IN THE SUPREME COURT OF BELIZE A.D. 2005

CLAIM NO. 19 OF 2005

BETWEEN: EUGENE ORDONEZ SR. PLAINTIFF

AND

LEONORA KELVIN DEFENDANT

Mr. Phillip Zuniga, S.C. for the claimant.
Mr. Linbert Willis, for the defendant.

AWICH J.

3.2.2009 JUDGMENT

1. *Notes:* A c*laim by husband for a share in property acquired by wife during marriage, or a claim by a partner during cohabitation after divorce; whether the property was acquired during marriage or after divorce; the intention of both regarding ownership of the property; whether both contributed to the costs of acquisition and development; whether there has been cohabitation durable enough, and which involves the same commitment as in marriage, so as to found a claim to a share in the property; application of s: 148A or 148E of the Supreme Court of Judicature Act Cap. 91.*
Alternative ground for the claim, based on oral express contract for service, or contract for service inferred from conduct; whether there was intention to enter legally enforceable contract.

2. The claimant, Mr. Eugene Ordonez Sr., and the defendant, Ms. Leonora Kelvin, were married on 17.6.1963 when they were, 22 years and 20 years old respectively. They cohabited at his parents' residence at No. 88A Collet Canal Street, Belize City. They had four children in the marriage; the youngest is 29 years old. The marriage did not last the youth of husband and wife. They started to drift apart after five years. Nine years later, in 1972, they divorced. The rest of the evidence did not disclose many common facts.

3. ***The claimant's account of events.***

According to the claimant, the husband, the events leading to the divorce, and later to this claim, are the following. They married on 17.6.1963, in Belize City, Belize, when he was 22 and she was 20 years old. They cohabited at No. 88A Collet Canal Street, Belize City, with his mother. He was a carpenter and a fisherman. She was a shop assistant. They, "pooled their resources", and purchased lot, No. 36 Iguana Street, Belize City, "in the defendant's name". "Over the years", they built on it a wooden structure.

4. The claimant said, in 1968, he placed the defendant and the children to live with the defendant's mother at her home on Vernon Street, Belize City, and he went to the USA to seek better employment. Two and one-half months later she joined him in Los Angeles, U.S.A. They lived in his brother's house on Figueroa Street, Los Angeles, California. They returned to Belize in 1969, when the defendant was pregnant.

5. In January 1970, he again left for Los Angeles. Their fourth child was born on 24.1.1970, when he was away. About two months after the claimant had left, the defendant called and informed him that a lot was available on Iguana Street. Although they already had a lot on Neal Pen Road, Belize City, he told her to go ahead and buy the lot on Iguana Street. She took money from their joint account and bought the lot. All the money in the joint account came from his fishing business.

6. In the absence of the claimant, and without his knowledge, the defendant left for New York, U.S.A., where she remained until he received divorce court papers from her. He travelled from Los

Angeles to New York to find out what the trouble was but, he was not able to see the defendant. He returned to Los Angeles. He learnt that the defendant obtained divorce in 1973.

7. The claimant testified further that, in 1980, he returned to Belize and lived at No. 36 Iguana Street, with the defendant and the children. In 1981, the defendant "relocated with the children to the USA". The defendant then moved and resided at No. 88A Collet Canal Street, and later at Central American Boulevard, Belize City.

8 In 1998, the defendant wrote to him stating that she intended to build a new and better house at No. 36 Iguana Street, and that she would give him the responsibility of the building work. Later in the year, the defendant and the children visited Belize. She stayed with him. They returned to the U.S.A. In 1999, the defendant asked the claimant to start driving piles into the ground for the building.

9. From the U.S.A, the defendant wrote letters to the claimant in December 1999, August 2001 and July 2001, expressing her renewed love for him; and sent greeting cards in April 2000, October 2000,

December 2000, October 2001, February 2002, and October 2000, also expressing her love for him.

10. The claimant continued that, they agreed that the claimant would complete building a room on the ground floor and move in and act as a watchman; and that he would be the supervisor of the building work. He would occupy the room, "rent free until the end of my days". Over the years the defendant visited Belize often and stayed with the claimant as man and woman in love in the room on the ground floor.

