

TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. 258/99

BETWEEN

FELIX PENA

*Plaintiff*

AND

AILSA PENA

*Defendant*

**Before: The Hon. Justice Nolan Beraux**

Appearances: Ms. J. Jones for plaintiff  
Mrs. S. Daly for defendant

## **JUDGMENT**

The plaintiff by originating summons filed on 9<sup>th</sup> February, 1999 applied for the following orders

- (1) The partition of the property known as No. 10 Ashland Avenue, comprising 9468 superficial feet more or less and delineated on the General Plan marked "A" annexed to Deed of Conveyance registered as No. 16851 of 1963 together with the buildings standing thereon (hereinafter called "the said property").
- (2) The sale of the property and distribution of the proceeds thereof in the shares one-third (1/3) to the defendants, two-thirds (2/3) to the plaintiff and that the court make all necessary or proper consequential directions.

- (3) That the costs of this application be paid by the defendant to the plaintiff.

At the hearing of the summons relief (1) was not pursued.

The plaintiff's application has its genesis in the order made by Lucky J in matrimonial proceedings between the parties. He was once married to the defendant. They were divorced after thirty-six years of marriage. In subsequent proceedings concerning the disposition of the matrimonial property, the defendant sought the transfer of one half of the beneficial interest in the matrimonial home at 10 Ashland Avenue, Jamboree Park, Valsayn North, St Augustine and occupation of it. That application, together with two other applications were heard by Lucky J. Of the three applications before Lucky J, two were applications of the defendant. Her second application sought periodical and lumpsum payments for her maintenance. The evidence before Lucky J consisted of affidavits and accompanying exhibits. The parties were not cross-examined nor was vica-voce evidence led.

Mrs. Pena sought fifty percent of the husband's assets and a fifty percent interest in the matrimonial home. On her behalf, counsel submitted that she had made substantial contributions during the marriage and a "solomonic" distribution would be reasonable.

Having heard full argument from both counsel, Lucky J decided *inter alia* that the matrimonial home was owned one third by the defendant and two thirds by the plaintiff. He refused the defendant's application to occupy the matrimonial home. He also refused to order any lumpsum payment with respect to the other assets sought by the wife. With respect to the rest of the matrimonial property, Lucky J found as follows:

- (1) 7000 shares in Royal Bank – one third to wife and two thirds to husband.

- (2) 352 shares in Bank of Commerce – half to wife and half to husband.
- (3) 728 shares in Royal Bank to husband.
- (4) 248 shares in Unit Trust second scheme – to husband.

In arriving at his decision, the learned Judge took into account the provisions of section 27(1) of the Matrimonial Proceedings and Property Act, Chap. 45:51. At page 4 of his judgment he makes the following comment:

*“I have considered what is justifiable and fair in these circumstances – age of the parties; their financial status; the length of the marriage; their contributions in the marriage; the most valuable asset (the matrimonial home) and the accepted valuation of same; and, the parties prospects for the future.*

Having considered these matters the learned judge then made his order, adding that the appraisal must be based on “fairness to both parties”.

The judgment of Lucky J was appealed by the defendant. The Court of Appeal varied the order in part, granting the defendant one half of all the shares in Royal Bank, Bank of Commerce and the Unit Trust respectively. It affirmed the learned judge’s apportionment of the matrimonial home. The Court of Appeal further ordered that:

*“both parties are entitled to remain in occupation of the matrimonial home until the same is sold or until some arrangement is made between them as to the occupation of same.”*

The plaintiff in his affidavit in support of the application now before me, deposes that he has been unable to make any arrangement with the defendant concerning the occupation of the matrimonial home. He contends that by letter of 11<sup>th</sup> March, 1998, the defendant’s attorney at law, on her behalf, requested that the

premises be valued and put up for sale. On 9<sup>th</sup> April, 1998, by written agreement he agreed to sell the premises for \$500,000.00, pursuant to a valuation done by Messrs Raymond & Pierre, valuers.

The valuation report was obtained on 29<sup>th</sup> April, 1998. That agreement for sale made no reference to the defendant's 1/3 share in the property inspite of the judgments of Lucky J and the Court of Appeal. By notice of motion dated 9<sup>th</sup> November, 1998, the plaintiff applied to the Court of Appeal to vary the order *inter alia* to read:

***“That both parties are entitled to remain in occupation of the matrimonial home until an agreement for sale is entered into in respect of the said premises.”***

The Court of Appeal dismissed the motion. de la Bastide C J found the wording of the amendment to be an attempt by the plaintiff to mask the fact that what he was seeking is an order for sale which would entitle him to sell the property and the entire beneficial interest in it without the agreement of the defendant.

