[2018] JMSC Civ. 155

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 05759

IN THE MATTER of respective rights of ownership of CURLINE JOHNSON and ERROL DANIEL JOHNSON in house located at Heartease, Point Hill in the parish of Saint Catherine measuring approximately 1,600 sq. ft or 148.63 metres comprising four (4) bedrooms, two (2) bathrooms, a living/dining room, a veranda, a carport and a kitchen and to the land upon which the house constructed.

AND

IN THE MATTER of The Partition Act

AND

IN EQUITY

BETWEEN	**CURLINE JOHNSON**	**CLAIMANT**
AND	**ERROL DANIEL JOHNSON**	**DEFENDANT**

IN CHAMBERS

Ms. Karlene Afflick instructed by Ms. Frances Jeanne Barnes of the Kingston Legal Aid Clinic Limited for the Claimant

Ms. Kristeina Beckford instructed by Kinghorn and Kinghorn, Attorneys-at-Law for the Defendant

October 1, October 3, and December 13, 2018.

Matrimonial Property - Claim for 50% interest in dwelling house - Parties separated - Claim brought more than twelve months after date of separation - Whether the Property Rights of Spouses Act applicable - Whether the Partition Act applicable - Whether the rules of common law and equity applies - House built by spouses on land not owned by either spouse.

GEORGIANA FRASER, J

BACKGROUND

[1] Mrs. Curline Johnson, the Claimant, and Mr. Errol Johnson, the Defendant met and commenced a relationship in 1983. They later got married in 1994. The union produced three children namely Dane Johnson, Shane Johnson and Ackeme Johnson who are all now adults. The parties built their house which is still unfinished on what is called “family land”. In 2010 the parties separated with the Defendant leaving the home after the relationship deteriorated. Sometime in 2012 the Defendant returned home and demanded that the Claimant quit the home. The Claimant moved out in that said year of 2012.

[2] The separation of the parties prompted the commencement of the proceedings by the Claimant on October 23, 2013 under the Partitions Act and in Equity to settle the question of their entitlement to the house in which they had lived as husband and wife, but on land “belonging” to the Defendant’s family at Heartease, Point Hill in the parish of Saint Catherine.

The Claim

[3] The relief being sought by the Claimant against the Defendant, as set out in the Fixed Date Claim Form filed on October 23, 2013, is as follows:

1. A declaration that the Claimant and the Defendant are each entitled to a fifty percent (50%) interest in the house located at Heartease, Point Hill in the parish of Saint Catherine measuring approximately 1,600 sq. ft or 148.63 metres comprising four (4) bedrooms, two (2) bathrooms, a living/dining room, a veranda, a carport and a kitchen and to the land to which the house is constructed.

2. (i) Within fourteen (14) days of this Order the Claimant and the Defendant are to agree on a reputable valuator.

   (ii) If the Claimant and the Defendant fail to agree within the fourteen (14) days, the Registrar of the Supreme Court is empowered to select a valuator from the list below:

   a. C.D Alexander Realty Ltd

   b. D.C Tavares & Finson Realty Ltd

   c. Allison Pitter & Co.

   (iii) The cost of the valuation to be borne equally between the Claimant and the Defendant.

3. (i) The Defendant has the first option to purchase the Claimant's interest in the property;

   (ii) The option is to be exercised by the Defendant executing an Agreement for Sale and making a down payment being not less than fifteen percent of the purchase price within ninety (90) days of receipt of the valuation;

(iv) If the Defendant fails to purchase the Claimant's interest in the property within the time allotted, then the property is to be sold on the open market or by private treaty;

(v) In the event that the property is sold to the third party, the proceeds of sale are to be divided equally between the Claimant and the Defendant;

(vi) The Claimant is permitted to deduct from the Defendant's share of the proceeds of sale the half costs of the valuation report, reasonable costs associated with the sale and Attorney-at-Law fees.

The Response

[4] The Defendant has not responded to the claim in the sense that he has not filed a defence or a written official response. The Defendant was served on the 8th day of March, 2014 according to the Affidavit of Service filed on April 10, 2014. The Defendant has however filed on the 17th of April 2014 an Acknowledgment of Service of the Fixed Date Claim Form and has had the benefit of Counsel appearing on his behalf throughout the time the matter has been before the court.

Preliminary Points

Whether or not the Claimant's suit can proceed under the Partition Act or in Equity?

