

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2006/0045

BETWEEN:

1st NATIONAL BANK ST. LUCIA LIMITED

Claimant

and

PAUL ELOISE

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Sardia Cenac-Prosper for the Claimant

Mr. Sahleem Charles for the Defendant

Mr. Rene Williams appearing amicus on behalf of the Sheriff of the High Court

Present:

Ms. Jacqueline Daniel, representative of the Claimant

Mr. Paul Eloise, Defendant/Applicant

Mrs. Jacqueline Emmanuel-Flood, Intended Purchaser

2018: February 2, 8.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** This decision concerns an application filed by the defendant, Mr. Paul Eloise ("Mr. Eloise") on 7th November 2017 with supporting affidavit for the annulment of judicial sales conducted on 24th October 2017 with costs. That application was subsequently amended on 26th January 2018.

Background Facts

- [2] On 22nd March 2006, judgment was entered in favour of the claimant, 1st National Bank Limited (“the Bank”), against Mr. Eloise in the sum of \$557,091.70 with interest accruing at the rate 10% per annum, or at the daily rate of \$136.4373, from 17th February 2006 until the date of payment and costs.
- [3] On 8th June 2017, the Bank obtained permission to issue writs of execution against parcels of land owned by Mr. Eloise. Instructions to levy were issued to the Sheriff in relation to Block and Parcel 1248B 578 and Block and Parcel 0442B 62. The judicial sale was conducted on 24th October 2017 and both properties were adjudicated as sold to Mrs. Jacqueline Emmanuel-Flood. The purchaser has six (6) months from the date of the sale to pay the balance of the purchase price which will expire in April 2018.
- [4] When the sales were advertised in the Official Gazette, the advertisements called for a deposit of \$26,183.31 in relation to Block and Parcel 0442B 62 and of \$29,525.86 in relation to Block and Parcel 1248B 578. These amounts represent less than one-tenth of the judgment debt owed although the combined amounts represent one-tenth of the debt. The advertisements also stated the times at which the sale in relation to each property would be conducted.

Grounds of the application

- [5] The application filed seeks to annul the judicial sales on the grounds that there was a failure to observe essential conditions and formalities. The application of 7th November 2017 identified the failure as the fact that the deposits paid in relation to the two properties although amounting to 10% of the judgment debt in total, separately represent 5.3% and 4.7%, respectively. The amended application of 26th January 2018 filed after the submissions of counsel amicus were filed on 22nd January 2018, stated that the adjudication of an immovable cannot be made before the expiration of an hour from the start of the sale proceedings, and after that delay, the officer adjudicating it must receive all other bids, and the Sheriff

failed to allow for the expiration of the one hour mandated by the law. Mr. Eloise averred that the sale of Block and Parcel 0442B 62 was conducted for only fifteen (15) minutes and not for one (1) hour.

The Law

[6] I have set out below the relevant provisions of the **Code of Civil Code** (“the Code”).

Deposit

Article 530 of the **Code of Civil Procedure** provides as follows:

“530. Before receiving the first bid of every bidder, the officer conducting the sale shall require from the bidder a deposit or a certified bankers cheque of an amount of money equal to 1/10 of the debt (in principal, interest and costs) due to the seizing party.”

Failure to pay deposit

Article 534 of the Code provides as follows:

“534. If a bidder fails to deposit forthwith the amount required by article 530, his or her bid shall be disregarded, and the proceedings shall be resumed upon the previous bid. “

Time for adjudication of immovable

Article 536 of the Code states:

“536. The adjudication of an immovable cannot be made before the expiration of an hour from the time at which it was put up for sale, and after that delay, the officer before adjudging it must receive all other bids offered.”

Adjudication to highest and last bidder

Article 537 states:

“537. The property must be adjudged to the highest and last bidder: provided however that in cases where the property is sold subject to an upset price the property shall not be adjudged to the highest and last bidder unless the upset is attained or exceeded.”

Annuling of Judicial Sale

- [7] Articles 558 and 560 of the Code provide:
- “558. Sheriff’s sales **may** be annulled:
1. At the instance of the judgment debtor, or of any creditor or other interested person:
If fraud or artifice was employed, with the knowledge of the purchaser, to keep persons from bidding;

If the essential conditions and formalities prescribed for the sale have not been observed; but the seizing party cannot annul the sale for any want of formalities attributable to himself or herself or his or her attorney-at-law;
 2. At the suit of the purchaser;

If the immovable differs so much from the description given of it in the minutes of seizure, that it is to be presumed that the purchaser would not have bought had he or she been aware of the difference.”
- “560. An application on behalf of the judgment debtor must be made within 15 days from the date of the adjudication.”

