

IN THE SUPREME COURT OF BELIZE, A.D. 2004

ACTION NO. 261

ALEXANDRIA NICHOLSON

Plaintiff

BETWEEN AND

BYRON WARREN

Defendant

—
BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Merlene Moody for the plaintiff.

Ms. Lois Young Barrow for the defendant.

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JUDGMENT

The facts of this case will, no doubt, tug at anyone's emotion for they involve a real human situation popularly or commonly called "love". However, this is a court of law and, I must hasten to add that it is not insensitive or oblivious to this situation. But it is enjoined by its duty to decide cases in accordance with the law.

2. Ms. Alexandria Nicholson originally was the plaintiff in this case, but is now the defendant to the counterclaim of Mr. Byron Warren. This judgment is on Mr. Warren's counterclaim. Ms. Nicholson's own action for a declaration that Mr. Warren holds the beneficial interest in condominium Unit G3 at Banyan Bay in San Pedro, Ambergris Caye, on trust for her and himself in such shares as the Court would deem fit, had been dismissed for her non-appearance after a number of adjournments.
3. However, by a last-minute amendment to her Defence which her new attorney, Ms. Merlene Moody obtained from the Court, a

valiant attempt was made to resuscitate Ms. Nicholson's claim for a declaration of her interest in the said Unit G3.

4. Mr. Warren's counterclaim, in the main, is that Ms. Nicholson has been in occupation of Unit G3 as a bare licensee and that even after she had been given, in or about January 2004, by him notice to quit, Ms. Nicholson refuses to vacate the said condominium unit. Therefore, Mr. Warren claims, he has been deprived of the use and enjoyment of the condominium and he has thereby suffered damage. He therefore claims possession of the condominium, mesne profits from the date of the writ (which was taken out by Ms. Nicholson's former attorneys on 11th May 2004), until possession of the condominium is delivered up to him by Ms. Nicholson.
5. Although this case is therefore about right to ownership and possession and interest, if any, in the said condominium Unit G3 at Banyan Bay Villas in San Pedro, it has as its backdrop, the romantic relationship that had subsisted between Ms. Nicholson and Mr. Warren. For it is common ground between the parties that by the time this action was instituted, this is, on 11th May 2004, they were not living together, Mr. Warren had moved out of the condominium. In fact, earlier this year, Mr. Warren made an application to this Court to have Ms. Nicholson removed from occupation of the condominium. This application was stoutly resisted and the Court declined making the order. So Ms. Nicholson has therefore remained in the condominium until the trial of this action.

Relationship between the Parties

6. It is clear from the evidence that the relationship between Ms. Nicholson and Mr. Warren was intimate and they had known each other for some time. There is no denying that they stayed together

for sometime in the same place. From the evidence they stayed together however briefly at Paradise Villas in San Pedro. This accommodation was owned by Ms. Nicholson who shared it as well with her two young children. This was early in January 2000. Ms. Nicholson and Mr. Warren must have been, from the evidence, amorous and very congenial to each other. They were, from the evidence, even regarded as a couple, husband and wife. But there is no evidence however, of any formal marriage ever between them, although Ms. Nicholson at the start of her testimony referred to Mr. Warren as “my husband”.

7. From the evidence, Mr. Warren commutes between his home in Arkansas, U.S.A. and Belize, spending the winter here in Belize and the rest of the year away from Belize.
8. In March 2001, he bought Unit G3, a condominium in Banyan Bay Villas, San Pedro Town, which is at the heart of these proceedings: see Exhibit BW1, the deed of assignment of the condominium to Mr. Warren, and Exhibit BW2, the wire transfer from his brokers in the U.S.A. evidencing payment by him of the sum of US \$225,000.00 for the condominium.
9. It is also therefore not in dispute that Mr. Warren paid solely for the condominium. From the evidence, however, Ms. Nicholson moved in and took up residence in the condominium some time in April 2001. Initially, she paid part of the expenses for the condominium. The couple lived together presumably amorously in love, and went on trips together, just like an ordinarily married couple. But, as I have said, they never had any formal marriage ceremony. Ms. Nicholson however testified that Mr. Warren later met her parents at Maruba Resort and presented a cooler containing huge lobster tails to them as dowry for her. I can only say that this was all clean

and hearty fun, even a practical joke, but it did not and does not, a marriage make.