In dismissing the motion, de la Bastide C J commented:

***It is conceded that Mr Justice Lucky made no order for the sale of the property and made no order which would entitle the husband to sell the property over the head of the wife. I am of the view that if the husband wishes to obtain such an order, then he must apply to the High Court for it. I am expressing no view as to whether he would or would not be entitled to it. He might apply for it either from the Matrimonial Court or under the statute which enables a court to make an order for sale of a property at the instance of one of two or more co-owners.”***

The plaintiff contends that by letter of 18<sup>th</sup> January, 1999 to the defendant's attorney, the defendant was asked whether she would be prepared to join in an agreement for sale. He received no response. He adds that, as a consequence of the delay, the agreement for sale was rescinded by the purchaser.

The defendant, in her affidavit in reply filed 29<sup>th</sup> June, 1999, asks this court to refuse the application or, to order physical partition of the property, by giving her an annex to the matrimonial home and one third of the grounds surrounding the matrimonial home. This would satisfy her interest in the matrimonial home. According to the defendant, the annex is self-contained, having a completely different entrance and road access from that of the main part of the building, but no connecting doors. A physical partition of the matrimonial home in this way, would not preclude the plaintiff from selling the main part of the matrimonial home and realising his financial interest in the home.

The defendant has also put forward other reasons why the court should refuse the application for a sale.

- (1) She is of advanced age (66 years old) and has not worked outside the home since 1961. She has no other source of income or assets other than those referred to in the judgments of Lucky J and the Court of Appeal. Not all the shares referred to in those judgments have been transferred to her pursuant to the finding and order of the Court of Appeal. The plaintiff continues to dispute her entitlement to the one half of the banks' shares.

The defendant concedes, however, that when the shares are transferred, there will be dividends from them.

- (2) If the matrimonial home is sold in the price range of \$500,000.00, the one-third proceeds thereof will not be sufficient to acquire a suitable alternative home nor will the

proceeds generate enough income to enable her to pay rent for alternative accommodation during the remainder of her natural life. The hardship occasioned to her would outweigh any disadvantage to the plaintiff from the proceeds of sale of the two-thirds of the matrimonial home, if partitioned in the manner requested.

The year “1961” referred to by the defendant appears to have been a typographical error and the plaintiff in his affidavit in answer to the defendant, contends (and I accept it) that she worked outside the matrimonial home up to 1991 and was in receipt of a monthly pension in respect of that employment and received a gratuity upon her retirement.

The plaintiff, in further answer, states that negotiations with the defendant with respect to the bank shares have been fruitless because the defendant has failed to confirm or deny his calculations in respect of them. She has refused to sign transfer forms to effect the transfer of the Royal Bank shares which were delivered by his attorneys to her attorneys. She has also refused to respond to letters concerning the transfers.

The plaintiff states that:

*“the history of the marriage and the subsequent events since the divorce confirm the fact that the defendant and I cannot continue to reside in the matrimonial home even if the premises are partitioned in the manner stated by the defendant in her paragraph 5. Such partition would defeat the whole concept of a ‘clean break’ in the matrimonial proceedings.”*

He adds that all infrastructure i.e. sewage, water, water heater is shared between the two buildings and, in addition to lowering the value of his two thirds share, that it is highly unlikely that town & country planning permission would be granted for such a partition.

## **The Partition Ordinance**

Mrs. Daly, in her very interesting submissions, contends that it was inappropriate to apply for a sale of the property under the Partition Ordinance having regard to the fact that the property has been the subject of proceedings under the Matrimonial Proceedings and Property Act Chap. 45:51. I do not accept that submission. The matter was fully argued before Lucky J. and the Court of Appeal and the interests of both husband and wife in the matrimonial home have been finally determined. It is appropriate that the matter should now proceed under the Partition Ordinance. I can see no collision between the Ordinance and the Act.