Discussion

- [8] The Attorney General’s Chambers were invited to appear amicus on behalf of the Sheriff of the High Court and the parties were given directions to file submissions in the matter. The intended purchaser, Mrs. Jacqueline Emmanuel-Flood was served with the application and with notice of the hearing and attended the hearing.
- [9] The basis of Mr. Eloise’s application is the fact that there was non-observance of conditions and formalities which has caused him to suffer prejudice. He says in his further affidavit in support of the amended application filed on 29th January 2018 that he would continue to suffer prejudice because:
- “As a result of the sales I would cease to be the owner of my properties and would thereby be illegally deprived of my right to property. Further with respect to Block and Parcel Number 0442B 62 I would be deprived of the opportunity of allowing other bidders to bid a higher sum for the property.”

- [10] Mr. Eloise further avers that his properties which were valued at over three million dollars (Block and Parcel 0442B 62) and one million dollars (Block and Parcel 1248B 578), respectively, were sold for \$508,000.00 and \$250,000.00 respectively.
- [11] Counsel appearing amicus for the Sheriff of the High Court, Mr. Rene Williams filed submissions on 22nd January 2018. Counsel referred to the case of **First Caribbean International Bank (Barbados) Limited v Jacob Morille et al**¹ in which Hariprashad-Charles J considered article 558 of the Code. The learned judge relied heavily on the case of **Garcia Transport Ltee v Royal Trust Co.**² in which the Court considered Articles 698 and 699 of the Quebec Code of Civil Procedure which is in similar terms to our article 558. I find this Canadian case to be extremely instructive. Although the facts in **Jacob Morille** are distinguishable from the case at bar, the principles espoused therein are nonetheless applicable.
- [12] At paragraph 50 of the **Morille** judgment, Hariprashad-Charles J said:
- “Given the strict formalities which precedes Sheriff’s sales, and the relative comfort with which interested parties most notably the owners of the property may oppose the seizure and sale before the latter takes place, a petition to vacate the sale will be scrutinized strictly and granted only exceptionally.”
- [13] At page 44 of **Garcia**, the Canadian Supreme Court said this:
- “Titles granted by Sheriff’s sales in Quebec’s civil law are treated with a considerable degree of respect and courts do not tamper with them lightly. Strict rules govern them and stringent conditions must be met to vacate them...”
- [14] The Court in **Garcia** continued at page 45:
- “Given their role in the execution of judgments and the rights conferred by them, as well as the necessity of guaranteeing the stability and certainty of titles, sheriff’s sales cannot be easily attacked.”

¹ SLUGCV1994/0432, delivered 17th September 2004.

² [1992] 2 S.C.R. 499.

- [15] At page 49 of **Garcia** the Court said:
- “Consequently, while it remains possible, it is only exceptionally that the vacating of sales at law will be permitted and then, only on certain limited and enumerated grounds. ... Article 698 allows “any interested person”, including the debtor whose property is seized, to seek the vacating a sheriff’s sale on the grounds of fraud, or the non-observance of essential conditions and formalities prescribed for the sale. **An informality will generally not give rise to the vacating of a sale, however, unless the petitioner can show that he or she was prejudiced by it:** Fort Garry Trust Co. v Roberts Sprinkler Ltd., [1981] C.S. 905.” (my emphasis)
- [16] At page 51, the Court summarized the principle thus: ‘once a sheriff’s sale has taken place, it is only exceptionally and on limited grounds that it can be set aside.’
- [17] Hariprashad-Charles J in **Jacob Morille** stated:
- “Our Civil Code is patterned after the Civil Code of Quebec and thus, our Sheriff’s sale must be treated with the same degree of respect. The sanctity of the Sheriff’s sale cannot be undermined.”
- [18] In **Jacob Morille**, the learned judge referred to the case of **Peter Jn. Marie et al v Winston Cenac et al and National Commercial Bank of Saint Lucia v Larima Lowrie et al**³ in which she made the following pronouncement at paragraph 46.
- “46. The importance of protecting the Sheriff’s sale should be emphasized. It attacks one of the most important acts of procedure of any court of record – the enforcement of its own judgment, and puts in issue not only the regularity of that procedure, but jeopardizes the rights of innocent third parties, who purchase property put up for public judicial sale under all the solemnities and formalities of the law. So an attack upon the Sheriff’s sale is to my mind, an attack upon a title conferred not just by an individual but by the justice system as a whole.”
- [19] Where there has been a failure to observe essential conditions and formalities, article 558 of the Code states that the judicial sale **may** be annulled. Counsel for Mr. Eloise, Mr. Sahleem Charles (“Mr. Charles”) submitted that although this article is written in discretionary terms, where a particular article uses mandatory words in relation to the particular formality, then this means that the sale must be annulled. Counsel for the Bank, Mrs. Sardis Cenac-Prospere (“Mrs. Cenac-

