

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-04256

BETWEEN

SEEREERAM NANAN

also called

SEEREERAM BEEPAT

Claimant

AND

BUTE BEEPAT

First Defendant

INDARJIT BEEPAT

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Ms. K. Persaud-Maraj for the claimant

Mr. A. Seepersad for the first defendant

Judgment

1. This case concerns the partition of a property situate in the Ward of Chaguanas, comprising four acres, one rod and thirteen point three perches, more particularly described in Certificate of Title registered in Volume 1969, Folio 97 (“the said land”).

The undisputed facts

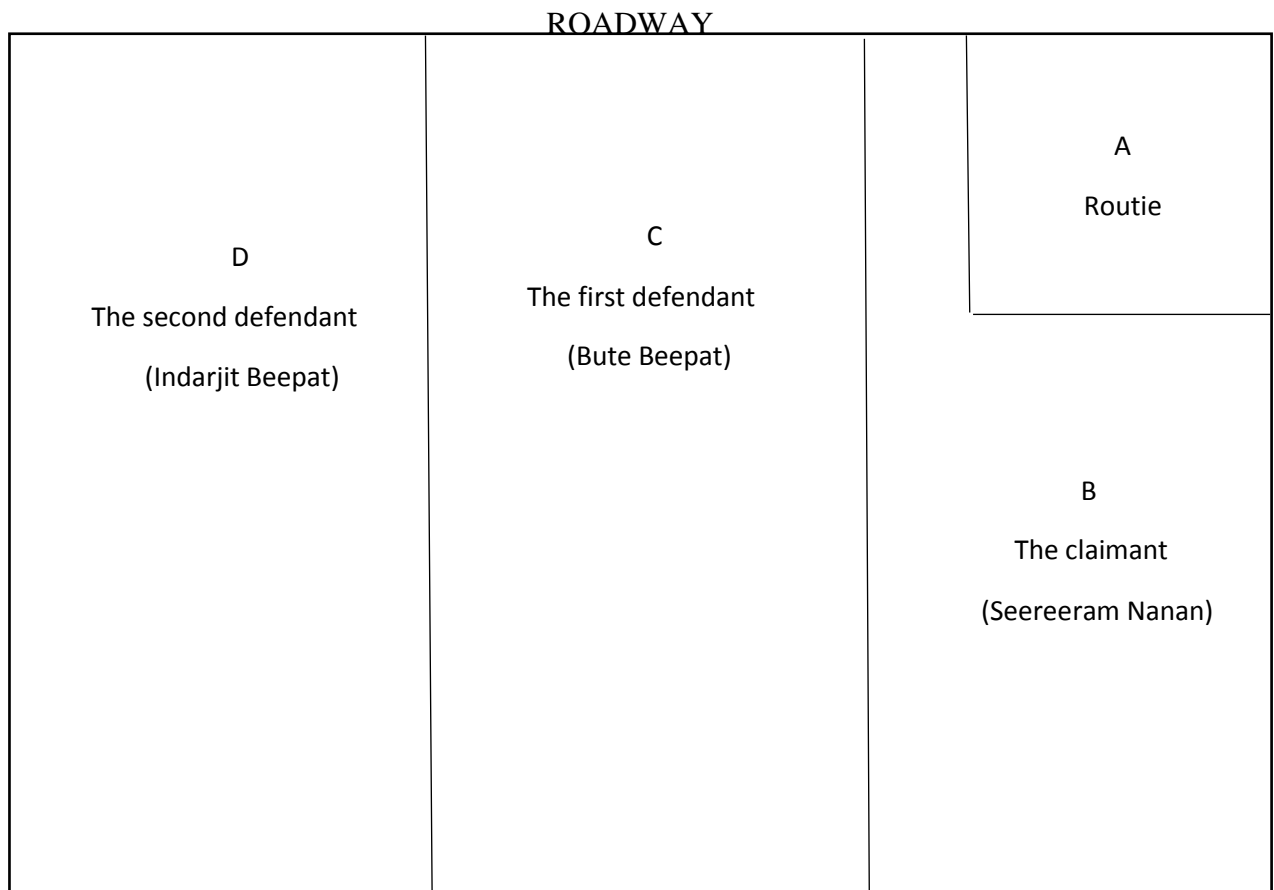
2. The claimant and the defendants are siblings. The second defendant did not participate in this case. He did not enter an appearance and/or file a defence. Beepat (deceased) is the father of the claimant and of the defendants. By Memorandum of Transfer dated the 15th July, 1980 (“the Memorandum of Transfer”), the said land was transferred by Beepat to the claimant and the defendants (as tenants in common) for the sum of twenty thousand dollars (\$20,000.00).
3. Beepat instructed that the portion of land located on the eastern portion of the said land comprising one lot more or less which was occupied by Routie Beepat, (the sister of the claimant and the defendants) should remain in her possession and occupation.
4. The first defendant gave permission to his sister, Rosie Beepat (“Rosie”) to build a house on the north-western portion of the said land. Rosie commenced the construction of the foundation for her dwelling house. She subsequently sold the foundation to Shirley Indarjit (“Shirley”) and Michael Beepat (“Michael”), the wife and son of the second defendant. Shirley and Michael continued the construction of their house on that portion of the said land. The first defendant disapproved of the transaction and initiated High Court Action No. S437 of 1999 against Shirley for repossession of the north-western portion of the said land. The first defendant asked for the claimant’s support in the action against Shirley. The parties to the High Court Action No. S437 of 1999 were the first defendant and the claimant (as plaintiffs) and Shirley (as defendant).