[5] Section 4 of The Property (Rights of Spouses) Act (PROSA) states that "*The provisions of the 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*". Hence there is no need, by law, to revert to the rules and presumptions of common law and equity to determine the parties' entitlement to any "family home" in question. In fact, by virtue of section 4 all those laws are inapplicable to the transaction between the parties in respect of the house. This is also made clear by a plethora of judicial pronouncements made in respect of this issue.

[6] PROSA according to Daye, J in the case ***Lilieth Marriot v Segree Jackson*** [2016] JMSC Civ. 108**,** ushered in a new regime. Among other things it abolished the presumptions of the common law rules and equity as clearly indicated in Section 4. The legislative provisions are extended to couples who are married and also couples in a common law union. Most significantly it is the avenue whereby spouses can commence proceedings against each other so as to determine their individual rights to property. The legislation also introduced a new concept termed the "family home" (Sec. 2 (1))". With these sentiments as enunciated by the learned Judge I entirely agree.

[7] I have also noted the opinion of Anderson, J in the case of ***Vilma Wilson Malcolm v Junior Washington Malcolm*** [2013] JMSC Civ. 161 where he was opining on the relevance and appropriateness of a spouse who had brought a claim pursuant to the Partitions Act. At paragraph 5 of the judgment he stated that a:

> "…. *claim pursuant to the provisions of Jamaica's* ***Partition Act****. This is surprising to this court, because, the* ***Partition Act*** *is an earlier statute than the* ***Property (Rights of Spouses) Act****. The* ***Partition Act*** *was enacted into law on June 5, 1873, whereas the* ***Property (Rights of Spouses) Act****, was enacted into law in 2004, but did not come into force and effect until April1, 2006. The former in time, contains within it, general provisions authorizing this court, in appropriate circumstances, to order that property be partitioned between persons. The provisions of the* ***Partition Act****, were never intended to apply as between spouses, in circumstances wherein, a partitioning of property as between themselves, was being sought. This court so concludes, because otherwise, why then would Parliament have thought it necessary to pass into law and put into force and effect on January 1, 1887, the* ***Married Women's Property Act****? That last-mentioned Act, which is the precursor to the* ***Property (Rights of Spouses) Act****, was subsequently repealed and replaced by* ***PROSA."***

[8] I have also considered the appellate decision in ***Annette Brown v Orphiel Brown*** [2010] JMCA Civ. 12 that has further extended the significant and far-reaching impact of PROSA**.** The Court has instructed that PROSA is to be interpreted and applied by this nation's courts, as having been intended by Parliament, to have retrospective effect and as such, Jamaican courts are required to give effect to such parliamentary intention. This was succinctly stated by Morrison, J.A. (as he then was) at paragraph 76, where he opined that:

> "*The statement in Section 4 that the provisions of the Act 'shall have effect in place of the rules and presumptions of the common law and of equity' is further evidence in my view of the intention of the legislature that the 2004 Act should, as of the date it came into force, have effect in respect of all disputes as to matrimonial property, irrespective of the date of separation or divorce of the parties, as the case may be*".

[9] I am also guided by the reasoning of Sykes (J), (as he then was) in the oft-cited case of ***Paulette Gordon v Vincent Gordon and Rohan Alphanso Gordon*** **(**unreported**)**, Supreme Court, Jamaica, Claim No. 2007 HCV04845, judgment delivered 7 April 2009, at paragraph 18 where he stated:

> "*Once the application is property under PROSA, then, so far as the rules of equity and common law would have applied, then those rules and principles are now displaced and the Act applies where the statute applies to the transaction between the spouses. Therefore, in relation to the family house, if the application is brought under section 11 the half share default rule laid down in section 6 apples, unless it can be displaced under section 7. This is so because the rules of equity and common law would have normally applied to the acquisition of the property those rules have now been replaced by the statutory provisions".*

[10] The Claimant's case herein was brought under the *Partition Act* 1873 and not the *Property (Rights of Spouses) Act 2004*. Although the Claimant's Fixed Date Claim Form indicated that she had brought her case pursuant to the *Partition Act*, her written submissions were based on the *Partition Act*, *PROSA* and the *Limitation of Actions Act*. The Court was left in a quandary in trying to ascertain as to how the Claimant was proceeding.

[11] Having regards to the foregoing authorities, this court is of the view that Mrs. Johnson was not even entitled, as a matter of law, to seek a partition of the relevant matrimonial property, pursuant to the provisions of the Partition Act and in Equity. To hold otherwise would mean that this court has taken an apparent contradictory approach that goes against the weight of binding precedents. Therefore, I will endeavour to deal with the Claim as per *PROSA*, in so far as statutory requirements are met by the Claimant.

[12] The narrative of the Claim and the Affidavit of the Claimant makes no mention of *PROSA* but having recognized that *PROSA* is the statute of relevant jurisdiction, I now must consider its applicability to the instant case.

[13] Pursuant to Section 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)…….*
>
> *Section 13 (2) provides that 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".*

[14] The appropriate qualifying criteria in this case would be sub paragraph (c) as none of the other criteria applies. The Defendant has however taken issue with the state of the claim and has submitted that the Claim is not properly before the court as it was not brought within time pursuant to section 13(2). The Defendant through his Counsel has further submitted that the Claim being brought almost three years after the parties separated and without any prior application being made to the Court for an extension of time, the Claimant cannot seek any relief under PROSA.

[15] I agree with Defence Counsel that section 13 of PROSA allows for proceedings to be brought within a certain time line which is twelve (12) months following the separation of the parties without a reasonable likelihood of reconciliation, or on dissolution of marriage or termination of cohabitation, as the case may be. The evidence in this case as stated in the Affidavit of the Claimant, Mrs. Curline Johnson dated 16th day of October 2013 and filed on October 22, 2013 alleges:

> "*15. That the relationship between the 1st Defendant and I deteriorated and he moved out of the house in November 2010 and started living with another woman."*

"16. That in October, 2012 he moved back into the house and started making all kinds of problems and demanded that I moved out of the house"

[16] The Claim was commenced on October 22, 2013 and the parties separated in November, 2010, that is almost three (3) years after the parties separated. The evidence before the court is not indicating that there was a reconciliation in 2012 so that time would begin to run anew. The claim pursuant to section 13(1)(c) would have been out of time by virtue of section 13 (2) of the Act given that the twelve months would have long passed since the actual date of the parties' separation.

[17] Having recognised that the claim is out of time, the next issue for the Court's determination is whether time ought to be extended to permit the claimant to proceed by way of section 13 (1) (c). PROSA section 13 (2) provides that "*an application shall be made within twelve months … or such longer period as the Court may allow after hearing the applicant*". Where a Claimant is within time, a claim may be filed without more; however, the phrase "…*after hearing the applicant*"; presupposes that an application is to be made to the court for the exercise of its discretion where the time limit has expired.

[18] The Appellate Court has adopted a particular approach in regards to the interpretation of this section. In the decision of ***Angela Saddler v Samuel Saddler and Fitzgerald Hoilette v Valda Hoilette et al*** *[2013] JMCA Civ. 11****,*** Phillips, JA at paragraph 41 enunciated that*:*

"It is clear that section 13(2) is a provision which sets out a time line for the application for division of property under PROSA. There are certain events which trigger the right to apply. They are set out in section 13(1) (a), (b), (c) and (d) above. But the application if being made under subsections (a), (b) or (c) shall be made within 12 months of the dissolution of the marriage, termination of cohabitation, annulment of marriage, separation ***or such longer period as the Court may allow after hearing the applicant****. So it is clear that the time to apply under PROSA can be extended, and that would be effected by the exercise of the court's discretion"*

[19] Philips JA continued at para 44, that:

"…. A fixed date claim form filed under section 13 claiming relief permitted under PROSA could not therefore be struck out as an abuse of process simpliciter. If filed outside the time limited in the section, the action certainly could not proceed without the court allowing the time period to be extended, for to do otherwise would be in breach of the specific words in the section. 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 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…."

[20] The Claimant herein simply filed her claim and did not apply for an extension of time notwithstanding that her claim was being filed three (3) years after the parties separated. As far as I am concerned this is not in compliance with the time requirement of section 13 (2) of the PROSA. Even up to the time of trial and despite a gentle nudge from the court and an adjournment granted to the parties so as to facilitate submissions being reduced into writing, no application or request was made on behalf of the Claimant to rectify this lacuna in the claim.

[21] I have accordingly found merit in the preliminary objection taken on this point by Counsel for the Defendant. It is the ruling of the court that where a claim has commenced under section 13 (1)(c) it must be done within twelve months of termination of cohabitation or such longer period as the Court may allow. It is clear from the evidence of this case that the parties separated in November of 2010 and the claim was field in October of 2013. That being said, twelve months would have elapsed. However, this is not the end of the matter, according to the principle in ***Saddler v Saddler***, where such a case is before the court then the Claimant can apply to the court for an extension of time. In that application the Claimant would have to satisfy the Court of certain requirements.

[22] Phillips JA in the case of ***Saddler v Saddler*** highlighted these requirements at para 46 as follows:

"…*Of course it must be taken as a given that in order for the application for extension to be successful and to obtain the exercise of the discretion of the court in favour of the applicant, the applicant must set out the length of the delay, the reasons for the delay, whether the claim is worthy of the grant of*

*extension and whether there is prejudice to the other party (**Allen v Mesquita**).”*

[23] The claimant in this case is not entitled to ask the Court to exercise discretion in her favour for reasons as follows:

1. No Claim was in fact made pursuant to PROSA
2. No application was made not even verbally for time to be extended;
3. None of the criteria as posited by Phillips JA, in ***Saddler v Saddler*** at paragraph 45 has been observed.

[24] It is also important to note, that apart from section 13, PROSA also makes provision under section 11 for applications to be made in respect of property dispute between spouses. Section 11, in so far as is absolutely relevant states:

> “*11-(1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides*”

[25] I will deal with section 11 since Counsel for the Claimant has raised the issue in her written submissions that she is also seeking relief under this section although her statement of case did not specifically invoke PROSA or indeed any specific section of the legislation. This omission seems to run afoul of the provisions of the Civil Procedure Rules that provides in rule 8.8 that a fixed date claim form must state the enactment under which the claim is brought. Nonetheless I will treat with this issue as raised notwithstanding the omission. I would also indicate that the limitation period of 12 months does not obtain for section 11.

[26] The definition of ‘subsistence of the marriage” was considered by Sykes, J in the case of ***Paulette Gordon v Vincent Gordon and Rohan Alphanso Gordon***. At paragraph 10 the learned Judge enunciated the following definition:

> *"The key word in section 11 is "subsistence." An application can be made under section 11 by a spouse or any other person only during the subsistence of the marriage or cohabitation. Subsistence* ***means continuing to exist or to live****. There are legitimate reasons why a spouse may wish to have their property rights determined while the marriage or cohabitation subsists…"*

[27] Whether a marriage is subsisting is a matter of fact and degree and each case must be considered on its own peculiar circumstances. The guiding principle has been expressed as the *consortium vitae* and the activities being carried on by the parties whether or not they are occupying the same physical space. This principle was explored in the case of ***In the Marriage of Todd (No 2)*** [1976] Fam Ca 12, where Watson J stated at paragraph 5 and 6:

> *"5. Three concepts require examination — (a) separation, (b) living separately and apart, and (c) resumption of cohabitation. In my view "separation'" means more than physical separation — it involves the destruction of the marital relationship (the consortium vitae). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed. What comprises the marital relationship for each couple will vary. Marriage involves many elements some or all of which may be present in a particular marriage — elements such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationships.*
>
> *6. When it is asserted that a separation has taken place it may be necessary to examine and contrast the state of the marital relationship before and after the alleged separation. Whether there has been a separation will be a question of fact to be determined in each case"*

[28] In one UK decision, ***Goudey (subsisting marriage-evidence) Sudan*** *[2012] UKUT* 00041 (IAC) where Mr. Justice Blake, President of the Upper Tribunal relying on the case of ***GA ("Subsisting" marriage) Ghana*** [2006] UKAIT 00046; indicated that a subsisting marriage required that there exists a real relationship as oppose to merely a formal marriage which has not been terminated. The court in the circumstances extended the rule and held that "*where there is a legally recognized marriage and the parties who are living apart both want to be together and live together as husband and wife, we cannot see that more is required to demonstrate that the marriage is subsisting and thus qualifies under the immigration rules"*

[29] Hence decided cases in other jurisdictions have laid down some clear indicators as to what makes up the consortium vitae and what other evidence the Courts will regard in ascertaining whether a marriage is indeed subsisting. In analysing the evidence there is nothing in the evidence that suggests that the parties' have a subsisting relationship. In the instant case, the Claimant had testified that the marriage deteriorated and her spouse moved out of the house in November 2010 and started living with another woman, thus ending the consortium between them and any act of sexual intercourse. This to my mind is a clear signal that the marriage was not subsisting at that time in 2010. That state of affairs continued and is buttressed by her further evidence, " …*that in October, 2012 he moved back into the home and started making all kinds of problems and demanded that I moved out"* and also *"the hostile behaviour of the Defendants and their relatives eventually forced me out of my house".* Based on his alleged conduct, which he has not disputed; clearly Mr. Johnson did not move back into the matrimonial home to mend his broken marriage. This Court, in all the circumstances draws the reasonable inference that his aim was to get Mrs. Johnson to quit the premises so that he could enjoy and occupy it to her exclusion. There is no evidence to suggest that the parties are even now communicating or that there was any subsequent reconciliation; on the contrary the fact that Mrs. Johnson has filed this claim is evidence of their continued estrangement.

[30] There is a school of thought that where no decree absolute is granted by a Court of competent jurisdiction then the parties are still married and technically the marriage still subsists. I do not subscribe to this school of thought. I am persuaded by the Australian and UK line of authority that for a marriage to exist there must be certain activities readily identifiable by the court as existing between the parties, this will include, but is not limited to; consortium vitae with the husband and wife dwelling under the same roof, shared intimacy and recognition of the marriage in both public and private relationships. In this case none of those tell-tale activities exist; furthermore, the separation between the parties was not for voluntary purposes such as to facilitate a job opportunity or because of medical reasons, etc. The separation was due to a break down in the marital union where one party being the Defendant transferred his affections and consortium to another female, thereby expressly demonstrating that the parties no longer shared a union and the marriage for all intent and purpose was at an end.

[31] Based on the evidence before this Court the parties separated without any likelihood of reconciliation and have not reconciled. Notwithstanding that there is no evidence that there has been a decree absolute as yet obtained, I nonetheless am of the opinion that the claim cannot proceed under either sections 11 or 13 of the Act, because she has not satisfied the qualifying criteria under either section.

Whether the Court can make a determination as to the parties' respective interest where the dwelling house was built on property not owned by the parties'?

[32] The Court has given due consideration that notwithstanding the house was built on land not owned by the parties the Court could have made a determination as to the parties' interest in the house. The Court could in fact have treated the disputed house as the 'family home' pursuant to section 2 of the Act as there is no doubt that it is owned either jointly by both spouses or wholly by one of them, this was never an issue. In the alternative the Court could have treated the house as 'other property' as stipulated under PROSA; however, the Court has been handicapped in making any such determination as the claim in my view is not properly before the court. The Court has also considered that an order for the payment of money from one spouse to the other could also have been appropriate but this would have been pursuant to section 23 of the Act, however, the same handicap obtains in this regard as the Claimant has failed to properly established her case under PROSA either by virtue of Sections 11 or 13. There can be no pronouncement made by the Court pursuant to PROSA unless the jurisdiction of the Court is firstly established.

Statutory Defences

[33] The Claimant has raised in her submissions section 4 of the **Limitation Actions Act** which provides that:

> "the right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time hereinafter is mentioned, that is to say-
>
> *a.* When the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have

> been in possession or in receipts of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been disposed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received"

[34] Counsel also made reference to the decision of ***Patsy Powell v Courtney Powell*** [2014] JMCA Civ. 11 at paragraph 17 where the learned judge commented on section 4 of the Statute of Frauds 1677. In relation to these provisions Counsel has merely stated these in the submissions, but has not demonstrated by any cogent argument their applicability to the instant case. The provisions are moreover statutory defences and as such they must be specifically pleaded or at the very least there must be evidence presented on the Claimant's case to justify a consideration of the same by the court. The Claimant also did not lay out how these statues affected her statement of case and as such the court will treat the submissions on the statutory defences as irrelevant for these purposes.

Disposition

[35] In the circumstances, the court is unable to grant the orders as prayed in the Fixed Date Claim Form as the court has no jurisdiction to deal with the matter under the aegis of PROSA. I have already indicated that the other statutes mentioned in the case are either irrelevant or inapplicable; accordingly, judgement is hereby given in favour of the Defendant. Each party is to stand their own costs.