

ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 2 of 2000

BETWEEN:

MARINA MACLEAN

Appellant

and

FATIMA RAEBURN

Respondent

Before:

The Honourable Mr. Justice Satrohan Singh
The Honourable Mr. Justice Albert Redhead
The Honourable Mr. Justice Albert N.J. Matthew

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. A. James and Mr. V. Thomas for the Appellant
Mr. C. Brown for Respondent

**2000: June 15;
July 24.**

JUDGMENT

- [1] **MATTHEW J.A.:** The background to this matter reveals a plethora of suits surrounding or affecting a portion of land at Herbert's Mill situated at Herbert's Estate and described in the Antigua Land Register as parcel 21 Block 613 1989 B in the Registration Section of Potter and Belmont containing approximately three (3) acres.
- [2] On April 3, 1986 the land was registered in the names of Raymond Raeburn and Fatima Raeburn as joint tenants. The present dispute as to the ownership of the land is between Marina Maclean, the Personal Representative, and at the time of his death, the common law wife of, Raymond Raeburn deceased and Fatima Raeburn, the former wife of Raymond Raeburn, deceased.
- [3] Raymond Raeburn who at one time described himself as being of Herbert's estate in the Parish of St. John in the Island of Antigua and

Fatima from The Philippines were married on January 26, 1983. Raymond was then 65 years old and Fatima was 33. In 1987 Fatima petitioned for divorce and sought ancillary relief. Raymond filed an answer. A *decree nisi* was pronounced on the answer on November 23, 1987 which was made absolute on January 7, 1988. On March 15, 1988 the Guildford County Court made an ancillary order dealing with properties in the names of the Parties. That Order was served on Fatima in Antigua on April 4, 1988. Raymond Raeburn subsequently died on August 12, 1999.

- [4] To put things in perspective and to clearly understand the issues between the Parties it will be necessary to mention briefly the various suits which I referred to earlier.
- [5] Suit 26 of 1997 was an Ex Parte Originating Summons between Raymond Raeburn as the Applicant and Fatima Raeburn as the Respondent. It was started on February 19, 1997. The Applicant by this action asked the Court, *inter alia*, for a declaration that he is the sole proprietor of the land in question in accordance with the Order of the Guildford County Court referred to above and also that the land register be accordingly rectified. On April 7, 1998 *Georges J* complied and declared Raymond Raeburn the sole proprietor and the learned Judge ordered that a new certificate be issued in the name of Raymond Raeburn as sole proprietor.
- [6] On June 8, 1999 an Ex Parte application was made on behalf of Fatima Raeburn to set aside the Order of April 7, 1998 on the grounds of non-disclosure and also since the Order was made on an ex parte application, it could be set aside on another ex parte application by the other side. On October 5, 1999, after the death of Raymond, *Georges J.* complied again and set aside his earlier Order of April 7, 1998 and ordered another rectification of the register so as to revert it to its former state showing

Raymond Raeburn and Fatima Raeburn as joint tenants of the land in question.

- [7] The **Rules of the Supreme Court**, in particular **Order 15** and **Rules 7, 9** and **15** as they relate to proceedings where a party to an action dies, were apparently overlooked. Learned Counsel for the Appellant submitted that the purported rectification of the land register in October 1999 after the death of the husband to show that he and the wife had the benefit of survivorship upon his death was nothing less than a fraud upon his estate. In my judgment, if it was not a fraud, it was at least certainly irregular.

- [8] On November 17, 1999, *Moe J.* made an Order making Marina Maclean a party to the action and that the action be carried on by her as Personal Representative of Raymond Raeburn deceased as Plaintiff.

- [9] On November 26, 1999 upon an Ex Parte application on behalf of Fatima Raeburn, *Moe J.* ordered that his earlier order made on November 17, 1999 be set aside, that the Respondent is entitled to possession of the property and that the proceedings in Suit 26 of 1997 be struck out on the grounds that they are *res judicata* and an abuse of the process of the Court.

- [10] It really amazes me how these orders, as regards property, are so readily made upon Ex Parte applications even after a claimant has died and has no representation. It appears that whoever applies obtains an order. So Fatima's entitlement was not decided on merits since Suit 26 of 1997 was struck out as being *res judicata*.

