REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2018-02776

HALIMA JACOB

Claimant

AND

LINCOLN WILFRED JACOB

(Substituted for Rookmin Rampersad pursuant to the Order of

the Honourable Mr. Justice Rahim dated the 18th day of October, 2019)

LINCOLN WILFRED JACOB

Defendants

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: November 4, 2020.

Appearances:

Claimant: Mr. K. Neebar

Defendant: Mr. D. Sankersingh.

DECISION ON APPLICATION

1. The claimant has, by application of June 30, 2020, applied for judgment in default of defence against the first defendant and an order that the defence of the second defendant be struck out.

2. The claimant is the sister in law of the second defendant. The first defendant (Rookmin) who passed away on September 3, 2018 was the mother-in-law of the claimant, the claimant having been married to her son Ramesh who is now deceased. The second defendant is the brother of Ramesh. The substantive matter concerns the ownership of a dwelling house (the subject property) situate at No. 4 Carat Hill Trace, Barrackpore situate upon state lands in respect of which the claimant has initiated proceedings and seeks a declaration that she owns a one half interest in the land and is the absolute owner of the dwelling house.

The Claim

3. The claimant's case is that at the time she married Ramesh he was living with his mother Rookmin in the house on the subject property. She averred that her husband owned the land jointly with Rookmin. She moved in with Ramesh and his mother and lived there for two years after which she and Ramesh moved to a house across the road from the subject property. There was another son named Naresh who also lived on the subject property but he moved out after the claimant and Ramesh did. The second defendant moved to Canada even before the clamant married Ramesh. The claimant and Ramesh continued to solely look after Rookmin and pay her medical and other expenses after they moved out. The house eventually became dilapidated and Rookmin promised the claimant and Ramesh that if they were to build over the

house, she would leave her share in the land to the Claimant's son Justin. The first defendant was at the time the holder of a Certificate of Comfort, for the said parcel of land.[1]

4. In reliance on the promise, the claimant with the consent of her husband expended the sum of $430,759.65 to construct a flat concrete house on the parcel of land. She then furnished the house and Rookmin and Justin moved in. Justin subsequently left for Canada to study. Ramesh was shot and killed on January 28, 2017. Rookmin became uncontrollable and was placed into a home for a short period but was returned to live at the subject property shortly thereafter. The second defendant returned in May 2017 and moved into the subject property with Rookmin. The claimant avers that the second defendant acknowledged that the house belonged to the claimant in the presence of five persons and offered to buy it after having it valued.

5. Thereafter, the second defendant made claim to ownership of the house and began works thereon. In answer in reply to a letter of the attorney for the claimant, his attorney indicated that he, the second defendant was in possession of a chattel deed in his favour executed by Rookmin.

6. It is the claimant's case that a one-half share and interest in the disputed lands situate at No. 4 Carat Hill Trace forms part of her husband's estate.

Defence

7. The second defendant denied that the claimant looked after or provided financial assistance to the first defendant and avers that the

[1] See exhibit "A" attached to the Defence namely a Certificate of Comfort in the name of Rookmin Rampersad, Certificate No. 7525 dated October 14, 2013

claimant and her husband were given notice to leave. Most of the other matters are denied.

8. According to the second defendant, he is the absolute owner of the dwelling house. He produced two Chattel Deeds to support his legal interest in the dwelling house,[2] one in which he is made joint tenant with Rookmin and one three months later in which Rookmin purports to transfer her entire share to him.

DEFAULT JUDGMENT

9. Relevant timeline of events

   i. The claimant instituted a Claim against the defendants on July 31, 2018;

   ii. No appearance was filed on behalf of the first defendant but one was entered by the second defendant on August 30, 2018.

   iii. A Defence was also filed on August 30, 2018 by the second defendant;

   iv. By court order dated October 18, 2019 the second defendant was appointed to represent the estate of the first defendant;

   v. An Amended Claim and Statement of Case was filed on November 19, 2019;

   vi. The Amended Claim and Statement of Case was served on the second defendant on November 21, 2019.

