



[2019] JMSC Civ 153

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2018 HCV 03486**

<b>BETWEEN</b>	<b>SYLVESTER GEORGE LINDO</b>	<b>1<sup>ST</sup> CLAIMANT</b>
	<b>LEMUEL AUGUSTUS LINDO</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>ANGELLA BROWN</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Representation: Jamila Thomas instructed by Lambie, Thomas and Co for Applicant/Defendant

Mrs. Natalya Heywood-Blake instructed by Heywood Blake for Respondent/Claimant

Heard: June 24, 2019 and July 30, 2019

**Civil Procedure – Claimant’s action for recovery of possession of land pursuant to 8.1(4)(b) - Defendant’s application for court order to consolidate claims pursuant to Rule 26.2 of Civil Procedure Rule – Whether there are common issues of fact and law – Registrar of Title to produce documents pursuant to Section 42 ROTA – Whether title of claimant was obtained by the fraud - Injunction against trespass – — Whether dispute may continue on the Fixed Date Claim Form.**

**T. HUTCHINSON, J (AG.)**

**INTRODUCTION**

**[1]** This is an Application for Court Orders filed by Defendant on 18.06.19 in which the Applicant is seeking the following orders

1. The Claim be consolidated and heard together as one claim with Claim No. 2017HCV04114 – Angella Brown v Dalston Lindo.
2. The Registrar of Titles is directed to furnish to the Defendant’s Attorneys all documents submitted by Dalston Lindo in his application to obtain the Certificate of Title registered at Volume 1445 Folio 323 of the Register Book of Title being application no. 1653031 within 14 days of the date hereof.
3. That the Claimants Lemuel Augustus Lindo and Sylvester George Lindo be restrained from
  - a. Selling, mortgaging, transferring or otherwise dealing with the property registered at Volume 1445 Folio 323 of the Register book of Titles.
  - b. Entering upon the portion of property registered at Volume 1445 Folio 323 of the Register Book of Titles in the possession of the Applicant, Angella Brown, containing by extension two squares of land bounded on the south by parochial road leading from Elrick to Main Road leading to Spanish Town on the north by Herbert Montaque on the east by Right of Way and on the west by Lloyd Montaque.
  - c. Doing any other act that would interfere with the Claimant’s quiet enjoyment of the said property.

## **BACKGROUND**

- [2] On the 16<sup>th</sup> of March 2018, the Claimants became the legal owners of property located at Stanbury Grove, Kensington, Sligoville P.O., St. Catherine when the registered owner Dalston Lindo, their uncle, transferred his interest to them inter vivos by way of a gift.
- [3] At the time of the transfer, the Defendant was occupying a dwelling house located on the said property. She had previously occupied same with her spouse who was the nephew of Dalston Lindo and who it is said was given permission to do so by Mr Lindo. On the passing of her spouse the Defendant remained in the premises.
- [4] On the 22<sup>nd</sup> day of June 2018 the Defendant was served with a Notice to Quit the premises by the 31<sup>st</sup> of August 2018. She remained in the premises after the expiration of the notice period and on the 17<sup>th</sup> of September 2019, the Claimants filed suit. An acknowledgement of service was filed on the 8<sup>th</sup> of March 2019 and on the 21<sup>st</sup> of March 2019 a notice of Application for Court Orders was filed. This was amended on the 28<sup>th</sup> of March 2019 with the Applicant/Defendant seeking the orders which have been referred to above.

## **SUBMISSIONS**

### **Court's power to consolidate**

- [5] Counsel for the Applicant submitted that the Court's power to consolidate claims such as these is found at Rule 26.2 (b) CPR.
- [6] She also submitted that matters involving common questions of fact and law can be consolidated and she asserts that these exists in both actions. For example, if the answer to the question was the title of Dalston Lindo obtained by fraud is yes, it would affect the title held by Claimants in the instant case as Dalston Lindo's Title would be cancelled and the Claimant's application for recovery of possession would fail since they weren't bonafide purchasers for value. She submitted that the Court also has to consider in both matters whether Defendant had acquired title by

adverse possession as well as whether she is entitled to an interest in the property. Ms. Thomas also raised the concern that if the matters are tried separately there is the risk of irreconcilable judgments.

