

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 227 OF 2008

BETWEEN:



THELMA HALL NEE RUSSELL

EWART RUSSELL

(Attorney on Record for Andrea Russell)

LORNA DAMM NEE RUSSELL,

PATRICIA RUSSELL, VERRALL RUSSELL, BARBARA RUSSELL, YVETTE RUSSELL

EWART RUSSELL

Claimants

v

RANDOLPH RUSSELL

Defendant

Appearances: Mr. Joseph Delves, for Claimants
Mr. Akin John, for Defendant

2011: April 20th

DECISION

- [1] **JOSEPH MONICA J:** The parties have agreed for me to hear this matter, which was commenced by a Fixed Date claim form filed on 21st August 2008, on written submissions that were filed in 2010: Claimants on 9th April and Defendant on 23rd April.
- [2] By Deed No. 1202 of 1979 dated 19th July 1979, Stephen Russell (deceased) made a gift to his ten children, of a parcel of land situate at Bottom Town, Kingstown, comprising seven dwelling houses extending from Lower Bay Street onto Middle Street and butted

and bounded on one side by Lower Middle Street, on a second side by another street which leads into Lower Bay Street, on a third side by a Lower Bay Street, and on fourth side partly the property of one McCaulay and partly by the property of one Wright and also by Hazell's Limited (the property).

[3] The Defendant is the brother of the Claimants. Two brothers Calvert Russell and Linton Russell died before the institution of this suit. Andrea Russell represents Calvert's estate gave a power of attorney to Ewart Russell bearing registration number 256/2007. Ewart Russell also has a power of attorney from Barbara, Patricia, Verrall, and Lorna and Yvette reg. no. 315 of 2004. Verrall died after the commencement of this suit. An order was made on application of the Defendant, for him to be appointed representative of the estate of Verrall for the purpose of these proceedings.

[4] The Claimants and the Defendant are equally entitled to the property. However, from the date of the gift from their father the Defendant has been in control of the property using it to store containers for his other businesses. He dumps backfill and other material on the property.

[5] The Claimants claim:

- a) An order that the Defendant sell his share or interest in the property to the Claimants
- b) Alternatively, an order that the property be sold first to anyone of the co-owners who is willing to make the highest offer
- c) Alternatively, an order that in the event any of the co-owners refuse or is unable to purchase the property, that it be sold by public auction and the proceeds divided according to the interests held.
- d) That the Claimants have conduct of the abovementioned sale
- e) That the Court give all necessary and proper consequential directions and orders to effect the above orders of sale.

- [6] In his defence, the Defendant agrees that the property be sold by public auction by the Registrar of the High Court. He is willing to pay the market price for the area he has occupied for many years by putting two containers in that area.
- [7] Three issues are identified by counsel for Defendant:
- (1) Is this Court now bound by its earlier order that the property be sold by public auction? If not then
 - (2) What are the powers granted to the Court to order a sale of the property under the Partition Act sections 3 to 5 and what are the principles upon which the Court must exercise those powers if any discretion granted thereby?
 - (3) Applying those principles how should the Court exercise its discretion in relation to the preferences of both parties?

RES JUDICATA

- [8] It is common ground that on 4th February 2010 when the fixed date claim came on for hearing, counsel for the Defendant submitted that, on a previous occasion, the Court had made an order on issues relating to the property. The Court adjourned to facilitate a search for that order, but none was found.
- [9] Counsel for the Claimants submitted that, without the Court's leave, on 26th March 2010, the Defendant filed an affidavit asking the Court among other things, to affirm the order of 1989 (1990). Exhibited to this affidavit were a valuation of \$821,300.00 by Molly Arthur and a letter from one Garnet Edwards dated 23rd March 2010 that he is willing to pay \$850,000.00 for the property.
- [10] Counsel for the Claimants advanced that the Defendant's affidavit and Edwards' letter are suspect, in that: there was no mention of 1989 (1990) order in the Defendant's pleadings: that after an order for sale in 1989 (1990) and the passage of twenty years, there was no buyer and when the instant suit is nearing determination someone is willing to pay \$200,000.00 more than the value suggested in the Claimants' valuation, and nearly

\$30,000.00 more than the Defendant's valuation, without stating the precise size and boundaries of the property.

