THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-02188

BETWEEN

DEOLAL GANGADEEN

Claimant

AND

HAROON HOSEIN

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Jeevan Andrew Rampersad for the Claimant

Mr. Abdel Ashraph for the Defendant

Decision on Preliminary Point to Strike Out Claim

I. Background:

[1] This case concerns the location and entitlement of use to a right of way on lands occupied by the parties.

[2] The Claimant's case is that he became seised and possessed of a certain parcel of land upon the death of his grandfather. Attendant to this parcel of land was an entitlement,

by way of implication or law, to use a right of way that existed on the public road reserve.

[3] The part of the road reserve on which this right of way exists is known as the Disputed Portion and the Claimant maintained that he and his grandfather would use this right of way to access the adjoining lands of Moolchan Trace for the cultivation of sugar cane during the period of 1930 to 1960. The public road reserve, inclusive of the right of way, along with the Defendant's land abuts the Claimant's land on its eastern boundary.

[4] On the 2nd July, 2010, the Defendant erected a fence some 26 feet in length along the said road reserve, which, the Claimant claimed, extended the boundary of his land. This fence purportedly blocked off the Claimant's access to the Disputed Portion and has denied the Claimant full access to his driveway.

[5] Accordingly, the Claimant claims that the Defendant's unlawful erection of the fence over the Disputed Portion of the road reserve amounts to an unlawful interference with the Claimant's use and enjoyment of his property and constitutes a nuisance.

[6] The Defendant, Mr Hosein, alleged that previous proceedings were brought and determined by the Court in relation to the location and entitlement to this right of way. In these previous proceedings, Mr Hosein was the claimant who brought an action against Mr Gangadeen due to Mr Gangadeen's placement of waste material on the road reserve and the spraying of chemicals on Mr Hosein's crops.

[7] In this previous action, Mr Gangadeen, the then defendant, filed a defence and counterclaim in which he counterclaimed for access to the said right of way, termed as an ***'access strip'*** in the following terms:

> ***"A declaration that I am entitled to the use and occupation to the access strip by reason of the fact that it is a right of way which has been used by me for over 30 years."***

[8] The presiding Judge, Kokaram J, granted a consent order pursuant to which, two surveyors, L & S Surveying and Lawrence Clarke & Associates, prepared a survey plan (the "2013 Plan") pointing out the boundaries between the lands belonging to the

Claimant and the Defendant and further stated that the parties are restrained from trespassing upon the lands of the other party as delineated by the Surveyors.

[9] It is Mr Hosein's case that the survey report concluded that the fence that he constructed was placed within 6 inches of his boundaries. Therefore, as this matter has already been decided in Mr Hosein's favour, Mr Gangadeen is estopped from pleading and claiming these matters and further, this Claim is an abuse of process and should be struck out.

[10] At the first Case Management Conference ("CMC") held on the 5th December, 2014, this Court indicated that based on the pleadings, a preliminary point arose for determination, being whether this Claim is indeed an abuse of process. Accordingly, the parties were ordered to file submissions.

[11] On the 29th June, 2015, Counsel for the Defendant indicated that both parties felt that the matter could be settled with the intervention of a surveyor. Accordingly, the Court granted the joint application to stay the application to strike out the Claim pending the outcome of a surveyor's report.

[12] The parties consented to a joint expert surveyor and submitted agreed questions, approved by the Court, to be put to him. Accordingly, at the next CMC of the 12th October, 2015, the Court appointed Ron Gajadhar as the joint surveyor and ordered that his report be sent to the Court.

[13] Mr Gajadhar's Report with survey plan attached (the "2015 Plan") was filed with the Court on the 13th November, 2015 and stated as follows:

> ***"Question a: is the fence or wall erected by the Defendant on or obstructs the road reserve or right of way as shown on the plan...?***
>
> ***Response: <u>No</u>***
>
> ***Question b: Has the picket shown as No. 2 on the attached plan been tampered with and/or displaced southwest or should it not be straight line (East/West) with picket No. 1?***

Response: <u>No</u>. Pickets 1 & 2 were not tampered with. Pickets 1 & 2 were found by the above mentioned Surveyors in February, 2013...within the error acceptable in surveying practice."

[14] The report was clearly adverse to the Claimant, however, counsel for the Claimant, Mr Ramnanan, requested that additional questions be submitted to Mr Gajadhar at the following CMC of the 11th December, 2015.

[15] Mr Ramnanan then came off record and Mr Annand R. Misir (counsel), and Ms Dayadai Harripaul (instructing attorney), were appointed as the Claimant's new attorneys. They duly formulated and filed the additional questions to be posed to the Surveyor, which were approved by Court Order dated the 21st March, 2016.

