

CIVIL APPEAL NO. 1 of 1990

LILLIAN CAREY - Defendant/Appellant
and
MILDRED WILLIAMS - Plaintiff/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: Henry L. Browne and G. Hamilton for the appellant
Angella Innis for the Respondent

1990; Oct. 2,
1991; March 11.

ROBOTHAM, CJ.

- (1) That the appellant is not entitled to occupy the land or dwelling house thereon at Pond Pasture.
- (2) That the Letters of Administration granted to the appellant on 7th March, 1988 in the estate of the late Carl Carey be revoked forthwith.
- (3) That possession of the said land and dwelling house situated at Pond Pasture be delivered up to the plaintiff/respondent on or before 30th September, 1990.
- (4) That the claim of the plaintiff/respondent for rents and profits with respect to the said property be refused.
- (5) No order as to costs.

/The manner.....

The manner in which the pleadings were framed played a pivotal role in the decision of the trial Judge. Before setting out these pleadings, it is desirable that the facts should be given in some detail.

THE FACTS

The defendant/appellant Lillian Carey testified that she was the wife of the deceased Carl Carey, the marriage having taken place on 30th June, 1960. Prior to the marriage she bore a child for her husband by the name of Ruth.

Before marriage appellant lived with her mother Ruthan Browne, and after marriage they lived in rented property.

There were three children born in wedlock.

In 1970 at the suggestion of the appellant, a piece of land was acquired at Pond Pasture on which a house was built to accommodate the family. The cost of the land was \$700, and the title was issued in the name of the husband only.

At the time the appellant was not employed, but she sold cakes, sweets and clothing by the wayside. There was no direct evidence as to how the \$700 was paid, but there was evidence from the appellant that her husband worked as a longshoreman at Horsford & Co. The appellant further said that her mother sent her 2000 Guilders from Aruba, and thereafter a decision was taken to build the house.

Appellant said lumber came from Horsford & Co., I quote:-

"I knew because my husband brought the receipts, and gave them to me. A bag of cement was then \$2.50. The house was a wall house. I kept the receipts in a board box; these bills were paid by his funds and by my funds."

The extent of her financial contribution was not quantified. She further said her brother-in-law Albert Francis brought stones and sand to the site for the building of the house. There was no charge for this.

They moved into the house before it was completed and appellant said she saw to the completion of the house. There was no direct evidence as to the financial source for this exercise, but she did say her daughter Ruth "sent her money monthly" - again there was no quantification. Furniture was sent from Aruba by her mother, and later on a separate room was built on the same compound to accommodate her mother, who was allergic to electricity. This was done in 1977.

/In 1977.....

In 1980, she left St. Kitts for the United States of America. She said this was with her husband's consent. She did not return until 1986 when her husband was sick. She took him to New York in February 1987 but he died on October 21, 1987. She said her daughter and herself and friends paid the funeral expenses, as "I could not afford to bring him home to St. Kitts".

In December 1987 she paid the land tax to cover the period 1983-1987.

I now turn to the evidence of plaintiff/respondent Mildred Williams.

She said prior to the marriage of Carl Carey to the appellant, she bore him two children, one born 8th November 1954, and the other 7th October 1957. They were on friendly terms from 1953-1958. The relationship ceased when Carey got married in 1960. His wife went off to the United States in 1980, and in 1981, during her absence the relationship was resumed. This continued until shortly before his death, and they were actually living together when he became ill and had to be hospitalized in St. Kitts and before he was taken up to U.S.A.

In 1984, whilst his wife was away Carl Carey made a will in which he named the plaintiff/respondent Mildred Williams as his sole beneficiary under the will. This will was prepared by Frederick Kelsick an Attorney-at-Law, now deceased, and the validity of this will is not disputed.

This will was given unprobated to the plaintiff in or about October 1989 by Mr. Kelsick's partner. In the interim however, whilst both plaintiff and defendant were ignorant of the existence of this will, the defendant Lillian Carey applied for and obtained on 7th March, 1989, a grant of Letters of Administration recorded at Liber Wills Volume O, Folio 472.

On 20th December 1988 (not 21st December, 1989 as stated in the Statement of Claim) a citation to propound the Letters of Administration was approved with leave to serve it on the appellant outside the jurisdiction.

THE PLEADINGS

In the Statement of Claim after reciting a summary of facts outlined above, the plaintiff claimed:-

/ (1) A declaration.....

- (1) A declaration that the defendant is not entitled to occupy the plaintiff's land or dwelling house thereon.
- (2) An order that the Letters of Administration obtained by the defendant be revoked.
- (3) Possession of the said land and dwelling house at Pond Pasture.
- (4) All rents and profits in respect of the property from the death of Carl Carey.
- (5) Damages.
- (6) Costs.
- (7) Further and or other relief as the Court sees fit.

The relevant portions of the defence in essence are as follows:-

1. The defendant was at all material times the lawful wife of Carl Carey and says that the land house referred to in paragraph one (1) of the Indorsement of Claim was owned by her and the said Carl Carey as joint tenants during their joint lives. The defendant says further that during their joint lives it was agreed between them that upon the death of both the said house and land would pass to their children in equal shares.
2. The defendant ~~says~~ ~~that~~ in light of paragraph one (1) hereof the said Carl Carey had no interest in the said property which could be devised by Will.
.....
.....
9. Unless specifically admitted the defendant denies each and every allegation contained in the Indorsement of Claim as if each were specifically set forth and traversed seriatim.

