



[2022] JMSC Civ 52

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE MATRIMONIAL DIVISION

CLAIM NO. SU2019MT01377

BETWEEN	ANN-MARIE WILKS-STEWART	APPLICANT
AND	ANDREW LLOYD STEWART	RESPONDENT

IN CHAMBERS

Mr Nicholas Chambers instructed by Legal Chambers for the Applicant

Mr Andrew Lloyd Stewart in person

Heard: May 25th, 2021, May 26th, 2021, December 16th, 2021 and May 6th, 2022

Application for division of property – property other than the family home – property purchased by one party to marriage –effect of power of attorney – relevant factors for the acquisition of an interest in property other than family home

HUTCHINSON, J

Introduction

[1] On the 8th of May 2019, an application was filed on behalf of the Applicant Mrs Annmarie Wilks-Stewart in which she sought a number of orders, namely;

- i. A Declaration that the parties are joint legal and beneficial owners entitled in equal shares in the family plot situated at Lot 20 Frontier Phase 2, Port Maria P.O. in the parish of Saint Mary registered at Volume 1426 Folio 159 of the Register Book of Titles ("The said matrimonial Property").
- ii. A Declaration that the Applicant, ANN-MARIE WLKS-STEWART is entitled to a fifty percent or one half legal and beneficial interest in the

said matrimonial Property purchased during the marriage at Lot 20 Frontier Phase 2, Port Maria P.O. in the parish of Saint Mary registered at Volume 1426 Folio 159 of the Register Book of Titles.

- iii. An Order that the said Property be valued by a reputable valuator agreed between the parties or in the alternative, that a valuator be appointed by the Registrar of this Honourable Court.
- iv. An order that the Respondent be given the option to purchase the Applicant's fifty percent or one half legal and beneficial interest in that property known as Lot 20 Frontier, Phase 2, Port Maria P.O. in the parish of Saint Mary and such option to be exercised within sixty (60) days of the date of this Order by a deposit of 10% of the Applicant's interest.
- v. Completion within 90 days of the signing of the Agreement for Sale.
- vi. Stamp Duty, Registration Fees and Transfer Tax to be paid by the parties equally.
- vii. Each party to bear their Attorney's cost.
- viii. Time shall be of the essence.
- ix. An Order that should the Respondent elect not to exercise his option to purchase the Applicant's fifty percent or one half legal and beneficial interest in that property known as Lot 20 Frontier Phase 2, Port Maria P.O. in the parish of Saint Mary registered at Volume 1426 Folio 159 of the Register Book of Titles within the time stipulated that the said Property be advertised and put for sale on the open market.
- x. An Order that should the property known as Lot 20 Frontier Phase 2, Port Maria P.O. in the parish of Saint Mary registered at Volume 1426 Folio 159 be sold on the open market, after all expenses and outgoings are deducted, that the net proceeds of the sale be divided equally between the Applicant and the Respondent.
- xi. Neither party shall do or cause to be done anything calculated to or having the effect of delaying or preventing the sale of the said

matrimonial Property and both parties shall take all reasonable steps to facilitate the said sale, which steps shall include but not limited to:

- a. Listing the property with reputable realtors
- b. Placing advertisements in the newspaper for the said sale
- c. Making the said matrimonial Property available for viewing by potential purchasers
- xii. Giving the other party and/or her/his nominee reasonable access to the premises
- xiii. An Order that the Applicant's Attorneys-at-Law shall have Carriage of Sale of the said matrimonial Property.
- xiv. An Order that the Registrar of the Supreme Court be empowered to sign any documents to effect the transfer of the said matrimonial Property should either of the parties be unwilling, unable and/or fail to do so.
- xv. There be any such further Order and or relief as this Honourable Court may deem fit.

[2] The proceedings found their genesis in the purchase of property at Lot 20 Frontier in the parish of St Mary in 2016. There is no dispute between the parties that no structure was on the property at the time of purchase and none has since been erected. It is also not in dispute that the property was purchased in the name of Mr Andrew Stewart and the purchase itself was financed by a mortgage which he obtained from the NHT. Questions have however been raised in respect of how the mortgage was obtained, the monthly repayments and the individuals who were intended to benefit from the purchase. The respective cases of the parties have been summarised below.

