

TRINIDAD AND TOBAGO

In the High Court of Justice

CV2013-00695

Between

MADO GAJADAR

Claimant

And

SHAM GAJADHAR

Defendant

Before the Hon. Mr. Justice A.des Vignes

Appearances:

Mr. Donald Seecharan for Claimant

Mr. Shiv Sharma holds for Mr. Larry Lalla instructed by Ms Vashti Narinesingh for Defendant

REASONS

1. On the 15th July 2013, I dismissed the Defendant's application for security for costs filed on the 7th June 2013, with costs to be paid by the Defendant to the Claimant in the sum of \$10,000.00. I set out hereunder the reasons for my decision.

The Proceedings

2. This action was commenced on the 20th February 2013. The essence of the Claimant's case is that he is the owner of a parcel of land situate at No. 1 King Street, Aranguez and that he is entitled to possession thereof. According to the Claimant, he gave permission to the Defendant, his brother, to be in possession of this parcel of land by a licence in writing dated 3rd January 1986 and that he formally terminated this licence on the 16th August 2011. He is anxious to return to Trinidad to live on this parcel of land but the Defendant has been running a business on the parcel of land and has refused to move.
3. The Defendant served a Defence and Counterclaim on the 23rd April 2013 in which he disputes that he is in possession under a licence granted on the 3rd January 1986. He contends that he did execute the licence relied upon by the Claimant and that the signature thereon is a forgery. He claims to be in possession based on an assurance given to him by the Claimant in or about 1982. According to him, he sought permission from the Claimant in 1982 to construct a bar on the parcel of land and the Claimant told him he could do what he wanted with the land since the Claimant did not intend to return to Trinidad to live. The Defendant says he understood this to mean that the Claimant was giving him ownership of the land and, in reliance of this assurance of ownership, he proceeded to spend substantial monies and carry out works and improvements to the land over the period 1982 to 2012. He seeks a declaration that he is the equitable owner of the parcel of land and all the buildings thereon and an order restraining the Claimant from interfering with his quiet enjoyment of the land and buildings.
4. The Claimant served a Defence to Counterclaim on the 23rd May 2013 and the first Case Management Conference was scheduled for the 10th June 2013.

The Application

5. On the 7th June 2013 the Defendant applied for an Order that the Claimant give security for costs on the grounds that the Claimant is ordinarily resident out of the jurisdiction. This application was supported by an affidavit of the Defendant's instructing Attorney, Vashti Narinesingh.
6. On the 10th June 2013, at the first Case Management Conference, I granted permission to the Claimant to file and serve an affidavit in opposition on or before the 17th June 2013

and gave directions for the Defendant to file and serve submissions in support of his application on or before the 24th June 2013 and for the Claimant to file and serve submissions in reply on or before the 1st July 2013. The matter was then adjourned to the 15th July 2013.

7. The Claimant filed his affidavit in opposition on the 17th June 2013 and both parties filed their submissions in compliance with my directions, which I have read. Further, on the 15th July 2012 the Defendant sought and obtained permission to amend the Notice of application to include the additional ground that “*having regard to all the circumstances of the case, it is just to make such order*” and to rely on submissions filed on the 11th July 2013 in reply to the Claimant’s submissions.

The applicable rule as to costs

8. In the affidavit filed in support of the application, it has been proposed that the Claimant be ordered to provide security for costs in the sum of \$227,875.00 based on an estimate of costs prepared by the Defendant’s instructing Attorney.
9. In his Statement of Case, the Claimant has sought declaratory orders as well as damages caused as a result of the Defendant’s breaches of the licence. However, he has not pleaded any special damages or any facts on which at this stage the Court may be assisted in determining the amount of damages that he is seeking.
10. The Claimant has pleaded that he terminated licence on the 16th August, 2011 and that he is being deprived of possession of his land to which he wishes to return to live. However, he has not particularized the loss that he has suffered as a consequence of being kept out of possession by the Defendant.
11. In his Counterclaim, the Defendant is not claiming any damages from the Claimant.
12. To date, neither party has made an application to determine the value of the claims made herein or for budgeted costs pursuant to Rule 67.6 and Rule 67.8 respectively. Further, the affidavit of the Defendant’s instructing Attorney does not contain any facts which would enable this court at this stage to stipulate the value of this claim as provided for in Rule 67.5 (2)(b)(ii). At this stage, therefore, I am of the opinion that there is no basis on which I can accept the estimate of costs suggested by the Defendant.