10. Sadly, like the proverbial good things which come to an end, so did the relationship between Ms. Nicholson and Mr. Warren. Their relationship, from the evidence, came to an end early in 2004, that is, February, following some altercation between them. Mr. Warren returned to the U.S.A. in May 2004 but returned in July of the same year to try counseling together with Ms. Nicholson to salvage their relationship. But this was to no avail. In the meantime attorneys for Ms. Nicholson had launched the action out of which this counterclaim arises.

Ms. Nicholson's Defence to the Counterclaim and Testimony

11. Ms. Nicholson in her Defence to Mr. Warren's claim to possession of the condominium Unit G3 and mesne profit, says that although Mr. Warren did give her oral notice to quit, he, Mr. Warren, subsequently withdrew the notice and together they continued to cohabit in the condominium as husband and wife.
12. In her testimony to this Court, Ms. Nicholson painted a moving picture of the relationship between herself and Mr. Warren. She said that they had known each other since the later 70s when she was living on the mainland of the country in the area now known as Maruba Resort. They had met through a mutual friend and they became intimately acquainted.

She further testified that Mr. Warren would frequent San Pedro for diving trips and would call her to visit him for the duration of his visits. She testified that he even fondly called her his "bag lady", meaning that she always accompanied him on these trips carrying his equipment bag. She also testified that this phase of their relationship lasted three years and Mr. Warren even visited her

parents in Rockford, Illinois. He even flew her in his private plane. Crucially, she testified that after three years they mutually went their separate ways. According to her testimony, they met again in 1998 while she was then living in Paradise Villas in a beach front property on San Pedro Town in Ambergris Caye. Mr. Warren must have departed Belize as Ms. Nicholson said that they got together again January 2000. She testified that they made a commitment to each other and that they could not regard themselves as just boyfriend/girlfriend but that they should regard themselves as married. She also testified that Mr. Warren lived with her at Paradise Villas, but because she and her two children were living in a one bedroom condominium, he insisted that they should find a bigger place. She further testified that in January 2000 she and Mr. Warren left for what she called "a honeymoon trip". They met some of Mr. Warren's old friends in Miami and he introduced them as a couple.

13. According to Ms. Nicholson's testimony Mr. Warren said he would buy condominium Unit G3 at Banyan Bay Villas for them as a family and that he would eventually put it in her name. Mr. Warren, she testified, came back in January 2001 and they moved into the condominium.
14. I must however say that from the evidence, in particular Exhibits BW1 and BW2 (the assignment of the condominium to Mr. Warren and evidence of the wire transfer for its payment respectively), the condominium was assigned and paid for at the end of March 2001. Therefore, I find that it is more probable that they moved into the condominium sometime after March 2001.
15. Ms. Nicholson also testified that she maintained the condominium by repairing and cleaning it and she had a maid whom she paid to

do some domestic chores for Mr. Warren like his laundry and polishing his shoes. She testified that she paid the telephone bill (this was in her name) and the internet fees; and purchased what she called "the family cars" – two golf carts. She further testified that she and Mr. Warren paid for renovating the condominium which she lovingly referred to as "our home". But all she presented in evidence as proof of her contributions was Exhibit AN1 which is undated and unsigned but headed: "Alexandria Nicholson Personal Investment into Home". This is a miscellany of expenses, covering various items in the grand sum of US \$144,446.00, without any supporting receipts.

16. Three other witnesses testified for Ms. Nicholson including Hannah Nicholson, her mother. Both Sarie Frank and Michelle Kachur testified that when they first met Mr. Warren he was living with Ms. Nicholson at Paradise Villas and they moved later into Unit G3 in Banyan Bay. Ms. Kachur testified that the condominium has been completely redecorated, an exercise which was overseen by Ms. Nicholson. She however testified that she had no idea who financed the remodeling of the condominium.
17. Mrs. Hannah Nicholson also testified about the relationship between her daughter, Ms. Nicholson, and Mr. Warren. She said that Mr. Warren said he was going to buy Unit G3 in both her daughter's name and himself. She said they treated Mr. Warren like a member of the family; they even went on cruise ship trip with him. She also testified that both Ms. Nicholson and Mr. Warren lived as husband and wife.

Determination

18. It is manifestly clear that however much the parties were in love and however strong might have been the affirmation or declaration

of their love for each other, they were simply not married, at least not in any form cognizable in law, whether the proper legal marriage or common law union: the latter is defined in section 148D of the Supreme Court of Judicature (Amendment) Act 2001, as meaning:

“... the relationship that is established when a man and woman who are not legally married to each other and to any other person cohabit together continuously as husband and wife for a period of at least five years”. (emphasis added)

19. The evidence in this case is that Ms. Nicholson and Mr. Warren had known each other at least since the late 70s, and they had intimate relationship between them, according to Ms. Nicholson, for some time. From the evidence, Mr. Warren was not continuously resident in Belize; he spent some of the winter months here and would then go back to the U.S.A. where he has another home.
20. There is some discrepancy as to when exactly the parties started to live together: Ms. Nicholson said in evidence it was January 2000 and Mr. Warren said sometime in April 2001. I am however not prepared to find and hold that because Mr. Warren might have stayed in her one bedroom condominium at Paradise Villas as testified to by Ms. Nicholson herself, Ms. Frank and Ms. Kachur that this could be regarded as cohabitation for the purposes of a common law union.
21. But whatever the exact date or time of the start of their intimate relationship and however frequent, and however long the period over which it might have stretched, it is not the same, in my view, as cohabitation for the purposes of the law as defined in section 148D of the Supreme Court of Judicature (Amendment) Act, 2001.

Cohabitation for the purposes of the law to constitute “a common law union” or “a union”, is the relationship that is established when a man and a woman who are not legally married to each other and to any other person, cohabit together continuously as husband and wife for a period of at least five years.

22. Therefore, the relationship to be invested with any legal import, at least for the purposes of property rights or entitlements, to qualify as cohabitation by living together as husband and wife, must in fact, have existed continuously for a period of at least five years. Anything short would not, in my view, suffice. Also, the law requires that either party to the cohabitation be not legally married to any other person during its subsistence. There is however, no evidence that either Ms. Nicholson or Mr. Warren was, during their time together (whatever its duration) legally married to any other person.
23. But on the evidence, whether that of Ms. Nicholson (that they started to live together in January 2000) or Mr. Warren (that they only moved into the condominium Unit G3 in April 2001), it is manifest that they had not live continuously together for at least five years. In fact, Ms. Nicholson launched these proceedings in May of 2004 – a period short of five years when they started living together on the account of either.
24. Also, for the purposes of the law to be entitled to a declaration of a party’s property title or rights, on the breakdown of a common law union, the property in question must have been acquired by the parties or either of them during the subsistence of the union – section 148E (1) of the Supreme Court of Judicature

(Amendment) Act 2001. On the evidence, I am unable to find that the condominium was acquired during the cohabitation of Ms. Nicholson and Mr. Warren as husband and wife. It was in fact acquired solely by Mr. Warren at the end of March 2001 (see Exhibits BW1 and BW 2) and they started living together in it sometime after its acquisition in March 2001.

25. I am therefore unable to declare, as Ms. Nicholson avers in paragraph 5 of her Amended Defence to the Counterclaim, that Mr. Warren holds the beneficial interest in the condominium in trust for her and himself.
26. On the contrary, I find that Mr. Warren bought the condominium solely and the parties' living in it did not factually meet the requirements of the law to find an interest in it for Ms. Nicholson. The period they lived together was short of that stipulated by law, to be a common law union, to entitle her to a share in the condominium.
27. I accordingly, find and hold, that Mr. Warren succeeds in his counterclaim for the possession of the condominium.
28. I must mention that the case of Abdool Hack v Rahieman 27 WIR (1976) 109 relied upon by Ms. Moody to advance Ms. Nicholson's case, on proper analysis, affords little if any succour on the facts, to her. In that case, the parties who were not legally married (although they had earlier undergone a Muslim marriage) had lived together continuously for over a period of 28 years. Later a property was purchased as their home and conveyed in the sole name of the appellant from whose salary deductions were made to pay off the mortgage on the house. The woman contributed to housekeeping expenses and from the profits of her business she made substantial financial contributions to the running of the home.