Applicant's Case

[3] In her affidavits as well as her viva voce account, Mrs Wilks-Stewart testified that on the 12th of July 2014, she was joined in marriage to the Respondent at the Emmanuel Baptist Church in St Mary. She averred that during the marriage she

resided at Lot 21, Frontier Phase 2 in St Mary while the Respondent resided at Lot 9 Pandora Crescent, Kingston 11 and Missouri City, Texas, USA. She also stated that the Respondent has never resided at 'her property'. A marriage certificate was attached by her but it was observed that, contrary to her assertions, at the line where the residence of each party is noted, the document states that they both resided at Lot 21 Frontier, St Mary.

- [4] It is Mrs. Wilks-Stewart evidence that she was the one who brought the disputed property to her husband's attention; as a result of which she was given a power of attorney to act on his behalf in the purchase of same and any other related transactions. She also deponed that she signed the Letter of Commitment on his behalf and at each step of the purchase she gave counsel and encouragement to him; as it was her understanding that the property was being purchased to construct their matrimonial home. She stated that Lot 21 had been purchased by her and a house constructed thereon for the benefit of her children and she had made the Respondent aware of this from the beginning.
- [5] Mrs Wilks-Stewart also gave evidence that she constructed a wall around Lot 21 but the Respondent constructed a wall around Lot 20 which he adjoined to 'her wall'. She insisted that it had been her intention to build a boundary wall to delineate the separation but she was not able to do so. In respect of mortgage payments made in respect of this land, Mrs Wilks-Stewart asserted that several of these were made by her.
- [6] She also averred that she made contributions to the NHT for the Respondent in order for him to qualify for a loan from them to purchase the 'matrimonial property'. She denied that the Respondent had any interest in Lot 20 and also rebutted his assertions that he had paid her half of the value of this property or had assisted in the building of the house for them to reside there as the family home. A number of receipts evidencing advances from the NHT and payment for material were provided in this regard. Mrs Wilks-Stewart also deponed that they started to have marital issues which later led to separation as the Respondent had begun to pressure her to place his name on her title and also informed her that when the matrimonial home was built her children would not be welcomed there.

Respondent' Case

- [7] The case for Mr Stewart was also outlined in a number of affidavits provided by him as well as his viva voce evidence. He stated that he had met the Applicant online in 2010 and after a number of trips to Jamaica the relationship evolved. He became aware that she had purchased the property at Lot 20, Frontier, St Mary and intended to build a home and they made plans for him to assist her in this regard. To this end, he paid her half the value of the property and sold a number of his properties in the United States to finance the construction of a dwelling house on this land. He stated that it had been agreed that his name would be placed on the property as their matrimonial property and in keeping with this agreement after the ground floor was completed they both moved into the house and this was their residence at the time of their marriage.
- [8] He accepted that during the relationship he would travel between Jamaica and the United States but insisted that it had been his intention to return to Jamaica to live and pursue his business. He also asserted that this was the reason behind his interest in acquiring property in St Mary. He stated that Lot 20 was ideally suited because of its proximity to the family home. In respect of the construction of the wall around the property, he denied that the Applicant had played any part in the construction of the wall around Lot 21 and insisted that he had built the wall around both properties.
- [9] Mr Stewart testified that the relationship was going well until he began insisting that his name be placed on the title for Lot 20, a request which was strongly opposed by the Applicant who contended that this property was for her children. He stated that she then obtained a protection and occupation order which had the effect of barring him from the house. From the timeline presented by both sides, it is evident that subsequent to the purchase of the property and before January 2018, the parties were no longer involved. As a result of this, Mr Stewart retained Counsel to file a suit on his behalf. In that claim, which was given suit number 2018HCV00245, Mr Stewart sought a number of declarations and orders in respect of Lot 21 Frontier, Phase 2. It was noted that reference was also made to

this action by Mrs Wilks-Stewart who described the Respondent's claim of being awarded 50% as misguided and that claim and its disposition are outlined below.

