

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2021/0269

BETWEEN:

LESHAWN DEY-KENNEDY

Claimant

and

GAIRY KENNEDY

Defendant

Appearances:

Ms. Wattisa Rose for the Claimant

Ms. Natalia Bevans for the Defendant

2023: February 8th
March 22nd

DECISION

[1] **Byer, J.:** This application filed by the Claimant was quite simple. The Claimant by her Fixed Date Claim Form filed on 28th June 2021 sought the following relief:

- (1) An order declaring that the property recorded and registered in the Land Registry as follows: **Registration Section: West Central; Block: 11 2191B; Parcel: 126** registered in the sole name of the Defendant is held by the Claimant and the Defendant as tenants in common in equal shares.
- (2) A declaration that the Defendant holds the property on trust for the Claimant.

- (3) A declaration that the Claimant is entitled to an equitable and legal interest of 50% of the property to be determined by valuation.
- (4) A declaration that the Claimant is entitled to half of the proceeds of sale of the motor vehicle particularly described as ***Mitsubishi IO Jeep 1999 with License Plate No. A28205*** at its reputable market value.
- (5) An order that the Defendant pays the Claimant 50% value of the motor vehicle at its reputable market value.
- (6) Alternatively, an order that the property be sold on the open market at the reputable market value with the proceeds of sale, less the expenses and any outstanding loans be divided equally between the Claimant and the Defendant, or in shares as this Honorable Court deems fit.
- (7) That the Registrar of the High court be empowered to sign all necessary documents for the completion of the sale of the property in the event of incapacity, neglect or willful refusal of either party to sign any such document.
- (8) In the alternative an Order that the Defendant pays the Claimant's 50% value of the said property.
- (9) Interest pursuant to Statute.
- (10) Costs.

- [2] The claim was supported by an affidavit of the Claimant filed on the 28th June 2021 and a witness statement filed on the 30th March 2022.
- [3] In response, the Defendant filed a defence and an Affidavit in support of the defence on the 11th August 2021. However, the Defendant failed to file his witness statement on time and by order of the court dated the 10th June 2022, Robertson J ordered that the Defendant was not permitted to place evidence before the court but was permitted to cross examine the Claimant on her evidence.
- [4] The trial of the matter came on for hearing on the 8th February 2023 with the Claimant therefore being the only person who provided evidence to the court.

- [5] From the evidence and the pleadings it is apparent that there are two issues which must detain this court in this regard:
- i) Whether the Claimant has an interest or share in the property located at **Registration Section: West Central; Block: 11 2191B; Parcel: 126** ("Parcel 126"); and
 - ii) Whether the Claimant has any additional interest in motor vehicle **Mitsubishi IO Jeep 1999 with License Plate No. A28205** ("the jeep").
- [6] That being said, having heard the evidence, seen the Claimant on cross-examination and having read the pleadings, this court accepts the following facts as having been established on a balance of probabilities:
- a) That the Parties met at some time prior to 1997 before the Defendant migrated to Antigua from Guyana, leaving the Claimant in Guyana with her young child.
 - b) In 1999 the Claimant and her infant daughter travelled to Antigua to reunite with the Defendant and they lived together at the home of the Defendant's sister for a period of time.
 - c) In February 2005 the Claimant and the Defendant got married.
 - d) Between 1999 and 2005 when the Parties got married both the Claimant and the Defendant were gainfully employed although the Claimant's employment did not commence until 2001.
 - e) That previous to the marriage, during 2004, the Parties pooled their resources and bought a Parcel of land described in the Land Registry as **Registration Section: South Central; Block: 15 2186D; Parcel: 18** ("Parcel 18")¹
 - f) That Parcel 18 was never registered in the names of the Parties. Parcel 18 was sold during 2004 and Parcel 126 was later acquired in early 2005 before the marriage of the Parties and registered in the sole name of the Defendant.
 - g) That both the Claimant and the Defendant shared in the expenses of the household and that the Claimant contributed to both the acquisition

¹ Executed and undated land transfer form at page 3-4 of the Core Trial Bundle filed on 12/1/2023.

of Parcel 126 and to the construction that commenced on Parcel 126 that was abandoned by both Parties in 2008.

