

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2019-00068**

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|---|--------------------------|
| <b>BETWEEN</b>  |                          |
| <b>SHERIDAN ABRAHAM</b>                                     | <b>First Claimant</b>    |
| <b>AND</b>  |                          |
| <b>HAZEL ABRAHAM</b>  | <b>Second Claimant</b>   |
| <b>AND</b>  |                          |
| <b>KENRICK TITUS KENNY-ARTHUR BURKE</b>                     | <b>First Defendant</b>   |
| <b>AND</b>  |                          |
| <b>SHANTA YINKHA BURKE</b>                                  | <b>Second Defendant</b>  |
| <b>AND</b>  |                          |
| <b>TRINIDAD AND TOBAGO MORTGAGE FINANCE COMPANY LIMITED</b> | <b>Third Defendant</b>   |
| <b>AND</b>  |                          |
| <b>ROWLE JORDAN</b>   | <b>Fourth Defendant</b>  |
| <b>AND</b>  |                          |
| <b>MARK LYLE</b>  | <b>Fifth Defendant</b>   |
| <b>AND</b>  |                          |
| <b>JENNIFER LYLE</b>  | <b>Sixth Defendant</b>   |
| <b>AND</b>  |                          |
| <b>ANDY PERUZAR</b>   | <b>Seventh Defendant</b> |

**Before the Honourable Mr Justice Frank Seepersad**

Date: September 23, 2020.

Appearances:

1. Mr Frank Peterson, Attorney-at-law for the Claimants.
2. Mr Christopher George instructed by Ms Anuradha S. Dean, Attorneys-at-law for the First and Second Defendant.
3. Ms Tamara Toolsie and Ms Jewel-Ann J. Troja, Attorneys-at-law for the Third Defendant.
4. Mr Gerard Gray instructed by Ms Mahalia George Attorneys-at-law for the Fourth, Fifth and Sixth Defendant.
5. No appearance for the Seventh Defendant.

## ORAL DECISION REDUCED INTO WRITING:

### Introduction:

1. Before the Court for its determination is the Claimants' Claim filed on January 9, 2019 by virtue of which the following declaratory reliefs were sought:
  - a. As against the First and Second Defendants: A declaration that the deed of conveyance dated 15 July 2015 registered as DE201501914003D001 made between Rowle Jordan, Mark Lyle and Jennifer Lyle and Kenrick Titus Kenny-Arthur Burke also called Kenrick Burke and Shanta Yinkha Burke is null void and of no effect and it be set aside.
  - b. As against the Third Defendant: A declaration that the deed of mortgage dated 15 July 2015 registered as DE201501945693D001 made between Kenrick Titus Kenny-Arthur Burke also called Kenrick Burke and Shanta Yinkha Burke and the Trinidad and Tobago Mortgage Finance Company Limited is null void and of no effect and it be set aside.
  - c. As against the Fourth, Fifth and Sixth Defendants: A declaration that the deed of conveyance dated 25 October 2013 registered as DE201402338386D001 made between Andy Peruzar and Rowle Jordan, Mark Lyle and Jennifer Lyle is null void and of no effect and it be set aside.
  - d. As against the Seventh Defendant: A declaration that the deed of conveyance dated 15 May 2013 registered as DE201302326322D001 made between the Claimants Sheridan Abraham and Hazel Abraham and Andy Peruzar is a forgery, and is null void and of no effect and it be set aside.
  - e. An order that the Claimants are the legal and beneficial owners of property situate at No. 9 Bushe Street also known as No. 9 Bushe Street, Petit Bourg, San Juan by virtue of deed of gift registered as DE201102542926D001 and are entitled to possession of same.
  - f. Costs.
  - g. Damages for trespass.

h. Further and/or other relief as the Court seems just.

