THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV2003/0423

BETWEEN:

I.H.M. INCORPORATED LIMITED

Claimant

and

(1) MELCHAID WILSON
(2) PHILLIP WILSON
(3) MARK WILSON or "MELAN"
(4) SYLS WILSON

Defendants

Appearances:

Mrs. Mary Juliana Charles and Ms. Leandra Verneiul for the Claimant.
Ms. Kate Wilson for the Defendants

2004: January 12
January 12,19

APPLICATION TO SET ASIDE JUDGMENT UNDER PART 39.5…FAILURE TO ATTEND HEARING DELIBERATE…WOULD THEIR PRESENCE AT THE HEARING WOULD HAVE MADE A DIFFERENCE…NO DEFENCE FAILED TO DATE…CLAIMANT HAVE DOCUMENTARY PROOF OF THEIR OWNERSHIP OF LANDS …JUDGMENT FOR THE CLAIMANT…COSTS

JUDGMENT

[1] HARIPRASHAD-CHARLES J: This is an application by the Defendants to set aside a Judgment made at trial on 25th September 2003 wherein I ordered the following:

(i) That the Claimant as the registered owner is entitled to possession of its lands situate at Micoud and registered in the Land Registry as Parcels 1628B 41 and 1628B 205.

(ii) That No.1 and No. 2 Defendants demolish and remove the two timber and concrete houses erected on Mondesir Estate situate at Micoud and described in the Land Register as Parcel 1628B 41 within three (3) months hereof failing which the Claimant is authorized to demolish and remove the said timber and concrete structures at the expense of the Defendants.

(iii) That the Defendants do not enter and remain on the Claimant's lands described as Mondesir, Volet and Troumassee Estates situate in the Registration Quarter of Micoud.

(iv) That damages for trespass be assessed by a Master or a Judge in Chambers.

(v) That Costs to the Claimant is in the sum of $5,000.00.

Historical Background

[2] It is useful to chronologize the events leading to the filing of the present application. On 23rd May 2003, the Claimant filed a Fixed Date Claim and an application for an injunction against the Defendants seeking among other things, an order that No. 1 and No. 2 Defendants demolish and remove the timber and/or concrete structures erected on Mondesir lands and an Order that the Defendants do not enter lands comprising of Mondesir, Volet and/or Troumassee Estates. A number of exhibits supported the application including a Deed of Sale by Troumassee Estates to I.H.M. Inc. Ltd dated 10th October 1973 made before Notary Royal Vincent Frederick Floissac (Exhibit PMcD 1) and Land Registers described as No. 1628B 205 and 1628B 41 for the Registration Quarter of Micoud showing their ownership of the three estates known as Troumassee, Volet and Mondesir Estates (Exhibits PMcD 2 and PMcD 6) respectively. Three of the Defendants were served on 27th May 2003 while No. 4 Defendant was served on 26th May 2003.The respective affidavits of service were filed on 5th June 2003. On 11thJune 2003, No. 4 Defendant, Syls Wilson filed his acknowledgement of service of the Fixed Date Claim Form.

[3] On 11th June 2003, the application for an interim order came before Master Cottle. Unfortunately, the Order made by the Master does not appear on the court record. However, it was accepted that the Honourable Master did not grant the Interim Order

prayed for but ordered that the Defendants file their defence by 27th June 2003 and for the Court Office to fix the date for the hearing of the Fixed Date Claim.

[4] On the said 11th June, one of the Defendants, Mark Wilson filed an affidavit in the matter. In that affidavit, he deposed among other things that he holds a Power of Attorney authorizing him to act on behalf of the other Defendants. He also alleged that he is one of the heirs of Catish Cadet and that they (the Defendants) have always been the lawful owners of lands known as Cadet Estate inclusive of Cartier Beaufond No. 1 and 2 and Veuve Donis, Devoe Canon, Cartier, Mahaut, Casse D'Arbaud and other lands. In a nutshell, Mr. Wilson alleged that the Defendants own the lands which were sold to the Claimant Company in 1973 and that they are still seeking rectification of the land register. He filed a number of exhibits with this affidavit but they are rather unhelpful.

[5] On 28th July 2003, the Court Office, fully complying with the Order of the Master notified both parties that the Fixed Date Claim will be heard on Thursday, 25th September 2003. On that day, the Claimant and their Counsel were present. All of the Defendants and their Counsel were conspicuously absent. In keeping with the powers of the Court under the CPR 2000, I proceeded with the matter and entered judgment for the Claimant. The Order of the Court was duly served on the Defendants.

[6] On 8th October and 15th December, the Defendants filed Notices of Application under Part 11.18 (3) of CPR 2000 seeking to set aside the Order made on 25th December 2003. I do think Counsel came under the wrong Part of the Rules. She should have applied under Part 39.5 to set aside the Judgment at trial where one party was not present. Such application must be supported by evidence on affidavit showing:

(i) a good reason for failing to attend the hearing; and

(ii) that it is likely that had the applicant attended, some other judgment or order might have been given or made.

Good reason for failure to attend

[7] The first question to be asked by the Court is why it was that the Defendants failed to appear on 25th September 2003 when the matter was listed for hearing. In *Grimshaw v Dunbar*[1], Jenkins LJ said:

> "…a party to an action is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent's case and cross-examine his opponent's witnesses and he is entitled to call his own witnesses and give his own evidence before the court. If by some mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands, so far as it can be given effect to without injustice to other parties, that the litigant who is accidentally absent (my emphasis) should be allowed to come to court and present his case, no doubt on suitable terms as to costs."

[8] In the instant case, the Defendants do not dispute the 25th September hearing date. Ms. Kate Wilson appearing for the Defendants submitted that in the affidavit of Mark Wilson sworn to on 15th December 2003, the Defendants through their Solicitor requested the Court Administrator to re-schedule a new hearing date to the second week of December and as such, the Defendants were under the mistaken impression that the Court had acceded to their request. At paragraph 7 of his affidavit, Mark Wilson stated:

> "The Claimant appeared in Court on the 25th September 2003 for trial. However, the Defendants were out of state and as such absent and also still under the belief that the Court had acceded to the request for the change of trial date to the second week in December 2003."

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[9] Mark Wilson alleged that the Court Administrator undertook to confirm the new date to the second week of December. Unfortunately, the Court Administrator was not on hand to confirm any of the allegations levied at her. However, it is important to observe that the very same Court Administrator scheduled the hearing of the claim for 25th September. Ms. Wilson argued that the Defendants were out of state and as such, could not be present. At this trial, when the Defendants were requested to provide their respective passports to substantiate this allegation, it was evident that none of the Defendants traveled. In passant, I pause to observe that the Defendants are all related to Counsel. No. 3 Defendant is her father and No. 4 Defendant is her brother.

[1] [1953] 1 All ER 350 at 355

[10] On the basis of the evidence, I am of the view that the Defendants had full notice and had the opportunity of availing themselves at court. They had contumaciously decided not to take advantage of their day in court. I am of the opinion that their absence was done in an attempt to prevent the trial from taking place since they had not put in their defence. As such, I find that there was no good reason for the Defendants' failure to attend Court on the day in question.

Different Outcome

[11] The next question in this case is whether attendance by the Defendants and/or their Counsel would have made any difference to the outcome. It seems to me that the Court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. What are the Defendants' chances of success in this case?

[12] At paragraphs 10 of her affidavit, Mark Wilson requests that the Defendants be given an opportunity to defend their claim of lawful ownership of the lands which they have had possession of since birth and which the Claimant erroneously obtained title of.

[13] At paragraph 11, he averred that the Defendants believe that they have a viable defence and that it is settled law that no injunction ought to be granted where a defendant has stated his intention of pleading a recognized defence.

[14] Seven months after, the Defendants still have not put in the good defence which they claimed to have. To make matters worse, the Defendants were cognizant that this application was coming up for hearing in January 2004 as it was their Counsel who requested the hearing date. They are still to put in this good defence.

[15] Ms. Wilson ingeniously argued that the affidavit of Mark Wilson sworn to on 11th June 2003 is akin to a defence and should be treated as such. This argument lacks substance. I have however read thoroughly the affidavit of Mr. Wilson and found that it contains a

plethora of unsubstantiated allegations. Based on the evidence adduced by the Defendants, I do not see any reasonable prospect of success.

[16] On the other hand, the Claimant has fully satisfied the Court as to their absolute ownership to the lands. Ms. Charles for the Claimant submitted that the Claimant has furnished the Court with documentary proof of their title dating back to 1894 supported by the Survey Plan. She next submitted that the Claimant has shown proper title and legal ownership of the Troumassee, Mondesir and Volet Estates and that the Claimant will reiterate that their ownership is within the meaning of Article 361 of the Civil Code.

[17] Ms. Charles also helpfully provided the case of *Shocked and another v Goldschmidt and others*[2] to illustrate that the court will take a rigorous approach to the question whether the party who failed to attend has a reasonable prospect of success at a reconvened trial. According to her, the Defendants have not even file a draft defence.

Conclusion

[18] The Defendants are fully aware that the Claimant Company is registered in the Land Registry as the owner with absolute title of the lands. They have been aware of this for an exceptionally long time - in excess of 20 years. To this very day, they have failed to institute proceedings in the High Court seeking the rectification of the register which they alleged they are now seeking. I think that there is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials. I fail to comprehend why the Defendants who claim to have legal title in 422 carres of land will sit by, allow months and years to slip by and do little about their case especially when they are blessed with two legal minds in their family.

[19] At the end of the hearing on 12th January 2004, I gave an oral judgment dismissing the application to set aside the Order made on 25th September 2003. I now reaffirm with reasons my oral judgment. I also reaffirm that the Defendants do pay the Costs of this application in the sum of $5,000.00.

[2] (1998) 1 All ER 372

INDRA HARIPRASHAD-CHARLES

High Court Judge