- h) That at the time that Parcel 126 was acquired in early 2005, neither of the Parties were citizens of Antigua and neither of them had obtained a non-citizen license to hold the land.
- i) That the Defendant became a citizen in 2005 and during the currency of the marriage and while the house was under construction, the Defendant obtained the land certificate in his sole name.
- j) The marriage broke down in 2012 with the house incomplete. Thereafter the Defendant became the sole person to assume financial responsibility for the completion of the house and has done so by way of a loan agreement in his sole name.
- k) That the Defendant at the breakdown of the marriage took custody of the jeep as the Claimant did not and still does not drive and sold the same in or about 2020/2021. That upon sale the Claimant was paid 50% of the purchase price as reported as having been received.

[7] Before I however delve into the merits of the Claimant's case on the two issues to be determined, I wish to deal shortly with two issues that were raised by the counsel for the Defendant, what may be termed as preliminary issues, that were never raised before and therefore to which the Claimant would not have had an opportunity to respond to as would have been her right.

[8] Be that as it may, the Defendant has indicated firstly that the Claimant is time barred from bringing this suit as it is in contravention of Rule 44 of the **Matrimonial Causes Rules No.1113 of 1937**. Counsel submitted that whereas the provisions of Rule 44, made it clear that any proceedings for a declaration of interest in property or other assets had to have been brought within one month of the final decree, the fact that this claim was filed some one year and ten months after the final dissolution of the marriage, meant that the Claimant was barred from prosecuting the claim as a result.

[9] In response to this submission it is necessary to have sight of the wording of Rule 44. Rule 44 states as follows: *"An application for maintenance, secured provision,*

*variation of marriage settlements, or settlement of wife's property, **in the case of proceedings for divorce** may be made by the petitioner at anytime after the time for entering an appearance to the petition has expired and by the respondents spouse at any time after entering an appearance to the petition, but no application shall be made later than one month after final decree except by leave of the judge."*

(my emphasis added)

- [10] From the terms of the provision, two things are therefore clear, firstly the failure to file after a period of one month is not an absolute bar given the fact that there is an express ability to obtain leave of the court to proceed with any application out of time and secondly and more importantly, these present proceedings are not divorce proceedings in the context of the Rule which states that it applies in the case of "*proceedings for divorce*."
- [11] Under the **Divorce Act No. 10 of 1997** of Antigua and Barbuda the only substantive Act to which the Matrimonial Rules could support, there is no provision for property settlement subsequent to the obtaining of a divorce, as such the instant proceedings are in fact civil proceedings which refer tangentially to the divorce but are not grounded in the same. Rather as is clear from the title of the proceedings, the instant application is made pursuant to the provisions of the **Married Woman's Property Act Cap 267** ("the MWPA"). The preliminary issue in relation to the Claimant being time barred under the provisions of the Matrimonial Causes Rules 1937 therefore has no merit before this court and is dismissed.
- [12] The second preliminary issue raised by counsel for the Defendant, seeks to impugn the ability of the Claimant to bring this claim as she no longer is included in the definition of a "wife" as stated under section 19 of the MWPA. By the submissions of counsel for the Defendant, the argument is made that the Claimant had no locus standi to bring this application since section 19 speaks to the resolution of issues as they arise between Parties who are termed as "husband" or "wife", and that at the time of the filing of the application the Claimant was no longer a "wife" as the final decree of divorce had already been issued.
- [13] Section 19 of the MWPA states as follows:

“In any question between husband and wife as to the title to or possession of property, either party, or any and wife as to such bank, corporation, company, public body, or society property to be decided in a as aforesaid, in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any Judge; and such Judge may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit:

Provided that any order of a Judge made under this section shall be subject to appeal in the same way as an order made by a single Judge in a suit:

Provided, also, that the Judge, if either party so require, may hear any such application in his private room:

Provided, also that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application, for the purposes of costs or otherwise be treated as a stake holder only.”