**Factual background:**

2. The Claimants pleaded in their Statement of Case that they reside both in the United States of America as well as in this jurisdiction and became the fee simple owners of a parcel of land situate at No. 9 Bushe Street, Petit Bourg, San Juan by virtue of a deed of gift dated 17 January 2011 and registered as DE201102542926D001.
3. By deed of conveyance dated 15 May 2013 the parcel of land was conveyed from the Claimants to the Seventh Defendant for consideration in the amount of \$100,000.00 (hereinafter referred to as “the first deed”). The Claimants pleaded in their Statement of Case at paragraph 4 that this deed was a forgery as neither of them signed the deed nor did they authorize anyone to sign on their behalf.
4. By deed of conveyance dated 25 October 2013 and registered as DE201402338386D001 made between the Seventh Defendant as vendor and the Fourth, Fifth and Sixth Defendant as purchasers, the said parcel of land was conveyed to the Fourth, Fifth and Sixth Defendant in consideration of the selling price in the sum of \$360,000.00.
5. By deed of conveyance dated 15 July 2015 and registered as DE201501914003D001 made between the Fourth, Fifth and Sixth Defendants as vendors and the First and Second Defendant as purchasers, the said parcel of land was conveyed to the First and Second Defendant in consideration of the sum of \$575,000.00.
6. The Claimants through their attorney-at-law wrote to all the defendants between April and May of 2018 regarding the said parcel of land and informed them of the alleged forgery in relation to the first deed.
7. The Claimants pleaded in their Statement of Case that they sought the expert opinion of forensic examiner Mr Glenn Parmassar who conducted a forensic analysis for the signatures which appears on the first deed dated 15 May 2013.

8. The Seventh Defendant did not enter an appearance nor did he file a defence. The Third Defendant indicated that there were no ascertainable title issues and the property was duly mortgaged. The other defendants put the Claimants to strict proof of their assertion of fraud and they outlined that they were bona fide purchasers for value without notice.

**Procedural history:**

9. After directions were given by the Court on 13 May 2019 for the parties to make standard disclosure the Claimants filed their list and bundle of documents on 13 June 2019 and 27 June 2019 respectively.
10. On 22 July 2019 the Court directed that the parties had to file and exchange their respective witness statements. In compliance with this order, the Claimants filed and exchanged their witness statements on 30 October 2019. At paragraph 3 of their respective witness statements, both Claimants outlined that at the time the first deed was executed on 15 May 2013, they were out of the jurisdiction and were in the United States of America and they annexed photocopies of their respective passports. Their pleadings never outlined that, at the time of the execution of the first deed, they were not in the jurisdiction and the pages of their passports were never disclosed. An expert report of Glen Parmassar was also annexed to the First Claimant's witness statement but no permission to rely on expert evidence was sought pursuant to Part 33 of the Civil Proceedings Rules 1998 (as amended).
11. On the 17 February 2020 the Third, Fourth, Fifth and Sixth Defendants filed evidential objections and indicated, *inter alia*, that they were objecting to the admissibility of the expert report and the passport pages.
12. The trial was fixed for 16 March 2020 and as a result of the Covid pandemic, was rescheduled to 13 July 2020 and then the trial was fixed for 15 September 2020.

13. At the trial the Court expressed the view that it would not be assisted by the evidence of the first six defendants as the Statement of Case did not allege any wrongdoing on their part and all parties concurred. In addition, the Court felt that the Claimants were not automatically entitled to the relief sought as against the absent Seventh Defendant and ruled that they had to establish fraud and discharge the requisite burden of proof.
14. The Court thereafter upheld the evidential objections in relation to the copies of the pages from the Claimants' passports which were annexed to their witness statements as these documents were never disclosed and there was no pleaded assertion that they were out of the jurisdiction when the first deed was executed. The Court also found that the report of Mr Parmassar had to be excised as no application to rely on expert evidence was made and the said document infringed the rules of evidence. The Court also noted that no notice to rely on hearsay evidence was filed by the Claimants and no application was made at the trial for an adjournment and for permission to rely on expert evidence.
15. After the Claimants were cross examined, the Court enquired of the parties whether it ought to exercise its discretion under Part 40.6(1) of the CPR so as to require the Chief Immigration Officer and/or an authorized official of the Immigration Department to attend and/or produce official records of the Claimants' travel history.

**The Evidence:**

16. The Claimants relied on their own witness statements and they were cross-examined. With the consent of all the parties the filed witness statements on behalf of the defendants were tendered into evidence but the defendants were not cross examined.

**Ruling on the Court's discretion under Part 40.6(1) CPR:**

17. Part 40.6(1) of the CPR provides as follows:

*Powers of the judge to summon witness*

40.6 (1) The judge may-

- a) issue a witness summons requiring a party or other person to attend the trial;
- b) require a party to produce documents or things at the trial; and
- c) question any party or witness at the trial.

18. The Court noted that Part 40.6(1) of the CPR is a unique provision which permits a Judge at the Judge's own initiative and without any application to call on a witness to solicit evidence at a trial. This provision enables the Court to embark upon a process which amounts to a clear and distinct departure from the general rules which govern witness summonses pursuant to Part 34 of the CPR and from the traditional norms which dictate that the parties solely control the adduced evidence.

19. The Court had regard to the judgment of Jamadar JA (as he then was) in the Court of Appeal decision **Civil Appeal No. P-252 of 2015 Her Worship Marcia Ayers-Caesar and another v BS** and adopted the view that the discretion pursuant to Part 40.6(1) has to be viewed within the context of the general provisions of the CPR and with regard to the overriding objective as recorded in the CPR.

20. When one considers the provisions of the CPR in its entirety, it is evident that the CPR did not intend to completely revolutionize the approach to civil litigation. There still exists a system of adversarial litigation which empowers the parties to the litigation to discharge their respective responsibilities in pursuit of or in defence of the reliefs which have been sought. It is not the role of the Court to prosecute or defend a claim and the discretion under Part 40.6 has to be exercised in circumstances where there is a legitimate pleaded issue before the Court and the Court can benefit from the evidence of a party who has not been called by the litigants.

21. In determining whether or not the Chief Immigration Officer should be summoned to produce the travel records of the First and Second Claimant, the Court remained acutely

aware that its role and function is not to assist the parties in the litigation but to ensure that justice is served and to do so it must also ensure that the procedural processes are properly adhered to. Where there are legitimate areas of concern within the confines of the pleaded case which require clarification and the judge is of the view that a particular witness may provide that clarification, then, in those circumstances the power vested in the Court, pursuant to Part 40.6 (1), can be exercised.

22. In determining whether it ought to exercise its discretion under Part 40.6(1) of the CPR, the Court must confine itself to the parameters of the case that is before it, as framed by the parties. Consequently, the Court carefully considered the pleaded case as outlined by the Claimants both in their Fixed Date Claim Form and in the Statement of Case.

23. When the Court considered the Fixed Date Claim Form and the Statement of Case it is patently obvious that the Claimants never asserted that they were out of the jurisdiction at the time the first deed was executed. The pleading as it relates to the execution of the deed was simply confined to the assertions that it was not their signature.

24. In the Court's view, if the Claimants intended that their claim as to fraud was premised upon their absence from the jurisdiction at the time the first deed was executed, that circumstance had to be pleaded. The Particulars of Fraud and the body of the Statement of Case was void of any such assertion.

25. While this Court holds the view that allegations of fraud, particularly as it relates to real property transactions, is a matter of an undeniable public concern, the Court cannot arbitrarily dispense with the need for procedural fairness. At the end of the day our system of justice is a regulated one and the Court is called upon to determine the issues as outlined by the parties.

26. Had the Claimants structured their case differently, if there was some pleaded reference to the fact that they were allegedly out of the jurisdiction at the material time, the Court would have had absolutely no hesitation to exercise its discretion pursuant to Part 40.6(1)

to call upon the Chief Immigration Officer to produce their travel history records. However, given the way in which the Claimants structured their case and having noted their absolute failure to outline in any aspect of their pleadings that they were in fact outside the jurisdiction at the material time, a factual position which they would have known, the case must be resolved in accordance within the pleaded parameters and there can arise no justification for the exercise of the Court's discretion under Part 40.6(1) of the CPR.

