



[2019] JMSC Civ 152

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

**CIVIL DIVISION**

**CLAIM NO. 2017 HCV 01546**

<b>BETWEEN</b>	<b>RONALD PARAGH</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>GEORGE PARAGH</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Phyllis Dyer and Raymond Samuels for the Applicant/Claimant

Fabian Campbell instructed by Kingston Legal Aid Clinic for the Defendant/Respondent

Heard: June 3, 2019 and July 19, 2019

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

**INTRODUCTION**

[1] This is a matter in which Lisa Paragh, Administrator of the Estate of Ruby Paragh, by way of Notice of Application for Court Orders which were filed on the 5<sup>th</sup> of July 2018, is seeking the following orders from the Court;

1. An order that as Administrator of the Estate of Ruby Paragh, late of Rosewell in the Parish of Clarendon by virtue of Grant of Administration granted out of the Supreme Court of Judicature of Jamaica on the 16<sup>th</sup> day of May 2018, Lisa Paragh be substituted as the Claimant herein.
2. An order permitting the New Claimant to file a Claim Form alleging Fraud against the Claimant (sic) and the Registrar of Titles based on the Defendant's Application for Title Application No. 2011344.

3. An Order permitting the Claimant to file Particulars of Claim.
4. An order that Anika Paragh of 237 Spanish Town Road be added as a Defendant to the Claim.
5. Costs of this Application to be costs in the Claim.

**[2]** In support of this application, the Applicant has filed a joint consent of both herself and Ronald Paragh, the original Claimant in this matter, agreeing for her to be substituted as the Claimant. She has also sworn to an affidavit in support of this application which makes reference to the following;

- a. The original claim which was brought,
- b. The grant of administration given to her on the 16th of May 2018,
- c. The documents submitted by the Defendant in support of his application for first registration which she says contains false representations amounting to fraud.
- d. An explanation as to the reason why Anika Paragh was not added as a Defendant in the original application.

## **BACKGROUND**

**[3]** The claim files its genesis in the fact that on the 31<sup>st</sup> of May 1992, Ruby Paragh died intestate possessed of a parcel of land in Rosewell, Clarendon. She was the mother of Ronald Paragh the Claimant herein, George Paragh, the Defendant and a number of other children to include Lisa Paragh, the Applicant.

**[4]** According to the Claimant, on the 23<sup>rd</sup> of February 2017 and 2<sup>nd</sup> of March 2017, an advertisement was placed by the Defendant in the Daily Observer pursuant to his efforts to bring the land in question under the Registration of Titles Act. This application was made by the Defendant without the knowledge of the other beneficiaries and it only came to their attention after the 9<sup>th</sup> of March 2017. An

attempt was made to lodge a caveat against this registration but it was out of time and title was issued to the Defendant and his daughter Anika Paragh as joint tenants.

**[5]** In order to challenge this grant, the Claimant filed a fixed date claim form on the 10<sup>th</sup> of May 2017 with an affidavit in support. The Fixed Date claim form sought;

(i) A declaration that the estate of Ruby Paragh is the legal owner of the said parcel of land,

(ii) That the Registrar of Titles be restrained from registering the land; or

(iii) In the alternative that the Registrar be directed to cancel any Title issued upon the Defendant's application and to issue a new title in the names of the Claimant and Defendant as tenants-in-common; or

(iv) Direct the Registrar of Titles to treat the Application by George Paragh as an application on behalf of the Estate of Ruby Paragh late of Rosewell District in the parish of Clarendon and to issue Title in the names of George B. Paragh, Everalld Paragh, Ronald Paragh, John C. Paragh, Blossom P. Hamilton and Lisa Paragh as tenants-in-common,

(v) Further or other relief as may be just; and

(vi) Costs.

**[6]** On the 18th of July 2017, an application was filed by the Claimant against the Defendant seeking an injunction to restrain the Defendant or anyone on his behalf from selling, leasing or mortgaging the land. The application also sought an injunction against the Registrar of Titles from registering any change in proprietorship of the said land.

**[7]** An undertaking in damages was given by the Claimant as well as by his niece who resides on the property and on the 30th day of January 2018 the injunction was granted by Justice J. Pusey. Contained in the same application was a request for

Anika Paragh to be added as a Defendant but it appears that no ruling was made on this part of the application.