- [7] Mrs. Heywood-Blake for the Respondent/Claimants has opposed the orders sought and submitted that these applications should have been brought on the claim against Dalston Lindo. She submitted that there are no allegations of fraud made by the Applicant in instant matter. It was accepted by her that both claims concern the same parties and same piece of land but it is her position that separate reliefs are being sought. Counsel also noted that in the claim brought by her the Applicant asserts that she has a legal and beneficial interest in the land but doesn't say how she came into possession. Dalston Lindo on the other hand, it is submitted, asserted a legal and beneficial title having been born and raised on land. He also deponed in his Defence in the related matter, that he had permitted the Defendant's spouse Wellesley Brown and his mother to reside on the land. The latter being his sister. Counsel submitted that the Applicant was subsequently brought there to live by her husband and as such her presence on the property was based on the permission given to her spouse by Dalston Lindo.
- [8] Counsel made further reference to the contents of the defence of Dalton Lindo that he exercised oversight in respect of the property even while living abroad for over 20 years and noted that in those circumstances the Applicant was never in undisturbed possession. It was also highlighted that in order to obtain First Registration Dalston Lindo's application would have been subject to rigorous checks by the Registrar of Titles.
- [9] In response to a query from the Court, Mrs. Heywood-Blake submitted that in the event the Applicant's matter against Mr. Dalston Lindo was resolved in her favour but a contrary result obtained in the instant matter, damages could serve as an adequate remedy for the Applicant's loss.

**Order directing Registrar of Titles to furnish copies of documents submitted by Dalston Lindo in his application to obtain Title.**

[10] On this point, Counsel for the Applicant has highlighted that the impact of Section 42 of the Registration of Titles Act (hereinafter ROTA) is that the Registrar cannot provide a Defendant or Counsel copies of documents submitted for application of title without a Court Order.

She had highlighted that in respect of her claim, Paragraph 10 of the Applicant's Particulars of Claim alleges that Mr. Dalston Lindo;

- a. Falsely representing to Registrar of Titles that he is entitled to be registered as proprietor of the said land.
- b. Falsely representing to the Registrar of Titles that he has been in possession of the said property.
- c. Failing to disclose to the Registrar of Titles the Claimant's possession and occupation of the said property and that the Claimant is entitled to an interest thereon.
- d. Falsely representing to the Registrar of Titles that he is the owner of said property

[11] It is in light of these assertions that it is submitted that production of these documents is relevant to the claim brought by Applicant/Defendant and also relevant to her defence to the claim brought by Claimants.

[12] It was also submitted that the Court would be asked to determine if Dalston Lindo made false representations to the Registrar of Titles in his application for title. As such it would be necessary for the Court determining this issue to have sight of this application.

[13] Counsel for the Respondent submitted that there are no allegations of fraud outlined in paragraph 10. She noted that allegations of fraud are serious and particulars must state what is the fraud committed. Counsel submitted that the

Applicant is seeking to use the Court Order as a fishing expedition in the hope of finding something to ground fraud as nothing stated in paragraph 10 does so.

**Injunction sought**

[14] Counsel for the Applicant has noted that she relies on the principle in ***American Cyanamid v Ethicon Ltd [1975] AC 396*** and ***NCB v Olint [2009] 1 WLR 1405***. Refer to and rely on paragraphs 16 and 17 of the latter.

[15] She has said the Court must consider;

- i. Whether there is a serious issue to be tried.
- ii. Whether damages would be an adequate remedy
- iii. Whether the balance of convenience lies in favour of granting or
- iv. refusing the injunctive relief sought

[16] Counsel also submitted that the Court should consider the extract below from the ***Olint*** decision;

*'The basic principle is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other'.*

[17] It is Ms. Thomas's submission that damages would not be an adequate remedy as if property is transferred the Applicant would have lost what cannot be restored as damages do not provide an adequate remedy when dealing with property.

[18] It was also submitted there is a serious issue to be tried as well as a real risk of the Claimants dealing with the property in a way that is prejudicial to Angella Brown.

[19] The basis of this submission is at the time the Applicant brought her claim against Dalston Lindo the title was registered in his name. It has since been transferred to the Claimants. Without an injunction, Counsel says, there is no guarantee that the

Claimants will not dispose of the property in a way prejudicial to the Applicant or interfere with her possession of same.