[11] In the Claimant's reply to the Defendant's affidavit, filed on 28th April 2010, reference was made to the fact that the

"Rose Place property which the Defendant described and administered for cannot be the subject matter of the instant claim. The instant claim is concerned with a parcel of land described in deed of conveyance 1202 of 1979. This deed was pleaded in (and was exhibited to) the claim form and admitted by the Defendant in his defence".

(In fact the deed was not exhibited but the description of the property in the schedule to the deed is given in the Fixed Date claim form).

[12] Further, it was submitted by Counsel that, notwithstanding the affidavit, the Defendant has not amended the defence to plead res judicata or any other special defence. It is clear, argued counsel, that the Defendant is determined to keep the property for himself and if he cannot have it or part of it, to have it sold to strangers – that that is consistent with his behaviour over the years.

[13] Counsel's submission was that the power of the Court to make the orders sought is provided in the Partition Act (Cap 245). Counsel cited from Partition provisions in Halsbury's Laws of England 2nd ed. p.378 and The English and Empire Digest Replacement volume 36.

[14] Counsel for the Defendant's submission was that the Claimants are seeking an order on exactly the same subject matter and the same issues that have already been litigated and decided on in suits 203/1989 and 234/1989. The instant claim raises no fresh proposition of law and alludes to no change of circumstances occurring since the Court's order of 1990. The Court is bound by that earlier decision and the Claimants are estopped and ought not to be permitted to re-litigate the same issue.

[15] Further, it was Counsel for the Defendant's submission that res judicata is a doctrine of law and there is no requirement either in point of pleading or in point of law, that in order to rely

on the previous order of the Court, the Defendant should have pleaded res judicata. To have done so, would be pleading law which is contrary to CPR 2000.

[16] Counsel argued that there is a sufficient factual basis for the plea as the Defendant pleaded in the defence that he had agreed that the land with the dilapidated houses should be sold by public auction by the Registrar of the High Court. That pleading, Counsel urged, referred to the substance of the order of the Court made in 1990 that the property be sold by public auction.

[17] In support of his submissions Counsel for the Defendant cited **Analdo Bailey v St. Kitts-Nevis Cable Communications Limited**, St. Christopher and Nevis Magisterial Civil Appeal No. 3 of 2004. In that case Gordon J.A. commented that Halsbury's Laws of England Fourth ed. para 975 as a good starting point for determining the matter.

"975: Essentials of res judicata. In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties....it is not enough that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

[18] The Learned Justice of Appeal then referred to **Thomas v Attorney General of Trinidad and Tobago** (1982) A.C. 113 P.C. Lord Jauncey:

"It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action."

[19] Although I am not satisfied that res judicata has been sufficiently pleaded, I will deal with the matter as if it has been sufficiently pleaded. For the Court to conclude that the plea of res judicata stands, there must be certainty in what transpired on the earlier occasion: what was before the Court: what was decided on and the terms of the earlier order made by the Court. The Court cannot embark on guessing game. It is for the party raising the

plea to lead a sufficiency of evidence to enable the Court to find that the same issue has already been decided on.

[20] In affidavit filed on 26th March 2010 the Defendant deposed:

“Para. 5. That on the 2nd day of March 1990 this Court made a joint order in suits No. 203 of 1989 and 234 of 1989 which also involved property in our late father's estate, that inter alia, the properties be sold by public auction by the Registrar on 5th May 1990 not below the reserve price and valuation certificate as filed and that all co-owners be at liberty to bid at the auction. A certified copy of the excerpt from judge's note in relation to the subject order is exhibited herewith marked RR2.

Para. 12. That in all the circumstances I pray that this Honourable Court would dismiss this claim and affirm the order of the Court in suits 203 of 1989 and 234 of 1989 respectively that the Rose Place property be sold by public auction under the auspices of the Registrar not below a reserve price to be set by the Court and that the parties hereto be at liberty to bid at said auction.”

[21] Counsel for the Defendant submitted that the parties in those suits are Randolph Russell as Claimant and Thelma Hall nee Russell as Defendant. On 5th May 1990 various properties forming part of the estate of Stephen Russell, including the subject property, were ordered by a judge to be sold by public auction by the Registrar not below the reserve price and valuation certificate as filed and that all co-owners be at liberty to bid at the auction. (Copy of order from the Judge's notebook was exhibited to affidavit).

[22] I find that in Letters of Administration of the estate of Stephen Russell dated 28th April 1989, Registered No. 69/1989, appears inter alia: “property at corner of Bay and North River Road measuring 30 x 40 ft lower floor of concrete and top floor of wood” and “Property at Upper Long Lane measuring 30 x 50 ft” (all referred to as administration property). The Claimants' reply stated that the administration property is not the property referred to in this suit.

[23] I pose two questions, One: is the administration property the subject matter of this suit? Two: is the property in this suit the subject matter of suits 203 of 1989 and 234 of 1989?

[24] Relative to question one: The Defendant deposed: “Court made a joint order in Suits No. 203 of 1989 and 234 of 1989 which **also involved property in our late father's estate,**

(emphasis supplied) that inter alia, the properties be sold by public auction. The inference is that all the suits deal with property belonging to Stephen Russell or to his estate.

[25] Stephen Russell made a gift of the property to his children in 1979, and so ownership of the property passed to his children. That property could not be part of Stephen Russell's estate in 1989. It is doubtful that the administration property is the same property referred to in this suit.

[26] Relative to question two: A reading of the Judge's order reveals that there was no order for the sale of "Rose Place property". There was an order for the sale of "**property**". The information to clear this up lies in the suit files that cannot be found. The Judge's note reads:

"Directions for sale: **Property** (emphasis supplied) be sold at public auction by Registrar on 5.5.90 not below reserve price & valuation cert as filed – all co-owners be at liberty to bid at the auction sale. Property be ad in two issues of local newspaper. Conveyance to purchaser or purchasers be executed by Registrar of High Court that all monies derived from said sale be paid into Ct. to be distributed not fully purchased.

- 1) Payment of Registrar fee & cost
- 2) Payment of cert., stamps current cost.
- 3) Balance to be distributed among all co-owners in accordance with registrar's cert. dated 15.2.90"

[27] In Thomas case mention is made that for the res judicata principle to apply, the subject matter and issues must be same in both suits. I find it uncertain that the subject matter in the previous suits is the same as in this suit. In the face of that uncertainty, the Court is unable to hold that the Judge's order in the previous suits provides the Defendant with the plea of res judicata.

THE PARTITION ACT (Cap 245)

[28] I consider the matter under the provisions of this Act. Sections 3, 4 and 5 of the Act which authorise the Court to order a sale of property in three situations. Those sections enact:

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, if it appears to the court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested, or presumptively interested therein, or of the absence or disability of some of those

parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, if the parties interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.
5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it think fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions, and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

[29] Under Section 3 any interested party may request the Court to order a sale of property rather than a division of property. The Court may order a sale, if it considers that that would be more beneficial for the parties in one of a number of stated situations, or in any circumstance. One of the stated situations relates to the number of persons interested in the property.

[30] The expression "more beneficial" must be read in the context of deciding between a sale of the property as against a partition of the property. It makes no sense to divide 8,213 sq ft of land among ten persons. Consequently, the Court considers that it is more beneficial to order a sale of the property.

[31] Section 4 authorizes the Court, unless it sees good reason to the contrary, to direct a sale of the property where an interested party or interested parties collectively apply to the

Court to order a sale. I see no good reason why the Court should not order a sale. In fact, the Court sees a good reason why there be a sale of the property. Common sense dictates the distribution of sale proceeds among ten persons rather than dividing 8,213 sq ft of land among ten persons.

[32] Section 5 authorises the Court to direct a sale of the property where any interested party applies to the Court for a sale of the property. However, where other interested parties undertake to purchase the share of the party who requested the sale, the Court, instead of ordering a sale, may order a valuation of the share of the party who requested the sale.

[33] Section 3 leaves it open to the Court about the manner of sale and enacts that the Court may give all necessary or proper consequential directions. The Court considers that it is necessary and proper to give consequential directions in case the persons who are given the option of purchasing the property fail to do so within the time as directed by the Court.

[34] The Claimants say:

“In June 2006 for example, all of the siblings met in Canada except for the Defendant. They discussed his offer for purchase of the said property of \$30.00 per square foot and offered to buy him out at \$35.00 per square foot but he did not agree. They are desirous of buying him out and are asking the Court for an order to this effect.”

[35] I grant the application of the majority (Claimants) and will make an appropriate order with consequential directions in the event that the Claimants do not act within the time frame given. On the Court's order the parties obtained valuations. Three valuations of the approximately 8,213 sq ft of the property were filed: At the request of the Claimants, Franklyn Browne's valuation dated 17th March 2010 - \$615,975.00 (say \$615,000.00); Franklyn G.H. Evans' valuation dated 16th March 2010 - \$615,975.00. At the request of the Defendant: B.A. Arthur's valuation dated 19th March 2010 - \$821,300.00.

[36] I accept as the sale price, the highest valuation of the property – the one filed by the Defendant - \$821,300.00.

[37] I will direct that the Defendant is to sell his share of the property, one tenth of \$821,300.00 i.e., \$82,130.00 to the Claimants.

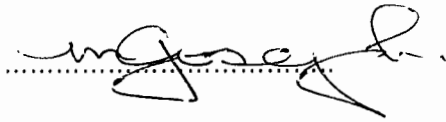
[38] The Claimants to pay \$164,260.00 (including Verrall's share) into Court on or before 30th May 2011. If they fail to do so, the property is to be sold to the Defendant and he is to pay the Claimants share of nine tenths of \$821,300.00 i.e., \$739,170.00 (including Verrall's share) into Court on or before 30th June 2011. If he fails to do so, the property is to be sold by public auction by the Registrar of the High Court, excluding bidding by the Claimants, Verrall's estate or the Defendant or any person bidding on their behalf.

[39] **IT IS ORDERED**

1. The property to be sold to the Claimants at a price of \$821,300.00.
2. \$164,260.00 being the Defendant's and Verrall's one tenth share each of \$82,130.00 to be paid into Court on or before 30th May 2011.
3. If the Claimants fail to pay that sum into Court by 30th May 2011, the property is to be sold to the Defendant who is to pay the Claimants' and Verrall's share of the property, (nine tenths of \$821,300.00) is \$739,170.00 into Court on or before 30th June 2011.
4. If the Defendant fails to pay that sum into Court by the 30th June 2011, the property is to be sold by public auction, which auction excludes bidding by the Claimants or the Defendant or the estate of Verrall Russell or the Defendant acting for Verrall in these proceedings, or any person bidding on their behalf.
5. The public auction by the Registrar of the High Court is to be held between 11th and 14th July 2011.
6. The public auction is to be advertised in at least two issues of local newspaper.
7. The Registrar is authorized to sign the deed of the property to the purchaser or purchasers.
8. From the proceeds of the auction sale, payment is to be made for sale expenses, (Registrar's fee, costs, stamps).
9. Remaining sum is to be divided equally between the Claimants, the Defendant, and the estate of Verrall Russell.

10. Liberty to apply on return date 20th July 2011.

11. No order at the costs.

A handwritten signature in black ink, appearing to read 'Monica Joseph', written over a horizontal dotted line.

Monica Joseph

HIGH COURT JUDGE (ACTING)

17th April 2011