



[2016] JMSC Civ 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03903

BETWEEN	JULIA DEPASS KELLYMAN	CLAIMANT
AND	XAVIER KELLYMAN	DEFENDANT
AND	NATHAN KELLYMAN	INTERESTED PARTY

IN CHAMBERS

Kent Gammon for the claimant

Dianne Edwards and Kristen Lewis for the defendant

February 17 and April 7, 2016

**CIVIL PROCEDURE – APPLICATION TO STRIKE OUT OR STAY PROCEEDINGS –
PRIVATE INTERNATIONAL LAW – PARTIES LIVING OVERSEAS AND LAND
LOCATED IN JAMAICA – PARTIES DIVORCING IN FOREIGN STATE AND MAKE
AGREEMENT TO DISPOSE OF LAND IN JAMAICA – WHETHER AGREEMENT
INVOLVES DISPUTE OVER TITLE TO LAND OR JUST PERSONAL OBLIGATION**

SYKES J

The application

- [1] This case is another of the increasing frequency with which the Supreme Court is now dealing with matters arising between Jamaican nationals who have emigrated to the United States of America, have begun litigation in the that country and then, rather belatedly, now seek to litigate in the Supreme Court of Jamaica.
- [2] Mrs Julia Kellyman and Mr Xavier Kellyman were married. They are now divorced. Mr Kellyman lives in the state of Florida in the United States of America, and so too does Mrs Kellyman. The marriage was dissolved by a court in that state. They have children and property and one of the properties is located in Jamaica. The property is located 21A North Widcombe Heights, Kingston 6, St Andrew and registered at volume 1362 folio 228 of the Register Book of Titles.
- [3] Before His Honour Judge Dale Cohen, in Broward County, the parties entered into what is called a *Marital Settlement Agreement*. The judge's order reads in the material parts:

(7) The parties have voluntarily entered into a Marital Settlement Agreement and an Agreed Parenting Plan, both dated May 1, 2014, and an Addendum to The Parties' Marital Settlement Agreement and Incorporated Parenting Plan, dated July 30, 2014, ...

ORDERED AND ADJUDGED

(8) The marriage between the parties is dissolved and each spouse is restored to the status of being single because the marriage is irretrievably broken.

(9) The Marital Settlement Agreement and Parenting Plan between the parties dated the 1st day of May 2014, and the Addendum to Marital Settlement Agreement and Incorporated Parenting Plan dated July 30, 2014, (collectively referred to as the "Agreement and Parenting Plan") which have been introduced into evidence are facially fair and were executed voluntarily and after full disclosure

and are in the best interest of the parties. The parties are ordered to comply with all the terms of the Agreement and Parenting Plan, which Agreement and Parenting Plan represent independent contracts which are not merged, but are incorporated in this Final Judgment.

(10) Except as to the Dissolution of Marriage granted in this judgment, the Court specifically reserves jurisdiction of this entire matter to enter such further orders as may be equitable, appropriate, and just and also to enforce the Marital Settlement Agreement and Parenting Plan, and the Addendum to Marital Settlement Plan and Incorporated Parenting Plan which are adopted herein by the Court. Further, each party is to take each and every reasonable and necessary action and conduct themselves in such manner as to carry out the intent and purpose of this Judgment.

[4] It has not been suggested that the parties were not aware of what they were doing when they entered this agreement. It has not been suggested that there has been any fraud or misrepresentation. Crucially, it has not been suggested that the court order does not reflect the true state of affairs between the parties at the time the order was made.

[5] The order tells that the parties entered into a Marital Settlement Agreement ('MSA') and an Agreed Parenting Plan ('APP') and that these agreements were entered into voluntarily. There has not been any allegation of coercion.

[6] The MSA indicates how the parties were to deal with real estate held by them. There are at least four properties: the Florida property, the Kingston property, the Portland property, the Blackwood property. The subject matter of this claim is the Kingston property alone.

[7] The MSA addresses the Kingston property in the following terms:

4.9 There exists certain real property in which one or both parties may claim an interest, herein referred to as the "Kingston Property," located at 21B North Windcombe Heights, (sic) Hope Pastures, Kingston 6, St Andrew.

4.10 There are two mortgages owing to the National Housing Trust secured by the Kingston Property, with a current total balance of approximately \$14,218.00.

4.11 The parties shall list the Kingston Property for sale for the fair market value with an agreed neutral third party realtor within thirty (30) days of the execution of this Agreement. The parties have agreed The parties will split equally all costs for the sale of the Kingston property 50-50. The proceeds from the sale ... will be used to first pay the costs of the sale including, but not limited to, real estate fees, attorney's fees, documents preparation, and recording fees, and to pay off the mortgages on the Kingston Property. Out of the net proceeds from the Kingston Property, Wife will receive the first Ten Thousand US Dollars as an equalization payment for Husband receiving the Portland Property and Blackwood Property set forth in the following paragraphs. The remaining proceeds will be split 50-5- between the parties.

...

[8] The description in the MSA is inaccurate but there is no dispute that it is referring to the land located in North Widcombe.

[9] The MSA is a 12 page document which ends with both parties signing it. The part signed by Mrs Kellyman has these words (as does the part signed by her former husband):

I, Julia Kellyman, certify that I have been open and honest in entering into this agreement, I am satisfied with this Agreement and intend to be bound by it.

