SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 783 of 1995

BETWEEN:

RODNEY JACOB

Plaintiff

and

STANISLAUS MODESTE

Defendant

Miss F. Byron-Cox for Plaintiff

Mr. M. Gordon for Defendant

1996: October 4 and 9

J U D G M E N T

MATTHEW J. (In Chambers).

On January 11, 1996 the Plaintiff filed an amended writ of summons claiming against the Defendant the following reliefs:

1. A declaration that a constructive trust exists between the Defendant and the Plaintiff on his own behalf and on behalf of the heirs of Felicien Alexander with respect to property Block 1456B Parcel No. 162;
2. In the alternative on behalf of himself and the heirs of Felicien Alexander an overriding interest over Block 1456B Parcel No. 162 under Section 28 of the Land Registration Act, 1984;
3. Rectification of the Land Register Block 1456B Parcel No. 162 aforesaid;
4. General Damages; and
5. The costs hereof.

The Defendant entered a conditional appearance on January 15, 1996 upon an order made to this effect on January 12, 1996 but by virtue

of the order of the Court it became unconditional since the Defendant did not apply within 14 days to set aside the writ.

On May 17, 1996 the Defendant took out a summons under Order 18 Rule 19 and under the inherent jurisdiction of the Court to strike out the writ on the ground that it is an abuse of the process of the Court or in the alternative to stay the proceedings in the action under Order 21 Rule 5 until after the Plaintiff shall have caused to be paid to the Defendant the costs directed to be paid by Phillip Bernadine to the Defendant in Suit 287 of 1992 in the High Court and in suit 9 of 1995 in the Court of Appeal.

Mary Frederick swore to an affidavit in support of the summons I wish to draw attention to two paragraphs of that affidavit. In paragraph 5 the deponent stated that in the High Court Suit No. 287 of 1992 Phillip Bernadine v. Stanislaus Modeste, the Plaintiff claimed title to the same piece of land being claimed in this suit, as an heir of Felicien Alexander; and in paragraph 8 she again stated:

> *"The Plaintiff herein, suing in his capacity as an heir of Felicien Alexander on his behalf and on behalf of the other heirs, is again putting in issue points which were distinctly put in issue in the aforementioned Suit No. 287 of 1992 and which have been solemnly found against one of the heirs in his capacity as such."*

On May 29, 1996 the Plaintiff filed a summons for judgment in default of defence under Order 19 Rule 5 of the Rules of the Supreme Court.

The above represent the material pleadings for the purposes of this case.

SUBMISSIONS OF COUNSEL

Learned Counsel for the Defendant in support of his submission

tendered a type written document with his skeleton arguments. Counsel asked that the matter be thrown out as res judicata. Reliance was placed on Article 1171 of the Civil Code which is as follows:

> *"The authority of a final judgment (res judicata) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."*

Counsel elaborated on the article by reference to a Treatise on the Civil Law, Volume 2, Part 1 by Marcel Planiol and George Ripert of the Faculty of Law of the University of Paris, pages 34 - 40.

At page 34 the two Professors state:

> *"In order to determine in what cases the defence of res judicata is opposable to a new demand, three conditions have long been established; it is necessary:*
>
> *(1) that the second suit be between the same persons, (2) that it concerns the same object, and (3) that it has the same cause as the first (Article 1351)."*

Under the heading, Identity of Persons, they state -

> *"Every action is litigated between definitely determined persons, who are parties to it. The judgment obtained by one of them against the other should not benefit or injure third persons, unless in case of an amicable arrangement concluded by such persons between themselves in lieu of pleading their respective rights.*
>
> . . . . . .
>
> *It follows, therefore that the exception of res judicata, by means of which individuals respect the authority or*

presumption of the truth which the law attaches to judgments, cannot be used except for the benefit of a person who was a party to the process, or who is a successor to the rights of one of the parties, and against a person who was a party or who is the successor to such party."

Under the heading, Identity of object, they state -

"It is necessary, between the parties, to restrain the effect of the judgment to that which was the object of the litigation, and to leave them free to debate between themselves, their other rights; in a word, to give the judgment an effect limited as to its object."

