

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-01435

Between

SIMON TIDD

Claimant

And

ISRAEL B. KHAN

Defendant

CV2008-02249

Between

THERESA ROSS

HUGO MONTROSE

ISRAEL B. KHAN

Claimants

And

SIMON TIDD

Defendant

Before the Honourable Mr. Justice A. des Vignes

APPEARANCES:

Mr. Joseph Toney for Mr. Simon Tidd,

Mr. Gregory Armorer for Mr Israel Khan & Others

RULINGS

Applications

- (1) Notice of Application filed 31st October 2011 on behalf of Simon Tidd to strike out Witness Summary of Gilbert Irvin Moreno.
- (1A) Affidavit filed 31st October 2011 on behalf of Israel Khan for permission to serve a Witness Summary in favour of Gilbert Moreno.
- (2) Notice of Application filed on 31st October 2011 on behalf of Simon Tidd to strike out paragraphs of Witness Statement of Israel Khan filed on 26th August 2011.
- (3) Notice of Application filed on 31st October 2011 on behalf of Simon Tidd to strike out Witness Summary of Kelvin Lewis filed on 26th August 2011.
- (4) Notice of Application filed on 31st October 2011 to strike out parts of Witness Statement of Kelvin Lewis.
- (5) Notice filed on 31st October 2011 on behalf of Israel Khan to admit hearsay evidence of Kelvin Lewis contained in Witness Statement dated 28th October 2007 (filed on 25th January 2008) and Witness Summary dated 26th August 2011.

Submissions filed

- (1) Submissions on behalf of Israel Khan filed 22nd March
- (2) Submission on behalf of Simon Tidd filed 3rd May 2012.

I. Application to strike out Witness Summary of Gilbert Moreno

IA. Application for permission to serve a Witness Summary in name of Gilbert Moreno

It is not in dispute that a Witness Summary of Gilbert Moreno was filed on 26th August 2011. Attorneys for Mr. Tidd have applied to strike it out on the grounds that (a) permission was not sought to serve a Witness Summary and (b) the Witness Summary does not comply with Part 26.6(7) and 29.5 (c) and (g) (not signed by Gilbert Moreno and no statement of belief that facts in it are true) and 29.5.(f))

By affidavit filed on 31st October 2011 Attorney for Khan has applied for permission to serve the Witness Summary of Gilbert Moreno.

On 14th March 2011 this Court made an Order that Witness Statements be filed and exchanged on or before 15th July 2011 with an express sanction that “in default no evidence to be led from any witness who has failed to file a Witness Statement.”

Attorney for Mr. Khan failed to file and serve a Witness Statement in name of Gilbert Moreno. Instead, he filed a Witness Summary in his name on the 26th August, 2011.

Part 29.6. (b) provides that “unless the Court orders, otherwise, a Witness Summary must be served within the period in which a Witness Statement would have had to be served.”

Accordingly, a Witness Summary should have been served by 15th July 2011 or such extended deadline as the Court may grant. However, Rule 29.6 (1) requires a party who is not able to obtain a Witness Statement to seek the Court’s permission “ to serve a Witness Summary instead”.

On the 12th July 2011 the Attorneys’ for both sides applied partly for an extension of time to the 19th August 2011 to file and exchange their Witness Statements. This application was granted on the 19th July 2011.

On the 17th August 2011 the parties applied jointly to extend the time to the 26th August 2011 to file and exchange their Witness Statements. This application was granted on the 26th September 2011.

In neither of these applications did the Attorneys for Mr. Khan apply for permission to serve a Witness Summary of Gilbert Moreno instead of a Witness Statement.

Accordingly, as at 26th August 2011 when the parties filed Witness Statements there was no application made for permission to serve a Witness Summary of Gilbert Moreno instead of a Witness Statement.

When the extension was granted on the 26th September 2011, the Order formally granted the parties until the 26th August 2011 to file and exchange Witness Statements.

No permission was sought or granted to Mr. Khan to serve a Witness Summary on behalf of Gilbert Moreno by the 26th August 2011.

Therefore, once the deadline of 26th August 2011 passed, the sanction imposed by my Order dated 14th March 2011 applied and neither party was entitled to lead any evidence from any Witness who had failed to file a Witness Statement.

In order to obtain permission to serve the Witness Summary of Gilbert Moreno filed on 26th August 2011 and to lead his evidence at the trial, Mr. Khan's Attorney was required to make an application for relief from sanctions and comply with Rule 26.7.

On 31st October 2011 Attorney for Mr. Khan applied by affidavit to serve a Witness Summary of Mr. Moreno. At para. 5 of that affidavit; Mr. Armorer set out that Mr. Moreno was unable to visit his office to sign a Witness Statement since he had cataracts.

In my opinion, there are two major hurdles that Attorney for Khan has to surmount in order to obtain relief from sanctions:

(1) Has he made this application promptly?

(2) Has he given a good explanation for the breach?

