND	ROSALEE MONICA DAVIS	DEFENDANT

IN CHAMBERS

Garth McBean Q.C instructed by Garth McBean and Company for the Claimant

Heard: July 19, 2022

PROSA- Applicability if Rule 8.8 not complied with. Section 13(2) of PROSA

O. SMITH, J (AG)

Introduction

[1] The Claimant, Gilbert Augustus Davis, filed a Fixed Date Claim Form, (FDCF) on September 29, 2021 against the Defendant Rosalee Monica Davis in relation to property located at Palmers Cross in the parish of Clarendon, registered at Volume 1447 Folio 11 of the Register Book of Titles, which is registered jointly in the names of the parties.

[2] He is seeking the following relief's

1. A declaration that the respondent has no beneficial interest in the property at Palmers Cross in the parish of Clarendon registered at Volume 1447 Folio 11 of the Register Book of Titles and that the Applicant is the sole owner.
2. An order that the Respondent execute an Instrument of Transfer prepared by the Applicant's Attorney's-at-Law transferring her interest in the said property to the Applicant.
3. In the event that the Respondent fails, refuses or neglects to execute an Instrument of Transfer pursuant to paragraph 2 herein, the Registrar of the Supreme Court shall be empowered to execute the said Instrument of Transfer.

[3] On January 19, 2022 an Amended FDCF was filed changing the designation of the parties from Applicant and Respondent, to Claimant and Defendant.

Preliminary matters

Service

[4] The FDCF was accompanied by an Affidavit of Gilbert Augustus Davis which will be detailed in short order. The affidavit exhibited the Certificate of Title for the property in question as Exhibit 1, a copy of the Decree Absolute as Exhibit 2 and a letter to the Defendant enquiring into her willingness to execute a transfer of her interest to the Claimant as Exhibit 3.

[5] On November 4, 2021 the Claimant filed a Notice of Application for Court Orders seeking an extension of time to file the claim pursuant to section 13(2) of Property (Rights of Spouse) Act, (PROSA) and also for permission to serve outside the jurisdiction pursuant to Rule 7.3(6) of the Rules. Said application was heard and granted, in part, on January 18, 2022. The orders among other things stated at paragraphs 3 and 4 respectively;

“3. The time for acknowledgement of service to be filed is within 28 days of service of the FDCF.

“4. The time for filing an affidavit in response/defence is within 56 days of the service of the FDCF...”

- [6] On April 21, 2022 an Affidavit of Chantalee Brown, a legal secretary in the offices of Garth McBean & Co was filed indicating that she had received an emailed copy of an Affidavit of Service from the Process Server, Cordel Mulder on April 20, 2022 and that the time of receipt did not allow sufficient time for its filing. She exhibited a copy of the Affidavit of Service. The original Affidavit of Service was filed on May 2, 2022.
- [7] Mr. Mulder deposed that on the 25th of February, 2022 at approximately 9:00pm he served the defendant “with a sealed original FDCF with Prescribed Notes for the Defendant, Acknowledgement of Service of FDCF and Defence, Affidavit of Gilbert Augustus Davis in Support of FDCF, Formal Order dated January 18, 2022 and Affidavit of Gilbert Augustus Davis in support of Application for Court Orders to Extend Time to File Suit and Serve Outside the Jurisdiction” at her place of residence at 9 Sage Crt., Brampton Ontario L6X, Canada by leaving the documents with her. He was able to identify her by a photograph he had been provided with.
- [8] On the 21st of April 2022, the court ordered that “the defendant having failed to file an Acknowledgement of Service, the claim shall proceed to be dealt with summarily.”
- [9] Rule 7.3 (6) allows service of a claim out of the jurisdiction, upon application, where the circumstances outlined under the rule exists. In this case the matter concerned land.
- [10] The orders given on January 18, 2022 gave 28 days for filing an Acknowledgment of Service and 56 days for the filing of an Affidavit in Response from the date of service of the FDCF.

[11] The Affidavit of Service exhibited in Affidavit filed on April 21, 2022 and also filed on May 2, 2022 indicates that the defendant was served on February 25, 2022. In the circumstances, time for filing an Acknowledgement of Service expired on March 26, 2022 and time for filing an Affidavit in Response expired on April 25, 2022. Therefore, by the date of this hearing both events had passed with no response from the Defendant. Consequently, this court is empowered to deal with this matter summarily.

Claimants Case

[12] Mr. Davis in his affidavit stated that the property, the subject matter of this application, was purchased by him in or around 1961. He remained the sole owner until 2011, when, upon the request of the Defendant, he placed her name on the title.

[13] He married Mrs. Davis on March 3, 2007. After the marriage he lived at the home with her for two or three months out of each year, after which she would return to Canada, which he described as her primary place of residence.

