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IN THE SUPREME COURT OF SIERRA LEONE

CIV APP.6/93

NATHALIE INA KOTO ELEADY-COLE - APPELLANT

AND

MAGNUS KOSO-THOMAS
(EXECUTOR OF THE ESTATE OF
REGINALD HOWARTH ELEADY-COLE)

AND

JEANNE PIERRE ELEADY-COLE - RESPONDENTS

CORAM:

THE HONOURABLE DR. ADE RENNER-THOMAS - C.J.
THE HONOURABLE JUSTICE SIR J. MURIA - J.S.C.
THE HONOURABLE JUSTICE S.C. WARNE - J.S.C.
THE HONOURABLE MRS JUSTICE V.A. WRIGHT - J.S.C.
THE HONOURABLE JUSTICE U.H. TEJAN-JALLOH - J.A.

DATED THE 7th DAY OF SEPTEMBER 2006

Y.H. Williams Esq. M.M. Tarawally Esq. & Ms. Kamara for the Appellant

J.B. Jenkins Johnston Esq. for the Respondent

Wright J.S.C.

This is an appeal from the judgment of the Sierra Leone Court of Appeal delivered on the 20th day of May 1993.

The grounds of appeal are as follows:-

1. "That the learned Justices of Appeal erred in law when they held that the allegations of cruelty by the appellant were not grave and weighty to amount to legal cruelty and that the absence of independent evidence adversely affected the appellant's case with regard to her allegations of cruelty;
2. That the learned justices of Appeal erred in law in substituting a decree of dissolution of the marriage in place of a decree of judicial separation;
3. That there is no legal ground for the granting of a "decree of Divorce by the learned Justices of Appeal;
4. That as the law stands, a decree of Divorce cannot be granted unless prayed for the learned Justices of Appeal had rejected the prayer of the respondent for dissolution of the marriage and the appellant had not prayed for dissolution of the marriage;
5. That it is not a legal ground for the granting of a decree of Divorce that the court thinks it would be better that the relief to be granted for a dissolution and judicial separation;
6. That the irretrievable breakdown of the marriage is not a legal ground for the granting of a decree of Divorce in this jurisdiction;
7. That the concept of public policy as a ground for the dissolution of a marriage is not recognized by the Matrimonial Laws in this Jurisdiction;
8. That the learned Justices of Appeal having correctly stated the Law relevant to the exercise by the Court of its discretion in favour of the respondent inspite of his own adultery with the woman named

and decided not to exercise its discretion then proceeded to consider matters in the discretion statement filed by the respondent in arriving at its decision to grant a decree of divorce;

9. That the learned Justices of Appeal erred in Law in allowing the Appellant 12% share of the current price of the property in question as her beneficial interest when there was no sufficient or any basis, for such a computation;

10. That having regard to the evidence and the law applicable the Judgment is unsatisfactory";

BACKGROUND

The appellant and the respondent in the court below hereafter called: "the deceased" were married in England on the 7th day of January 1961. After the marriage the parties lived at divers addresses. There were no children of the marriage. The appellant petitioned the High Court on the 30th June 1992 for a dissolution of marriage and that she be granted a half share in the land and premises known as 14 Spur Loop, Wilberforce. On the 10th September 1982 an order was granted to the appellant amending her prayer in the petition for a dissolution of marriage to read "that she may be judicially separated from the respondent".

On the 21st February 1990 the High court granted a judicial separation between the parties and that the property at 14 Spur Loop, Wilberforce in Freetown of the Republic in Sierra Leone was the joint property of the parties. The Justice of Appeal granted a dissolution of marriage between the parties and awarded the appellant

12% share in the property at W14 Spur Loop Wilberforce for which the appellant has appealed to the Supreme Court.

Counsel for the appellant was given leave to argue ground 9 because he conceded that because of the death of respondent Reginald Howarth Eleady-Cole (hereinafter called the "deceased") the cause of action, the basis for grounds 1-8 of this appeal abated.

Learned Counsel for the appellant stated that the learned trial judge was right in deciding that the appellant was entitled to a 50% share in the property at W14 Spur Loop Wilberforce citing Rimmer vs Rimmer (1952) 2 AER 863. He said that the issue in dispute in this appeal was the quantum to which the appellant was entitled.

