

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)**

SUIT NO: NEVHCV2013/0121

In the Matter of an Application
pursuant to CPR Part 11, Rule 11.1 and
Part 55, Rule 55.3, 55.5 and certain lands
at Garrick's Pasture, St. Thomas' Nevis.

BETWEEN:

Leonora Louisa Walwyn – Applicant

and

Royal Bank of Canada- 1st Respondent

Illingworth Dexter Bowrin- 2nd Respondent

APPEARANCES:

Ms. Jacqueline Walwyn for the Applicant. – Applicant present

Mr. A. Gossai for the 1st Respondent.

Ms. D. Camilla Cato for the 2nd Respondent. – Respondent present

DECISION

2014: March 17

2014: April 15

[1] **WILLIAMS, J. (Ag):** The Claimant Ms. Leonora Walwyn has applied to the Court
for Directions and Order for sale pursuant to Rule 11.1 and Part 55, Rules 55.3 (b)
(d); 55.4 and 55.5 of the CPR for an order for:

(a.) The sale of certain lands known as Garrick's Pasture lands or specified parts thereof and buildings thereon, with a direction that the proceeds of sale be used to satisfy the outstanding mortgage loan consisting of principal sum, arrears of payment and interest, with the 2nd respondent being responsible for the payment of any shortfall.

(b.) Pending the sale, that all rental proceeds earned in relation to the said property be directed to the accounts of the 1st Respondent in accordance with the Deed of Rental Assignment dated the 8th December 2009 between the 1st Respondent and the 2nd Respondent and the Deed of Rental Assignment between the Applicant and the 1st named Respondent dated the 8th day of December 2009.

[2] Counsel for the Applicant Ms. Jacqueline Walwyn at the hearing of this Application on the 17th of March 2014 sought leave of the Court to amend the Notice of Application dated the 14th of November 2013 to include reference to Section 45 of the Title by Registration Act Chapter 10.19 and that the Draft Order be amended to read as follows "That the 1st Respondent be ordered to make application to the Court for the sale of the subject property pursuant to Section 45 of the Titles by Registration Act Chapter 10.19 and Part 55 of the CPR 2000 to satisfy the outstanding debt."

Counsel for the Applicant also sought leave to amend paragraph 4 of the Affidavit filed on the 12th March 2014 to read the "21st January 2012" instead of the "7th January 2012".

[3] The Grounds of the Application are:

(a.) That the property in question formed part of the matrimonial property of the Applicant and the 2nd Respondent. By virtue of a Separation Agreement dated the 14th February 2012 the Applicant ceded the said property to the 2nd Respondent. As a result of this division of property, the 2nd named Respondent became the sole and exclusive owner of the said property subject to the Mortgagee's (1st Respondent's) interest. The Applicant retained the matrimonial home. Both properties were subject to a mortgage in favour of the 1st Respondent.

(b.) Notwithstanding that it was the parties intent that each would be solely responsible for the debts and obligations arising in respect of their property as divided under the Separation Agreement, the Applicant has not been relieved of the obligation to repay the mortgage loan for the said property.

(c.) That the 2nd Respondent has total management and control over the said property. He enters into leasehold agreements, collects rents and generally manages and deals with the said property in his total discretion and without input from or consultation with the Applicant, which is in keeping with the terms of the Separation Agreement entered into by the Applicant and the 2nd Respondent.

- (d.) That following the execution of the Separation Agreement and the division of property, the 2nd Respondent soon fell into arrears in respect of the monthly mortgage payments for the said property
- (e.) That by virtue of a Deed of Rental Assignment dated the 8th of December 2009, the 2nd named Respondent agreed to direct and assign all rental proceeds from the said property to the account of the 1st Respondent on the same date the Applicant entered into an identical Rental Assignment Agreement with a view to creating a mechanism whereby the 1st Respondent could receive the monthly mortgage payment as they became due
- (f.) The 2nd Respondent has consistently failed to comply with the Rental Assignment Agreement
- (g.) That despite the division of property and the obligations of the 2nd Respondent and despite the rights of the mortgagee under the Rental Assignment Agreement as well as their rights under the Memorandum of Mortgage and at Common-law, the 1st Respondent continues to demand payment from the Applicant, even while acknowledging that it is the 2nd Respondent who collects all of the rental income accruing from the said property as evidenced by the letter before action dated the 25th of September 2013.
- (h.) That the Applicant has made several attempts to resolve the outstanding loan matters with the 1st Respondent, even going so far as to suggest to the 1st

