

C.C. 99/09

2009 A. NO. 8

IN THE HIGH COURT OF SIERRA LEONE
(LAND AND PROPERTY DIVISION)

BETWEEN: -

HASSIATU GBASSA AGBAJIE

-PLAINTIF

AND

ARTHUR EBUN AGBAJIE

-1ST DEFENDANT

AND

CHRISTIAN EBUN AGBAJIE

-2ND DEFENDANT

**Miss M. J. Tucker and E.E.C. Shears-Moses Esq. for the
Plaintiff.**

J.B. Jenkins-Johnston Esq. for the Defendants

JUDGMENT DELIVERED THE 13TH DAY OF JULY, 2011

The Plaintiff herein issued a writ of summons dated 27th March 2009 against the Defendants praying for a number of reliefs. The said writ of summons was amended by Order of Court dated 5th July 2010 and the amended reliefs are as follows:

1. Enforcement of an agreement made the 28th day of April 2008 between **MR. ARTHUR EBUN AGBAJIE** and **MRS. HASSIATU GBASSA AGBAJIE** (Nee Jalloh) registered as 179/2008 in Volume 76 at page 15.

2. Cancellation of a Deed of Gift made by **ARTHUR EBUN AGBAJIE** to **CHRISTIAN EBUN AGBAJIE** dated the 16th day of October 2002 registered as 195/2002 in Volume 96 at page 85.
3. That the 1st Defendant pays 50% of the amount received by him for the renting of No1A, Babadorie Hills to the Plaintiff.
4. An injunction preventing both Defendants, whether by themselves, servants or agents or howsoever called from selling, entering or in anyway interfering with the property known as No1 Babadorie Hills and No1A Babadorie Hills, Babadorie, Freetown, the subject matter of the agreement.
5. Any further or other order the honourable court deems fit.
6. Costs.

The facts in the matter are set out in the particulars of claim and they are briefly as follows: The Plaintiff is the wife of the 1st Defendant and they were married in 1999 after having lived together at No 35 Wellington Street Freetown the 1st Defendant's family house since 1996.

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In 1998 they both agreed to contribute towards building a house of their own. The Plaintiff got her aunt, **MRS. ZAINAB KARGBO** to sell a piece of land at 1 Babadorie, Lumley and the conveyance was made out to the 1st Defendant who assured the Plaintiff that the property was meant for both of them.

The Plaintiff was then working for the Union Trust Bank and she contributed to the construction of the house to the tune of approximately Le126 million. They moved into the said house at 1 Babadorie Lumley on its completion. Later they were able to construct a second house at No1A Babadorie Hill on land brought from the same vendor, **MRS. ZAINAB KARGBO**. The second property was originally conveyed to the 1st Defendant but later he conveyed it to both the Plaintiff and himself. The Plaintiff asked him to do the same for the property at 1 Babadorie Hills and he claimed he would convey it to their child who was then 13 years old.

The couple then had serious marital problems and had to make an agreement dated 28th April 2008 in which it was agreed in paragraph 5 thereof that they "shall take immediate steps to convey property situate lying and being at No. 1 Babadorie Hills, Babadorie Freetown (the old house) to **MRS. HASSIATU GBASSA AGBAJIE** (Nee Jalloh) and that property situate at No1A Babadorie Hills Freetown (the new house) shall be conveyed to **MR. ARTHUR EBUN AGBAJIE**."

The Plaintiff whilst taking steps to comply with the said agreement discovered that the 1st Defendant had made a Deed of Gift of No. 1 Babadorie Hills in favour of the 2nd Defendant on the 16th October 2002.

The Plaintiff alleged that the 1st Defendant fully aware that he had transferred the said property fraudulently signed the said agreement purporting to share out the two properties. She stated that the house in issue is their matrimonial home and that the 1st Defendant has rented out the second house for the sum of US\$9000 and the Defendants are threatening to dispose of the property 1 Babadorie Hills.

The Plaintiff consequently instituted the present action praying for the reliefs already mentioned.

The Defendants entered appearance to writ and file separate defences. The 1st Defendant filed a defence and counterclaim. In his defence and counterclaim the 1st Defendant denied that he and the Plaintiff had ever agreed to contribute and build a house and he averred that the property was paid for by himself alone as is evidenced by his Deed of Conveyance. He further denied that the Plaintiff had contributed the sum of Le 126 million towards the construction of the house and stated that although she was an Assistant Manager at the Union Trust Bank she did not earn enough to be able to make such contribution as alleged.

He further averred that he bought the second property 1A Babadorie with his own money and had it conveyed in his name but that after much harassment and pleading by the Plaintiff had it re-conveyed to both their names as an advancement to the Plaintiff and with the intention of giving the said property to her absolutely for the benefit of herself and the two children she had for the 1st Defendant.