- [11] The next suit in the saga was No.6 of 1988 between Fatima Raeburn as Plaintiff and Raymond Raeburn as Defendant. This took the form of an originating summons under the **Married Woman's Property Act, Cap. 352**, section 19. It was filed on January 19, 1988. By her summons,

Fatima Raeburn sought a declaration that the property is held jointly by both of them and she asked for a severance of the joint tenancy. *Benjamin J.* on March 20, 1997 delivered a judgment to a preliminary issue raised by the Defendant, Raymond Raeburn. The learned Judge held that the Guildford County Court Order was no bar to the proceedings.

[12] On June 8, 1999 in Suit 26 of 1997 Richard Bruce Lai Choy of the Chambers of Messrs Lake and Kentish, on behalf of the Plaintiff swore to an affidavit that Suit No.6 of 1988 was dismissed on May 6, 1997 *“on the ground that the said date was a preemptive date and Fatima Raeburn Respondent/Plaintiff was not then present in Court and ready to proceed with the trial. In dismissing the matter the Honourable Mr. Justice Kenneth Benjamin did not consider the merits of the case.”*

[13] The next Suit is 7 of 1998 filed on January 8, 1998 again between Fatima Raeburn as Plaintiff and Raymond Raeburn as Defendant. This action commenced by Writ and sought the same relief as Suit No.6 of 1988, namely, a declaration that the property be held jointly by the Parties and an application for severance. After appearance, defence and reply were filed an order was made on a summons for directions on October 22, 1998. But then on November 10, 1999 the Plaintiff, Fatima Raeburn, discontinued the action.

[14] Suit 224 of 1999 was the last action filed coming after Suit 213 of 1999 which is the Suit from which the appeal to this Court lies and which I shall deal with below. In Suit 224 of 1999 Marina Maclean was the Applicant and Fatima Raeburn was the Respondent. This commenced by Originating Summons filed on December 21, 1999 and was with respect to the Reciprocal Enforcement of Judgments. It was supported by an affidavit with exhibits but there is no indication that it was served. Presumably it never got off the ground.

- [15] The final Suit to be looked at is Suit 213 of 1999 between Fatima Raeburn as Applicant and Marina Maclean as Respondents filed on or about December 6, 1999. It sought an order that Marina Maclean do forthwith quit, vacate and deliver the said property. This action of the Applicant, no doubt, stems from the Order made by *Moe J.* on November 26, 1999. On December 9, 1999 *Moe J.* made an Ex Parte Order once more that Maclean delivers possession. On December 10, 1999 Marina took out a summons to vary or rescind the order. This matter was heard *inter partes*. Both Parties filed affidavits and legal arguments were entertained. On February 1, 2000 *Moe J.* held that there would be no rescission or variation of his earlier order made on December 9, 1999.
- [16] Marina Maclean was not satisfied with the decision and on February 4, 2000 she filed several grounds of appeal. At the hearing of the appeal, learned Counsel for the Respondent submitted that he would rely on the judgment of *Benjamin J.* given in Suit 6 of 1988 on March 20, 1997 which had not been appealed against. Counsel submitted that notwithstanding the **Penn v Baltimore** line of cases, the Guildford County Court judgment could not bind land in Antigua. Counsel also made reference to the two Orders of *Georges J.* made on April 7, 1998 and October 5, 1999.
- [17] It seems to me that all the judgment of *Benjamin J.* did was to overrule a preliminary submission made by the Defendant, Raymond Raeburn, in Suit 6 of 1988. The submission was that the Plaintiff's action be struck out on the grounds that it was *res judicata*; and/or that it was scandalous, frivolous and vexatious; and/or it was an abuse of the process of the Court.
- [18] In his judgment, the learned Judge stated: "*The crux of the Plaintiff's contention was that though bound in personam by the English Order of March 15, 1988, the Plaintiff was not estopped from pursuing her rights in the Courts of Antigua, where the immovable property is situated.*" The

learned Judge seemed to have agreed with the Plaintiff's contention for he later stated towards the end of his judgment –

“I hereby hold that the preliminary issue is overruled. It is ordered that the application embodied in the notice dated 10th March 1997 be dismissed. Costs shall be in the cause.”