Counsel for the respondent submitted that the Court of Appeal was right in awarding 12% of the value of 14 Spur Loop on the evidence before the court. He stated that the appellant did not make any contribution towards the building of the house and that there was not enough evidence to support a resulting trust. (See Gissing v Gissing (1970) 2AER 781.

It was ordered by this Court on the 6th April 2006 that Magnus Koso-Thomas one of the Executors of the estate of the deceased be substituted as respondent in this appeal in place of the deceased who died on the 9th October 1997.

Before arguments were closed the Court referred to the affidavit of Yada Hashim Williams sworn to on the 3rd March 2006 which was supported by a

Motion dated 3rd March 2006 in which the deceased purported to convey the property to Jean-Pierre Eleady-Cole and the Court declined to make orders in this motion because firstly, Jean Pierre was not a party to the proceedings and secondly because it was agreed by both sides that the appellant had a share in the property but the extent of that beneficial interest was not certain.

I now turn to ground 9 in these grounds of appeal referred to earlier. The evidence is clear that the land on which the house in dispute was built was State land leased by the deceased by the Government of Sierra Leone and was in the deceased's name. The architectural plan was drawn in the name of both the appellant and deceased to which the deceased had no objection. Both parties to the marriage opened a joint account into which both parties paid in money for the purpose of constructing a house on the said land which was to be matrimonial home.

From the above evidence it is clear that it was the intention of both parties right from the beginning that they were to have a joint interest in the matrimonial home.

However, the parties never lived in the house as it was later rented to pay a loan given to the deceased by Barclays Bank under a gentleman's agreement though no formal document was drawn out the appellant had produced her title deeds in respect of other properties in which she had interest as collateral to secure the loan from the bank. It is not possible to ascertain precisely the amount paid to the savings account by each party because there is no evidence as to the respective quantum paid in by both parties.

The appellant paid for the cleaning of the site and bought some fittings for the house. There was unchallenged evidence that the Le1,000.00 which was paid to the appellant as compensation for her damageds car was received by the deceased and used for decorating the deceased surgery. The deceased admitted receiving the sum of Le700.00 from the appellant while the building was under construction which he gave to the contractor. The contractor deposed that the appellant was often at the site.

There is substantial evidence of the common intention. I now quote from the evidence of the appellant at page 142 of the for the record of appeal:

> *"When the land was about to be purchased my husband and I had a joint account at Siaka Stevens Street, Freetown. The purpose of the account was to save up for the building of the house at Spur Loop Wilberforce. Our intention was that the house was to be out matrimonial home I never lived in the house because we leased it to the manager of Barclays Bank. I surrendered my title deed for the land at Aberdeen Road land at Mudge Farm Aberdeen Road, Freetown land at Tengbeh Town, my share of land at Hamy's Farm Congo Cross, my own share of property at Howe Street Freetown and my share of 19A Garrisson Street Freetown as collaterals to the bank. I have with me the joint saving pass books in the name of Dr. and Mrs. Eleady-Cole. I made a list of all the properties I was surrendering to the bank and the bank accepted it. My husband signed the Mortgage Deed".*

The appellant also said at page 143:

> *"My husband applied for a building permit and obtained it in the name of Dr. and Mrs. R. Eleady-Cole. I now produce and tender it marked Exh. E. the permit is in respect of a dwelling house off Wilberforce Spur Loop. It was this house I told the Court I contributed to financially. Quite apart from the financial contribution I made I bought some fittings. I also paid for the hiring of two loader for clearing the site. I bought the fittings in London and sent them by ship. I have never received any share of the rents paid in respect of the house".*

In page 157 the deceased is recorded as saying:

> *"When the house was under construction my wife had her own share of the rents from the jointly owned property. Her share was Le700.00. She gave me Le700.00 which I gave the builder."*

Both Counsel for the appellant and the 1st respondent agreed that the appellant was entitled to a share in the property in dispute.

From the above what is not clear is whether they were to have equal shares or some other proportion.