He admitted that they had serious marital problems mainly due to the fault of the Plaintiff and averred that at the time he signed the Agreement he was traumatized, under duress and was being threatened by the Plaintiff and that he only signed it to relieve his stress and trauma but did not fully realize the purport of the said document. The 1st Defendant relied on the maxim non est factum. He pleaded that he could not have agreed to convey 1 Babadorie Hills to the Plaintiff because he had already conveyed it to his son the 2nd Defendant in 2002 which he alleged was his right to do as the beneficial owner thereof.

The 1st Defendant admitted that the house 1A Babadorie Hills is rented and that the rent accruing therefrom is utilized for the benefit of the whole family.

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In his counterclaim, the 1st Defendant averred that it has always been understood by the Plaintiff and himself that the property 1 Babadorie Hills was for his three sons by his first marriage and the second property 1A Babadorie Hills was for the two children of the second marriage. He stated that the Plaintiff owns her own property situate at Hill Station which she bought during the subsistence of her marriage and which she had had conveyed to her clandestinely in her maiden name and that of her daughter whom she had before her marriage to the 1st Defendant. He pleaded that her insistence on having the property in issue conveyed to her was just a selfish attempt to deprive his sons of his first marriage of their inheritance. Further he stated that he has always been willing and ready to convey property at 1A Babadorie Hills to the Plaintiff for herself and her two children. He therefore counterclaimed that the Plaintiff's claims be dismissed; for a declaration that the Deed of Gift made by the 1st Defendant to his son of property No 1 Babadorie Hills is valid and is made for the benefit of the three sons of his first marriage; thirdly that the 1st Defendant and the Plaintiff do convey property 1A Babadorie Hills, Babadorie to the Plaintiff for herself and for the benefit of the two children of their marriage.

The Plaintiff filed a Reply and Defence to the Counterclaim in which she denied that the property in issue was built solely by the 1st Defendant. She averred that she purchased building materials mostly on credit and that at that material time she was a Manager at the Bank. She also denied that the 1st Defendant was traumatised at the time he signed the agreement as it was signed at the house and in the presence of the Solicitor who prepared it and the agreement came about after a family meeting. She averred that she has been solely responsible for the maintenance and payment of school fees and looking after the children.

In her defence to the Counterclaim the Plaintiff averred that she contributed to the construction of 1 Babadorie Hills Babadorie and the general maintenance of the said property as she regarded it as their matrimonial home which would later be conveyed to their son, her first born. She admitted having purchased property at Hill Station but stated that the 1st Defendant was fully aware of it and that she had put it in her name and that of her daughter as the 1st Defendant had refused to adopt her as his child and this was a way to make provision for her. She averred that the 1st Defendant was never willing to convey the property to the Plaintiff or her children and that gave rise to their having to make the agreement.

At the trial the Plaintiff gave evidence on her own behalf and elaborated on the facts already mentioned herein. She tendered her witness statement which formed part of her evidence in chief and tendered several receipts and documents Exh "G-P" in support of her testimony that she had contributed towards the construction of the house, the maintenance of the home and payment of school bills for the children. She also called two witnesses. The first witness **ABDUL SESAY, PW2** told the court that he was employed as caretaker for the property at 1 Babadorie Hills by **MR. and MRS. AGBAJIE** before the construction of the house and stayed at the site until the couple moved into the house. He said he was responsible for receiving building materials brought to the site and that these materials were supplied by both **MR. and MRS. AGBAJIE**. He said at the time both of them worked together to complete the main house and that the paving and terracing of the compound was left to **MRS. AGBAJIE** whom **MR. AGBAJIE** said in the witness' presence was the one interested and fussy about flowers and terracing. He said she hired the services of a horticulturist to plant flowers.

The second witness was **JONATHAN KOJO MAMMAH**, the building contractor who was to continue the construction after the contractor who started the work abandoned it. He too tendered his witness statement which was used as his examination in chief. He said negotiation for the work and his fees was done by both **MR. and MRS. AGBAJIE**.

The sum of his testimony was that both **MR.** and **MRS. AGBAJIE** were responsible for the construction of the house.

Both witnesses were cross-examined on their testimony. That ended the case for the Plaintiff.

The 1st Defendant testified on his own behalf and tendered his witness statement. He too elaborated on the evidence already set out above and he was cross-examined. The 2nd Defendant did not appear at the trial.

Only counsel for the plaintiff submitted written closing address.

The first relief prayed for in this matter is the enforcement of the Agreement made between the Plaintiff and the 1st Defendant in 2008. The 1st Defendant has opposed the claim on the ground that at the time he signed it he was traumatised, over stressed and under duress. He has relied on the maxim "non est factum". In other words the agreement he signed was not his deed. Now the basis of the defence of non est factum is that the signatory is mistaken as to the nature of the transaction.

In this case the evidence given by the 1st Defendant under cross-examination was that the agreement was prepared after discussion with his family. He stated that two meetings were held and that his uncle and aunt together with his wife were there and that it was at the second meeting held in his first cousin's home, **MR. CENTUS MACAULEY** a solicitor that he signed the agreement.