[20] Counsel for the Respondent has submitted that the injunction is opposed as it is not required. She has stated that the Claimants having received title from their uncle have no intention of parting with it. She has submitted that no conduct has been alleged by them to put the Applicant in imminent danger to ground the basis for an injunction. She said that they have not sought to interfere with the Applicant but there is another property on the land owned by a family member and to prevent them going to visit that relative is not necessary. In concluding her submissions on this point, Counsel also submitted that as the Applicant is only seeking an interest in the property damages can be an appropriate remedy.

#### **Claim to be treated as commenced by Claim Form**

[21] In light of the issues raised, Counsel for the Applicant has contended that it would not be appropriate for the matter to continue by way of Fixed Date Claim Form as there are issues of fraud and interest in property which are best determined by way of a trial in open court.

[22] In respect of this submission, Counsel for the Respondent highlighted that her clients were entitled to have their matter heard in Chambers as is the practice with Fixed Date Claim Form. She noted that there are no allegations of fraud on this claim and as such there are no issues in dispute and the matters can and should be dealt with separately.

#### **Mediation**

[23] In respect of mediation, Counsel for the Respondent submitted that there would be no need for the matter to be referred to mediation given the allegations of fraud.

#### **DISCUSSION/ANALYSIS**

##### **Consolidation**

[24] On the issue of a Courts power to consolidate a claim, Sykes J in ***O. Augustus Sherriah v DYC Fishing Co. Ltd etal [2015] JMSC Civ 27*** stated as follows;

“Rule 26.1 (2) (b) of the Civil Procedure Rules (CPR) permits the court to consolidate proceedings. There is no definition of consolidation in the rules and so it is prudent to use the definition that has been used over time. It is an expression that has been used in the law for over one hundred years. The usual meaning is this: different claims or causes of action are joined together and treated as if they were all one claim. One of the primary consequences of consolidation is that all findings of fact bind all the parties to the consolidated claim. The purpose of consolidation is to save time, costs and effort. The application is usually made before a trial of any of the matters has commenced.”

[25] As submitted by Counsel for the Respondent the power does exist and the appropriate time for making the application has been observed.

[26] In respect of the guiding principles for a Court faced with a request for consolidation of claims, the dicta of K. Anderson J in ***Dr. Sandra Williams-Phillips v University Hospital Board of Management [2014] JMSC Civ 117*** is very useful;

It is worthwhile to make reference to that which has been stated in the text – ‘Civil Procedure,’ Vol. 1 [2004] – commonly termed as, ‘The White Book,’ as to the circumstances in which an order for consolidation may be appropriate and in which, such an order may be inappropriate. Prior to quoting from that text though, it is worthy of note that in that text, the editors have made it clear, in interpreting England’s rule of court, that being rule 3.1 (2) (g), which is worded precisely the same as Jamaica’s Civil Procedure Rule 26.1 (2) (b), that nowadays, the rule of court which addresses the court’s power to make an order consolidating proceedings, is far more flexible than it once was. As such, whilst consolidation may be permitted where the joinder of claims and the joinder of parties that results from such consolidation, would satisfy the law as to such joinder, this does not at all mean, that consolidation should be ordered in all such circumstances, since overall, the court must, in deciding as to whether or not to make an order of consolidation, take care to act justly. [15] The White Book also goes on to state, at

paragraph 3.1.10, that, 'Under the former rules, consolidation of proceedings could be ordered where it appeared to the court (a) that some common question of law or fact arose in both or all of them, (b) that the rights to relief claimed were in respect of, or arose out of the same transactions or series of transactions, or (c) that for some other reason it was desirable to make an order for consolidation. These conditions reflected the fact that the main object of the consolidating power was to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Rule 3.1 (2) (g) contains no such confining conditions. But as the court, in exercising this power, must seek to give effect to the over-riding objective, the conditions stated in the former rules, are bound to remain important considerations.... Aspects of the overriding objective other than those concerned with cost and delay may also be engaged in the question, whether consolidation should be ordered (emphasis supplied).