- [8] On the 22nd of January 2018, Justice D. Batts made an order for Lisa Paragh to see and take copies of the Defendant's application for title application no. A2011344 and the declarations of the Defendant are attached to the list of documents which fall for the Court's consideration in the matter herein.
- [9] The Defendant has filed a defence and in same he asserts the fact that contrary to the contention of the Claimant he was in fact residing at the property and doing actions consistent with ownership including the payment of property taxes for the past fifteen years. He also averred that the issue of having the land registered had previously been discussed with his siblings, the majority of whom resided overseas. He states that they showed no interest so he went ahead with the knowledge and approval of Blossom Hamilton and had this done at his own expense. He also questions the standing of the Claimant to bring this claim in light of the fact that fact that he had no grant of administration in respect of the estate of Ruby Paragh.

### **CLAIMANT'S SUBMISSIONS**

- [10] In written submissions filed on behalf of the Applicant, it is noted that Ms. Paragh has applied to the Court for permission to be substituted and to that end on the 24th of October 2017 she filed the necessary consent jointly with the Claimant who cannot continue as a result of illness. It is also submitted that as a result of having obtained the grant of administration the Applicant is in fact the proper Claimant to the proceedings.
- [11] Under the heading allegations of fraud against the Defendant and the Registrar, Counsel for the Applicant submits that the Court has jurisdiction to amend statements of case at any time up to trial in order to bring forward and determine the real questions and issues in controversy between the parties. To this end Counsel referred to and relied on ***Cropper v Smith (1884) 26 Ch. D 700.***

Reference has also been made in this regard to the decision of ***Gloria Moo Young and Eric Moo Young v Geoffrey Chong, Dorothy Chong and Family Food Limited (in Liquidation) SCCA 117 of 1999*** on late amendments.

- [12] It was also submitted that the amendment that is being sought is in order to plead fraud based on the information gleaned from the Defendant's application for title. It is said that the Claimant was unable to do so at the time the original claim was filed as that information was obtained much later. Additionally, it would mean that the Fixed Date Claim Form would have to be converted to a Claim Form given that there are substantial disputes as to fact including fraud and to this end reliance is placed on ***Manfas Hay v Clover Thompson and Jonathon Prendergast {2018} JMSC Civ 26*** a decision by Master N. Hart-Hines.
- [13] In respect of the application to add Anika Paragh, Counsel submits that this application is necessary as at the time that the Fixed Date Claim Form was filed the Title had not yet been issued and as such the Claimant was not aware that Ms. Paragh was a joint proprietor. Counsel submits that it is necessary to have her added to the Claim to ensure that all relevant parties are before the Court.
- [14] In the course of her submissions, Counsel for the Claimant has referred to and relied on paragraph 9 of the Affidavit of the Applicant in which she stated that the property in question is occupied by her children and not the Defendant as he asserts. She also highlights the fact that he has sought an order for recovery of possession against them.
- [15] On the point of the application to add the Registrar of Titles as a Defendant, it is submitted that this is necessary as the Registrar is the 'person' against whom the fraud has been committed along with the estate of Ruby Paragh.

## **DEFENDANT'S SUBMISSIONS**

- [16] In his submissions in response, Counsel for the Defendant has highlighted that while the submissions made on behalf of the Applicant ask for the Fixed Date Claim

Form to be converted to a Claim Form, there is no such order sought in the Notice of Application for Court Orders which was filed on the 5<sup>th</sup> of July 2018. The same is true it is submitted in respect of the addition of the Registrar of Titles as a Defendant as no request is made for same in the notice as filed.