[2] See exhibits "B"and "C" attached to the Defence namely a Deed of Gift dated July 27, 2017 and registered as DE201702039822 and a Deed of Gift dated September 23, 2017 and registered as DE201702192145

vii. An affidavit in opposition in relation to the application for default judgment was filed on July 27, 2020 but no defence has been filed by the first defendant to the amended Claim Form and Statement of Case.

LAW AND ANALYSIS

10. Part 10.2 (1) of the Civil Proceedings Rules, 1998, as amended ("the CPR") reads:

10.2 (1) A defendant who wishes to defend all or part of a claim must file a defence

10.3 (1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of case.

11. The defendant has relied on Part 19. (6) of the CPR which reads:

(6) Where the court makes an order for the removal, addition or substitution of a party, it must consider whether to give consequential directions about—

(a) filing and serving the claim form and any statements of case on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings.

12. In essence, the defendants argued that it was the court's intention that the Defence of the second defendant would apply to the first defendant especially since it is the same cause of action. Further, that the court gave no directions in relation to the service of the Amended Claim and Statement of Case after its order to substitute the second

defendant for the first defendant. These arguments were oddly enough set out in a documents filed on July 27, 2020 which purports to be a statutory declaration sworn to by the second defendant with the signature of his lawyer appended thereto.

13. On July 24, 2020 the defendants filed a document that is itself unknown to the CPR and which is oddly worded as follows:

> *"Take notice that I Denish Sankersingh Attorney at Law for the defendants hereby request the adoption of the Second Named Defendant's Defence for the First Named Defendant."*

14. There are several issues with this document. Firstly, it purports to be an application but it does not so qualify under Part 11 CPR. Secondly, it appears to be an application being made by the lawyer and not the parties in the case. Thirdly, in substance it is not an application but a notice that purports to adopt the defence of the second defendant for the first defendant. Fourthly, there exists no rule under the CPR that entitles a party to adopt a Defence of another after the time limited for filing a defence has expired. Fifthly there is similarly no such rule that permits this some two years after the time limited for the filing of the defence or even eight months after service of the amended documents as is the case here. Sixthly, the CPR dictates that each party must file a Defence. This of course can be done in one document but it must be made clear that the defence is being filed on behalf of all parties.

15. Further, such an action goes wholly against the provisions of the CPR and seeks to bypass the requirement that a defence be filed within 28 days of service of the statement of case. Should this be permitted, it follows that the timelines set out for the filing of a defence in the CPR would be rendered absolutely nugatory in that a party would simply be able to adopt a defence of another at anytime during the proceedings.

This is wholly inappropriate, is a patent error and abuse of the court's proceedings. The notice will therefore be struck out.

16. Additionally, a substitution of a defendant is not the equivalent of the addition of a new party. At the beginning of these proceedings (the original claim) the first defendant was alive. She died on September 3, 2018, some one month and three days after the filing of the original claim. It is clear that no Defence had been filed on behalf of Rookmin and no extension of time to file same was sought by her before her death.

17. However, the court has found that there exists no proof that the Claim Form and Statement of Case were served on Rookmin before her death. Proof of service is a fundamental requirement for the grant of any order of default judgment.

18. After Rookmin's death, by virtue of **Part 21.7 (4) CPR**, the claimant could take no step in the claim until someone was substituted for the deceased by the court.

19. This court made the substitution order on October 18, 2019 and the proceedings were served on November 21, 2019, on the attorneys for the second defendant in his personal capacity and in his capacity as the representative of the first defendant by agreement (see paragraph 3 of the affidavit of Seeta Maraj of June 30, 2020) but that notwithstanding no application was made by him to extend the time for the filing of the defence of the first defendant. It is this service that is the one that matters in relation to the first defendant there having been no service on her during her lifetime.

20. Although no order was made for such an amendment, it coming after the first CMC at which this court gave directions on April 12, 2019, a

perusal of the amendments demonstrate that they were in fact formal amendments to reflect the substitution of the second defendant to represent the estate of Rookmin for the purpose of the claim only. There has been no substantive amendment. The court however considers the absence of such permission in light of the contents of the documents to be one which is curable as the amendments were merely procedural formalities. Rule **26.8 CPR** reads:

> 26.8 (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party.

