



[2012]JMSC Civil 87

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2008HCV05458

|         |                 |                           |
|---------|-----------------|---------------------------|
| BETWEEN | CLAUDETTE WHITE | CLAIMANT                  |
| A N D   | CYRIL MULLINGS  | 1 <sup>ST</sup> DEFENDANT |
| A N D   | ELDRED MULLINGS | 2 <sup>ND</sup> DEFENDANT |

Vincent Chen instructed by Chen, Green & Co. for the Claimant.  
Linton Gordon & Tamiko Smith instructed by Frater, Ennis & Gordon  
for the Defendant.

HEARD: 20<sup>TH</sup> April, 2012 & 25<sup>th</sup> May, 2012

CORAM: ANDERSON, K. J.

***Application to strike out Claimants' statement of case – property dispute – whether Claimant had reasonable grounds for instituting the Claim as against the First Defendant.***

[1] This Judgment is being rendered in respect of the First Defendant's Application for Court Orders which was filed on 30<sup>th</sup> March, 2012, as well as in respect of the First and Second Defendants' Application for Court Orders as filed on 2<sup>nd</sup> November 2011. By means of the Application for Court Orders which was filed on 30<sup>th</sup> March, 2012, the primary Order being sought by the First Defendant is 'that the Claimant's statement of case be struck out against the First Defendant/Applicant herein.' The grounds upon which the First Defendant had sought that Order, as well as an Order for costs and, 'such further relief as this Honourable Court deems just,' were originally as follows – 'a) The First Defendant/Applicant herein is the sole registered owner of the land, the subject matter of this Claim and that I live on the land with her consent and permission; b) The First Defendant does

not own the lands herein and is not in a position to transfer the title to the Claimant. It was agreed upon as between the parties counsel and this Court, on the day when arguments in respect of this Application were made before it, that there was an error in ground (a) above, insofar as that ground, apparently had mistakenly specified therein, that, ‘...The First Defendant is the sole registered owner of the land the subject matter of this Claim...’ In point of fact, there exists no dispute between the parties, that it is the Second Defendant who owns the relevant property. This Court therefore, accepts that this is so.

[2] In the other Application for Court Orders, which was filed by both of the Defendants, the primary relief being sought, consisted of restraining orders, seeking to restrain the Claimant, whether by herself, her servant and/or agent, from doing any of the following, namely – entering or remaining on the land which is the subject of this Claim, or removing any furniture or fixture from such land, or from removing the Defendants from such land, or threatening or otherwise interfering with the occupation of such land by the Defendants. This application was withdrawn by the Defendants at the close of the oral hearing by this Court of arguments related to the Application to strike out the Claimant/Statement of Case, as was filed by the First Defendant.

[3] The most unfortunate aspect of this entire Claim, is the fact that the Claimant is a daughter of the Defendants. It is in the circumstances, sincerely hoped by this Court, that this matter can be resolved through amicable discussions between the parties, if not through a mediator. If that is however not possible, then it is for this Court to legally resolve the

parties' dispute. That is what this Court must now do, as regards the First Defendant's Application, Application to strike out the Claimant's Statement of Case against the First Defendant. The said Application is supported by the Affidavit of the First Defendant. The Claimant has deponed to a single Affidavit in response to each of the Defendant's Affidavits. This Court will, in rendering its Judgment, refer to pertinent aspects of each of these Affidavits.

[4] What is not disputed as between each of the respective applicants, who are all of the parties to this Claim, is set out seriatim, immediately below:-

- (i) The Claimant is the Second Defendant's daughter;
- (ii) The Second Defendant has been occupying the land which is the subject of this Claim since her birth, whereas, the First Defendant has been occupying the same ever since 1958, when he got married to the Second Defendant;
- (iii) As at 2<sup>nd</sup> November, 2011, this being the date of filing of the Second Defendant's Affidavit, the First Defendant was then seventy-nine (79) years of age and the Second Defendant was then seventy-four (74) years of age.
- (iv) The Second Defendant is the sole registered title holder of the property which is the subject of the Claim and has been so, since 29<sup>th</sup> July, 1993. Her title is subject to a

caveat by 'Claudette White Estate, claimed equitable interest.' How the estate of Claudette White has claimed an equitable interest in property in circumstances wherein Claudette White is certainly alive, is baffling to this Court. Nonetheless, such is another matter, perhaps best dealt with in another context and at another time.

