IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(DIVORCE)

GRENADA

SUIT NO.GDAHMT2016/0041

BETWEEN:

KATHERINE KAY LUPKE

Petitioner

and

HANS RICHARD LUPKE

Respondent

Appearances:
Ms. Marion Suite for the Petitioner
Mr. Nazim Burke for the Respondent

2022: June 30
August 18

RULING

[1] **ACTIE, J.**: The parties marriage solemnized on 29th June 1985, was dissolved by a decree absolute on 10th August 2016. On 18th December 2016, the petitioner filed ancillary relief proceedings and the parties arrived at an amicable settlement at mediation. The mediation agreement was made an order of the court on 26th November 2021.

[2] Clause (1) of the order provides that the petitioner shall pay to the respondent the sum of USD Three Hundred and Fifty Thousand (USD$350,000.00) on or before

31st March 2022, in full settlement of all claims he may have in respect of the dissolution of the marriage.

[3] Clause 2 of the order reads “the petitioner shall retain the matrimonial home situate at Lauriston in the Island of Carriacou in the state of Grenada together with its contents for her sole use and benefit and the respondent shall relinquish full interest in same to the petitioner. The respondent hereby agrees to execute the requisite documents to give effect to the intent and purpose of this provision. Should the respondent fail or refuse to execute the said documents upon receipt of the sum mentioned in paragraph 1 of this order, The Registrar of the Supreme Court shall be at liberty and is hereby authorized and directed to do so”.

[4] The petitioner by notice application filed on 31st March 2022, (i.e., the date due for the payment) seeks an order of the court to vary the terms of the order of 26th November 2021. The petitioner’s application seeks the following orders (i) make a part payment sum of USD $175,000.00 on the agreed date of 31st March 2022 and for the remaining balance of USD $175,000.00 to be paid by annual payments of not less than (USD $35,000.00) by the 31st March in each calendar year commencing on the 31st March 2023 and continuing for each year until the 31st day of March 2027 provided there remains a balance;(ii) The unpaid balance of the outstanding sum of USD 175,000.00 shall attract an interest rate of four point five percent (4.5%) interest per annum until payment in full or otherwise ordered by the court: (iii) The petitioner is at liberty to make payments on such days earlier than herein stated and in such additional amounts so as to reduce both the balance and the interest amount payable; (iv) That the respondent shall have a legal interest in the former matrimonial house limited to the amount outstanding only at any specific time:.(v) That in the event the applicant fails to make the payments promptly as set out in the application the applicant be allowed an extension of thirty (30) days to make any payment due failing which the matrimonial property situate at Lauriston shall be immediately listed for sale: (vi) In the event of a listing for sale of the said property and in the event of a successful sale the respondent shall be entitled to full

payment of any capital sum outstanding together with accrued interest at the date of closing of the sale only after payment of all the expenses relating to the said sale;(vii) That in any event that a sale does not yield sufficient funds to extinguish the sum outstanding, any remaining sum owed to the respondent pursuant to the order dated 26th November 2021 and this order herein the outstanding sum and related accrued interest shall be extinguished, there being no further matrimonial asset on which a lien may be placed.

[5] The respondent, Hans Richard Luke, opposes the application and on 20th April 2022 filed an application to enforce the 26th November 2021 order. The respondent also sought consequential orders in the following terms: (i) That the petitioner shall pay the respondent the agreed sum of USD $350,000.00 on or before 31st May 2022, together with interest on the said sum computed from the 31st March 2022 to date of payment at the rate of six percent (6%) per annum;(ii) Should the petitioner fail or refuse to comply then she is to convey her interest in the matrimonial home to the respondent on or before 7th June 2022 upon payment the sum of USD $350,000.00 less interests at 6 % from 31st March 2022 to 7th June 2022; (iii) 50% of all monies payable to the petitioner between 31st March 2022 to 7th June 2022 by way of rents fees and related charges from lodgers including Airbnb short term tenants; (iv) All other terms in the order dated 26th November 2021 shall remain in effect.

Law and Analysis

[6] A consent order derives its authority from the contract made between the parties. The court under its inherent jurisdiction retains the power to grant an order for extension of time even though the parties had previously agreed the terms. The court must be very careful in exercising a discretion to vary the terms of an order which represents a contract[1].

[1] Weston v Dayman [2006] EWCA Civ 1165.

[7] In **S. S.(Ancillary Relief): Consent Order (2002) EWHC223 (Fam.1)** Bracewell J. said:

> "The authorities demonstrate that the grounds for setting aside or varying a consent order fall into two categories: They are: (1) cases in which there was, at the date of the order an erroneous basis of fact and (2) cases in which there has been a material or unforeseen changes in circumstances after the order so as to undermine or invalidate the basis of the order".

[8] 'Neuberger J in **Ropac Ltd V Inntrepreneur Pub Co And Another** [2] said:

> "Where the parties have agreed in clear terms on a certain course, then, while that does not take away its power to extend time, the court should, when considering an application to extend time, place very great weight on what the parties have agreed and should be slow, save in unusual circumstances, to depart from what the parties have agreed."

[9] The court in **Purcell v F C Trigell Ltd.**[3] states that the court's power in matrimonial proceedings to vary the terms of a consent order on the basis that there had been a material or unforeseen change in the circumstances after the order was made might be extended to consent orders generally.

[10] The petitioner's in her affidavit in support of the application states that she had every good intention of complying with the consent order within the time set therein. However, since the mediation, there has been a significant change in circumstances. She states that her compliance with order depended on the generosity of third parties who were sympathetic to her position and promised in advance to provide the sum required. She further states that she decided to lean on the generosity of friends even though she knew it was risky but was under so much emotional distress and wanted a clean break that she agreed with the terms and the stringent time frame set out in the consent order.

