2005 No.311 BERBICE

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
(CIVIL JURISDICTION)

BETWEEN:-

1. DOROTHY LEWIS

2. LAVERN LAWRENCE

3. BRYAN LAWRENCE

4. SANDRA JOHNSON

5. ERVIN ROSE

Plaintiffs

- and -

1. JACQUELINE CAMERON

2. HAMID LAWRENCE, a minor

3. ABRAHIM LAWRENCE, a minor

4. ZAHEER LAWRENCE, a minor

5. ALIAH LAWRENCE, a minor

6. EDRIS LAWRENCE, a minor

7. ASHIKAH LAWRENCE, a minor

Defendants

Coram: Mr. Justice Franklin D. Holder

Mr. M. Bacchus for the Plaintiffs

Mr. A. Anamayah for the Defendants

DECISION

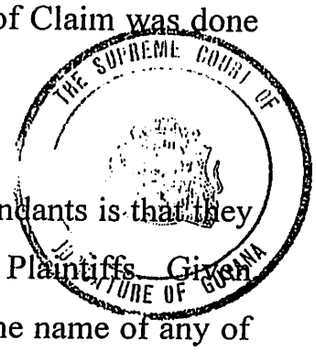
On the 15th April, 2005 the Plaintiffs who are siblings filed the instant action against the common law wife and children of a deceased sibling. At the time of the filing the children were all minors.

The indorsement of claim reads as follows:

> The Plaintiffs' claim against the Defendants is for:-
>
> a) A declaration that the Plaintiffs are the owners of five-sixth parts or share of and in to:-
> "South half of lot numbered 53 b (fifty three b) south of the public road, in the town of Rose Hall, situate on the Corentyne Coast, in the county of Berbice, Republic of Guyana, the said lot being shown on a plan by E. C. H. Klautky, Sworn Land Surveyor, dated September, 1911, and deposited in the Deeds Registry at New Amsterdam, on the 10th July, 1912, with the building thereon."
> b) A declaration that the Plaintiffs are entitled to possession of the said property.
> c) An order re-calling or revoking or cancelling Letters of Administration No. 154 of 1995 (Berbice) and Transport No. 23 of 1988 (Berbice) for fraud.
> d) Alternatively, a declaration that the estate of Lena Lewis, deceased, is the owner of the said property.
> e) An injunction restraining the Defendants from disposing of or encumbering the said property.
> f) An order that the Plaintiffs are en titled to purchase the one sixth (1/6) share of the Defendants in and to the said property.
> g) Any other order as may be just.
> h) Costs.

However, when the Statement of Claim is perused, in my opinion, it is found not to disclose any cause of action against the Defendants and I so rule. The cause of action raised by the Plaintiffs on the Statement of Claim is fraud allegedly perpetrated by their deceased brother, relative to the estate of their deceased mother.

In short the Plaintiffs claim that as beneficiaries on intestacy of the estate of their deceased mother they were defrauded of the property which formed part of the estate when it was vested solely in their deceased brother's name. It is appropriate to note that this vesting according to the Statement of Claim was done in 1998 some seven years before this action was instituted.



The only seemly adverse allegation made against the Defendants is that they are in occupation of the property in issue to the exclusion of the Plaintiffs. Given the fact as pleaded, that the transport for this property is not in the name of any of the Plaintiffs and they hold no other paper title to the property, I find that the Defendants by being in possession of the property without more cannot ground a cause of action against them for any alleged fraud committed by the deceased who was the reputed husband of the first Defendant and father of the other Defendants. Therefore the Plaintiffs have no case against the Defendants entitling them to the orders prayed for in the instant action.

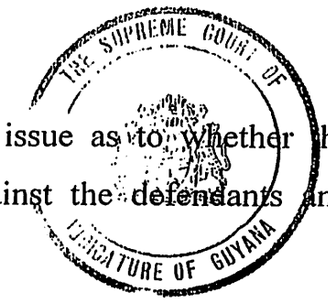
The Defendants in their personal capacities in which they have been sued cannot answer to the allegations and claims made by the Plaintiffs all of which are directed against the deceased father and husband. There are no allegations made in the Statement of Claim that any of the Defendants was a part or privy to the alleged fraud of the deceased.

Mr. Bacchus contends that the Defendants have not pleaded that the action cannot be maintained against them nor have they pleaded that the orders sought cannot be made against them. I do acknowledge this submission however, I disagree with him that they ought not to be allowed at this stage to raise this objection having failed to plead it.

In support of his contention Mr. Bacchus refers this Court to the case of **Dasodra** and **Balmakund -v- Lutchwa** [1996] G.L.R. 105. I do not find the statements made in that case to be supportive of Mr. Bacchus' submission. The case is distinguishable.

In that case the Plaintiffs had brought the action in their representative capacity of executors. The Defendant at the trial by way of defence argued that the Plaintiffs should have brought the action in their personal capacity since their function as executors had already been spent. Crane J. besides finding this argument to be unmeritorious found such an objection could not be taken at the trial because of the rule of pleading "that if a plaintiff sues in a representative capacity and it is contended he is not an executor or administrator, that defence must be pleaded". He relied on the case of **Hole -v- Bradbury** (1879) 28 W. R. 39.

