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CIV. APP. 27/2006

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

MADAM EJATU JALLOH - APPELLANT

AND

ABDUL TURAY - RESPONDENT

CORAM

Hon. Mrs. S. Bash-Taqi, JSC - (Presiding)
Hon. Ms. Justice S. Koroma, - JSC
Hon. Mr. Justice E. E. Roberts, - JA.

Barristers

J. B. Jenkins-Johnston Esq. for the Appellant
David G. Thompson, Esq. for the Respondent

JUDGMENT DELIVERED ON THE 26th DAY OF JANUARY 2010

S. BASH-TAQI, JSC:-

A Writ of Summons was issued on behalf of the Respondent on 6th April 2000 claiming possession of premises situate at 16, Betham Lane, Freetown. The Statement of Claim states that the Respondent, then Plaintiff, is the sole fee simple owner of the premises at 16 Betham Lane Freetown. The parties had a son born in December 1987. Both parties gave evidence in the High Court.

BACKGROUND

The facts of this case, according to the evidence, are that in 1986, the Respondent entered into a customary marriage with the Appellant in Lungi in the Northern Region of Sierra Leone. They had a son born in 1987. The marriage broke down in 1988, and the Respondent took the Appellant to 'her Sababu', who then returned her to the Respondent's family with some money, as was the custom, signifying termination of the marriage. Both parties then went their separate ways.

Between 1988 and 1995 after the divorce, the Respondent negotiated and acquired the property at No. 16 Betham Lane Freetown on 23rd October 1995, by Conveyance expressed to be made between Evelyn Dowoo Gabbidon (nee Roberts), Augustus Roberts and Rebecca Roberts the Vendors of the one part and the Respondent as purchaser of the other part. The Conveyance was registered as No. 1195 at page 26 in Vol. 490 of the Books of Conveyances in the Office of the Administrator General in Freetown. The Respondent contends that after buying the land in 1995, he built the house thereon which is now Numbered 16 Betham Lane Freetown in the Western Area of Sierra Leone and lived there with his son.

In 2002, the parties again met and went through another customary marriage. However, in March 2003, the parties again separated and eventually divorced. The Respondent in his evidence contends that he returned the Appellant, first, to the "Sababu" , that is, the middle man, and thereafter, he instituted divorce proceedings to dissolve the marriage in Marampa Native Court. He was given a divorce certificate by the Paramount Chief at Lunsar which he tendered in evidence together with the receipt of payment as Exh. "B 1-3".

After the second divorce, the Respondent served the Appellant with a notice to quit the house at No. 16, Betham Lane Freetown. The matter came before the Magistrate at Court No.1A in Freetown, the property being situated in Freetown. During the proceedings in the Magistrates Court, the Appellant contends that she contributed to building the house and therefore she is entitled to a 50% share in the property. Furthermore, she alleged that she is still married to the Respondent as he has never returned her dowry. The Magistrate decided that the matter involved title to property and therefore transferred the action to the High Court for determination of the title.

The matter came before the Learned Judge, Nylander, J, (as he then was) and he, after reviewing the evidence of the parties and their witnesses entered judgment in favour of the Respondent. In his judgment the Learned Trial Judge had this to say on the matter: -

> "The house which the defendant is claiming 50% interest, the facts disclose that the land on which the house stands was bought by the plaintiff alone before he married the defendant. The house was built after the plaintiff first divorced the defendant and before the plaintiff married the defendant again in 2002. The plaintiff and the defendant were not living together between 1992 and 2001. They were divorced. I just cannot see how the defendant helped plaintiff to build the house. I do believe the evidence of the plaintiff; I do no believe the evidence of the defendant. I am satisfied in my mind that

the plaintiff has proved his case on the balance of probabilities. I enter judgment in plaintiff's favour. The counterclaim is dismissed."

It is against this judgment that the Appellant has appealed to this Court on five (5) grounds, which are as follows: -

(i) That the Learned Trial Judge failed to consider adequately or at all the case for the defendant and the evidence led in support thereof.

(ii) That the Learned Trial Judge was wrong to have treated the Defendant as a tenant-at-will or licensee, thereby totally disregarding her occupation of the matrimonial home as a wife as being of right rather than as a tenant or license.

(iii) That the Learned Trial Judge failed to consider adequately or at all the fact that the property the subject matter of the action, that is to say 16 Betham Lane Freetown, was the matrimonial home of the Plaintiff and the Defendant, and consequently did not apply the several principles and decided legal authorities applicable in such situations.

(iv) That the Learned Trial Judge was wrong to have dismissed the Defendant's Counter Claim without adequately considering the merits thereof.

(v) That the Judgment is against the weight of the evidence."