[14] Subsequently, communication between the parties broke down and the marriage came to an end. He says that prior to 2021 they had not communicated for over five years.

[15] At paragraph eight of his affidavit Mr. Davis deponed that Mrs. Davis made no contribution towards the acquisition of the property or towards its improvement. In addition, since the dissolution of the marriage in 2018 he has resumed cohabitation with his previous wife at the subject premises.

[16] He attempted to contact Mrs. Davis in June 2021 via a letter, (Exhibit 3) but it bore no fruit.

Submissions.

[17] In his written submissions the Leaned Q.C. relied on Sections 2,6,7,13 and 14 of PROSA. He submitted that based on section 2 of PROSA, the home was not a family home. In order to be considered as a family home there are two requirements that must be satisfied; firstly, the property must be wholly owned by either or both of the parties and secondly, it is used habitually or from time to time as the only or principal family residence. In the circumstances of this case, Mr. Davis in his affidavit indicated that the defendant resided at the home for only two to three months out of each year and then returned to Canada which was her “principal place of residence” as such it was not a family home. He relied on the case of *Omar Mitchell v Vesta Fay Davidson Mitchell* [2020] JMCA Civ. 64.

[18] He ended his written submissions by arguing that even if the court finds that the home is a family home, under section 7 of PROSA the court can adjust the 50% presumption if the property was acquired before marriage. In that regard, he submitted that the home was acquired 46 years before the marriage and the defendant made no contributions towards its improvement as such she has no share in the property.

[19] The issues I have identified are as follows;

1. Whether the Court can treat with the claim as a matter under PROSA without it having been pleaded.
2. Whether the Court can proceed under PROSA no application having been granted pursuant to s. 13 (2) of PROSA.

The Law

[20] For ease of reference I have sought to lay out the pertinent Rules under the CPR and the relevant sections of the applicable statute.

Rule 8.8 of the CPR states that;

“(1) Where the claimant uses form 2, the claim form must state –

- (a) the question which the claimant wants the court to decide; or*
- (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; (Emphasis is mine)*

[21] By virtue of Section 2 (1) of PROSA a family home is defined as;

“...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 together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;”

Sections 6 & 7

PART 11. Family Home

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; ...

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one half share of the family home.

7.-(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-

(a) that the family home was inherited by one spouse;

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration..."

[22] Sections 13

I have set out only the applicable subsections.

Division of Property

13.-(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; or ...

(2) An application under subsection (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."

Whether the Court can treat with the claim as a matter under PROSA without it having been pleaded. If yes,

[23] Neither the FDCF (Form 2) filed on September 29, 2021 or the Amended FDCF filed on January 19, 2022 indicate under what enactment the claim was brought. It was only in his written and oral submissions that the Learned QC indicated that the application was made pursuant to PROSA, specifically sections 13 and 14. He argued that failure to adhere to Rule 8.8 (c) did not prevent the court from considering the claim under PROSA. He sought to rely on Rule 26.9, specifically Rule 26.9 (2). He also pointed out that the application for permission to serve outside of the jurisdiction was made under PROSA and as such the court can treat the claim as having been made under PROSA. In fact, the application for permission to serve outside of the jurisdiction was not made pursuant to PROSA.

However, in that application counsel sought an order for an extension of time to file the claim pursuant to section 13 (2) of PROSA. I agree with counsel that despite the omission, this court can still proceed with the claim as if it had been made under PROSA. I will add however, in certain circumstances.

- [24] In the Court of Appeal decision of **Suzette Hugh Sam v Quentin Hugh Sam** [2018] JMCA, Civ. 15, Edwards, JA (Ag), as she then was, in considering a very similar matter in terms of non-compliance with Rule 8.8 relied on the case of **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775 in which Lord Woolf explained the purpose of pleadings at pages 792-793:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”

- [25] Edwards, JA (Ag) acknowledged that the claim filed on behalf of the Claimant was deficient. She indicated that to simply state that the claim is for a share in property could not alert anyone, including the respondent and the court that the matter was one which invoked the **Property (Rights of Spouses) Act, (PROSA)**. Notwithstanding this, at paragraph 45 of her Judgement she concluded;

“However, despite the fact that it was not indicated in the claim that the property at Dillsbury Avenue was to be treated as the family home, in my view, there was nothing to prevent the judge from considering whether or not the property fell to be treated as the family home.”

- [26] In the case at bar Mr. Davis has filed a claim seeking a declaration that the respondent has no beneficial interest in a particular property. His FDCF does not provide any other information about the property or his relationship with the respondent. As such it has failed to comply with Rule 8.8 (c) of the CPR.