Respondent that it enforce the terms of the Rental Assignment Agreement, and later on that it invoke its power of sale under the Memorandum of Mortgage.

(i.) That the actions and omissions of the 2nd Respondent, namely his failure to pay over the rents to the 1st Respondent, and the inaction and or omissions of the 1st Respondent namely its failure to enforce the Rental Assignment Agreement or to seek redress in keeping with the remedies available to it under the Terms of the Memorandum of Mortgage have financially inconvenienced and severely prejudiced the Applicant.

[4] The 1st Respondent has applied to the Court with supporting Affidavit dated the 30th of January 2014 to strike out the Notice of Application for sale brought by the Applicant and filed on the 14th of November 2013 on the following grounds:

(a.) That the Application is misconceived in that CPR 55.1 deals with the sale of land under any enactment which authorizes the Court to order a sale. The Applicant/Respondent has not set out or identified any enactment under which she is entitled to apply to the Court to obtain a sale. Part 55 is adjectival only and does not give a right of sale.

(b.) Part 55.1 does not contemplate applications there under as initiating actions. The requirements of the particular enactment in question must be satisfied.

(c.) The Applicant has attempted to institute an action without using a claim form or fixed date claim form.

[5] The 2nd Respondent has also filed an Affidavit in Response dated the 21st of February 2014 to the Applicant's application in which he seeks a dismissal of the Application by the Applicant on the grounds that

(a.) The Application has not been served on the 2nd Respondent in violation of part 11.8 of the CPR 2000.

(b.) Part 55 of the CPR does not contemplate applications originating there under without the two conditions of part 55.1 being satisfied, and that the Applicant has failed to satisfy both conditions.

THE ISSUES

[6] (a.) Whether the Applicant's application for Directions and Order for sale is properly grounded in the Law and Rules of the CPR in particular part 55.1 and should be struck out.

(b.) Whether the Court can order the sale of the property contained in Certificate of Tile Book 42 Folio 322 of the Register of Titles and situate at Garrick's Pasture by Public Auction by the Registrar of the High Court.

(c.) Whether the Court can direct that all rental proceeds earned in relation to the said property be directed to the 1st Respondent's accounts.

(d.) Whether the 2nd Respondent has been properly served with the Application of the Applicant and is therefore in violation of part 11.8 of the CPR.

BRIEF BACKGROUND

- [7] Leonora Louisa Walwyn and Illingworth Dexter Bowrin are former spouses and are joint owners of matrimonial property comprising of the Highmount property in Jessups, and a rental townhouse development at Garrick's Pasture in the Parish of St. Thomas.
- [8] The parties entered into a Separation Agreement dated the 14th of February 2012 with the intention of dividing their properties equitably between them. The Separation Agreement provided that Leonora Walwyn would transfer all her rights and interests in the Garrick's Pasture property to Illingworth D. Bowrin and Illingworth Bowrin would transfer all his rights and interests in the Highmount property to Leonora Walwyn.
- [9] Prior to their separation and divorce, the parties had obtained a Mortgage loan from the Royal Bank of Canada against the Garrick's Pasture property. The loan was used to construct the four townhouse units that are presently situated on the said property.
- [10] The proceeds of rental of the townhouses were intended to repay the said Mortgage loan. However the loan has fallen into substantial arrears and the Royal Bank of Canada has filed a Claim Form in the Registry against the Applicant and 2nd Respondent seeking repayment of the arrears on the said loan and has obtained Judgment against both parties.

- [11] The Applicant Leonora Walwyn has now applied to the Court to order the sale of the said property and to order that all rental proceeds of the said property be directed to the accounts of the Royal Bank of Canada (1st Respondent).
- [12] The Royal Bank of Canada (1st Respondent) has filed an Application to strike out the Applicant's Notice of Application for Sale and Directions.
- [13] The 2nd Respondent Illingworth Bowrin has also filed an Affidavit in Reply to the Notice of Application for order of sale and directions in which he petitions the Court to dismiss the Applicant's said application.

THE LAW

CPR 55 AND ITS APPLICABILITY TO SALE OF LAND

- [14] CPR 55 governs the sale of land by order of Court and provides as follows:

Rule 55.1 – This part deals with the sale of land-

- (a.) under any enactment which authorizes the Court to order a sale and
- (b.) when it appears to the Court to be necessary or expedient that the land should be sold.

The case of **Francis Monroe vs. Bank of Saint Lucia Ltd. HCVAP2011/011** is

relevant and instructive in this matter. According to the Learned Hon. Mde.

Janice M. Periera J.A (as she then was) at paragraph 18 of her skilfully reasoned

Judgment states:

“In the bulk of the Common law States and Territories following under the Court’s jurisdiction, the statute empowering the Court to order a sale is normally styled as the “Judgment Act”. The Judgments Acts of Antigua and Barbuda, St. Christopher and Nevis and The Virgin Islands are substantively identical. These Acts direct an application to the Court for an order for sale of lands in satisfaction of a Judgment debt. Further they specify the Form which the Application must take. The Form is then set out in the First schedule. It is at this stage that CPR 55 comes into play in providing for the evidence in support of the application and otherwise setting out the procedure for the hearing and the directions which the Court may give on making order for sale... The general conclusion to which I have arrived is that once the Enactment empowers the Court to order a sale, directs that such an application be made to the Court and does not delimit the manner by which such a sale may be carried out then CPR 55 governs the procedure and the Court on making the order may also direct the manner of sale, which may be a sale either by public auction or by private treaty as the circumstances of the case may require. “

- [15] I agree and adopt the reasoning of the learned Justice Periera J.A and conclude that the arguments of the Applicant are unsound in that CPR 55 does **not** give to the Court a power of sale. It directs one to an enabling statute for grounding the Court’s power to order a sale and in the case of St. Kitts and Nevis, it is the **Judgment Act Cap 3.14 Laws of St. Christopher and Nevis 2002.**

[16] Part 55.2 and 55.4 are also instructive to this matter and provide thus:

55.2 (1.) An Application for an order for sale must be supported by Affidavit evidence.

(2.) The Evidence under paragraph (1) must (c) state any restriction or condition that should be imposed on the sale for the benefit of any adjoining land of the **Judgment Debtor or otherwise.** (My emphasis)

[17] In scrutinizing the Memorandum of Mortgage ("Exhibit LW2") signed by both parties and in particular paragraph (g) of the said document it states that "The Mortgagors shall not exercise any of the Powers of leasing given by Law to a Mortgagor of land and shall not affect any sale or create any charge upon the property affected by this security without the **consent in writing of the Mortgagee.** " (My emphasis)

[18] I have also perused the undated Memorandum of Transfer ("Exhibit LW3") purportedly signed by Leonora Walwyn and Illingworth Dexter Bowrin and the Rental Assignment Agreement ("Exhibit LW4") dated the 8th of December 2009.

[19] In both of these documents, I observe that there has been no intervention by the 1st Respondent the Royal Bank of Canada, in giving consent in writing to the actions of the parties in dealing with the said properties.

[20] I refer to the **Halsbury Laws of England 32 paragraph 642,**

“A Deposit of Title deeds by way of security does not create a pledge of the Deeds, but confers on the Mortgagee an equitable interest in the property and any assignment of such an interest must be in writing.”

