

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT OF JUSTICE (Civil)

CLAIM NO. SLUHCV 1005 OF 2002

BETWEEN

SYLVESTER COX

Petitioner

AND

JOHN EMMANUEL

*Respondent/
Judgment Debtor*

Appearances:

Mr. Patrick Straughn for Petitioner
Mr. Marcus Foster for Respondent

2004: April 23
September 22

JUDGEMENT

Introduction

- [1] **EDWARDS J:** The Petitioner Mr. Sylvester Cox was a successful bidder at a Judicial Sale conducted on the 11th September 2001.
- [2] He purchased the immovable property of Mr. John Emmanuel, a Judgment Debtor indebted to Mary Bentick in Suit No. 99 of 1999.
- [3] Under a Writ of Execution filed on the 26th September 2000 for the Judgment debt, in the sum of \$25,770.79 with interest and costs, the immovable property of Mr. Emmanuel was seized.
- [4] The required Gazetted advertisement described the immovable property as –
- "SCHEDULE**
***Parcel No. 10493 B204. All that portion of land situated at
La Clery measuring 4011 square feet and registered
in the Land Registry as Parcel No. 1049 B204"***
- [5] Mr. Cox paid \$20,000.00 for this immovable property. He was registered on the 21st February 2002 as the Proprietor of **Parcel No. 1049 B204**. The Deed of Sale and adjudication date 29th January 2002 mentioned no real rights as a condition of the sale. The property adjudicated was described as "***All that portion of land situate at La Clery measuring 4, 011 sq ft. and registered in the Land Registry as Parcel No. 1049 B204***".
- [6] Having failed to obtain the delivery of the property from Mr. Emmanuel, on the 23rd October 2002, Mr. Cox filed a Petition for an Order commanding the Sheriff to dispossess Mr. Emmanuel and put him in possession.
- [7] On the 5th March 2003, the Master heard the Petition in the absence of Mr. Emmanuel and his lawyer. The following Order was made –

"IT IS ORDERED

1. *That the Sheriff be and is hereby ordered to dispossess the Respondent and put the Petitioner in possession of the premises in accordance with Article 556 of the Civil Code.*
2. *Costs to be awarded in the sum of \$1,000.00".*

The Applications

- [8] By an application to set aside this Order of dispossession, Mr. Emmanuel is seeking to have the Petition for dispossession decided on its merits.
- [9] He filed such an application on the 7th March 2003. The date set for hearing was the 14th July 2003.
- [10] Again, Mr. Emmanuel and his Counsel Mr. Marcus Foster were absent on the 14th July 2003 when the matter came for hearing before the Master.
- [11] Again, the application was not determined on its merits. The Master refused the application "*for want of prosecution*" and ordered further "*that there be liberty to the Defendant to make a fresh application to set aside on or before the 31st July 2003*".
- [12] Apparently, as a result of one possible interpretation of this Order, Counsel Mr. Foster on the 31st July 2003, filed an application to set aside the Master's Order made on the 14th July 2003, instead of renewing the application filed on the 7th March 2003.
- [13] In the absence of an Affidavit opposing this latter application, I granted this application after hearing Counsel Mr. Straughn and reserved the question of costs for the Petitioner. I adjourned the application filed on the 7th March 2003 on several occasions, to facilitate discussion between the parties, and permit the appearance of Counsel Mr. Foster in this matter. The discussions between the parties broke down.

- [14] On the 23rd April 2004, I heard submissions from both Counsel on the merits of the Application to Set Aside the Order of Dispossession.
- [15] An application to set aside an Order made in the Absence of a Party is governed by PART 11.18 (3) of the Civil Procedure Rules 2000. This Rule requires the applicant to show in his supporting Affidavit –
- (a) a good reason for failing to attend the hearing; and
 - (b) that it is likely that had he attended, some other order might have been made.
- [16] The supporting Affidavit of Mr. John Emmanuel sworn to and filed on the 7th March 2003, shows a good reason for his absence at the hearing of the Petition on the 5th March 2003.
- [17] Consequently, both Counsel have focused on the second limb of the criteria, and other matters relating to Suit No. 99 of 1999 which I consider irrelevant to this application.

The Back Ground Facts and the Petition

- [18] Prior to the 11th September 2001, the registered proprietors of the said immovable property from the 13th February 1989, were Mr. John Emmanuel and his wife Magdalene Emmanuel (*In Community*). Their names have been deleted from the Land Register as proprietors.
- [19] Prior to the 11th September 2001, there were 2 houses on the land, one relatively new concrete house belonging to Corporal Peter Ermay who is Mr. Emmanuel's son, and a wooden house over 20 years old which apparently is Mr. and Mrs. Emmanuel's matrimonial home.
- [20] The Valuation Report of Mr. Ian Constantine dated 14th February 2004, which was commissioned by Mr. Cox has described and valued the 2 houses and the land individually.

[21] It states that the 2 storey concrete house consists of 3 bedrooms, 1 bathroom, living room, kitchen, hallway and 2 balconies on the top floor, and a partially constructed ground floor. He valued this concrete house for \$338,000.00.

[22] The 2 storey wooden house has a top floor with 3 small bedrooms, living room, hallway, toilet bathroom and balcony. The ground floor consists of a kitchen, hallway, bedroom and an additional room used for commercial enterprise. The value placed on it is \$57,000.00.

[23] The value of the land is \$34,093.50. There is another valuation report which conflicts with Mr. Constantine's.

[24] The Land Register for **Parcel No. 1049 B204** discloses that the third party rights noted as affecting the land, after Mr. Emmanuel and his wife were registered as the proprietors, have been crossed out. They are:-

(a) Hypothec Instrument No. 610/89 dated 20th February 1989 in favour of the Bank of Nova Scotia to secure EC\$8,000.00 with interest rate at 10.50% per annum. Repayment date not specified – 211/95.

(b) Hypothec Instrument No. 344/95 dated 25th January 1995 in favour of BNS to secure \$41,000.00 with interest at 15.50% per annum. Repayment date not specified - 739/2002.

(c) Variation of Hypothec Instrument No. 322 dated 28th August 1995 in favour of BNS to secure an additional sum EC\$15,000.00 making an aggregate of \$56,000.00 at 15.50% per annum. Repayment date not specified - 739/2002.

[25] Mr. Emmanuel's Judgment debt was incurred in an action brought against him personally and not as a liability of the community.

[26] The 3 immediate questions begging to be answered from these facts therefore are:

- (a) Whether or not the share of Mrs. Magdalene Emmanuel in the property automatically passed to Mr. Sylvester Cox under the Judicial sale for him to be registered as the absolute sole proprietor of the property?
- (b) Does Mr. Cox have absolute ownership of the property, free from any hypothec not discharged or satisfied which was registered as an encumbrance prior to the 21st February 2002?
- (c) Does Mr. Cox have absolute ownership of the property free from Cpl. Peter Ermay's interests in and claim to the concrete house on the property?

[27] If the answer to any of these questions is "**No**", then the Petition for Dispossession needs to be revisited.

[28] I shall therefore consider the law and submissions of Counsel on these issues to decide whether another order would probably have been made on the 5th March 2003, had Mr. Emmanuel and his Counsel Mr. Foster been present at the Hearing of the Petition, and made these submission.

Law and Submissions

[29] It was the submission of Learned Counsel Mr. Foster, that since the seizure and sale of immovables can only be made against the Judgment Debtor, then the seizure and sale of **Parcel No. 1049 B204** could not jeopardize the right of co-owner Mrs. Magdalene Emmanuel to her share of the property as she is not the Judgment Debtor.

[30] Further, that Mr. Cox a purchaser, took ownership, subject to the **OVERRIDING INTEREST OF MAGDALENE EMMANUEL** who is a co-owner. That as a proprietor – in-common with an undivided share in the property, Mrs. Emmanuel cannot lawfully be dispossessed of her share by any dispossession order.

[31] In support of his weighty submissions vigorously argued, Mr. Foster referred to the provisions of the Land Registration Act No. 12 of 1984 and the Land Registration

- (Amendment) Act No. 7 of 1986, Sections 3, 28, 62 (1), 63 (2), and Article 498 of the Code of Civil Procedure Ch. 243.
- [32] Counsel Mr. Foster also relied on the treatise entitled Coutume De Paris to 1988 The Evolution of Land Law in St. Lucia by Winston F. Cenac Q.C. LLB (Lond) Published 1988 – Chapters XII and XIV.
- [33] Mr. Foster did not confine his submissions only to Mrs. Emmanuel's co-ownership. He argued further that the interest of the Bank of Nova Scotia under the Hypothecs are protected by the Land Registration Act, and is still preserved despite the Judicial Sale.
- [34] As for the 2 houses on the land, Mr. Foster has canvassed his view that since Mr. Cox bought only what was advertised, which was 4011sq ft. of land, then he had not acquired the 2 houses on the land. All he acquired he said, was some undivided share in the 4011 sq ft. of land, and his only recourse is to seek a partition if this is possible.
- [35] On the other hand, Learned Counsel Mr. Straughn focused on the provisions of the Code of Civil Procedure, which allow a Judgment Debtor whose property is seized under a Writ of Execution, as well as third parties, having an interest in the property or a charge on the property in their favour, to file a petition opposing, or a petition for an annulment of the seizure and/or sale of the property.
- [36] Mr. Straughn submitted that the Judicial Sale was governed by the Code of Civil Procedure and not by the Land Registration Acts.
- [37] That Articles 519, 520, 514, 521 and provide for oppositions to be made in a timely manner after the seizure, after advertisements and/or before the sale. That Article 558 also permits applications to annul the sale.
- [38] Learned Counsel Mr. Straughn argued that Mrs. Emmanuel should have opposed the seizure and sale, or petitioned to have the sale annulled because of her share in

community. That the submissions of Mr. Foster should have been advanced by way of the relevant oppositions or petition for annulment of the sale. That the rights of Mrs. Emmanuel and the Bank of Nova Scotia have been extinguished in the absence of any such opposition. That based on the equitable principle of Laches, their rights have withered away.

[39] I have refrained from dealing with all of the arguments advanced and statutory provisions mentioned by Counsel for the parties, since in my view, the Court cannot now concern itself with the irregularities in the seizure, advertisements and sale of the property, in the absence of any timely opposition or a petition for annulment of the sale.

[40] In my Judgment, the success or failure of Counsel Mr. Straughn's submissions depends on Articles 498, 499, and 557 to 554 of the Code of Civil Procedure, which deal with whose property can be seized, the effect of an unchallenged Judicial sale; and the impact of the relevant provisions of the Land Registration Acts on these Articles.

[41] Article 498 stipulates that "*The seizure of immovables can only be made against the Judgment Debtor. No seizure can be made of immovables declared . . . by law, to be exempt from seizure*".

[42] Article 499 provides –

"The seizure of immovables can only be made in virtue of a Writ clothed with the same formalities as Writs of Execution against movables, ordering the Sheriff to seize the immovables of the defendant and to sell them in satisfaction of the debt."
(My emphasis)

[43] After the Judicial sale adjudication had been made perfect by Mr. Cox's payment of the \$20,000.00, Article 552 states that he took "the immovable in the condition in which it is at the time of adjudication, without regard to deteriorations or improvements subsequent to the seizure". (My emphasis)

[44] Article 593 states –

"The adjudication is always with warranty as to the contents of the immovable; and it conveys all the rights which belong to it, and which the Judgment Debtor might have exercised and also all active servitudes attached to it, even though they are not mentioned in the minutes of seizure." (My emphasis)

[45] Article 554 provides –

"A Sheriff's sale discharges immovable from all servitudes with which they are charged except those established by law. A Sheriff's sale discharges property from all other real rights not mentioned in the condition of sale." (My emphasis)

[46] Article 555 states that *"A purchaser who buys an immovable advertised as having a certain building thereon, may demand a diminution of the price if the building be found to be on a neighbouring lot."*

[47] By virtue of Section 23 of the Land Registration Act No. 12 of 1984, a registered proprietor with an absolute title holds the property subject to the overriding interests declared by Section 28 of the Act, and hypothecs and other encumbrances shown in the register.

[48] The overriding interests catalogued by Section 28 as amended by the Land Registration (Amendment) Act No. 7 of 1986 include –

- "(a) Servitudes subsisting at the time of first registration under this Act;*
- (b) Servitudes which arise from the situation of the property or which have been established by law;*
- (e) Any unpaid moneys which without reference to registration under this Act, are expressly declared by any law to be a charge upon the land;*

- (g) *The rights of a person in actual occupation of land or in receipt, of the income thereof save where inquiry is made of such person and the rights are not disclosed;*
- (i) *Community property as described by Articles 1188 et seq of the Civil Code Ch. 242”.*

[49] The fact that Mr. And Mrs. Emmanuel were registered as proprietors in community from the 13th February 1989 to the 21st February 2002 means that they were proprietors in common under the Land Registration Acts.

[50] Section 62 (1) states that *“When any land is conveyed, transferred, devised, or devolves to two or more persons in their own right, such person shall be deemed and taken to be proprietors in common.”*

[51] In the absence of any evidence that there was a judicial separation of property or dissolution of the community, Mr. And Mrs. Emmanuel *“held in undivided ownership, each . . .entitled to an undivided share in the whole. . .”* (Section 63 (1)).

[52] Furthermore, Section 63 (2) forbade Mr. And Mrs. Emmanuel, each from dealing with their undivided share in favour of a third person except with each others written consent, and such consent should not be unreasonably withheld.

[53] I therefore make the following findings based on my interpretation of the statutory provisions referred to:

- A. Pursuant to Articles 498, 499 and 553 of the Code of Civil Procedure and Sections 23, 62 (1) and 63 of the Land Registration Acts, the only immovable property that passed to Mr. Cox under the Judicial Sale was an undivided share in the community property allotted to the Judgment Debtor Mr. John Emmanuel.

- B. Mrs. Magdalene Emmanuel remains a proprietor in common with Mr. Sylvester Cox, and they hold in undivided ownership, each entitled to an undivided share in the whole property.
- C. Mrs. Emmanuel's share in the property cannot be extinguished because of laches, since she has a legal interest in the property. Section 3 of the Land Registration Act No. 12 of 1984 makes it very clear that –

“3 (1) Except as otherwise provided in this Act, no other law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act”. Further, the proviso to Section 3 (1) does not apply to the circumstances of this case. See also Section 37 (1) set out at paragraph F below.