5. By consent order dated the 7th May, 1999 (“the consent order”) the parties to the High Court Action No. S437 of 1999, agreed to compromise the action in the following terms;

- a) *The lands comprising four acres one rood and thirteen perches described in Certificate of Title Volume 1969 Folio 97 be partitioned equally between Bute Beepat, Indarjit Beepat and Seereeram Beepat as shown on the plan hereto annexed and marked “X”.*
- b) *That the three registered proprietors bear the cost of surveying the said land equally and after being approved by the Director of Surveys to convey to themselves their respective shares as shown in the plan marked “X”.*
- c) *That Harvey Ramrekha licensed surveyor be appointed to conduct the said survey.*
- d) *That plot marked “A” to be conveyed by the registered proprietors to Routie Beepat who shall bear the cost of Surveying and Transfer fees of the said plot.*
- e) *That each party bear their own costs.*

6. The copy of the plan attached and marked “X” to the consent Order shows the allocation of the land as follows;

DRAWING NUMBER 1



7. As such, by the consent order, plot A located at the north-eastern boundary of the said land was allocated to Routie, plot B located at the back of plot A was allocated to the claimant, plot C (the middle plot) was allocated to the first defendant and plot D (the western plot) was allocated to the second defendant.
8. In or around 2001 to 2003, the claimant's son, David Beepat ("David") began construction of his dwelling house on the middle portion of the said land. The first defendant then commenced High Court Action No. 2181 of 2003 against David for an injunction to prevent David from constructing his dwelling house and for a roadway to be granted to the first defendant to access the portion of the said land located behind Routie's dwelling house. This matter was discontinued.
9. In or around 2011, the first defendant began construction of a bridge near to the dwelling house of David in an attempt to gain access to his portion of the said land located to the back of Routie's dwelling house. David demolished the bridge.