What is the test in determining the proportion to which the appellant is entitled? Romer, L.J. in Rimmer v Rimmer (1952) AER said:

> *"cases between husband and wife ought not to be governed by the same strict consideration, both at law and in equity as are commonly applied to the ascertainment of the respective rights as strangers*

when each of them contribute to the purchase price of property and the old fashion doctrine that equity leans towards equality is peculiarly applicable to dispute of the character of the present one, where the fact, as a whole, permit its application".

In Jansen v Jansen (1965) 363 AER Lord Denning said:

"agreements such as these, as I say are outside the realm of contract altogether. The common law does not regulate the form of agreement between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in those cold court".

To my mind the test to be applied in such cases is the intention of both parties to the marriage. Was there an agreement between the parties express or implied as to how the property was to be held? Could the conduct of the parties reveal their intention and was there a constructive or resulting trust on the property.

In the case of Pettitt v Pettitt (1969) 2AER 411 a freehold of a cottage had been purchased entirely out of moneys provided by the wife and the property stood in her name. The husband undertook internal decoration work and built a wardrobe in it. He also laid a lawn and constructed a wall and side wall in the garden. It was held that the husband was not entitled to an interest in his wife's property merely because he had done in his own leisure time jobs which husbands normally did.

Lord Diplock said in this case:

> *"How does the court ascertain the "Common Intention" of spouses as to their respective proprietary interests in a family asset when at the time it was acquired or improved as a result of contributing in money or moneys worth by each of them they failed to formulate it themselves? It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the court should give effect to it".*
>
> *"In numerous judgments of the court of Appeal during the last 20 years this branch of the law of property has undergone considerable developments. The cases start with Re Rogers question and end with Gissing v Gissing 1 AER 1043"* and I may add that we now have Miller vs Miller and McFarlane vs McFarlane which was decided in the House of Lords on the 24th May 2006.

In Jones vs. Maynard (1951) 1AER 802 it was decided that where there is a joint purse between husband and wife whatever comes out of that joint purse or pool is the joint property of both parties.

Vaisey J. in that case said;

> *"Plato said that equality was a sort of justice, that is to say, if in such a matter as this one I cannot find any other bass, equality is the proper basis. I think that it is principle which applies here. When moneys were taken out of the joint account for the purpose of making an investment the intention which I attribute to the parties is equality and not some preparation to be ascertained by an inquiry as to the*

amount which were respectively contributed by the husband and the wife common purse".

The conduct of the parties may give rise to some other inference as to their common intention (see Ulrich v Ulrich and Felton, 1968 (AER 67.

This case can be distinguished from Gissing v Gissing (Supra) in which the purchase price and mortgage payments were paid by the appellant. The respondent provided furniture and equipment for the house and for improving the lawn. At no time was there any express agreement as to how the beneficial interest in the matrimonial home should now be held. It was held that on the fact it was not possible to draw any interference that the respondent should have any beneficial interest in the matrimonial home.

At page 782 Lord Reid said:

"if there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house could not be bought. I agree that depends on the law of trust rather than on contract so the question is under what circumstances does the husband become trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him and implied constructive or resulting trust".

At page 784 Viscount Dilhorne concurred and said:

> *"I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by person in whom the legal estate is not vested and whether made by a stranger, or spouse or a former spouse must depend for its success on establishing that it is held in a trust to give effect to the beneficial interest of the claimant as cesti que. trust. Where there was a common intention at a time of acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouses in whose name the legal estate was vested to fail to give effect to that intention and the other spouses will be held entitle to a share in the beneficial interest".*

As I have said above it is clear from the evidence in the cases cited that there was a common intention that the property was to be held jointly by the appellant and the deceased.

According to the circumstances of this case and the evidence I hold that the legal estate of the property the subject of this action is held in trust for the appellant whether constructive or resulting trust.

To give effect to the common intention of the parties I hereby declare that though the legal estate was at all material times vested in the deceased it was held in trust constructive, resulting or otherwise, as to the beneficial interest in equal shares for himself and the appellant.

The appeal therefore succeeds.

V.A. Wright, J.S.C.

The Hon. Dr. Ade Renner-Thomas C.J. - I agree:.....

The Hon. Justice Sir J. Muria J.S.C. - I agree:.....

The Hon. Justice S.C. Warne, J.S.C. - I agree:.....

The Hon. Justice U. Tejan-Jalloh J.A. - I agree:.....