Claim 2018HCV00245

[10] On the 22nd of January 2018 Mr Stewart filed an action in which he sought the following orders;

- a. *A DECLARATION that the parties are the joint legal and beneficial owners entitled in equal shares in the family home situated at lot 21 Frontier, Port Maria, P.O. in the parish of Saint Mary registered at Volume 1426 Folio 160 of the Register Book of Title;*
- b. *A DECLARATION that the Claimant is entitled to one half of all of the legal and beneficial interest in the family home situated at lot 21 Frontier, Port Maria, P.O. in the parish of Saint Mary registered at Volume 1426 Folio 160 of the Register Book of Title;*
- c. *A DECLARATION that the Claimant is entitled to a half interest in the items of furniture and appliances in the matrimonial home as itemized in the schedule attached to the Claimant's affidavit;*
- d. *ORDERS that:*
 - a. *The Matrimonial Home be appraised by Messrs. DC Tavares Finson & Company in order to establish the market value thereof; the cost of the said appraisal to be borne by the parties*
 - b. *Either party shall have the right to purchase the other party's interest in the said matrimonial home. The option to purchase shall be exercised by the payment of a deposit of 10% of the purchasing party's interest within 21 days of the appraisal report being delivered to the respective Attorney-at-Law. The sale shall be on the usual terms and shall include:*
 - i. *A deposit of 10% as stated above, a further payment of 5% on the signing of the Agreement for Sale, balance on completion.*
 - ii. *Completion within 90 days of the signing of the Agreement for sale.*

signature or execution the said document shall be forwarded to the Registrar of the Court who shall execute same on the defaulting party's behalf.

- h. ORDERS that An inventory of the furniture and Appliances referred to at paragraph 3 be carried out by the parties and/or their representatives jointly within twenty-one (21) days of the herein Order and either the said furnishings and furniture be divided between the parties as they shall agree; or failing such joint inventory valuation and agreement they be appraised by Messrs D.C. Tavares Finson and Company and sold by the said appraisers by private treaty or by public auction after 30 days if on the first private offer they or any of them be not sold.*
- i. Such further or other order as this Honourable Court deems.*

[11] The matter was referred to mediation and on the 8th of November 2018 the parties were able to arrive at an agreement. This agreement was executed by the respective parties as well as their attorneys and contains the terms upon which the matter was disposed of. This was formalised in a consent order entered on the 13th of May 2019, the terms of which included the following orders;

- i. It is hereby Declared that the parties are the joint legal and beneficial owners entitled in equal shares in the family home situated at lot 21 Frontier, Port Maria, P.O. in the parish of Saint Mary registered at Volume 1426 Folio 160 of the Register Book of Title;*
- ii. The Matrimonial Home is to be appraised by a licensed valuator to be agreed between the Attorneys-at-law in order to establish the market value thereof; the cost of the said valuation to be borne by the parties equally;*
 - a) The Claimant is entitled to 70% of the value of the perimeter wall and the Defendant is entitled to 30% thereof;*
 - b) The Defendant is entitled to 100% of the unimproved value of the land*
- iii. Either party shall have the right to purchase the other party's interest in the said matrimonial home. Such option to purchase shall be exercised by the payment of a deposit of 10% of the purchasing party's interest within 21 days of the appraisal report being delivered to the respective Attorney-at-Law. The sale shall be on the usual terms and shall include;*

- a. *A deposit of 10% as stated above, a further payment of 5% on the signing of the Agreement for Sale, balance on completion;*
- b. *Completion within 90 days of the signing of the Agreement for sale.*
- c. *Stamp Duty and Registration fee to be paid by the parties equally, the parties are responsible for the Transfer Tax and either parties responsible for their own Attorney's fees.*
- d. *Possession on completion.*
- e. *Time shall be of the essence.*
- f. *In the event that the parties do not exercise their option to purchase the said matrimonial home, the premises shall be sold on the open market at the appraised market value or at such other price as shall be agreed between the parties and the net proceeds of sale be divided between the parties equally.*
- g. *Neither party shall do nor cause to be done anything calculated to or having the effect of delaying or preventing the sale of the matrimonial home and both parties shall take all reasonable steps to facilitate the said sale, which steps shall include but be not limited to:*
- h. *Listing the property with reputable realtors*
- i. *Placing advertisements in the newspapers for the said sale.*
- j. *Making the premises available for viewing by potential purchasers.*
- k. *Giving the other party and/or his/her nominee reasonable access to the premises.*
- l. *The Attorney-at-Law with Carriage of Sale shall be BARBARA HINES & ASSOCIATES, Attorneys-at-Law; xiii) In the event of a sale on the open market, Stamp Duty, Transfer Tax, Registration Fee, Cost of Agreement for Sale and other necessary cash cost due from the vendor shall be payable by the parties equally and each Attorney shall be responsible for his Attorney's fees.*
- m. *In the event that either party shall fail or neglect to sign or to execute any document (inclusive but not limited to the Agreement for Sale and Instrument of Transfer) within two (2) weeks of such documents being presented for signature or execution the said document shall be forwarded to the Registrar who shall execute same on the defaulting party's behalf.*

[12] Upon an examination of the orders sought in the 2018 action, it is clear that the claim proceeded on the basis that the Property Rights of Spouses Act (hereinafter PROSA/The Act) would be applicable as Lot 21 was alleged to have been the family home which was owned and occupied by the respective parties. It is also evident that contrary to much of what was stated on behalf of the Claimant in this matter, that matter was disposed of on an agreement between the parties that Lot 21 was declared to be the 'family home' and ordered to be shared equally.