THE SUBMISSIONS/ARGUMENTS

Counsel both filed Skeleton Arguments in support of their respective cases and relied on the submissions thereon.

Counsel for the Appellant in his written submission conceded that this action is one to which a different set of rules, principles and authorities apply, but contended that the property the subject matter of the action was the matrimonial home of the parties and having been acquired during the subsistence of the parties' marriage, the parties lived in it as their matrimonial home; and therefore the Appellant could not be regarded as a tenant-at-will. He further submitted that the fact that property was conveyed to the husband alone does not mean that the property is owned by him alone. He relied for this submission on the Supreme Court decision in the case of **Eleady-Cole vs. Eleady-Cole of 07/09/06 (unreported)**. Again Counsel referred to the decision in the case of **Gissing vs. Gissing (1969) 2 CH 85** and

Denning M. R 's dictum at page 93, and that of **Evershed** in the case of **Rimmer vs. Rimmer (1953) 1Q.B 72.**

Mr. D. G. Thompson of Counsel for the Respondent, in answer to Mr. Jenkins-Johnston's submission, referred to the evidence adduced at the trial, and submitted that there was overwhelming evidence that the Learned Judge considered the Appellant's case adequately and relied on the evidence appearing at pages 27 to 30 of the Records. He denied that the property was acquired during coverture, and pointed out that there is overwhelming evidence that the property was acquired by the Respondent alone in 1992 after the parties' first divorce in 1988; that the Conveyance having been executed on 23rd October 1995, is evidence that the property was purchased seven (7) years after the parties' first divorce; and when the parties got married again in 2002 which is another seven (7) after the Respondent's purchase of the property. He submitted therefore that the property could not have been acquired during the subsistence of the marriage.

He denied that the Appellant is still living on the property as the wife of the Respondent; that the parties divorced for the second time in 2003. Counsel submitted that the authorities cited by Mr. Jenkins-Johnston in support of the Respondent's appeal are not applicable to this case; that the operative law governing ~~in~~ this matter is customary law and the principles of law under the English system should not apply; that under customary law, a wife is not entitle to property, she being a chattel herself, hence her father's demand for the return of her dowry of Le 6,000,000.00 (Six Million Leones) and two cows. (See page). He submitted further that the notion of resulting trust is unknown under customary law and therefore not applicable to the present case which is purely based on customary law.

Counsel finally submitted that there is no evidence that the parties acquired the property by their joint efforts intending it to be a continuing provision for their joint lives. He stressed that on the contrary, there is overwhelming evidence that the Respondent bought the property when there was no marriage subsisting between him and the Appellant, and therefore there is no inference to be drawn that the couple intended it to be family property.

Both Counsel agree that this case is not the usual kind of case that normally comes before the Courts, as Mr. Jenkins-Johnston stated in his Skeleton Argument, "either for a declaration of title or for recovery of possession by a Landlord against his/her tenant, squatters or trespassers."

Both are agreed that the marriage between the parties is one governed by customary law and the operative customary law is that operating before the coming into effect

of what are now known as "the Gender Acts of 2007"; therefore in our opinion, the issues raised in this appeal should be decided with reference to customary law, more particularly, that relating to the custom governing Matrimonial property. This being so, it is our view that principles of law governing Western marriages are inapplicable in this matter.

The appeal concerns recovery of possession of property situate at 16 Betham Lane Freetown. It is not disputed that the property was acquired by the Respondent during the period that the parties were not living together as husband and wife , and that it was acquired by the Respondent alone without any financial contribution from the Appellant.

Even though the Appellant stated in her evidence that she and the Respondent owned the house at 16 Betham Lane Freetown having contributed or helped the Respondent to build the same, there is no evidence of the type or form of contribution she made towards the acquisition of the property. Counsel for the Appellant submitted that it is impossible to quantify a wife's contribution (other than financial) to the success or wealth of a husband while a marriage lasts. He referred us to certain authorities. We agree and adopt the principles of law in the authorities quoted. In **Rimmer vs Rimmer**, supra, the Court was satisfied that both parties had a substantial interest in the property, and in **Gissing vs. Gissing** supra, the couple by their joint efforts got a house and furniture intending it to be a continuing provision for their joint lives" and by their conduct, it was implied that the house and furniture is family asset in which each is entitled to equal shares. The operative part in that case is that both parties contributed to the acquisition by their joint efforts; it was therefore inferred that the property belongs to them equally.