- [21] Additionally according to Paragraphs 679, 681, 682 and 686 of the **Halsbury Laws of England Vol. 32** unless the Mortgagee goes into possession of the Mortgaged premises, that is by agreeing to take the rents and profits of the Mortgaged property by virtue of the legal ownership that the Mortgage confers on him, then the Mortgagor remains in possession and the Tenants must pay rent to the Mortgagor. The Mortgagee must either take possession or leave the Mortgagor in possession of the Mortgaged premises in the circumstances.
- [22] The Applicant in an Affidavit in Reply dated the 12th of March 2014 at Paragraph 8 states that “The 1st Respondent’s deviation from the Best Practices or Prudential Credit Guidelines which are recommended by the East Caribbean Central Bank for the management of loan accounts has been to her detriment and caused her grave financial hardship.
- [23] However under the Memorandum of Mortgage dated the 4th of September 2006 and duly signed and executed by the Applicant and the 1st Respondent at paragraph (e) it states that “No neglect or forbearance or omission on the part of the Mortgagee to take advantage of or to enforce any rights arising out of any breach or non-performance of any of the covenant, conditions or stipulations herein contained or implied shall be deemed to be or taken as a general waiver of

any such covenants or stipulations or of the right to enforce or take advantage of any right arising out of any such breach or non-performance or non-observance either original or recurring.

[24] It is my understanding of this provision in the Memorandum of Mortgage that the Mortgagee retains the absolute right to determine how and when it will enforce its rights arising out of breach for non-performance or non-observance of any of the conditions under the said Agreement.

In the circumstances I fully agree with learned Counsel for the 1st Respondent that the Applicant has attempted to place herself in the position of the Mortgagee in seeking to bring this Application before the Court to enforce rights and obligations that are only available to the Mortgagee/1st Respondent. Further section 45 of the Title by Registration Act Cap 10.19 is pellucid and states that “The specific sum lent upon the pledge of the land shall be payable at any date which may be fixed in the Memorandum of Mortgage and if not repaid at that date, the mortgagee may at any time thereafter take steps for the sale of the land in manner hereinafter provided.” (My emphasis)

The Court agrees with learned Counsel that it has no jurisdiction to entertain this Application and substitute itself for the Mortgagee. The Mortgagee does not need an order of the Court to pursue an action under Part 55 to enforce its rights and obligations over Mortgaged property and this action by the Applicant is therefore ill conceived, frivolous and vexatious.

[25] The 1st Respondent has applied to the Court to strike out the Applicant's Notice of Application for Directions and order for sale dated the 14th of November 2013.

In the case of JIPFA Investments Limited vs. Minister of Physical Planning and 1) Alfred Freet 2.) Natalie Brewley BVIHCV 2011/0038- Hariprashad-Charles J stated that "The jurisdiction to strike out pleadings is draconian and should only be exercised in clear cases."

The learned Judge cited the case of Lindsay Fitz- Patrick Grant vs. Glen Fitzroy Philip SKBHCV2010/0026 in which she had observed that:

"Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. So the power to strike out pleadings at a preliminary stage will be exercised very sparingly and only in the clearest circumstances."

[26] These considerations by that Court were also echoed by Blenman J in Delcine Thomas vs. Victor Wilkins et al ANUHCV 2007/0530 at paragraph 32, the learned Judge said:

"It is the Law that the Court acting under its inherent jurisdiction is clothed with the power to strike out part or paragraphs of an Affidavit that contains scandalous, frivolous and vexatious information: Affidavits should contain evidence that is relevant and necessary- they are not to be used to attack others unnecessarily by giving the opinions of others... the Court is enjoined to determine whether any aspect of the Affidavit offends the rules of evidence or

procedure, should the Court come to the conclusion, and only in very clear cases, where it is shown that the Affidavit offends either of the two sets of rules, the offending paragraphs should be struck out.”

