BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

CIVIL DIVISION

No: 25 and 26 of 1999

BETWEEN:

SINCLAIR RUDDER

And

FRANK SCANTLEBURY

(Appellants)

And

RUEBEN CARTER

(Respondent)

Before: The Honourable Sir Denys Ambrose Williams, Chief Justice, and the Honourable George Cecil Moe and Colin Anthony Williams, Justices of Appeal.

2000: September 2nd, October 26th.

Mr. Alair Shepherd, Q.C., and Mr. Marcel Deher for the Appellants.

Mr. Chester Sue for the Respondent.

DECISION

Colin Williams, J.A. These proceedings concern competing claims to certain land situate in the district of Providence in the parish of Christ Church.

In the first suit No. 167 of 1998, commenced on the 4th February 1998 by Originating Summons, the plaintiff Rueben Carter seeks the following relief:-

"1. An injunction to restrain the Defendants and each of them, whether by themselves, or by their respective servants or agents or any of them, or anyone claiming title by or through the First Defendant or otherwise howsoever from trespassing on the Plaintiff's land at Providence in the parish of Christ Church by excavating the soil and any plants thereon and erecting any buildings thereon;

2. Damages in the sum of $700.00 for the destruction of the Plaintiff's crop on the said land;

3. Costs;

4. Further or other relief."

On the 10th March 1998 the plaintiff took out a summons in which he claimed the relief sought in the Originating Summons. Although this summons appears in its form to ask for final judgment, the order made by Mr. Justice Moore on the 16th March, 1998 was an interlocutory injunction in form and substance.

Some six months later, on the 17th September 1998, the defendants applied for the discharge of the above injunction of the 16th March 1998 and that application was granted on the 16th December 1998.

While the first suit No. 167 of 1998 was at this stage, the plaintiff took out an Ex Parte Originating Summons dated the 18th January 1999 to which the Registry allotted the number 99 of 1999. The relief claimed in this new suit is as follows: -

“1. A declaration that the Plaintiff is entitled to exclusive possession of a parcel of land at Providence in the parish of Christ Church.

2. The Defendants and each of them be restrained whether by themselves or by their respective servants or agents or any of them or anyone claiming title by or through the First Defendant or otherwise howsoever from trespassing on the Plaintiff's land at Providence in the parish of Christ Church in any manner whatsoever.

3. Damages for the destruction of crops of the said land.

4. Costs

5. Further or other relief.”

A number of affidavits have been filed by the plaintiff and the defendants in the two suits Nos. 167 of 1998 and 99 of 1999, but those affidavits are relevant to the present appeals only in so far as they establish that the subject-matter of both suits is one and the same parcel of land. This means that from the 18th January 1999 there were two suits pending in the High Court between the same parties and dealing with a dispute over the same land.

To make confusion worse confounded, the plaintiff's attorney-at-law on the 9th March, 1999 presented the Registrar with a writ of summons with endorsed Statement of Claim, in which the said Rueben Carter was again the plaintiff, the said Sinclair Rudder and Frank Scantlebury were named as defendants, and the subject-matter was the same land at Providence. Notwithstanding that the second suit No. 99 of 1999 had been properly instituted by Originating Summons (Order 5, Rule 1 and Order 7, Rule 2), this new writ was assigned the same number 99 of 1999 even though it commenced a new action. After identifying the said land at Providence, Christ Church, as the subject-matter of the suit, the new Statement of Claim claims the following relief: -

“1. A declaration that the Plaintiff is entitled to exclusive possession of the said land

2. An injunction restraining the Defendants whether by themselves their servants or agents or otherwise howsoever from entering the said land.

3. Damages for trespass at the rate of $150.00 per week from the 11th day of December, 1997 until possession is delivered up.

3. Interest

4. Costs

5. Further or other relief as deemed by this Honourable Court.”

In an effort to deal with this multiplicity of proceedings, the defendants took out a summons on the 7th October 1999 in each suit. In suit No. 167 of 1998 they asked for an order that the proceedings therein be continued as if the action had been commenced by writ of summons and that the plaintiff do serve a Statement of Claim on the defendants within 14 days and thereafter the action to continue as if it were begun by Writ of Summons. In suit No. 99 of 1999 the defendants asked for an order that all further proceeding therein, including a certain injunction, be stayed and/or struck out and/or dismissed; and/or an order that all further proceedings therein be stayed until certain costs in the first suit are paid and that in default of such payment within a certain time the action be dismissed; and/or that the said injunction be discharged and/or set aside and/or dissolved and/or varied.

By consent of the parties, both of these applications were heard together. On the 28th October 1999 both applications were dismissed by Mr. Justice E. Leroy Inniss, Q.C., Judge of the High Court (Acting). The defendants have appealed to this Court against those decisions.