- [17]** In continuing his response, Mr. Campbell took issue with the affidavit in support of the court orders sought. He submitted that parts 30.1 and 30.2 of the CPR require that an application must be supported by an affidavit and these particular rules speak to what should be contained in same. He submitted that Rule 30.4(2) makes it clear that the jurat must follow the information being sworn to and should not appear on a separate page. In respect of the affidavit of Ms. Paragh, it is submitted that this affidavit does not comply with the rules. He pointed out that the jurat should state when, where and before whom the affidavit was sworn and that latter information appears on a separate page and as such the affidavit is irregular.
- [18]** In respect of the consent document Counsel also takes issue with whether it complies with 19.3(4) of the rules as not only is it done in the form of an affidavit but it makes reference in the body to being sworn to only by Lisa Paragh although Ronald Paragh's name and signature also appear at the end. Additionally, in the contents the Claimant consents to have a Kizzy Paragh, as opposed to a Lisa Paragh continue the action on his behalf. This submission concludes with the assertion that not only is the affidavit irregular but so is the consent and neither should be taken note of by the Court.
- [19]** In respect of the application for substitution, Counsel submits that at the time that the original action had been filed, the Claimant had no locus standi to do so as he was not in possession of a grant of administration and as such could not bring the claim. Counsel submits that the grant would have been required in order to commence the action but it was afterwards that it was obtained by Lisa Paragh who is now seeking to replace the original Claimant.

- [20] In respect of the Claim, he submits that the Grant makes no reference to the property which the Applicant has been appointed to administer. Accordingly, he submits the grant is contrary to legal requirements as set out in Volume 16 page 212, paragraph 382 Halsbury 3<sup>rd</sup> edition which requires the application for the grant to show that the property in question was owned by Ruby Paragh.
- [21] In respect of the Title, he submitted that the Title is indefeasible per section 68 of the Registration of Titles Act (hereinafter ROTA) and the information being referred to by the Applicant which she would wish to plead in the Claim Form does not establish fraud.
- [22] In concluding his submissions, Mr. Campbell stated that the grounds of his objection are as follows;
- a. The affidavit and consent are irregular
  - b. Even though the Applicant has standing the consent to continue the claim has been given to Kizzie Paragh.

#### **ADDITIONAL SUBMISSIONS**

- [23] In further submissions, Counsel for the Claimant asserted that he had standing at the time he brought the Claim both by virtue of Rule 68 and Rule 67.2. She also highlighted that he has a beneficial interest pursuant to Rule 67.2 (c) and as such he could bring the action.
- [24] In respect of the fraud on the part of the Registrar, Counsel submits that the request has been made to add the Registrar as a Defendant as in order to give her the authority to revoke the title, she must be a party to the claim. The alternate position was also submitted that in the event the Court did not agree that the Registrar should be added then the Court could direct the Registrar to revoke the Title.

- [25] On the point of the new Claim Form, it was also submitted that the Claimant be permitted to amend to add all parties and issues. In respect of the submissions about the consent, Counsel points out that this was a typo where it stated that the consent was to allow Kizzie Paragh to take over the action as there is no such person. In respect of the jurat on the affidavit of Lisa Paragh, it is submitted that it was properly witnessed before a notary public and should be permitted to stand.
- [26] On the point of the requirement for the property to be administered to be stated in the application for the grant of administration, Counsel submitted that this requirement had been dispensed with from 2002.
- [27] She also disagreed with Counsel's submissions on the indefeasibility of the Registered Title per Section 68 ROTA and submits that this has to be read along with Section 67 which she submits provides that the Title can be set aside on grounds of fraud.
- [28] In his further submissions in response, Mr. Campbell submitted that Rule 67.2 (c) has to be read in conjunction with 67.4(1) as an individual does not become an administrator unless one has a grant.
- [29] He also submitted that Rule 68 specifically addresses applications for Probate and this was not a matter in which the parties had made an application for same, the deceased having died intestate.

## **LAW**

### **Substitution of Claimant and Addition of Defendant**

- [30] The procedure to be followed in order to effect changes to either the Claimant or Defendant in a claim is set out at rule 19.3 as follows;
- 19.3 (1) The court may add, substitute or remove a party on or without an application.

- (2) An application for permission to add, substitute or remove a party may be made by
  - (a) an existing party; or
  - (b) a person who wishes to become a party.
- (3) An application for an order under rule 19.2(5) (substitution of new party where existing party's interest or liability has passed) may be made without notice but must be supported by evidence on affidavit.
- (4) No person may be added or substituted as a claimant unless that person's written consent is filed with the registry.
- (5) The court may add, remove or substitute a party at or after the case management conference.
- (6) An order for the addition, substitution or removal of a party must be served on
  - (a) all parties to the proceedings;
  - (b) any party added or substituted; and
  - (c) any other person affected by the order.
- (7) Where the court makes an order for the removal, addition or substitution of a party, it must consider whether to give consequential directions about
  - (a) filing and serving the claim form and any statements of case on any new defendant;
  - (b) serving relevant documents on the new party; and
  - (c) the management of the proceedings, and subject to such directions rule 19.2(2) applies.
- (8) Where

(a) the court makes an order for the addition or substitution of a new defendant; and

(b) the claim form is served on the new defendant; these Rules apply to the new defendant as they apply to any other defendant.

