TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012 – 00646

BETWEEN

NAZIMA GARIB **Claimants**

AND

INSHAN ISHMAEL

RAYMOND LEO TEIXEIRA **Defendant**

Before The Hon. Madam Justice C. Gobin
Appearances:

REASONS

1. This action concerned possession and ownership of a parcel of land situated at No. 41 Aruac Road Valsayn in respeect of which the claimant claimed she had been in exclusive possession since 1976. The claimant's case was dismissed for the following reasons.

2. The claimant filed this action against the defendants in which the central issue was whether the right to possession of the 2nd defendant, the paper title holder, Mr. Teixeira, had extinguished by 31/12/2011. This is the date on which he purported to lease the land to the 1st defendant, Mr. Ishmael. At the time of filing the claimant sought injunctive reliefs against the 1st defendant only, to restrain him from interfering with her occupation of the said lands and from removing her fixtures, chattels, crops trees etc. Interim relief was granted against Mr. Ishmael on 15/02/2012. At a case management conference on 24/03/2012 I noted that the 2nd defendant had not yet been served with notice of the proceedings. The claimant and the 1st defendant sought an early trial and comprehensive directions were given and a trial date fixed for 17th and 18th July, 2012.

3. Having regard to the nature of the claim and the fact that Mr. Ishmael was a lessee under a lease which had been executed about a month before the injunction was granted, it is hard to imagine that the existence of the court proceedings would not have been brought to the Landlord's attention informally, even before service of the proceedings was effected.

4. On 14/05/2012 I made an order for substituted service of the claim form and statement of case on the 2nd defendant by way of personal service on his nephew Anthony Teixeira or alternatively by pre-paid registered post to the 2nd defendant in care of the said Anthony Teixeira at No. 223A Belmont

Circular Road, Port of Spain. This was the address given on the lease. I was satisfied that the notice of the proceedings would have reached the 2nd defendant. Indeed it was the said Anthony Teixeira who had identified himself as his uncle's agent for the lands in the response of Mr Ishmael's attorney to a pre-action letter.

5. Mr. Teixeira entered an appearance on 12/07/2012 well over five (5) weeks out of time. Thereafter he failed and or neglected to file a defence at all or to make an application for an extension of time to do so.

6. On the date fixed for the trial between the claimant and the 1st defendant, the claimant and the 1st defendant, their counsel and all their witnesses were present and ready to proceed with the trial. Counsel Mr. Hannays appeared at some stage shortly before the matter commenced and announced his appearance for the 2nd defendant. Mr. Hannays indicated that he had been alerted to the fact that there was a hearing that day, via a telephone call on the afternoon before, from one of his colleagues in the matter. Since he had filed no defence, no case management conference would have been fixed for a hearing in the claimant's case against the 2nd defendant.

7. After some discussion in which Counsel focussed on the issue of service and the appropriateness of the order for substituted service of the proceedings on Mr. Teixeira that I had made, and once it was confirmed that the 2nd

defendant had been properly served, I indicated that since the 2nd defendant had filed nothing, meaning a defence or any response to the claimant's claim I was minded to enter judgement in default against him so I could proceed with the matter which was listed for trial.

8. Mr. Hannays offered no good reason why I should not do so. He did not request me to allow him an opportunity to make an application for an extension of time. He did not seek an adjournment of the trial between the other two parties, to avoid prejudice to all sides; he did not attempt then and there to make an oral application for the extension of time to put in a defence. He did not attempt to indicate what if anything was his client's defence. Somewhat surprisingly, he simply sought leave to withdraw from the matter. This left me the impression that there really was no interest on Mr. Teixeira's part in defending the claim. This was against the background of the expectation that the 2nd defendant would have been told of the proceedings and the injunction several months before, and further that the marshall's assistant had, in an attempt to serve Mr. Teixeira, had actually met with his nephew Anthony, the agent who had been looking after the lands.

9. Had counsel simply made a request and offered a good reason for his failure to comply with the time frame, I would have considered the application, even an oral one. His neglect to do so left me with little option but to enter the order under my general case management powers, to save time and costs. It

made no sense to expend judicial time and have the parties who were before me for trial, incur further costs to adjourn the trial in the absence of any indication by the paper title holder of his intention to put in a defence. There was evidence to support the claimant's case on her injunction application affidavit as well as on her witness statements to support the grant of judgement against Mr. Teixeira, if indeed such was required. I don't believe in the circumstances of his failure to file a defence that it was.

10. Before he withdrew from the proceedings Mr. Hannays was told and I believe he subsequently confirmed in his affidavit filed on 22/08/2012 that he understood, that what was being entered against his client was a judgement in default of defence. In those circumstances it ought to have been clear that the procedure to be followed if he wished to set aside that order was that set out in part 13 of the CPR. When on the hearing of the application which was wrongly filed under part 40 of the CPR, counsel claimed he had to await receipt of the court order to determine which rule he needed to invoke, I had to reject that excuse. No trial directions had ever been given on a matter between the claimant and Mr. Hannay's client. Counsel could not have thought that his matter had been determined at a trial.

11. The 2nd defendant failed to file the proper application and there was no basis on which I could properly have granted the relief claimed in his application dated 22/08/2010 – which was in any case filed almost five (5) weeks after I

had made the order in counsel's presence at the trial of the action between the claimant and the 1st defendant.

12. This history notwithstanding, on the morning of 12/10/2012 when I was to deliver my ruling on the application to set aside, I indicated that if counsel were able to get instructions to settle the claimant's costs and any short fall in compensation which might have been accepted by the claimant by reason of the compromise entered at the hearing on 17/07/2012, between the claimant and the 1st defendant, I would have been inclined to set aside the order I had made, all of the wasted costs and the prejudice to the claimant notwithstanding. I made it clear that I was doing so even when I did not think that on the application and evidence before me there was any justification for such. I hoped that the claimant would not object to such a course.

13. I allowed about a half hour for Mr. Teixeira's counsel to get instructions. None were forth coming as I was told no contact could be made. While I appreciated that the gentleman resided abroad, I did not in the circumstances believe he would not have been waiting for his counsel's call if he had any real interest in the matter. This was the morning on which he would have been expecting a ruling that affected his entitlement to be heard in the case on his ownership of the subject lot.

14. This seeming lack of interest was confirmed by the fact that even the affidavit that was eventually filed in support of the application to set aside was made by counsel and not his client, rendering the contents and explanations for the breach second hand and less convincing. The fact that no contact could be made by telephone even on the morning of the decision, persuaded me that this litigant was not seriously interested in this litigation. When the claimant's counsel insisted that he was resisting the 2nd defendant application and was not prepared on the application was without merit, to consent to any order to set aside the proceedings, I had no choice but to dismiss the application with costs.

Carol Gobin
Judge.