[16] In response, by Report dated the 4th May, 2016, Mr Gajadhar answered the questions as follows:

"<u>Question 1</u>: In conducting the survey of the 9th November, 2015 which boundary marker was used as a starting point in conducting the survey?

<u>Response</u>: L1 and A1 were used as starting points and measurements to A2, L2 and A3 were consistent with the measurements given in the Hanoomansingh/Clarke 2013 plan.

Measurements were also taken to the boundary pickets (L0 and A) at the North Eastern corner and South Eastern corner of the Claimant's boundary. The distance between L0 and A (the Claimant's eastern boundary) measured 76.22 metres. Previous plan measure 76.04 metres (refer to plans 1 and 5).

The Southern boundary line (point P) of the Defendant was also verified by measurement from the Rail (X) on the South-Western corner of Radhakissoon. The distance between X and P measured 138.34 metres. Previous plan measure 128.00m + 10.06 m (road) = 138.06 metres (refer to plans 1 and 6).

<u>Question 2</u>: Does the road reserve which runs along the southern boundary of the Defendant's lands measure 10.06 metres in width all along the length of that said road up to the point at which it meets the Eastern boundary of the Claimant's lands?

<u>Response</u>: Yes.

<u>Question 3</u>: Has the Southern boundary of the Defendant's lands moved or shifted at any point along its length?

<u>Response</u>: No.

[17] The parties met again on the 10th October, 2016 and further questions were posed for the expert by the Claimant:

"<u>Question 1</u>: why was the boundary marker used as the starting point for the survey conducted on the 9th October, 2015?

<u>Response</u>: my survey was conducted on the 9th November, 2015. The questions raised on the 12th October, 2015 referred to a plan dated 19th March, 2013 prepared pursuant to the Court order of the 25th November 2009 by L & S Surveying and Lawrence Clarke and Associates. There was the need to verify the boundary markers position on the ground corresponded to the vectors on this plan. This plan shows the existing fence and the boundary markers were clearly visible on the ground at the corners of the fence.

<u>Question 2</u>: what is the distance between points A and A1 on your survey of the 9th October, 2015?

<u>Response</u>: 26.61 metres."

[18] Another Notice of Change of Attorneys was filed on behalf of the Claimant and Mr Jeevan Rampersad was appointed as the Claimant's new attorney. He represented the Claimant at the following CMC of the 13th March, 2017, where the Court ordered the parties to file submissions in relation to the preliminary point having regard to the

answers to the questions posed by the Claimant to the agreed joint expert, Mr Ron Gajadhar.

[19] The Defendant filed submissions on the 5th May, 2017 and the Claimant filed his in response on the 31st May, 2015.

II. Submissions:

[20] Mr Ashraph for the Defendant submitted that Mr Gajadhar's initial Report was conclusive on the material issue to be decided in this matter. It clearly indicated that the fence erected by his client, Mr Hosein, was neither on, nor did it obstruct the road reserve.

[21] Further, he contended that, in the previous action, a consent order was entered relating to the same parcels of land and to which a survey plan was prepared by two surveyors. Based on the plan, the surveyors had identified the boundaries to the parties' lands. Therefore, it was submitted that (i) the subsequent questions posed by the Claimant to the joint expert did nothing to change the conclusions of either Mr Gajadhar or the surveyors from the previous action and (ii) if the Claimant seeks to attack the survey, it would amount to an attempt to litigate anew issues that fell to be determined in the previous action, which is an abuse of process.

[22] Accordingly, it was Mr Ashraph's view that pursuant to **Part 26.2 (1) (b) of the CPR** along with Mr Justice Kokaram's speech in the case of **University of Trinidad and Tobago v Professor Kenneth Julian & Ors**[1], the Claim should be struck out as an abuse of process.

[23] Mr Rampersad's submissions on behalf of the Claimant were a bit more technical in nature. He submitted that Mr Hosein's fence falls within 8.21 metres of his client's right of way. Further, it was contended that this client's land comprises 76 metres of which 8.21 metres are unaccounted for and this said 8.21 metres were utilized by the Defendant's fence. In support, reliance was placed on a survey plan prepared by Licensed Land Surveyor Lenny W. Hanomansingh on the 12th October, 2009. This plan

[1] High Court Action No. **CV2013-00212**

purports to show that the unaccounted 8.21 metres area is the exact area on which Mr Hosein's fence was constructed.

[24] Mr Rampersad sought to criticize Mr Gajadhar's report by contending that it fails to state with any certainty: (i) whether Mr Hosein's fence is on the portion of the road reserve belonging to the Claimant; or (ii) whether Mr Hosein is the proprietor of the unaccounted 8.21 metres of the road reserve.

