THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2008/0480

BETWEEN:
HAZEL-ANN BASCOMBE — CLAIMANT
(of Glenside Mesopotamia)

and

SHANNA SUTHERLAND — FIRST DEFENDANT
(of Glenside Mesopotamia)

CASSITA MARKS — SECOND DEFENDANT

Appearances:
Mr. Sten Sargeant for the Claimant
Dr Linton Lewis for the Defendants

2018: June 5th
October 25th

JUDGMENT

BYER, J.:

BACKGROUND:

[1] By Fixed Date Claim Form filed on 15th November 2006, the claimant brought this action against the first defendant for a declaratory order to property at Glenside Mesopotamia, recovery of possession of it, injunctive relief, damages and costs. She premised her claim on the strength of her "paper title" being Statutory Declaration Number 764 of 1984. The claimant claimed that her now late uncle Ian Cato ("Mr. Cato") who died in 2004, was permitted to put a chattel building on land belonging to her and now that he is deceased, his daughter the first defendant continued to operate the shop despite oral notice in October 2005 to remove the building. The first defendant refused to remove the building despite being written to by Solicitor Mr. Mc Caulay Peters and having been taken to the Mesopotamia Magistrate's Court for recovery of possession.

[2] That claim was discontinued on 15th March 2018, the very morning of trial. The Counterclaim survived to be heard by this Court de novo.

The Counterclaim

[3] In their Defence and Counterclaim filed on 17th January 2007, the defendants stated that the claimant was never entitled to the parcel of land because the claimant's great grandmother Nancy Marks who died in the year 1965, then her grandmother Mary Marks who died in 1984, occupied it at one point. During Mary Marks' occupation, she gave her son Mr. Cato the piece of land in dispute where he operated a shop from the year 1976 when he returned from England, which he did until he died in 2004.

[4] In the Defence and Counterclaim the following reliefs were claimed:

1. A Declaration that the parcel of land previously occupied by the late Ian Cato and his wife Cassita Marks from 1976 until his death in 2004 and of which his widow Cassita Marks remains in possession and occupation, is the property of Cassita Marks.
2. A Declaration that Cassita Marks of Glenside, Mesopotamia be added as a defendant herein.
3. An Order that the Claimant ceases her trespass on the said parcel of land.
4. An Order that the Statutory Declaration bearing registration Number 764 of 1984 in the name of Hazel-Ann Bascombe be declared invalid.
5. Damages.
6. Costs.

[5] There was no amendment made to the prayers in the Counterclaim but in light of the way in which this matter has progressed, prayer two (2) is dismissed, in that Cassita Marks was made a defendant since 26th January 2007 before Bruce-Lyle J.

[6] That having been said, I accept that the issues left to be determined are as contained in

1. Prayer 1 - whether the second defendant is entitled to a declaration of ownership,

2. Prayer 3 - whether the defendants are entitled to an order against the claimant for trespass and

3. Prayer 4 - whether the defendants are entitled to a declaration against the validity of the statutory declaration of the claimant.

Court's Consideration and Analysis

Prayer #4 **–** Whether the defendants are entitled to a declaration against the validity of the statutory declaration of the claimant.

[7] It seemed to be lost on counsel for the defendant that the claimant in these proceedings had nothing to prove.

[8] When the claim was before the Court for the claimant, she sought to rely on a statutory declaration made in her favour to maintain her action for an order for recovery of possession.

[9] That claim being withdrawn, the claimant is no longer required to prove anything to the satisfaction of this Court. It is for the defendants to prove that they are entitled to the declaration as sought.

[10] There has been no evidence led by the defendants or any legal authority proffered by counsel for the defendants, which in this Court's mind establishes any entitlement to this declaration.

[11] The issues raised by counsel for the defendants in his extensive cross examination as to the credibility of the claimant, did nothing in this Court's mind to advance or establish their case in this regard.

[12] No learning was given as to what is required to declare a statutory declaration invalid nor was there in any event any reliance on the said document as it did not form the basis of the defendant's claim.

[13] Indeed it must be borne in mind that a statutory declaration "*does not without more confer …any interest in the land. …it is in fact not efficacious to vest a legal or beneficial interest in the …land".*[1]

[14] Indeed on the defendant's case, it was her possession which she claims to rely on as to her entitlement to ownership, an issue I will return to shortly. It was not her case, and could not have been her case, as to the validity of the statutory declaration, especially in the circumstances where there is no longer a reliance on this document. This prayer for that declaration was therefore in this Court's mind rendered otiose by the withdrawal of the claim.