11. About the money for building, the claimant conceded that the defendant sent all the money from the USA, except that he lent $17,000.00; "to the defendant, she paid back $15,000.00"; and that a further sum of $13,200.00, "was withdrawn from a joint bank account of the defendant and himself, and it remained unpaid".

12. Further, the claimant testified that, he cleared some two acres of land in Corozalito, Belize District, which land the defendant had "interest" in. He had not been paid for the work. He claimed payment for the work.

13. The claimant contended that after their divorce, he lived with the defendant as common law husband an wife, from 1998 until September 2004, when because of, "a domestic misunderstanding", attorneys for the defendant demanded that he quit premises 36 Iguana Street.

14. On those facts, the claimant claimed: (1) a share in property No. 36 Iguana Street, Belize City, and a share in the two acres of land in Corozalito Belize District, "pursuant to the provisions of Act No. 8 of 2001"; and (2) an injunction order restraining the defendant from mortgaging, disposing of, or otherwise dealing with the properties. "Alternatively", the claimant claimed: (1) breach of the agreement by which, he contended, he was entitled to reside in the room at No. 36 Iguana Street, rent free, until the end of his days; (2) payment of $111,000.00 for the building work he carried out; (3) $31, 920.00 for work as a watchman; and (4) $13, 200.00 which he said, was withdrawn by the defendant from the joint account for the building work. He also asked for interest on judgment sums, and costs.

15. ***The defendant's account of events.***

According to the defendant, it all started with the husband leaving Belize in 1968, to seek employment in the U.S.A., so as to improve their life. In his absence, she said, "she received an offer", and she also left for New York, U.S.A., and went on to Los Angeles to the claimant. She went to the U.S.A, "right after him, about a month after he had left". She was there for five months and was employed. It was easy for a woman to get a job then. They first lived in his brother's house, then she rented a house behind the brother's.

16. They returned to Belize in September 1969, and lived with her mother and the children. In October 1969, he again left for the USA. He left her pregnant with their fourth child.

17. The defendant continued to testify that, in 1964 she had bought a shack for $240.00 from a certain "lady". The purchase money came from her "childhood savings before she was married". She had a "Treasury Savings Book", with the Treasury. She bought the shack because she would get with it the lease of the swampy land. She said, she told the defendant about it, but he was not interested in it. From

late 1969 to early 1970, while in Belize, she built a small 20 feet by 20 feet wooden house on stilts on the land. The money for the building came from her wages for five months in the U.S.A.

18. The defendant testified further that, in 1970, she left the children in the care of her mother in the wooden house at No. 36 Iguana Street, and went to New York to work. She believed that the defendant had abandoned her and the children. In 1972, she obtained divorce in New York. She remarried another man there. She often travelled to Belize to see the children.

19. In 1980, the defendant learnt that the claimant returned from Los Angeles to Belize and went to reside at No. 36 Iguana Street. The defendant's mother accepted him, because he had nowhere to go. The children were still living with the defendant's mother. In 1981, the defendant returned to Belize for a short visit to attend school graduation of one of the children. She stayed at No. 36 Iguana Street, with her mother and the children. The claimant also lived there. The defendant returned to New York with all four children leaving her mother and the claimant in the house. Later the claimant moved out

because the house fell into disrepair, and he could not carry out repairs, and "he could not get along" with the defendant's mother, sister and brother.

20. The defendant continued that, later on the advice of her daughters, she demolished the wooden house so as to build a new house. She had been in contact with the claimant for the sake of the children. She informed him of her intention. He suggested his cousin, Mark Arnold, for the builder, and she accepted. Later Mark and the claimant had disagreement and Mark left the work. The defendant said, she then dealt with the claimant. She sent money for building. He carried out the purchase of materials and supervised the building work.

21. When the new building partly reached liveable stage, the claimant moved back to lot 36 Iguana Street, and lived in a self contained guest room on the ground floor. When she became aware, she permitted him to continue to live in the room until he would repair his property No. 88A Collet Canal Street. The defendant's mother lived on the upper floor. The defendant's sister and brother also lived in the house. Whenever the defendant visited Belize, she stayed upstairs

with her mother, not in the room occupied by the claimant. She never cohabited with the claimant as husband and wife, since 1969, when he left for the second time for Los Angeles, or as man and woman after divorce.