- [14] The court agrees that the clear language of the section does speak to persons who bear the reference as husband and wife. However, unlike the provision quoted by counsel for the Defendant purportedly from the **Married Woman's Property Act Cap 239** of Jamaica which was is in fact from section 11 of the **Property (Rights of Spouses) Act No. 4 of 2004** of Jamaica, that piece of legislation specifically makes the clear provision that applications in relation to property settlement are to be made during the subsistence of the marriage. The MWPA does not include any such wording and in this court's mind to so read into the MWPA any similar provision would be usurping the sole province of the legislature which is certainly not open to the court to do. In any event, this court is satisfied that there cannot be any such interpretation of the section relied upon by the Defendant. In this court's, mind and in considering all of the legislative content the court is satisfied that not only is there no time bar in which to file the application under the MWPA but additionally that there is no requirement for the Parties to be still married at the time of filing. Rather

in this court's mind the references and use of the titles, "husband" and "wife" in section 19 is simply meant to limit the individuals who can make the application before the court, which is Parties to a marriage subsisting or not at the time of filing. This court is fortified in this view when it considers a decision emanating out of the jurisdiction of St Christopher and Nevis where my sister Williams J in the case of **Carlisle Everton Powell v Emma Frances Powell** ² dealt with an application under the very same provisions of our MWPA as contained in the **Married Woman's Property Act of St Christopher and Nevis Cap 12.11**. In that matter it was clear from the fact pattern that the marriage was dissolved in 2016 while the application was filed in 2017. This was not seen as a bar and although the court was not asked to consider this point in that case, this court is satisfied that it was not considered a bar therein and I so hold here as well. I therefore do not accept that the fact that the Parties are no longer married is a bar to the application in its present form and the preliminary objection raised is also dismissed.

- [15] Having therefore dealt with those preliminary matters this court must now consider whether the Claimant has made out her case at all and if so to what extent.
- [16] In that regard this court will deal with the second issue first, that is whether the Claimant has any further claim to the jeep as claimed.

Does the Claimant have any additional interest in motor vehicle Mitsubishi IO Jeep 1999 license number A28205 ("the jeep")

- [17] In the claim of the Claimant, she sought a 50% share in the value of the jeep on its "reputable market value" and that the Defendant be ordered to pay her that share as valued.
- [18] In examination in chief the Claimant had this to say about the claim as stated above:
- (1) After our divorce in August of 2019, the Defendant contacted me about his intentions to sell our vehicle. Conversely, I never heard from the Defendant

² NEVHMT2015/0032

again in regard to the said sale until December of 2019, when he handed me \$700.00 as half proceeds of the sale representing my half interest in the said personal property.

(2) The Defendant provided me with no evidence of sale and failed to consult me and involve me prior to the alleged sale of the vehicle. In fact, the Defendant indicated to me that he received a total of \$1400.00 for the alleged sale.

(3) I am also requesting that the Defendant pays me my 50% interest in the motor vehicle at its reputable market value.

[19] On cross examination the Claimant admitted the following 1) that she had received \$700.00 from the Defendant who had informed her that the vehicle had been sold for \$1400.00; 2) she knew that the vehicle had been sold for parts after she accepted the sum as paid by the Defendant; 3) that the vehicle was 20 years old when it was sold in 2019 and 4) that she had not made any contribution to repairs or other wise to the vehicle between the period of 2012 (when she left) and 2019 (when it was sold) .

[20] The sole basis of this claim therefore in this court's mind, stemmed from the fact that the vehicle was acquired during the term of the marriage and that it can be considered a matrimonial asset.

[21] Bearing that in mind, this court accepts that indeed this asset at the time of acquisition became a matrimonial asset which was disposed of after the marriage came to an end and the Claimant was reimbursed for her 50% share of what the Defendant stated he received for that asset. The onus is on the Claimant to show that the monies she received were not in fact in keeping with what the Defendant had in reality sold the jeep for and in this court's mind she has not led a scintilla of evidence to cast doubt on the transaction.