The trial judge accepted the evidence of the woman in preference to that of the appellant and found as a fact that the substantial contributions made by her towards housekeeping expenses was directly referable to the acquisition of the house as they enabled the appellant to pay the mortgage installments. She was held to be entitled to one third part or share in the disputed property.

This is markedly different from the facts of the instant case – where only Mr. Warren paid solely for the condominium, and there is no evidence of any contribution by Ms. Nicholson in its acquisition.

29. I find as a result that whatever contributions Ms. Nicholson might have made to the condominium by way of remodeling or renovation and or purchase of furniture etc., as she put in evidence in the undated and unsigned Exhibit AN 1, without any supporting receipts, could not, in my view, entitle her to a proprietary interest or a share in the condominium. The facts of this case are a long way off from the Rahieman case (supra).

On the issue of mesne profits

30. Mr. Warren in his counterclaim claimed in addition to possession of the condominium, claimed as well mesne profit from the date of the writ in this action (which was ironically, in the event, taken out by Ms. Nicholson on 11th May 2004) until the delivery up of possession of the condominium. This claim for mesne profit, is one of the remedies available to the owner of property who has been deprived of the use and occupation of his property. It is usually assessed according to the current value of the property, normally the ordinary rental or letting value of the property – see Clifton Securities Ltd v Huntley (1948) 2 All ER 283; and Swordheath Properties Ltd v Tabet (1979) 1 WLR 285.

31. Mr. Assir Tzul testified on behalf of Mr. Warren on the issue of the quantum of mesne profit for the condominium and tendered as Exhibit AT1, an advertisement for rental of condominiums in the Banyan Bay complex where Unit G3 is situate. The thrust of his testimony is that it was possible for a property such as G3 to fetch on the rental market from \$2,000.00 to \$2,500.00 per month.
32. Mr. Warren testified that he orally asked Ms. Nicholson to leave his condominium in January 2004 and that he did not rescind his notice to her to leave; but that Ms. Nicholson requested that she be allowed to stay until May when her daughter would finish school. He testified that he agreed to that.
33. On the evidence as a whole, I am not satisfied that there was a clear and unequivocal notice to Ms. Nicholson to leave the condominium. The evidence is that after their altercation he left the condominium but would visit it from time to time, for example, to fetch clothes and other things. In fact, an application by Mr. Warren to the Court in January of this year, to have Ms. Nicholson vacate the condominium was not allowed.
34. Moreover, I am satisfied on the evidence in this case and given the relationship between the parties which evidently must have been loving as well as tempestuous, and the fact that Ms. Nicholson had to leave her own accommodation in Paradise Villas to move in with Mr. Warren into his condominium in Unit G3 in Banyan Bay, that in all the circumstances, I should not award mesne profit against her. I am fortified in this conclusion by the fact that since the condominium was bought in 2001; it has appreciated in value and has been appreciably remodeled and refurbished. This, on the evidence, under the discriminating gaze of Ms. Nicholson. While they lived together, she must have brought a touch of class to the appearance, ambience and comforts of the condominium.

35. I therefore am unable to award any mesne profits against her in favour of Mr. Warren.

Conclusion

36. I however declare and order that Mr. Warren is entitled to possession of the condominium in Unit G3 in Banyan Bay Villas in San Pedro. I order as well that Ms. Nicholson should deliver up possession of the said condominium on or by end of July 2005.

The costs in this action are awarded to Mr. Warren and are to be agreed or taxed.

A. O. CONTEH
Chief Justice

DATED: 17th June 2005.