³ Consolidated claims No 695 of 1995 and No. 789 of 1995, delivered 1st March 2004, (unreported).

Prosperé”) submitted that in interpreting the provisions of the Code, one must have regard article 1 of the **Civil Code**. Article 1 states:

“The meaning, explanation or application assigned in this section to a word, term or enactment, attaches to it whenever occurring in this Code, in the Code of Civil Procedure, or in any ordinance or proclamation, unless such meaning, explanation or application is inconsistent with the context or with the object of the provision in which such word, term or enactment occurs, or is repugnant to some special provision of law.”

Article 1(53) states:

“The word “shall” is construed as imperative, and the word “may” as permissive. A verb in the present tense denoting the doing of an act is directory and imperative; as for instance in article 27, “Each depositary keeps” is construed as though the words were “each depositary shall keep,” or “it is the duty of each “depositary to keep.””

[20] Article 558 is not mandatory and contemplates an exercise of discretion in deciding whether to annul a sale or not. This is a very important factor which cannot be overlooked. The cases to which I have referred support this and are all very clear that a sale may be annulled but only in certain circumstances. The case of **Garcia** suggests that this can only be done where the debtor can show that he has suffered prejudice. In assessing what the Court said in **Garcia**, I had regard to the word ‘informality’ used in the text of the judgment at page 49 and looked at the French version of the judgment to understand what the word ‘informality’ means. In the French text, the phrase used at the beginning of the sentence is ‘Toutefois, une irrégularité’ which translates in English to ‘However, an irregularity..’. In the context of the passage, I understand the word ‘informality’ to refer to a non-observance of formalities as opposed to something which is not a formality. Therefore, it suggests that it is not every non-observance of an essential condition or formality which will lead to the annulment of a judicial sale.

[21] In addition to the applicant having to show that he has suffered prejudice from the non-observance of essential conditions and formalities, I am of the opinion, and this is the position at common law, that a necessary part of the exercise of the discretion provided for in article 558 must involve a consideration of the particular condition or formality which the applicant is alleging was not complied with, in

order to assess whether that particular condition or formality goes to root of the sale. I think it must be that to allow the sale to stand in the face of the particular non-observance would be unfair. The purpose or reason for the identified essential condition or formality in the sale process and any potential prejudice must also be considered.

Incorrect deposit amount

- [22] It is not in dispute that the amounts paid as the deposits in relation to the two properties was incorrect as neither sum represents one-tenth (1/10) of the judgment debt. The deposit ought to have been \$55,709.17 on each property as there were two separate judicial sales. Clearly, the Sheriff did not treat the sales as two separate sales and this is where the error occurred. The important question notwithstanding is whether this error or non-compliance with article 530 has prejudiced Mr. Eloise in any way or was of such a nature that it goes to the root of the process.
- [23] Counsel for the Bank, Mrs. Cenac-Prospere raised an important point for consideration. Mrs. Cenac-Prospere submitted that there could be no prejudice suffered by Mr. Eloise in circumstances where the sales were advertised in three consecutive issues of the Official Gazette and in all these advertisements the deposits stated were in the amounts which amounted to less than one-tenth of the judgment debt. Counsel submitted and I agree that it was open to Mr. Eloise to oppose the sale at that point. Indeed, article 519 of the Code provides that a person whose property is being seized may oppose the sale, whether the opposition is for matters of form or substance. Mrs. Cenac-Prospere added that the bidders and by extension the purchaser had done nothing wrong and had simply complied with the amounts advertised as being the required deposits and therefore they should not be prejudiced.
- [24] This position is supported by the case of **Garcia** where the Supreme Court of Canada said at pages 47-48:

“Finally, given the strict formalities which must be followed prior to a sale at law, and the relative ease with which interested parties, most notably the owner of the property, may oppose the seizure and sale before the latter takes place, a petition to vacate the sale will be scrutinized strictly and granted only exceptionally. Petitioners who could have opposed the seizure and sale, but who failed to do so, generally do not succeed in having a sheriff's sale set aside because their failure to act earlier implies that they consented to whatever irregularity they might later invoke, ...”