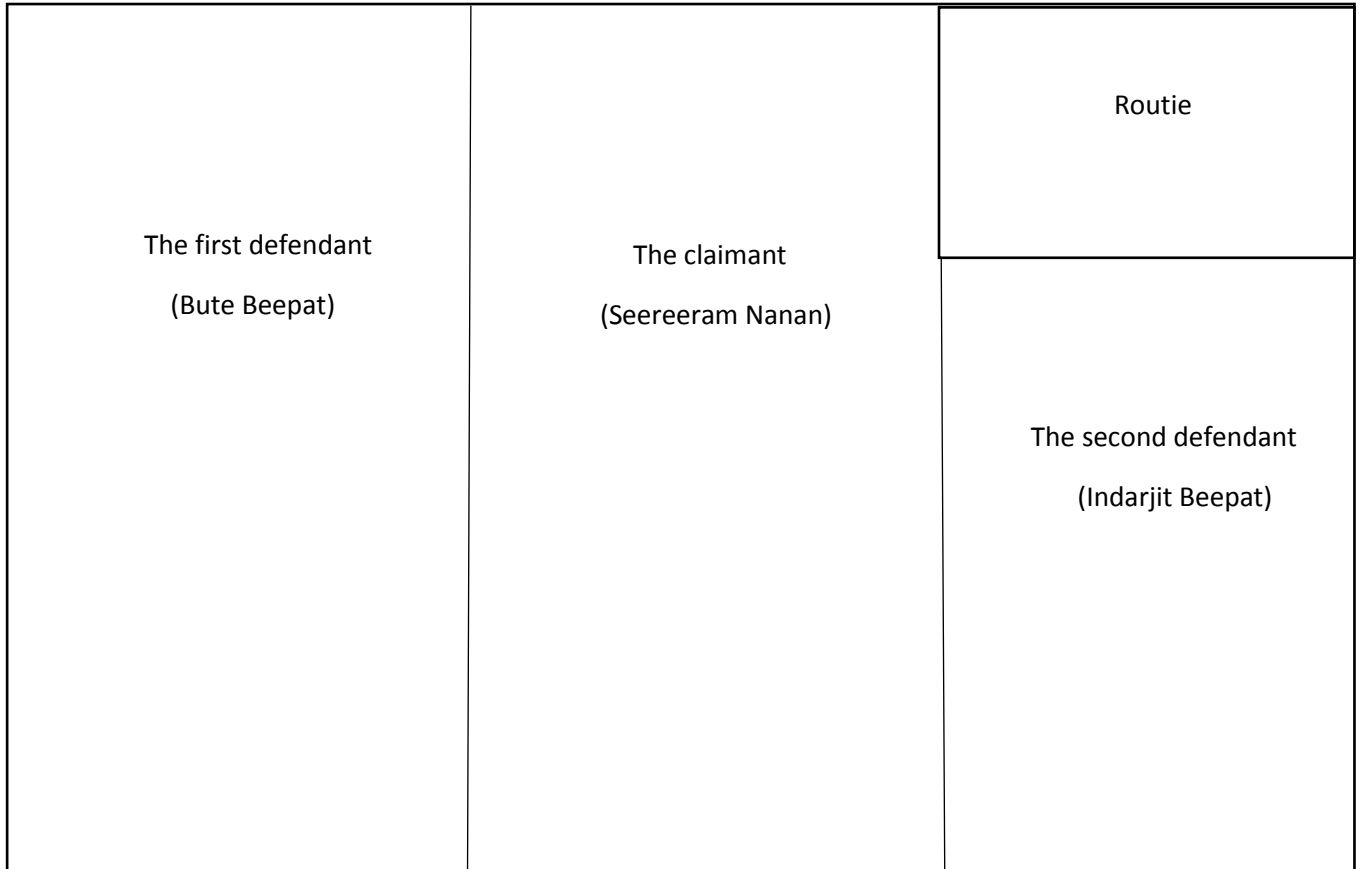
The case for the claimant

10. The claimant gave evidence for himself. The claimant is seventy-three (73) years of age. He migrated to the United Kingdom in 1971. When he is in Trinidad, he resides at L.P. No. 121 Munroe Road, Cunupia. According to the claimant, after the said land was transferred there was no formal partition of same. The claimant testified that when he returned to Trinidad in or around 1986, his father, Beepat confirmed that he should be given the middle portion of the said land since the first defendant had occupied the westerly portion of the said land and the second defendant had occupied the easterly portion of the said land.
11. In keeping with the format of the plan attached to the consent order, the court finds it of much convenience to set out the original intention of Beepat and the present state of the occupation by way of further drawings. These drawings are not done to scale and they are not evidence. They are however a simple way to illustrate that which has happened to the

land by way of occupation over the years. According to the claimant, the land was allocated by Beepat as follows;

DRAWING NUMBER 2

ROADWAY



12. The court notes however that the Memorandum of Transfer did not specifically apportion parcels of land to the claimant and the defendants. Therefore, even though the claimant's evidence is that he was entitled to the parcel situate in the middle of the land, he was not legally so entitled as the land was transferred to the three brothers as tenants in common which meant they were simply each entitled to an equal portion of the said land.

13. The claimant further testified that since the portion of land given to the second defendant was a bit less or unequal to his and the first defendant's portion (as the one (1) lot of land given to Routie had to be deducted from the second defendant's share), Beepat gave the second defendant another two (2) acres of land in Bejucal, Cunupia. During cross-examination, the claimant testified that the portion of said land which was given to the second defendant is now occupied by the first defendant. The claimant disagreed that there should be some adjustment to the partition of the said land to compensate the first defendant for his alleged unequal share of said land.
14. During cross-examination, the claimant testified that he did not contribute any money towards the transfer of the said land as he was not asked to do so. According to the claimant, he was unaware that the said land was sold to him and the defendants for twenty thousand dollars.
15. According to the evidence of the claimant, the first defendant encouraged Routie to occupy more than one lot of the said land despite the fact that she was only given one lot by Beepat. The claimant testified that Routie is currently occupying approximately four lots of the said land and her occupation of same blocks the remaining of the land situate on the easterly portion from being accessible from the Munroe Road.
16. The claimant further testified that he did support the first defendant in the High Court Action No. S437 of 1999. During cross-examination, the claimant testified that even though he lent his support to the first defendant in the claim, he was unaware as to what occurred in the case. According to the claimant, at the commencement of this action, he learnt that the consent order was granted. During cross-examination, the claimant testified that the consent order was entered into without his knowledge. On the consent order, there are four signatures, Shirley's, the first defendant's and two others. By process of logical deduction, the court came to the conclusion that the two other signatures were that of the respective attorneys for the first defendant and Shirley. As such, the court accepts the evidence of the claimant that he was unaware of the consent order since he did not sign same. Therefore, the claimant was not bound by the terms of the consent order. Further, the absence of his consent has other material consequences for the purported agreement to

divide as set out in drawing number 1 herein. This will be discussed later on in this judgment.

17. The claimant testified that the first defendant without consulting him constructed a forty foot drain and bridge to the east of Michael's dwelling house in order to access the remaining lands situate to the back of the said land. The claimant further testified that the said land was not measured to ensure that the construction of the drain and bridge were being constructed on the first defendant's one third portion. Moreover, the claimant testified that after the first defendant discontinued the High Court Action No. 2181 of 2003 against David, the first defendant built a bridge and road within Routie's portion of the said land.
18. According to the claimant, sometime in or around 2014 to 2015, the defendants engaged in construction upon their respective portions of the said land and have encroached upon his portion (the middle portion) of the said land. The claimant testified that the consent order has never been complied with and that more than twelve years have passed since same was made. The claimant further testified that he was informed by the Court's staff that the respective attorneys never prepared the Order and/or lodged same for approval.
19. According to the claimant, over the years he has tried on numerous occasions to speak to the defendants to have the said land partitioned. The claimant testified that the first defendant has failed and/or neglected to have any discussions with him concerning the partition of the said land. However, the second defendant has responded to the claimant's request to have the said land partitioned.
20. Moreover, the claimant testified that he informed the defendants that the reason he wants the said land partitioned was because he wants to transfer his one third share and interest in the said land to his children. The claimant testified that the first defendant has refused to release the original Certificate of Title for the said land which he possesses for such a transfer to take place.
21. According to the claimant, the relationship between him and the defendants has deteriorated. On the 28th May, 2014, the claimant instructed his attorney at law, to write

to both the first defendant's attorney at law, and the second defendant requesting the release of the original Certificate of Title (if it was in their possession) so that the claimant could transfer his share in the said land to his children and/or if they did not possess the Certificate of Title, to execute a consent so that the claimant could apply to the Registrar General's Department to obtain a new Certificate of Title. By letter dated the 19th May, 2015, Ms. Shalini Dhanipersad, attorney at law for the second defendant responded to Mr. Seecharan's letter and stated that the second defendant would like the said lands partitioned. Neither has the first defendant nor his attorney at law responded to the claimant's letter.