**[31]** The Application herein is made under 19.3(2) (b) of the rules as the Applicant wishes to become a party to the claim. In keeping with the requirements at 19.3(4) a joint consent has been filed and the composition of the consent has been the subject of criticism by Counsel for the Defendant.

**[32]** Apart from her request to be added as a party to continue this claim, the Applicant is also seeking an order that Anika Paragh the daughter of the Defendant be added as permitted by 19.3(6)(b). The Court can add additional parties to ensure that all relevant parties are before the Court in order to resolve the issues between them. Ms. Anika Paragh being a joint owner on the Certificate of Title would certainly be relevant to the proceedings.

**Amendment to Statement of Case**

**[33]** In the event the Court is minded to grant the substitution and addition sought, the Applicant is inviting the Court to allow her to amend the statement of case to allow for a claim of fraud to now be presented.

20.1 A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either

(a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or

(b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period), applies.

20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.

(2) Statements of case may only be amended after a case management conference with the permission of the court.

(3) Where the court gives permission to amend a statement of case it may give directions as to

(a) amendments to any other statement of case; and

(b) the service of any amended statement of case.

**[34]** If this were to be permitted, the Claimant would have to file an amended Claim Form to replace the Fixed Date Claim (assuming permission is granted to convert the latter) and a Particulars of Claim to replace the Affidavit of Ronald Paragh. The fraud would then have to be specifically pleaded, to this end draft Particulars have been attached to the Affidavit of the Applicant. The authority of *Manifas Hay* supra which has been cited by Counsel provides the legal basis for proceeding by way of claim form and particulars where fraud is alleged. In light of the existing power, the question for the Court then is whether this is an appropriate matter to be dealt with in this fashion.

### **Administration claim**

**[35]** In respect of her submissions on the point of the Claimant's standing to bring the original claim in this matter, Counsel for the Applicant has submitted that contrary to the assertion of Counsel for the Defendant, the Claimant would have had standing under Rule 67.2 of the CPR. The application and relevance of these rules are outlined below;

67.1 (1) This Part deals with

(a) claims for

- (i) the administration of the estate of a deceased person; and
  - (ii) the execution of a trust under the direction of the court, referred to as “administration claims”; and
- (b) claims to determine any question or grant any relief relating to the administration of the estate of a deceased person or the execution of a trust.
- (2) Such claims must be brought by a fixed date claim in form 2.

67.2 (1) An administration claim or a claim under rule 67.4 may be brought by

- (a) any executor or administrator of the relevant estate;
  - (b) any trustee of the relevant trust; or
  - (c) any person having or claiming to have a beneficial interest in the estate of a deceased person or under a trust.
- (2) Any executor or administrator of the relevant estate or trustee of the relevant trust who is not a claimant must be a defendant to the claim.
- (3) The general rule is that the claimant need not join any person having a beneficial interest under the estate or trust as a defendant.
- (4) However (a) the claimant may make any such person a defendant; and  
(b) the court may direct that any such person be made defendant.

67.4 (1) An executor, administrator or trustee may issue a claim for

- (a) the determination of any question; or
  - (b) any relief, without bringing an administration claim.
- (2) The “determination of any question” includes
- (a) any question arising in the administration of the estate of a deceased person;

(b) any question arising in the execution of, or under, a trust;

(c) any question as to the composition of any class of persons having a claim against

(i) the estate of a deceased person;

(ii) a beneficial interest in the estate of a deceased person; or

(iii) any property subject to a trust; and

(d) any question as to the rights or interests of a person claiming to be

(i) a creditor of the estate of a deceased person;

(ii) entitled under a will or on the intestacy of a deceased person; or

(iii) beneficially entitled under a trust.

