SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 949 OF 1996

BETWEEN:

EDMAY CELESTIN

Plaintiff

and

HEIRS OF FRANCHETTE REMY or ST. REMY
represented by AGNIS REMY a.k.a. AGNES LUBIN

Defendant

Appearances:

Mrs. Shirley M. Lewis for the Plaintiff.
Mr. Michel Magloire for the Defendant.

1999: November 12
December 16

JUDGMENT

[1] HARIPRASHAD-CHARLES J. [Ag] : This is an application by way of summons filed on 20th day of May 1999 by the Plaintiff pursuant to Order 34 Rules 7(2) and 11 (b) of the Rules of the Supreme Court, 1970 seeking a revivor of the action in a land matter. The application was heard on 12th day of November 1999 and I granted the Order for revivor of the action. I indicated that the reasons therefor would be reduced into a written judgment subsequently. The following represents my reasoned judgment.

[2] On 24th day of October 1996, the Plaintiff issued a Writ of Summons against the Defendant claiming that lands which were mistakenly registered in the name of the Defendant in the Registration Quarter of Micoud as Block and Parcel No. 1825B 8 be declared lands of the Plaintiff and that the said lands be surveyed and partitioned.

[3] The Defendant, represented by Agnis Remy was served with a copy of the Writ of Summons on Thursday, 27th day of February 1997. No appearance having been entered, the Plaintiff, on 12th day of September 1997 filed a Summons for Judgment in Default of Appearance. This matter was pending before the Court and was scheduled to be heard on 19th day of November 1997. There is no indication from the record of the Court as to what transpired on that day. What is clear, however is that the next adjourned date was 10th day of December 1997. On 10th day of December 1997, Mr. Michel Magloire made his first appearance as Counsel for the Defendant and requested an adjournment. As the record reflected, the Defendant formally entered an appearance on 18th day of December 1997 and filed a Defence on 13th day of January 1998. Counsel for the Plaintiff agreed to accept service of the Defence beyond the time prescribed by Law, as can be gleamed from the record. The Defence was served on the Plaintiff's Solicitor on 21st day of January 1998 The record reflected that the last document filed was an affidavit verifying service of the Defence on the Plaintiff's Solicitor. This was filed on 28th day of January 1998.

SUMMONS FOR REVIVOR OF ACTION

[4] It cannot be disputed that almost fifteen months later, on 20th day of May 1999, the Plaintiff filed a summons seeking the revivor of the action. Learned Counsel for the Plaintiff based her application for revivor on two grounds:

(1) That her application was made under Order 34 Rules (7) (2) and 11(1) (b) and,

(2) That Learned Counsel for the Defendant misled her to believe that the matter was in the course of settlement and as a result of such assurance, she even withdrew the application for Judgment in Default of Appearance.

[5] The application for revivor of action was set down for hearing on 23rd day of July 1999. There is again no record as to what transpired on that day in Court. However, on the said day, the Defendant filed an affidavit deposed to by one Wheatley Lubin who alleged that he is an heir to the Estate of Fanchette Remy. His affidavit is two-pronged in nature and stated as follows:

(!) That none of the heirs of Fanchette Remy nor their Solicitor have approached the Plaintiff or the Plaintiff's Attorney with a view to settlement;

(3) that the last document filed in this matter was on 19th day of January 1998 and and by virtue of Order 34 Rule 11 (1) (a), the cause is deemed abandoned and incapable of being revived.

[6] The gist of the affidavit of Wheatley Lubin is an opposition to the summons for revivor of action on the aforesaid grounds.

(i) ORDER 34

[7] By Order 34 Rule 3, if the Plaintiff does not deliver a reply within the period allowed for that purpose the pleadings shall be deemed to be closed at the expiration of that period and all the material statements of fact in the pleading last filed shall be deemed to have been denied and put in issue.

[8] By Order 18 Rule 20 (b), the pleadings in the action are deemed to be closed if neither a Reply nor a Defence to Counterclaim is served, at the expiration of 14 days after service of the Defence. By virtue of Order 34 Rule 3(1)(b), the matter

became ripe for hearing fourteen days after service of Defence, that is on 5th day of February 1998.

[9] Under Order 34 Rule 7(1), it is the duty of the Plaintiff to file a request for hearing within six weeks after the matter became ripe for hearing, that is, not later than 19th day of March, 1998.

[10] That the matter became deserted on 19th day of September, 1998; that is six months after the time for filing by virtue of Order 34 Rule 7(1) and that the effect of the desertion is that proceedings cannot be restored to life until there is an Order for or consent to revivor by virtue of Order 34 Rule 7 (2).

[11] And that the matter became abandoned by Order 34 Rule 11(1) (b) by 19th day of March 1999, that is six months after the matter was deemed deserted.

[12] This would seem to be the result of a careful reading of the rules and the view of Mitchell J. and the entire Court of Appeal in **Barbuda Enterprises Ltd v The Attorney General of Antigua & Barbuda (Privy Council Appeal No 32 of 1992).**

[13] Harsh as it may seem, this is the inescapable consequence of the plain language of Order 34 and the Court has no discretion to relieve it.

See: (1) Henry St. Hilaire et al v. Ena Baptiste [unreported] Civ. App. No.21 of 1993;

(2) Ena Lewis v Henry St Hilaire et al (Privy Council Appeal No. 58 0f 1995.

(3) Gustavus Frett v Idalia Davies et al (unreported) Civ. App. No.2 of 1995 from the British Virgin Islands.

