

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHMT2013/0022

BETWEEN:

ROSELIND FRANCIS NEE CYRILLE

Petitioner/Applicant

and

RUBEN FRANCIS

Respondent

Appearances:

Laurina Vidal Telemaque for Petitioner/Applicant

2015: February, 12, 23
December, 18

JUDGMENT

- [1] **STEPHENSON J:** This is an application filed by the applicant for a declaration that the respondent has no interest in the house or land at Calibishie where they both reside and which was given to her by her adopted mother and father, and for an order that the respondent vacates the said house within 7 days of the court's order.
- [2] The application and affidavit in support of application were filed on the 15th October 2014 and fixed for the 12th February 2015. An Affidavit of service was filed on the defendant personally on 11th February 2015. In the affidavit of service the process server a police officer stationed at Calibishie Police Station averred that the Application for ancillary relief and affidavit in support were personally served on the respondent.

- [3] There is no response or participation from or by the respondent.
- [4] On the 12th February 2015 the matter was called and there was no appearance of the respondent. The applicant was ordered to file written submissions for the court's consideration on the application. The applicant duly filed the written submissions with authorities as ordered by the court.

This is my judgment

- [5] The Petition and answer to the petition was filed herein, decree nisi and decree absolute were all granted prior to the applicant filing for the declaration in the application engaging the attention of the court at this instant. It is to be noted that there was no application in the petition for ancillary matters even though it was contained in the answer to the answer but there is no evidence on the file that the application has been pursued by the respondent.
- [6] The applicant has filed an affidavit in support of her application in which she states the property which is the subject of her application belongs to her, that she inherited the father's share of the property on intestate succession and her step mother's share was bequeathed to her in her step mother's will.

Applicant's Evidence

- [7] The applicant avers that she owned this property prior to her relationship with the respondent and had been living there with her three children prior to her marriage to the respondent. That the respondent moved into the house and that there were three children of the marriage making her a mother of six.
- [8] The applicant further averred that the house originally comprised of two bedrooms and a living area. There was an outside kitchen and no toilet or bathroom. She said

that during the marriage the respondent requested her to register the property in their joint names which she refused to do because she says, he had no interest in the property and that her stepmother did not like him and did not want him to own any part of her property.

[9] According to the applicant's evidence the house has gone through a number of repairs and remodeling and what started as a two bedroom house with a living area, no bathroom and toilet and outside kitchen, is now a four bedroom house with living room kitchen, bathroom and toilet and barber shop.

[10] The applicant stated that the repairs and extensions to the house were done over the years as follows:

- 1) With funding obtained from Barclays Bank in 1990 in the sum of XCD\$25,000 which loan was paid off from the earnings from the sale of the bananas from the banana farm worked by both the applicant and respondent.
- 2) With a loan obtained in 2013 which was used to complete the third bedroom in the house.
- 3) With a loan and assistance received from the Government of Dominica through the Calibishie Village Counsel

[11] The applicant further averred that the respondent has not made any contribution to the last set of repairs and renovations to the house, that the house in its current state has two floors with bathroom, toilet, living room and two bedroom upstairs and a kitchen, bedroom and barber shop owned and operated by their son on the downstairs.

[12] The applicant further stated that the respondent works as a security officer for a company in Picard Portsmouth and that when he is at the house he uses one of the

bedrooms and the living room as his kitchen much to her inconvenience and he washes his dishes on the steps of the house.

- [13] Overall in the circumstances the applicant is unable to enjoy her home which was her inheritance, that she is unhappy and uncomfortable there and further that she is unable to entertain anyone at her home

Submissions made on behalf of the applicant

- [14] Learned Counsel Mrs. Vidal Telemacque submitted in this case the uncontroverted evidence of the applicant is that the property was inherited by the applicant before the marriage and that even though the respondent obtained a loan in the sum of XCD\$25,000.00 to do repairs and to extend the house the loan was repaid from the income derived from the joint efforts of the parties hereto. Further that the other additions to the house were financed by the applicant, her children with assistance received from the government and that this was done during the time that the respondent and the applicant were estranged.
- [15] Learned counsel urged the court to find that the respondent's financial and non-financial contributions to the matrimonial home were minimal. Further that the respondent has not submitted any evidence to the court as to what he considers his contribution to the home.
- [16] As it regards ascertaining the common intention of the parties, in the case at bar learned counsel further submitted that from the evidence presented to the court, that the applicant never intended for the respondent to acquire a share in the property, that in her affidavit in support of her application she stated categorically that the respondent did ask for the property to be registered in their joint names and she refused to do so and further that she told him that he had no interest in the property.

[17] Learned counsel also urged the court to take into consideration the factors as set out in Section 25 of the Matrimonial Causes Act 1973¹ which are:

“(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for your family;

(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the Court be inequitable to disregard it;

(h) in the case of proceedings for divorce or nullity of marriage, the value of each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”

[18] Learned counsel submitted that in so doing to consider that:

- 1) The applicant was always self-employed and not entitled to any benefits from the social security;
- 2) She is currently no employed and is reliant on support received from her children;
- 3) The Respondent on the other hand is employed and has been employed in the past and will receive Social Security benefits upon his retirement;

¹ Matrimonial Causes Act 1973(UK)

[19] It was also submitted that the respondent has substantial income and he stands to benefit in the future from his Social Security benefits. That in the circumstances of the case that it would not be reasonable for the applicant to go out to work and in the circumstances of the case she does not have an earning capacity.

[20] Learned counsel also submitted that it is significant that the applicant is 58 years old and the respondent is 62 years old and were married for 28 years.