22. The claimant testified that during the course of this matter, he has paid Mr. Rishi Mohan Mahabir for a draft survey to be conducted in respect of the division of the said land in hope of a resolution (*See draft survey at Tab 16 of the claimant's list of documents filed on the 28th October, 2016*). According to the claimant, the proposed division shown in the draft survey is as equal as can be in the circumstances of the case. The claimant further testified that the first defendant has refused to move forward with the partition of the said land and to produce the Certificate of Title to the said land. During cross-examination, the claimant testified that he has a wall where Mr. Mahabir planned to accommodate the proposed roadway in the draft survey.

23. Consequently, by Fixed Date Claim Form filed on the 14th December, 2015, the claimant seeks the following relief;

- i. An order that All and Singular that certain piece or parcel of land situate in the Ward of Chaguanas, in the Republic of Trinidad and Tobago, comprising, FOUR ACRES ONE ROOD AND THIRTEEN POINT THREE PERCHES be the same more or less delineated and coloured pink in the plan registered in Volume 1969 Folio 97 and drawn on the margin thereof being portion of the lands described in the Crown Grant in Volume 35 Folio 651 and shown as Parcel 2 in the General Plan filed in Volume 1969 Folio 89 and delineated and coloured pink in the plan registered in Volume 1969 Folio 103 and drawn in the margin thereof and bounded on the North by Munroe Road on the South by lands claimed by Manohar*

Mahadeo and Ramnarine Bheput on the East by Parcel I and on the West by Parcel 3 (hereinafter “the said land”) be surveyed and partitioned into three (3) portions after being approved by the Director of Surveys.

- ii. *An Order that a Licensed Land Surveyor or some other qualified Surveying Firm to be appointed by the Court to survey the said land into three (3) equally portions and make the necessary application for the sub-division of same.*
- iii. *An order that the costs for the surveys to be equally divided amongst the claimant and the defendants.*
- iv. *That the first defendant produce the original Certificate of Title registered in Volume 1969 Folio 97.*
- v. *An Order that the claimant’s attorney at law prepare the requisite Memorandum of Partition to be vetted by the defendants’ attorneys at law and to ensure same is executed by their respective clients.*
- vi. *An Order directing the Registrar of the Supreme Court to execute the memorandum of Partition on behalf of the defendants if they fail to comply as directed by the court.*
- vii. *An injunction restraining the defendants whether by themselves or their servants and/or agents or otherwise howsoever from conducting any type of works on the said land or interfering in any manner with anything whatsoever standing on/or touching the said lands until such time that the same is equally divided and/or partitioned and/or until the hearing and determination of this matter or until further order of this Honourable Court.*

The case for the first defendant

24. The first defendant gave evidence for himself. According to the first defendant, all expenses associated with the Memorandum of Transfer were paid by him since the claimant and the second defendant always claimed that they did not have any money. During cross-examination, the first defendant testified that he did not attach any receipts to show the money he expended on the Memorandum of Transfer. The first defendant testified that the

claimant claimed that he did not want anything to do with the name “*Beepat*” and the claimant was not in Trinidad when the transfer of the said land was executed. That despite the positions of the claimant and the second defendant, the transfer of the said land was still done in their names.

25. The first defendant testified that there was never any agreement amongst himself, the claimant and the second defendant as to the allocation and/or partition of the said land. That the only occupation of the said land when the transfer of same was executed in 1980 was Routie’s occupation.
26. According to the first defendant, it was his intention to claim the north-western portion of the said land and it was for this reason he permitted Rosie to build her house on same. The first defendant testified that in the High Court Action No. S437 of 1999, he together with the claimant took Shirley to Court for repossession of the property which was sold to Shirley by Rosie. During cross-examination, the first defendant testified that he could not recall who were present in court for the trial of the High Court Action No. S437 of 1999. The first defendant identified his signature on the consent order.
27. The first defendant testified that in or about 2001, David began construction on plot C which was allocated to the first defendant by the consent order. The first defendant was out of the country at the time. According to the first defendant, the terms of the consent order were disregarded and not complied with since by the consent order, the said land was supposed to be partitioned and assigned to the designated owners in accordance with the plan annexed the consent order. The first defendant testified that he could not have executed the consent order by himself and in order to prevent David from continuing any construction on the said land before same was surveyed and partitioned, he initiated High Court action No. 2181 of 2003. By this Court action, the first defendant also requested an access to plot B. As mentioned above, this action was discontinued.
28. Since David occupied the middle plot (plot C) which was allocated to the first defendant by the consent order, the first defendant decided to occupy plot B. According to the first defendant, after David demolished the bridge he had built between plots A and C to access

plot B, David constructed a wall preventing any access to plot B. The first defendant testified that he informed the claimant of what was happening and the claimant did nothing.

29. The claimant has completed the construction of his house on plot C and was able to secure a supply of water and electricity for his house without the consent of the first defendant as co-owner of the said land. However, the Trinidad and Tobago Electricity Company is requiring that the other co-owners of the said land to give consent in order for first defendant to obtain an electricity connection for his dwelling house.

30. Having no other option, the first defendant began constructing his home on plot B through an access from plot A. The first defendant testified that he has no access to plot B except through plot A. That the only access has been blocked and fenced by the claimant and/or his agent. Plots A, C and D form the entire frontage of the said land which runs along the Munroe Road.