(3) "Any relief" includes an order

(a) requiring an executor, administrator or trustee to furnish and verify accounts;

(b) requiring the payment into court of money held by a person in the capacity of executor, administrator or trustee;

(c) directing a person to do or abstain from doing a particular act in the capacity as executor, administrator or trustee;

(d) approving any sale, purchase, compromise or other transaction by a person in the capacity as executor, administrator or trustee; or

(e) directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust, which the court could order to be done if the estate or trust were being administered or executed under the direction of the court.

## **Affidavits**

**[36]** In respect of the concerns raised as to the sufficiency of the affidavit of Lisa Paragh which has been filed in support of the application for Court Orders, 30.4 provides as follows;

- (1) An affidavit must (a) be signed by each deponent; (b) be sworn or affirmed by each deponent; (c) be completed and signed by the person before whom the affidavit is sworn or affirmed; and (d) contain the full name of the person before whom it was sworn or affirmed.
- (2) The statement authenticating the affidavit ("the jurat") must follow immediately from the text and not be on a separate page.
- (3) No affidavit may be admitted into evidence if sworn or affirmed before the attorney-at-law of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such attorney-at-law.
- (4) Where it appears that the deponent is illiterate or blind, the person before whom the affidavit is sworn or affirmed must certify in the jurat that (a) the affidavit was read to the deponent by him or her or in his or her presence; (b) the deponent appeared to understand it; and (c) the deponent signed or made his or her mark in his presence.
- (5) A person may make an affidavit outside the jurisdiction in accordance with (a) this Part; or (b) the law of the place where the affidavit is made.
- (6) Subject to section 22(4) of the Judicature (Supreme Court) Act, any affidavit which purports to have been sworn or affirmed in accordance

with the law and procedure of any place outside the jurisdiction is presumed to have been so sworn.

- [37] In light of the requirement at 30.4(2) the Court will then have to give careful consideration to the question whether this affidavit in its current form can be viewed as a properly executed document for the purposes of this hearing.

**Registration of Titles Act**

- [38] In response to the submission of the Applicant, Counsel for the Respondent has asked the Court to bear in mind the indefeasibility of the Registered Title and to this end I have taken note of the provisions of Section 68 and 70 of ROTA which are outlined below;

68. No certificate of title registered and granted under this Act shall 'be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on

the folio of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

The Court's view of this section however would have to be tempered by the provisions of Section 71 of the same Act, to which I believe Counsel for the Respondent meant to refer when she spoke of Section 67.

### **Discussion/ Analysis**

[39] Although the application for Court Orders commences with the request to have the Applicant substituted to continue the Claim brought by Ronald Paragh, I propose to conduct my examination of the orders sought in reverse order.

### **Filing of a New Claim Form and Particulars to Plead Fraud**

[40] In respect of the order being sought to allow the Applicant to file a new claim form to plead fraud as well as particulars of claim, it is noted that this is a claim for possession of land which was brought by way of a Fixed Date Claim Form with an Affidavit in Support as permitted by Part 8.1(4) of the CPR which provides;

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; (emphasis added)

(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.

**[41]** As a result of the Applicant's review of the Defendant's application for Title she stated that she realised that he had provided false information to the Registrar on which the latter acted and issued the title. The Defendant on the other hand insists that he acted properly and with the knowledge and tacit consent of at least one of his siblings. He also asserts that in any event he had solely been responsible for the payment of taxes for the property in dispute, plus he maintained a residence on the land and as such was entitled to make the application.

**[42]** In respect of what is being asserted, it is clear that this is matter which will likely involve substantial disputes of fact and as such the action commenced could not be continued on a fixed date claim form. I have reviewed the application for Court orders filed herein and I note that contrary to the submission of Counsel for the Defendant, the Applicant had specifically applied for an order to have this matter dealt with by Claim Form and a Particulars of Claim filed. Accordingly, the submission that this order ought not to be granted as it was never sought in the notice is without merit.

**[43]** In the circumstances if the matter is to continue there would have to be a conversion of the Fixed Date Claim Form to a Claim Form.

**[44]** In respect of the application to file a particulars of claim outlining fraud, I have noted the submissions of Counsel for the Defendant on the indefeasibility of the Title. It is accepted by this Court that Sections 68, 70 and 71 of the Registration of Titles Act (ROTA) affords an armour and protection to a party in whom registered lands are vested, save and except in the case of fraud.

