REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-04355

BETWEEN

BERNARD HOSAM otherwise BERNARD FABIAN HOSAM
RICHARD HOSAM otherwise RICHARD MATTHEW HOSAM
(In their capacity as Legal Personal Representatives
of the Estate of COSMOS ATHALBERT HOSAM
otherwise COSMOS HOSAM)

CLAIMANTS

AND

DAMIAN HOSAM

DEFENDANT

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Before The Hon. Madam Justice Pemberton

Appearances:

For the Plaintiff:	Mr S. Sharma instructed by Ms C. Sherwood
For the Defendant:	Mr D. Hannays instructing Mr P. Lamont and Mr G. Hannays
For the Proposed Intervenor:	Mr D. Hannays instructing Mr P. Lamont and Mr G. Hannays

DECISION

[1] There are three (3) applications for the court's consideration.

(1) An application by the Defendant to extend the time to file his Defence;

(2) An application by the Claimants for Summary Judgment; and

(3) An application to intervene by a the Proposed Intervenor Shamsoon Nisa Ackbarali.

I shall deal with each application in turn.

[2] **(1) EXTENSION OF TIME TO FILE A DEFENCE**

The **CIVIL PROCEEDINGS RULES** (CPR), Part 10.3(1) limits the time for filing a defence to 28 days after the service of the Claim Form and Statement of Case. That was not done. Part 10.3(5) permits a Defendant to apply for an Order to extend the time for filing a defence.

[3] There are no conditions attached to applying for such an Order. The Court must look at the application to assess if the grounds relied on are reasonable. I am guided by the learning set out by the Privy Council in **ATTORNEY GENERAL v KERON MATTHEWS**[1] where Lord Dyson's dicta at paragraph 14 were pellucid in that:

> *… a defence can be filed without permission of the court* ***after the time for filing has expired****. If the Claimant does nothing or waives late service the defence stands and no question of sanction arises. If as in the present case, judgment has* ***not*** *been entered when the Defendant applies out of time for an extension of time there is no question of any sanction having been imposed on him. No distinction is drawn in Rule 10.3(5) between applications for an extension of time* ***before*** *or* ***after*** *the period for filing a defence.* [Emphasis mine]

[1] 2011 UKPC 38

[4] I must say that the judgment referred to in that case was a default judgment and not a summary judgment as applied for in this case by the Claimant.

[5] Lord Dyson continues and this in part supports my contention that the judgment referred to is a judgment under Part 12 – a default judgment:

> *There is no rule which states that, if the Defendant fails to file a defence within the time specified by the CPR, no defence may be filed unless the court permits.*

[6] Thus, there really is no bar to a Defendant filing a defence outside the time permitted. The Rules provide for what either party may do – 10.3(5) apply for an extension of time or Part 12.4 or pursuant to the Claimant may apply to the court office for entry of a default judgment.

[7] Since there is no application under Part 12.4 made by the Claimant, the court must look to the reasons set out and the circumstances of the case to determine whether the Defendant should be allowed to file his defence. In the said **MATTHEWS** case, Gobin J. in the High Court laid much store on whether there would be any prejudice to the Claimant if the Defendant was allowed to file the defence as opposed to denying the Defendant an opportunity to defend the claim. This was commendably cited by the Privy Council and I adopt this course.

[8] This is a family matter. It is early days yet in the litigation. Although Attorney error is not touted as sufficient reason and I do not now feel obliged to change that view, I must look at whether to deny the Defendant an opportunity to defend this case would be inimical to the objective of dealing with cases justly and more importantly whether I should shut out the Defendant at this stage. In other words, given the nature of this case would the ends of justice be served by denying this Defendant his day in court? I think not. There have been some serious allegations of fact made by the Claimants against the Defendants. The Defendant ought to be given his opportunity to present his case, but the usual consequence of costs will follow.