Learned counsel urged the court to consider the principles enunciated in the case of Errington –v- Errington² and submitted that there was no promise made to the respondent that he would have earned an interest in the property and in fact he was told so.

[21] Learned counsel also made reference to the court to the decision of Thompson –v- Earthy³ referred to in the Errington Case is support of her submission that the repairs done to the property with the help of the respondent according to him was done to ensure that his children had a proper roof over their heads. That the respondent could not have envisaged acquiring an interest in the said property since he was simply allowed to live with his family and that now that the marriage has broken down he can be ejected from the property.

[22] In her conclusion learned counsel made reference to the guiding principles laid down in the case of White –v- White⁴

“In order to enable fair financial arrangements after the divorce between parties, where there is no agreement the judge should “check his tentative

² Mary Duncan Errington-v-Edith Annie Wood[1951] EWCA Civ 2, [1952] 1 All E R 149

³ (1951) 2 KB

⁴ [2000] UKHL 54 @para 1 per Nichols J

views against the yard stick of equality of division". Further, in aiming at a fair outcome the Court was also required to have regard to factors such as the available resources and the parties' contribution. The court must therefore have regard to the standard of living the parties are accustomed to, their age, state of health and the duration of the marriage."⁵

[23] Learned counsel wrapped up her submissions by stating that the applicant claims to be entitled to the entire property having regard to the following:

- 1) that the applicant owned her home before the marriage
- 2) that she inherited the said property
- 3) that she has always indicated to the respondent that he had no interest in the property
- 4) that the respondent's contribution to the repairs of the house was minimal because these repairs were paid for from the monies earned from the farm (which was worked by both parties)

[24] Mrs. Vidal Telemacque asked that in the alternative that the respondent be awarded a 10% share of the property to be paid by the applicant by monthly installments.

Courts considerations

[25] In determining the beneficial ownership of matrimonial property the Constructive Trust is the more beneficial tool for determining the beneficial ownership of matrimonial property

[26] In the circumstances of this case it is necessary for the court to determine:

- 1) Whether the parties had a common intention that they would share the beneficial interest in the property;
- 2) If they had that common intention, then in what proportion did they intend the share to be;

⁵ Written Submissions from Mrs. Laurina Vidal Telemacque filed on 23rd February 2015

3) What evidence if any has been presented to this court in support of a finding of a common intention of the parties that there would be if not a joint ownership of the property that the husband would have interest in the property?

4)

[27] In making its calculation the Court is also obliged to take into consideration the matters as set out in section 25 (as quoted above).

[28] In the case of Millar –v- Millar⁶ Lord Nichols said “*In seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles ...*”

[29] Section 25 of the Matrimonial Causes Act 1973⁷ confers a wide discretion on the court and the court is required to consider *inter alia*, the financial obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future. I am required to have regard to all of the circumstances of the case and exercise the powers granted to the court to achieve an outcome that is fair between the parties.

[30] Looking at the facts of this case from the constructive trust perspective, the respondent has not met the requirements for acquisition of an interest in the matrimonial home. From this standpoint, I am required to determine whether his contributions can be counted as an acquisition by him of an interest in the property. Whether there existed a common intention upon which he could acquire such an interest and that on the strength of these he acted to his detriment in a way that one can infer such an acquisition.

⁶ 2006 UKHL 24 para 1

⁷ Op cit

- [31] I ask myself the question, what then is the parties shared intention and the whole course of conduct in this matter. Is there evidence of any agreement between the parties at the time of the extension and repair of the matrimonial property?
- [32] In the Abbott Case⁸ it was stated by the Privy Council that *“the parties whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership”*
- [33] In the case at bar consideration is made of the loan application made by the parties to do the first repair and extension to the house which was paid from the joint income of the parties, and the fact that the applicant informed the respondent that she was not putting the property in their joint names which based on the evidence before the court was accepted by the respondent. Consideration is also given to the further work and extensions done to the house by the applicant and her children also the assistance obtained.
- [34] I accept that the applicant did at the outset of the marriage indicate to the respondent that the home was hers and that he understood and accepted that to mean that he did not acquire a share in the matrimonial home.
- [35] Having reviewed all the circumstances of this case, having accepted the uncontroverted evidence of the applicant; and the factors as set out in section 25 and the authorities cited by Counsel;⁹ applying the above legal principles to the case at bar, I find that the Applicant is entitled to sole ownership of the matrimonial home and I so declare.
- [36] This, however, is not the end of the matter. I am compelled to view the situation broadly, and to look at the entire circumstances of the case, in an effort to ensure that justice is done and to achieve a fair division of the matrimonial assets. It is clear that the respondent has made some contribution to the extension of the home I

⁸ Op cit Paras 5&6 quoting Lord Walker of Gestingthorpe in *Stack-v-Downed* [2007] UKHL 17 @ para 31

⁹ *Philomena La Qua-v- Justin La Qua* (unreported) GDAHMT2010/0006 and *Huhes –v-hughes* (1993) 45 WIR 149

however find that based on the evidence before this court that contribution is minimal.

[37] In conclusion, I give judgment to the applicant and it is therefore ordered that:

- 1) The property located at Calibishie where the applicant resides and which was in the first instance given to her by her father and adopted mother is declared to be the sole property of the applicant and the respondent has no interest in the said house and land.
- 2) That the respondent is to vacate the said house within 10 days of the order of this court.
- 3) No order as to costs
- 4) Liberty to apply

[38] I would like to thank learned counsel for her assistance in this matter and I also wish to apologise to the counsel and the applicant for the delay in delivering this judgment but the file was misplaced for some time and only made its way to me a few weeks ago and I endeavored to read the submission and write this judgment as soon as possible thereafter.

M E Birnie Stephenson
High Court Judge