From the evidence it is clear that he must have been fully aware of the contents of the agreement. It was not just thrust upon him nor was he taken by surprise. He knew when he was going to the solicitor's house that he was going to sign the agreement. He knew what had been discussed at the previous meeting and what had been agreed. He cannot therefore claim that he was not fully aware of the agreement. In the case of **Saunders vs. Anglia Building Society** {1971} A.C. 1004; {1970} 3 All E. R. 961 it was held by the House of Lords that the plea can be allowed only where there was a mistake as to the character and class of the transaction. In the case of **Howatson vs. Webb** {1908} 1; and Ch. 1 **Blay vs. Pollard and Morris** {1930} 1 K. B. 628 both Court of Appeal cases, it was held that where the mistake was merely as to the contents of the document, the plea was not available. His plea of *non est factum* therefore fails.

The Plaintiff has alleged that she has acquired a beneficial interest in the house at 1 Babadorie and the 1st Defendant was therefore not the sole owner thereof and could not dispose of it on his own by Deed of Gift to his son as he purported to do.

The Plaintiff testified to the several contributions she made not only to the construction of the house and she produced receipts and other documentary evidence in support of her testimony. Counsel for the Plaintiff in her submissions relied on the case of **Hargrave vs. Newton** {1971} 3 All E. R. 866 where the Court of Appeal held that the use by the wife of her earnings

It is now well established by a long line of cases that such contributions towards the running of the home entitles the wife to a share of the matrimonial home. See the case of **Hargrave vs. Newton** (supra) relied upon by counsel for the Plaintiff. In **Falconer vs. Falconer** {1970} 3 All E. R. 449 at 452 Lord Denning MR said:

“The House of Lords stated the principles on which a matrimonial home, which stands in the name of husband or wife alone, is nevertheless held to belong to them jointly (in equal or unequal shares). It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is imposed by law. The law imputes to husband and wife an intention to create a trust, the one for the other. It does so by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement on it. Thus inference of a trust, the one for the other is readily drawn when each has made a financial contribution to the purchase price or to the mortgage instalments. So long as there is a substantial financial contribution to the family expenses, it raises the inference of a trust.”

It is therefore clear that from the evidence by the Plaintiff of her contributions both to the construction of the house which is the matrimonial home and the efforts made by her to help in the running of the home, she is entitled to a proportionate share of the said property.

There is however evidence that in 2002 the 1st Defendant had without the knowledge and consent of the Plaintiff made a Deed of Gift of the property to his son by his first marriage. The question is what is the effect of the said Deed of Gift of the matrimonial home to the said son? The 1st Defendant has averred that the Plaintiff knew that the property had been conveyed to his first son and that it was always understood between them that the said property was for the three boys from his first marriage. It is my view that the Plaintiff could not have known this and yet be prepared to contribute so much towards the home. I believe the Plaintiff when she says she regarded the property as her matrimonial home meant eventually for the benefit of her children and that the property 1A Babadorie was meant to be conveyed to the 1st Defendant as agreed. In the circumstance the Plaintiff by her several contributions had acquired an equitable interest in the property and the 1st Defendant was no longer the sole owner of the property with absolute right to dispose of it as he thought fit. In 2002 therefore when he purported to convey it to his first son, he had no authority to do so without first obtaining the consent of the Plaintiff who had by then acquired the said equitable interest. The said Deed of Gift is therefore not valid. The 1st Defendant has failed to prove his Counterclaim and it is hereby dismissed.

In the case of property No1A Babadorie it is presently owned by both the Plaintiff and 1st Defendant. The evidence is that it has been rented out. The Plaintiff is therefore entitled to a half share of the rents deriving therefrom until such time as it is conveyed to the 1st Defendant as stipulated in the Agreement.

The Plaintiff has proved her claims and judgment is given in her favour. I make the following Orders.

1. That the terms of the agreement made on 28th day of April 2008 between **MR. ARTHUR EBUN AGBAJIE** and **MRS. HASSIATU GBASSA AGBAJIE** (nee Jalloh) registered as 179/2008 in Volume 76 at page 15 of the Books of Miscellaneous Instruments kept in the office of the Registrar-General Freetown be enforced.
2. Cancellation of the Deed of Gift made by **MR. ARTHUR EBUN AGBAJIE** to **CHRISTIAN EBUN AGBAJIE** dated 16th day of October 2002 registered as 195/2002 in Volume 96 at page 85 of the Books of Voluntary Conveyances kept in the office of the Registrar-General Freetown. I hereby direct that the Deed of Gift be expunged from the Records kept at the office of the Administrator and Registrar General Freetown.
3. That the 1st Defendant pays to the Plaintiff 50% of the rents received by him in respect of 1A Babadorie Hills Babadorie, Freetown for the period the house has been under rentage.

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4. An injunction preventing the Defendants whether by themselves, servants or agents or howsoever called from selling, mortgaging or in any other way disposing of the properties known as No.1 Babadorie Hills and 1A Babadorie Hills Freetown.
5. Costs of the action to the Plaintiff to be taxed if not agreed upon.

A. Showers
SIGNED: - A. SHOWERS 13/7/2011
JUSTICE OF COURT OF APPEAL