[25] Counsel Mr. Charles submitted that since article 534 stated that if a bidder did not pay the required one-tenth deposit required by article 530, his/her bid should be disregarded, then the sale cannot be allowed to stand as no bidder paid the correct deposit as required by article 530. However, the purpose of article 530 and whether this requirement goes to the root of the sale must be considered.

[26] The correct application of article 530 in relation to the deposit would not translate to a higher bid. There can be no prejudice from this failure as the deposit is paid prior to the sale and does not in any way affect the final adjudication price. It does not set the basis for the commencement of bids at the sale. If that were the case, I would agree that a failure to observe the one-tenth requirement would have clearly been prejudicial to a debtor. The deposit simply put, is an amount which has been set at one-tenth of the judgment and which the bidder must pay so that he can secure his/her place in the bidding process. I could find no special reason for the deposit being set at one-tenth of the judgment debt as opposed to another amount. In addition, as Mrs. Cenac-Prospere noted, the error in the deposit amount existed on the face of the advertisement and Mr. Eloise could have opposed the sale on that basis prior to the conduct of the sale on 24th October 2017 and he failed to do so

Adjudication before one hour

[27] The minutes of the sale of Block and Parcel 0442B 62 prepared by the Sheriff clearly show that the sale commenced at 10:01 a.m. and ended at 10:15 a.m. Therefore, there can be no dispute that this was under one hour. I note that the

sale in relation to Block and Parcel 1248B 578 lasted for just over an hour and Mr. Eloise has no complaint where this sale is concerned.

- [28] At the sale of Block and Parcel 0442B 62, there were three bidders, Jacky Daniel, Curth Hippolyte, who are employees of the Bank, and Jacqueline Emmanuel-Flood. The bidding started at \$249,000.00 and ended with the last bid by Jacqueline Emmanuel-Flood at \$250,000. Mr. Eloise stated in his application and affidavit in support that when the Sheriff did not wait until the hour was up to make the adjudication of the property in Mrs. Emmanuel-Flood's favour meant that Sheriff cannot be said to have received all the bids offered, as the time to conclude the auction had not expired. He also said that as a result of the irregular sales, he would cease to own the properties, be deprived of his property and/or deprived of the opportunity to allow other bidders to participate in the sale at a higher bid.
- [29] Counsel for Mr. Eloise, Mr. Charles submitted that article 534 clearly contemplates that a person can enter a bid at any time within the hour required for the sale to take place and therefore it means that there was a possibility that there could have been higher bids had the sale remained open for the entire hour. Whilst I initially had some difficulty accepting the argument that a bidder could enter the bidding process in a judicial sale at any time whilst it is still open, I am prepared to accept that on the interpretation of article 534, that this is possible. It would mean that a bidder coming in after bidding has started need only pay the required deposit and enter the bidding process at the point of the last bid.
- [30] Mr. Eloise must show that he has suffered prejudice because the sale of Block and Parcel 0442B 62 was conducted for a duration of 15 minutes as opposed to the one hour required by article 536. Mr. Charles also argued that Mr. Eloise did not have to show any specific evidence that any other persons had wanted to attend the sale but could not because it was cut short by forty-five minutes, or that anyone wanted to bid higher than the final adjudication price. Mr. Charles submitted that all that was required was that there was the potential that Mr. Eloise

would have suffered prejudice. I find that Mr. Eloise has clearly articulated the potential prejudice in his further affidavit in support of his application.

- [31] Article 536 is written in mandatory language and states that adjudication of a sale **cannot** take place before the expiration of an hour from the commencement of the sale. The purpose of article 534 must be to allow sufficient time for the bidding process so that every opportunity is given to ensure that prospective bidders can attend the sale and put in their bids, to ensure transparency in the process and to avoid any opportunity for collusion. By the Sheriff adjudicating on the sale of Parcel 62 before the one (1) hour, there was a possibility that someone who wanted to bid may not have had the opportunity to do so as they may have arrived after the 15 minutes. That certainly is a real possibility and cannot be disregarded.