[45] The concept of indefeasibility of title is seen in section 68 of ROTA but a clear understanding of the term is provided in Section 70 both of which have previously been reviewed.

[46] On the issue of what undermines this indefeasibility of Title, Section 71 provides:

*“Except in the case of Fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”*

[47] In order for a Claimant to rely on fraud this must be specifically pleaded hence the request as above. This principle was stated by Thesiger, L.J. in ***Davy v Garrett (1877) 7Ch. D. 473 at 489*** in these terms:

*“In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred.”*

[48] The principle was adopted and applied in the Jamaican decision of ***Leroy McGregor v Verda Francis [2013] JMSC Civ. 172***. Having reviewed the rules and authorities on this point, it is clear that the Applicant would be on good ground to obtain the Court’s permission to file the Particulars of Claim with these allegations pleaded therein.

#### **Application to add Registrar as a Defendant**

[49] In respect of the request to add the Registrar as a Defendant to the claim, Sections 160 and 164 of the Registration of Titles Act are instructive:

160. The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or

proceeding, for or in respect of any act or matter bona fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act.

164. Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or my other officer or clerk, in the execution of their respective duties under the provisions of this Act or by an error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for the recovery of the land, estate or interest may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages

**[50]** In *Ilene Kelly and Errol Milford (Executors of Estate of Evelyn Francis. Dec'd) v Registrar of Titles [2011] JMCA Civ. 42*, Phillips JA outlined the treatment of cases where the Registrar was joined as a party.

*In my opinion, the appellants have thus far failed to provide any evidence to show that they have suffered loss through any omission, mistake or misfeasance of the Registrar in the execution of her duties under the provisions of the Act. To the contrary, the learned judge found that there was no express duty under the Act to inform the executors of suit no. E 357 of 1997. I agree with him. The appellants have not shown that their alleged loss was due to the entry of any memorandum in the register book or by the registration of any other person as proprietor. They also have not shown that by the provisions of the Act they are barred from bringing an action for the recovery of the said property. In fact, as stated previously, the deceased lost her estate in the said property because of the adjudication on all the circumstances by a competent court of law. There is also no error or misdescription in the certificate of title for the said property. On the true construction of this provision, the appellants could only proceed to bring an action against the Registrar if:*

*(a) barred by the provisions of the Act from bringing an action for recovery of land;  
and*

*(b) the action for recovery of damages as provided for under the Act is inapplicable.*

*It is important to note that proceeding under this section is acceptable only if no other alternative remedy is available.*

Having said this, the Learned Judge continued;

*This court has also already held that all the above stated circumstances must be satisfied before a person can bring an action against the Registrar as a nominal defendant pursuant to section 164 of the Act (see **Registrar of Titles v Melfitz Ltd & Another (SCCA No. 9/2003, delivered 29 July 2005)**). In my view, the stated circumstances have not been satisfied here.*

[51] The Applicant in seeking to add the Registrar as a Defendant to the Claim seems to be seeking a remedy that is already available to them which they could attain without joining the Registrar of Titles as a party to the action. The Remedy sought for the Title to be cancelled or amended can be achieved without the Registrar being a party as on the authority of **Melfitz Ltd** the Court can make the requisite orders.

### **Can the Applicant be substituted to continue the Claim**

[52] In respect of the applications for Court Order the primary order which has been sought is for Ms. Lisa Paragh to be appointed to continue this action. It is clear from the rules that substitution of a Claimant is permitted in certain circumstances once certain procedural requirements have been met. Counsel for the Respondent has submitted that these requirements have not been met as the Applicant is not named in the consent additionally, her application isn't properly grounded as the affidavit in support of same is irregular.

[53] Having reviewed both documents, I agree with Counsel for the Respondent that neither document is in compliance with the rules. The affidavit is indeed irregular

as the jurat begins on one page and continues on another where no text appears. The consent document is also flawed as in it the Claimant consents to someone bearing the first name of the Applicant's daughter but the Applicant's surname. Counsel for the Applicant has said this is a typo.