The authors explain the Identity of Cause by stating -

"It is quite clear that if I claim the ownership of property as acquired by purchase, my failure will not prevent me from renewing the revindication as a legatee or heir of the owner. My second action has not the same cause as my first."

Learned Counsel for the Defendant went on to make a submission based on what he called the public interest principle. Under that head he submitted that the Court has the power under Order 18, Rule 19 and under its inherent jurisdiction, to dismiss an action as vexatious and an abuse of the process of the Court where the action raises matters which could and should have been litigated in the earlier proceedings. He cited as authority the case **YAT TUNG INVESTMENT CO. LTD. v. DAO HENG BANK LTD. and ANOTHER 1975 A.C. 581 P.C.**

Learned Counsel for the Plaintiff in reply submitted that the Parties in the present case are not the same as the Parties in the earlier suit, No. 287 of 1992. She submitted that in the earlier case, Phillip Bernadine, the natural son of Muriel Joseph, acted for himself and his claim was based on adverse possession. Counsel submitted the novel proposition that Phillip was claiming adverse

possession for himself and during his minor years, the mother's possession was to be regarded as his possession. She said that Phillip's claim was against the heirs of Felicien Alexander which includes his mother.

Counsel stated that the present case is a representative action brought by one of the heirs of Felicien Alexander and so it cannot be held that the interest of Phillip Bernadine is identical to that of Rodney Jacob although she admitted that the piece of land was the same in both actions. Counsel submitted that the bases of the actions are different.

CONCLUSIONS

From the pleadings in this case it appears Felicien Alexander was married to Arcenne Felicien and they had six lawful children namely:

(1) Netta Petit Frere;

(2) Hortense Deterville;

(3) St. Martin Felicien;

(4) Joseph Felicien;

(5) Nemorin Felicien; and

(6) Felicien Felicien

It must always be noted that this is only a pleading. There has not been yet any proof of the family tree.

In the earlier suit Phillip Bernadine, though not an heir, traced his roots from St. Martin Felicien who would have been his great grand father via Amazilta Joseph and her daughter Muriel Bernadine.

The pleadings state that Elizabeth Macauldy from whom the Defendant claims was the grand daughter of Joseph Felicien.

It is not quite clear from the pleadings how the Plaintiff in this action becomes the lawful great grandson of Felicien Alexander and

Arcenne Felicien as stated in paragraph 1 of the amended statement of claim, or as an heir of the said Felicien Alexander as stated in his affidavit dated July 8, 1996 in opposition to the Defendant's summons to strike out the writ.

It will be incumbent on him to prove those things if his action in the second suit is to succeed.

But let me deal with the summons under Order 18 Rule 19. In the course of making his submissions, very early in the day, learned Counsel for the Defendant asked to delete from his skeleton arguments the following words:

> *"He sought to defeat the Defendant's registered title, alleging that title should be awarded to him instead, as heir of the said Felicien Alexander, who he alleged was the true owner thereof".*

These words were spoken of Phillip Bernadine because Counsel had just realised that Bernadine was never an heir. He is the natural son of an heir at most. The deletion was sought to rectify the basis of his argument that Phillip Bernadine was an heir. But the deletion of the words did not cure the position. The words deleted were contained in the 5th, 6th, 7th and 8th lines of a paragraph which began with the words:

> "No 287/92 was an action brought by Phillip Bernadine, an heir of Felicien Alexander, against Stanislaus Modeste."

If I may be permitted to use the analogy of this dreadful disease, "the BIG C", I understand that the surgeon may remove defective parts of the body affected which are clearly visible, yet there still remains infected parts of the body which are not so clearly visible.

The statement of claim in the earlier suit is an exhibit in this

case. Paragraph 2 clearly states that Phillip Bernadine is the natural son of Muriel Bernadine Joseph, who is mentioned in paragraph 1 as the lawful great grand daughter of Felicien Alexander.

Page 2 of the skeleton arguments continues the error when it stated - "It was further held that the Plaintiff, (Phillip Bernadine) did not by himself nor through his ancestors," etc.