27. In the circumstances having considered the pleaded case, having noted that a) the Claimants had had the benefit of legal representation prior to the institution of the claim and b) there was a failure to disclose in any of their lists of documents any information in relation to their travel history and alleged absence from the jurisdiction, the filed evidence before the Court had to stand as the evidence upon which the Court had to determine the issue as to whether the Claimants have established fraud.

**Resolution of the substantive matter:**

28. This case rests upon the validity of the first deed between the Claimants and the Seventh Defendant and the Court had to consider whether the Claimants discharged, on the adduced evidence, the burden of proof which rests upon them so as to lead the Court to conclude on a balance of probabilities that the first deed was fraudulently executed and ought to be set aside.

29. The Particulars of Fraud were itemized in the Claimants' Statement of Case at paragraph 4(a) to (g) and the Claimants pleaded that the first deed was not executed by either of them. They testified that neither of them attended the office of the lawyer who allegedly prepared the deed and they stated that they were never in receipt of the sum expressed as the consideration paid for the said transfer namely the sum of \$100,000.00.



30. As referenced earlier, prior to the receipt of the Claimants' evidence, the Court determined the evidential objections which were filed by the respective parties, ruled in favour of the Defendants and excised the passport pages which were annexed to the respective witness statements of the Claimants. These photocopies of passport pages were annexed in support of their assertion that they were out of the jurisdiction when the first deed was executed. These pages were never disclosed and were not referenced in the Claimants' list of documents nor was there any pleaded reference to their alleged absence from the jurisdiction at the time the first deed was executed.
31. Part 28.13 of the CPR imposes a sanction for a failure to disclose documents and no disclosed document can be relied upon by the parties at the trial.
32. The Court also excised from the witness statement a forensic report which was purportedly prepared by a forensic examiner, Mr Glenn Parmassar. While there was pleaded reference to the generation of this report and an assertion that the report suggested that the signatures on the first deed on the 15 May 2013 may not have been the signatures of the Claimants, the defendants put the Claimants to strict proof of the assertion as to fraud. The Claimants made no application pursuant to Part 33 of the CPR to rely on expert evidence, no hearsay notice was filed nor was any application made to have Mr Parmassar attend the trial. Accordingly, the information contained in the exhibit was not properly before the Court.
33. The Court is not bound to accept the evidence of an expert but is entitled to evaluate same and if there is no rational or reasoned position why the opinion ought not to be accepted, then the Court should consider the opinions expressed in same.
34. The manner in which the Claimants' claim proceeded is, at best, questionable. There was a failure to follow the procedure outlined under the CPR and a failure to properly adduce forensic evidence as to the signatures in the first deed. This failure was fundamental and fatal.

35. These procedural failings and deficient pleadings were unfortunate as both Claimants instilled in the Court an unshakeable feeling that they were forthright witnesses. They did not appear to be evasive and the Court generally felt that their testimony was characterized by an ascertainable degree of candour. Their testimony however had to be evaluated against their pleaded case and the test of relevance had to be applied.

36. The fundamental question was whether or not the first deed ought to be set aside in accordance with the outlined particulars of fraud and the Court reminded itself that the burden of proof rested upon the Claimants' shoulders.

37. The Court considered the dicta of Rajnauth-Lee J (as she then was) in **HCA 2387 of 2000 Ian Sieunarine and Doc's Engineering Works (1992) Limited** wherein it was stated, *inter alia*, that a court may be entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue in an action. The application of the principles enunciated in *Doc's Engineering* (supra) was applied by the Court of Appeal in **CA-P No. 326 of 2015 Jude Moses v Selwyn Moses and Clive Gill v Jude Moses**. In that case Jones JA at paragraph 30 stated:

30. "...Given his acceptance of the reasons given for the Appellant failing to give evidence the Judge ought not to have drawn this adverse inference against her. While this was a conclusion to which the Judge could have ultimately arrived he ought to only have done so after examining all of the relevant evidence..."

38. However, the Court, in this case, was not inclined to make adverse inferences against the Claimants. The Court felt that the deficiencies were probably attributable to poor case preparation as opposed to an intention to deceive.