Issues

[13] In treating with this matter, it is evident that the issues which must be determined are as follows;

- i. Is the Applicant entitled to a declaration that she is holds joint legal and beneficial interest in Lot 20 Frontier, Phase 2, St Mary?
- ii. Is the Applicant entitled to 50% of the legal and beneficial interest in Lot 20, Frontier, Phase 2, St Mary?

Summary of Submissions

[14] In submissions made on behalf of the Applicant, Counsel submitted that the incontrovertible position is that the Court possesses the requisite power to hear matters involving property other than the family home. The authority of ***Marlene Davis v Hugh Ashley Davis [2018] JMSC Civ 99*** in which the Court's power in this regard was highlighted was cited in support of this point. Counsel also relied on ***Carlene Miller v Ocean Breeze Hotel Ltd [2015] JMCA Civ 42*** in which Brooks JA, as he then was, had stated the import of property other than the family home being dealt with in accordance with what is fair in the circumstances.

[15] Counsel argued that the parties had worked together to acquire the property and as such each was entitled to an equal share in Lot 21. He asked the Court to take careful note of the intention of the parties which he stated could be gleaned from their conduct and contribution whether monetary or non-monetary. Counsel submitted that the instant claim can be distinguished from the ***Marlene Davis*** case as that Claimant had gone to great lengths to conceal the purchase of the disputed property from the defendant. Counsel asked the Court to find that Mr Stewart's actions in empowering the Applicant to acquire the property is a clear indication of his intention to benefit her. He argued that by attaching the wall for Lot 20 to that which had been built by Mrs Wilks-Stewart he clearly intended to benefit her.

Counsel also contended that the purchase of this property during the course of the marriage lends further support to this position.

- [16] Counsel submitted that the Respondent continued to reside at 9 Pandora Crescent even after the marriage and described this as clear evidence that Lot 20 was purchased to construct the family home. He described the evidence of the Respondent that he did not inform the NHT of his intention to use the property for commercial purposes as undermining his credibility. This argument was repeated in respect of the restrictive covenant on the title which stated that it was for residential purposes. The evidence of Mrs Wilks-Stewart's in respect of her monetary contributions was highlighted and Counsel argued that this along with her non-monetary contributions outlined in her actions under the power of attorney should be favourably considered. He described the Respondent as lacking credibility and submitted that his evidence that although he and the Applicant were discussing divorce he still constructed the wall was beyond belief. Counsel also raised questions in respect of the absence of documentary proof for any NHT payments by the Respondent's sister and the relevance of the Western Union transactions provided by the Respondent which he asserted did not align with payments made to the NHT.
- [17] There were two sets of written submissions filed on behalf of Mr Stewart, the first in time by Counsel who had appeared for him initially and the second by Mr Stewart himself. In these submissions, the Respondent submitted that the principle of division of property on equal terms would not be strictly applicable as the property in question is not the family home. The Court was referred to the requirements outlined in Section 14 of the Act and the decision of ***Suzette Ana Hugh Sam v Quentin Ching Ghong Hugh Sam [2018] JMCA Civ 15*** was cited in support of the application of this provision.
- [18] It was argued on behalf of the Respondent that on a detailed examination of Section 14 of the Act, Mrs Wilks-Stewart did not meet the requirements for the award sought on the following basis;

- a. The marriage is of short duration 2014 to separation in 2017.
- b. The respondent had built the family home from his own resources and had paid the mortgage loan taken out by the Applicant.
- c. The respondent paid the mortgage for the disputed property from his own resources.
- d. The question of the family home was already settled and did not apply.
- e. The Applicant made no contribution to the acquisition of the property, construction of the wall, retention or improvement of the lot.
- f. The applicant knew from the inception that the property was being purchased for the Respondent's business.
- g. There was never a common intention for the property to be held jointly.
- h. The Applicant had been granted the power of attorney to make the purchase and was wholly aware that her name was not being placed on the title.