There can be no doubt that if I accede to either party's prayer, hardship will be caused to one of them. The Ordinance is almost identical in its expression as that of the 1868 Partition Act of England. In **Pemberton v Barnes** [1871] 6 Ch. App 685, Lord Hatherley L C, in expressing his views on the hardships experienced by the operation of the Partition Act said, at pg. 692:

*“The very circumstance of being obliged to submit to a partition is a great hardship in some cases, but it is a thing which must be submitted to. Then, no doubt.... there may be extreme hardship in compelling a man who has a share in land to take money instead of it. But, on the other hand, a partition may expose him to very serious inconvenience. He does not know what the result of the partition may be; whether the lots are of equal value is a matter of valuation – that is, in fact, of opinion; and supposing them to be of equal value, it may be that he gets the very lot which he least wishes to have; and a part owner may very well say, “I would rather have the estate turned into money, and get my share of its real and proper value, than take the change of*

*having the estate allotted at the discretion of somebody whom I may not like to be my judge, or under the direction of the court, and of having allotted to me a lot which I think of less value than the others, or which, for other reasons, I do not wish to have. He therefore may wish for a sale. One man may prefer a partition because he wishes to be a landed proprietor; another, who is not so anxious to possess land, may prefer a sale of the entirety, as giving the certainty of a fair and equal division. The Legislature saw that all these questions might arise, and it has provided for them by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> sections of the Act.*

Sections 3 & 4 of the Ordinance are expressed in identical terms to the corresponding sections of the English statute.

Section 3 of the Partition Ordinance provides:

*“In a suit for partition, where, if this Ordinance had not been passed, a decree for partition might have been made, then if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.”*

One of the considerations of the court under this section is to have regard to the nature of the property and to consider whether a sale of the property would be

more beneficial to the parties than a division of the property between them. If it is of that view, then it may grant the request in spite of the dissent or disability of other interested persons.

Section 4 provides:

*“In a suit for partition, where, if this Ordinance had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.*”

Under section 4, the court shall order a sale at the request of the party or parties holding one half share or more unless there is good reason not to do so. The onus is on the person seeking to prevent the sale of the property to show good reason.

Miss Jones founded her application for sale under section 4 of the Act and submitted that the plaintiff, by dint of having more than half share in the property, was entitled to a sale. She relied on **Kelvin Thomas & Others v Harry Persad** HCA 3594 of 1991, a case in which sections 3 & 4 were considered. Sealey J in that case stated at pg 5:

*“By section 4 of the Ordinance once a party who is interested to the extent of one half or upwards of the property requests the court to direct a sale instead of a division, the court shall, unless it sees good reason to the contrary, direct a sale of the property.”*

The purport of sections 3 & 4 of the English Partition Act was considered in Drinkwater v Ratcliffe [1875] L R 20 Eq 528. Jessel M R commented at pg 530 in this way.

*“The 3<sup>rd</sup> section gives power to the court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are, the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified in one case, viz., where, by reason “of any other circumstance,” a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the court may direct a sale. It is an absolute power of sale on the request of anybody, provided the court is satisfied that it would be more beneficial for the parties interested than a division. Then the 4<sup>th</sup> section provides that if the parties interested, to the extent of a moiety or upwards, request a sale, the court shall sell, unless it sees good reason to the contrary – that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shown; they have not to shew any reason for the sale, but a reason to the contrary must be shewn.”*

In Pemberton v Barnes (supra), Lord Hatherley L C, in his very compelling judgment stated at pg. 691

*In the 3<sup>rd</sup> section it deals with the case which frequently happens where there is extreme inconvenience in partition. We are all*

*familiar with the absurdities to which the partition of a single house has sometimes given rise, and there were many cases where a partition was inconvenient in the extreme. The Legislature has, in the 3<sup>d</sup> section, provided a complete remedy for this by empowering the Court, in a case where there would be grievance and hardship in a partition, to sell, on the application of any party, notwithstanding dissent or disability on the part of any or all, it might be of the other parties. The 4<sup>th</sup> section seems to me to be perfectly distinct from the 3<sup>d</sup>, for whereas the 3<sup>d</sup> section in terms applies only where the Court is satisfied that a partition is inconvenient and not beneficial for the parties, there is no such condition inserted in the 4<sup>th</sup> section; and whereas under the 3<sup>d</sup> section a discretionary power was given to the court to order a sale, if it thought a sale more beneficial than a partition, the 4<sup>th</sup> section makes it imperative on the court, in a certain state of circumstances, to order a sale, unless it sees good reason to the contrary; that is to say, the onus is thrown on the person who says that the court ought not to order a sale, to shew some good reason why it should not do so; otherwise, the court is bound to order it. The scope of the enactment appears to me to be this: there being, as I have said, reasons which may induce some of the part owners to wish for a partition and others to wish for a sale and a division of the proceeds, the Legislature says that if the votes are equally divided, one half of the persons interested in the property desiring a sale and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the court shall be bound to give them a sale wholly irrespective of the 3<sup>d</sup> section. But still there is a certain discretion left to the court, so that the court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable.*

