

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2008/0289

BETWEEN:

CLAUDE SCHOULETTE

Claimant

and

THE ATTORNEY GENERAL

Defendant

Appearances:

Mr. Horace Fraser for the Claimant

Ms. Brender Portland-Reynolds Senior Crown Counsel with Dara Modeste

2010: August 26.

DECISION

- [1] **GEORGES, J. [AG.]:** The facts of this matter which are ably set out in the defendant's written submissions and were adopted by Counsel for the Claimant may be summarized in this way.
- [2] The Claimant was the registered owner of three parcels of land ("the properties") registered as Block and Parcels Nos. 1239B 48 54 and 174 in the Land Registry against which a Writ of Seizure and Sale was issued on 25th July 2005 with respect to High Court Claim No. 360 of 2001 ("the 2001 suit") instituted by one Gildas Willie against the claimant for the recovery of \$45,000.00.
- [3] On 7th November 2003, Master Brian Cottle (as he then was) ordered the claimant to pay to Willie \$1000.00 by 30th November 2003, and \$250.00 every month thereafter. On 5th February 2004, the Honourable Madam Justice Ola Mae

Edwards (as she then was) ordered the claimant to pay to Willie \$250.00 monthly failing which the entire amount would be due and payable.

- [4] The claimant failed to comply with either of the orders and as a result a Writ of Seizure and Sale was issued and executed against the properties which was advertised in three consecutive issues of the Saint Lucia Government Gazette on 5th, 12th and 19th December 2005, giving proper and precise descriptions of the properties to be sold with respect to the 2001 suit but mistakenly referred to another entity instead of Gildas Willie as claimant.
- [5] On 15th February 2005, the Sheriff caused the properties to be sold to the highest bidder Emmanuel Prevost Mande ("the Third Party") and on 20th February 2006, a Deed of Sale and Adjudication with respect to the properties was issued to the Third Party the Deed of Sale being registered as Instrument No. 1357/2006 and from 20th March 2006, he has been registered as owner of the properties with absolute title.
- [6] Nine months later on 20th December 2006, the claimant filed a Without Notice application seeking an interim order to forbid the Third Party from selling conveying assigning or otherwise disposing of the properties in any way and to set aside the Judicial Sale. The application was dismissed by Hon. Madame Justice Ola Mae Edwards (as she then was).
- [7] On 5th February 2008 (over a year later) the claimant filed another application seeking annulment of the sale and setting aside of the seizure as being null and void. That application was withdrawn following which the instant constitutional motion was launched against the defendant on 20th March 2008, alleging breach of his constitutional right pursuant to sections 1 and 6 of the Constitution of St. Lucia Cap 1.01 of the Revised Laws of St. Lucia, ("the Constitution") and seeks a number of declarations and orders to wit:

- (a) A Declaration that the Judicial Sale executed on 15th February 2006 where the immovable properties more particularly described in the Land Register as Block 1239B Parcels 48, 54 and 174 were sold was null and void.
- (b) A declaration that the Sheriff's conduct of the sale was procedurally improper, violated all standards of fairness and was in breach of natural justice.
- (c) A declaration that the Sheriff acted ultra vires and in excess of his authority under the Code of Civil Procedure, Chapter 243 of the Laws of Saint Lucia, which governs judicial sales.
- (d) A declaration that the Sheriff conducted the judicial sale in breach of his statutory duty.
- (e) An order that the judicial sale executed on the 15th day of February, 2006 be set aside.
- (f) A order directing the Registrar of Lands to forthwith correct the Land Register to reflect that the Claimant is the absolute owner of the immovable properties more particularly described in the Land Register as Block 1239 B Parcels 48, 54 and 174.
- (g) An order of inhibition to prevent Prevost Mande from registering any dealing with the immovable properties more particularly described as Block 1239 B Parcels 48, 54 and 174.

[8] Learned Senior Crown Counsel contended and I agree that the main issues in the instant case are:

- (a) Whether or not alternative means of redress were available to the Claimant and whether or not the Claimant has exhausted the alternative means of redress.

(b) Whether the Claimant can substantiate a claim for constitutional redress pursuant to section 6(1) of the Constitution.

(c) Whether or not the remedies sought by the Claimant are Judicial Review remedies and whether the Claimant would be so entitled.

[9] By notice of application dated and filed 10th November 2008, Counsel for the defendant applied pursuant to Parts 11 and 26.3 (1)(b) and (c) of the **Civil Procedure Rules 2000** (CPR) that the Fixed Dated Claim filed on 20th March 2008, be struck out in that the application was wholly misconceived and on the basis that it was an abuse of the process of the court and for reason that:

(a) The claimant had proffered no evidence to support a contravention of the fundamental rights and freedom provisions under the Saint Lucia Constitution and has failed to particularize with any detail and sufficiency the constitutional breaches.

(b) That the claimant is and was at all material times obligated to explore all avenues of redress by a timely application to the court under its ordinary non-constitutional jurisdiction.

(c) The declarations and orders prayed for by the claimant in his statement of claim are synonymous with declaratory orders pursuant to an application for Judicial Review and for which leave pursuant to Part 56 of the **CPR** is required.

(d) The claimant has never made any application for judicial review and or has opposed the seizure and sale pursuant to Articles 513 and 514 of the Code of Civil Procedure. Further, the claimant has also failed to make any application to annul the sale within the requisite statutory period as mandated by Article 560 the Code of Civil Procedure.

Those are formidable grounds which claimant counsel in my view was unable to refute or successfully challenge.

[10] The properties comprising Block 1293B Parcels 48, 54 and 174 which belonged to the claimant is the subject of these proceedings. The Judicial Sale emanated from a writ of seizure dated 25th July 2005, which instructed the Sheriff to seize the properties.

[11] The seizure and sale was for enforcement of a judgment in the 2001 suit in which the claimant was judgment debtor. As can be seen in paragraphs 3 and 4 of this judgment the writ of seizure and sale of the claimant's properties was as a result of the claimant's non-compliance with earlier court orders.

[12] Referring to Article 1875 of the Civil Code which stipulates that:

"Whoever incurs a personal obligation renders liable for its fulfillment all his property movable and immovable present and future except such as is specially exempted from seizure.

learned Counsel for the defendant contended that by very application of the law and the fact that the claimant knew that he was a judgment debtor and that he had failed to honour the judgment or any subsequent orders that were made that his properties would be liable for fulfillment/satisfaction of the debt.

[13] Therefore when the writ of seizure and sale was issued and subsequently executed and sold pursuant to the properties being properly advertised the advertisement in the Gazette properly and concisely described the properties to be sold which were in fact sold on 15th February 2006, to Emmanuel Prevost Mande he being a bona fide purchaser for value.

[14] The Court notes that on 20th December 2006, the claimant filed a notice **Without Notice application seeking** an interim order forbidding Mande from selling or otherwise dealing with the properties and **to set aside the Judicial Sale** which had been dismissed by Hon. Justice Ola Mae Edwards. And a little over a year later he **applied** on 5th February 2008, **seeking to annul the sale and set aside the seizure** as being null and void. That application was subsequently withdrawn.

In my view besides being res judicata the applications clearly smack as being an abuse of the process of the Court.

- [15] Counsel for the defendant further submitted that the declarations sought by the claimant do not give rise to any constitutional relief.
- [16] Touching on **the conduct of the seizure and sale of the properties by the Sheriff** the claimant at paragraph 12 of his supporting affidavit for example merely avers that the said seizure and resultant sale of the properties by the Sheriff were procedurally improper and therefore contravened his constitutional right (sic) enshrined in Chapter 1 section 6 of the Constitutional Order of St. Lucia 1978 which provides that his properties can be sold judicially by execution of a judgment but due observance must be had to fairness of procedure and adherence to the rules of natural justice. **(My emphasis)**
- [17] At paragraph 13 the claimant further averred that the Sheriff in the conduct of the said judicial sale breached the statutory duty imposed upon him by the Code of Civil Procedure Chapter 243 of the Laws of St. Lucia regarding judicial sale and in the process violated his right to fairness of procedure and his right to be heard and hence the judicial sale was null and void and without legal effect.
- [18] There is however nothing in the affidavit in support which gives rise to an infringement in the conduct of the sale and nothing in the application of the claimant to support the allegations against the conduct of sale on 15th February 2006. There is nothing in the affidavit to indicate how the Sheriff acted ultra vires or in excess of his authority. The question therefore is whether or not the claimant can properly move this Court for an infringement of what he purports to perceive as his constitutional rights.

[19] Section 16 of the Constitution states:

(1) If any person alleges that any of the provision of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in ration to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section.

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[20] The crucial issues which fall to be determined are set out at paragraph 8. The pith and substances of the claimant's allegation is that the Sheriff acted improperly by failing to utilize the correct procedure when executing the sale of the properties.

[21] Counsel for the defendant indicated and submitted that there were alternative means of redress available to the claimant and the fact that he may not have utilized them or may not have exerted sufficient promptitude in utilizing them does

not mean he can invoke the jurisdiction of the Constitutional Court. I fully endorse that submission which is reflected and reinforced by the proviso to section 16(2) of the Constitution at the end of paragraph 19.

- [22] Elaborating further learned defendant Counsel contended that the essence of the claimant's complaints the language used to buttress his arguments and the declarations sought were indicative that if the claimant were minded to move the court by any action he ought to have challenged the Sheriff's actions on the grounds of procedural impropriety and unfairness by way of judicial review in accordance with Part 56 CPR.
- [23] Constitutional redress is not an absolute right. The action is therefore misconceived and it is inappropriate and indeed insufficient as indicated earlier for the claimant to invoke the jurisdiction of this Court by merely alleging that his fundamental rights have been infringed and especially when alternative means of redress for the contravention are and have been available to the claimant. The claimant should not therefore purport to engage the court to adjudicate on a constitutional motion where he has failed to invoke the alternative means of redress available to him.
- [24] It is indeed only in exceptional cases in which there has been a fundamental subversion of the rule of law that constitutional redress is likely to be appropriate and the claimant has not by any means demonstrated that he falls within the ambit of that exception. See judgment of Lord Bingham in the **Privy Council decision of Hinds v Attorney General (No. 2) [2001] UKPC 56, 59 [2002] 2 WLR470** and Lord Diplock's salutary warning that a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision.
- [25] Turning to the alternative remedies which may have been available to the claimant in paragraph 25 of the affidavit deposed to by Kim Moise who had conduct of the

judicial sale he avers that his instructions were derived from the Solicitor for Gildas Willie (in the 2001 suit), the Sheriff of the High Court and the statutory provisions imposed upon him by the Code of Civil Procedure ("the Code") which outlines the procedure to be adopted in the event that the sale is being opposed or annulled, none of which were invoked by the claimant.

[26] Articles 513 and 514 of the Code of Civil Procedure state that:

"513. The Sheriff, in the absence of any consent on the part of the seizing creditors, cannot stop the sale of immovables, except upon the Judge's order permitting the filing of an opposition, accompanied with an affidavit on the part of the opposant, or his attorney in the absence of the opposant, that all the allegations in the opposition are true to the best of the deponent's knowledge and belief, and that the opposition is not made with intent unjustly to retard the sale, but solely to obtain justice.

514. Every opposition to the seizure and sale of immovables or rents must be filed in the Sheriff's office at the latest on the tenth day before that fixed for the sale.

No opposition filed after this period can stop the sale, unless the special order of the Judge be obtained on good cause shown, and upon such terms and conditions as he may think just. If the object of the opposition not allowed by the Judge is to withdraw, in whole or in part, the immovable or the rent under seizure, or to impose upon the purchaser some charge which would be destroyed by a Sheriff's sale, such opposition has the effect of an opposition for payment out of the monies levied."

[27] In his affidavit in reply to the defendant's application to strike out filed 3rd December 2008, the claimant contends that he was deprived of the opportunity to challenge the judicial sale within the prescribed time due to the defective notices. The defendant however contends that there was no defect in the actual conduct of the sale. The Sheriff had not acted ultra vires on 15th February 2006, and notwithstanding the time limits prescribed under the Code the claimant could have but did not apply for any extension of time to annul the sale recognized by his very own admission at paragraph 6 where he concedes that the Code provides adequate means by which a judicial sale could be challenged. The issue before the Court is the conduct of the sale. I fully agree Article 513 of the Code clearly

stipulates that a sale can only be stopped by the consent of the parties or order of the judge. The Sheriff having received instructions from Counsel for the judgment creditor who records show is the deceased and was deceased at the time of the sale which information would not have been known to the Sheriff and as a result the writ of seizure and sale was properly executed by the Sheriff.

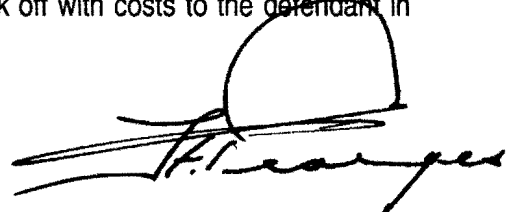
[28] It is plain that ordinary means of redress were available to the claimant and in that regard he should not because of his failure to apply for any of the alternative means of redress come before the Court and say that he has been deprived of his property under the Constitution. See paragraph 26 and **Hinds v Attorney General (No. 2)**.

[29] In sum the claimant has not stopped or attempted to stop the sale under Article 514 of the Code nor has he made any successful attempts to annul the sale pursuant to Article 560 of the Code of Civil Procedure nor was any application for an extension of time made.

[30] In light of the foregoing the Court holds that the sale of the properties belonging to the claimant was properly executed within the ambit of the law and save for a minor spelling error in the name of the judgment creditor the properties put up and advertised for sale were adequately and accurately advertised so as to put the claimant/judgment debtor on notice without doubt of the pending sale.

[31] It must be borne in mind that Section 6(1) of the Constitution deals with compulsory taking of property Section 6(6)(iv) makes it permissible for property to be taken in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations. The claimant cannot therefore substantiate that there has been any breach of his fundamental rights under section 6(1) of the Constitution because there is no evidence of any unlawful or wrongful acquisition as illustrated in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al [1998] ECLR122**.

[32] It is quite clear that the claimant had alternative means of seeking redress for what he perceived to have been breaches of his constitutional rights but were in actual fact not since no evidence has been disclosed of a breach of any of his fundamental rights under the Constitution. Any attempt by the claimant to use the procedure under section 16 of the Constitution as a general substitute for ordinary procedures which were available constitutes an abuse of process and as a result the claim by way of originating motion is struck off with costs to the defendant in the sum of \$2,500.00.

A handwritten signature in black ink, appearing to read 'E. Georges', with a large, stylized loop at the end.

Ephraim Georges
High Court Judge [Ag.]