[9] **ORDER:**

(1) That the Defendant be permitted to file and serve his Defence in the same;

(2) That the Defendant do file and serve his defence within 28 days of the date of this Order;

(3) Leave to the Claimants to Reply on/before 12th October 2012.

[10] **THE APPLICATION FOR SUMMARY JUDGMENT**

As I said before the application for Summary Judgment does not fall within the contemplation of steps to be taken by the Claimant to shut out a Defendant at this early stage of litigation. There are therefore two issues to examined

(1) At what time should an application for summary judgment under Part 15 be entertained by the court?
(2) Given the circumstances of this case, can an application for summary judgment succeed?

[11] (1) **AT WHAT TIME SHOULD AN APPLICATION FOR SUMMARY JUDGMENT UNDER PART 15 BE ENTERTAINED BY THE COURT?**

Part 15.2(a) which concerns us provides:

> *The court may give summary judgment on the whole or part of a claim … if it considers that*
>
> *(a) On an application by the Claimant, the Defendant has no realistic prospect of success on his defence to the claim …*

[12] In the 1975 RSC, an application for summary judgment was possible so soon as the Defendant gave notice of his intention to defend. These requirements are not repeated in the CPR. Part 15.2(a) specifically speaks about "his defence". To my mind this pre supposes that there is some statement of facts upon which a Defendant proposes to rely.

[13] It would seem to me that this procedural remedy is applicable if a defence has been filed. In **WESTERN CREDIT UNION** Case the Court of Appeal had before it a claim and a defence, which they held had a realistic prospect of success, since it raised a triable issue on the authority of a party to bind the Board[2]. In **ED & F MAN LIQUID PRODUCTS LTD v PATEL & ANOR**[3] the entire case was before the court; in **KATHLEEN HOSANG v KENDAL BHAGGY**[4] this court considered both the claim and defence and counter claim as filed; **THE BANK OF BERMUDA LIMITED v PENTIUM (BVI) LTD & LANDCLEVE LTD**[5] again both claim and defence were up for consideration by the various courts.

[14] At the time of the filing of the Claimants' application there was no defence filed by the Defendant. As such I think that the application for Summary Judgment in this case is premature.

[15] (2) **GIVEN THE CIRCUMSTANCES OF THIS CASE, CAN AN APPLICATION FOR SUMMARY JUDGMENT SUCCEED?**

This action concerns a contest between persons claiming to be beneficiaries under an estate and also the nature and extent of the estate to which they are entitled. In other words, the court is being asked to decide upon the corpus of the estate of a deceased person that was available for distribution to his heirs and beneficiaries and moreover who comprised that class of persons entitled to share in the estate. The Claimants' case is that they were the beneficiaries under the will of the deceased and that the estate comprises a property in Glencoe and a business.

[16] The gist of the Defendant's Defence was gleaned from the application to extend time. This is in summary that the assets which the Claimants claim to be part of the estate of the deceased do not form part thereof. As such they are not entitled to possession of either the Glencoe property or the business. He bases his position

[2] Civil Appeal No 103 of 2006 per Kangaloo J.A. In that case a defence was filed by the Defendant which was considered both by the High Court and the Court of Appeal.
[3] [2003] EWCA Civ. 472
[4] CV2009-02286 (Trinidad and Tobago)
[5] Civil Appeal No 14 of 2003 (BVI)

on the fact that *"there was a subsequent will of Cosmos which was kept in his diary …"*. To my mind this raises a realistic defence in relation to the nature of the action at bar – the corpus of the estate of a deceased person that was available for distribution to his heirs and beneficiaries and moreover who comprised that class of persons entitled to share in the estate. There are facts which are disputed by either side and without the benefit of evidence coming from both sides there is a vacuum which can only be filled by cross-examination and testing at trial. This satisfies all that is required by Part 15.2(a) and is in accord with the authorities cited by both the Claimants and the Defendant[6].

[17] In the premises, since there is a real prospect of oral testimony affecting an assessment of facts in this case, I do not share the Claimants' view that this is the case in which an application for summary judgment can be entertained.