[15] I therefore find that defendant has not proven her case on a balance of probabilities to entitle her to the declaration in all the circumstances, as sought with regard to the statutory declaration.

[16] This prayer is therefore dismissed.

[11] Per Henry J in **Ernest Mattis v Leticia Neverson and anr** SVGHCV2009/0264 at Para. 30

Prayer #1

Whether the second named defendant is entitled to a declaration of ownership of the lot of land occupied by Ian Cato in her favour

[17] Once again, the onus was on the defendant to satisfy this Court on a balance of probabilities that she is entitled to a declaration of ownership.

[18] That being said, it would have been apparent that the first hurdle for the defendant would have been to establish that she was the person with a *right* to any such declaration. That is, that she was the person who had personally carried out acts evidentially sufficient to be so entitled or was the person who was entitled to rely on the acts of another to establish the basis for such a declaration.

[19] When the evidence in this regard is examined, the defendant told this Court she was the person entitled to administer the estate of Mr. Cato, the person purportedly placed in possession of the said parcel of land. She however also went on to say, that she was in fact now married to someone else and that even if she was not so entitled now to apply for the Grant of Letters of Administration (and although she never did even before her subsequent marriage) then the first defendant was, as his daughter.

[20] However, there was not a scintilla of evidence brought to substantiate any such action having been taken. No documents were produced to show that the process had commenced or had in fact been completed. So instead the second defendant made the bald statement that she is entitled to the prayer of a declaration as to ownership.

[21] From the submissions made by Counsel for the defendant, this prayer seemed to have been grounded in the purported acts of possession by the second defendant in her own right, that is entitlement based on adverse possession.

[22] This was indeed a startling proposition given the clear statement that the second defendant gave by way of examination in chief in her witness statement which clearly stated *"the land in question* ***is the property of the estate of Ian Cato my late husband …"***[2]

[23] The defendant therefore cannot have it both ways. Either the land formed part of her late husband's estate and she claims as his "widow" *or* she claims in her own right.

[24] In this Court's mind it cannot be and is not open to the defendant to change its pleaded case by way of submissions. Parties to litigation must know the case they are going to meet by way of the pleadings and as supplemented by evidence. Failing that there would be chaos in litigation.

[25] I therefore find that the defendant must be bound by her pleadings and the manner in which she claimed entitlement. By her witness statement[3] she clearly made this claim:

[2] Paragraph 17 Witness Statement of second defendant filed 6 May 2008

"16. I am advised and verily believe that my late husband's undisturbed and uninterrupted occupation of the parcel of land from 1976 to 2004 (up to the time of his death) rendered him the person entitled to the parcel of land and as his Intended Administratrix and beneficiary, I have continued the occupation and possession of the said parcel of which forms part of my late husband's estate."

[26] I therefore accept the submission of counsel for claimant having relied on the case of George Leopold Crichton (Attorney on record for Patrick Crichton Intended Administratrix in the Estate of Lucy Crichton deceased) v. Lena Holder[4].

[27] In that case Thom J as she then was, accepted the submission of counsel for the defendant therein, that the Court has no jurisdiction to determine a claim for possession of land by an Intended Administratrix of the estate of a deceased person. At paragraph 18 of the said case quoting from the case of Ingall v. Moran[5] this was what was said:

> *"*"It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of Court by which the executor can prove the fact that he is the executor...An administrator is of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ."

[28] Additionally, in the case of Marjorie Bennett of Beachmont, Kingstown, St. Vincent and the Grenadines Intended Administratrix of the Estate of Charles Michael Bennett Deceased (by her lawful Attorney of Record Camille Lakhram of Queen's Drive) v. CIBC First Caribbean International Bank of Upper Halifax Street, Kingstown, St. Vincent and the Grenadines and Stanley Hinds (Otherwise Standly Hinds) **Executor of the will of Kendol (otherwise "Kendal")** Franklyn Hinds Deceased v. CIBC First Caribbean International Bank of Upper Halifax Street, Kingstown, St. Vincent and the Grenadines[6], my sister Henry, J., as recent as 2015 restated the law at paragraph 9 therein in which she said *"the title of "administratrix" vests in a person only after she has been granted Letters of Administration. Likewise, a grant of Letters of*

