

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

CV No. 2008-03727

Between

TIRATH MAGRAM

Claimant

And

BALKISSOON MAGRAM

Defendant

**Before the Honourable Mr. Justice R. Rahim**

Appearances:

Ms. V. Badrie-Maharaj for the Claimant.

Mr. K. Kamta for the Defendant.

**REASONS**

1. By Notice of Application of the 27th November 2012, the Defendant applied to the court for several orders including an order that all action by the Registrar of the Supreme Court purportedly (*sic*) under the consent order dated 27th July 2012 be stayed until further order.

2. The Defendant also sought several orders three of which were in relation to Mark Seepersad Attorney at Law and one other as follows;
  - (i) That he deliver to the Defendant's Attorney at Law a copy each of all offers received from the Claimant's Attorney at Law in accordance with the consent order entered on the 27<sup>th</sup> of July, 2011.
  - (ii) That he deliver to the Defendant's Attorney at Law a copy of all outgoing correspondence from Mr. Seepersad to the Claimants Attorney at Law, and in particular, those after the agreement for sale of the subject lands was executed in his office.
  - (iii) That in the absence of such correspondences above that Mr. Seepersad file a response as to what actions was taken by him on behalf of the Defendants to secure the payment of the deposit and/or to forward same to the Defendant and if not.
  - (iv) An order declaring that the Defendant has no obligation to enter into a second agreement with Nizam Ali and/or that Nizam Ali and/or his Attorney at Law and/or Mr. Seepersad pay over into Court within 14 days of the order of Court for the benefit of the Defendant the sum of \$75,000.00 due and owing the Defendant under the contract for the sale of the Defendants rights in the subject lands and which sum the Claimant and Mr. Ali Attorney at Law warranted they would forward to the Defendant.
3. On the 16th April 2013, the court dismissed the application. These are the reasons for so doing.
4. In support of the application, is the Defendant's affidavit sworn to and filed on the 27th November 2012. In opposition to the application, the Claimant filed an affidavit on the 14th February 2013. Thereafter, without permission, the Defendant filed an affidavit on the 12th March 2013.

## **Brief History**

5. By Fixed Date Claim Form filed on the 25th September 2008, the Claimant commenced an action for partition or sale of property owned by both parties. By Consent Order of the 22nd May 2009, the parties agreed as follows:

i. That the Defendant do pay to the Claimant the sum of **Four Hundred and Seventy Five Thousand Dollars (\$475,000.00)** representing the Claimants's one half undivided share and interest in the property described in Certificate of Title Volume 1638 Folio 229 on or before the 25<sup>th</sup> September, 2009.

ii. The Claimant is to vacate the property described in Certificate of Title Volume 1638 Folio 229 on or before the 31<sup>st</sup> December, 2009 upon receipt of the said sum on the date stated in paragraph 1.

iii. That in the event the Defendant fails to pay the said sum of **Four Hundred and Seventy Five Thousand Dollars (\$475,000.00)** on the stipulated date as mentioned in paragraph 1 of this Order, the said property is to be sold by private treaty for a minimum value of **Nine Hundred and Fifty Thousand Dollars (\$950,000.00)**, and the proceeds to be divided between the Claimant and the Defendant.

iv. That the Defendant do pay the sum of **Twenty Thousand Dollars (\$20,000.00)** by way of the Claimant's costs on or before the 25<sup>th</sup> September, 2009.

6. On the 27th July 2011, the parties varied the order of the 22nd May 2009, by consent, in the following terms:

That paragraphs 1-4 of the said order be deleted and replaced by the following:

i. Subject to paragraph (iii) the parties do enter into an agreement for the sale of the property as described in Certificate of Title Vol. 1638 Folio 229 to the highest offer which offer must be received in writing by the 31<sup>st</sup> October, 2011.

