BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
FAMILY DIVISION

Civil Appeal No: 23 of 1996

IN THE UNION OTHER THAN MARRIAGE

BETWEEN:

ERROL BROWNE

(Appellant)
AND

MURIEL IDINA GRIFFITH

(Respondent)

Before: The Honourable Mr. Justice Errol DaCosta Chase, Justice of Appeal, The Honourable Mr. Justice Colin Anthony Williams, Justice of Appeal and The Honourable Mr. Justice Frederick Lawrence Adamstraw Waterman, Justice of Appeal (acting)

2000: July 10;

2001: April 20;

Miss Vonda Pile in association with Miss Sharon Parris for the Appellant.

Mr. Clement Lashley for the Respondent

Decision

Colin Williams, J. A. These proceedings arise out of a dispute between the two parties over two pieces of real estate, certain items of furniture and household effects, a motor car and miscellaneous sums of money.

The material facts are that the parties lived together as man and wife from 1985 to 1995, first in England for about a year and then in Barbados for about nine years. In Barbados they co-habited at No. 36 Warners Park, Christ Church, a property owned by Browne. After the parties returned to Barbados, Griffith arranged for various sums of money owned by her to be sent to Barbados from England to be applied towards the purchase of a parcel of land at Woodbourne, St. Philip, and towards the construction of a two-apartment building on land owned by Griffith at Fairholme Gardens, Christ Church. Browne is retired and has no permanent employment; Griffith has worked as a relief nurse since her return to Barbados.

Griffith's claim is for the following relief: -

"(a) A declaration of the Applicant's interest in respect of a portion of land at Woodbourne in the parish of St. Philip pursuant to Section 56(1) of the Family Law Act.

(b) Pursuant to Section 57(11) altering the interest of the said property and ordering the Respondent to transfer his interest to the Applicant.

(c) That the Respondent repay the Applicant the lump sum of $30,000.00, as a settlement from rents coming into the hands of the Respondent from 1987-1995 from her two apartments situated at 29 Fairholme Gardens, Christ Church.

(d) That the Respondent return the items of furniture mentioned in the Schedule attached hereto.

Such other orders as the Court deems just."

Griffith makes no mention of any motor car in her application, but in his affidavit Browne raised the issue of the ownership of a certain car which he bought for her transportation to and from work, and the case proceeded on the footing that Browne had made a cross-claim in respect thereof.

Griffith made two affidavits in support of her claim; Browne made one affidavit to support his position, and he further relied on an affidavit by Wilhelmina Toppin, who describes herself as a maid and general helper.

There are a number of issues on which Griffith and Browne make opposing claims in their affidavits. Griffith says that she was the source of all the funds which purchased the land at Woodbourne (which was bought in both names); Browne says he put up $6,000.00 plus the legal fees. Griffith asserts that she sent the money to build the apartments at Fairholme Gardens; Browne says he contributed $50,000.00 to that end. Griffith says Browne has not accounted to her for the rent received from the apartments at Fairholme Gardens; Browne says that he has. Griffith says she did all the household chores; Browne says not, and he files an affidavit by Wilhelmina Toppin to support his contention on this issue. The parties give different stories about a joint account. Griffith says the motor car was a gift from Browne to her; Browne says that it was not.

Having read the affidavits (on which there was no cross-examination) and having heard the submissions of counsel for Griffith and counsel for Browne, the Trial Judge made the following orders: -

"That the Respondent

(a) do transfer to the applicant his interest in the land at Woodbourne, the costs of transfer to be borne equally by the applicant and the respondent,

(b) do pay the applicant the lump sum of $25,000.00 as settlement from the rents received during the period 1988 to May 1995. The applicant in her application claims $30,000.00 as settlement but having considered that the respondent has lost the use and benefit of the motor car which the applicant admits the respondent gave her the claim is reduced by $5,000.00 as compensation to the respondent for such loss , and

(c) do return to the applicant the items of furniture in the Schedule to the affidavit filed on 27th June 1996, except air dryer and the mahogany smoked glass table.