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[3] Paragraph16 Witness statement of the second defendant filed 6th May 2008

[4] SVGHCV2004/0018; See also **Jacqueline Bartlett (The proposed Administratrix of the Estate of Agatha Bartlett, deceased, of Breedy's Land, in parish of Christ Church) v. Ronnie Kirton (The land Owner by entitlement and person in possession of lands formerly owned by Elnora Hinds)** Civil Appeal No. 13 of 2004, Barbados

[5] 1944 1KB P196

[6] SVGHCV 2014/0243 consolidated with SVGHCV2014/0244

Administration constitutes the grantee as the deceased's personal representative in relation to his real and personal property. A suit brought before such grant is obtained will be deemed a nullity unless the court makes an order authorizing the intended administratrix to lodge the claim."

[29] In accepting this as a correct exposition of the law, I therefore find that the second defendant has no ability to maintain this action for a declaration on behalf of the estate.

[30] Having so, found that the defendant is not entitled to maintain this action on behalf of the estate of her husband, I also find that there is no evidential basis upon which she can maintain an action on her own behalf. I do not accept that the evidence of the second defendant can reach the threshold of establishing possession in her own right. In fact all the evidence seemed to point to the actions of her husband and then her daughter the first defendant but none of her own. I therefore also dismiss this prayer for a declaration of ownership in favour of the second defendant.

Prayer #3

Whether the defendants are entitled to an order for the cessation of trespass

[31] In the case of Clarabell Investments Ltd. and others v. Antigua Isle Company Ltd. and Other[7], Blenman J. as she then was at paragraph 14 said *"a person having the right to the possession of land acquired by entry on the land is in the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry wrongfully continues on the land".* (My emphasis added)

[32] There was no evidence on the part of the defendant to substantiate any acts of trespass and the pleadings themselves are devoid of any averment as to this purported trespass. Additionally, the submissions of counsel for the defendant were also devoid of any assistance to the Court on this prayer.

[33] Thus, the only assistance on this prayer was as provided by the Counsel for the claimant.

[34] In the statement of law at paragraph 30 above, it is clear that it must be the person who is entitled to possession who may maintain an action for trespass. The evidence before the Court revealed this: "*My husband continued the operation of the shop until just before his death in 2004 when he handed it over to our daughter Shanna Sutherland."*[8]

Then she contradicted herself in the same document when she said at paragraph 12:

"12. The building which was originally completely of wooden material and has over the years been considerably rebuilt and now is substantially a brick building. Since my husband's death I have continued the operation of the shop.

[7] ANUHCV2006/0326

[8] Paragraph 10 Witness Statement of the second defendant filed 6th May 2008

13. The first-named defendant named in the Fixed Date Claim Form is my daughter but is also my employee who works in the shop on a day to day basis."[9]

And in cross examination, she said her daughter was not her employee – but she was young and had to report to her on the business of the shop, at the time.

[35] It would therefore appear to this Court that the defendant herself was unsure of the status of this shop or who was in fact in possession of the land. Indeed, I find as a fact that if anyone could have possibly maintained an action for trespass before this Court, it would have been the first defendant. She was the party who was the original defendant to the action and she was the party against whom all the claims were made in the claim. It was in fact not until 2009 that the second defendant was added as a party upon her own application.

[36] I therefore find that on a balance of probabilities that it was not the second defendant who was in possession of the shop or the parcel of land upon which it stands.

[37] Further, the fact that the first named defendant did not attend the trial of this matter makes it abundantly clear that this prayer could not be maintained by the second defendant.

[38] Additionally and for the sake of completeness, counsel for the claimant also raised the submission that on the pleadings in their present state, the second defendant sought to rely on the pleading of jus tertii. That is, that the second defendant appeared to rely on the fact that the land belonged to another, that is the estate of Mr. Cato and as his "widow" she was entitled to maintain an action for trespass. Having already ruled that the second defendant could make no such claim there having been no grant issued to her, I further find that she could not compound the issue and seek to rely on whatever entitlement she may have to the estate of Mr. Cato for grounding this claim. Plainly stated this claim was just not available to the second defendant.

[39] Therefore the prayer for an order against trespass is also dismissed.

