SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT No 477 of 1999

BETWEEN:

EXPARTE: JUSTIN EMMANUEL

Applicant

And

JN BAPTISTE EMMANUEL

Respondent

IN THE MATTER of an application for a Writ of Injunction

AND IN THE MATTER of Article 841 and 850(17) of the Code of Civil Procedure, Chapter 243 of the Revised Laws of Saint Lucia 1957

ExParte Justin Emmanuel

Appearances
Mr. Andie George for Applicant
Mr. Winston Hinkson for Respondent

2000: May 4
September 19

JUDGMENT

[1] **d'Auvergne J**,:The Applicant and the Respondent are brothers and beneficiaries under the Last Will and Testament of their father James Albert Emmanuel and the Respondent is the Executor of the said Will

which was admitted to Probate on the 8th June 1993 and registered in the office of Deeds and Mortgages on the 18th day of June 1993 in Vol 146a No 168943.

[2] The Applicant filed for an order of injunction dated 29th June 1999 whereby he petitioned the Court to grant the following.

(a) prohibiting the Executor (his servants and/or agents) from selling any of the said properties,

(b) prohibiting any persons occupying the said properties from remaining in possession

© to make an order compelling the Executor to allow the Petitioner to survey and mutate his share from the said properties.

[3] On the 21st day of September 1999 an order of injunction was granted in the following terms.

That the Respondent, Jn Baptiste Emmanuel be and is hereby restrained whether by himself, his servant and or agent from selling or placing any person in possession of any of the properties namely: - Block 1042B17 until further order of the Court.

Returnable date 13th October 1999.

[4] On the 12th day of October 1999 an affidavit in reply to the order of injunction was filed by the Respondent, Jn Baptiste Emmanuel, the gist of

which is that he sold the said property Block 1042 B Parcel 17 with full knowledge and consent of all the beneficiaries.

[5] He deponed that the Petitioner was the first among the beneficiaries who suggested to him that the land should be sold since the banana production was "low and unprofitable" that the Petitioner even sent a potential buyer to him but that they "could not agree on a price." He further deponed that after the suggestion of sale by the Petitioner he informed the other beneficiaries of the said suggestion and they all agreed to the sale of the property.

[6] He again deponed that the Petitioner was aware of the application for extension of time to administer the property, that Margaret Tarapasade and her common law husband, Denis Primus better known as Denis Louis had made a firm offer to buy the land and the offer was accepted and that they had secured a loan in the sum of $212,600.50 towards the purchase. That the Petitioner had even given his banana production card from the St. Lucia Banana Company to the Respondent in order to facilitate the securing of the loan from the National Commercial Bank by the purchasers and that he, the Respondent only became aware of the Petitioner change's of mind when he presented him with the cheque representing his portion.

[7] He concluded his deposition by stating that the Petitioner had caused the buyers to act to their detriment, they having incurred certain sums of money for securing the loan and that he should be estopped from repudiating his contractual arrangements with the purchasers. He finally deponed that he was seeking an order to discharge the injunction and to remove the caution entered jointly by the Petitioner and another brother Smith George Emmanuel who had since the placing of the caution accepted his share of the proceeds of sale.

[8] After many adjournments the matter was heard on the 11th day of May 2000.

[9] At the hearing Learned Counsel for the Respondent reiterated his affidavit in reply filed 12th October 1999. He argued that it was only on the 3rd day of March 1999 when cheques were being paid out that Petitioner and beneficiary Smith George Emmanuel placed a caution on the property.

[10] Counsel vehemently argued that the Petitioner should be estopped from reneging on his promise thereby placing the *bona fide* purchasers in the predicament that they had found themselves which continues to this day. He quoted **Halsbury's Laws of England Vol 14, 3rd Edition Pages 638** and **639 Para. 1177** and **1179** respectively and two cases namely

Civil Appeal No 8 of 1995. From Tortola British Virgin Island

Appellant

Village Cay Marina Limited

and

(1) John Acland
(2) Landac Development Ltd
(3) Rhyto To Investments Ltd
John Greenwood

Respondents

and

Barclays Bank Plc

3rd Party

and **Taylor Fashions v Liverpool Victoria Trustees Co 1981 1 AER 897 at 915.**

Learned Counsel for the Petitioner argued that while an executor may do all in his power to realise a sale it must be done with the consent of the beneficiaries and in this instance the Petitioner was unaware of the sale until the Executor actually told him of the proposed sale whereupon he informed him that he did not want his share sold.

[11] He quoted **Article 855** of the **Civil Code** which states that heirs must be notified. Counsel further argued that the consent of a beneficiary could not mean that he introduced a prospective buyer. He concluded his argument with a proposal that the Petitioner's share be extracted, surveyed and mutated.