- (v) The Claimant assisted the Defendants financially, in about 2005, when she, along with one of the Defendant's sons, paid towards the construction of a home built of concrete, which was built in replacement of a then decrepit wooden building which was then standing on the premises. The person, who primarily contributed financially in that regard, was the Claimant. It is this cement building which is now jointly occupied by the Defendants.
  
- (vi) On the 19<sup>th</sup> October 2011, the Claimant removed from the relevant land and building, furniture and appliances which are owned by and belong to her.

[5] The primary factual matter in dispute between the parties is as to whether or not the Defendants had promised the Claimant anything and if so, what they had promised the Claimant, in exchange for the monies which she undoubtedly spent in order to have enabled the concrete home structure to have been built on the relevant premises. The Claimant

contends that she was promised that she would be registered as a joint tenant in respect of the said land and that a room in the newly built concrete home structure would have been reserved for her use and benefit. The Defendants deny this, but there is no doubt that either they or one or the other have /has taken steps specifically designed to prevent the Claimant from gaining access whatsoever to the concrete home structure, this by changing the locks to that structure.

[6] In her Claim Form, the Claimant has claimed two primary reliefs, these being the transfer of title to her as joint tenant with the existing registered proprietor, or alternatively, the sum of \$4,800,000 which is due for work done in construction of a two storey concrete structure by the Claimant, pursuant to a verbal agreement with the Defendants.

[7] In her Particulars of Claim however, the Claimant's claim for relief has significantly evolved and is now quite different from the relief as specified in the Claimant's Claim Form. Whether the Claimant can properly pursue, at trial, reliefs not sought in her Claim Form, will undoubtedly be a live issue for this Court to resolve at trial. In any event though the primary reliefs sought by the Claimant in her Particulars of Claim, are as follows:-

- (i) The transfer of the title to her name;
- (ii) Possession of the portion of the house formerly occupied by her or alternately;
- (iii) The sum of \$4,800,000, plus interest at 6% per annum;

- (iv) A declaration that the Claimant is the equitable mortgagee by way of deposit of title deeds for the amount claim;
- (v) An order that the property be appraised, sold and the said amount with interest and costs be paid out of the proceeds to the Claimant.

[8] The presently existing context of the Affidavit evidence which has been placed before this Court for consideration in respect of the First Defendant's Application which is not at hand, is one wherein no application was made by either of the parties to cross-examine any of the deponents to any of the affidavits filed as regards that Applications for Court Orders. As such, no cross-examination of either such deponent was ever undergone. This Court cannot resolve patent disputes of fact as exist in sworn evidence given on paper, in the form of Affidavit evidence, just by simply reading that evidence and even, along with that, considering all the other filed Court documents and thereby decide upon which of the disputed written evidence it believes and which it disbelieves. On that point, see *Lascelles Chin v Ramona Chin* thus, this Court cannot and will not be able to resolve whether or not the Claimant was promised anything by either or both of the Defendants in exchange for her financial and other help provided to the Defendants so as to enable them to live in the concrete home structure which they presently occupy.

[9] With that in mind, this Court must decide on the Defendants' respective Applications, solely on the basis of this Court's acceptance of the proven and undisputed facts as set out above.

[10] What arises from this approach, is that it is very clear that any Claim against the Second Defendant for the transfer of title into the name of the Claimant cannot succeed as against the First Defendant, as he is not the registered title holder of the relevant land. Equally, no Claim by the Claimant to be registered as joint tenant with the Second Defendant of the relevant premises can possibly succeed as against the First Defendant. Does this mean however, that the Claimant's Statement of Case, seeking either or both of those two reliefs, should be, or can lawfully be, struck out by this Court? That question is answered below. As far as the Claimant's Claim against the First Defendant for possession of the portion of the house formerly occupied by her is concerned, it is equally apparent to this Court, that even though the First Defendant may have an equitable interest in the relevant property, by virtue of both the length of time that he has lived there undisturbed and also by virtue of his marital interest which exists in relation to said property, nonetheless, the First Defendant cannot grant possession of the relevant property, or any portion of the relevant property, without the consent thereto, of the registered title holder that property as she the second Defendant is the sole legal owner of that property and thus, her claim to that property is far superior in law, to that of the First Defendant. Thus, whilst if the Court Orders the Second Defendant to grant possession of any portion of the relevant premises, then such Order can and will be expected to be fulfilled by her, on the other hand, no order made against the First Defendant in a similar view could possibly have the

desired effect and thus, could not properly be made by this Court. Once again therefore, this is yet another aspect of the Claimant's Claim as against the First Defendant, which has no realistic prospect of success.

[11] Insofar as the Claimants' Claim for restitution of \$4,800,000 is concerned, there can also be no doubt that this Claim had, in the circumstances of the Claimant's Claim as presented to this Court in the Claimants filed documents to date, to be brought as against both Defendants, as the Claimant has alleged that it was both Defendants who made the promise to her that in exchange for same, she would be registered as a joint tenant and also in that building which she had, it seems, formerly occupied when the structure, was wooden. Whilst it is indeed true and correct to state, as was stated by the First Defendant's lead counsel in oral arguments before me in respect of the Applications, that the First Defendant, even if he had made such promises, this being something which is being expressly denied by him, nonetheless, such promises were ones that he could not lawfully have made such as to confer rights in that regard, upon anyone, including the Claimant. Thus, the arguments go, the promise, even if made, cannot confer any lawfully recognizable interest in the relevant property, on the Claimant's part. Whilst this is undoubtedly correct, the Claimant would still, in the circumstances, if she can prove that such promises were made to her by the Defendants, or even if she can only prove that such promises were made to her by the First Defendant, then the Claimant would, at the very least, be entitled to restitution of some, if not all of the money which she spent, if the Court believes, after having heard evidence from the respective parties at trial, that the Claimant would not have spent the



money which she did on the building of the concrete home structure, were it not for the promises made to her, as she has alleged. In the circumstances therefore, there could be no basis whatsoever for the striking out of the Claimant's Claim for restitution of the sum of \$4,800,000.00 as against the First Defendant.

[12] As to whether the Claimant's Claim for possession and/or for title to be transferred into her name, or for her to be registered as joint tenant of the relevant land parcel, should be struck out on the grounds that these reliefs as are being sought in Claimant's Claim and Particulars of Claim respectively, insofar as the First Defendant is concerned, should be struck out, consideration must carefully be given to the applicable Rules of Court in this regard.

[13] The pertinent Application for Court Orders, seeks to have the Claimant's Claim as against the First Defendant, struck out as against him. No particular Rule of Court is referred to by the Applicant/First Defendant in any aspect of his application. In paragraph 9 of his Affidavit though, which it is to be noted that the Defendant has signed with his mark, 'X', this no doubt signifying that this Defendant is likely functionally illiterate, the First Defendant has deponed to having been informed by his Attorneys-at-law, Messrs. Frater, Ennis and Gordon and believing, that the Statement of Case herein, does not disclose any reasonable grounds for bringing this Claim against him. From this assertion, it is very clear that the First Defendant/Applicant is relying on the Rule 26.3 (1) (c), in an effort to have the Claimant's statement of case, 'struck out.' **This rule provides that – 'In addition to any other power, the Court may strike out a statement of**

**case or part of a statement of case if it appears to the Court – that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.’** Two things are clear from this. These are, firstly, that this Court has the power to strike out part of a Statement of Case. Secondly, that the First Defendant has not applied for summary judgment, which is an altogether different application, in respect of which, altogether different principles apply. Counsel for the Claimant made this latter – mentioned point very clear to this Court and cited a helpful case on point, this being – Gordon Stewart and John Issa – Supreme Court Civil Appeal No. 16/2009. The Court of Appeal’s Judgment in the Stewart v Issa case, has made clear, the distinction between granting summary Judgment – which this Court can only grant where a Claim has no reasonable prospect of success, as against striking out a Claim on the basis that there was no reasonable ground for bringing that Claim. This Court thus now has to consider whether the statement of case, or part to be struck out, discloses any reasonable grounds for bringing a Claim.