- ii. That either party do indicate to the other party in writing any and all offers received under paragraph (i) hereinabove.
- iii. That by the 18<sup>th</sup> November 2011 either party be at liberty to indicate to the other party their offer to purchase the half share of that party for the consideration of half the purchase price as indicated in the highest offer received by the 31<sup>st</sup> October, 2011 and the parties shall accordingly enter into an agreement for sale to the other party on the terms offered to the highest offeror under paragraph (1) hereinabove.
- iv. In default of either party making an offer to purchase under paragraph (iii) above, the parties shall be at liberty to enter into an agreement for same to the highest offer under paragraph (i) hereinabove on or before 30<sup>th</sup> November, 2011.
- v. That the Registrar of the Supreme Court be and is hereby empowered to execute any agreement for sale and memorandum of transfer in default of any party executing the same.
- vi. That the Defendant do pay the sum of Twenty Thousand Dollars (\$20,000.00) by way of the Claimant's costs, interest of said costs to run from the date of 25<sup>th</sup> September, 2009.
- vii. Subject to paragraph (ii), the proceeds of the sale from any purchaser other than a party to these proceedings, shall be divided between the parties in equal shares.
- viii. The Defendant shall satisfy all indebtedness to the Claimant pursuant to the orders for costs made herein out of the Defendants share of the proceeds of sale.
- ix. That leave be granted to the Defendant to withdraw application filed on the 23<sup>rd</sup> February, 2010.

7. It was in respect of the order of 27th July 2011, that the Defendant sought a stay.

### **Order sought at paragraph 1 of the application**

8. The application for the stay appeared on the face of the notice to be an application for an interim stay pending the determination by the court of the application for other relief contained in the notice. As a consequence, the court granted that which was sought on the 7th March 2013 and stayed paragraph 5 of the order of the 27th July 2011 until further order.

### **Orders sought at paragraphs 2 (i), (ii), (iii) of the application**

9. These orders related to acts between attorney and client, although Attorney-at-law, Mr. Mark Seepersad, was not made a party to the application. In those circumstances, on the 7th March, 2013 the court ordered that the applicant serve the application and all documents filed in support of and in opposition to the application and a notice of the next date of hearing on Mr. Seepersad and Mr. Nizam Ali, a person previously interested in purchasing the property. The application was thereafter adjourned to the 20th March, 2013.
10. On the 20th March, 2013, Attorney-at-law for the Claimant and Mr. Seepersad appeared. There was no appearance of Attorney-at-law for the Defendant, who by letter indicated to the court that he would be absent because he was to attend a funeral. On that occasion Mr. Seepersad informed the court that he had not received a deposit from any prospective purchaser and further that he had no other documents in his possession in relation to the claim.
11. The court then granted permission to Mr. Seepersad to file an affidavit by the 12th April 2013 and adjourned the application to the 16th April 2013. Mr. Seepersad was relieved from further attendance. Mr. Seepersad has since failed to file an affidavit.
12. Notwithstanding Mr. Seepersad's failure to file the affidavit, the court found that there was no evidence adduced on the part of the Defendant that Mr. Seepersad was in possession of any document relating to the claim including any correspondence or agreements for sale or offers for purchase of the subject land.

13. In this regard, paragraphs 2 to 5 of the Defendant's affidavit filed on the 27th November 2012 showed that the Defendant being dissatisfied with Mr. Seepersad, requested documents from him, and was provided with several letters. It was the Defendant's evidence that the letters showed that the Claimant's attorney wrote to Mr. Seepersad indicating that Mr. Ali offered \$1.5 million for the sale of the subject property. There was no evidence that at that time, that is, by the 12th October 2011, Mr. Seepersad had in fact received a copy of that offer. The Defendant further deposed that by letter of the 19th December 2011, the Claimant's attorney again wrote to Mr. Seepersad, requesting that the Defendant execute an agreement for sale, and promised to deliver a deposit after such execution. The evidence was that the agreement was not executed at that time.
14. On the 12th April 2012, the Claimant's attorney once again wrote to Mr. Seepersad and enclosed an agreement for execution. Again there appeared to have been no execution.
15. It was in those circumstances that attorney for the Claimant, by way of letter dated 14th May 2012 wrote to Mr. Seepersad expressing her intention to have the Registrar sign the agreement should the Defendant fail to execute by the 18th May 2012.
16. It was clear to the court from this evidence, that if any offers were in fact made by Mr. Ali, they were made to Attorney-at-law for the Claimant and not to Mr. Seepersad Attorney-at-law for the Defendant at the time. It was also clear to the court that in those circumstances no deposit would have been paid to Mr. Seepersad. In fact evidence to the contrary is to be found at paragraph 9 of the Defendant's affidavit filed on the 12th March 2013 wherein the Defendant deposed that Mr. Ali assured him that he paid the deposit to one Mr. Badri Maharaj.
17. The court also found that there was no evidence that there would have been outgoing correspondence from Mr. Seepersad to attorney for the Claimant (prior to Mr. Kamta's involvement) which had not been disclosed or handed over to the Claimant by Mr. Seepersad. If that were the case, one would have reasonably expected such

correspondence to feature in the affidavit of the Claimant filed on the 14th February 2013, but there is no such correspondence. In fact, the Claimant's affidavit in its entirety is reflective of a course of one-way communication from Attorney-at-law for the Claimant to Mr. Seepersad, prior to Mr. Kamta's intervention.

18. What was clear from the evidence, is that the Defendant and/or his present attorney did in fact receive correspondence in relation to the claim from Mr. Seepersad. As a consequence, there was no evidential basis for the court to grant the relief claimed at paragraphs 2 (i), (ii), (iii) of the application.

### **Order sought at para 2 (iv) of the application**

19. In this regard, there was no evidence that there was an executed agreement for sale. The evidence of the agreement attached to the affidavit of the 27th November 2012 showed that there was execution only by the Defendant. In the circumstances of there being no agreement, it could not be properly argued that the sum of \$75,000.00 was due and owing to the Defendant under the contract for sale.
20. Further, and of utmost importance, no authority was provided to the court to support the proposition that a court would have the jurisdiction to make such a declaration in respect of a final order, previously entered into whether by consent or not. It would seem to this court that if there was in fact a contract for the sale of the property, this should form the basis of a claim which would have to be the subject of a trial in the usual course of events.
21. Further, this application did not appear to the court to be one which fell within the parameters of 'liberty to apply'. An order pursuant to a liberty to apply provision (which is implied in all final orders) in so far as it is given to work out or for implementing or giving effect to the main provisions of an order or judgment, must not vary the terms of the original order. Even if the order amounts to a variation, it is allowed if it does nothing

more than to succour the terms of the original order: **Halsbury's Laws of England, 4th Edition, Reissue, Volume 37, 2001, para 1230; Chia Chew Gek v Tan Boon Hiang [1997] 2 SLR 209.**

22. An order in terms of that sought would clearly not have been for the purpose of working out, implementing or giving effect to the main provisions of the original order but would in fact have amounted to a final order and would have the effect of varying the original order in substance.
23. As a consequence, the interim stay which was sought and granted was lifted and the application was dismissed.

### **Costs**

24. According to Part 66 of the CPR, the successful party is entitled to his costs. Further, in this case having regard to the paucity of the evidence the court was of the view that it was unreasonable for the Defendant to pursue the issues related to paragraph 2 (i), (ii), (iii) and (iv) of the application.
25. Further, in assessing costs the court considered the number of years standing at the bar of Attorney-at-law for the Claimant, the number of appearances, the time spent in arguing the application and the preparation of affidavits in opposition. The court therefore felt that costs in the sum of \$3,500.00 was reasonable in the circumstances.
26. Finally, the court notes that the Claimant has by way of recent application sought to vary the said order and this application is pending.

Dated the 25th April 2013

Ricky Rahim

Judge