

**THE REPUBLIC OF TRINIDAD AND TOBAGO:**

**IN THE HIGH COURT OF JUSTICE**

**No. CV 2019-01235**

**BETWEEN**

**KATHLEEN KALLICHARAN**

**Claimant**

**AND**

**TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION**

**SEHON OTTLEY**

**Defendants**

**Date of Delivery December 9,2019**

**Before the Honourable Madam Justice Margaret Y Mohammed**

**Appearances**

**Ms Earla Nyack Attorney at law for the Claimant**

**Ms Karen Gonzales Attorney at law for the First Defendant**

**Mr Earle John Attorney at law for the Second Defendant**

**RULING**

1. In the substantive action the Claimant seeks the following orders:

- (a) A declaration that the Claimant is the sole tenant of the First Defendant in respect of Lot 412 Mantis Lane, La Horquetta Housing Project, Arima, Trinidad (“the property”);
- (b) An order mandating the First defendant to repay the Claimant such sum of money as is found to represent overpayment on account 18000315007 (“the Account”)
- (c) An order mandating the First Defendant to prepare a Deed of Sub-Lease for the property in favour of the Claimant.

(d) Cost.

(e) Interest and such further or other relief.

2. At the hearing of the first case management conference in this matter Both Defendants applied to strike out the Claimant's respective claim against them for different reasons. At the hearing of the applications, the First Defendant indicated that it would be willing to give an undertaking to abide by any order which the Court makes with respect to the issues between the Claimant and the Second Defendant and which impacts on the First Defendant.
3. This ruling concerns the Second Defendant's application which was filed on the 3 May 2019. It was not in dispute that the Claimant and the Second Defendant were married and 29 October 1984 the Second Defendant and the Claimant ("the parties") were advised that their application to purchase a mortgage house had been successful. The parties were allowed to purchase the property at the price of \$118,263.22 with a 30 years state land lease. The parties were required to pay a deposit in the sum of \$5,913.16 and monthly payment were to be made in the sum of \$864.66. The other terms and conditions of the offer were reduced to a written Agreement which was executed by the parties and dated 22 February, 1985 the Account was created by the First Defendant to facilitate the monthly payment of the rental amount.
4. By letter dated 2 July 1985, the Claimant informed the First Defendant's predecessor that payment was not being made as a consequence of the loss of employment of the Second Defendant. The First Defendant sent a formal notice by letter dated April 30, 2009 which indicated that the account for the property was in arrears and it was scheduled for recovery.
5. The Claimant entered into an agreement on 31 July 2009 with the First Defendant to liquidate the arrears on the Account for the property. The Claimant also paid to the First Defendant the sum of \$10,000.00.

6. By request dated 31 July, 2009 the First Defendant requested from the Ministry of Agriculture Land and Marine Resources that arrangements be made for the sum of \$1,468.83 to be deducted on a monthly basis from the Claimant's salary.
7. The Claimant through her Attorney-at-Law wrote to the First Defendant by letter dated 3 June 2015 requesting that the Second Defendant's name be removed from the Account. By letter dated 11 September 2015 the First Defendant, through its then Attorney-at-law, Ms Rachel L. Jaggernaut responded.
8. The Account in the name of the parties showed a full repayment of the mortgage loan as at 4 May 2016. The Account has been overpaid in the sum of \$21,890.78 and it is to be refunded. This sum can only be paid out to the Account holders who are the parties. However the First Defendant's position is that it has no authority to make any payments to the Claimant in circumstances where all monies allegedly paid by her was into an account in which the Second Defendant's name also appears. By letter dated 27 June, 2017 the First Defendant instructed the Claimant's Employer to cease the salary deduction from the Claimant's salary.
9. The issue in dispute between the Claimant and the Second Defendant is the extent of financial and non-financial contribution each made to the property.
10. It is important to note at this juncture that the sole reason the First Defendant advanced in its affidavit that it cannot refund the money to the Claimant nor transfer the property to her is because the account is on both the names of the Claimant and the Second Defendant
11. The Second Defendant contended that the instant action against him is an abuse of process since in the divorce proceedings, ie M365 of 1997 ("the property settlement") between the Claimant and the Second Defendant, the Claimant sought an order pursuant to section 56 of the Matrimonial Proceedings and Property Act Chapter 45:51 to vest the tenancy of the property in her sole name. He stated that the parties had reached the trial of the property settlement. However due to the failure by the Claimant to comply with the Order to file the Trial Bundle on the first day of the

scheduled trial, the matter was withdrawn by the Claimant and the Court ordered the Claimant to pay the Second Defendant's costs. He stated that to date none of the said costs has been paid. Counsel also submitted that in the instant case the Claimant has failed to advance any explanation for: her failure to file the Trial Bundle in the property settlement ; her failure to pay the costs of the property settlement; to account for the property settlement being withdrawn and to justify the same issue to be re-litigated in the instant action. As such the Second Defendant is being prejudiced by having to incur legal costs again to determine the same issue which ought to have been determined in the property settlement.