39. The Court also considered the judgment and approach adopted by the Court of Appeal in **Civ App No. 262 of 2010 Savitre Lochan v Keith Farfan and Republic Finance and Merchant Bank Limited** and noted the caution given by Mendonça JA when he indicated that more than just bare assertions should be placed before the Court if the Court is asked to exercise its jurisdiction and to issue a declaration in relation to fraud. At page 42 of the transcript Mendonça JA stated:

“The point is, that is one has to look at the evidence critically and anxiously in a case where an allegation of forgery is made, which is inherently improbable, people don’t behave that way, is that one would expect a bit more evidence, more cogency in the evidence.”

40. In applying the principles from *Jude Moses* (supra), in the absence of direct evidence, the Court must consider all of the evidence that is capable to support the Claimants’ claim and then determine the inference to be drawn, if any, from that evidence.

41. In considering the admissible evidence which was before the Court as a whole, the Court noted that no attempt was made to get Mr Yaseen Ali who prepared the first deed to testify before the Court, nor was any attempt made to have the witness who signed the affidavit of due execution examined nor was any admissible expert evidence adduced. All the Court had before it was the Claimants’ “say so” and although there were many available avenues which could have been explored so as to demonstrate on a balance of probabilities that the first deed was fraudulently executed those avenues were not explored. Consequently, the Claimants did not put before the Court the required evidence so as to discharge the requisite burden of proof for the Court to conclude on a balance of probabilities that the deed of conveyance dated 15 May 2013 was fraudulently executed. The preparatory shortcomings in this case were pellucid and unfortunate.

42. The Court found however that there were aspects of this claim that appeared odd and there were certain issues which incited a measure of disquiet in the Court's mind. In

particular the Court noted that the first deed purported to be a conveyance for which the consideration of \$100,000.00 was allegedly paid on 15 May 2013. The second conveyance which was between the Seventh Named Defendant and Rowle Jordan and Mark and Jennifer Lyle reflected that on the 25 October 2013, five months after the first deed, the property was sold for \$360,000.00. The increase in the value of the property seems to be highly unusual. The Court also noted with concern that the Seventh Defendant elected not to engage in the instant litigation. These concerns however were not sufficient to satisfy the Court that fraud was established.

43. Fraudulent land transactions occur with alarming regularity in this jurisdiction. This unacceptable circumstance has attracted the attention of the Executive and the Court notes that The Honourable Attorney General has pointed to the deficiencies that exist with regard to the registration of common law lands and has actively engaged welcomed reform and mitigation initiatives.
44. There is an undeniable public interest in undoing fraudulent transactions and in ensuring that the Land Registry only reflects lawful and valid transactions. The Court must however operate on the basis that its role is not inquisitorial but its mandate is confined to the obligation to do justice as between the parties to the litigation having due regard to the manner in which their respective cases have been framed and pursued. The Court notwithstanding its concerns cannot assume some wider inquisitorial function in the search of the truth nor should it adopt an overtly speculative stance.
45. The Court noted that both Claimants testified that a report was made to the Fraud Squad. The Court is concerned based on their testimony that seemingly very little action has been engaged by the police. This matter though poorly pursued from a civil litigation perspective raises areas of significant concern and, in the Court's view, criminal investigations should be pursued by the Trinidad and Tobago Police Service.

46. This Court therefore directs the Registrar of the Supreme Court shall send to the Commissioner of Police and the Director of Public Prosecutions all of the documentation filed in this matter together with the transcript of evidence adduced before this Court and the judgment of the Court so that consideration could be had to possible investigation into the circumstances surrounding the execution of the deed of conveyance dated 15 May 2013.

47. For the reasons outlined, this Court is, though with regret, constrained to hold, based on the case as pleaded and the evidence adduced, that, the Claimants have not discharged the burden of proof.

48. In the circumstances, the Court hereby dismisses the Claimants' claim.

49. Having regard to the overriding objective and the disquiet in the Court's mind as outlined, the Court is prepared to depart from the usual cost order that cost follows the event and in the peculiar circumstances of this case, it is the order of this Court, that there shall be no orders as to costs.

.....  
**FRANK SEEPERSAD**  
**JUDGE**