



[2016] JMSC Civ. 107

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04072

BETWEEN	WILFRED HYATT	CLAIMANT
AND	LINDA HYATT	DEFENDANT

IN CHAMBERS

Ms. Loverne George instructed by Carol G. Sewell Attorney-at-Law for the claimant.

Ms. Marion Rose Green and Ms. Colleen Franklin instructed by Marion Rose Green and Company Attorneys-at-Law for the defendant.

Heard: 19th January and 22nd June 2016

Real Property - Application for entitlement to property - Property Rights of Spouses Act - Whether property is the family home for the purposes of the act - What is the proper trigger for an application under the Act - Whether preconditions for application have been satisfied - Limitation of Actions Act sections 3, 14 and 30 - Whether co-owner has been dispossessed.

BERTRAM LINTON J (AG.)

The Claim

[1] This case calls for a determination of issues relating to property, which is owned by former spouses as joint tenants. Both parties gave evidence on affidavit and were cross examined.

Mr. Hyatt filed his claim on October 7th, 2014, he seeks a declaration that:

1. "Property located at 67b Waltham Park Road and registered in the names of himself and his former wife, the defendant qualifies as the family home within the meaning of the Property Rights of Spouse Act.
2. He is entitled to a 50% share in the property
3. Valuation of the property be done
4. The cost of the valuation is to be borne equally
5. The premises are sold and the net proceeds be divided between them, in the event that the defendant does not wish to purchase his half interest.
6. If the defendant does not cooperate in the signing of the document as ordered by the court, the registrar is to be given the authority to execute the documents in order to facilitate the orders of the court.
7. The costs are to be borne equally, and
8. The claimant's attorney is to be given carriage of sale.

The Affidavits of the claimant filed on October 7, 2014 and September 14, 2015 were adopted as his evidence in chief in the matter.

[2] The first one outlines, the history of acquisition of the property and the relationship with his former spouse so far as is relevant to the proceedings and the second seeks to respond to the defendant's affidavit, and outlines in the main his maintenance and contribution to the upkeep of the family and the property which he says he never abandoned even though divorced since August 2001. This second affidavit also details and establishes that the defendant has been solely collecting rental from several tenants to his exclusion since 2001. (Paragraph 16 of affidavit filed on September 14, 2015).

[3] The claimant also says that he visited Jamaica on several occasions after he had migrated, *"but I have been prevented by the defendant from staying on the premises. On one particular (sic) occasion in January, 2005 the defendant allowed me to stay at the premises but when I returned to the house after being out with my friends she threw my clothes out of the house in a scandal bag and I could not get into the house."*

- [4] Under cross examination, the claimant expressed that he had started a new life in the USA, where he was permanently residing when he got his divorce from the defendant. He admitted that the court ordered maintenance for the children was not paid as it was discussed between them that the business and cars left here in Jamaica would take care of those expenses.
- [5] In fact quite significantly, he said that the whole plan to get divorced so that he could marry in the USA and concretize his stay there was the subject of an agreement between himself and the defendant, who was concerned about the difficulties he experienced at the airport on his frequent trips, and it was the defendant who had suggested that he marry.
- [6] They still had a good relationship even after his marriage in the United States. It was later when they had a disagreement in 2006 that she threw him out of the house and took control of it. Despite returning to Jamaica on several occasions after that, he never stayed there.

He outlines the following;

- a) The defendant rented the premises and kept all the proceeds for herself
 - b) His brother who was there, was evicted by the defendant without reference to his wishes
 - c) The defendant brought her parents to live at the premises without consulting him
 - d) She built a self contained house at the back of the premises without his knowledge
 - e) She built and operated a shop in the yard without his knowledge or permission
 - f) She changed the ceiling, redid the electrical wiring and the plumbing, retiled the premises, changed the windows and covered the driveway, all without his knowledge.
- [7] He insists however that he did not give up his interest in the house and that it is now to be shared equally between them since it “was the family home within the

meaning of the Property (Rights of Spouses) Act 2004.”(extract from paragraph 1 of the Fixed Date Claim Form).

THE CASE FOR THE DEFENDANT

- [8] The defendant’s affidavit filed on June 9, 2015 as well as the submissions on her behalf are indicative of her position. She outlines the situation thus;

In 1981 the parties met, formed a relationship and soon after began cohabiting. They purchased the property jointly in 1988 and got married in 1989. They resided there along with their two children and Mr. Hyatt’s son from a previous relationship. From 1994 to 1998 Wilfred began travelling to the United States until he finally migrated in 1998. Thereafter he filed for, obtained a divorce and remarried in 2001.

- [9] The defendant, Mrs. Hyatt contends that thereafter the claimant paid very little attention to the family he left behind and none to the upkeep or maintenance of the property. He did not participate in any way to the much needed and extensive repairs, maintenance and enhancements that were carried out at the premises and was a mere visitor to the premises. In fact she says, she gave him permission to stay there for two short periods between 2006-2008 when he came to Jamaica for a wedding or a funeral.