- [24]** There is no dispute between the parties that both matters relate to a disagreement between the parties as to the same plot of land. There is also no dispute that the parties are largely the same as the Claimants in the instant action obtained their title from the Defendant in Claim N0. HCV20170414. The issue that has been joined between the parties appears to be one of Title, specifically has the Applicant acquired possessory title over the portion of land in issue? Did Dalston Lindo obtain his Title by fraud and can the Claimants herein obtain recovery of possession against the applicant on the basis of the title received from Dalston Lindo?
- [27]** As stated in the authorities cited above, Rule 26.2(b) has vested the Court with the power to consolidate claims where there are common issues of fact and law. It is clear from the identification of these issues that though the actions were brought separately and separate reliefs are sought, the issues joined are so interconnected that it would be a better use of judicial time to have the matters consolidated to be heard. Once this approach is adopted it would also avoid the possibility of irreconcilable judgments and the matters could be fully resolved on the question of title.

Order to the Registrar pursuant to Section 42 ROTA

[28] In considering this application, the Court found the decision of Batts J in ***Iris Anderson v Thomas Anderson and the Registrar of Titles [2014] JMSC Civ 62*** particularly helpful, with specific reference to paragraphs 71 to 72 which are quoted as follows;

[71] Fraud in this context denotes dishonesty or dishonest intent. ***Assets Co Ltd v Mere Roihi and Others (1905) AC 176***, ***Alele v Honnibal & Brown SCCA 111/789 (upheld on appeal by Judicial Committee of Privy Council) and Daley V RBTT et al CL 1995/D162*** Per Sykes J @ para 113 and @118 “118. I have now established under the RTA contrived ignorance or wilful blindness is sufficient for a finding of dishonesty. Although there are dicta that suggest that fraud is not confined to the obtaining of the transfer or in securing registration, it now seems well established that fraud committed in securing registration is included (see ***Bahr v. Nicolay (No. 2)*** per Wilson and Toohey JJ @ 633 “the fraud to which SS68 and 134 refer is fraud committed in the act of acquiring a registered title” and Mason CJ and Dawson J at page 615 “for our part we do not see the illustrations given and the statements made in the cases as amounting to definitive pronouncements that fraud is confined to fraud in the obtaining of a transfer or in securing registration.”)”

[72] Conduct which the First Defendant knowingly embarked upon in order to obtain a registered title but which the First Defendant knew to be wrong is dishonesty. In this case the Defendant at the time he applied for title knew that the Claimant was asserting an interest. He also knew that her sons had been in possession and doing farming hence the use of men with guns to chase them off. He also knew that the Claimant had attempted to survey the land. The Defendant knew that such disclosures would be likely to result in his application for title being delayed or refused hence his decision not to mention these things. Incidentally it matters not for present purposes that the omission to mention these matters may

have been on legal advice. The fraud is the knowledge of the truth and the withholding of facts with intent to get title issued. Doing so on legal advice does not change the fact it was done or the reason it was done. The lawyer being the Defendant's agent.

It bears repeating that fraud under the Registration of Titles Act is not necessarily the crime of fraud and hence actus reus and mens rea as clinically defined and proof beyond reasonable doubt are not prerequisites. The acts or omissions of his lawyers are the Defendants acts for this purpose. I hold that he failed to disclose material particulars and falsely alleged that no one had challenged his claim when this was patently not so. (emphasis supplied)

[29] It is the contention of the Applicant that false representations would have had to be made to the Registrar of Titles by Mr. Lindo in order to obtain the First Registration. It is accepted by him that he had been residing overseas for over 20 years and it is also accepted that the Applicant was living on the land for over 12 years and still resides there. The Applicant contends that had these factors been declared to the Registrar no title would have been issued and she wishes to have the documents produced to assist the Court on this point. Counsel for the Claimant has urged the Court to deny the request as she contends that none of these things even if true amount to fraud, the decision of ***Anderson v Anderson and Registrar of Titles*** shows that this isn't strictly correct as any dishonest representation to the Registrar is sufficient for the purposes of the Registration of Titles Act.

[30] Having reviewed the submissions on this point as well as the guidance provided in cases on the point, I am of the view that it would be of benefit to the Court to make the order sought herein.