(4) BNP Traders Company Limited v Otways Investments Limited (unreported) Civ. App. No. 5 of 1997 (Grenada).

(5) Barbuda Enterprises Limited v The Attorney General of Antigua & Barbuda (Privy Council Appeal No.32 of 1992).

[14] I have no difficulty in concluding that this Court is bound by these decisions and to hold that Order 34 Rule 11 (1) (a) of the Rules of the Supreme Court empowers the court to deem the cause abandoned and incapable of being revived because more than one year had elapsed before either party took any proceeding or filed any document in the matter. I also agree with the opinion therein that the party benefitting from the rule could waive it.

(ii) MATTER IN COURSE OF SETTLEMENT

[15] Learned Counsel for the Plaintiff, Mrs. Shirley Lewis submitted that the Defendant led her to believe that the matter would or could be settled. She further deposed that with a view to settlement of the matter, the Plaintiff' withdrew the Summons for Judgment in Default of Appearance on 19th day of January 1998. Learned Counsel for the Plaintiff tendered as an Exhibit EC2 to verify her statement that there were on-going discussions at a resolution of this matter. On 9th day of March 1999, Mrs Lewis wrote to Mr. Magloire, Counsel for the Defendant. Her letter reads thus ***"In an effort to settle this matter,*** *kindly let us meet along with your clients on 14th April, 1999 in the Library of the High Court."*

[16] On 12th day of March 1999, Learned Counsel for the Defendant replied to Mrs. Lewis:

> "Dear Mrs. Lewis
>
> We are in receipt of your letter of 9th March, 1999 and we are attempting to contact our client in order to confirm the arrangements for the meeting. Once we have our client's instructions we will be in touch with you again.

Yours sincerely

CALDERON, MAGLOIRE & CO.
Per:

Michel Magloire.

[17] Learned Counsel for the Defendant, Mr. Magloire, in his submissions to the Court accepted the chronology of events as what transpired. He emphatically denied having approached Mrs. Lewis at any time with a view to settling the matter. He contended that the only issue in this case is one of waiver. Learned Counsel was most reluctant to consent to the Summons for revivor of action.

[18] It is clear from the evidence that had Learned Counsel for the Plaintiff filed her application for a revivor of the action on 9th day of March 1999 instead of directing a letter to Learned Counsel for the Defendant, she would have been within the statutory time to do so. But instead, she directed a letter to Counsel for the Defendant. The underlying question is why did she choose such course and may I add, dangerous one as it turned out to be? Analysing the chronology of events and the submissions of both Counsel, I am of the firm view that Learned Counsel for the Defendant misled Learned Counsel for the Plaintiff in believing that the matter could be settled. I believed Mrs. Lewis when she deposed under oath and well as related to the Court that had there not been discussions at settlement, she would not have withdrew the Default Judgment.

[19] I agree with Mrs. Lewis that Learned Counsel for the Defendant acquiesced to whatever occurred and the Defendant could not now benefit from this misrepresentation. She further submitted that since it is a land matter, it is a fitting case where the issues should be ventilated and determined by the Court.

(iii) LOCUS STANDI OF WHEATLEY LUBIN

[20] The affidavit of Wheatley Lubin filed on 23rd day of July 1999 stated as follows:

"(i) I am a heir to the estate of Fanchette Remy the Defendant in this action. My father Ferick Lubin was Fanchette Remy's grandson. Agnes Lubin who represents the Defendant is my mother and the wife of Ferick Lubin.

(ii) I am duly authorized to make this Affidavit on behalf of my mother and the heirs of Fanchette Remy."

[21] Learned Counsel for the Defendant submitted that it was the Plaintiff who brought this action and chose the Defendant. I cannot agree with Learned Counsel's submission. He has acquiesced to the Defendant being represented by Agnis Remy. Why did Agnis Remy not swear to the affidavit of 23rd day of July 1999 opposing the summons for revivor of action. I conclude that Wheatley Lubin has no locus standi in this matter to swear to this affidavit and for all intents and purposes, there is really no opposition to the summons for revivor of action.

[22] Based on the above findings, the only application that the Court is left to consider is the summons for revivor of action. I am of the opinion that when a matter is deemed deserted it is in suspense but not wholly dead until it is deemed altogether abandoned under Order 34 Rule (11) (1) (a).

[23] What principles should guide the Court in considering applications for orders for revivor under the rule. After a careful review of the authorities, I have no doubt as to the main principle, which is expressed in general terms in the following quotation from the **Encyclopaedia of the Laws of England (2nd edition),** cited at page 1448 of the **Annual Practice, 1948:**

> " An application to enlarge time is an appeal to the Court for increased facilities to carry on the action and the court in such a case is always inclined to act with clemency towards the applicant provided he can show that his opponent will not thereby be injuriously affected."

[24] An application for revivor of action is an application for renewal of an action and is analogous to applications for renewal of a writ.

[25] It is my considered opinion that taking into consideration what transpired in this particular case, it is a fitting case for the issues to be ventilated in Court if a possible settlement could not be achieved. It is a land matter and serious issues are involved. As I earlier indicated, the affidavit to deem the matter abandoned and incapable of being revived was sworn to by someone who has no locus standi in this matter and the Court is duty bound not to consider it. In light of my findings, I granted the Order for the revivor of the action which was the only interlocutory application pending before the Court.

Indra Hariprashad-Charles
High Court Judge [ag]