She is adamant that since their divorce in 2001, he never made a claim for any share in the premises and he is now statute barred from making of any claim that the property should be divided based on the Property (Rights of Spouses) Act. Alternatively it was submitted by the defendant that the claimant’s title was extinguished by virtue of the Limitations of Actions Act and she is solely entitled to the property.

THE LAW

- [10] **The Property (Rights of Spouses) Act** makes provision for just this type of application but with certain specific preconditions. It says;
Section

2. (1) *In this Act-*

...

"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 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;

And at

Section 13

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*
- (b) on the grant of a decree of nullity of marriage; or*
- (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or*
- (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.*

(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

(3) For the purposes of subsection (1) (a) and (b) and section 14 the definition of "spouse" shall include a former spouse.

14.--(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-

- (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
- (b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2);*

ISSUES FOR DETERMINATION

- [11] On the claim before the court the initial issue to be determined, is whether the claim falls within the ambit of the Property (Rights of Spouse) Act (PROSA) and if so, does the claimant have a right to make an application at this time under the Act, without more, which can and should result in his entitlement to a 50% share.
- [12] In my assessment of these issues I have determined that I must also decide whether any of the required “triggers” are present to ground the application as required. It is only when and if that hurdle has been surmounted, that I must go on to examine the issues of the fair and equitable division of the property between the former spouses in this matter .This will include any issue as to dispossession of co-ownership that has been raised by either party. The Act says that it is when the application has been properly made, that the court can then go on to make a determination in keeping with sections 6 and 7 of the Act or as the case may require.

FAMILY HOME

- [13] It is not in dispute that the property was acquired by the parties jointly, that they lived there with the children of the family and that they regarded it as their matrimonial home, certainly up until 2001 when the marriage was dissolved.

The Act defines the family home 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 dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit.”

- [14] It is my finding that the property in question could be seen as having been the family home and an application for its division on that basis can be made. Thereafter it would seem that based on section 13(2) addressing the issue in this case is dependent on an application being made within twelve months of the

divorce which occurred in 2001, “or such longer period as the court may allow after hearing the applicant.”

- [15] Notably this application was filed On October 7th, 2014 some 13 years after the dissolution of the marriage in 2001 and the claimant while referring to the act in aid of the application has given no reason for the lapse of time and the delay in filing the action. It is open to the court to allow the application to be addressed and this is assessed on the hearing of the applicant and any other issues involved.

In my judgment it makes sense to determine the shares and divide the property at this time based on the application now before the court.

‘SUCH LONGER PERIOD AS THE COURT MAY ALLOW’

- [16] In considering whether it makes sense to allow this application so far out of time several factors were looked at;

- A) The issue was never raised by the applicant seemingly because of the peculiar circumstances that he says influenced the divorce of these parties and what is alleged to have been their arrangement, certainly from the point of view of the applicant.
- B) The property is owned by both former spouses as joint tenants and so it is understandable that from the point of view of the applicant there was no imperative to address the issue of his share in light of a reasonable expectation as to survivorship.
- C) Curtailing the determination of the issue based on the twelve month deadline would be tantamount to delaying the inevitable since the defendant seems to have joined issue with the claimant as to their entitlement on division, this is evidenced in her lawyer’s submission that she has dispossessed him and entitled to be the sole owner of the property based on the Limitations of Action Act.

[17] It appears that dealing with this issue now is in keeping with the overriding objective to save time and the expense of having to look at the issue later ,as well as the court having to allot resources in the future to addressing a separate application for entitlement by either of the parties. It is open to the court to look at all the issues now and make such orders as are required based on this application.(Sections 13(3) and 14(1)) Property (Right of Spouses) Act (PROSA)

WILFRED HYATT'S ENTITLEMENT

[18] The starting point for entitlement to the family home is a 50/50 as stated in section 6 (PROSA).

The Property (Rights of Spouses) Act Section 6-1 (a) is clear in its pronouncement that, each spouse shall be entitled to one half share of the family home “on the grant of a decree of dissolution of marriage or the termination of cohabitation”

This is made subject to sections 7 and 10 but for the purposes of this case the defendants suggest that section 7 is relevant.

Section 7 (1) provides for the exercise of the discretion of the court:-

“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 on the application by any interested party, make such order as it thinks reasonable taking into consideration such factors as the court thinks relevant ...

[19] In my judgment the relevant factors for consideration in these circumstances are the party's positions under the Registration of Titles Act as well as the Limitations of Actions Act.

Section 68 of the Registration of Titles Act, reads:

“68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application of same, ...and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent

*operation of any statute of limitations, **be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.*** (Emphasis mine)

- [20] It is evident from that provision (as well as section 85 of the Registration of Titles Act) that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else. The defendant argues that by virtue of section 3, 14 and 30 of the Limitations of Actions Act the claimant's entitlement as a joint tenant was extinguished.

Limitations of Actions Act

- [21] Section 3 of the Limitation of Actions Act provides:

"3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Section 30, which is closely related then reads:

"30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

Section 14 provides as follows:

"14. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them." In effect, section 14 renders the possession of

co-tenants as separate possessions from the time that they first became joint tenants.

