[2011] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 69/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**QUILLO LOWTHAN**	**APPELLANT**
AND	**COURTNEY HAYNES (Executor of Estate Josiah Lowthan)**	**RESPONDENT**

H Charles Johnson and Miss Claudine Blake instructed by H Charles Johnson & Co for the appellant

Linton Gordon and Miss Tamika Smith instructed by Frater, Ennis & Gordon for the respondent

26 September, 28 October and 29 November 2011

PANTON P

[1] The appellant herein sought to overturn the order of Donald McIntosh J who on 30 May 2008 dismissed her claim to being beneficially entitled to the whole, or a portion, of land registered in the name of her late former husband Josiah Lowthan at Volume 1175 Folio 613 of the Register Book of Titles. We heard submissions on 26 September 2011 and on 28 October 2011 we ordered as follows:

> "Appeal dismissed. Decision of the court below affirmed. Costs to the respondent to be agreed or taxed."

We promised then to put our reasons in writing and this we now do.

[2] According to the particulars of claim filed by the appellant, she and her late husband were married on 20 December 1975 and while living together they jointly purchased the land in question. The purchase money, she said, came from a joint savings account which they operated at the Bank of Nova Scotia, Linstead. Her late husband gave instructions to their attorney-at-law that her name was not to be placed on the certificate of title, she said. However, the particulars state that he assured her that there was nothing to worry about as he would not do anything to deprive her of her share in the property. Not only did she contribute to the purchase of the land, but she also contributed to the construction of a house thereon by physically assisting in the building process.

[3] The appellant claimed that she and her husband lived together as man and wife until 1995 when she migrated to the United States of America. Her husband died on 12 November 1999, leaving a will in which the land was devised but there had been no acknowledgment or recognition of her interest in that land.

[4] The respondent denied that the parties lived together as man and wife from 1975 to 1995. According to him, there was a separation in or about 1976, and eventually, the parties were divorced on 12 August 1999. The respondent also denied that the appellant contributed to the purchase of the land or the construction of the

house thereon. According to the defence to the claim, there was no basis for the placing of the appellant's name on the certificate of title. Furthermore, it was no longer possible for there to be a claim on the property as it was sold on 24 January 2003 for $3,000,000.00.

[5] The hearing before Donald McIntosh J was conducted on the basis of the foregoing pleadings as well as witness statements from six persons. Apart from the appellant, there were statements from her brother Mr Talbert Russell and her niece Miss Consetha Burey supporting the claim that the appellant contributed cash as well as her labour towards the construction of the house. On behalf of the respondent, there were statements from the executor himself, his wife Mrs Sheryl Claire Haynes who is the daughter of the deceased, and Mr Newlyn Seaton, a son-in-law of the deceased. In the latter statements, the witnesses denied that the appellant was involved in the construction of the house. However, Mrs Haynes conceded that occasionally the appellant cooked for the workers.

[6] The respondent said in his statement that his deceased father-in-law died testate on 12 November 1999, and during the year 2000, he applied for a grant of probate in respect of his estate. Neither the appellant nor anyone else objected to the grant of probate to the respondent. After the grant of probate, an agreement for sale of the property was executed. The certificate of title shows that on 1 March 2004, the property was transferred to Valentine Ludlow Long and Paulette June Valentine Ludlow Long of the United States at a price of $3,000,000.00.

[7] The divorce proceedings referred to earlier took place in the state of New York in the United States of America. The Special Referee in charge of the matrimonial proceedings found that the cause of action "commenced at the marital address, located at 2325 University Avenue, Bronx, New York 10468" and that "Neither of the parties seeks equitable distribution of the property". These findings were made after consideration of "the allegations and proofs of the Plaintiff". That plaintiff was the appellant.

[8] In her witness statement, referred to earlier, Mrs Haynes said that her father, the deceased husband of the appellant, had never owned a passport and had never travelled outside of Jamaica so it was untrue for the appellant to say in the divorce proceedings that the deceased had lived in the Bronx, New York. However, Mrs Haynes contradicted her husband, the executor, in respect of the time of the separation between the appellant and the deceased. As far as Mrs Haynes is concerned, she went to live with the appellant and her father in 1976, and the appellant did not migrate until 1995. Hence, the separation would have been at about the time of the migration as her father did not travel to the United States of America.

[9] The learned trial judge, in arriving at his decision, said that the basic facts were not in issue. In narrating those facts, he stated the year of separation as 1976. In view of the statement of Mrs Sheryl Claire Haynes, it is clear that the learned judge was in error so far as the year of separation is concerned. This was acknowledged by Mr Linton Gordon, the attorney-at-law for the respondent. The learned judge also noted

that the appellant "indicated no interest in any division of property, wheresoever situate".

[10] On the evidence that he accepted, the learned judge concluded that any interest that the appellant "would have had or gained in the property, would have been lost by 1999 and certainly by 2004 when this action was filed". He dismissed the appellant's claim for the following specific reasons:

> 1. the appellant, in her petition for divorce, had made no claim on the property in question "or for any property owned by the parties";
>
> 2. under the Married Women's Property Act, the appellant would not have been able to pursue her claim after a period of over five years;
>
> 3. under the Property Rights of Spouses Act, 2004, the appellant needs the special leave of the Court in order to make a claim at this time; and
>
> 4. the property has been sold in keeping with the executor's duty and responsibilities to the beneficiaries.