[12] Apart from reading the affidavit evidence and listening to the addresses of the two counsel I decided to take *viva voce'* evidence and the Respondent was the first to give evidence. He repeated the facts in his affidavit and emphasised rather vehemently that he categorically told the Petitioner, a beneficiary and brother, that he was offering the land for sale and the Petitioner agreed. He said that there was a lapse of time between that conversation and the selling of the land. Then one day he approached the Petitioner with a cheque representing his share of the land whereupon the Petitioner told him that he was no longer interested in selling his share and that if the Respondent had waited a little longer, he himself, the Petitioner would have bought some of the land. Under cross examination the Respondent told the Court that he had always and still remains on friendly terms with the Petitioner and that he was fully aware that he needed the consent of all the beneficiaries, before selling but he was led to believe, by all the beneficiaries, that they consented.

[13] The Petitioner under oath told the Court that the Respondent told him on many occasions that he was interested in sell the property but at every occasion he told the Respondent that he was not in agreement with the selling of the property, that he never attended any of the meetings held by the Respondent and the other beneficiaries. He categorically told the Court that he made known his intention of not selling his portion to

Respondent, all the prospective buyers and even the father of the female purchaser who approached him.

[14] Under Cross Examination he told the Court that he occupied 1½ acres representing his share of the property and therefore he was the best person to buy the land and to put a caution on the land. He confirmed that the Respondent and himself are on friendly terms but the latter sold his land so he took him to Court.

[15] Isidore Taraparade the father of the female purchaser referred to earlier, gave evidence and said that he first approached a brother Timothy, then the Respondent, that he visited the Petitioner on many occasions and left messages but the latter never responded.

[16] Under Cross Examination this witness agreed that after the offer was closed and the land was paid for, the Petitioner came to his home and said "Did I not tell you that I was not selling my land?" and the witness said he replied "I never saw you nor spoke to you." This witness said that his daughter (female purchaser) owned the land adjoining the land in question and therefore was interested in purchasing it, that the property was purchased at $23,000.00 per acre and paid for, more then one year ago.

[17] Marguerite Tarapersade, the female purchaser boldly told the Court that she bought the land in question in partnership with Denis Primus her boyfriend. She told the Court how she repays Two Thousand dollars ($2,000.00) monthly to the bank and that she was definitely against the property being mutated for the Petitioner to retain his share even if he compensates for improvements done.

[18] **Conclusion**

Article 855 of the **Civil Code** clearly indicates that an Executor needs the consent of the heirs, legatees and other interested persons before disposing of any of the properties of the succession. The evidence of the Respondent is that he discussed the selling of the property Block 1042 B 17 with all the heirs including the Petitioner and they agreed.

[19] I believe the Respondent and accept as a fact that it was based on that consent that the Respondent offered and eventually entered into the contract with the above named purchasers for the sale of the land.

[20] I have no doubt in my mind that the Petitioner who still occupies a portion of the land upon seeing his father's estate once more being worked and may be showing prospects decided that he was no longer interested in selling his portion. I believe the Respondent when he said that the Petitioner only told him of his change of mind when he handed him the

cheque. As I see, it the Petitioner should have communicated his change of mind to the Respondent in writing since he had originally agreed to sell.

[21] The authorities quoted by Learned Counsel for the Respondent all deal with estoppel by acquiescence and according to the authorities, the typical prerequisites to the success of the plea or defence of estoppel by acquiescence (silence or other passive conduct) are manifold but there is one underlying factor, that, "it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

Taylor Fashions v Liverpool Victoria Trustees Co (1981) 1 AER 897 at 915 and 916 Oliver J.

[22] This dictum was confirmed by the Privy Council in **Lim v Ang (1992) 1WLR 113** where it was held "that, in order to ground a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did; it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make."

[23] This is a case seeking an order of injunction to prevent the Respondent from selling a property which he has already sold to purchasers in good faith, who have paid the purchase price. While I agree that the Respondent did not exhibit a copy of the unregistered mortgage and Deed of Sale, it cannot be disputed that consideration passed between the Respondent and then prospective buyers, for it was upon presenting a cheque to the Petitioner for his share of the property that he told the Respondent that he was not selling his share and that he immediately caused a caution to be placed on the property.

[24] In my judgment the principle enunciated in **Taylor Fashions v Liverpool Victoria Trustees Co. [Supra]** should be applied analogously to this case.. It is therefore unconscionable for the Petitioner to inform the Respondent at the ninth hour that he no longer wishes to sell his portion of land. He should not be allowed to hold back the registration of the mortgage and deed of sale of the purchasers.

[25] My order is as follows:

(1) That the order of injunction granted on the 28th July 1999 and entered on the 21st September 1999 be and is hereby discharged.

(2) That the caution placed on the property namely Block 1042 B 17 is to be removed forthwith.

(3) That the Petitioner do pay the costs of this action to the Respondent to be agreed or otherwise taxed.

Suzie d'Auvergne
High Court Judge