22. The claimant testified further that, she alone provided all the money to purchase the possession of lot 36 Iguana Street; the money was her childhood savings. Later in 1977, she alone bought the freehold. She obtained the Land Certificate in her name alone on 14.4.2004. She said further, that she alone provided all the money for the building. She explained that she did not obtain a loan of $17,000.00 from the claimant; and that, the $13,200.00 that she withdrew from the joint bank account was part of $16,000.00 that she had deposited into the account. She explained further that, the account became joint account because she had been sending large sums for the building work; she added her name to the account of the claimant, so that she could access the money. She explained further still that, the deposits of: $5,000.00 made on 3.3.2004; $5,000.00 made on 8.4.2004; $5,000.00 made at the end of April 2004; and $6,000.00 made on 26.4.2004;

were not payments for a loan from the claimant, they were sums sent for the finishing work of the building.

23. The defendant admitted that in 2002, she demanded that the claimant quit the property. She said, it was because he had quarrelled with the defendant's mother, sister and brother, and had been disrespectful. He left and made the demands the subjects of this claim.

24. On the above facts, the defendant counterclaimed the following: (1) $10,000.00 sent by the defendant for building work, and said to be unaccounted for by the claimant; (2) $60,000.00 rent for the one room that the claimant occupied from April 2000 to January 2005; (3) *mesne profit* continuing; (4) $1,744.00 utilities bills paid by the defendant for the claimant; (5)$22,000.00 for plumbing and other poor works redone and paid for by the defendant; (6) "damages for wrongful suit"; and (7) interest and costs.

25. ***Deterrmination:*** *Claims by the claimant.*

The claim against the defendant for a share in the two acres of land at Corazilito, must be disposed of in a few words. I take it that the full

particulars of the claim were that, the defendant had interest in the land, and because the claimant and the defendant were married and divorced, or because they cohabited after divorce, and the cohabitation ended, the claimant is entitled to a share in the property, "pursuant to the provision of Act No. 8 of 2001". In the alternative, the claimant claimed that, he worked on the land, the defendant has "interest" in the land, and so she must pay him for the work done.

26. The nature and particulars of the said interest of the defendant, and when it commenced, were not disclosed in the statement of claim, or in the testimony of the claimant, and other evidence adduced for him. All that seemed not to bother the defendant; she simply disclaimed any interest in the land. Instead, Eugene Ordonez Jr., their son, witness No. 2 for the defendant, testified that the land belonged to him. In crossexamination, he said that his father, the claimant, "got it" for him, Ordonez Jr. On the evidence, there is no basis for the claimant to make any claim against the defendant in respect of the land at Corozalito. The claims of Mr. Eugene Ordonez Sr. against Leonora Kelvin, for a share in the two acres of land at Corazalito,

Belize District, based on the defendant's interest, and for payment for work that he may have done on that land, are dismissed.

27. I proceed to make determination of the principle claims based on marriage or cohabitation after divorce. Mr. Ordonez Sr. claimed that, under "the provisions of ***Act No. 8 of 2001",*** he was entitled to share in the properties numbered 36 Iguana Street, (and in the two acres of land at Corozalito). Act No. 8 of 2001, is an amendment Act, amending the ***Supreme Court of Judicature Act, Cap. 91.*** The amendments have been incorporated into that Act as follows:

> *"148A (1) Notwithstanding anything contained in this part or in any other law, a husband or wife may during divorce proceedings make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage*

(2) In any proceedings under subsection (1) above, the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) In addition to making a declaration under subsection (2) above, the court may also in such proceedings make such order as it thinks fit altering the interest and rights of either the husband or the wife in the property, including:-

....

"148E.(1) Where the parties to a common law union separate, then either party to the union may thereafter make application to the court in respect of property acquired by the parties or either of them during the subsistence of the union.

(2) In any proceedings under subsection (1) above between the parties to a common law union in respect of the existing title or rights to property, the court may

declare the title or rights, if any, that a party has in respect of the property.