[40] As a final point, in the submissions of counsel for the defendants, an issue was raised regarding the procedural irregularity of the certificate of truth to the Reply to Defence and Counterclaim. The Certificate of Truth had not been personally signed on behalf of the claimant but rather by the practitioner for the claimant.

[41] Before I examine this issue for the sake of all matters raised, I categorically state that it was entirely inappropriate for counsel for the defendants to raise this issue in Closing Submissions. This was at the end of the trial and had not been raised before as a preliminary point and as such the claimant would not have been in a position to respond to the same. This type of litigation by ambush has been frowned on by this Court at both this level and at the appellate level and it does nothing to enhance the practice of law within this jurisdiction.

[42] Be that as it may, Part 3.12 of the CPR 2000 deals with the issue of Certificates of Truth. Part 3.12 (1) states: -

"(1) Every statement of case must be verified by a certificate of truth."

[9] Paragraphs 12 and 13 Witness Statement if the second defendant filed 6th May 2008

And more specifically Part 3.12(4) and (8) state:

"(4) A certificate of truth given by the legal practitioner must also certify –

(a) that the certificate is given on the client's instructions; and
the reasons why it is impractical for the client to give the certificate.

(8) A certificate given by the legal practitioner for a party must be in the following form-

"I [name of the individual legal practitioner giving the certificate] certify that –

(a) the [claimant or as the case may be] believes that the facts stated in this [name document] are true; and
(b) this certificate is given on the [claimant's or as the case may be] instructions.

The [claimant or as the case may be] cannot give the certificate because [state reason]"."

If the Certificate of Truth is missing completely, Part 3.13(1) gives the Court the discretion to strike out the statement of case.

[43] It would appear that that is what counsel for the defendants is seeking to do without giving the claimant an opportunity to respond. Again, I say wholly inappropriate.

[44] The Certificate of Truth attached to the Reply and Defence to Counterclaim filed in the matter on the 25th February 2009 is as follows:

"Certificate of Truth

I, STEPHEN A. F. WILLIAMS of Villa, Junior partner in the law firm of Williams & Williams, certify that all the facts set out in the Reply and Defence to Counterclaim are true to the best of my knowledge, information and belief.

*This certificate is given on the instructions of the Claimant as the Claimant is unable to come to these chambers today to personally certify this defence." (*My emphasis added)

[45] Thus, it is clear, that on the face of it, the prescribed wording of the Certificate of Truth pursuant to Part 3.12 (8), was not complied with in the instant case. However, can this be sufficient to strike out that pleading? I find that the answer to this must be a resounding no.

[46] In the case of Indra Hariprashad-Charles v. the Bank of Nova Scotia[10] our very own Chief Justice said this about Part 3.12:

"While I agree with Mr. Williams that the language of Rule 3.12 is in mandatory terms, rule 3.13 gives the Court a discretion whether or not to strike out any statement of case which has not been verified by a certificate of truth….

Striking out of a statement of case has often been referred to as the Court's nuclear option. This option should only be employed where the justice of the case requires it. Rule 3.13 having given the Court a discretion whether or not to strike out, the Court is required to consider whether

[10] SLUHCV2014/0015 at paragraphs 22 and 25

*there are other alternatives which could be employed to deal with the case justly." (*My emphasis added)

[47] Additionally, in the case of Ray George v. Attorney General of the Virgin Islands[11] Tabor M stated it thusly: *"In some of the cases cited by the learned Counsel for the defendant, the Court treated the defective certificate of truth as a procedural error and ordered rectification of the error rather than declaring the defence void. This approach is in line with Lord Collins dictum in Pacific Electric v Texan Management and Others[12] where he said that, "in the pursuit of justice, procedure is a servant not a master". I must say that I am in agreement with that approach."*

[48] I am in agreement with both of these views, regarding the irregularity of the certificate of truth. I do not accept that the oversight of the use of the word "my" therein warrants the striking out of the Reply and Defence to Counterclaim.

[49] At this stage, case management is long past. I therefore invoke Part 26 (2) (j) and exclude this matter from determination as it would at this stage serve no worthwhile purpose.

ORDER

i. The Counterclaim as filed by the defendants is therefore dismissed.

ii. Prescribed costs to the claimant on an unvalued claim pursuant to Part 65.5 CPR2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

[11] BVIHCV2012/0161 at paragraph 40
[12] UKPC [2009] 46 at Para. 1