[14] This Court does not hold the view that the Claimant’s Statement of Case, which includes her Claim Form and Particulars of Claim, discloses any reasonable grounds for bringing either a Claim against the First Defendant for transfer of title to the Claimant, nor a Claim against the First Defendant to be registered as joint tenant in relation to the relevant parcel of land. The Claimants Statement of Case discloses no reasonable grounds for bringing the Claim seeking either of these two reliefs, one of which has been sought in the Claimant’s Claim Form and the other in her Particulars of Claim, as against the First Defendant. This is simply because, in the Claimant’s Particulars of Claim, she has referred to the

registered title and it is clear from a perusal of that registered title, that it is the First Defendant who is the sole title holder of the relevant land parcel. Thus, there exists no reasonable grounds for bringing a Claim against the First Defendant, either for outright transfer of that title to the Claimant, or to be registered as joint tenant on that title along with the Second Defendant. It should have been apparent to the Claimant from the onset of her Claim, that neither of these reliefs could properly have been sought as against the First Defendant. The same is true in respect of the Claimant's Claim for Possession of a portion of the relevant land parcel to be granted to her by the Court. That Claim, based on the Claimant's Statement of Case, should have been apparent to the Claimant from the onset, as being one which, bearing in mind that the First Defendant has, as would have been known to the Claimant from the onset of her Claim, no registered title to the relevant land parcel either in his name solely or jointly with anyone else, could not reasonably be instituted as against the First Defendant.

[15] The situation is different however, insofar as the Claimant and the First Defendant are concerned, in terms of the Claimant's Statement of Case as regards restitution of monies allegedly spent by her in fixing up and/or making anew, a house on the relevant land parcel. This Court cannot and will not make any Judgment at this stage, on the merits of that Claim. Such will have to be decided at Trial, as to this Court's mind, the Claimant's Statement of Case does certainly disclose reasonable grounds for bringing the Claim as against the First Defendant in this regard, as he was allegedly, one of the two persons – the other being the Second Defendant, who had allegedly promised the Claimant that if she paid for the work in refurbishing/rebuilding the home then on the land parcel, then her

name would be placed on the title for that land parcel. In the circumstances, restitution of the monies allegedly paid by the Claimant and properly be sought by her, this notwithstanding that even if such promise was allegedly made by both of the Defendants to the Claimant, the First Defendant could not lawfully have made such a promise, as he was not at the material time and still is not, a title holder for the relevant land parcel. This is inconsequential in law, in terms of the Claimant's Claim for restitution of the monies spent is concerned, because, restitution is an equitable remedy and this Court in deciding on whether to exercise its powers in equity, will always bear in mind that through equity, this Court can and will always put right that which it believes has gone wrong. Thus, if this Court believes the Claimant's assertion on this particular issue at trial, then this Court definitely can grant the restitutionary relief as sought by the Claimant against the First Defendant. Thus, there exist reasonable grounds for the Claimant's Claim against the First Defendant, seeking recovery of the sum of \$4,800,000.00 allegedly spent by her in building/refurbishing the structure in which the Defendants now reside.

[16] It must be mentioned at this juncture, that the Claimant has sought in her Claim, by virtue of the Particulars thereof, 'A declaration that the Claimant is the equitable mortgagee by way of deposit of title deeds for the amount Claim.' Again it should be noted that this particular relief, is another relief that is not set out in the Claimant's Claim Form. The significance of this, if any, will have to be determined at Trial. For purposes of the Application presently being considered by this Court however, the Declaratory relief being sought, as against the First Defendant, is one in which the Claimant is merely seeking to have this Court declare something

in relation to her, as a matter of law. Thus, in the considered view of this Court, the First Defendant cannot properly seek to strike out the Claimant's Statement of Case insofar as that particular relief as is being sought, is concerned. This is because it cannot properly be concluded that such relief is one which is being sought against him and thus, is one which he can properly seek to have struck out. In the circumstances, this Court will not strike out that particular portion of the Claimant's Statement of Case.

[17] In the circumstances, my Orders are as follows:

- (i) The Claimant's Statement of Case seeking the following reliefs as against the First Defendant, is struck out: a) Claim for possession of the portion of the house formerly occupied by her; and (b) Claim for the transfer of title in her name and/or the Claim to be registered as joint tenant in respect of the parcel of land registered at Volume 1262, Folio 598.**
  
- (ii) The First Defendant's Application having been partially successful, the First Defendant shall be entitled to a percentage of the overall costs of the Application. That percentage is determined by this Court, after having heard from the respective parties, as being: 50% thereof. Such costs are to be taxed if not agreed.**
  
- (iii) The First Defendant shall file and serve this Order.**

**(iv) Case Management Order – The Defendants are granted an extension of time, up to and including of 1<sup>st</sup> June, 2012, within which to file and serve Skeleton Submissions and list of Authorities and provided that this Order is complied with by the Defendants, the Defendants’ Skeleton Submissions and list of Authorities shall be deemed as having been filed and served within time.**