31. The land therefore is at present occupied as follows;

DRAWING NUMBER 3
ROADWAY

The second defendant (Indarjit Beepat)	The claimant (Seereeram Nanan)	Route
		The first Defendant (Bute Beepat)

32. According to the first defendant, through discussions amongst the parties and their respective attorneys at law, it was agreed that Mr. Mahabir, licensed surveyor would conduct a preliminary or outline survey for consideration of a settlement. During cross-examination, the first defendant was shown the proposed division in the draft survey prepared by Mr. Mahabir (*See draft survey at Tab 16 of the claimant's list of documents filed on the 28th October, 2016*). The first defendant testified that measurements in the proposed division are all the same and by those measurements there would be an equal distribution of the said land amongst the defendants and the claimant.
33. Further during cross-examination, the first defendant testified that he has the Certificate of Title to the said land in his possession and that he has never received any letter from the claimant's attorney at law requesting the Certificate of Title.
34. Consequently by Defence and counterclaim filed on the 26th February, 2016, the first defendant counterclaims for the following relief;
- i. An order that the claimant's Claim Form and Statement of Case be dismissed with cost for either one or any of the following reasons:-*
- a) The claimant is asking the Honourable Court for relief that were already granted by Order of the Honourable Mr. Justice Kangaloo on the 7th May, 1999;*
 - b) The claimant has failed to take any steps to implement Justice Kangaloo's order and is again before the Court seeking the same relief amounts to an abuse of process and a waste of the court's time and resources.*
 - c) The claimant has failed to issue the first defendant with a Pre-action Protocol Letter in keeping with the Pre-Action Protocol Practice Direction of the Civil Proceeding Rules 1998 (as amended) that could have resulted in this matter being resolved but chose instead to institute High Court Action resulting in the expenditure of unnecessary expense by the first defendant.*
 - d) The partition request by the claimant cannot be realized without the first defendant obtaining an approved access that is currently being denied by*

the claimant by the erection of a wall and the destruction of the bridge by the claimant and/or is agent that the first defendant had constructed.

- e) That Routie who is not an owner but who has been in possession of certain portions of the said land has not been made a party to this matter as such the claimant cannot obtain the relief requested.*
- f) That the said land cannot be divided into three portions without excising the portion occupied by Routie or alternatively the partition must be into four plots and not three as requested,*
- g) The claimant is not entitled to the Order requested since the parcel of land that is the subject of the requested Order is inclusive of that parcel of land occupied by Routie for more than thirty-five years by consent or acquiescence by the owners.*

ii. An Order that the claimant do pay the first defendant's cost.

35. In the alternative, the first defendant seeks the following relief;

- i. An Order that the claimant is not entitled to the occupation of the middle portion of the said land due to the failure of the owners to agree on the partition and allocation of the said land.*
- ii. That the area occupied by Routie no longer forms part of the said land due to the continuous occupation of Routie by consent and/or acquiescence of the owners and cannot be considered as part of the partition but must be excised from the said land before partition.*
- iii. That the first defendant is entitled to a larger portion of the said land in the subdivision to compensate the first defendant for the loss of road frontage and subsequent residential/commercial value enjoyed by the claimant and the second defendant.*
- iv. Or the frontage residential/commercial land space being occupied by the claimant and the second defendant be valued and the first defendant be compensated for his one third share and*
- v. That the remaining back portion be equally partitioned and transferred to the owners in severalty.*

The issues

36. The issues to be determined are as follows;

- i. Whether the Court should enter judgment against the claimant for failing to file a defence to the first defendant's counterclaim; and
- ii. Whether an order for partition of the said land can be made in the circumstances of this case.

Issue 1 - *Whether the Court should enter judgment against the claimant for failing to file a defence to the first defendant's counterclaim*

The first defendant's submissions

37. The first defendant submitted that he is entitled to judgment against the claimant on his counterclaim since the claimant failed to file a defence to his counterclaim. In so submitting, the first defendant relied on **Part 18 of the CPR**.

38. **Part 18.1 of the CPR** provides as follows;

"18.1 (1) An "ancillary claim" is any claim other than a claim by a claimant against a defendant or a claim by a defendant to be entitled to a set off and includes—

(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;

(b) a claim by the defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and

(c) where an ancillary claim has been made against a person, any claim made by that person against any other person (whether or not already a party)."

39. Further, **Part 18.12 (1) & (2) of the CPR** provides as follows;

“18.12 (1) This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time. (Rule 18.9 (2) deals with the time for filing a defence to an ancillary claim)

(2) The party against whom the ancillary claim is made—

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and (b) subject to paragraph (4) if judgment under Part 12 is given against the ancillary claimant, he may enter judgment in respect of the ancillary claim.”

The claimant’s submissions in reply

40. The claimant submitted that while the provisions of **Part 18.12 (2) of the CPR** clearly set out that there is a deemed admission by the claimant of the first defendant’s case where he failed to file a Defence to a Counterclaim, it is instructive to analyse the Counterclaim. According to the claimant, when one looks at the first defendant’s counterclaim, he is essentially saying that the partition action should be dismissed since (1) an order was already made in relation to the partition of the said land, (2) the claimant failed to carry out the partition, (3) no pre-action protocol was followed and (4) Routie not being a part of this action will cause the action to fail.

41. The claimant submitted that in order to be successful in his counterclaim, the first defendant has to demonstrate the following;

- i. There is a manner of partition that can be carried out;
- ii. As a corollary to (i), the claimant has failed to act on the previous partition;
- iii. That there is no impediment or change in circumstances which will warrant a deviation of the consent order.