[25] The result being, in the Claimant's opinion, is that Mr Hosein's fence, which is the pinnacle of these proceedings, has not been precisely depicted in Mr Gajadhar's plans. Therefore, the Claimant submits that an independent survey report should be conducted.

III. Law & Analysis:

[26] Contrary to Mr Rampersad's submissions, on an examination of the three survey plans being (i) the survey plan done by L & S Surveying and Lawrence Clarke & Associates dated the 19th March, 2013 (the "2013 Plan"); (ii) the survey plan done by the joint expert Mr Gajadhar on the 13th November, 2015 (the "2015 Plan") and (iii) the survey plan done by Mr Hanomansingh on the 12th October, 2009 (the "2009 Plan"), it is this Court's opinion that the 2013 and 2015 Plans best depict the location of the disputed area, inclusive of the right of way, Mr Hosein's fence and the boundaries between Mr Gangadeen and Mr Hosein's portions of land.

The 2009 Plan, on which Mr Rampersad seeks to rely in his updated submissions, does not show the position of Mr Hosein's fence clearly.

[27] In both the 2013 and the 2015 survey plans, the following observations are clearly made by this Court:

a. That Mr Hosein's fence does not encroach onto the road reserve, the right of way or Mr Gangadeen's land. If one were to look at the 2013 Plan attached as "B" to the Statement of Case and "E" to the Defence, which was the Plan requisitioned by the parties in their previous action before Justice Kokaram, the highlighted area which represents the disputed portion, is independent of Mr Hosein's fence.

b. That pursuant to the 2013 and 2015 Plans, the entire road reserve, inclusive of the right of way, exists outside of both parties' lands. Moolchan trace, which emerges from the road reserve, cuts across Mr Hosein's land. Therefore, the disputed portion, which is the small area of the road reserve that is located between Mr Gangadeen's driveway and Mr Hosein's fence, is occupied by neither party.

c. That Mr Gangadeen's driveway, which begins on his land, leads onto the road reserve which, as stated above, is outside of his and Mr Hosein's land and fence. Accordingly, Mr Hosein's fence in no way blocks Mr Gangadeen's driveway and/or access to his driveway.

[28] These findings by this Court coincide with Mr Gajadhar's findings in his report, where he clearly answered that Mr Hosein's fence does not obstruct nor is it situated on the road reserve or the right of way.

[29] Having found that both the 2013 and the 2015 survey plans sufficiently indicate that Mr Hosein's fence is safely within his portion of land, there are therefore sufficient grounds to strike out the Statement of Case pursuant to **CPR Part 26.2 (c)** on the basis that it discloses no grounds for bringing the claim.

[30] As to the abuse of process argument under **CPR Part 26.2 (b),** the Claimant, through his former attorney at law, Mr Ramnanan, sought to argue that this matter does not fall under the rubric of cause of action and/or issue estoppel or res judicata as per the rule in **Henderson v Henderson**, because the consent order granted by Justice Kokaram in the previous proceedings addressed the cause of action of trespass, whereas this claim is for a different cause of action, being nuisance.

[31] In the House of Lords decision of **Arnold v National Westminster Bank PLC**[2], **Lord Keith of Kinkel** discussed the distinction between **cause of action estoppel** and **issue estoppel** thus:

> *"It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel.* ***Cause of action estoppel arises***

[2] 1991 2 A.C. 93 at page 104.

where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter*. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened."*

"...Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

[32] In **Thoday v Thoday**[3] **Diplock J** described the principle of **issue estoppel** as follows:

"The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. ***If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."***

[3] **Thoday v Thoday (1964) P. 181**.

[33] Based on the learning, the fact that the cause of action in the previous action, being trespass, is different from the cause of action in the current proceedings, being nuisance, is immaterial to the principle of issue estoppel. What is crucial is whether the issues that were material to the previous cause of action are the same in the instant case. If those same issues were already decided in the previous action, then Mr Gangadeen would be estopped from litigating them anew in these proceedings.

[34] In both matters, the Court is of the view that the material issue to be decided before determining the claim for nuisance or trespass was the location and entitlement to the right of way along with the boundaries of the parties' lands inclusive of Mr Hosein's fence.

[35] At paragraph 3 of the statement of case in the previous proceedings, Mr Hosein, the then claimant, had claimed that Mr Gangadeen had trespassed on the access strip. At paragraph 3.1 of the defence, Mr Gangadeen, the then defendant, averred that he and his grandfather used this same access strip ever since he has lived on the said lands. This was the exact averment used in Mr Gangadeen's Statement of Case in the instant proceedings at paragraph 13 and therefore shows that the access strip described in the previous proceedings is the same right of way claimed for in the instant matter.