(3) In addition to making a declaration under subsection (2) above, the court may also in such proceedings make such order as it thinks fit altering the interest and rights of the parties to the union in the property, including:-

…"

28. I think that the reference by the claimant to the "provisions" of Act No. 8 of 2001, generally, and not to a specific provision of the Act, was an intended ambiguity. The purpose was to claim under S; 148 A, which is concerned with married persons divorcing and asking that their property be shared; and also to claim under S: 148 E which is concerned with unmarried persons ending cohabitation and asking that their property be shared. The proper pleading was to identify the two claims as alternative claims.

29. Some effort was made in the testimony of the claimant to prove that, the property was bought in 1969, during marriage, after discussion in

a telephone conversation, so the claim for a share in the property was grounded on marriage. But much more effort was made to prove that from 1998, that is, after the divorce in 1972, the claimant and the defendant rekindled their love for each other, and cohabited as man and woman, and even intended to remarry; and that the property was developed by building a substantially valuable house on it by joint effort during that cohabitation, and so the claim for a share in the property was grounded on cohabitation after divorce. In my view, the two simultaneous approaches show weakness in the claims, based on constructive trust arising from marriage, or cohabitation, by which the parties would be entitled to share in the property said to have been acquired during marriage or cohabitation.

30. I have considered the evidence as a whole. I disbelieved the evidence for the claimant, in regard to proof as to when lot No. 36 was bought, and where the money came from. His testimony about the purchase and the purchase money was general and vague. He started by stating that, over the years after their marriage, they "pooled" their resources and purchased lot 36 Iguana Street, and "put it in the defendant's name", and that they eventually built a wooden structure on the land.

Then later he stated that in 1969, about two and one-half months after he had left Belize the second time, and was in Los Angeles, the defendant called him on telephone and informed him that a lot was available on Iguana Street; he then told her to buy it. He said that the money came from their joint account, and all of it was from his fishing business.

31. The first part of the account given implied a deliberate joint plan by husband and wife, leading to the purchase of the property, with money they "pooled", that is, jointly saved. The second part of the account implied that a sudden opportunity arose to buy the property, and that only the claimant's money was used to pay the purchase price. Both accounts of events could not be true; only one could be true.

32. I believed the testimony of the defendant about the purchase of the lot, and where the money came from. Her testimony was more specific and consistent. She testified that in 1964, she bought a shack on a swampy land, lot No. 36 Iguana Street, so that she could acquire the lease of the land. The purchase price was $240.00. It came from her

"Treasury Savings Book". She stated that the defendant was not interested in the land; she told him about it.

33. The claimant continued that later, on 10.2.1976, property tax and fire service rates assessments were made for the property, and addressed to her. She paid the assessments on 11.5.1976. I note that by that date, they were already divorced; the divorce had taken place in 1972. According to Land Register, the Registrar of Lands on 13.2.1986, gave the land the official survey numbering, namely, Block 45, Parcel 47, Queen's Square, Belize City. The land measured 423.3 square yards. The Registrar issued Land Certificate No. 588/86 to the defendant on the same date, 13.2.1986, and recorded it on Land Register. On 14.4.2004, another Land Certificate No. 3100/2004, was issued to the defendant. It is not clear what the reason was. At the top right part of the Register the certificate issued on 13.2.1986, was entered as No. 589/86, instead of No. 588/86 entered in the "Proprietorship Section". May be the certificate dated 14.3.2004, was intended to correct the error. There is no doubt, however, that the defendant was the first owner of the land, after the Government of Belize. She became the owner on 13.2.1986, after divorce.

34. The defendant nonetheless, admitted that they had a joint bank account after the marriage. She explained that the money in the account was used to purchase property on Neal Pen Street; and that the defendant has since transferred title to that property to one of their sons.

35. My conclusion is that, Leonora Kelvin acquired possession of the property, Block 45, Parcel 47, Queen's Square, Belize City, also known as, No. 36 Iguana Street, in 1964 alone, she used her own money that she had before the marriage. That time, Leonora intended to have the property as hers alone. Eugene Ordonez Sr., the husband then, did not intend to have any claim to a share in the property, and did not make contribution to the purchase price. Further, my conclusion is that title to the property, that is, ownership, was actually bought by Leonora Kelvin from the Government, the original owner, on 13.2.1986, and she acquired the freehold title only on that date, after divorce.