42. The claimant further submitted that upon investigating the evidence obtained from both the claimant and the first defendant, the following was clear;

- i. The manner of partition as envisaged in the consent order cannot be carried out due to the primary fact that there is actual possession by all of the co-owners of the said land in a manner contrary to the order.
- ii. In cross-examination, the first defendant admitted that he failed to carry out the partition and that it is he who possesses the actual Certificate of Title.
- iii. The first defendant testified that he had not seen letter dated the 28th May, 2014 sent by Mr. Seecharran to Mr. Ramtahal. By this letter, the claimant requested the Certificate of Title from the first defendant. The first defendant admitted that Mr. Ramtahal was once his attorney at law and as such, the claimant submitted that the first defendant would be placed with imputed knowledge, unless notice to the contrary was given by the first defendant or Mr. Ramtahal that he was not acting for the first defendant.
- iv. By the first defendant's own admission, Routie is not a paper title owner, but a possessor. From the evidence elicited and the draft proposed partition survey, credence is given to her possession and there ought to be no hindrance in an order being made due to her absence from this action.

43. As such, the claimant submitted that even though he failed to file a defence to the first defendant's counterclaim, the first defendant is not entitled to judgment on his counterclaim since he failed to prove his claim.

Findings

44. It is abundantly clear that the court ought not to grant judgment in default to the first defendant for several reasons. Firstly, the first defendant had ample opportunity to have this point heard as a preliminary point much earlier on at the Case Management stage, however he chose not to do so. In the court's view therefore the first defendant is attempting to prey on a negligible procedural deficiency in the claimant's pleadings which could have and should have been dealt with during the Case Management Stage.

45. Further, an entire trial has taken place and facts have been ventilated by way of evidence. Default judgment will no doubt complicate matters and it is the duty of the court to bring some finality to this litigation but more so to ensure that the parties' dispute is resolved with certainty. Moreover, such an action would be both unfair and prejudicial to the claimant having regard to the passage of time. As such, to give effect to the overriding objective enunciated in Part 1.1 of the CPR, the court will not grant default judgment.
46. Nonetheless, the court agrees with the submissions of the claimant that even though he has failed to file a reply and defence to the first defendant's counterclaim, the court still has to examine the first defendant's counterclaim to determine whether same has been made out.

Issue 2 – *Whether an order for partition of the said land can be made in the circumstances of this case.*

Law

47. **Section 3 of the Partition Ordinance, Chap. 27 No. 14** ("the Ordinance") provides as follows;

"In a suit for partition, where, if this Ordinance had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

48. In the case of *Pena v Pena HCA 258/ 1999*, (relied upon by both the claimant and the first defendant), Bereaux J (as he then was) in dealing with the issue of hardship in an application for the partition of a property cited the case of *Pemberton v Barnes* [1871] 6 Ch app 685 at 692 per Lord Hatherly LC and stated the following at pages 7 and 8;

“There can be no doubt that if I accede to either party’s prayer, hardship will be caused to one of them. The Ordinance is almost identical in its expression as that of the 1868 Partition Act of England. In Pemberton v Barnes [1871] 6 Ch. App 685, Lord Hatherley L C, in expressing his views on the hardships experienced by the operation of the Partition Act said, at pg. 692:

“The very circumstance of being obliged to submit to a partition is a great hardship in some cases, but it is a thing which must be submitted to. Then, no doubt.... there may be extreme hardship in compelling a man who has a share in land to take money instead of it. But, on the other hand, a partition may expose him to very serious inconvenience. He does not know what the result of the partition may be; whether the lots are of equal value is a matter of valuation – that is, in fact, of opinion; and supposing them to be of equal value, it may be that he gets the very lot which he least wishes to have; and a part owner may very well say, “I would rather have the estate turned into money, and get my share of its real and proper value, than take the change of having the estate allotted at the discretion of somebody whom I may not like to be my judge, or under the direction of the court, and of having allotted to me a lot which I think of less value than the others, or which, for other reasons, I do not wish to have. He therefore may wish for a sale. One man may prefer a partition because he wishes to be a landed proprietor; another, who is not so anxious to possess land, may prefer a sale of the entirety, as giving the certainty of a fair and equal division. The Legislature saw that all these questions might arise, and it has provided for them by the 3rd, 4th, 5th, and 6th sections of the Act.”

49. In this case, the claimant and the defendants have all agreed to have the said land partitioned. In order to determine whether this court should grant an order to partition the said land the following issues must be determined;

- i. Whether this matter ought to be dismissed since there is a prior consent order relating to the partition of the said land;
- ii. Whether Routie's occupation of the said land should be considered and whether she should have been a party to these proceedings;
- iii. Whether the court can increase the first defendant's share in the said land and/or compensate him for the alleged inequity he faces due to the fact that he does not occupy any of the front portion of the said land which runs along the Munroe Road and
- iv. Whether the first defendant should be granted an access way between the land occupied by Routie and the claimant.

The consent order

50. The parties to the High Court Action No. S437 of 1999 were free to resolve their issues by compromise and an unimpeached compromise represented the end of the disputes which arose from therein: **See Knowles v Roberts (1888) 38 Ch D 263 per Bowen LJ at page 272.**

51. In **South American and Mexican Company ex parte Bank of England [1895] 1 Ch 37 at page 50,** Lord Herschell LC stated as follows;

“The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action”.

52. According to the **Halsbury's Laws of England, Volume 11 (2015), paragraph 1225,** a judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set

aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent is given effectually.

53. Additionally, it is the law that Section 3(2) of the Limitation of Certain Actions Act, Chapter 7:09 is applicable to civil actions other than those relating to real property. As such, that section is clearly not applicable to this case.