21. The court will therefore make the necessary order in relation to the amendments.

22. It follows however, that upon service of the amended claim and statement of case on the second defendant on behalf of the first defendant in November 21, 2020 the second defendant would have had an opportunity to file a defence to the amended statement of case within 28 days of service but he failed so to do. Further, he also failed to make an application for extension of time for so doing. It must be noted at this stage that the second defendant has not denied that there was an agreement to serve his lawyers on his behalf as testified to in the Maraj affidavit and so the court accepts that there was good and proper service as testified to by Maraj.

23. In all of the circumstances therefore the claimant would be ordinarily entitled to an order of judgment in default of defence however, in the circumstances of this claim, whether same is ordered must be a matter of discretion having regard to the nature of the claim. The claim against the first defendant is for a declaration that the claimant's husband held half share in the lands upon his death and so the half share forms part of his estate and a declaration that the claimant is the owner of the house. Should the court grant judgment against the first defendant on both issues, the effect would be a determination of the issue of ownership of the house against the second defendant who has in fact filed a defence. This would of course be unfair and simply unjust unless the claimant's application for the defence of the second defendant is successful. The determination of the next limb of the application will therefore be instructive as to how the court proceeds with this limb.

SUMMARY JUDGMENT

24. The claimant has submitted that:

    i. The Defence of the second defendant has no realistic prospect of success; and

    ii. The defence is a bare denial and has not put forward a different version of events or reasons for not admitting the allegations.

25. Further, the claimant averred the circumstances under which she constructed the dwelling house[3] and there had been no response to this by the second defendant in his defence.

[3] See paras 4 to 7 of the Amended Statement of Claim.

26. On July 27, 2020 the second defendant filed an affidavit in opposition to the claimant's application for summary judgment. According to the second defendant the claim lacks merit. Further the second defendant says that the claimant has not asserted any equitable interest in the disputed property.

27. The second defendant deposed that it was he and his siblings who decided to renovate the dwelling house. He and the first defendant contributed financially to these renovations and the claimant's husband oversaw the works.

28. As such, the application for summary judgment is premature and an abuse of process.

29. The claimant objected to this evidence and submitted that the second defendant attempted to introduce facts in his affidavit that was not set out in his Defence.

LAW AND ANALYSIS

30. The burden of proof in an application for summary judgment rest upon the claimant.

31. The legal test for entering summary judgment is set out in Part 15 of the CPR.

15.2 The court may give summary judgment on the whole or part of a claim or on a particular issue 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, part of claim or issue; or

(b) *on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue*.

32. In ***APUA Funding Limited & another v RBTT Trust Limited,***[4] Mendonça J.A. cited with approval the dicta of Lewinson J. at paragraph 4 in the Federal Republic of Nigeria v Santolina Investment Corporation and Ors. [2007] EWHC 437. Mendonça J.A. stated the following principles to be applied in deciding whether or not to give summary judgment:

(a) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** *[2001] 1 ALLER 91, [2000] PIQR p. 51;*

(b) A "realistic" defence is one that carries some degree of conviction. This means that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** *[2003] EWCA Civ. 472 at 8.*

(c) In reaching its conclusion the court must not conduct a "mini trial": ***Swain v Hillman****;*

(d) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED&F Man Liquid Products v Patel*** *at 10;*

(e) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal***

[4] Civil Appeal No. 94 of 2010

Brompton Hospital NHS Trust v Hammond (No. 5) *[2001] EWCA civ. 550 [2001] Lloyd's Rep PN 526;*

(f) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd. v Bolton Pharmaceuticals Pharmaceutical Co. 100 Ltd.*** *[2007] FSR 63;*

(g) Although there is no longer an absolute bar on obtaining summary judgement when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of the finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case look strong on the papers: ***Wrexham Association Football Club Ltd. v Crucialmove Ltd.*** *[2006] EWCA Civ. 237 at 57."*

33. The above case also sets out that the Defence must be properly pleaded.

34. In ***M.I.5 Investigations Limited v Centurion Protective Agency Limited***[5] Mendonça J.A. noted at paragraph 7 that:

[5] C.A.CIV.244/2008

Where there is a denial it cannot be a bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events … he must state his own version.