## **Findings**

The question is, should the court exercise its power under section 4 as requested by the plaintiff and order a sale of the property? I shall deal with the section 4 considerations first. Under section 4, once a party who is interested to the extent of one half share or upwards request the court to direct a sale instead of a partition, the court shall direct a sale of the property “unless it sees good reason to the contrary”. The onus is on the defendant to show good reason why a sale should not be ordered.

The defendant had put forward two reasons why the sale should not be ordered. Her first contention is that given her advanced years and the size of her income, any sale of the property would result in hardship to her since, given her income, the sum realised from her share would not be sufficient to allow her to purchase another property or to generate sufficient income to allow her to rent a property for the rest of her life.

I have no doubt that hardship to one party in circumstances which are sufficiently compelling, is a factor which a court may take into account in refusing to order a sale of the property pursuant to section 4 of the Ordinance. But the plaintiff has a two-thirds share of the property and there will also be hardship to him if the property is partitioned rather than sold. Any hardship to the defendant therefore must be of a nature over and above that which is to be normally expected in order to constitute good reason to deny the sale under section 4.

The question is whether in this case, the defendant has shown her circumstances to be sufficiently compelling to require the exercise of my discretion against a sale of the property. I agree with Miss Jones that the issue of hardship was already considered by both the High Court and Court of Appeal in determining the interest of the defendant during the application by both parties for ancillary relief relative to the matrimonial home. Lucky J did so at page 4 of his judgment

in terms set out earlier in this judgment at page 3. This does not preclude me from considering the defendant's circumstances afresh, but it is a matter which I cannot ignore. In any event, I am satisfied that the defendant's circumstances are not as difficult as she has stated, since she has not denied being in receipt of a monthly pension or that she received a gratuity upon her retirement.

In all the circumstances of this case therefore, I do not accept that her financial situation is such as to allow me to stifle the plaintiff's larger interest in the property and his desire to realise the pecuniary benefits thereof by way of sale.

The second reason advanced by the defendant falls to be considered under section 3 rather than section 4. I daresay, however, that even if it is a section 4 consideration, I am not satisfied, for the reasons given hereafter, that it is a sufficient basis to refuse the sale. She contends that the property can be partitioned. The annex has a separate entrance and the grounds to the property are sufficient to allow her some yardage for herself while permitting the plaintiff to sell his share of the property. I fully appreciate the defendant's efforts to remain on the property, but the suggestion by the defendant is simply impractical.

I have grave doubts that a property partitioned in that way would attract any purchaser willing to buy the plaintiff's share of it, given that the annex and the main building share the same infrastructure and a common wall.

In my judgment and as section 3 provides, when one takes into account the nature of the property and the respective interests of the parties, it is appropriate and best that the property be sold and the proceeds apportioned to the parties in accordance with their respective shares. From the evidence the parties have been unable between them to arrive at an agreement to sell the property and it is because of this that the plaintiff has come before this court to have the same sold.

It seems to me therefore, that I can order a sale of the property pursuant to either of sections 3 or 4, but given that Miss Jones has founded her case on section 4, I shall direct that the property be sold pursuant to section 4. The defendant, having failed to show a good reason to refuse the sale, the court is obliged to direct a sale of the property on the request of the plaintiff. I must add that there is no evidence before me that the plaintiff's application is actuated by vindictive feeling nor do I find it to be otherwise unreasonable.

**Order**

I am not satisfied, however, that the value of the property is as set out at paragraph 7 in the plaintiff's affidavit. I agree with Mrs. Daly that on its face the property appears to be undervalued. I shall direct therefore that a further valuation be done of the property by valuers appointed by agreement between the parties within fourteen days of today's date. If no agreement is arrived at between them, the Registrar shall appoint a valuator within seven days thereafter. The valuation report is to be completed and submitted to the Registrar within fourteen days of the appointment of the valuation (whether by agreement or by the Registrar). The parties shall bear the cost of the valuation equally between them.

Each party shall bear their own costs in this action.

Adjourned to 14<sup>th</sup> March for further directions.

Dated this 4<sup>th</sup> day of February, 2000

NOLAN BEREAX  
Judge