13. Accordingly, since the Claimant's claim is not for a monetary sum, I am of the opinion that the value of the claim should be treated as a claim for \$50,000 in accordance with Rule 67.5 (2)(c).

Security for costs

14. Part 24.3 of the Civil Proceedings Rules 1998 (as amended) provides that the Court may make order for security for costs "only if it is satisfied, having regard to all the circumstances of the case; that it is just to make such an order"

15. It is not in dispute between the parties that in the exercise of the Court's discretion under this Rule, the mere fact that the Claimant is ordinarily resident out of the jurisdiction is not a sufficient basis for an order compelling him to provide security for costs. The Court is required to have regard to all the circumstances of the case in determining whether it is satisfied that it is just to make such an order.

16. The Claimant is over seventy years old and suffers from a heart condition. His paper title to the subject parcel of land is not challenged by the Defendant and, according to the Claimant, the value thereof is \$1.2M. The Claimant wishes to return to Trinidad to live at the subject parcel of land but has not been able to do so because the Defendant has refused to leave his land. The Defendant seeks to retain possession based on the alleged assurances given by Claimant on which he relied to his detriment. He contends that he is entitled to a declaration that he is an equitable owner of land and buildings.

17. The Claimant's Attorneys have alleged in their submissions that the Claimant has expressed a willingness to go to mediation but the Defendant has refused. This suggestion was contained in a letter from the Claimant's Attorneys to the Defendant's Attorney dated 25th October 2012 but up to the filing of these proceedings on the 20th February 2013, mediation had not been pursued by either side.

18. It is evident that there are disputes of fact between the parties concerning an alleged gift of ownership of the subject parcel of land in 1982 (as contended by the Defendant) and the alleged execution by the Defendant of a licence in 1986 (as contended by the Claimant).

19. Based on the pleadings, it is correct to say that if the Claimant does not succeed on his Claim and Defendant succeeds on his Counterclaim, the Court will dismiss Claimant's

Claim for the declarations sought and grant the declaration and injunction sought by the Defendant. If such orders are made at the conclusion of a trial, the practical effect would be that the Claimant's title to the land and his entitlement to recover possession may be encumbered by the Defendant's equitable interest in the parcel of land and therefore the sole asset of the Claimant within the jurisdiction may not be available to him to satisfy any order for costs made in the Defendant's favour.

20. However, the Court must weigh up in the balance the risk of injustice to the Claimant if he is prevented from pursuing his claim until he provides security for costs against the risk of injustice to the Defendant if he succeeds in establishing his claim to equitable ownership of the Claimant's land and cannot recover prescribed costs of \$14,000, computed in accordance with Appendix B to Part 67 on a claim for \$50,000.
21. The language of the relevant rules gives the Court a discretion to make an order for security for costs "only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order."
22. Accordingly, bearing in mind that:
 - (i) it is inappropriate at this stage for the Court to embark on a detailed examination or assessment of the likelihood success of the Claimant's or the Defendant's claims¹;
 - (ii) the overriding objective of the Rules is to enable the Court to deal with cases justly and this includes the factors set out in Rule 1.1 (2)(a),(b) and (c);

I was of the opinion that, at this stage of the litigation process, it would not be just for the Court to make an order that the Claimant provide security for costs.

23. Therefore, the Defendant's Notice of Application filed on 7th June 2013 was dismissed with costs to be paid by the Defendant to the Claimant. Having regard to the affidavit and the submissions filed on behalf of the Claimant in opposition to the application, I considered that four hours of preparation time for the Claimant's Attorneys was reasonable and applying the relevant hourly rate of \$2,500.00, I ordered the Defendant to pay to the Claimant costs in the amount of \$10,000.00.

¹ Porzelack KG v Porzelack (UK)Wst (1987) All ER1074

Dated the 17th day of July, 2013

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Judge