In **Eleady-Cole vs. Eleady-Cole**, supra, it was clear from the beginning that the intention of both parties was that they were to have a joint interest in the matrimonial home, which was acquired during the subsistence of the marriage. The parties opened a joint account into which both paid in monies for the purpose of constructing the house which was to be the matrimonial home. The wife paid for the cleaning of the site and bought some fittings for the house, and money due to the wife as compensation was paid to the husband who used it for decorating the husband's surgery, and while the building was under construction the husband received some money from the wife which he admitted paying to the contractor. In those circumstances, the Supreme Court held that the legal estate in the property though vested in the deceased husband, it was held in trust for the husband and his wife in equal shares.

With respect to Counsel for the Appellant, the above authorities do not apply to the circumstances of this case. Quite apart from the lack of contribution from the

Appellant, the property was acquired by the Respondent after the parties divorced the first time, and even though they got married a second time, there is no evidence that the Respondent had the requisite intention to make the property, the matrimonial home, since he could not have known that he would marry the Appellant a second time. We are therefore of the opinion that the property is not jointly owned by the Appellant and the Respondent. It remains the sole property of the Respondent. In view of our conclusion that the authorities quoted by Counsel for the Appellant do not apply, we hold that the Learned Trial Judge was right to come to that conclusion.

Having held that, the next question we have to consider is whether the Appellant is a tenant at-will as suggested by Counsel for the Respondent or a tenant at sufferance or indeed a wife. The action in the High Court was for recovery of possession of that part of the premises occupied by the Appellant. The Appellant first came into the premises after her marriage to the Respondent by customary law. After the final divorce was granted by the Native Court, the Respondent served on the Appellant a Notice to quit the premises. Counsel for the Appellant has submitted that the Appellant's status in the house was that of a wife who has been abandoned, deserted or divorced by her husband and not a tenant; that as a wife, she was entitled to stay in the premises, and she should be treated more "equitably and fairly than used to be the case".

In order to determine the status of a divorced wife in the matrimonial home, we will have to take cognizance of the position under customary law. In customary law there is a general consensus of opinion among tribes that the husband owns the matrimonial home absolutely if he acquired it without the "contribution" of the wife; but that the wife has an interest in it inferior to that of the husband even if they both contributed equal shares to it acquisition. Whether or not she contributes to it, a customary-law-wife resides at the matrimonial home at the pleasure of her husband. If she is driven away by the husband or the marriage comes to an end and she cannot stay in the house, she can claim compensation for any financial "contribution" which she made towards its acquisition. But in my view, she cannot insists on the house being sold and the proceeds divided, as would a wife married under the general law." (See Sierra Leone Customary family Law, by Dr. H. M. Joko-Smart, Associate Professor of Law, FBC. page 118, para. 2). If through her personal efforts she contributed to the acquisition of the house and not financially, she is entitled to nothing. On the other hand, even if she contributed towards the acquisition of the home, the ~~contribution~~ compensation granted to her is not equivalent to her contribution.

'The reason for the inequality is that customary law recognizes that it is the wife's duty to assist her husband by her personal services even in the provision of a shelter

for her. Therefore whatever service she renders, personal or financial, towards the achievement of that goal is regarded more as a "help" to the husband rather than a "contribution" by her towards a common enterprise. Inherent in the reasons for the inequality is the old concept that a wife is herself a form of chattel of her husband which still persists in the customary laws. If equality were to be advocated in determining the ownership of the matrimonial home, the leadership of the husband in the family would be destroyed and his ability to marry more than one wife would be impaired. As long as the customary-law marriage remains polygamous, the wife of such a union is bound to suffer certain hardships, one of which is her unequal right to the matrimonial home." (See Sierra Leone Customary Law, supra)

I do not agree with Counsel's submission that the Appellant in this case contributed to the success or wealth (if any) of the husband while the marriage lasts, there is no evidence of such contribution. The Appellant in my view is a tenant-at-will and the Respondent was justified to serve notice to quit and demand possession of the property under the general law. In my view Exhibit "A" is valid Notice to quit the property on 30th April 2003. In view of the premise, we hold that the Learned Trial Judge was right to treat the Appellant as a tenant-at-will.

Similarly, for the reasons we have given above, we hold that the property at 16 Betham Lane Freetown is not the matrimonial home of the parties; it is the home of the Respondent alone, and the Learned Trial Judge was correct to have dismissed the Appellant's counter-claim.

The appeal is therefore dismissed. We make the following orders:

1. The Judgment of the High Court is hereby upheld.

2. The Respondent is granted immediate possession of the premises situate lying and being No. 16 Betham Lane Freetown in the Western Area of Sierra Leone.

3. The Appellant shall pay the cost of this appeal and that of the Court below, such costs to be taxed if not agreed

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HON MRS JUSTICE S BASH-TAQI, JSC

I AGREE.....

HON MS JUSTICE S KOROMA, JSC

I AGREE.....

HON MR. JUSTICE E. E. ROBERTS, JA