[11] The petitioner in her affidavit further stated:

> "My friend who made a commitment to assist me had to first give notice to her investment bankers for the release of funds and the expected date of delivery to my attorney at law was the second week of February 2022. As

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[2] [2001] [2000] PLSCS 136.
[3] [1971] 1 QB 359.

> funds were being released, my friend had a medical emergency which caused her to rely on some of the funds and withdrew her commitment. She turned to another friend who on Sunday 13th May 2022 withdrew her offer citing fear of the possibility of World War 111. Her next resources was a grass roots combination of family and other close friends of lesser earnings. The sum of USD $175,000.00 was raised through bank loans and is currently negotiating certain commitments to raise the $35,000.00 per annum over the next five (5) years".

[12] The applicant in this case is not only seeking to vary the timeline to pay the agreed sum but is seeking to significantly alter the terms of the mediation order which has since crystallized into an order of the court. The applicant agreed to pay the total sum by 30th March 2022 but is now seeking an extension of time to make part payments over a period of five (5) years. The proposed method of payment of the balance is still speculative as she is presently negotiating the means to pay the proposed annual sum.

[13] The court will set aside or vary the terms of an order on the basis that new events have occurred since the making of the order which invalidate the basis on which it was made or where there is substantial injustice. The petitioner's application for the variation of the terms of the order is based on promises made by friends. This is not a justifiable reason to keep the respondent out of the proceeds in an ancillary relief claim filed by the said petitioner since 2016. The petitioner's request that partial payment be made to the respondent for a period of five years cannot be sanctioned by the court. The petitioner ought to have known that she did not have the means to pay the said sum when she arrived at the consent order. There is no indication in the consent order that the payment of the agreed sum of USD $350,000.00 was conditional upon the generosity of friends and family, The petitioner was in breach of her duty of candour by failing to reveal relevant circumstances under which the consent order was made.

[14] The court may extend consent orders generally but only in exceptional circumstances where new or supervening unforeseen circumstances could permit the court to reopen ancillary relief orders even if those orders had been reached by

consent. In the court's view there are no new events to justify the variation of the order to the extent of the petitioner's application. There is a public policy in all litigation, but especially in family law litigation, about finality, conclusion and certainty. The application for ancillary relief was filed by the petitioner since 2016 and in 2021 gave her undertaking to pay the agreed sum by 31st March 2022.

[15] In exercising its power on variation application, the court must have regard to all the circumstances. As indicated above, the law wants finality and a clean break in matrimonial matters. The petitioner cannot be allowed to take back and change an order for payment which should have occurred within a relatively short time to now extend it in excess of five years for no justifiable reason.

[16] I wish to adopt the statement of Wooding CJ in **Baptiste V Supersad**[4] where he said:

> "The jurisdiction of the court is to do justice. Law is not a game, nor is the court an arena. It is the function and duty of a judge to see that justice is done as far as may be according to the merits".

[17] The petitioner's circumstances and the application have demonstrated that the order justifies a review and the varying of the order in favour of the respondent. The respondent has indicated his willingness to pay the petitioner the sum of USD $350,000.00 if she is unable to pay the agreed purchase price in order to bring finality to this long outstanding issue.

Conclusion

[18] The court is of the view that the petitioner has failed to provide any sufficient reason to vary the consent order which has since crystalized into an order of the court. The grounds upon which the petitioner relies to vary the order are totally unfair to the respondent. Also, the proposed terms imposed on the respondent for the protracted payment in excess of five years is onerous and irrational in the circumstances. To request that the respondent be paid the remaining balance over a period of five

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[4] (1967) 12 WIR 104 at 144.

years in an application for ancillary relief filed by the petitioner since 2016 is illogical and disadvantageous to the respondent especially having regard to the agreement to pay the full sum by 31st March 2022.

[19] There must be finality in litigation and a clean break in matrimonial proceedings. The court takes into consideration that the petitioner's application was filed on the 31st March 2022, on the date due for the payment, and also the respondent's application for the petitioner's payment of the sum by 7th June 2022, and will accordingly vary the order to grant an extension to allow the petitioner to pay the total sum of USD 350,000.00. The respondent has indicated his willingness and ability to pay the petitioner the said sum should she be unable to pay the sum by the date ordered. In the circumstances, the court will vary the order to give effect to the respondent's application should there be a default on the part of the petitioner.

ORDER

[20] In summary and for the above reasons, it is ordered and directed a s follows:

(1) The Petitioner, Katherine Kay Lupke, shall on or before 30th September 2022, pay the Respondent, Hans Richard Lupke, the sum of USD $350,000.00 together with interest at the rate of six percent (6%) from the 31st March 2022 until payment. Thereafter the respondent, Hans Richard Lupke, shall convey his interest in the matrimonial home to the Petitioner, Katherine Kay Lupke.

(2) Failing compliance with paragraph one (1) above, the Respondent, Hans Richard Lupke, shall on or before the 15th October 2022 pay the Petitioner, Katherine Kay Lupke, the sum of USD$350,000.00 less interest calculated at the rate of 6% from the 31st March 2022 to date of payment. The Petitioner, Katherine Kay Lupke, shall thereafter convey her interest in the matrimonial home to the Respondent, Hans

Richard Lupke, who shall be at liberty to re-enter and take possession and occupation of the matrimonial home.

(3) Should either of the parties fail to execute the instrument of conveyance as required upon the payment respectively in terms of the paragraphs 1 & 2 above, The Registrar of the Supreme Court is at liberty to and is hereby authorized and directed to execute the said instrument of conveyance.

(4) Costs shall be in the cause.

(5) All other terms of the order dated 26th November 2021 shall remain in effect.

Agnes Actie
High Court Judge

By the Court

Registrar Ag.