36. I do dismiss the claim of Eugene Ordonez Sr. to a share in the property based on marriage, for the reason that, only possession of the shack and swampy land or even mere licence, was acquired by

Leonora during the marriage. The claimant failed to claim a share in the right to the possession or licence, at divorce or soon after. It was only in 1986, fourteen years after the divorce, that the defendant obtained the freehold title. The title to the freehold, the absolute title, and the beneficial interest thereto, were not available for sharing when divorce was obtained in 1972. The claimant was not entitled to share in the property because of marriage.

37. There is another way that leads to dismissal of the claim based on marriage. It is the law that, in deciding division of property on divorce, or upon cohabitation of partners ending, the court first ascertains the intention of the parties at the time of acquisition of the property, as to whether the property would be regarded as belonging to one of them, or to both of them. The intention is given effect at the time of divorce or cohabitation coming to an end. The property is dealt with according to the intention. A case in point is ***Pettitt v Pettitt [1969]2All ER 385.*** More recent cases are: ***Elaine Oxley v Allan Hiscock [2004] EWCA Civ 546,*** and ***Landsford Myvette v Ann Burns, civil Action No78 of 1999 (Belize).*** That rule of law has now been modified by ***ss: 148A and 148E of the Supreme Court of***

Judicature Act. Intention is still an important factor, but court may now order sharing out property belonging to one spouse or partner with the other, if there are facts which make it fair to do so. Some of the facts to be taken into consideration are stated in the two sections of the Act. The case of, ***White v White [2001] 1 AC 596,*** is an example of how court takes into consideration the various factors. The judgments of the House of Lords in the two appeals considered together, ***Miller v Miller and McFarlane v McFarlane [2006] UKHL 24*** illustrate the difficulties that are sometimes encountered in the consideration of some of the factors.

38. In this claim there are no facts during the marriage, that may cause the court to order that the claimant is entitled to share in the property that both the claimant intended to belong to the defendant alone. Although possession of the swampy land was bought one year into the marriage, the money came from savings before the marriage. The development of the property in late 1969, to early 1970, by building the wooden house on stilts was carried out entirely by the defendant when the husband was away.

39. Marriage aside, there are reasons for dismissing the claim based on cohabitation. The reasons flow from answers to two questions, namely: (1) did the claimant contribute his labour and responsibility when the modern house was built from 1999 to 2002; and (2) were the claimant and defendant during that period cohabiting as man and woman as obtains in common law marriage, so that the court may deem it fair to grant to the claimant a share in the property? Both answers must be in the positive if the claim based on cohabitation is to succeed.

40. The defendant admits that the claimant was the overseer of the building work during the period 1999 to 2002. She sent money to him and he was responsible for purchasing materials, payment of wages and other expenses. The part played by the defendant was in no way diminished by the hiring and dismissing of Mr. Mark Arnold. The defendant made the kind of contribution that would entitle a husband, or a partner in cohabitation, to a share in the property belonging to the other.

41. The difficulty in the case for the claimant was in the question of cohabitation. The following relevant facts have been proved about it. Love between the claimant and the defendant was rekindled in 1998 and lasted at least until 2002, despite veiled denial by the defendant. On the evidence, it seemed the love was even more abundant from the defendant. I believe the evidence for the claimant about what happening on the occasions that the defendant visited Belize. But love, however intense, is not cohabitation, although it may bring about cohabitation.

42. Despite their love, the evidence showed that the claimant and the defendant were living their separate lives, and each acknowledged and accepted it. Other men and women in the mix were mentioned in the evidence. It has been proved that the defendant really lived in New York, and the claimant, in Belize City. Moreover, there has been no mention that the second marriage of the defendant had ended, or that cohabitation in the marriage had ended. To entitle a partner to a share in property, their relationship, that is, their cohabitation must be an enduring one such as exists in marriage, it must involve the same comitment as in marriage, a relationship known in Belize as common

law marriage – see ***Bernard v Joseph [1982] 3 All ER 162,*** and ***Landsford v Ann Burns Supreme Court Action No 78 of 1999 (Belize).*** It is my conclusion that there was no cohabitation between the claimant and the defendant after their divorce in 1972, to entitle the claimant to a share in the property of the defendant.