[10] Mrs Kellyman has filed an affidavit alleging that she cannot sell the property despite efforts because her former husband and Mr Nathan Kellyman have denied her access to the property during a viewing. She also alleges that she is unable to purchase the defendant's share in the property. She says that she has sought to abide the MSA but that is not possible because her former husband is demanding a sale price over and above the valuation. Mrs Kellyman accepts that

the MSA forms part of the final judgment of the Florida court but is nonetheless asking the Supreme Court to exercise jurisdiction and hear the claim.

- [11] In response to this, Mr Xavier Kellyman has applied to ask this court to decline jurisdiction. This way of putting is rather more subdued than the bold application by Mr Kellyman who takes the position that the Supreme Court of Jamaica 'has no jurisdiction to try the claim' and that the 'claimant's case against the defendant' be struck out. Mr Xavier Kellyman is asking that the order made on September 2, 2015 be set aside. Should the above fail, he is asking for 'a stay of proceedings.'
- [12] Remarkably, Mr Xavier Kellyman has not seen it fit to respond to the allegation that Mrs Kellyman has made all effort to comply with the MSA but his demand for a sale price above the valuation has hampered the sale and that his conduct and that of Mr Nathan Kellyman have further eroded the possibility of a sale of the property.

Resolution

- [13] This court is indebted to Dunbar-Green J in **Miller v Miller** [2015] JMASC Civ 18 for her Ladyship's analysis of the law in this area. The present claim like **Miller** raised matters related to private international law and which law should prevail where the subject matter of the dispute is land. Dunbar-Green J indicated that there is a distinction to be drawn between dispute over title to the land and enforcement of contract, trust or any other personal obligation.
- [14] According to her Ladyship, the correct legal analysis is that where the claim involves title to land the court of the country where the land is located is the better place for the matter to be heard. One of the main reasons for this is that the foreign court may not be able to enforce its judgment in respect of land located outside the country. This is known as the **Moçambique** rule, named after **British South Africa Co v Companhia de Moçambique** [1893] AC 602. Her Ladyship also indicated that there were some instances where the **Moçambique**

rule may not be applied. One of those instances relevant to this case is where the defendant has a personal obligation to the claimant in contract or equity.

- [15]** While the discussion of her Ladyship was primarily concerned with enforcement of foreign court order, the factors identified by her Ladyship in determining that question are also relevant to whether this court should exercise its discretion not to hear the case or at the very least stay the proceedings.
- [16]** This court wishes to say quite clearly that the Jamaican Supreme Court has jurisdiction to hear this matter. The submission of counsel that the court has no jurisdiction has the potential to deprive the courts of Jamaica over jurisdiction concerning land.
- [17]** This court takes account of the fact that both parties reside in the Florida. There is nothing to indicate that either party lives or works in Jamaica. Both parties submitted their dispute to the court of Florida. Both parties signed an agreement to give effect to decisions regarding the properties they hold in Jamaica. The dispute is not one involving title to property. In fact, there is no dispute that both parties are in fact entitled to the Kingston property. The issue is the disposition of the property in accordance with what both parties agreed. Put another way, the parties have entered into a contract with each other regarding the disposition of the disputed property. The contract imposes personal obligations on both parties. Both parties live and work in Florida and therefore the courts there are better placed to deal with the personal obligations that arise under the MSA and other agreements.
- [18]** Mrs Kellyman complains that her former husband has been frustrating her good faith effort to comply with the MSA. It seems to this court that since Mr Kellyman is living in Florida, the courts there are better able to deal with that complaint and if necessary can enforce its order by imprisoning Mr Kellyman if he is found to be in contempt. The Jamaican courts would not have that option.

- [19] Mrs Kellyman's claim is seeking to come up with a different solution from that to which she agreed in Florida. She is now talking of severance of a joint tenancy and the like. The agreement arrived in Florida contemplated a sale, followed by payment out of the proceeds of sale the associated costs of selling the land and discharge of the mortgage. Thereafter the money was to be divided accordingly. That agreement does not involve Mrs Kellyman in living in the property though as a co-owner she has full rights of access to the property unless prevented by law.
- [20] Mrs Kellyman has not said that she cannot secure the assistance of the Florida courts in dealing with her ex-husband if he is recalcitrant as she suggests that he is.
- [21] The court has decided in favour of a stay rather than a striking out because the picture painted by Mrs Kellyman in her affidavit and which Mr Kellyman has not sought to answer is that of a man who in practice is frustrating the order of the Florida court while at the same time maintaining that the Jamaican courts have no jurisdiction. If Mrs Kellyman's portrait is correct then there is a risk that she may be without an adequate remedy. The purpose of the stay is to give the parties an opportunity to dispose of the property in the manner contemplated by their agreement. If there is a problem, the first option should be to return to the Florida court and seek an alteration of the order.
- [22] Another reason to stay the claim rather than striking it out is that a striking would have the consequence of depriving Mrs Kellyman of the benefit of the Kirk Anderson J's orders. The order still stands and must be obeyed particularly that part of the order that requires Mr Nathan Kellyman to remove immediately from the property and to remove his personal belongings as well.

Disposition

- [23] The action is stayed. The order of Kirk Anderson J stands and is to be obeyed. Each party to bear own costs.