[22] This court therefore finds that the Claimant has already been paid her 50% share of the asset upon its disposition by the Defendant and I therefore dismiss her claim for any further relief in relation to the jeep.

Does the Claimant have an interest or share in the property located at Registration section: West Central; Block: 11 2191B; Parcel: 126 (Parcel 126)

- [23] In order for this court to make this determination it must consider the conduct of these Parties as they ordered their affairs to determine what may amount to the fair distribution of Parcel 126 to which the Claimant lays claim.
- [24] In the case of **Abbott v Abbott**³, the court made it clear that there are two questions which must be addressed, *“first was it intended that the Parties should share the beneficial interest in a property conveyed to one of them and second if it was so intended, in what proportions was it intended that they share the beneficial interest?”* As this is understood, and as it was succinctly elucidated in the case of **Jones v Kernott**⁴ that in order to answer these questions the *“search is to ascertain the Parties shared intentions, actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it.”*
- [25] This marriage lasted from 2005 to 2012 but it was clear that the Parties were in an intimate relationship from as early as 1997 when the Defendant migrated from Guyana. Therefore, the relationship between these Parties lasted some 15 years, not a period that can be considered brief by any stretch of the imagination.
- [26] In that period this court accepts that these Parties worked as a team, it was therefore very disingenuous of counsel for the Defendant to suggest in cross examination of the Claimant that the Defendant was the sole breadwinner or the only one who was working during the currency of the subsistence of the marriage and at the time of the acquisition of Parcel 126.
- [27] As this court has already determined both the Claimant and the Defendant were instrumental in the acquisition of this land, indeed even though this court does accept the contention of the Defendant that the documentary evidence that is before it does not support any quantum of a direct financial contribution of the Claimant, this court accepts and accepts so wholeheartedly that the Claimant was in this

³ [2007] UKPC 53 at paragraph 4 per Baroness Hale of Richmond

⁴ [2012] 1 AC 776 at paragraph 60

relationship with the Defendant and that ‘tec/tec’⁵ they built a life including acquiring the said Parcel 126.

[28] However the evidence does show the following ; a) that the vendor Ms Lucinda Cadet in 2005 signed a transfer of land document to both the Claimant and the Defendant, b) that the attorney at law who the Defendant in his pleadings admitted was the person to whom payments were made, wrote on the behalf of both the Claimant and the Defendant for planning permission⁶ c) that planning permission was in fact granted to both the Claimant and the Defendant⁷ and d) that utilities were applied for to Antigua Public Utilities in the names of the Claimant and the Defendant.⁸ It was therefore clear to this court that the manner in which the Defendant and the Claimant ordered their affairs, even without there being any evidence of their having merged their finances, that it all evidenced an intention that the land and the development of the same was not intended to be the Defendant’s wholly, with no reference to the Claimant. It is this evidence without doing a mathematical calculation as to who spent what, that satisfies this court that there was a common intention that they should both share the beneficial interest in the property.⁹

[29] Whether the Defendant intended that the Claimant would be able to claim an interest in what he states as property bought by his savings¹⁰ it is clear to the court that the fact that Parties buy a Parcel of land, get married, commence building a home on that said lot of land all show a clear intention that they should each have a share in the property. However, the contention made on behalf of the Claimant that she should be entitled to a half share in the property in this court’s mind is not made out and in fact, as was identified in the case of **Izola Willett v John Willet**¹¹ the principle of equality is merely a means by which the courts have dealt with matters where there was no ability on the breakdown of a marriage to produce precise evidence

⁵ Grenadian colloquialism meaning that they did so together as a team – no one was doing more than the other.

⁶ Letter dated the 26th April 2005 at page 7 of the core trial bundle filed 12/1/2023.

⁷ Page 20 of the core trial bundle filed 12/1/2023.

⁸ Pages 12,13,14, 15, 16 of the core trial bundle 12/1/2023

⁹ Supra **Lloyds Bank plc**

¹⁰ Paragraph 8 of the Affidavit in support of the defence filed on the 11/8/2021.

¹¹ ANUHCv2000/0254 at paragraph 25 per Joseph -Olivetti J

as to the extent of the contribution made by each individual to the “joint” acquisition of the property in dispute.

- [30] As this court has stated, the documentary evidence of the Claimant leaves a lot to be desired however even the Defendant had to admit that there was some contribution to the building materials. With that and the finding of this court that the Claimant also contributed to the acquisition of Parcel 126 and that the court has found that there was a common intention to share the property, I therefore find that after a 15-year relationship the Claimant is entitled to a 40% interest in Parcel 126 as of the date when the construction came to a halt in 2008.
- [31] In addressing its mind to that value, the valuation prepared by Addison Workman Engineers¹² is the only document that was presented to the court to support what that value may have been at that time.
- [32] However in looking at what was stated therein, Mr. Workman although not stating it as such, seemed to have valued what was on the ground at \$105, 012.50.¹³ It would therefore appear that from a strict mathematical calculation, having found that the Claimant was entitled to a 40% share of the value at that time, that equates to \$42,005.00.
- [33] The court was however not presented with any information as to the present finances of the Defendant or the state of any mortgage that may exist over the property as he was unable to present any evidence before the court. In that regard the court is therefore hamstrung as to the nature of the order that could be made with regard to the payment to the Claimant and as such, I simply order that the Defendant is to pay the Claimant that sum representing her 40% value.
- [34] For the purpose of completeness I also wish to address the issue that was raised in cross examination and again in submissions by the counsel for the Defendant that the fact that the Claimant did not have a non- citizen license was clear evidence that there was never any intention to have the Claimant hold the land with the Defendant

¹² Page 29 of the Core trial bundle filed 12/1/2023.

¹³ Excerpt from the valuation *ibid*: “Our measurements indicated that 921 sq ft of livable space had been created along with 139 sq ft of patio space. Applying today’s rates, we estimate that the construction cost should be in the region of EC\$210,025.00 and since the building is about 50% complete a sum of EC\$105,000.00 should be required to complete it.”

and that there was no agreement to do so. Although this court has already found that the Claimant is entitled to an interest and has quantified that interest, I believe that it is necessary to indicate the court's specific position as it relates to the holding of land where there is no license to hold it as provided by the law. From a reading of the **Non-Citizen Land Holding Regulation Act Cap 293**, the provisions therein are almost identical to the provisions that were considered by the Privy Council in **Young and Anr v Bess**¹⁴ in which the court clearly stated that where there is no license to hold the land, the title of the landholder is only voidable until there is action taken by the Crown to enforce forfeiture and not void ab initio. In this court's mind it therefore is clear that the failure of the Claimant to obtain a non-citizen license before her grant of citizenship could not prohibit the Claimant and the Defendant from obtaining the land by purchase and having the land registered in the name of the Claimant and the Defendant. Indeed, all that would have occurred is that the title would have been "potentially defective"¹⁵. It is therefore in this vein that the court did not consider that this could operate as evidential assistance in the determination of the question before the court as to the intention of the Parties.

The order of the court is therefore as follows:

1. The Claimant is entitled to a 40% interest in the property located at **Registration Section: West Central; Block: 11 2191B; Parcel: 126**.
2. The said 40% is to be paid on the basis of the valuation dated 25th September 2008 by Addison Workman Engineers
3. The claim for the declaration in relation to the Motor vehicle Registration number A28205 is dismissed.
4. The Claimant having been partially successful on the claim was filed; I award her 75% her costs to be assessed if not agreed within 21 days of today's date.

¹⁴ (1995) 46 WIR 165

¹⁵ **Sharon Simmons Registrar of Lands v Novan Francis and Keisha Francis ANUHCv2020/0037** at paragraph 6 per Kelsick J (Ag)

Nicola Byer
High Court Judge

By the Court

Registrar