The reasons given by the Trial Judge for his dismissal of the applications are as follows:

“Re S.C. Suit No. 167 of 1998:

The Court held that since this matter was the subject of Appeal, it was not proper for the Court to make further orders unless the appeal was heard. The Court therefore dismissed the Summons with costs to be costs in the cause.

“Re S.C. Suit No. 99 of 1999

“It appears that the subject of S.C. Suit No. 99 of 1999 is substantially the same as S.C. Suit No. 167 of 1999 (sic – meaning 1998) and on the face of it could be considered an abuse of the process of the Court. However, although S.C. Suit No. 167 of 1998 had come before the Court as an ex parte application it was heard inter partes. The Plaintiff amended the application to substitute inter partes for ex parte. The Judge on the hearing of that application would have heard the submissions of both sides and after hearing the parties granted the injunction.

This Court was of the view that if the Defendants are dissatisfied with the decision of the learned Judge, the proper course is to appeal to the Court of Appeal. The matter was therefore dismissed with costs to the Plaintiff.”

As matters stand, we have three suits (No.99 of 1999 being two, as shown above) that have been commenced to resolve a single dispute, viz., the beneficial ownership of a single parcel of land.

The Court's approach to a multiplicity of proceedings with a common subject-matter has been considered in a number of cases. In Maher v. Maher [1919] V.L.R., 577 a petition for divorce on grounds of desertion was followed later by a petition for divorce on grounds of adultery. The husband secured the costs of the first petition, but an application for security in the second case while the first was still pending was refused.

Hood, J., said that the commencement of a second suit for a cause that, so far as appears, might have been dealt with in a pending suit is, in his opinion, clearly wrongful.

Halifax Overseas Freighters Ltd. v. Resno Export et al (The "Pine Hill") [1958] 2 Lloyd's List Law Reports, 146, had to do with a dispute over a salvage claim involving parties to a charter-party with an arbitration clause and parties to bills of lading without any such clause. An application for a stay of an action under the charter-party was made pursuant to the arbitration clause but this was refused on the ground that an arbitration would otherwise be proceeding concurrently with an action under the bills of lading. McNair, J., said "inter alia": -
"If the claim of the shipowners against the bills of lading holders and the claim of the shipowners against the time charterers are allowed to proceed before different tribunals, there is a risk - and it may be a substantial risk - that you will get from those two tribunals inconsistent findings of facts."

"…I think there is force in the point … that time and expense and costs would be saved to a very substantial degree by insisting that the whole of these disputes between the shipowners and the time charterers should be disposed of in one set of proceedings. That set of proceedings must be proceedings in Court. The bill of lading holders are not subject to arbitration."

These principles were echoed in Tauton-Collins vs. Cromie [1964] 2 All E.R. 332. Lord Denning, M.R., said at page 333, letters D et seq: -

"It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay … All in all, the undesirability of two separate proceedings is such that I should have thought that it was a proper exercise of discretion for the official referee to say that he would not stay the claim against the contractors. Everything should be dealt with in one proceeding before the official referee."

I would add an additional reason why there should not be two different tribunals deciding the same dispute. Over and above the significant increase of expenses to litigants, the additional delay would almost certainly increase the anxiety and frustration (often approaching trauma) which many persons in Barbados experience when they are parties to litigation.

Applying the above principles to the matter before us, I entertain no doubt that the facts which are in dispute in these proceedings should be determined in one of the actions and that the other actions should be put out of the way. It is plain that significantly greater difficulties would be encountered in trying to unravel the confusion that is suit No. 99 of 1999 than in permitting suit No. 167 of 1998 to advance to trial.

At the same time, even a casual perusal of the documents filed so far shows that there are crucial disputes of fact which will have to be resolved in arriving at a final adjudication of the disputes between the parties. In my opinion, therefore, an Originating Summons was not the appropriate method of commencing any of these proceedings – Order 5, Rule 4(2)(b) – so this is a proper case to resort to the provisions of Order 28 Rule 8(1) which enacts as follows: -

"Where, in the case of a cause or matter begun by Originating Summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavit shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

Having regard to the large number of affidavits filed so far, I think that the parties should be left to frame their respective cases in such manner as they consider most advantageous to their own interests; so I would simply make an order that suit No. 167 of 1998 should proceed from this point as if it had been commenced by Writ of Summons, and that the plaintiff serve and file his Statement of Claim within 21 days, after which the provisions of Order 18 and subsequent orders will kick in and take effect. I would also order that all proceedings carrying the number 99 of 1999 be dismissed.

The plaintiff Reuben Carter must bear responsibility for the multiplication of the proceedings which has eventually led to this appeal. It is fair and just, therefore, that he should bear the taxed costs of the proceedings carrying the number 99 of 1999 and of these appeals. Such costs are certified for two attorneys-at-law.

CHIEF JUSTICE.

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