12. The Claimant's position is that that the Court did not make any determination of any issue in the property settlement; the court could not have had a trial without HDC's involvement in the affidavit of means; the issue between the Claimant and Second Defendant was not resolved in the property settlement; and it is not a waste of the courts resources. Although the courts resources were utilized in the property settlement, the court could not have a trial without the HDC involvement.
13. Counsel for the Second Defendant referred the Court to the decision of Rampersad J in **CV 2009-04689 Wendell Steele v Lennox Petroleum Services Limited** and the Court of Appeal decision of **the Attorney General of Trinidad and Tobago v Trevor Mahabir, Civil Appeal No 238 of 2013** .
14. In **Trevor Mahabir** the Court of Appeal considered a fact scenario very similar to the instant case. In that case, the Appellant filed an Application to strike out the Respondent's Claim Form and Statement of Case as an abuse of process, which was refused by the High Court Judge. The second claim commenced by the Respondent in respect of an incident which occurred on 26 August 2010. The Respondent and two others had commenced earlier proceedings seeking the same relief as in the present claim.

15. In the earlier proceedings the Court gave directions for the filing and exchange of Witness Statements which was not done by the Respondent even after the Appellant consented to an extension of time and variation of the Court's timetable. The Respondent then went on to file a Notice of Application for an extension of time and relief from sanctions in respect of the failure to file and exchange Witness Statements. The Application was listed for hearing on the same day as the Trial. On that date the Respondent did not pursue the Application and instead sought leave to withdraw the claim. The Court gave leave to withdraw the earlier proceedings with no Order as to costs.

16. In paragraph 16 of the Judgment of the Court of Appeal Mendonca JA stated the issue to be resolved in the following terms:-

“The issue in this appeal is whether the Respondent having withdrawn the earlier proceedings, is entitled to pursue the present claim, which is based on the same facts and claims the same relief as the earlier proceedings, or whether in the circumstances of this case to proceed with the present claim is an abuse of the process of the Court.”

17. In paragraph 23 Mendonca JA set out the approach the Court is to take in considering if to strike out the Claim in the following terms:-

“What is required is a balancing exercise of the competing public and private interests taking into account all the circumstances of the case focusing attention on the question whether in all the circumstances the claimant is misusing or abusing the process of the Court by seeking to pursue the second claim. Of course as we have mentioned, the Court must seek to give effect to the overriding objective which is to deal with cases justly (see rule 1.1 of the CPR) and one of the factors that must be taken into account is whether in pursuing the second claim there is a disproportionate use by the Claimant of the Court's resources. This entails an appreciation of the extent to which the combined effect of the earlier proceedings and the resent claim places a

disproportionate burden on the Court's resources (see *Wahab v Khan and Ors* [2011] EWHC 908). After considering all the relevant circumstances the Court must then form a judgment as to what justice requires overall."

18. In paragraph 24 Mendonca JA continued:-

"Although the earlier proceedings were not adjudicated upon they had gone a far distance. Indeed they were withdrawn on the day they were fixed for trial. The Court had therefore invested a fair amount of its resources in getting to that point. There were at least one case management and two pre trial reviews. There were also applications for an extension of time by the Respondent in relation to his witness statements. The resources expended by the Court in managing the case to that point were therefore considerable. Most of them would need to be duplicated in the pursuit of the present claim. It seems to us that the pursuit of the second claim in those circumstances would result in a disproportionate use of the Court's resources by the Appellant. The reasons offered by the Respondent for withdrawing the earlier proceedings and then seeking to pursue the present claim provides no justification or excuse for such a misuse of the Court's resources."

19. Mendonca JA concluded at paragraph 26:-

"In the circumstances we are of the view that to permit the Respondent to pursue the present claim is an abuse of process of the Court. We therefore allow the appeal and set aside the Judge's order in the Court below. The statement of case is struck out and in furtherance of the overriding objective we also strike out the claim (see rule 26.1 (w))."

20. There is a dispute between the Claimant and the Second Defendant on the reasons the property settlement matter was withdrawn before the Court. In my opinion this dispute does not assist the Court in determining if the Claimant's action is an abuse of process. Of course if I adopt the position advocated by Mendonca JA as set out above I can easily take the view that the claim by the Claimant against the Second Defendant

is an abuse of process and not the best use of the Court's resources and that would bring this aspect of her action to an end.

21. However dismissing the claim between the Claimant and the Second Defendant in the instant matter would not bring closure to these parties on this burning issue of settling the distribution of the property between them since the issue has not been determined on its merits. In my opinion any prejudice which the Second Defendant has asserted he would suffer by having to incur more costs in this matter can be addressed with an appropriate costs order.
22. For these reasons I have decided to dismiss the Second Defendant's application of the 3 May 2019. I have also decided to stay the instant action until the Claimant pays the Second Defendant his cost in the property settlement matter to address the issue of prejudice which the Second Defendant has alleged.
23. I had suggested at the hearing that if the only issue in the instant matter is in the nature of property settlement between the Claimant and the Second Defendant I am minded to exercise my powers under Rule 26.1 (b) Civil Proceedings Rules and transfer the matter to the Family Court to have the issue determined. The Claimant and the First Defendant had indicated that they had no objection to this course of action. The Second Defendant continued his objection on the ground of abuse of process.
24. I will also order that the action between the Claimant and Second Defendant be transferred to the Family Court and for the First Defendant to be bound by the Court's finding on the ownership of the property.
25. I will hear the parties on costs of the application of the 3 May 2019.

## **ORDER**

26. The Second Defendant's application filed on the 3 May 2019 is dismissed.

27. The instant action is stayed until the Claimant pays the Second Defendant his cost in the property settlement matter namely case number M365/ 1997.
28. Pursuant to Rule 26.1 (b) Civil Proceedings Rules the instant action is transferred to the Family Court to have the property settlement between the Claimant and Second Defendant to be determined.
29. The First Defendant to be bound by the Court's finding on the ownership of the property as will be determined by the Family Court.

**Margaret Y Mohammed**  
**Judge**