[19] The Court was also asked to reject the submission that the assigning of the power of attorney conveyed any benefit to the Applicant. The Respondent contended that if there had been such an intention, the purchase would have been authorised in both names.

Analysis/Applicable Law

[20] The Application made by Mrs Wilks-Stewart in respect of the order for division of property has been made on the premise that the property in question is the family plot/ matrimonial property. The phrasing adopted is significant as it is the Court's understanding that it is not being alleged that the disputed property was the family home. The definition of what qualifies as the 'family home' is addressed at Section 2(1) of PROSA which provides as follows;

"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.

[21] Section 6 of the Act which treats with applications involving the division of the family home provides as follows;

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;

(b) on the grant of a decree of nullity of marriage;

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

(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.

[22] The remit of this provision has been examined in a number of decisions and relevant guidance was provided by McDonald-Bishop J (as she then was) in ***Graham v Graham Claim No 2006 HCV 03158 (delivered 8 April 2008)*** where she assessed the statutory basis for the equal share rule at paragraphs 15-16 of that case, thus:

*"15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See **R v R [1992] 1 AC 599, 617** per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless*

*there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in **Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633.***

16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation....” (Emphasis supplied)

[23] It is evident that the purpose of this provision is to ensure that each party to the marriage walks away with an equal share of the family home which was acquired during the course of the marriage unless there is good reason to the contrary. The reference by the Court to the phrase ‘unless there is good reason to the contrary’ is a recognition of the fact that there are occasions when the strict application of the rule can and ought to be departed from and Section 7 of the Act addresses this as follows;

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, 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.

(2) In subsection (1) "interested party" means- (a) a spouse; (b) a relevant child; or (c) any other person within whom the Court is satisfied has sufficient interest in the matter.

[24] Having completed this detailed analysis of Sections 2, 6 and 7 of the Act it is clear that these provisions are quite specific in their application as they refer solely to the ‘family home’ which is the home which was used whether habitually or occasionally by the parties as the family’s residence. Applying this distinction to the instant claim, it is evident that the land which is the subject of this application would not fall within the ambit of these provisions and as such the presumption of

a 50% entitlement would not arise. The Court then has to consider whether the Applicant has provided an evidential basis to justify the declarations and orders sought.

[25] At section 14 of the Act, the legislature outlined the difference in approach between the family home and other types of property. The latter being the category within which I am persuaded the disputed property would appropriately fall, Section 14(1) reads:

“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), or, where the circumstances so warrant, take action under both paragraphs (a) and (b).”

[26] Subsections (2) and (3) which address the factors to be considered in the division of property acquired during the course of a marriage (other than the family home) state as follows:

“(2) The factors referred to in subsection (1) are –

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

(3) In subsection (2) (a), '**contribution**' means –

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof;

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse.”.

Subsection (4) states:

“(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution. (Emphasis supplied)

[27] Although a substantive portion of the affidavits provided by both parties to the action sought to address the purchase and construction of the property at Lot 21 Frontier, Phase 2, St. Mary, it was clear from the mediation agreement that this

matter had already been disposed of. In light of this fact, this Court is not required to provide a decision on the question of ownership of same. Before leaving this point however it was interesting to note, that although Mr Stewart insisted that it had been agreed that they were joint owners of Lot 21, Mrs Wilks-Stewart initially stated that he was 'misguided'¹. She subsequently stated that she had settled the matter at mediation to avoid the hassle of legal fees and stress and to move on with her life². These changing positions when viewed against the backdrop of an agreement did not paint a flattering picture of Mrs Wilks-Stewart's consistency and brought into question the reliability of her account in this matter.

Is the Applicant entitled to a declaration that she holds joint legal and beneficial interest in Lot 20 Frontier, Phase 2, St Mary? Should the Court award her 50% of the legal and beneficial interest in Lot 20, Frontier, Phase 2, St Mary?

[28] Although the issues were stated separately above, they are so intricately connected that I elected to address them together in my analysis. In order to determine if Mrs Wilks-Stewart is entitled to the declarations she seeks a detailed examination was conducted in respect of the evidence and other relevant documents in this matter. My review of the affidavits of Mr Stewart revealed that he was consistent in his assertion that he had been informed about the property by a third party after which he engaged the assistance of the Respondent in the purchase process. In her affidavits however³, Mrs Wilks-Stewart is adamant that she was the person who became aware that the property was for sale and made her enquiries in that regard before bringing it to Mr Stewart's attention.