And yet at page 3, learned Counsel cites Planiol at page 36 and says -

> *"The obverse of this statement would be that if another person were to recommence the suit in the capacity as tutor of the same minor, he would be subject to the defence of res judicata, notwithstanding the lack of identity of the material person."*

These last words are premised on the contention that Phillip Bernadine was an heir just as Rodney Jacob.

This leads Counsel to come to a wrong conclusion when he states at page 3 of his skeleton arguments -

> *"Thus, there is an identity of persons between No. 287/92 and No. 788/95. While the material person bringing No. 788/95 is Rodney Jacob he brings it as a representative of the heirs of Felicien Alexander. Thus the person whose rights were adjudicated upon in No. 287/92 and that which is now demanded to be adjudicated upon in No. 788/95 is the same: the heirs of Felicien Alexander."*

In my judgment therefore the Plaintiffs in both actions are materially different and are not acting in the same capacity.

Learned Counsel for the Plaintiff cited the case of **MARGINSON v. BLACKBURN BOROUGH COUNCIL 1939 1 KB** as an authority on Parties

being different. In that case the Parties were materially the same but Marginson was not estopped where he brought a second action as Personal Representative of his deceased wife when the first action was brought by him his personal capacity. That decision can be seen as an authority for a statement at the footnote of page 36 of Planiol's treatise. There it is stated -

> *"The identity of the parties in the second case, which is necessary in order that the exception of res judicata may be used, does not mean the material identity of persons, but identity of capacity or quality. Thus a tutor, after having lost a case brought in the name of his ward, may recommence it in his own name, without being subject to the defence of res judicata because he is not acting in the same capacity; it is not the same person who is pleading."*

It is admitted that there is a common identity of object in both actions and I have found that there is no common identity of persons. It may be unnecessary to consider identity of cause. Learned Counsel for the Defendant submitted that there was identity of cause and learned Counsel for the Plaintiff submitted to the contrary. I would be more inclined to agree that common identity of cause was lacking. Phillip Bernadine's case was based on adverse possession and this is made clear at pages 1, 2, 7 and 8 of the judgment in the earlier suit. This suit seems to be a claim on behalf of the heirs of Felicien Alexander, not based on adverse long possession, but derived from a deed of sale and possession by the owner and his heirs.

I do not think it necessary to consider the public interest principle and the authority of **YAT TUNG INVESTMENT CO. LTD.** It is not here relevant where there is an absence of identity of Parties. The decision of the Privy Council in that case was that the doctrine of res judicata in its wider sense applied and it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in

the earlier proceedings."

If it were found that there was identity of persons in both cases then in my view the principle could apply in the consideration of the new claims brought in the second action, that is, the issue of constructive trust and overriding interests, or community property which were absent in the earlier case.

In his summons, the Defendant asked to stay the proceedings because the Defendant was not paid costs due to him in two suits between himself and Phillip Bernadine.

Order 21 Rule 5(1) of the Rules of the Supreme Court is as follows:-

> *"Where a party has discontinued an action or counterclaim or withdrawn any particular claim made by him therein and he is liable to pay any other party's costs of the action or counterclaim or the costs occasioned to any other party by the claim withdrawn, then if, before payment of those costs, he subsequently brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid."*

This rule is clearly inapplicable where two different parties are bringing the actions. And even if it was Phillip Bernadine who was bringing the second action the rule would not apply in respect of the High Court action for he did not discontinue the action or withdrew any particular claim in the action.

Finally learned for the Defendant at the conclusion of submissions stated -

> *"In the event the Court should find that the action should continue we are applying for an extension of time within which to file a defence."*

This was clearly related to the Plaintiff's summons for judgment referred to above and learned Counsel for the Plaintiff must have been aware of it. In her reply learned Counsel for the Plaintiff did not oppose the application.

I therefore grant leave to the Defendant to file and serve his defence within twenty one days failing which judgment shall be entered for the Plaintiff.

The costs on this summons shall be costs in the cause to the Plaintiff to be agreed or otherwise taxed.

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A.N.J. MATTHEW
Puisne Judge