Findings

54. As mentioned before, four signatures were affixed to the consent order. The signatures were that of the first defendant, Shirley and their respective attorneys. The claimant did not sign the consent order which made his evidence of not having knowledge of the execution of same plausible and believable. The first defendant testified that he could not recall who was present during the trial of the High Court Action No. S437 of 1999. Therefore, the first defendant has led no evidence that would have proven on a balance of probabilities that the claimant knew what took place in the trial. As such, the court finds that the claimant was not bound by the consent order since he did not sign same. Further, the court finds that the entire consent order was invalidated and/or vitiated since the claimant who was a party to the action, did not give his authority for the matter to be compromised in such a manner. There was therefore no meeting of the minds and no agreement between all of the parties.

55. Moreover, even if the consent order was valid, the court agrees with the claimant that the consent order was frustrated due to the primary fact that there is actual possession by the claimant and the defendants of the said land in a manner contrary to the consent order.

Routie's occupation of the said land

56. It is undisputed that Routie occupies a portion of the said land situate on the north-eastern boundary of same. The claimant submitted that Routie's occupation of the said land ought to be a non-issue. That mathematically and geometrically, Routie's occupation can and will be divided. The claimant further submitted that in the proposed survey plan prepared by Mr. Mahabir (*See draft survey at Tab 16 of the claimant's list of documents filed on the 28th October, 2016*) Routie's portion of the said land is delineated to be partitioned.

57. According to the first defendant, Routie should have been a party to these proceedings. However, **Part 19.3 of the CPR** states as follows;

"19.3 The general rule is that a claim shall not fail because—

(a) a person was added as a party to the proceedings who should not have been added; or

(b) a person who should have been made a party was not made a party to them."

58. As such, it was the submission of the claimant that even if the view was that Routie should have been a party to these proceedings, her absence will not warrant a dismissal of the matter. Notwithstanding the aforementioned, the claimant submitted that there was no need for Routie to be party to these proceedings since even though she is in occupation of part of the said land, she is not a co-owner and the parties in any event have agreed that she is in occupation.

59. The first defendant submitted that although not adding Routie as a party to these proceeding may not be fatal to the claimant's claim, the claimant's failure to add her as a defendant prevented the court from dealing with the issues emanating from this case fully. The first defendant further submitted that Routie is not bound by any order of the court without her being properly brought before the court and given the opportunity to be heard.

Findings

60. The court agrees with the claimant that there was no need for Routie to be party to these proceedings since she holds no legal title as registered proprietor of the said land. The evidence is clear that Routie was for all intents and purposes given permission by her father, Beepat to occupy the said land. She is therefore in occupation with permission of the registered proprietors. The court noted that at the time the Memorandum of Transfer was executed, Routie was already in occupation of the land and as such, it was abundantly clear that Beepat never intended to make Routie one of the registered proprietors. Consequently, the land occupied by Routie is legally owned by the claimant and the defendants since, even though she has been in continuous occupation of same, her occupation has always been with and continues to be with their permission, first from Beepat and then from the claimant and the defendants. As such, the land occupied by Routie ought not to be severed from the entire parcel when treating with the issue of partition. To state the obvious, there is a fundamental difference between an occupier and an owner and the parties to the claim remain the only owners of the title to the land.

The alleged inequity

61. It is undisputed that the first defendant does not occupy any part of the land which abuts upon the Munroe Road. The first defendant is convinced that due to that fact, his plot is less valuable than those plots allocated to the claimant and the second defendant. As such, the first defendant has asked the court to have the assigned plots valued in order to determine the equitable worth of each plot. According to the first defendant, if the court was required to order a sale of the said land, a valuation of same would have been ordered. The first defendant is therefore submitting that the court use the same principle in order to determine partition. The first defendant submitted that by using the outline survey prepared by Mr. Mahabir, the plots can be valued and based on the valuation, the parties can be compensated for any inequity in value or the plot sizes can be adjusted to ensure the partition is fair.

62. In so submitting, the first defendant relied upon the authority of **Rampartap Ramesh Doon Pundit and Ors v Ramsewak Doon Pundit and Ors CV2007-02343, per Dean-Armorer**

J. In Rampartap supra, the claimants sought an order for the sale or partition of a parcel of land comprising some twenty-seven acres. Much of the defendants' objection to the order for partition arose from their complaint that the first claimant had carried out excavation works on the subject lands, had sold the excavation soil and had damaged and reduced the value of the land. At pages 18 and 19, paragraphs 9, 10 and 11, her Ladyship stated as follows;

“9. The Court was mindful that the claimants contended that the changes effected by the excavation enhanced the value of the land. In the absence of expert evidence to support of the claimant’s contention, it is my view that the contention is disconsonant with common experience. The difference in heights will render the land useless as a poultry farm. Additionally, the excavation, which left in its wake drastic differences in land levels, will undoubtedly create a real risk of flooding. In my view therefore it is artificial to suggest that the excavation was anything but destructive.

10. The claimant contends further that the proper remedy open to the defendants was an action in tort. This argument was undoubtedly based on two of the authorities cited and relied upon by the first defendant. The defendants however, seek not a remedy in tort but a direction from the Court for an equitable account to be taken.

11. The first defendant has provided authority in the decision of in Re Pavlou in support of the proposition that the court is entitled to direct that there be equitable accounting together with an order for partition. In my view this is an equitable remedy and the Court will be mindful of equitable maxims in granting this remedy.”

63. Consequently, at page 19, paragraph 12, Dean-Armorer J ordered the following;

“... an account be taken of the devaluation which was caused to the subject premises by reason of the unlawful excavation by the claimant. The claimants are ordered upon such enquiry to pay to the defendants the amount in question. Upon completion of payment pursuant to the enquiry, the court directs and orders that the subject lands be partitioned according to portions held by each party.”