[19] It is evident from the above including the nature of the costs order that Suit 6 of 1988 was not completed after the pronouncements of the learned Judge. And as stated above it was later dismissed. Suit 7 of 1998 was discontinued. Suit 26 of 1997 was ordered to be struck out. There was no effective decision by the Courts of Antigua in any of these Suits. I am therefore puzzled as to how the doctrine of *res judicata* arises or applies as submitted by learned Counsel for the Respondent.

[20] In my judgment the Ex Parte Order made by *Moe J.* on November 26, 1999 is clearly wrong for striking out Suit No.26 of 1997 on the ground of *res judicata* which did not exist, and for no obvious reason he says Respondent Fatima Raeburn is entitled to possession and occupation of the land in question. Further the order was affecting the property rights of a deceased person who was not represented in the action at the time the order was made for the learned Judge had set aside his earlier order substituting Marina Maclean for Raymond Raeburn. And the order made by the learned Judge in Suit 213 of 1999 was evidently based on his earlier order of November 26, 1999.

[21] The crux of these proceedings is the effect of the Guildford County Court Order on the ownership of the land in Antigua. As stated earlier, Fatima Raeburn had petitioned for divorce in England and had also sought property orders. The *decree nisi* was granted on November 23, 1987 and was made absolute on January 7, 1998. Between *decree nisi* and decree absolute, Fatima Raeburn petitioned the Antigua High Court for divorce. She did so in Suit 51 of 1987 filed on December 3, 1987.

[22] In her petition which she personally signed, she stated at paragraph 5, the usual provision *“that there have been no previous proceedings in the High Court of Justice or any other Court of Summary Jurisdiction with respect to the said marriage save and except that on the 17th day of September 1987, an application was made to the Guildford Magistrate’s Court to remove the woman named from the parties residence in England.”*

That statement was obviously untrue for she must have known and remembered that she had recently petitioned the English Court for divorce and had also made an application for ancillary relief. Learned Counsel for the Appellant in his submissions stated that the evidence was clear that the wife wanted to disregard the decisions made by the English Court to which she had herself resorted by moving her Suits to Antigua where she hoped that the law there would negate the English order in relation to the property rights of the Parties. I find there is much to justify that submission.

[23] The Order of the Guildford County Court dealt with properties in England, in the Philippines and in Antigua. There were two properties in England. The Court ordered one to be sold and after payment of charges, mortgages and expenses the balance to be paid to Raymond Raeburn. The other property in England was to be retained absolutely by the Respondent. As regards the two properties in the Philippines the Court dismissed the Respondent’s application for property transfers and ordered that both be retained by the Petitioner, Fatima Raeburn. The Court dismissed the Petitioner’s application for property transfer in respect of Herbert’s Mill. It ordered that the Petitioner do within 14 days of personal service of the Order upon her to transfer to the Respondent Raymond all her interest of any description in Herbert’s Mill, Herbert’s Estate, St. John’s, Antigua, West Indies absolutely. As stated earlier the Petitioner was served with the Order on April 4, 1988. She has not complied with the Order of the Guildford County Court.

[24] All are agreed that the Guildford County Court Order did bind Fatima Raeburn *in personam*. As learned Counsel for the Appellant submitted, the judgment did not affect the title to the land. It created an obligation on the wife by judicial decision to transfer whatever interest she had to the husband. She could not thereafter have any enforceable rights to deal with the property save to transfer her interest in it to her husband. The order created a legal obligation which equity would have enforced against her to ensure she made the transfer and in default an order could have been made directing the Registrar to do it for her.

[25] I agree with the submissions of Counsel. It is my view that while the Guildford County Court Order does not operate directly upon the property in Antigua, this Court should recognize the *in personam* Order made against the wife to transfer all her interest in the property at Herbert's Mill to the husband absolutely. It is evident that Fatima Raeburn will not obey the order but in my judgment she should not be able to use her default and willful disobedience to her advantage. The Court will therefore direct the Registrar of lands to do what she will not do so that in the final analysis Herbert's Mill should revert to the Estate of Raymond Raeburn.