In the present case unlike that case it is the Plaintiffs who have brought the action in their personal capacity and there is no challenge to the capacity in which they have brought the action.



In any event it was the Court which raised the issue as to whether the Statement of Claim disclosed any cause of action against the defendants and invited the parties to address it on this issue.

This Court is empowered to do so by virtue of Ord. 23 r.4 which states,

> Nothing in the Rules shall be construed to prevent the Court from giving effect to any point of law appearing on the record or at the hearing of any action or matter although not raised by either party in his pleadings or otherwise.

See **Basir -v- Goolcharan** [1961] L.R.B.G. 528 in which the power of the Court to raise points of law revealed on the pleadings or at the hearing is discussed.

I find it proper and appropriate to raise this issue at this stage since I am not prepared to embark on a lengthy trial which at the end of the day it is found that no cause of action is established against the Defendants for which they can or ought to answer.

A Plaintiff is required to prove his case according to his pleadings and if his pleadings do not reveal a cause of action against a Defendant it is the view of this Court that it is right and proper to bring this to the attention of the parties and hear them on the issue before embarking on a trial.

Though Mr. Bacchus has not expressly stated it in his written submission I infer from these that should I find as I did, he is seeking an amendment. This application for an amendment is made on the penultimate paragraph of his submissions.

This amendment he asserts may be made under Ord. 15 r. 6A and/or Ord. 20 r. 5(1) to (5). These orders I am afraid are orders of the U.K Rules of Court.

Firstly, I find that Ord. 15 r. 6A is not applicable to our jurisdiction. It cannot be applied since it came into effect in England on 1st January, 1971 after the 23rd February, 1970 the cut off date before which, where our rules are silent we may apply English rules relevant to the point in issue.

Now while I find the rule that is Ord. 15 r. 6A not applicable I consider the reasons for its adoption in the United Kingdom a useful starting point for my ruling on Mr. Bacchus' application. This rule provide inter alia,

Order 15 r. 6A

1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

2) Without prejudice to the generality of paragraph (1), an action brought against "the personal representatives of A.B deceased" shall be treated, for the purposes of that paragraph, as having been brought against his estate.

3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

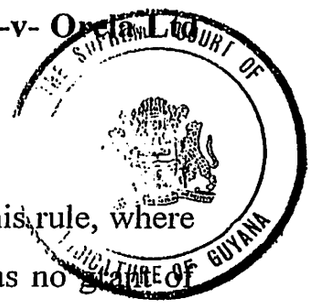
The learning in the White Book informs us as follows:-

> **Effect of rule** – This rule had been made to give effect to s. 2 of the Proceedings Against Estates Act 1970 which was repealed (see S.C.A. 1981, s. 152 (4) but replace by ibid. s. 87(2) and which had implemented the recommendations of the Law Commission contained in their report on this subject (Cmnd.4010 (1996). That Act and this rule had been brought into force on January 1, 1971 (S.I. 1970 No. 1870).
>
> Section 2 of the 1970 Act was designed to overcome the difficulties of bringing proceedings where the person against whom the action would be brought has died without a grant of probate or administration being made to his estate or where an action has been brought against a person who is already dead. In pursuance of the provisions of s. 2, this rule provides the machinery for overcoming these difficulties, first by enabling an action to be brought against the estate of the deceased, where the cause of action survives, even though no grant of probate or administration has been made (para (1)); and secondly by requiring that an action which has been brought against a defendant who has died where the cause of action survives to be treated as having been brought against estate, even though no grant of probate or administration has been made (para (3)).
>
> **Action against estate without grant**- If before an action is commenced against the estate of a deceased person, a grant of probate or administration has been made, the action should of course be brought against the personal representatives to whom the grant has been made. If it is not so brought, it may be necessary to apply for amendment to add or substitute the personal representatives or defendants.

On the other hand, if no grant of probate or administration has been made, the rule nevertheless enables the action which would have lain against the person who has died but the cause of action survives to be brought against the estate of the deceased (para (1)). The operation of

> the rule is thus remedial, since its effect is to prevent any prejudice to the plaintiff in having, as it were, himself to constitute the representation of the estate of the deceased against whom he intends to bring an action, and this is especially so, where any relevant period of limitation may be fast running out. There will be no need, for example, to obtain the appointment of an administrator ad litem by a grant issuing out of the Probate Registry.

For present purposes I understand from the foregoing that firstly, you cannot bring an action against a dead man, the action will adjudged to be a nullity and incurable See: **Clay -v- Oxford** (1986) L.R. 2 Ex ch 54 and **Tetlow -v- Oxford Ltd** [1902] 2 ch 24.



Secondly, prior to the English Act which brought into effect this rule, where someone had died and a cause of action survived him and there was no grant of probate or administrator an intended Plaintiff before he bring his action had to obtain the appointment of an administrator ad litem by a grant from the Court.

Now, analyzing the instant case with the foregoing in mind it means that when Counsel for the Plaintiff received his instructions and he had determined what was his cause of action he ought to have recognized that the cause of action was against a dead man. Note must be taken that this is not a case where the person in question died during the currency of the case or after the action was filed.

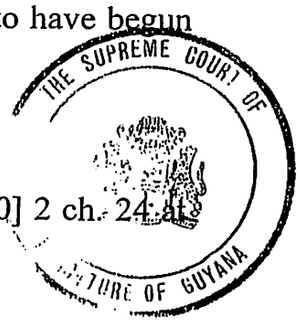
If there was no grant of probate or letters of administration it was incumbent on him to obtain an administration ad litem in respect of the deceased estate to allow him to institute proceedings against the deceased estate. This Counsel for the Plaintiff failed to do.

If Ord. 15 r. 6A does not apply Counsel seeks to save his case by asking this Court to apply Ord. 14 r. 14 and/or r. 38 which is similar to Ord. 15 r. 6 and 15 of the UK High Court rules respectively.

I find that neither of these two rules provide solutions for saving these proceedings.

Firstly Ord.14 r.14. This rule provides:-

> No action shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every action deal with the matter in controversy as far as regards the rights and interest of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order that the name of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every person whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or is such manner as may be prescribed by any special order, and the proceedings as against any such party shall be deemed to have begun only on the service of such writ or notice.



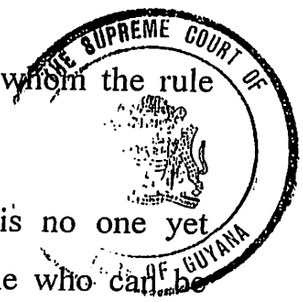
This rule was analyzed by Russell J in **Tetlow -v- Orela** [1920] 2 ch. 24 at page 27 when he states:-

> In my opinion the names of 'parties improperly joined' and the names of 'parties who ought to have been joined' are, within the meaning of that rule, the names of living persons.

The Court ruled that where an action is commenced in the name of a dead man in his representative cannot be substituted as Plaintiff. In **Dawson (Bradford) Ltd and others –v- Dove and Another** (1971) 1 QB 330 a case of a deceased Defendant, **Tetlow's** case was applied. Mackenna J. said at pages 334G – 335A

> If Ord. 16 r. 11 of the rules 1883 did not, as Russell J. held, enable an action commenced in the name of a dead man to be continued in the names of the executors, it must follow, I think, that an action commenced against a dead man could not have been continued against his executors. The language of the rule made no distinction between the power of striking out and adding plaintiffs and that of striking out and adding defendants. If there were no power under the rule to put matters right where there had been no living plaintiff, the rule must have been equally ineffective where there had been no living defendant. If the "parties" referred to in the rule were only living persons, the rule must have excluded the case of dead defendants as well as that of dead plaintiffs.

I adopt this reasoning relative to the parties or persons to whom the rule applies.



Therefore, since we cannot join the deceased and there is no one yet appointed to administer the estate of the deceased there is no one who can be joined under this rule.

And by parity of reasoning if the rule does not apply for the substitution of a legal representative of a dead man named as party at the time of the filing it cannot allow for the substitution of some person to represent a dead man who had no legal representative at the time the action was brought against the wrong Defendants.

In respect of Ord.14 r.38 this rule provides,

> If in any cause, matter or other proceeding it shall appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or a Judge may proceed in the absence of any person representing the estate of the deceased person or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding on such notice to such person, if any, as the Court or a Judge shall think fit, either specially or generally by public advertisement, and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the same cause, matter or proceeding.

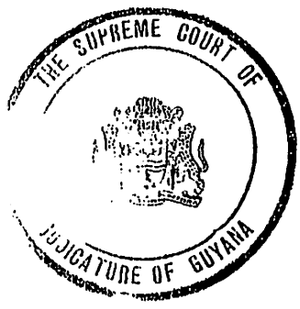
This rule does not contemplate the circumstances of the extant case. This rule contemplates there being and extant valid action. In the case at hand there is no extant valid against anyone. The cause of action does not related to anyone named as a party.

I am of opinion that this rule does not contemplate the Court striking out parties improperly named and substituting them with some person to represent the estate of a deceased person who the plaintiff was aware was dead at the time of institution of the proceedings and would be a necessary party to answer the claims being made.

This is not a substitution rule for misjoinder or non joinder of parties. The Plaintiffs cannot at this stage seek to ask the Court to do under this rule what cannot be done under Ord. 14 r. 14 as just explained or do what ought to have been done to commence the action against the proper defendant.

Finally Ord. 26 which provides for amendments has no application to the circumstances of this case. This order was not created to deal with the adding, striking out or substitution of parties.

In the premises the application to amend and/or substitute the Defendants is refused and the action dismissed against the Defendants.



Franklin D. Holder
Puisne Judge
Dated 29th October, 2010