- [54] A review of the document itself shows that it is entitled joint consent of Ronald Paragh and Lisa Paragh and they are in fact the persons who have signed to it. It is evident that in spite of what the wording of the contents of the document the intention of both parties was to have Lisa Paragh continue the claim.
- [55] The option which would be open to the Applicant would be to have an amended consent and supplemental affidavit filed to cure these irregularities but in light of the fact that there were other areas of greater importance to determine in this matter no such orders were made.
- [56] The issue that was viewed as being of greater importance in determining the application by Ms. Paragh was whether the Claimant Ronald Paragh had the requisite standing at the time that he brought this claim. In respect of the submission by Counsel for the Applicant that he would have had standing under rule 67.2 (c), it is clear from a reading of Part 67 that this section of the rules relates to administration claims, the definition of which is outlined at 67.1 as being actions/claims specific to the administration of the estate of a deceased. That is different from the circumstances which exist in the instant matter as what is being sought herein are declarations in respect of property which was said to have belonged to Ruby Paragh which the defendant is alleged to have obtained title for in questionable circumstances.
- [57] On the issue of standing useful guidance is provided by Harris J.A. in the local decision ***George Mobray v. Andrew Joel Williams, [2012] JMCA Civ 26*** where she stated the position of a beneficiary on an intestacy as follows;

*On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until*

*the completion of the administration process: see **Commissioner of Stamp Duties (Queensland) v Livingston [1964] 3 All ER 692**. So then, what is the nature of the interest of a beneficiary of an estate prior to or during the administration process? There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein: see **Lord Sudeley v Attorney General [1897] AC 11; Re K (1986) Ch 180; and Lall v Lall [1965] 1 WLR 1249**.*

*In the Australian case of the **Commissioner of Stamp Duties (Queensland) v Livingston**, the Privy Council, although dealing with a case of testate succession, firmly established the principle that, in an un-administered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate. In that case, a widow died prior to the administration of her husband's estate in which she was entitled to the residue. It was held that she had no beneficial interest in the husband's estate.*

[58] The ruling of the Court in **Ingall v Moran [1944] K.B. 160** also provides assistance on this point, it dealt with a plaintiff who issued a writ in an action under the Law Reform Miscellaneous Provisions Act (LRMPA) suing in a representative capacity as administrator of his son's estate. He did not obtain a grant of letters of administration until nearly 2 months after the date of the writ. It was held that the action was incompetent at the date of its inception by the issue of the writ and that the doctrine of relation back of an administrator's title on obtaining a grant of Letters of Administration as to the date of the intestate's death could not be invoked so as to render the action competent.

[59] In continuing my review of the case law on this point I also took note of the decision **Murlena Redden v Higo Edwards etal [2012] JMSC Civ 40** a decision of Frank Williams J as he then was. The circumstances of the application therein were very similar to instant case as the Claimant was seeking an order from the Court to

substitute another person as Claimant. A consent was also filed by the intended Claimant.

- [60] The action was commenced by the Claimant in August 2014 with the Claimant Murlena Redden named as Executrix for the Estate of the deceased. She was not the executrix however as another individual had obtained a grant of probate in December 2003, a date prior to the commencement of the claim.
- [61] The Application was opposed by the 3<sup>rd</sup> defendant who relied on the authorities of ***Ingall v Moran [1944] 1 KB 160 and Hilton v Sutton Steam Laundry [1946] 1 KB 65*** in support of their position that the substitution could not be effected as the claim was void ab initio.
- [62] The Attorney for the Claimant prepared an affidavit indicating that the error was hers and noting that at the time the Claim was brought there was an individual who had the capacity to do so but it was a case of error in naming.
- [63] The issue for the Court then was whether substitution could be allowed in the circumstances or was the claim void ab initio.
- [64] The Court reviewed the decisions of ***Ingall V Moran and Hilton v Sutton Steam Laundry*** which dealt with claims brought on an intestacy. The Judge also considered the decision of ***Al Tawwab [1991] Loyd's Law Report 201***. In the course of the review the Court noted that the decision of ***Ingall v Moran*** made a distinction in law between an executor and an administrator in respect of the powers which could be exercised by them.
- [65] The Court also examined the dicta of Lloyd LJ in ***Thistle Hotels Ltd v Sir Robert McAlpine and Sons Ltd delivered April 6<sup>th</sup>, 1989*** where the question as to who was the executor for the purposes of bringing the claim was being treated with, from the guidance provided therein, it was the conclusion of Williams J that as the intention was for the Executrix to bring the Claim and an Executrix already existed

at the relevant time, this was simply an error in naming and the substitution was allowed.