Having regard to the fact that the original deadline for filing Witness Statements was the 15th July 2011, which was extended on 2 occasions without any mention being made of any difficulties being experienced in getting Mr. Moreno to sign a witness statement, I consider that this application filed on 31st October 2011 was not made promptly.

Further, bearing in mind that the Attorneys were granted from 13th March 2011 to the 26th August 2011 to file and serve Witness Statements, I am not satisfied on the evidence set out in the affidavit of Mr. Armorer that there is a good explanation for the breach nor am I satisfied with the explanation of why it was not possible to obtain a witness Statement from Mr. Moreno.

The affidavit refers to Mr. Moreno "having cataracts" but fails to state when this was discovered or to produce any medical report to support this Statement. Further, it states that Mr. Moreno was unable to attend to sign the Witness Statement without explaining what efforts were made between March and August 2011 to arrange either for Mr. Moreno to be brought to Mr. Armorer's office to sign a Witness Statement or to send a Witness Statement to him at his home to be signed or for Mr. Armorer to attend on Mr. Moreno at his home to have the Witness

Statement signed. It should be noted that in the submissions filed in support of this application Mr. Armorer submitted that Mr. Moreno “was unwilling to visit the office of the Attorney at law for Khan and others”. However, Mr. Armorer in his affidavit stated that Mr. Moreno was “unable to visit my office to sign a Witness Statement and as such I was not able to get a Witness Statement from him”

Accordingly, the application for permission to serve a Witness Summary of Mr. Moreno, instead of a Witness Statement, is refused and the application is dismissed with costs. Therefore, Mr. Khan will not be permitted at the trial to call Mr. Moreno as a witness to give evidence as contained in the Witness Summary filed on the 26th August 2011.

II. Notice of Application filed on 31st October 2011 on behalf of Simon Tidd to strike out paragraphs of Witness Statements of Israel Khan filed on 26th August 2011

Paras. 4, 8, 13, 14, 15, 17, 22 – Allowed.

Para 7 & 9 allowed.

Para 10

The witness cannot give evidence as to “mistakes” of Godfrey Montrose and Kelvin Lewis since he cannot give evidence as to their state of mind when they signed the Memorandum of Transfer. Such evidence is either based on what he was told by Montrose and Lewis (in which case it is hearsay) or he is expressing a speculative opinion (in which case it is not based on fact and has no probative value)

Accordingly, para 10 is struck out.

Para 11

For same reasons as above, para 11 is struck out.

Para 12

This witness is expressing a speculative opinion about what Mr. Lewis would have done.

Accordingly, para. 12 is struck out.

Para 19

The Witness does not purport to give this evidence from his personal knowledge. Since the erection of the sign post, its removal and the clearing of the road are not matters within his personal knowledge; the evidence is inadmissible.

Para 19 is struck out.

Para 21

Again, this witness cannot give evidence as to state of mind of Godfrey Montrose and Kelvin Lewis when the land was transferred.

Accordingly, para 21 is struck out.

Para 23.

The placement of boundary markers is the function of a surveyor. Mr. Khan is not saying that he personally observed Mr. Tidd placing boundary markers. He is also not saying that he saw a surveyor place the western boundary markers. Therefore, Mr. Khan is not giving evidence of matters within his personal knowledge. This evidence cannot properly be given by Mr. Khan.

Therefore para. 23 is struck out.

Paras 26 –

Negotiations for the settlement of a matter are without prejudice and privileged. Therefore, the parties ought not to bring to the attention of Court the details of their negotiation. Accordingly, from the words - "*I then offered \$3000 for the disputed land....*" to end of the paragraph are hereby struck out.

III. Notice of Application filed on 31st October 2011 on behalf of Simon Tidd to strike out Witness Summary of Kelvin Lewis filed on 26th August 2011.

Kelvin Lewis died on 3rd September 2011. Therefore, Attorney for Mr. Khan is not relying on this witness summary.

Witness Summary of Kelvin Lewis filed on 26th August 2011 is hereby struck out.

IV. The Notice of Application filed 31st October 2011 to strike out paragraphs of Witness Statement of Kelvin Lewis filed on 25th January 2008.

Para 16

First sentence refers to what Simon Tidd allegedly said to Mr. Lewis – Allowed.

Para 18

First part of first sentence is hearsay and should be struck out – Conversation between Clunis and Lewis about what someone told Clunis about Tidd surveying the land. Second part is incomprehensible on its own.

2nd and 3rd sentences – Lewis purporting to describe Clunis’ state of mind but such evidence is inadmissible.

Therefore entire sentence is struck out.

In exercise of Court’s discretion under Pt 29 R 5(2) to strike out inadmissible evidence, both sentences are struck out.

Para. 19

Based on concession of Khan’s Attorney from the words “*he told me*” in line 2 to word “completed” in line 5 are hereby struck out.

Para. 20 – last sentence.

This witness cannot give admissible evidence as to the state of mind of Glen – Struck out pursuant to Pt. 29 (2).

V Hearsay Notice filed on 31st October 2011 by Attorneys for Mr. Khan.

This will be dealt with at the trial.

Dated the 21st day of January 2014

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Judge