43. The claim based on an agreement, a contract, for work done as a builder, supervisor, and watchman is unsustainable in my view. A legally enforceable contract has a number of elements, such as; free consensus, exchange of valuable consideration, not be illegal or about illegal matter or contrary to law, the parties must have capacity, in some cases the contract must be in the required form such as in writing, and the parties must intend, that is, contemplate that the agreement will be legally enforceable.

44 On the evidence, there was indeed *consensus ad idem,* a free meeting of minds that, the claimant would supervise or oversee the building work. I am prepared to accept in addition that, the supervision would include actual building work. But, the evidence did not disclose that any consideration, *a quid pro quo,* such as payment for the work, was

offered or understood to have been offered by the defendant to the claimant and he accepted it. There was no express agreement, about what the claimant would be given or would gain in return for his labour and burden of responsibility. It could not be inferred from the letters and discussion either.

45. Most important, is the lack of intention to enter a legally binding agreement – see ***Balfour v Balfour [1919] 2K.B 571,*** and ***Ford Motor Co. Ltd v AUEFW [1969] 1W.L.R 339.*** The evidence adduced was that, the idea to build a new house came from their daughters. Then the defendant wrote to the claimant expressing her intention to build a better house on lot No. 36 Iguana Street. Then she and their children came to Belize City, and discussed the matter with the claimant. The defendant requested that he supervise the work. He agreed. There was no discussion about remuneration. In my view, there was no intention that whatever was agreed would be legally enforceable. They simply did not contemplate legal consequences. The agreement was a mere domestic arrangement between father, mother and their children. The claim of the claimant for payment for work done based on contract must fail.

46. Moreover, I see no evidence that would support an award for payment based on *quantum meirut*. That was not one of the grounds for the claims anyway.

47. The claim based on contract, that the claimant is entitled to remain in occupation of the guess room at No. 36 Iguana Street, is unfounded. I accept the testimony of the defendant that the claimant moved in and the defendant subsequently permitted him to remain in occupation of the guess room. What the claimant got was a mere licence at will granted by the defendant. It could be ended at her will, and that was what happened.

48. Finally, the claim for money lent by the claimant to the defendant; and for money withdrawn by the defendant from a joint account between them, must also fail. I have already said that I accept the evidence for the defendant, about the various sums of money, and reject that for the claimant.

49. ***Determination:*** *Counterclaims by the defendant.*

Let me say straightaway that, a claim or counterclaim cannot be made for, "damages for wrongful suit". Instead, a claim or counterclaim may be made for costs of suit. Generally the party who is not successful in his claim or defence pays the costs. However, court has discretion to order otherwise. The counterclaim by the defendant for, "damages for wrongful suit", is dismissed.

50. The counterclaims for rent for the guest room and *mesne profit* continuing, do fail for the reason that there was no agreement granting exclusive possession of the room to the defendant, in return for payment of rent, and for a certain, period – see ***Street v Mountford [1985] AC. 809 HL***, for definition of a lease. The claimant occupied the room by mere permission, a simple licence at will, not a contractual licence.

51. There was no contract that the claimant would pay the utilities bills either. The counterclaim for money spent to repeat the plumbing and other works done poorly by or under the supervision of the claimant also fails. There was no legally enforceable contract between the claimant and the defendant. To succeed, the defendant would have to prove negligence. That was not pleaded, and evidence was not led to prove it. The counterclaim for money sent by the defendant to the claimant, and not accounted for, also fails because they did not contemplate that their agreement would have legal consequences.

52. The final orders that this court makes are the following: (1) the claims by Mr. Eugene Ordonez Sr. are dismissed; (2) the counterclaims by Leonora Kelvin are also dismissed; (3) because Mr. Ordonez Sr. gave of his labour in a domestic arrangement, for little material benefit, I order limited costs of these proceedings in the sum of $3,000.00 to be paid by him to the defendant, Leonora Kelvin; and (4) I order no costs in respect of the counterclaims, they were in the nature of defences.

53. The effect of the orders made is that, Leonora Kelvin remains the holder of the legal title in freehold to Block 45, Parcel 47, Queen's

Square, Belize City, also known as Lot No. 36 Iguana Street, Belize City; her title is free of any claim by Mr. Eugene Ordonez.

54. Delivered this Tuesday 3rd February, 2009
At the Supreme Court,
Belize City.

Sam Lungole Awich
Judge