[29] Although both parties made reference to other individuals in this regard, there was no independent evidence provided. In examining this issue, I considered it useful to examine the documents which had been provided by them in the related claim

¹ Applicant's affidavit filed 29th January 2020 para 25

² Applicant's affidavit of 12th November 2020 para 38

³ Applicant's affidavit filed on 29th of January 2020 para 11

which it was accepted made reference to both properties. In doing so, I noted that in the defence executed and filed by Mrs Wilks-Stewart, paragraph 6 outlined that in or about 2016 Mr Stewart informed her that he had discovered that Lot 20 Frontier Estate, was for sale and asked her to make enquiries on his behalf. She said she made the enquiries and confirmed that the land was for sale and Mr Stewart told her that he would purchase it. Not only is this position entirely different from what she swore to in the instant claim, it also lends cogent support to the account of Mr Stewart who has always maintained that this was the sequence of events.

[30] In respect of the acquisition of the property, although the question of contribution, financial or otherwise, is not a relevant consideration for the family home, it is accepted that this would be examined under Section 14. As such the evidence of Mrs Wilks-Stewart that she made payments to the NHT to assist Mr Stewart in qualifying for the loan as well as towards his mortgage would be sufficient to establish an interest in the property. Mr Stewart however strongly denies that any such contribution was made. In my examination of this assertion by Mrs Wilks-Stewart, I took careful note of the documentary evidence which was presented by her in support of this point. In her affidavit filed on the 29th of January 2020, she relied on documents which were exhibited as ASW-6 these were three receipts bearing dates in 2016 which showed payments of various sums to the NHT in Mr Stewart's name. It was her evidence⁴ that these receipts were proof of payments made personally by her in this regard.

[31] On a comparison of these assertions with her defence filed in the related matter, it was noted that paragraph 5 stated as follows;

'Furthermore, the Defendant will say that the Claimant informed the Defendant he had started to make National Housing Trust payment

⁴ Para 17

contribution as he intends to purchase a property in Jamaica. From time to time the Claimant would ask the Defendant to make payments on his behalf and he would refund the Defendant. Hereto exhibited and marked ASW-2 are some of the National Housing Trust contribution payments made by the Defendant on behalf of the Claimant.'

- [32]** Careful analysis of the contents of this paragraph revealed that this was yet another situation in which Mrs Wilks-Stewart gave contradictory accounts in respect of the disputed property. In the instant claim it is her evidence that she was the one who initiated the making of payments to NHT on behalf of Mr Stewart. She even insisted that she personally made several of these payments as her investment in the matrimonial property. It was not until her last affidavit that she conceded that Mr Stewart had previously been making payments to the NHT before her intervention but insisted that she had not been aware. The veracity of her utterances on this point in the instant claim is wholly undermined by her contradictory remarks in the related matter as well as in her later affidavit. I was left with a number of questions as to what was her exact position on this point. This was of some significance given the fact that as the person bringing the claim she was tasked with the responsibility of proving same.
- [33]** This situation was further compounded by the fact that an examination of ASW-2 (exhibited to the defence), which Mrs Wilks-Stewart described as receipts evidencing payments towards the acquisition of the property by her, also raised a number of questions. The receipts dated May 17th, 2016, December 12th, 2016 and February 2nd, 2016 were also exhibited by her in ASW-6 but in the defence she described them as evidence of payments which were made by her on behalf of Mr Stewart for which she had been refunded.
- [34]** While these were significant contradictions on the applicant's part they were not the only instances. In her evidence in chief as well as under cross examination, Mrs Wilks-Stewart insisted that she was speaking the truth about these payments.

She also gave evidence of having made a financial contribution in the bushing of the lot and the construction of its perimeter wall. A comparison of these assertions with paragraph 14 of her defence however tells a different story as there it was stated;

*'...the Western Union receipts presented by the Claimant is dated for the years 2014 and 2016 long after the Defendant completed the construction of her house. **The Defendant will also say the monies sent by the Claimant to the Defendant in the years 2014 and 2016 were to make payments on behalf of the Claimant to the NHT towards the Claimant's contributions. Monies were also sent to the Defendant in the year 2016 to pay workmen on behalf of the Claimant to construct a concrete perimeter wall around the Claimant's property at Lot 20, Frontier, Port Maria in the parish of St Mary. The Defendant will further say that the wall required large sums of money to construct.**' (Emphasis added)*