It will be seen that the main plank of the defence was that Carl Carey and the defendant Lillian Carey held a legal interest in the land as joint tenants. There was no pleading that the house and land had been acquired by them as a joint enterprise, to which each had contributed, and that as such the defendant was entitled to a beneficial interest therein.

/The legal.....

The legal effect of having ~~pleaded~~ simpliciter that it was agreed between them that upon the death of both the house and land would pass to their children in equal shares is very dubious. A joint tenancy is a legal interest in land and normally upon the death of one joint tenant the survivor takes the whole.

Furthermore in a joint tenancy, there are four unities namely possession, interest, time, and title. Each joint tenant must claim his title to the land under the same document, and the clear evidence in this case is that the registered title was issued in the name of Carl Carey only.

Much argument and judicial time was taken up in the trial of the case and the hearing of this appeal. One point raised by Counsel for the appellant was that no reply was filed to the defence, that the property was held under a joint tenancy, and therefore the defence was deemed to have been admitted. This is a fallacious argument as Order 18, rule 14 of the Supreme Court rules clearly states that if there is no reply to a defence, there is an implied joinder of issue on that defence.

THE APPEAL

It is not out of disrespect that I do not propose to dwell at any length on the arguments advanced or authorities cited by Counsel before us. It is clear that the issues before the trial Judge centered around the fact that

- (1) That appellant was saying she owned the land jointly with Carl Carey for their joint lives, and
- (2) That Carl Carey had no interest in the property which he could devise by Will to the plaintiff.

I will restate here that paragraph 1 of the defence stated in no uncertain terms that the appellant and Carl Carey owned the land as joint tenants. There was no claim in equity for any beneficial interest in the matrimonial home.

During the course of the trial, the Judge repeatedly drew to the attention of Counsel for the defendant that the evidence being led by him was not in accordance with his pleadings. I quote one exchange:

"BY THE.....

"BY THE COURT"

Dr. Browne you have repeatedly told me that the evidence you are leading with respect to the wife's contribution is not being put forward to show that she made a substantial contribution to the purchase of the property but to show the intention of the parties. Bearing in mind the nature of your pleadings I am somewhat at a loss to determine exactly what is the purpose of this evidence. You have not pleaded that the husband held the property on trust with respect to the wife's interest so what are you really getting at. What is the principle of law on which you are relying. I have some difficulty seeing joint tenancy on the basis of the evidence being led.

DR. BROWNE:

The common intention to which I rely is the common intention between the husband and wife to build a family home for their children.

I am not relying exclusively on trust because already there is a rebuttable presumption that there is a constructive trust between the parties. In the normal course of things the court might with some ease declare the position between husband and wife to be one of half and half.

Halsbury's Third Edition Volume 19, n. 841, paragraph 1372.

BY THE COURT:

I am still not clear in my mind that the evidence you are leading in part accords with your pleadings. I am allowing this line of questioning in the hope that at the end I might see where it is leading to. I am being over liberal but I have grave doubts about it."

There was no application to amend.

The object of pleadings is to define the issues on which the parties are seeking the final decision of the Court. They are intended to ~~narrow~~ the issues or reveal more clearly what case each party is making.

Bullen & Leake and Jacobs Precedents of Pleadings - 12th edition in Chapter 1, page 17 puts the matter thus:

"The respective case of the parties can only be considered in the light of and on the basis of the pleadings, which acts as fetters upon them, binding them and circumscribing them closely and strictly to their own cases as pleaded, subject only to the form of amendment to free them from such fetters, so as to put forward the real questions in controversy between the parties....."

In Atkins Court Forms (2nd edition) 1985, line 32 - page 7, paragraph 4 - Importance of Pleadings - it is stated:-

/"A plaintiff.....

"A plaintiff may not therefore radically or at all depart from his pleaded case. Equally the Court is bound by the pleadings and may not decide the case on an issue or question which has not been pleaded, and indeed the failure to raise an issue in the pleading may prevent it being raised on appeal....."

Before this Court Counsel for the appellant submitted:-

"We concede title was in Carey's name but because of the nature of the ownership, it was fixed with a trust rendering him a constructive trustee. Mrs. Carey would not have done all she did if her husband could will away the property on his own."

This was not the appellant's case on the pleadings. The pleading in paragraph 1 of the defence was that the house and land "was owned by her (Mrs. Carey) and the said Carl Carey as joint tenants during their life".

The trial Judge recognized the nature of the pleading and drew it to the attention of Counsel that he was departing therefrom but there was no application for an amendment.

There was in my view no evidence to support the pleadings and the Judge was not empowered to decide the case outside the ambit of the pleadings.

There was no counterclaim by the defendant Lillian Carey for the monies expended by her on the property after husband's death. However I support his finding that she should not be called upon to account for any rents and profits since the death of her husband.

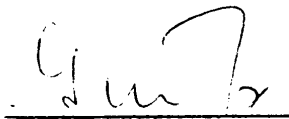
I would also confirm the declaration that the Letters of Administration obtained by the defendant on 7th March, 1988 be revoked forthwith.

I would revoke the order for possession on or before 30th September, 1990, and make no order as to costs here and in the Court below.



L.L. ROBOTHAM,
Chief Justice

/G.C.P.....

A handwritten signature in dark ink, appearing to be 'G.C.R. MOE', written over a horizontal line.

G.C.R. MOE,
Justice of Appeal

A handwritten signature in dark ink, appearing to be 'C.M.D. BYRON', written over a horizontal line.

C.M.D. BYRON,
Justice of Appeal (Acting)