35. Part 10.5 (3) and (4) of the CPR sets out the information which the defendant must include in its Defence. It reads:

10.5 (3) In his defence the defendant must say-
(a) Which (if any) allegations in the claim form or Statement of Case he admits;
(b) Which (if any) he denies; and
(c) Which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or Statement of Case-
(a) he must state his reasons for so doing; and
(b) if he intends to prove a different version of events from that given by the claimant he must state his own version.

36. In ***Matias Bienenwald vs Jose Marina***, CV2015-00984, Kokaram J (as he then) provides guidance at paragraph 2 on how the court exercise its discretion in deciding whether or not to grant summary judgment.

….In a summary judgment application, the Court is now engaged in a thorough examination of the facts as presented in a claim where factual discrepancies may not need the expense and resources of a trial to resolve. To determine whether the Claimant's prospect of success is real, the Court must be satisfied that the claim advances grounds which are more than arguable and the chances of

succeeding on the propositions advanced are not speculative nor fanciful but deserves fuller investigation.

THE PLEADED DEFENCE OF THE SECOND DEFENDANT

The House

37. In relation to the claim for the house, the claimant has set out the agreement made with Rookmin and she itemized the sums she paid to construct the house. She however annexed no receipts in support of her claim in that regard. These matters were pleaded at paragraphs 9, 10 and 11 of the amended statement of case. The defendant in his defence, by paragraphs 11, 12 and 13 thereof, simply avers that he is not able to admit or deny the said paragraphs but does not put the claimant to strict proof of them. This falls squarely into the category defined by Mendonca JA in ***M.I.5*** above.

38. Additionally, as a matter of evidence the defendant has likewise failed to set out any facts to the contrary of that of the claimant that she in fact built the house with her own funds. What he has attempted to do is to introduce matters in his affidavit in opposition that he has not pleaded. In that affidavit he deposed that his mother was the owner of the house and she used her pension money to start the renovations. He also deposed that he contributed in the sums of $8,000.00 and $5,000.00 Canadian dollars.

39. The court may be assisted by consideration of the evidence that is likely to be led at trial. In this case both parties have filed their respective lists of documents. The claimant has disclosed many receipts for the funds she allegedly expended from hardwares, furniture stores, plumbing stores and others in the name of her husband's business Raj's Wrecking and in her own name for the months of May, June, July, August, September, October 2016 and many in 2017 along with quotations and

receipts for labour costs. The defendant has in his list provided one money transfer to the claimant on September 15, 2015 in the sum of $5,000 Canadian, the purpose of which is not stated on the transfer. This of course does not form part of his pleading but more than that, it is inconsistent with what he has deposed in his affidavit namely that he sent the money to his brother Ramesh in the year 2016. He has provided no other document in support of his evidence on affidavit. The court finds that this evidence is the sum of the evidence likely to be led by both parties on the issue of money spent to build the house.

40. It follows and it is abundantly clear to the court that the second defendant has simply not provided any defence whatsoever to that limb of the claim short of saying that his mother transferred to him in 2017. Even on the facts as pleaded, those transfers by deed of gift will not be able to defeat the claim of the claimant on the money spent in building the house in light of the arrangement she says was made with Rookmin which the second defendant has denied. Put another way, Rookmin could not have conveyed that which she did not own. As far as a realistic prospect of success on the defence is concerned therefore, in the absence of a case on the part of the second defendant that provides evidence that refutes the case of the claimant on construction of the house and the agreement made between Rookmin and she and her husband the court can see no such prospects.

41. Further, at paragraph 15 of the defence, the second defendant denied paragraph 12 of the amended statement of case. Paragraph 12 of the amended statement of case is an averment of the claimant that after the house was constructed she purchased all of the furniture and appliances and placed Rookmin and her son Justin therein to live. As set out above, the evidence likely to be led by the claimant in that regard includes the receipts from furniture stores for furniture.

42. Paragraph 15 of the defence is a bare denial which run afoul of the learning set out above. The second defendant has therefore failed to properly answer the averments and provide his version of events.

43. Finally, the claimant has attached to her amended statement of case, a statutory declaration declared on March 15, 2018 in which Rookmin purports to state that the second defendant is co-owner of the house and joint tenant of the land. The document was attached as part of a letter sent by attorney for the second defendant to the claimant's lawyer. The issue is dealt with at paragraph 15 of the statement of case. The claimant avers that the statutory declaration makes a false claim.