ORDER:

That the Claimants' application for summary judgment be dismissed.

[18] **THE APPLICATION TO INTERVENE**

The Proposed Intervenor **Shamsoon Nisa Ackbarali** and the Deceased were into a Common Law relationship from about 1978 – 2001. Ms Ackbarali wishes to intervene in this action to secure what she alleges are her rights and interests in the disputed properties.

[19] The CPR at Part 19 empowers a court to join parties at any stage of the litigation process so that all of the proper and necessary parties are before it with the aim of resolving all matters in dispute. Further if there is an issue involving a new party which is connected to the matters in dispute the court can add that party so as to resolve that issue. There is a liberal application of this Rule, the basis of which essentially is to avoid multiplicity of proceedings. The ability of the court to join must be circumscribed by the fact that the party to be joined must be a necessary and proper party.

[6] See p. 11 **HOSANG v BHAGGY** para. 25

[20] In this case Ms Ackbarali has raised the issue of the existence of a will which has been suppressed. This is in direct conflict with the Claimants' case. Ms Ackbarali further contends that her contribution to the acquisition and possession of the properties under dispute ensure her entitlement to claim an interest based on estoppels and her business relationship with the deceased. These are the facts upon which she relies on for intervening.

[21] Counsel for the Claimants saw this application to intervene solely in light of whatever rights Ms Ackbarali may have been able to pursue under the provisions of the **CO-HABITATIONAL RELATIONSHIP ACT**[7] and the fact that Ms Ackbarali could not seek shelter under those provisions. Mr Lamont in his response to those submissions took a difference view. Counsel submits that the Act does not proscribe a co-habitants ability to make a claim for property. In fact the Act does not cause to vanish either the Law of Trust of the Law of Proprietary Estoppel and acquiescence. In fact the Act at Section 2(3) states that its provisions do not derogate from or affect the rights of a person to apply for and pursue any remedy or relief under any other written or common law.

[22] It is in that light that I must consider Mr Lamont's submissions. Ms Ackbarali's claim is based on estoppel and the fact that she contributed to the assets by way of being in business with the Deceased. It is not a claim by the cohabitant *simpliciter*. That brings her claim outside of the Act so that it is arguable whether the limitation period in the Act applies. This is a matter of evidence. Her claim therefore is strong and cannot be dismissed lightly. This needs to be ventilated as the outcome significantly impacts upon the corpus for distribution and the beneficiaries to an estate.

[23] In the premises, I must allow Ms Ackbarali to join in these proceedings. It does mean that the Claimants must now be given the opportunity to answer these claims.

[7] Chap. 45:55

[24] **LACHES**

This is an issue that must be answered by way of evidence. To look at the lapse of time without more is not sufficient. There must be some evidence, and it has to be tested to see if the court can use this equitable principle to defeat a claim if it exists. One cannot make a determination at this stage.

ORDER:

1. **That Shamsoon Nisa Ackbarali be added as a Defendant in this action;**
2. **That the said Shamsoon Nisa Ackbarali do file and serve a Defence and Counter Claim if necessary on/before 28th September 2012;**
3. **Permission granted and Claimants to Reply on/before 31st October 2012.**

COSTS ON ALL APPLICATIONS:

4. **On application for extension of time – Defendant to pay the Claimant's costs to be assessed if not agreed;**
5. **On application for summary judgment – Claimants' to pay the Defendant's costs to be assessed if not agreed;**
6. **On application for joinder – that the Proposed Intervenor bear the Claimants' costs of the application to be assessed if not agreed;**
7. **Statements of costs to be filed and served on/before 28th September 2012;**
8. **Objections to be filed and served on/before 19th October 2012;**

FURTHER ORDER:

9. **Case Management Conference to take place on 5th November 2012 at 10:00 a.m. POS #17 at which date costs will be assessed.**

Dated this 29th day of June 2012.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE