

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 1994/F097

BETWEEN AUBREY FAULKNOR PLAINTIFF
AND PEARJOHN INVESTMENTS LTD. FIRST DEFENDANT
AND YVONNE CLUDIUS SECOND DEFENDANT

Mr. Earle and Mrs K. Wilson for First Defendant instructed by Rattray, Patterson and Rattray.

Mr. Samuel Harrison for the Plaintiff instructed by Dunn Cox & Orrett.

HEARD: OCTOBER 8, 11 and 25, 1996.

ORAL JUDGMENT

JAMES G.G.

In this application the First Defendant (Pearjohn Investments Limited) is seeking an Order for Summary Judgment and/or an Order to Strike Out the Writ of Summons and Statement of Claim.

Mr. Samuel Harrison for the Plaintiff/Respondent contends that Summary Judgment is unavailable to a Counterclaimant as the word 'Plaintiff' in Section 79(1) of the Consolidated Civil Procedure Code does not include a Defendant who is counterclaiming.

Mr. Earle in response said that when a Defendant is applying for Summary Judgment on a Counterclaim he is not doing so pursuant to Section 79 of the Civil Procedure Code but rather he is invoking the current practise and procedure which obtains in England which is permissible by Section 686 of the Civil Procedure Code. The Defendant is entitled to invoke the practise and procedure in England owing to the fact that our code does not have any express provision on the procedure to be adopted by a Defendant who wishes to apply for Summary Judgment on a Counterclaim.

I find that the provision contained in Section 686 of the Civil Procedure Code is applicable and the English provision whereby Summary Judgment is available to a Counterclaiming Defendant is applicable in our jurisdiction.

The question arises - should an Order be made that Summary Judgment be entered in favour of the First Defendant.

The Plaintiff has been in possession of premises at Norman Manley Boulevard, Negril, Westmoreland registered at Volume 965 Folio 617 of the Register Book of Titles. The First Defendant is the Registered Proprietor of the said premises. The Second Defendant was the predecessor in title to the First Defendant, the Second Defendant having sold the said land to Llewellyn Johnson who nominated the First Defendant as transferee.

By an earlier agreement in writing made in 1987 between the Plaintiff and the Second Defendant, the Second Defendant agreed to sell and the Plaintiff agreed to purchase the said premises. It is alleged that the premises was sold to Llewellyn Johnson in breach of this agreement. Llewellyn Johnson is a Director and Shareholder of the First Defendant.

The Plaintiff in this action seeks:-

- (1) A declaration that the Transfer of Title in the name of the First Defendant is null and void;
- (2) Specific Performance and or Damages against the Second Defendant.

It is agreed on both sides that under the Registration of Titles Act, the name for the time being endorsed on the Title as registered proprietor thereof shall in the absence of fraud be conclusive evidence that the person is the proprietor having the estate and/or interest stated therein.

S.S. 68, 70 and 71 of the Act refers.

There is no allegation of fraud in the Statement of Claim but in his affidavit in response to the affidavit in Support of the Summons for Summary Judgment, the Plaintiff (in paragraph 8(d) accuses the First Defendant and Llewellyn Johnson together with one Washington Pearce that they planned to deprive or cheat him (the Plaintiff) out of his interest in the said land.

Mr. Harrison said during the course of his submissions that there was collusion between the vendor and purchaser and that they acted fraudulently. He stated his intention to seek an amendment to allege fraud in his Statement of Claim. Mr. Harrison submitted that the absence of pleading fraud can be remedied by an Amendment and that it is his intention to seek such an amendment. The case of *Honiball and Brown v. Alele*, Privy Council Appeal No. 9 of 1992 was cited in support of Mr. Harrison's submissions.

I have carefully considered the submissions by both Mr. Harrison and Mr. Earle, I am particularly grateful to Mr. Earle for the very helpful Summary of his submissions which he made available to the Court.

It appears to me that the Plaintiff's remedy lies primarily against the Second Defendant for damages for breach of contract, that is, however, a matter to be determined at a trial.

I find that there are triable issues in this case and the application for summary judgment ought to be refused. I find also that the pleadings should not be struck out. As Carey, P (Ag.) as he then was said in *Hutchinson v. Ellis Shepherd* S.C.C.A. No. 93/90, 'where a judge is of the view that the pleadings are redeemable by amendment, then he ought not to accede to the application to strike out the pleadings' - this statement was cited with approval from *Republic of Peru v. Peruvian Guano Company* 36 Ch. D. 496.

I therefore refuse to grant the order sought in the Summons dated 19th December 1995. Plaintiff is granted leave to Defend the Counterclaim. Counterclaim to be filed within fourteen days from the date hereof.

Costs to be costs in the cause. Plaintiff is granted leave to Defend the Counterclaim. Reply and Defence to Counterclaim to be filed within fourteen days from the date hereof 25th October 1996.

G. A. A. A.