44. Two matters are of note here. Firstly, the second defendant has not pleaded this document or sought to rely on it as part of his case. Secondly, the second defendant has not denied the contents of paragraph 15 of the amended statement of claim and so is deemed to have accepted the contents of the paragraph which includes the averment that contents of the statutory declaration are false.

<u>The land</u>

45. The claimant prays for a declaration of title to land. She predicates her claim on the fact of possession and a letter of October 11, 2016 from the Ministry of Agriculture Land Management Division signed by an Assistant Inspector of State Lands in which it is certified that Rookmin have been the joint occupants of the one lot of land owned by the state for residential purposes for over thirty years.

46. At paragraph of 19 of his defence, the second defendant sets out that he in turn relies on Certificate of Comfort of October 14, 2013 in the name of Rookmin and rejects the terms of the above letter. He however, admits in his pleading that such a certificate does not vest

any property rights to anyone including any of the parties. The second defendant has not however pleaded any basis for not accepting the letter of October 11, 2016. As a matter of pure inference, the certificate of comfort is dated before the rebuilding of the house began and was completed so that there appears to be a reasonable explanation for the terms of the October 11, letter, the Ramesh having by then acquired an interest in the property. The second defendant has also failed to answer this issue and the evidence that will likely come from him in this regard, being the certificate of comfort does not realistically raise a defence or any part of a defence to the claim for the land.

47. The State Lands (Regularisation of Tenure) Act, No. 25 of 1998, in any event sets out that a claim under a Certificate of Comfort applies only to the State. Although framed in terms of title, the court understands the claim to be one of the right to occupation of the land and not title as it is clear even on the case for the claimant that the land belongs to the state. The highest that can therefore be awarded is the right to occupy and not an interest in title. The evidence from the state entity is that Rookmin and Ramesh have been in possession for the land and it appears that the house is a fixture on the land.[6]

48. Finally, once again in odd and unconventional manner, the defence contains a claim for a declaration that the second defendant is the absolute owner of the house. The defence as pleaded does not set out a basis upon which this claim is based. There are specific requirements for the form of counterclaim as set out in the CPR. The pleading of the purported counterclaim is therefore also grossly deficient.

[6] See ***Mitchell v Cowie*** 3 (1964) 7 WIR 118 at 122 that provides the test to determine whether or not a structure is a chattel house.

49. The court therefore finds that the claimant has demonstrated that the second defendant does not have a defence with a realistic prospect of success on either issue. It follows that this is a fit case to exercise the discretion to likewise grant default judgment on the claim against the first defendant.

DISPOSITION

50. The order of the court is therefore as follows:

    a. Permission is granted to the claimant to file and serve an amended claim form and statement of case to include the substituted party as a defendant in place of the deceased Rookmin Rampersad only and the amended claim form and statement of claim filed on November 19, 2019 shall stand.

    b. There shall be judgment for the claimant against the first defendant in default of defence in manner appearing at paragraphs d, e, and h hereof.

    c. There shall be summary judgment on the entire claim for the claimant against the second defendant in the manner appearing at paragraph d, e, f, g and i hereof the second defendant having no realistic prospect of success on the defence.

    d. It is declared that the claimant is the absolute owner of All and Singular the dwelling house situate on one lot of land described as No. 4 Carat Hill Trace, Barrackpore and is entitled to remain in occupation of the land upon which it stands subject at all times to all rights of the State in the said parcel of land.

e. The defendants are restrained whether by themselves or through their servants and/or agents howsoever from carrying out and/or executing any renovations, repairs or works of any kind on the said dwelling house and from selling or attempting to dispose of same.

f. The second defendant shall pay to the claimant 45% of the prescribed costs up to the stage of the defence on the basis of the value of the claim being one for $50,000.00.

g. The second defendant shall pay to the claimant the costs of the application for summary judgment to be assessed by a Registrar in default of agreement.

h. The first defendant is to pay to the claimant the fixed costs of the application for default judgment to be quantified by a Registrar.

i. To the extent that the defence of the second defendant may contain a counterclaim, it is dismissed.

Ricky N. Rahim

Judge.