- [26] In **Razelos v Razelos 1969 3 ALL E.R. 929** *Barker J.* held that the English Court could act *in personam* notwithstanding that the property concerned was in Greece. In **Hamlin v Hamlin 1985 2 ALL E.R.1036** the Court of Appeal approved the decision in **Razelos**. **Hamlin's case** arose from interlocutory proceedings for an order restraining a husband from disposing of a villa which he owned in Spain. *Benjamin J.* was of the view that there was no doubt that the decisions in **Razelos** and **Hamlin** were sound in principle. I agree.
- [27] But the learned Judge seems to have detracted from that view when he said the decisions must be treated as conclusions of an English Court seeking to achieve a determination of issues being litigated by parties resident in England, albeit involving real property situated outside of the physical jurisdiction of the English Court. He said that the matter must be viewed from the perspective of the Antigua Courts.
- [28] The learned Judge preferred to apply the decision of the **Supreme Court of Canada** in **Duke v Andler 1932 4 DLR 529**. In that case the Court was asked to make a declaration vesting certain property situated in British Columbia pursuant to an order of the Superior Court of California. The Court held that the judgment of the Court of California does not, in British Columbia, affect the title of the land in question and is not a judgment that should be enforced by the Courts of British Columbia as binding there on the Parties.
- [29] *Benjamin J.* seems to have accepted the contention on behalf of Fatima Raeburn that there had been no final determination on the merits of the respective rights of the Parties relative to the property situated at Herbert's Mill by a court of competent jurisdiction. The position remains the same since the Supreme Court of Antigua did not finally determine the issues in Suits No.26 of 1997, No.6 of 1988 or No.7 of 1989.

[30] Reference has been made to **Dicery and Morris on The Conflict of Laws**, Ninth Edition. I shall refer to the Tenth Edition. **Rule 77** deals with **Jurisdiction of the English Court**. It states that subject to the exceptions hereinafter mentioned, the Court has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable situate out of England; or the recovery of damages for trespass to land. One exception which is relevant here is that where the Court has jurisdiction to entertain an action against a person under any of **Rules 21, 22, or 24**, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England on the ground of either a contract between the parties to the action or an equity between such parties with reference to the immovable. **Rule 21** gives the Court jurisdiction to entertain an action *in personam* if the Defendant is in England.

[31] **Rule 78** deals with choice of law. It states that all rights over, or in relation to, an immovable are subject to the exceptions hereinafter mentioned, governed by the law of the country where the immovable is situated; the *lex situs*. The commentary on the rule states that the Sovereign of the country where land is situated has absolute control over the land within his dominions: he alone can bestow effective rights over it; his courts alone are, as a rule, entitled to exercise jurisdiction over such land. Consequently, any decision by an English Court which ran counter to what the *lex situs* had decided or would decide would be in most cases a *brutum fulmen*. But as I have been saying the *lex situs* has not decided anything contrary to the Guildford County Court Order.

[32] The commentary goes on to state that indirectly, of course, a foreign immovable may be affected by a judgment of an English Court *in personam* ordering some person subject to the control of the Court to execute a conveyance or mortgage. This is the section of the commentary

applicable to the facts of the current case. It is true that the commentary recognizes that the converse may not be true and cites the **Andler case** as authority.

[33] This Court's perspective is not to give effect to fraud or other inequitable behaviour. I have already referred to the way in which the Guildford County Court dealt with the properties located in the three countries. There is no effective decision of the Antigua Court giving Herbert's Mill to the Respondent. It would be in my judgment unconscionable for the Respondent to retain it. I am of the view that Herbert's Mill should revert to the Estate of Raymond Raeburn, deceased.

- [34]
1. I would therefore allow the appeal and set aside the judgment of *Moe J.* delivered on February 1, 2000 and discharge the injunction granted by him against the Appellant on December 6, 1999.
 2. I grant the declaration sought that the said property at Herbert's Mill is owned by the Appellant and I order the Registrar of Lands to restore the said property to the Personal Representative of Raymond Raeburn deceased.
 3. The Appellant is entitled to damages for wrongful dispossession to be assessed.
 4. The Appellant is to have her costs both here and in the Court below to be taxed if not agreed.

A.N.J. MATTHEW
Justice of Appeal

I concur.

SATROHAN SINGH
Justice of Appeal

I concur.

ALBERT REDHEAD
Justice of Appeal