[35] It is my opinion that these contradictions lend critical support to the position of the Respondent that he made the payments for his contributions, some through the Applicant and others through his sister. The Applicants use of the term 'the Claimant's property' was also instructive especially in light of her assertion that it had been their intention that the land was purchased for their joint benefit and the construction of the family home. Additionally, while it may be argued that the term 'Claimant's property' was used to make a distinction, this could also have been achieved by stating the lot number only. As a result of the foregoing factors, I was left with questions as to whether the Applicant was indeed being motivated by malice to make the assertions that she did, the timing of which were subsequent to the mediation agreement.

[36] In examining the Applicant's claim, I gave careful consideration to the questions raised by Counsel in respect of the Respondent's credibility as a witness. One of the questions raised was his assertion as to the purpose for which the property was purchased given that it was never communicated to NHT that the property

was for commercial purposes and the restriction on use. Under cross examination on this issue, the following exchange took place;

Q: According to you, you were buying Lot 20 for the sole purpose of conducting business on that property

A: No sir, I was buying it to house my equipment to conduct my business.

Q: When you were buying the property from the NHT did you tell them you were intending to conduct business

A: No

Q: When you were taking the loan from NHT did you tell them it was to be used for your business

A: Absolutely not

[37] It is clear from the responses provided that contrary to Counsel's assertion, Mr Stewart's did not seek to mislead the NHT as to the purpose of the loan or the property. His evidence disclosed that the property was purchased not to conduct business there but to house his equipment. He was also clear that he did not tell the NHT when taking the loan that it was to be used for his business, I did not find this response to stand in contradiction to his other evidence as the housing of material/equipment on a property is not the same as conducting business there. This conclusion was supported by his other evidence on this point where he stated;

Q: You are aware that NHT does not give loans for commercial properties

A: I was not aware of that but I did not take the loan to buy a commercial property

Q: Did you look at the title

A: It's for residential sir

Q: There is a restrictive covenant that says no business should be conducted on it

A: I was not conducting business on it, it was to secure my investment that I shipped from overseas

- [38]** In respect of the questions raised as to payments by the Respondent's sister and the absence of receipts showing payment by her, the documents which were exhibited as ASW-6 in this action were examined. It was noted that although they bore the name of the Respondent as the person on whose account the payments were made as well as the address and sum paid, there was no other name on the documents to show by whom the payment was made. This was admitted by Mr Stewart who said documents he had bore no other name. I did not believe that the absence of the name in these circumstances had the effect of calling the Respondent's credibility into question as contended by the Applicant.
- [39]** This property was purchased approximately two years after the parties had gotten married and 1 year before they separated. Although the Applicant contended that it was purchased to construct the family home, the only construction which is acknowledged to have occurred there was a perimeter wall. The only other work that was done was the bushing of same. If the Applicant is to be believed as to the intention behind the power of attorney, the construction of a home as opposed to a wall would seem to be of paramount importance. The urgency behind such a construction would be greater if the Court was to accept that the Respondent never stayed at Lot 21 when he visited Jamaica, but remain in Kingston. I believe that by opting to construct the perimeter wall, Mr Stewart was acting in keeping with his assertions of securing his property as opposed to establishing a family residence.
- [40]** I also considered whether the execution of the power of attorney in the Applicant's name was sufficient to vest her with an interest in same. I believe that if it had been Mr Stewart's intention to own the property jointly with the Applicant, he would have authorised the purchase in both names as opposed to deliberately restricting her authority in this regard. I examined the Applicant's evidence that this decision was

taken as the inclusion of her name could void the benefit from NHT but no evidence was provided by her in support of this contention.

[41] Careful consideration was also given to the argument that the trips to the NHT, RGD and Tax Office in respect of the purchase were actions which could be considered as sufficient to meet this requirement. I was not persuaded that this was the only conclusion as they seemed equally consistent with the efforts of a partner or even friend to assist another who was out of the jurisdiction. In light of the foregoing findings, I was not satisfied that the Applicant had met the evidential burden for the declarations/orders sought. I believe that she had been fully aware that the property was being purchased by the Respondent for his benefit only and that she had been informed of the purpose of same hence her description of it. As such, she is not entitled to a declaration of entitlement in the disputed property and her request for an award of 50 % interest cannot stand. The application filed on the 8th of May 2019 is refused.