

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-03568

**IN THE MATTER OF THE REAL PROPERTY
ACT CHAPTER 56:02**

AND

**IN THE MATTER OF AN APPLICATION BY
CARL JOHN AND MARGARET JOHN**

**PURSUANT TO SECTION 49 FOR A VESTING ORDER IN RESPECT
OF ALL THOSE TWO PARCELS OF LAND COMPRISING 7 ACRES
3 ROODS 37 PERCHES AND 6 ACRES RESPECTIVELY BOTH SITUATE
IN THE WARD OF CHAGUANAS IN THE REPUBLIC OF TRINIDAD AND
TOBAGO AND DESCRIBED IN CERTIFICATE OF TITLE IN VOLUME 586
FOLIO 91**

AND

CV2017-02624

**IN THE MATTER OF THE REAL PROPERTY
ORDINANCE CHAPTER 27 NUMBER 11**

AND

**IN THE MATTER OF AN APPLICATION OF
MOLLY HELEN FORTUNE AND COLLIN ARTHUR FORTUNE
FOR AN ORDER VESTING IN THEM THE PARCEL OF LAND
DESCRIBED IN REAL PROPERTY ORDINANCE
VOLUME LXXXIV FOLIO 361**

Applicants

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: August 27, 2021

Appearances:

The First Named Applicant in CV2014-03568: Mr. S. Saunders instructed by Ms. F. Cayenne

The Second Named Applicant in CV2014-03568: Mr. O. Kerr

For both applicants in CV2017-02624: Mr. V. Maharaj instructed by Ms. L. Hosein.

The Registrar General's Department: Mr. S. Rampersad

**DECISION ON APPLICATION TO STRIKE OUT APPLICATION
FOR LEAVE TO APPEAL**

1. Venice Mendoza and Margaret John a couple in a common law union at the time made an application to have a particular parcel of land vested in them in 2014. They claimed to each be in possession of the premises for the required period such possession being adverse to the title held by the owners.
2. In 2017, Molly Fortune and Collin Fortune brought another application of the same type for the same parcel of land. Venice Mendoza subsequently passed away on February 16, 2016 leaving Margaret John as the only applicant on record in the 2014 matter.
3. Both matters which were filed and heard before Boodoosingh J as he then was have since been consolidated.
4. By order of April 1, 2016 Boodoosingh J appointed Carl John, the son of Venice to represent the estate of the Applicant Venice Mendoza for the purpose of the claim. Carl is the executor of the last Will and testament of Venice and also the sole beneficiary of the interest of Venice in the property under the provisions of the Will.
5. On November 22, 2019 Margaret John took the point by way of submissions without a formal notice of application that because Venice died she was entitled to have the property vested in her sole name when the principle of survivorship is applied. In other words, Margaret has sought to have Carl removed as a co applicant. All the parties were heard

on the point and in an oral decision delivered on February 12, 2020 Boodoosingh J gave reasons for his decision.

6. Those reasons included inter alia a finding that having regard to the nature of the matter before him, namely an application for a vesting order, it was the duty of each applicant to prove possession for the required period and the necessary animus. So that Boodoosingh J appears to have been saying that in the court's view, there is no presumption of joint tenancy in such a case. Further, that each applicant's interest must be considered separately and in any event, this also includes the Fortunes. He therefore did not accede to the submission and found that the appropriate course was for the court to move forward with all of the persons who were applicants then before the court and make the appropriate orders.
7. It is to be noted as a matter of procedure only that the decision of Boodoosingh J was not the subject of an order.
8. On February 27, 2020 Margaret filed an application for leave to appeal the decision and by application of August 28, 2020 the Fortunes in turn applied for an order that the application of February 27 for leave to appeal be dismissed. The matter was subsequently reassigned to this court. This court must determine the sole issue of whether leave to appeal is a legal requirement. If it was not then the Margaret John's application for leave to appeal will be struck out. If leave is required then the court will proceed to determine the leave application.

Leave to appeal

9. Leave to appeal is required only in respect of the matters set out under section 38 of the Supreme Court of Judicature Act, namely in respect of

orders made by consent, orders as to costs and final orders made in summary proceedings.

10. It is common ground that the matter before Boodoosingh J did not result in a consent order and was not an order for costs. The issue is therefore whether the decision of the court was one to which section 38 (2)(c) was applicable. So that this court must determine whether the challenge made by Margaret was one on relation to a final order made in summary proceedings.

11. Summary proceedings was defined by Nelson JA In the case of **Lalla, Kenneth; Wooding, Henley; Mohammed, Corinre; Walters, Carlyle; Seemungal, Sakal [Members of the Public Service Commission]; Baptiste, Cipriani [The Commissioner of Prisons] v Rajkumar, Dougnath** C.A. CIV. 128/1999, at page 7 as:

“In my judgment it is better to treat the phrase “summary proceeding” in S.38[2][c] of the Act as referring to interlocutory applications which finally dispose of a cause or matter without the formality of a trial.”

12. The first port of call is a determination of whether the proceedings are summary proceedings. It is pellucid that these proceedings are in no way shape or form summary proceedings in that the court is yet to hear all parties on their applications and there is likely to be a full trial by way of cross examination.

13. In the case of **Rajkumar v Lalla and others** [2001] UKPC 53, Their Lordships of the Privy Council saw it fit to set out what in their view amounted to summary proceedings for the purpose of section 38(2)(c). At paragraph 7 thereof Lord Mackay of Clashfern set out the following when treating with

the issue which by then had been of no moment to the issues in the appeal under consideration but was provided for general benefit having regard to the usage of the phrase in the legislation;

“In the absence of any applicable statutory definition of “summary proceeding” their Lordships take the view that in essence a summary proceeding is one which can be distinguished from a more formal proceeding such as occurs in the distinction between trials on indictment in the criminal law and summary proceedings where no jury trial with its attendant procedure is required but the judgment is committed to another tribunal with the expectation that the proceedings will take less time and that they will not require the same elaboration of procedure which is attendant on a jury trial. In the civil law a summary judgment Ord 14 of the Rules of the Supreme Court is an illustration of summary proceedings.”

14. This would of course ordinarily be determinative of the application to strike out the leave application on its own but for completeness the court has also considered the second limb of section 38(2)(c).
15. The second matter for determination therefore is whether the decision made by Boodoosingh J was final. In making such a determination, the court is to be guided by what has traditionally been referred to as the application test. In **The Attorney General of Trinidad and Tobago v Lennox Phillip and another** Civil Appeal 155 of 2006, Justice of Appeal Mendonca had the following to say at paragraphs 14 to 17;

“(14) There is no dispute that the proceedings in question are civil proceedings and the appeal involves indirectly a question respecting property of the value of \$1,500.00 or upwards. The

criteria therefore at (2) and (3) above are satisfied. The questions which however arise are whether the decisions are final and whether the appeal raises a genuinely disputable issue.

(15) To determine whether a decision is final or interlocutory this Court has adopted the application test or approach (see Durity v Judicial and Legal Service Commission (1995) 49 W.I.R. 433 and Elias v Elias (No. 2) (1996) 51 W.I.R. 382).

(16) The application test was first adumbrated in Salaman v Warner (1891) 1 QB 734. According to the application approach whether an order is final depends on the nature of the application and not on the nature of the order as eventually made. Fry L.J. explained the approach in this way:

“I conceive that an order is “final” only where it is made upon an application or other proceeding which must, whether such application or proceeding fail or succeed, determine the action”.

(17) The application test therefore dictates that an order is final if it is made on such an application or proceeding that for whichever side the decision was given it would, if it stood, finally determine the matter in litigation.”

16. In that regard, it is clear to the court that when the application is considered the outcome could have been as follows;

- a. Carl would have been excluded from the claim and if that order was permitted to stand, the case would have been finally determined in relation to his application.

- b. Carl would have been permitted to continue with the claim. This in effect means that Margaret would not be entitled to assert that she is solely entitled to the vesting order however, should this order be allowed to stand, the effect is not one with finality as the claim must still be decided by recourse to the evidence from all parties inclusive of the interest of the Fortune applicants.

- 17. Therefore, it is not the case that the decision would have finally determined the litigation regardless of whichever outcome was decided upon. The order made in this case was therefore not final and the court so finds.

- 18. Margaret raised several other matters in relation to joint possession and the effects of Registration under sections 27 and 74 of the Real Property Act Chapter 56:02. In the court's respectful view the substance of these sections do not apply either directly or indirectly to the issue to be decided on this application and in relation to the substantive claim as none of the applicants possess a registered interest under the Act at this stage of the proceedings.

- 19. Margaret also made submissions on the issue of whether the law of joint possession and severance applied but in the court's view while that may have been the issue before Boodoosingh J it certainly is not the issue before this court. It appears therefore that Margaret has attempted to re-litigate the very issue determined by Boodoosingh J. This is of course procedurally improper so that the court makes no decision or comments on those issues.

Procedural appeal

20. Part **64.1(2) CPR** reads;

“procedural appeal” means an appeal from a decision of a master or judge which does not directly decide the substantive issues in a claim and excludes—

(a) any such decision made during the course of the trial or final hearing of the proceedings;

(b) an order granting any relief made at an application for judicial review (including an application for leave to make the application) or under section 14(1) of the Constitution under Part 56;

(c) the following orders under Part 17:

(i) an interim injunction or declaration;

(ii) a freezing injunction;

(iii) an order to deliver up goods; and

(iv) any order made before proceedings are commenced or against a non-party; and

(d) an order for committal or confiscation of assets under Part 53;

In the court’s view, the submissions before Boodoosingh J involved matters of joinder, and the issues of proper party to represent the estate having regard to the death of a litigant. These are matters that fell under Rules 19 and 21 CPR respectively and the decision of the Judge was not one made during the course of the trial or final hearing of the substantive

claim. Neither did it fall within any of the other exceptions set out in Part 64.1 CPR.

21. It follows that the proper course would have been for Margaret to have filed a procedural appeal and the court so finds. The time for so filing is that of seven days from the date of the decision so that time has long expired for so doing. These claims therefore remain listed for hearing on November 24, 2021 for further directions on the substantive claims.

22. The order of the court on the application of August 28, 2020 is therefore as follows:

- a. The Application for leave to appeal filed by the Applicant in CV2014-03568 Margaret John on February 27, 2020 is struck out.
- b. The Applicant Margaret John shall pay to Carl John the Co-Applicant in CV2014-03568 and Molly Helen Fortune and Collin Arthur Fortune, the Applicants in CV2017-02624 the costs of the application to strike to be assessed by a Registrar in default of agreement.

Ricky Rahim

Judge