- D. By virtue of Section 23 of the Act, any Hypothec in favour of the Bank of Nova Scotia remains an encumbrance on the land if it was not discharged or satisfied in accordance with Sections 54 and 55 of the Act which provide –

“54 (1) A discharge whether of the whole or of a part of a hypothec shall be made by an instrument in notarial form and (if of the whole) the word “Discharged” may be endorsed on the hypothec on the duplicate or triplicate and the endorsement executed by the Creditor and dated.

(2) A discharge shall be completed by a cancellation in the register of the hypothec or part thereof as the case may require and filing the instrument of discharge or the endorsed hypothec.

55 *Upon proof to the satisfaction of the Registrar-*

(a) that all money due under a hypothec has been paid to the creditor or by his direction; or

(b) that there has occurred the event or circumstances upon which, in accordance with the provisions of any hypothec, the money thereby secured ceases to be

*payable and that no money is owing under the hypothec,
the Registrar shall order the hypothec to be cancelled in the register, and thereupon the land lease or hypothec shall cease to be subject to the hypothec”.*

- E. If Corporal Peter Ermay was in actual occupation of the land, having built his concrete house on the land, then Mr. Cox’s undivided share in the whole land is subject to the rights of Cpl. Ermay, unless Mr. Cox can establish that he made inquiry of Cpl. Ermay and Cpl. Ermay did not disclose his interest/rights to him prior to the perfection of the Judicial Sale adjudication: (Section 28 (g)).
- F. Despite the provisions of Article 554 (set out at para 45 of this Judgment) and the absence of any mention of real rights in the condition of sale, the Judicial Sale has not discharged the property from all other real rights not mentioned in the condition of sale. In my view, the real rights qualify as overriding interests under Section 28 of the Land Registration Acts, including servitudes and hypothecs. These have not been discharged because of Section 3 of the Act (Set out at para C above) and Section 37 (1) which states –

“37 (1) No land. . .or hypothec registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land,. . .or hypothec otherwise than in accordance with this Act shall be ineffectual to create, extinguish transfer vary or affect any right or interest in the land or hypothec. . .”. (My emphasis)

Section 28 has therefore impliedly repealed Article 554 of the Code of Civil Procedure.

- G. Given Article 553 of the Code of Civil Procedure (set our at paragraph 44 of this Judgment), it seems to me that the adjudication conveyed all the rights belonging to the immovable property including the buildings on

the land, which Mr. Emmanuel might have exercised. Despite the absence of any mention of the 2 houses in the advertisement or in the Deed of Sale and Adjudication, it is my view that whatever rights in the 2 houses that Mr. Emmanuel might have exercised, then such rights would also pass to Mr. Cox. This means therefore that such rights must be disclosed by Mr. Emmanuel so that there can be a determination of the rights in the 2 houses which would have passed to Mr. Cox.

Conclusion

- [54] This has been an unfortunate and distressing matter for the parties. It has remained unresolved for a long time because of Counsel Mr. Foster's omissions.
- [55] It is evident from my findings that had the submissions made before me, been made by Mr. Foster at the hearing of the Petition on the 5th March 2003, it is very likely that some other Order might have been made other than the dispossession order.
- [56] Consequently, the dispossession order made on the 5th March 2003 by the Master is set aside with costs \$3,000.00 to the Petitioner.
- [57] On the 3rd February 2004 and 2nd March 2004, the Court indicated that it was considering whether to make an order under PART 64.8 (1) directing Counsel Mr. Foster to pay wasted costs as a result of his omissions in dealing with this matter. Mr. Foster has been informed of the Court's intentions and the grounds on which the Court is minded to make the Order on previous occasions.
- [58] I am fixing this matter for further consideration on Thursday the 7th day of October 2004 at 9:00 a.m. in Chambers at the High Court at Peynier Street, Castries for Mr. Foster to attend and show cause why the Order should not be made for the costs \$3,000.00 awarded to the Petitioner to be paid by him as wasted costs.

[59] It appears to me also that PART 26.1 (2) (j) of the Civil Procedure Rules 2000 should be applied since no worthwhile purpose would be served in adjourning the Petition for rehearing on its merits in light of my findings.

[60] It is my view that substantive justice can be done between the parties based on my determination of the merits of the Petition. To rehear the Petition will be a waste of time.

[61] Consequently, I am adjourning this Petition to Thursday the 7th October 2004 for further directions to be given as may seem appropriate under paragraphs 53 D, E, F and G of my Findings.

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OLA MAE EDWARDS
High Court Judge

Dated this 21st day of September, 2004