[27] Rules 8.1 (1) (b) also stipulate that a Form 2 must be filed with an affidavit, except in circumstances outlined in Rule 8.2. Mr. Davis's FDCF was accompanied by an affidavit. In his affidavit, Mr. Davis outlined among other things, that he was married to the defendant, the date of his marriage, when he obtained the property, how Mrs. Davis's name came to be on the title, how long the respondent lived or stayed at the property and when he obtained the Decree Absolute. That information in my view was enough to indicate to the defendant and the court the nature of the matter before the court. I am therefore guided by the approach of Edwards, JA (Ag) in *Hugh Sam* and agree that, prima facie, this matter could be dealt with as a matter under PROSA.

Whether the Court can proceed under PROSA no application having been granted pursuant to s. 13 (2) of PROSA.

[28] It should be noted that the entitlement to apply for the division of property is governed by section 13 of PROSA. The section lists the circumstances under which that entitlement arises. In this case it is the obtaining of the Decree Absolute on June 13, 2018 which grounds the claimant's application. Section 13 (2) makes it clear that this application must be made within 12 months of the listed circumstances with the exception of one. However, it gives the court the discretion to extend this time upon an application.

[29] The Absolute having been granted on June 13, 2018, the parties had 12 months from that date to make an application under section 13 of PROSA. This claim was filed on September 29, 2021, more than three years after the period had expired.

[30] A Notice of Application for Court Orders along with an Affidavit in Support was filed in this Court on November 4, 2021. The applicant, Mr. Davis, sought two main orders: Firstly, an extension of time to file the claim pursuant to section 13 (2) of PROSA and secondly, permission to serve the FDCF and affidavit outside of the jurisdiction. The application was heard on January 18, 2022 but only order 2 was granted, nothing was said in relation to order 1. The obvious effect is that no extension of time was given for the claim to proceed under section 13 of PROSA.

[31] In ***Saddler (Angela) v Saddler (Samuel) and Hoilette (Fitzgerald) v Hoilette (Valda) and Hoilette (Davion)*** [2013] JMCA Civ 11, (***Consolidated Appeal, Saddler Appeal, Hoilette Appeal***) Phillips, JA in considering the entitlement of the claimants to apply under **PROSA** in the Consolidated Appeal said at paragraph 44

“... the parties would have appeared to have been entitled to apply under section 13(1) of PROSA, to obtain the statutory remedies open to them under sections 6, 7, 14 and 23 of the Act. Their claim to apply under PROSA could only be defeated by their failure to comply with section 13(2).”

She continued in her analysis in paragraph 44 to state,

“...The fact that the legislation specifically provides a time within which a claim shall be made, but also refers to a longer period being allowed by the court, indicates that although the time is limited, the time period is flexible, and can be extended, once the court exercises its discretion in favour of the applicant after hearing him/her. If the time is not extended by the court, as the matter could proceed no further, the limitation defence would succeed, as although a procedural defence, it is a complete defence, and the claim would be time barred.”

[32] The Claimant filed a claim in this matter seeking the courts assistance in declaring beneficial interest in property. However, he was married to the defendant for a number of years and as such his claim falls into a special category of cases. The legislature in its wisdom passed PROSA to fairly deal with matters between spouses, as defined by the act, relating to property. The act applies to the circumstances listed in section 13 (1). However, before one can benefit from or rely on PROSA they must be compliant with 13 (2), unless their claim can be dealt with under section 11 or section 13(1)(d). This is not the case here.

[33] Having submitted to the court that despite the lack of compliance with Rule 8.8 (c), the claim can be still be dealt brought under PROSA and the court having found that it can treat the claim as having been brought under PROSA, then Mr. Davis I find has surrendered himself to the full application of PROSA.

[34] Section 4 of PROSA says,

“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.”

[35] In the Court of Appeal case of **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, Cooke, JA in discussing the applicability of PROSA said at paragraph 10,

“By section 4 of the Act, the legislature directed that there was to be an entirely new and different approach in deciding issues of property rights as between spouses. Section 4 is a directive to the courts as to what the approach should be.”

[36] He went further and expressed the view that section 4 was a directive to the courts on how to treat with these matters irrespective of when the divorce occurred or of when the separation took place. He set out the definition of family home under section 2(1) and sections 6 and 7 of PROSA in an effort to underscore his conclusion that with the passage of PROSA the courts should no longer be guided by common law and equity when dealing with the issue of division of property.

See paragraph 13,

“I have set out these sections in extenso to emphasize the dramatic break with the past as demanded by section 4 of the Act, which directs that it is the provisions of the Act that should guide the court and not, as before, “presumptions of the common law and of equity”.

Disposition

[37] This court is unable to grant the orders sought in the Fixed Date Claim Form. The Claimant having not been granted an extension of time to file a claim under PROSA the claim stands statute barred. Accordingly, the claim is dismissed.