Further, in his counterclaim, Mr Gangadeen claimed for a declaration that he is entitled to the use and occupation of the access strip *"...**by reason of the fact that it is a right of way which has been used**..."* by him for over 30 years. A Reply was then filed by Mr Hosein in which he denied that Mr Gangadeen ever used the access strip[4]. Pursuant to this material issue in dispute, Justice Kokaram granted a consent order whereby the parties agreed to have a survey done to demarcate the boundaries between their lands and upon doing so, that each party would restrain from trespassing on the other's land.

It is therefore clear that, although the cause of action was different, a material ingredient of the previous proceedings was the location and entitlement to the same access strip which is being claimed in the current proceedings.

[4] At para 9 of the Reply.

[36] By virtue of the 2013 Plan requisitioned by the parties in their consent order, it was revealed that the access strip/right of way situated on the road reserve was on neither party's land. Further, as depicted by the 2013 Plan, Mr Hosein's fence, which was already built, did not encroach upon the road reserve or the access strip and therefore, was not obstructing upon Mr Gangadeen's land or his access to his drive way or right of way. The 2015 Plan, which is identical, merely confirms the same fact.

[37] Accordingly, all of the claims in Mr Gangadeen's Statement of Case that refer to his use, entitlement, access to or location of the right of way are duplicitous and have already been decided. Further, any claim relating to Mr Hosein's fence being an obstruction to the right of way and/or driveway is also duplicitous considering that the purpose of the 2013 Plan, as stated in the consent order, was to... *"...point out the boundaries of the lands described in paragraph..."* Having had those boundaries demarcated, the issue of any encroachment by Mr Hosein's fence was also already decided.

III. Disposition:

[38] Having considered the Parties' submissions and updated submissions along with the three aforementioned survey plans, the findings of this Court are that the statement of case is an abuse of process and discloses no grounds for bringing the claim and ought to be struck out pursuant to CPR Part 26.2 (1) (b) & (c).

[39] In relation to costs of the proceedings, the Claimant will have to pay to the Defendant his costs incidental to the preliminary point to strike out the Claim and Statement of Case which shall be assessed costs in accordance with CPR Part 67.11, in default of agreement. If there is no agreement on this aspect of costs, then the Defendant shall file a Statement of Costs for assessment.

[40] Since the decision on the preliminary point resulted in the determination of the Claim, the Claimant shall also have to pay to the Defendant his costs of the Claim up to the stage at which the Claim was determined in accordance with CPR Part 67 Appendices B and C of the scale of prescribed costs. The Claim, not being one

for a monetary sum, and neither party having applied under CPR Part 67.6 (1) (a) to determine the value to be placed on the Claim, is deemed to be one for $50,000.00 the full prescribed costs of which is $14,000.00. However, the Claim was determined at a stage which is after the defence and up to and including the case management conference which, according to Appendix C aforesaid, amounts to 55% of the full prescribed costs quantified in the sum of $7,700.00 (i.e. 55% of $14,000.00).

[41] Accordingly, the order of the Court is as follows:

ORDER:

1. **The Claim and Statement of Case both filed on the 18th June 2014 be and are hereby struck out pursuant to CPR Part 26.2 (1) (b) and (c).**
2. **The Claimant shall pay to the Defendant costs occasioned by the preliminary point to strike out to be assessed in accordance with CPR Part 67.11, in default of agreement.**
3. **In default of agreement, the Defendant to file and serve a Statement of Costs for assessment within 2 months of this order. The Claimant to file and serve Objections, if any, within 14 days thereafter.**
4. **The Claimant shall also pay to the Defendant 55% of prescribed costs of the Claim, the Claim having been determined at the stage which is after the defence and up to and including the case management conference, quantified in the sum of $7,700.00.**

Dated this 10th day of July, 2017

Robin N. Mohammed
Judge

Post Script: Upon delivery of the above judgment, the parties have agreed to the following order in relation to costs:

a. **That the order for costs to be assessed in accordance with CPR Part 67.11 referred to clause 2 of the order made herein be quantified in the agreed sum of $10,000.00.**

b. **That there be a stay of execution of the order for costs until the 15th September, 2017 in relation to the assessed costs agreed in the sum of $10,000.00 as well as the prescribed costs quantified in the sum of $7,700.00 referred to in clause 4 of the order made hereinabove.**

And it is so ordered by consent.

Dated this 10th day of July, 2017

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Robin N Mohammed
Judge