[11] The appellant filed the following grounds of appeal:

> "(a) The learned Judge erred or misinterpreted the evidence when he stated as a fact that the Claimant [appellant] was married to her deceased husband in 1975 and left Jamaica in 1976 and did not cohabit with the deceased after 1976.
>
> (b) The learned Judge erred in or misinterpreted the evidence when he said that the Claimant [appellant] and the deceased did not cohabit after 1976 when it

was accepted by the Defendant's [respondent's] witnesses that the Claimant [appellant] and the deceased lived together as man and wife up to 1995 and Claimant [appellant] during this period had two children for the deceased.

(c) The learned Judge erred in law when he said that the Claimants (sic) [appellant] claim would have been lost by 1999 or by 2004 as her claim under the Married Woman [sic] Property Act would have been extinguished by 2004.

(d) The learned Judge erred in law when he failed to distinguish the claim of the Claimant as an equitable owner as against one whose interest is derived at by virtue of one acquired overtime under the Married Woman [sic] Property Act without more.

(e) The learned Judge erred or misinterpreted the evidence when he said that the property was disposed of in 2003, without considering that an injunction was obtained which prevented the completion of the sale until the trial of the Claimant's [appellants] claim and by that action would have prevented the dissipation of the Claimant's [appellants] interest."

[12] So far as grounds (a) and (b) are concerned, as already stated, it is accepted that the learned judge erred in finding that the parties were separated in 1976. The statement of Mrs Haynes, daughter of the deceased, puts the matter beyond debate as she actually lived with the deceased and the appellant. However, that error by the judge, when placed in its proper context, was insignificant. This will be seen when the

other grounds are considered. No relief can flow to the appellant as a result of this error.

[13] In oral argument before us, Mr H Charles Johnson for the appellant said that the action was brought under the **Married Women's Property Act**. This statement was rather surprising seeing that no mention was made of that Act in the skeleton submissions filed on 30 July 2009 and 11 January 2011. In these submissions, the issue was stated as being whether the appellant had a beneficial interest in the property as a result of being a joint purchaser whose name was not on the title. In the circumstances, according to the appellant, there would have been a constructive trust in her favour. So far as the Married Women's Property Act is concerned, Mr Gordon submitted that the action could not have been grounded under that Act as the appellant was not a married woman at the time she filed the suit. Mr Gordon is correct. The suit was filed in 2004, but the parties had been divorced since 1999. Section 16 of the **Married Women's Property Act** makes provision for the determination of questions "between husband and wife as to the title to or possession of property". Therefore, the appellant would not have been entitled in 2004 to apply for such a determination in the capacity of "wife".

[14] In ground (c), the complaint was that the learned judge was in error in stating that the claim under the **Married Women's Property Act** would have been extinguished by 2004. There is no merit in that ground as the appellant was not a "wife" in 2004 and so her claim to an interest in the property could not have been made after she ceased being the wife of the deceased.

[15] As regards ground (d), the complaint was that the learned judge failed to distinguish the appellant's claim as an equitable owner as against one who is claiming under the **Married Women's Property Act**. Mr Johnson submitted that there was a common intention between the appellant and her deceased husband that she should have a share of the property. He sought to demonstrate the intention by quoting from letters dated 28 August 1997 and 23 November 1997 written by the deceased to the appellant. He quoted the following from the former letter:

> "… the place is still here it don't move, only Ian is making is (sic) workshop around the back. … I could not think to give Ian the place how the girl is treating me, … she is one of them that cause me to be in trouble. I soon kill myself so you and the Boy can have the place. Its you help me to have it. I remember the 22 years you take care of me and keep me clean …
> Its the money you gave me is keeping me, its almost done because I am still Buying the Lotto to see if I can win some money to school the three children that I left motherless … The land and house still yours and the Boys. I could not have the heart to left [sic] you although you desert me and cause me to get into trouble."

[16] Mr Johnson submitted that these passages demonstrated that "the deceased always maintained that the property belongs to the appellant and disenfranchising her was an afterthought because of the divorce. The deceased at best was only a trustee of the property or owner at law while the appellant was clearly the owner in equity".

[17] A thorough examination of the full content of the letter defeats the argument put forward by Mr Johnson as there are other parts of it that suggest that the appellant had

no interest in the property, and that it was the deceased alone who had the interest. For example, there is this sentence that was written by the deceased:

> "Why I said I give the place to Sheryl is because you didn't wright [sic] a line when I send the money."

This is a clear indication that it was the deceased, not the appellant, who was the person with an interest to give.

[18] The complaint was that the learned judge did not consider this aspect of the matter to the exclusion of the **Married Women's Property Act**. This complaint was baseless given the fact that the judge considered that the appellant did not make any such claim at the hearing of her petition for dissolution of the marriage. In any event, it is clear that the learned judge must have rejected the evidence of the appellant, her brother and Miss Burey as to her contribution to the purchase of land and the construction of the house. Instead, he accepted the evidence of Mrs Sheryl Claire Haynes, the daughter of the deceased, and Mr Seaton, the son-in-law of the deceased.

[19] The learned judge, in his reasons for decision, as well as the attorneys-at-law made references to the **Property (Rights of Spouses) Act**. It is sufficient to say that that Act was not relevant to the proceedings. Although it was enacted in 2004, it did not come into operation until 1 April 2006 – that is, two years after the filing of the suit and nearly seven years after the divorce proceedings between the appellant and her late husband. The provisions in that Act relating to the family home are therefore inapplicable to the instant situation.

[20] In the circumstances, there was no basis on which the appellant could have succeeded. She failed under the **Married Women's Property Act**, the **Property (Rights of Spouses) Act**, at common law and in equity.

DUKHARAN JA

[21] I have read in draft the reasons for judgment of my learned brother Panton P and agree with his reasoning and conclusion. There is nothing that I wish to add.

HIBBERT JA (Ag)

[22] I too agree with the reasoning and conclusion of Panton P.