SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1994

Suit No. 586 of 1994

BETWEEN: RENEE FRANCIS
MARIE FRANCIS

Petitioners

and

KENNETH JAMES
LUCIA JAMES

Respondents

APPEARANCES:

Mr. C. Landers for the Petitioners
Miss P. Mendes for the Respondents

1994: November 30;
December 7.

JUDGMENT

MATTHEW J. (In Chambers)

These proceedings are in respect of a petition for injunction filed by the Petitioners on September 23, 1994 to restrain the Respondents from entering upon a certain building which was built by the Petitioners for the Respondents.

On August 3, 1994 the Petitioners filed a writ of summons indorsed with statement of claim against the Respondents and Nicholas John claiming certain relief one of which was an order of injunction.

In that writ the Petitioners alleged that they entered into an oral agreement with the Respondents to build for the Respondents a wall structure on the Petitioners' land for the sum of $200,000. The Petitioners alleged that a deed of hypothecary obligation was prepared by Nicholas John in favour of the Canadian Imperial Bank of Commerce on behalf of the Respondents to secure a sum of $166,500.

The Petitioners alleged that at the request of Nicholas John they signed a deed of sale upon agreement with the said Nicholas John and the Respondents that Nicholas John would register the deed of sale and the deed of hypothecary obligation only after the Petitioners had received the full purchase price. The Petitioners alleged that Nicholas John in breach of that agreement registered the deed of sale on September 15, 1992 and the deed of hypothecary obligation on September 23, 1992.

The Petitioners state that the dwelling house was completed in September 1993 but by then the Respondents still owed them a balance of $100,650.00. The Petitioners alleged that ownership and possession of the dwelling house have not passed to the Respondents.

They state that on July 14, 1994 the Defendants wrongfully changed the lock on the front sliding door of the building and trespassed thereon. They said they had regained possession but unless restrained the Respondents would continue wrongfully to enter the premises of the Petitioners.

Nicholas John entered appearance on August 11, 1994 and filed a defence on September 14, 1994. In that defence he stated that he acted upon the instructions of his clients, the Respondents, and prepared a deed of sale of a certain parcel of land. He said the deed was signed and executed by the Petitioners in his presence on August 29, 1992 after it was duly read to them. He said the deed was then registered on September 15, 1992. He said that the Petitioners were at all material times aware of the fact that the Respondents were being funded by the Bank and that it was necessary to convey the land to the Respondents in order that the Respondents could mortgage to the Bank. He said the Petitioners advanced to the Respondents the sum of $7,000 to assist them in doing so. He denied that the Petitioners signed the deed of sale upon the agreement of himself and the Respondents that he would register the deed of sale and deed of hypothecary obligation only after the Petitioners had received the full purchase price.

I have to ponder whether the Bank would ever agree to their security not being registered promptly. It seems to me one can only hypothecate his land.

The Respondents did not enter appearance but filed a defence and counterclaim on September 27, 1994. In their defence, inter alia, they allege that ownership of the house and land passed to them and that they have fully paid the Petitioners the agreed sum of $200,000 and are not trespassers.

In an affidavit in support of the petition for injunction filed on September 23, 1994 the Petitioners repeated the allegations contained in the statement of claim.

The Respondents filed an affidavit in reply on November 17, 1994. In that affidavit they allege that ownership and possession of the house and land passed to them by virtue of the deed of sale executed before Nicholas John, Notary Royal, on August 29, 1992.

They seemed to have admitted that they went on the premises on July 14, 1992, but not as trespassers, and that upon the intervention of the Police the keys were taken from them and later handed to the Petitioners. They stated that since that time they have never attempted to enter the property. They asked for the dismissal of the petition for the issuance of the writ of injunction against them and at the same time asked to make an order restraining the Petitioners from entering or occupying the property so as to maintain the status quo.

In his submissions learned Counsel for the Petitioners referred to

the facts outlined above and maintained that ownership and possession never passed to the Respondents because the whole amount was to be paid and only then the property would become that of the Respondents.

Counsel submitted also that the solicitors had in fact asked the Petitioners to sign a deed of sale for the land above at a time when there was no house on it.

He said the effect of that was that the entire property could be sold although the Respondents have not fully paid for the house and land.

Let me make two quick observations on the submissions. Is Counsel suggesting that because the land was conveyed before the house was built on it the Petitioners can be heard to say they have interest in the house but not in the land? It also seems to me that the reason why the entire property has not been sold is because the Respondents are paying their mortgage. The bank can always exercise their rights under the hypothecary obligation if they are not paid and the injunction sought is certainly not against the Bank.

In her reply learned Counsel for the Respondents submitted that since July 14, 1994 they had never entered or threatened to enter the premises and so the Court could not act in vain, this being an

equitable measure. She submitted that the Respondents feared that if the Petitioners are allowed to remain on the property they would commit waste. They deny owing the Petitioners on the house and they ask to dismiss the petition of the Petitioners but to give them an order restraining the Petitioners from occupying the property in question.

She referred to the fact that the Petitioners did not give an undertaking as to damages as required by Article **842** of the Code of Civil Procedure but I do not see where the Respondents have given any either.

There is no doubt in my mind that ownership of the land passed to the Respondents when the deed of sale was executed on August 29, 1992 and the house accrued to the land when the Petitioners built it on the land. The statement of claim mentions in paragraph **3** and **4** of statement of claim that there was some oral agreement between the Parties. That was denied by Nicholas John in his defence. I cannot now rule on matters in the pleadings of the High Court action but I noticed that these allegations were not repeated in the affidavits pertaining to the petition.

Both sides seek restraining orders. I therefore have to look at the strength of their respective claims and see where the balance of convenience lies. I have no doubt that there is a serious question to be tried and it cannot be said either of the claims is

frivolous or vexatious.

If the Petitioners are deprived of occupation of the property it is my view that they can still obtain a proper remedy by way of damages. Their remedy can be protected subject to the prior rights of the Bank. As I said earlier even now the Bank could exercise its rights over the house and land if the Respondents were to default in paying the mortgage instalments. So in effect the Respondents are paying the mortgage for the Petitioners to exercise their rights of occupation.

The Respondents are deprived of the use of the property yet no doubt they are continuing to meet their obligations under the hypothecary obligation. And I note in paragraphs **16 - 19** of their defence and counterclaim they are alleging other consequential expenses that they have to incur.

It is my view that the balance of convenience lies in favour of the Respondents. I accordingly refuse the application for the writ of injunction sought by the Petitioners. I think they should deliver the keys to the Respondents forthwith. I shall grant the order requested by the Respondents at paragraph **10(2)** of their affidavit

My order is as follows:-

1. Upon the Respondents filing in Court within five days a document as to their undertaking to pay the damages in case the Court shall hereafter be of the opinion that the Petitioners shall have sustained any by reason of this Order which the Respondents ought to pay:

IT IS HEREBY ORDERED that the Petitioners, their servants and/or agents be restrained and an injunction is hereby granted restraining the said Petitioners, their servants and/or agents from occupying and/or entering the property referred to in paragraph 1 of the statement of claim until the trial of this action or until further order.

2. The Respondents are ordered to enter appearance in this suit within five days failing which the order of injunction shall cease to have effect.

3. Costs in this matter shall be reserved.

A.N.J. MATTHEW
Puisne Judge