IN THE COURT OF APPEAL

SAINT LUCIA

CIVIL APPEAL NO. 1 of 1971

Between: BOSWELL WILLIAMS Petitioner/Appellant
and
LEWIS FLOISSAC Plaintiff/Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice Cecil Lewis
The Honourable Mr. Justice Louisy (ag.)

Appellant in person,
M. Gordon for respondent.

1971, September 8

JUDGMENT

LEWIS, C.J.

On the 7th October, 1970, a writ of execution was issued in suit No. 44 of 1967 - Lewis Floissac, plaintiff against Boswell Williams, defendant. It was returnable on the 2nd February, 1971. The sheriff was instructed to seize and sell a portion of land known as Venus Estate in the quarter of Anse-la-Raye, the property of the defendant (appellant), Boswell Williams. The levy was duly made and the property was advertised for sale in the Gazette.

On the 22nd December, 1970, the appellant filed an application under art. 513 of the Code of Civil Procedure by which he asked the judge for leave to file an opposition to annul the seizure. If leave was granted, then on the filing of the opposition the sale would be stopped. In compliance with that article, his application was accompanied with an affidavit and with a copy of the proposed opposition to annul. The opposition to annul is permitted by art. 519 which entitles a party whose immovable is seized to oppose the seizure or the sale thereof, whether his opposition is founded on matters of form or matters of substance.

The ground of the appellant's application was that

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between the date of the judgment and the date of the issue of the writ of execution, the respondent by an assignment dated the 15th July, 1969, had transferred absolutely his rights in the judgment debt to a company known as Floissac Holdings Ltd., and therefore no longer had any right in the judgment debt and had no right to issue the writ of execution.

Affidavits were filed by the plaintiff and on behalf of Floissac Holdings Ltd., in which it was acknowledged that this judgment debt had been assigned as stated in the appellant's affidavit but Floissac undertook to hand over to Floissac Holdings Ltd. any monies that might be collocated to him as a result of the sale of the property and Floissac Holdings Ltd. said, through the company's secretary, that the writ had been issued with their knowledge and consent and they were quite satisfied that the sale should take place in pursuance of the levy.

The matter duly came before Mr. Justice Renwick for hearing, and there was argument before him as to whether the writ was properly issued, whether the name of the assignee whould have been added or substituted or what otherwise was the proper way in which the writ should have been issued. Counsel for the plaintiff referred the judge to art. 418 of the Code of Civil Procedure which is as follows:-

> "If the judgment does not order a thing that is purely personal to the judgment creditor, it may be executed in his name even after his death; if any contestation arises upon the execution, his representatives must intervene.
>
> The writ of execution is issued upon a praecipe signed by the solicitor of the representatives, whose names and description must be set forth therein."

He intimated, through his counsel, that he would be satisfied with any order that the Court might make to meet the justice of the case. The appellant drew attention to art. 317 of the Code of Civil Procedure, which deals with continuance of suits, and he contended that if the assignee wanted to execute judgment then he should

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have come in under art. 317 para. 4, and applied to continue the suit.

It may be that there was some misunderstanding as to what issue the parties wanted the judge to decide. Certainly, the appellant has told the Court today that he did not intend that the merits of the opposition should be determined on the hearing of his application; that he never consented to the judge making any order which would determine the merits.

Learned counsel for the respondent was not present at the hearing of the application and was unable to assist the Court in this matter. The judge's notes do not record any agreement between the respondent and the appellant that hearing of the application should be treated as hearing of the opposition on its merits. The learned judge held that art. 317 para. 4 of the Code of Civil Procedure was applicable, and made an order that the name of the plaintiff be changed to that of Floissac Holdings Ltd. I presume that this means the name of the plaintiff as shown on the writ; because in his reasons for judgment, (which the Registrar has informed the Court were written after the appeal was filed, but which the judge erroneously dated as of the day on which he delivered his judgment), he says:- "Consequently, the justice of the case demands that the writ of execution should be issued in the name of the assignee and that the property be re-advertised, and I so order."

The ground of this appeal is that the learned judge had no authority to make such an order without the consent of the appellant: the appellant did not give his consent to such an order being made and the judge had either to allow or refuse him leave to file his opposition.

Speaking for myself, I would simply say, that having regard to the affidavits that were filed, I cannot see how the appellant would be prejudiced by the continuance of the writ as it was issued. I venture no firm opinion as to whether art. 317, para. 4 applies after judgment or to the execution of a judgment which has been assigned. On the face of it, having regard to its ppsition in the section of chapter 6 of the Code of Civil Procedure in which it occurs, it would seem doubtful that it does. But this

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would require careful research in the light of the French Canadian authorities - not the law of England which is quite different.

But there is no doubt that the learned judge exceeded the power which he had because he adjudicated beyond the terms and the prayer of the application which was before him. art. 23 of the Code of Civil Procedure says:-

> "The Court cannot adjudicate beyond the conclusions of a suit, but may grant them only in part."

He went outside the terms of the petition which he had to determine and gave an order which he had no authority to give, unless the parties expressly agreed. So in my view, this appeal must be allowed and this Court is entitled to do what the judge ought to have done. I would substitute an order that leave be granted to the appellant to file the opposition; the order of the court below shall be set aside. We have already made an order about the costs of the preliminary objection and of the application for leave to appeal out of time, but the costs of this appeal proper should be paid by the respondent. The appellant should also have the costs of the court below.

Allen Lewis
CHIEF JUSTICE

LEWIS, J.A.

I agree with the judgment which has been delivered by the learned President and the order for costs which he has proposed.

P. Cecil Lewis
JUSTICE OF APPEAL

LOUISY, J.A. (Ag.)

I agree with the judgment which was delivered by the learned President and the order proposed.

Allan Louisy
JUSTICE OF APPEAL (Ag.)