[22] It is clear from these provisions that they may operate together to bar the registered owner of property from making any entry or bringing any claim to the property after the expiration of 12 years if certain circumstances exist. The effect of section 14 is that one co-owner whether joint tenants or tenants in common, could extinguish the title of the other. This was clearly enunciated in the cases of

Paradise Beach and Transportation Co. Ltd. v Price-Robinson [1968] AC 1072, Wills v Wills 64 WIR176 P.C, Freckleton v Freckleton, Claim No. 2005 HCV01694, and more recently approved by the Jamaican Court of Appeal in **Fullwood v Curchar SCCA 89/2014** delivered 19th June, 2015.

[23] The valuable take away here then is that it is extremely important to examine what circumstances exist and determine whether they were enough to dispossess the claimant as the defendant has suggested she has done and based on the evidence of the claimant of the situation that exists with the property currently.

The person who is claiming that the title of the paper owner has been extinguished has to establish that there was

- (a) Occupation or physical control of the land and
- (b) An intention to possess

Sykes, J in **Freckleton v Freckleton** says at paragraph 18 that this “*intention to possess here means the statement of the mind which says that the dispossessor has it in mind to possess the land in question in his own name or on his own behalf to exclude the world at large including the paper title owner, so far as this is possible. An intention to own or even an intention to acquire ownership is not necessary but if present it enhances the prospects of success.*”

It is the state of mind of the dispossessor that matters in the course of the events and not the intention of the paper owner.

What matters in this case is Linda Hyatt's intention and her state of mind not that of Wilfred Hyatt.

[24] My assessment of the legal position is that a registered owner or in fact any other type of owner may have his title to land extinguished because they have not been vigilante in the exercise of proprietorship over it.

[25] Linda and Wilfred Hyatt bought the premises in 1988 and got married in 1989. They resided there with the two children of the marriage and then the husband's son from a previous relationship came to live there as well. It was the family home and remained so until 2001 when the claimant filed for and completed divorce proceedings. Thereafter he migrated to the USA, remarried and started a new life. He subsequently went on to marry again. He has been back to Jamaica for brief visits since that time and only once did he stay at the premises. He has no belongings there and very significantly has to seek permission from the defendant to stay there. On one occasion the defendant threw him off the premises when they had a disagreement. She has since done major addition, enhancement and improvement to the premises without reference to him and without his financial assistance. She has exercised complete control over the premises, collecting rent and even evicting his brother who was her tenant without reference to him or his wishes.

[26] On the claimant's own affidavit evidence and evidence in cross examination, Linda is in complete control of the premise and has been since he migrated in 2001. I cannot imagine what else Linda Hyatt would need to do or say to convince this court that she is in complete control of the premises and has had every intention to possess it in her own right and in her own name to the exclusion of Wilfred Hyatt and the world at large.

[27] She appears to have formed this intention when the claimant and she got divorced and it continues right up to present. I have no evidence that she has had any thought of holding the property for them both and no evidence that she solicited or got funds to carry out any improvements or repairs to the property.

[28] In addition, during this time Mr. Hyatt did not do anything in relation to the property that showed any intention to continue his possession or ownership. In fact his behavior and the course of conduct in relation to the property suggested the exact opposite.

Mr. Hyatt's title was extinguished

[29] Case law, e.g. The Wills case shows that the conduct relied on by the Privy Council to establish possession in one joint tenant sufficient to extinguish title of the other was a) not accounting to the other joint tenant for rents received, (b) the joint tenant in possession did not invite the other to the house when she visited Jamaica.

[30] However it is not sufficient to compare the actions of the parties in one case with another, so for example I am not going to say in this case or that case the dispossessor did something similar so that her action qualifies as sufficient to dispossess. It is sufficient in my mind that Mrs. Hyatt formed the intention or the "animus possidendi" in 2001 when she says that he told her he had no intentions of coming back and with that intention along with occupation and control, time began to run against Mr. Hyatt.

[31] The authorities have also established that where a person against whom a claimant has brought the action pleads the statute of limitations, then the claimant must prove that he has a title that has not been extinguished by the statute. **The Laws of England, The Earl of Halsbury Volume 24 paragraph 606 and Dawkins v Penrhyn (1878) 4 App Cas. 51.**

In that case Lord Penzance said at page 64, "*The Statute of Limitation as applied to debts is as a statute that does not put an end to the debt, it merely prevents the remedies; and may be taken advantage of, according to the volition of the defendant. But the Statute of Limitations applying to real property, as has been pointed out, does more than that; it goes to the root of the plaintiff's claim*"

[32] So, the statute automatically arises for consideration once the title to the land is being relied on to ground the claim and its operation is not dependent on whether the defendant chooses to avail herself of it.

The court therefore orders in keeping with the findings above as follows;

1. Linda Hyatt is declared to be the sole owner of the property situated at 67B Waltham Park Road, in the Parish of St. Andrew and registered at Volume 876 Folio 6 of the Registered Book of Titles.
2. The Registrar of Titles is directed to remove Mr. Wilfred Hyatt's name from the Certificate Title.
3. Costs are awarded to the defendant to be agreed or taxed.