In the circumstances of this case each party will bear his own costs."

Browne has appealed to this court against that order, on the following grounds: -

"1. Decision of the learned Trial Judge was against the weight of the evidence.

2. That the learned Trial Judge erred in law and improperly exercised his discretion in that he failed to consider thoroughly the financial contribution that the Appellant made towards the acquisition of the Respondent's property at Woodbourne in the parish of Saint Philip.

3. That the learned Trial Judge erred in law and improperly exercised his discretion in that he failed to pay sufficient regard to the fact that the Respondent was paid the rent received from the top apartment in cheques crossed to her name.

4. That the learned Trial Judge erred in law in not taking into consideration the financial contributions made by the Appellant to the property at Fairholme Gardens in the parish of Christ Church and to balance this interest in relation to that claim by the Respondent.

5. That the learned Trial Judge was wrong in law in that in considering the duration of the union he failed to consider that the Respondent had lived at the Respondent's home for the duration of the union and in this regard was able to contribute towards the construction of her own home.

6. That the learned Trial Judge erred in law in taking into consideration the contribution of the Respondent as a homemaker when these services were rendered by a maid and general helper and paid for by the Appellant while the Respondent was free to pursue her career.

7. The learned Trial Judge was wrong in law not to consider that the Appellant is the owner of the motor vehicle, which the Respondent has in her possession.

8. That the learned Trial Judge was wrong in law in failing to take into account the age of the Appellant and the fact that he is retired while the Respondent is at present pursuing a nursing career."

Having regard to the contents of the four affidavits that were before the Trial Judge, I am at a loss to understand how the Trial Judge could come to a balanced and reasoned decision without the benefit of a cross-examination of any of the deponents. This is not a case where any of the affidavits or material portions thereof is or are so manifestly suspicious and unreliable as to merit being rejected out of hand. There is nothing in his Decision which suggests that the Trial Judge made any such finding, nor is there anything in the affidavits which would justify any such finding, so the mystery remains as to how he decided in favour of one side or the other on the important facts that were in dispute.

In addition to the mystery of how the Trial Judge arrived at his findings in the present case on certain material facts, there is his failure to deal with (1) the question whether the acquisition of the land at Woodbourne and/or the purchase of the motor car could raise the presumption of a gift (2) the affidavit of Wilhelmina Toppin (3) Griffith's rent-free living in Browne's house (4) the parties' joint account and (5) the crossed cheques for rent for one of Griffith's apartments.

But some of the blame for the unsatisfactory state of the material before the Trial Judge must attach to the attorneys-at-law for the parties. The nature of the issues involved cried out for particulars and/or for discovery of documents, especially the parties' bank records and accounts in England and in Barbados. I cannot help thinking that the time and effort that would have been consumed in those exercises would have been well spent in that they would almost certainly have clarified and/or narrowed the issues in dispute.

In the premises, my view is that the Trial Judge erred in not directing the cross-examination of the parties and, if necessary, Miss Toppin. I do not appreciate how otherwise he could have assessed the reliability of the evidence of the deponents. In my judgment, therefore, this Court too is unable to make any fair, just and reasoned decision on the merits based on the material before us. Further, it would be wholly unsatisfactory to dismiss both claims and thereby allow the beneficial ownership of the properties to follow the legal ownership. Such a decision would mean that there has been no proper adjudication on the merits, and one or both of the parties could feel disadvantaged through no fault of their own.

It is most unfortunate that the parties have to be put to the inconvenience, delay and expense of a re-trial, but I do not think we have any choice but to send back the matter to the High Court to be adjudicated anew by a different judge, after the parties have been afforded an opportunity to decide whether to apply for particulars and/or discovery and/or to have the deponents exposed to cross-examination.

Browne has succeeded on his appeal, so he must have his costs in this court certified for two attorneys-at-law. The order for costs in the court below is set aside; those costs will be costs in the cause on the re-trial.

JUSTICE OF APPEAL.

JUSTICE OF APPEAL. JUSTICE OF APPEAL.