[27] Learned Counsel Mr. Gossai submits that the Applicant’s affidavits should be struck out in its entirety as it is not properly grounded in Law and contrary to Part 30 of the CPR;

(a.) Counsel for the 1st Respondent contends that the Application dated the 14th of November 2013 is filed pursuant to Rule 11.1, and Part 55.3 (b) (d); 55.4 and 55.5 of the CPR 2000. These rules in particular 55.2 (c) speak to the existence of a “Judgment debtor”. However in this case there is no **Judgment debtor** as there is no Judgment summons or Judgment debt before the Court.

(b.) The Affidavit in Reply of the Applicant dated the 12th March 2014 in paragraph 3 states that “her sole objective is to be cleared of the responsibility of the 2nd Respondent’s debts”; however in paragraph 7 of the said Affidavit, the Applicant states:

“I regard my joint commitment to the Bank as a serious obligation and in keeping with this ought to mitigate the onerous and unnecessary delinquency of the loan by my actions of 7th January 2012.”

These paragraphs of the Affidavits are contradictory and further not in compliance with Rule 30.3 (2) (i) (ii) and constitute commentary on the facts.

[28] Also in scrutinizing the Affidavit of the 14th of November 2013, I am of the considered opinion that paragraphs 7-21 constitute commentary on the facts, unnecessary opinion, and submissions better left for a trial of the matter. I also consider these paragraphs irrelevant and touching on personal matters and cross over the boundary to “unacceptable opinion, legal conclusions, conjecture and speculation.” See: Sierra Club of Canada vs. The Minister of Finance of Canada and others . Accordingly I will strike out the offending paragraphs.

[29] I have made similar observations to the Applicant’s affidavit of the 12th March 2014 as paragraphs 3-9 offend Part 30.3 of the CPR 2000 and constitute commentary on the facts and border on unacceptable and unsolicited opinion conjecture and speculation.

The Deponent is a senior member of the Bar and should have brought her legal experience to bear in this case. I consider that the Affidavits are poorly drafted and appear to be legal submissions which are not permissible in an Affidavit.

See: National Insurance Corporation vs. Rochamel Development Co. Ltd. SLUHCV2006/0638 Edwards J.- Judgment 26; September 2008.

Accordingly these paragraphs are struck out for the reasons given herein.

Additionally I concur with Counsel for the 1st Respondent that there is no Judgment debtor before the Court as contemplated by part 55.2 (c). Further the application for leave to amend the affidavits as already stated has no material

bearing on this matter, and the Court does not consider that these amendments advance the cause of action of the Applicant.

[30] In relation to the Affidavit of the 2nd Respondent who has entered these proceedings without being served through the appearance of his Counsel Ms. D. Camilla Cato with the Application for Directions and Order for sale, and has filed an Affidavit in Reply dated the 21st of February 2014.

The general rule is that a Notice of Application must be served as soon as practicable after the day on which it is issued and;

(b) at least 7 days before the Court is to deal with the Application.

Part 11.11 (3) states that this Notice of Application must be served in accordance with part 6 which specifies the methods of service of documents other than a Claim Form and the power of the Court to dispense with service upon an Application being made.

[31] On a perusal of the Court files, I can find no Affidavit of Service or Acknowledgment of Service on and by the 2nd Respondent. Accordingly the 2nd Respondent's affidavit is not properly before the Court since the Applicant's Notice of Application for Direction and Order for sale has not satisfied the requirements of part 11.8. Therefore the Affidavit in Reply of the 2nd Respondent dated the 21st of February 2014 is struck out.

THE ORDER

[32] In the premises, I hereby make the following order:

1. That the Applicant's Notice of Application for Directions and Order for sale with accompanying affidavits of the 14th of November 2013 and the 12th of March 2014 against the 1st and 2nd Respondents is struck out for the reasons given herein
2. That the 2nd Respondent has not been properly served in compliance with Rule 11.8 of the CPR and is therefore not properly before the Court. Accordingly the Affidavit in Reply of the 2nd Respondent dated the 21st of February 2014 is also struck out for the reasons given.
3. That costs be awarded to the 1st Respondent in the sum of \$1000.00 to be paid within 14 days of the date of this order.

Lorraine Williams
High Court Judge (ag)