64. The claimant submitted that the permission given by the first defendant to Rosie to build her home on the north-western portion of the said land (which is now possessed by the second defendant), ultimately led to the first defendant being deprived of that portion of the frontage of the said land. According to the claimant, the equitable maxim, "*he who comes to equity must come with clean hands,*" ought to be heeded in this instance. As such, it was the submission of the claimant that to make an order granting the first defendant a larger portion of the said land or for compensation in value would be to permit the first defendant to benefit from his own wrong doing that is, not consulting with the other co-owners of the said land prior to giving his permission to Rosie to build on the land.
65. The claimant further submitted that in any event, the first defendant has led no evidence on the value of the said land that he is likely to be deprived of or the extent of the enrichment of the claimant and the second defendant. That the first defendant in his case merely stated that the claimant and the second defendant's portion is more valuable than the portion which he occupies without leading any evidence of the actual value of the land for consideration or determination.

Findings

66. It is undisputed that the first defendant gave permission to his sister, Rosie to build her home on the western-portion of the said land which is now occupied by the second defendant and his family since Rosie sold the foundation of her home to Shirley (the wife of the second defendant). The court therefore finds that it was the first defendant who was responsible for alienating that portion of the said land. Having done so, it does not lie with him and in fact it will be to grant him an unfair advantage to permit him to seek compensation from the claimant and the second defendant for being deprived of occupation of the frontage of the said land. He has found himself in this position because of his own doing and has benefited therefrom. The court therefore finds that there will be no inequity in partitioning of the land without compensating the first defendant in value.

67. Additionally, by the Memorandum of Transfer, the land was transferred to the claimant and the defendants as tenants in common. As mentioned before the Memorandum of Transfer did not specify how the land should be partitioned and without such specifications the land must be partitioned amongst the claimant and the defendants equally. In that regard the court finds that it is in fact practical for the lands to be partitioned. The court will therefore order that the said land be partitioned into three equal parcels between the claimant and the defendants so that each person retains the parcel he presently occupies according to drawing 3 above.

68. Having regard to the finding of the court that title to the parcel of the land occupied by Routie remains vested in the registered proprietors (Routie not being one), the court also finds that the first defendant will not be disadvantaged by the partition of the land in manner set out above since legal title in the parcel occupied by Routie will remain vested in he who takes that one third share of the entire parcel, part of which is occupied by Routie, namely the first defendant. The matter of compensation if any remains a matter between Routie and the first defendant and is not an issue in this case.

The access way

69. The first defendant has asked the court for an access way between the land occupied by Routie and the claimant. Currently, the claimant has a wall where the proposed access way is being sort. Having regard to the court's finding that the first defendant is the owner of the land occupied by Routie, the right to an access way is also an issue between Routie and the second defendant. It would in those circumstances be manifestly unfair to the claimant should the court order that he break his wall to grant access to the first defendant in circumstances where the first defendant remains the paper title owner of the parcel occupied by Routie through which he presently gains access on his own admission.

Disposition

70. The judgment of the court is therefore as follows;

i. Judgment for the claimant on his claim as follows;

- a) All and Singular that certain piece or parcel of land situate in the Ward of Chaguanas, in the Republic of Trinidad and Tobago, comprising, FOUR ACRES ONE ROOD AND THIRTEEN POINT THREE PERCHES be the same more or less delineated and coloured pink in the plan registered in Volume 1969 Folio 97 and drawn on the margin thereof being portion of the lands described in the Crown Grant in Volume 35 Folio 651 and shown as Parcel 2 in the General Plan filed in Volume 1969 Folio 89 and delineated and coloured pink in the plan registered in Volume 1969 Folio 103 and drawn in the margin thereof and bounded on the North by Munroe Road, on the South by lands claimed by Manohar Mahadeo and Ramnarine Beeput, on the East by Parcel I and on the West by Parcel 3 (“the said land”) is to be surveyed by a licensed surveyor to be appointed by the court in default of agreement by the parties and partitioned into three (3) equal parcels to be distributed between the claimant and the defendants.
- b) After the said land is surveyed and partitioned into three equal parcels and approved by the Director of Surveys, the western parcel is to be transferred to the second defendant, the middle parcel is to be transferred to the claimant and the eastern parcel (including the lands occupied by Routie Beepat) is to be transferred to the first defendant.
- c) The costs of and associated with the survey and application and grant of permission from the Town and Country Planning division is to be borne equally by the parties.
- d) The first defendant is to produce the original duplicate Certificate of Title registered in Volume 1969 Folio 97 to attorney at law for the claimant upon request prior to the execution of the Memorandum of Partition.

- e) The requisite Memorandum of Partition which is to be vetted by the defendants' attorneys at law shall be prepared by attorney at law for the claimant.
 - f) The parties are to bear all costs associated with the preparation, and registration of the memorandum of partition equally.
 - g) The Memorandum of Partition is to be executed by all parties to this claim.
 - h) In default on the part of any party, the Registrar of the Supreme Court is to execute the Memorandum of Partition on behalf of that party.
- ii. The counterclaim is dismissed.
 - iii. The first defendant is to pay to the claimant the prescribed costs of the claim in the sum of \$14,000.00.
 - iv. The first defendant is to pay to the claimant the prescribed costs of the counterclaim in the sum of \$14,000.00

Dated this 19th day of July, 2017.

Ricky Rahim
Judge