- [66] The Learned Judge noted however, that this was a very different situation from that in which no will existed as any action brought would have to be commenced by an administrator. He stated that what existed in the **Redden** case was an irregularity which could be cured by substitution and not a nullity but in an intestacy type situation he stated;

*'in the case of the administrator, it is the letters of administration that clothe him/her with the authority to act.'*

- [67] The final authority which was examined on this point was **Gladstone Allen v Donald Allen [2014] JMSC Civ 220** a decision of Harris J. This was a matter in which an action had been brought by one brother against the other in which certain declarations and orders were sought by the Claimant against the Defendant in circumstances where the property in question had been owned by their deceased mother and no letters of administration had been obtained on her intestacy. The Court reviewed the position of the law as follows;

*In the case of **Commissioner of Stamp Duties (Queensland) v Livingston [1964] 3 All ER 692** it was held that the beneficiary under a will or on intestacy has no legal or equitable proprietary interest in the unadministered assets of a deceased's estate.*

*This principle was cited with approval in a number of cases from this Court, as well as, the Court of Appeal. In the case of **Kathleen Morrison, Andrew Morrison and Joy Morrison v. Herma Lemond [1989] 26 JLR 43** it was decided that the respondent in that case, who claimed to be a beneficiary under an unprobated will, did not have an equitable estate that was certain, much less a legal estate.*

The Judge continued;

*Mangatal J in the case of **Winston O'Brian Smith and Pleasurephonics Ltd v Constantine Scott, Croswell Scott, Veronica Robinson and Joyce Gibson [2012] JMSC Civ 152** stated:*

*That until a grant of administration has been made and the estate distributed, the beneficiaries have no such claims as would entitle them to stake claims as owners of the estate's assets. A beneficiary under a will or intestacy has no legal or equitable proprietary interest in the unadministered assets of the deceased's estate...*

*Further the true status of a beneficiary under a will or on intestacy is that he has a chose in action to have the deceased's estate properly administered. (Emphasis supplied)*

**[68]** Having completed the review as above Harris J stated as follows;

*Applying these principles to the case at bar, it would seem to me that the substantive claim is bound to fail as the Court has no basis in law or equity to make the declarations and orders being sought by the claimant.*

*The property in question remains an unadministered asset in the parties' mother's estate and until a grant of administration is made to her personal representative, neither the claimant nor his brother the defendant has any legal or equitable proprietary right to her property. They do not possess 'an equitable estate that is certain, much less a legal estate.' Their interest in the property would at best be as 'inchoate equitable owners'. It is only after a grant of LA and the distribution of the estate have taken place can the parties 'stake claims as owners of the estate's assets.'*

*For the reasons cited above, I am of the view that the Court cannot make an order declaring that the claimant is beneficially entitled to one half interest in the property. The court, in these circumstances, cannot order that the property is to be sold and the net proceeds of the sale are to be shared between the parties. The estate must be administered and distributed before this can be done. The court cannot aid the claimant to circumvent the administration of his mother's estate bearing in mind that the Crown has a right to its revenue.*

[69] A review of the case law on this point makes it clear that prior to the filing of this action, the Claimant should have obtained a grant of administration in his mother's estate in order to have standing before the Court as his right's as a beneficiary under his mother's estate did not go far enough. The situation cannot be remedied by the substitution of his sister who has since obtained a grant as it is clear from ***Ingall and Moran*** that the doctrine of relation back does not assist in these circumstances.

[70] Accordingly, it is my ruling on this point that while the substitution would be permitted on the rules, it would be pointless to allow this in these circumstances as the original claim is a nullity and as such there would be nothing to continue. Although I have not dealt with the application to add Anika Paragh as a defendant in any great detail, it should be noted that the position would be the same where she is concerned. While it would be perfectly permissible to do so, the claim being a nullity would militate against the Court making any such orders.

[71] Having conducted a complete review of the orders sought and the applicable law, it is the ruling of the Court is that the Orders sought herein are refused as the original claim on which they are based is a nullity. Consequently, all orders previously made herein in must fall away.

Costs to the Defendant to be agreed or taxed.