### Injunction

[31] In respect of this point, I have reviewed the cases submitted by Counsel for the Applicant and I have taken note of the guiding principles outlined therein. I have also taken note of the Applicant's concern which can be simply stated as a fear that the Claimants herein could part with the property if not restrained from doing

so, title for same having already been passed to them while the matter was pending.

**[32]** In considering the balance of convenience I have taken note of the submissions of Counsel for the Respondent in which she was quite candid in pointing out that her clients have no intention in parting with the property having recently acquired same. She also noted that they have not sought to dispossess the Applicant but have been content to go through the Court to recover possession. She has also indicated that while they visit a relative's house on the same plot of land they have not sought to trespass on the Applicant's premises or sought to remove her from same.

**[33]** It is clear in these circumstances that whereas the Applicant's concerns are valid and relate to the place she calls home; the Claimants would not be dispossessed or out of pocket if the injunction requested were to be granted. I also agree with Counsel for the Respondent that this is not a matter where damages would be appropriate in the circumstances given that she stands to lose possession of her dwelling house in circumstances where she asserts a legal or beneficial interest.

**[34]** While an injunction could be granted to prevent any trespass on the part of the premises on which the residence of the Applicant is located, I would not seek to bar the Claimant's visiting the property of their relative as the Applicant's request does not seem to relate to any other residence located on the land in question.

**[35]** The injunction is granted on the usual condition that the Applicant gives an undertaking as to damages.

Claim to be treated as commenced by claim form

**[36]** 8.1(4) of the Rules provide that Form 2 (fixed date claim form) must be used (a) in mortgage claims; (b) in claims for possession of land; (c) in hire purchase claims; (d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact; (e) whenever its use is required by a rule

or practice direction; and (f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

**[37]** The action which was brought by the Claimant's was for recovery of possession, in those circumstances the claim was properly brought by Fixed Date Claim Form pursuant to 8.1(4)(b). The difficulty that has risen however, is that although an affidavit in response has not yet been filed by the Applicant, in her affidavit in support of the application for court orders she makes it clear that she will be taking issue with the claim brought herein on the basis that the Title on which the Claimants rely was obtained by the fraud of their predecessor in title.

**[38]** In those circumstances, it is clear that the matter has now become a dispute as to fact and could not continue on the Fixed Date Claim Form. In those circumstances, the Court finds that it cannot resist the application of the Applicant to have the matter continue by the Fixed Date Claim Form being converted to a Claim Form.

#### Mediation

**[39]** In respect of this request, it seems to be a bit premature given that although the Applicant has indicated her intentions, she has not yet filed a defence which is a pre-requisite for the matter to proceed to medication. What the Court will do at this stage is direct that the Applicant's defence is to be filed within 14 days of the Order herein which would then result in the automatic referral to mediation.

**[40]** It remains open to the Respondent to make an application to dispense with mediation if they do not believe it would be a viable exercise.

**[41]** Accordingly, the orders of the Court are as follows;

- a. The Claims are consolidated and the Claim herein is to be heard together as one claim with Claim No. 2017HCV04114 – Angella Brown v Dalston Lindo.
- b. The Registrar of Titles is directed to furnish to the Defendant's Attorneys all documents submitted by Dalston Lindo in his application to obtain the

Certificate of Title registered at Volume 1445 Folio 323 of the Register Book of Title being application no. 1653031 within 14 days of the date hereof.

- c. The Claimants Lemuel Augustus Lindo and Sylvester George Lindo are restrained from
  - i. Selling, mortgaging, transferring or otherwise dealing with the property registered at Volume 1445 Folio 323 of the Register book of Titles.
  - ii. Entering upon the portion of property registered at Volume 1445 Folio 323 of the Register Book of Titles in the possession of the Applicant, Angella Brown.
  - iii. Doing any other act that would interfere with the Defendant's quiet enjoyment of the said property.

Until the determination of the claims herein.

- d. The injunction is granted, undertaking as to damages to be filed forthwith and no later than the 2<sup>nd</sup> of August 2019, failing which the injunction expires.
- e. No modifications/improvements are to be done to the house occupied by Ms. Angella Brown.
- f. The Claim herein is treated as begun by way of Claim Form.
- g. The Defendant to file and serve a Defence within 14 days of the order herein.
- h. No order is made as to cost.
- i. The Defendant's Attorney to prepare, file and serve order herein.