

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 583 OF 2001

BETWEEN SANIDA JOHNSON APPLICANT

AND ROAN CLARK RESPONDENT

Miss Kayann Balli instructed by Leon Green & Co. for applicant.

Miss Juliet Bailey instructed by Forsythe & Forsythe for respondent

Heard: May 19, 20 and June 27, 2003

JONES, J. (Ag.)

Sanida Johnson "the applicant" and Roan Clark "the respondent" lived together from 1986 to 1995, when they separated; they did not cohabit, thereafter. At the date of their parting, they both owned a house Lot 227 South East 51st Way 2 East Greater Portmore in the parish of St. Catherine. In 1995 -- the date of their separation -- the applicant migrated to Canada, and on November 27, 2001, filed an Originating Summons in the Supreme Court of Jamaica requesting the following relief:

"(1) A declaration that the applicant and the defendant each have a 50% share in the premises located at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine and registered at Volume 1249 Folio 118 of the Register Book of Titles.

(2) An order that the joint-tenancy of the premises located at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine and registered at Vol. 1249 Folio 118 in the Register Book of Titles to be severed.

(3) An order for the sale of the said premises and the net proceeds thereof divided in accordance with the respective shares of the applicant and the defendant."

The applicant's evidence by way of her affidavit was that prior to the purchase of the property she and the respondent were involved in a relationship lasting some twelve years. She said that they decided to jointly purchase property at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine. It was common ground between the parties that they intended to reside in this house as their home, for the benefit of them jointly, for the rest of their lives.

It was the applicant's evidence that she and the respondent applied for a mortgage from Caribbean Housing Finance Corporation Limited. She said that she and the respondent paid the deposit by pooling their savings, and that they both assumed equal responsibility for the repayment of the mortgage. In April 1992 they both started to make improvements on the house, but the relationship with the respondent came to an end, and she later migrated to Canada where she currently resides. She said that from that time to now the respondent has resided in the joint premises, and has derived the sole benefit from it.

The applicant said that the respondent has always acknowledged that they were both owners of the property and on at least one occasion they discussed the means by which she would be able to access some benefit from the property. To this end they requested a valuation report, which indicated that the property is now worth One Million Six Hundred Fifty Thousand Dollars (\$1,650,000.00).

On the other hand, the respondent in his affidavit -- while admitting that the property was purchased jointly -- denied that he and the applicant pooled their resources to purchase the property. He said that he was the one that paid the deposit for the house, and that he received Five Hundred Dollars (\$500.00) from the applicant as he was short of that amount on the deposit. Nevertheless, the respondent admitted that the applicant closed her account and transferred \$7,000.00 to his account at the National Commercial Bank.

The respondent said that he has done extensive work on the property over the years, and this resulted in the value of the property being increased over the years. He admitted, however, that the applicant lodged the amount of C\$500.00 to his account some time after she migrated for the purpose of making improvements to the house. This he said was the only contribution the applicant made to the improvements in the house.

On this basis, the respondent has asked this court to make an order that the applicant is only beneficially entitled to twenty-five percent of the value of the house at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine. The questions to be asked are these: what is the extent of the beneficial interest of the parties in the said property? And, how is that beneficial interest to be determined?

The learned author of Halsbury's Laws of England 4th edition states the law in this way at paragraph 278:

"Where there is an express declaration as to the beneficial interest, if the property was purchased from joint funds an equitable joint tenancy exists. Where, however, the purchase money was provided in unequal shares it creates an equitable tenancy in common with each party holding a share in proportion to his or her contribution to the purchase price."

In *Bernard v. Joseph* [1982] 3 All ER 162 it was held that where there was no express declaration of trust there was no presumption that the parties would always take equal shares. The shares were to be ascertained by determining the intention of the parties at the time of the purchase as evidenced by their respective contributions both at the time of the purchase and subsequently.

Denning MR in giving the judgment of the court, made the following observation on page 165:

"As between husband and wife, when the house is in joint names and there is no declaration of trust, the shares are usually to be ascertained by reference to their respective contributions, just as when it is in the name of one or other only. The share of each depends on all the circumstances of the case, taking into account their contributions at the time of acquisition of the house, and, in addition, their contributions in cash, or in kind, or in services, up to the time of separation. In most cases the shares should be ascertained as at that time. But there may be some cases where later events can be considered... I would adopt, in particular, the words of Pearson LJ (Hine v. Hine [1962] 3 All ER 345 at 350, [1962] 1 WLR 1124 at 1132):

'In my judgment, however, the fact that the husband and wife took the property in joint tenancy does not necessarily mean that the husband should have a half interest in the proceeds of the sale now in contemplation. The parties agreed, expressly or by implication from the creation of the joint tenancy, that the house should be the matrimonial home and should belong to both of them (technically to each of them in its entirety) and that, on the death of one it would belong to the other by right of survivorship. They did not, however, make any agreement, or have any common intention, what should happen in the event of the marriage breaking up and the property then being sold. That event was outside the contemplation of the parties. The proper division of the proceeds of sale in that event is left to be decided by the court in this application under s. 17 [of the Married Women's Property Act 1882]. The court has to do this by attributing artificially to the parties a reasonable intention at the time of the transaction in the year 1950, and for this purpose has to take into account not only the nature and form of the transaction, but also (as

stated by ROMER, L.J., in *Cobb v. Cobb* ([1955] 2 All ER 696 at 699, [1955] 1 WLR 731 at 735))

"the course of conduct of husband and wife (including their respective contributions towards the purchase price) at the time when the home was purchased and subsequently."

In my judgment, the principle, which is shortly stated in the maxim "equality is equity", though it affords a just solution in many cases under s. 17, does not in the present case afford a just solution such as the parties can reasonably be taken to have intended.' "

In our jurisdiction, the Court of Appeal in *Forrest v. Forrest* [1995] 48 221 stressed the need for courts to determine the intention of the parties at the time of the acquisition of the property. It was held in that case that in the absence of evidence to the contrary, spouses whose common intention at the time of the acquisition of a house was to take equal shares in the house, enjoy equal shares even after their separation.

The law is summed up in the following passage taken from the judgment of Forte J.A (as he then was) on page 224:

"Where, therefore, there has been an express agreement between the parties the court has no power to alter their respective rights in the property. Where there is no express agreement, the court is entitled to determine from the conduct and contribution of the parties, what was their common intention at the time of the acquisition of the property."

In this case, there was no evidence of an express declaration by either of the parties as to the beneficial interest in the Portmore property. However, counsel for the applicant - with great passion -- asserted that there were sufficient facts for the court to find that there was a common intention of the parties to share the beneficial interest in the property equally.

The court accepted, firstly, that both the applicant and the respondent are legal joint tenants by virtue of Certificate of Title Volume 1249 Folio 118. Secondly, I find as a fact that the deposit for the purchase of the property was \$22,017.00. Thirdly, that the money in the savings account at the time when the deposit was withdrawn was not joint money between the parties. At the time of the payment of the deposit the money in the account belonged solely to the respondent. However, shortly after the deposit was paid in 1993, the applicant closed her account at the Bank of Nova Scotia and deposited the amount of \$7,000.00 into the respondent's account for the purpose of contributing to the deposit and closing cost for the purchase of the premises at Lot 227 South East 51st Way, 2 East Greater Portmore. The account was then made a joint account. As a result, I find as a fact that the applicant's contribution was approximately one-third of the deposit on the property.

I also find as a fact that the respondent paid all the mortgage payments on the property to the present date, and also paid for most of the improvements to the property. The court accepted that the applicant contributed C\$500.00 towards the improvements to the house. I also accepted the evidence of the respondent that he received the sum of C\$3,000.00 from the applicant as the income from rum that he had given her to sell. The applicant did not give any evidence of how she earned the money that she said that she contributed to the improvements, and on balance, I accepted the respondent's version of the source of the income as more credible.

It is commonly accepted, that there cannot be a presumption of advancement where the parties, although living together, are not married. Consequently, it cannot be implied, in the instant case, that the respondent intended a gift to the applicant. However, where the court is satisfied that the relationship between the parties has the same level of commitment as a married couple it may regard it as such.

In paragraph 283 of Halsbury's Laws of England 4th Edition, the learned author states as a proposition of law that:

"The absence of the commitment of marriage may, however, mean that the court will not make the same assumptions and draw the same inferences from the behaviour of an unmarried couple as in the case of a married couple. Only if the court is satisfied that the relationship was intended to involve the same degree of commitment as marriage is it legitimate to regard the couple as no different from a married couple, for example, if they have children by each other and intend to marry when free to do so..."

The court finds as a fact that both parties were living together in a faithful relationship for a period of at least nine years. However, the court was unable to conclude that the degree of commitment between the applicant and the respondent was the same as in a marriage. As a result, the court was unable to apply to this case the principles it would apply were the parties married.

In the judgment of this court, it can be inferred on a balance of probabilities that, despite the legal joint tenancy, the parties intended to take their beneficial shares in proportion to their contribution to the acquisition of the property. Consequently, it is my judgment that the applicant in this case is entitled to a share of the disputed property in proportion to her stake in the original investment for the property; this I assess at 33.33% of the current value of the property.

As the respondent contributed the mortgage payments, and a greater share of the money for the improvements, these sums would constitute an advance from the applicant to the respondent. Any consideration of the repayment of these advances is properly to be settled by a separate action for an accounting between the parties.

Accordingly, the court makes the following orders:

1. That the applicant has a 33.33% share, and the respondent a 66.66% share, of the premises located at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine and registered at Volume 1249 Folio 118 in the Register Book of Titles.
2. That the joint tenancy of the premises located at Lot 227 South East 51st Way, 2 East Greater Portmore in the parish of St. Catherine and registered at Volume 1249 Folio 118 be severed.
3. That subject an accounting being done regarding advances between the parties to this action, the said premises are to be sold, and the net proceeds thereof divided in accordance with the respective shares of the applicant and respondent referred to above.
4. No order as to cost.