Property sold below market value

- [32] It must be noted that there is a valid judgment in this claim against Mr. Eloise which has not been challenged. The Bank exercised its rights to enforce its judgment and the writs of seizure and sale issued were also not challenged. Counsel amicus, Mr. Williams submitted that the only prejudice which Mr. Eloise could suffer is that the properties could be sold at values which are insufficient to cover the debt which he owes, exposing him to liability for the balance of the judgment debt.
- [33] Mr. Eloise seems to be suggesting that the lack of observance of the formalities he has identified meant that his property was sold below their market value. However, as counsel amicus, Mr. Williams rightly submitted, the only way to avoid a sale at undervalue is for there to be an upset price set for the property. In this case, there was no upset price set by the Bank and so bidding at the sale was open and could have commenced at any amount. The lack of observance of the formalities identified by Mr. Eloise certainly did not cause his properties to be sold below their **market values**.

In **Jacob Morille**, Hariprashad-Charles J said:

“Given that no upset price was fixed, the Sheriff was under no obligation to start the bid at a particular price. The Bank had a duty to set an upset price if it wanted to ensure that it got a price equivalent to the judgment debt, interest and costs. It is both law and equity that where no upset price is fixed, the property shall be sold to the highest bidder, **whether the sum bid be equivalent to the real value or not.**” (my emphasis)

- [34] It is the case that the application to set the upset price can only be made by the creditor, and even then, it is not a mandatory requirement. This has always been a concern for me as it seems heavily weighted in favour of the creditor and perhaps, the time has come to consider changing this and affording a debtor the option of setting an upset price to secure the best price for his property based on the market value of the property.
- [35] In Quebec, there have been significant changes made to the annulment of the judicial sales provisions under their Civil Code so that a sale of property must be done in the interests of the debtor and creditor, at a “commercially reasonable” price. A judicial sale may be annulled at the request of the debtor or other creditor if the property is sold for a price that is clearly unreasonable given market conditions, or if the sale is affected by serious irregularities that could not, despite reasonable diligence, be raised before the sale. The sale of a property is considered made at a “commercially reasonable” price if it is sold for fair market value. If the property sold is an immovable, the minimum sale price must be greater than 50% of the municipal evaluation, unless the court is convinced that the property cannot be sold at that price within an acceptable time frame. It has been argued by some that the current judicial sale regime is weighted too heavily in favour of the creditor. I believe the time is ripe for a serious review of our judicial sales regime to take into consideration the interests of both debtors and creditors and ensure that justice is served in both cases.

Conclusion

- [36] In the meantime, the law must be administered in accordance with the provisions as set out in our **Code of Civil Procedure**. For the reasons discussed, I conclude that Mr. Eloise has not suffered any prejudice by the failure to set the deposit at one-tenth of the judgment debt and that in any event this is not a formality which goes to the root of the sale. The sale of Block and Parcel 1248B 578 only suffered from this non-observance and will not be annulled. The formality of not adjudicating on the sale until one (1) hour has passed receives a different treatment as that formality is one which I think goes to the heart of the sale and has the potential to cause prejudice to Mr. Eloise. The sale of Block and Parcel 0442B 62 suffered from the non-observance of both formalities but will only be annulled on the basis of the non-observance of the latter formality.

Order

- [37] The Order is as follows:
- (1) (a) The application to annul the judicial sale of 24th October 2017 in relation to Block and Parcel 0442B 62 is granted and the sale is void ab initio.

(b) The intended purchaser, Mrs. Jacqueline Emmanuel-Flood shall be refunded the amount of \$26,183.31 paid as the deposit for the sale of Block and Parcel 0442B 62.
 - (2) The application to annul the judicial sale of 24th October 2017 in relation to Block and Parcel 1248B 578 is refused.
 - (3) There shall be no order as to costs.
- [38] Despite the fact that I have concluded that the failure on the part of the Sheriff in relation to the deposit was not of such a nature to have caused prejudice to Mr. Eloise and did not go to the root of the judicial sale, what this matter demonstrates is the importance of adherence to the provisions of the Code in all aspects of the

judicial sale process so that a judicial sale is not open to challenge and the intended purchaser is not faced with situations like this. The Sheriff and officers acting on behalf of the Sheriff should ensure that due regard is always had to the provisions of the **Code of Civil Procedure** relating to sales and this judgment should in no way be misread so as to afford a licence to anyone not to comply punctiliously with all the requirements of the judicial sale process as set out in the **Code of Civil Procedure**.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar