

2016-HC-DEM-CIV-S-142

land law
- possession

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

309

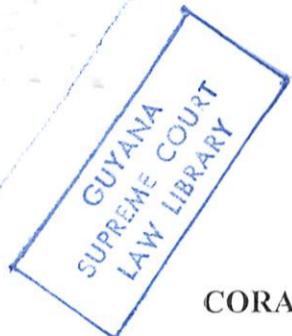
DAPHNE ELAINE ROGERS

Plaintiff

- and -

SHIRLAND ASHTON JOHNSON

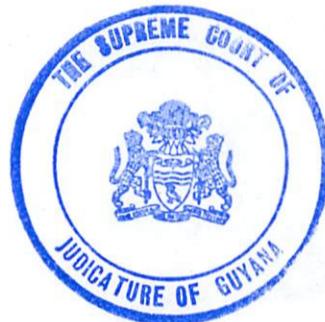
Defendant



CORAM: Franklin D. Holder

Mrs. Abiola Wong-Inniss for Plaintiff

Mr. Saphier Husain for Defendant



DECISION:

On the 16th September, 2016 the Plaintiff instituted these proceedings by way of a Specially Indorsed Writ claiming, possession of a property she owns pursuant to Transfer of Lease No. 169 of 1982 and mesne profits.

On the 17th October, 2016 when the matter was heard in Bail Court I gave the Defendant fourteen days leave within which to file his Affidavit of Defence and the matter was adjourned to the 7th November, 2016.

The Defendant filed his Affidavit of Defence on the 1st November, 2016 and when the matter was heard on the 7th November, 2016 he was given leave to file a Supplementary Affidavit of Defence to comply with the provisions of Order 12 Rule 3. No application was made nor leave given to file the Supplementary Affidavit of Defence for any other purpose.

On the 18th November, 2016 the Supplementary Affidavit of Defence was filed as ordered and on the 21st November, 2016 when the matter was called in Bail Court Ms. Wong-Inniss for the Plaintiff, requested that she be heard on the issue of whether the

Affidavit of Defence disclosed a triable issue. I fixed 1st December, 2016 as the date for the hearing of her on this issue.

On the 30th November, 2016 without leave of the Court the Defendant filed what he termed a Further Supplementary Affidavit of Defence.

When the matter was heard on the 1st December, 2016 I struck out this Affidavit, it having been filed without leave of the Court.

After the Affidavit was struck out Mr. Hussain for the Defendant made an oral application to file a Supplementary Affidavit of Defence to Exhibit a Petition for Declaration of Title by the Defendant in respect of the property in issue, filed on the 26th September, 2016.

Ms. Wong-Inniss in opposing this application submitted that at the time of the filing of the Affidavit of Defence the Petition would have been in existence, however, no mention was made of it in the Affidavit of Defence neither was it averred therein that the Plaintiff's title was extinguished pursuant to the Title to Land Prescription and Limitation Act 60:01. She further submitted that paragraph 8 of the Affidavit of Defence contradicted any claim to adverse possession.

I refused the application to file a Supplementary Affidavit of Defence to exhibit the Petition. I found that based on the Affidavit of Defence before me a claim for a Declaration of Title on the ground of adverse possession had no merit and as such no chance of success.

Further the mere fact that a Petition may have been filed does not in my view entitle the Defendant leave to defendant, what the defendant was required to do was aver in his Affidavit of Defence all the facts which could satisfy the Court that he could reasonably raise a defence of extinguishment of the Plaintiffs title for the prescribed period.

I am required to rule on the issue of whether the defendant's Affidavit of Defence discloses a triable issue, should I find that it does not the application is for judgment for the Plaintiff.



Order 12 rules 3 (1) and 4 (2) of the Rules of the High Court, Chapters 3:02 provide as follows:

Rules: 3 (1) If the defendant, or any defendant if there be more defendants than one, desire to defend the action, he shall, not later than eleven o'clock in the forenoon of the day (not being a public holiday) immediately preceding that fixed by the writ of summons for the appearance of the defendant, file an affidavit of defence.

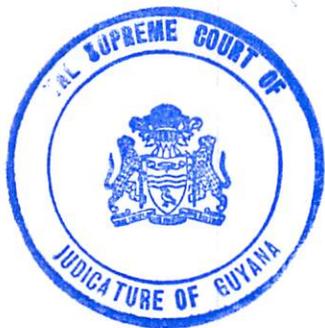
Rules: 4 (2) The Judge may on any hearing under this Order give judgment for the plaintiff on his application: provided that if the defendant by his affidavit shall satisfy the Judge that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the Judge shall give leave to defend, subject to such terms, if any, as the Judge may impose or make such order or orders as may be just or otherwise as the case may require.

In the case of **Guyana Oil Company Ltd – v – Amin** 82 W.I.R 346 Singh Ch. (ag) after considering the foregoing rules set out at page 355 what were the obligations of a Defendant, he said;

A Defendant's Affidavit of Defence, in Specially Indorsed Writ proceedings, should as far as possible deal specifically with the plaintiff's Claim and should state clearly and concisely what the defence is and what facts are relied on as supporting it. Sufficient facts and particulars must be given to show that there is a bona fide defence – Leave to defend is usually granted where there is a triable issue and the obligation is that of the defendant to satisfy the court that there is a triable issue.

What is required of a Defendant in his Affidavit of Defence was profoundly stated by Lord Blackburn in the case **Walling Ford – v – Mutual Society (1880) 5 App Case 685** at 704 where he said:

I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true . . . that would

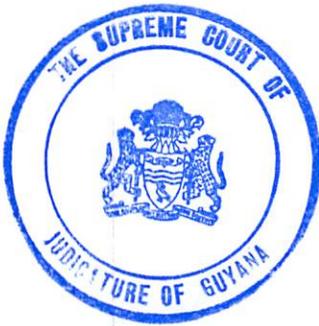


be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so . . . It is difficult to define it, but you must give such as extent of definite facts . . . as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence.’ (Emphasis added).

Singh Ch (ag) at page 352 (letters f – h) in the **Guyana Oil Company** case set out guidelines for a trial judge as to how a Defendant’s Affidavit of Defence ought to be considered, he said:

In **Banque de Paris et des Pays-Bas (Suisse) SA v de Narray (1984) 1**

Lloyd’s Rep 21, a decision of the Court of Appeal (UK), their Lordships Ackner and O’Connor held that-



The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.

Suitable guidance for an appropriate approach to the facts and circumstances of the instance matter is to be found in **National Westminster Bank plc – v –**

Daniel [1993 1 WLR 1453 at 1457, Glidewell LJ explained:

‘I think it right to ask, using the words of Ackner; CJ in the Banque de Paris case at pg 23, “Is there a fair or reasonable probability of the defendants having a real or bona fide defence? The test posed by

Lloyd, CJ in [**Standard Chartered Bank – v – Yaacoub** [1990] CA

Transcript 699]”. Is what the defendant says credible?

In that case the Respondent in the appeal who was the Defendant at first instance appealed to the Caribbean Court of Justice in **Feizal Mohamed Amin – v – Guyana Oil Company Ltd** (2014) CCJ 10 (AJ). Saunders JCCJ who gave the judgment of the Court said of the Guyana Court of Appeal decision:-

The first point that must clearly be made is that this Court accepts entirely in principle, the learning on leave to defend so eloquently set out by the Court of Appeal and referred to in the several cases cited by the Court. In these Order 12 rule 2 cases, it is important that trial judges do not unnecessarily prolong litigation by embarking upon trials when, on the affidavits before them, there is neither a reasonable prospect of defending the claim or a bona fide defence raised to the claims of a plaintiff. The Court therefore commends to trial judges this aspect of the Court of Appeal's judgment.

Taking into consideration the principles of law I have just set out I would now examine the contents of the Affidavit of Defence.

Paragraph (3) of the Affidavit of Defence states, "Paragraph (2) is denied to the extent that the Plaintiff was not in occupation of the property".

When paragraph 2 of the Statement of Claim is read paragraph (3) of the Affidavit of Defence without more in my view is incomprehensible. I am unable to make sense of the averments contained therein.

In paragraphs 4 and 5 the Defendant avers,

(4) Paragraph (3) is denied. The Plaintiff has not been competent to give consent or commission because of being of incapacitated by illness.

(5) The I was residing in the said property from (2) yrs. old and exclusively for sometime as the Plaintiff became incapacitated.

The averment that the Defendant had been living in the property since he was 2 years old lends to the irrefutable inference that he had been living in the Plaintiff's property with permission and by the further averments in paragraph (5) I conclude that this was with the consent and approval of the Plaintiff, since he states he was there exclusively for sometime as the Plaintiff became incapacitated. There are no further averments to show or establish how this permissive occupation was transformed into any adverse possession of his. In my view he supports this permissive and consensual occupation of the property by his averments in paragraph 7, where he says:

(7) That I shall contend that I contributed to the maintenance, repairs and up-keeping of the property including payments of rates and taxes, Electricity bills and Telephone bills for a period over 18 yrs since after leaving school.

The words "I contributed" connotes that he shared with another or others, this in my view further support the Plaintiff's claim that the Defendant is in occupation by permission and consent.

Then in paragraphs 8 of the Affidavit of Defence he avers:

(8) That I am advised by my Attorney-at-Law, Mr. Saphier Husain and verily believe that at least I have acquired equitable interest in the building, the plaintiff is stopped from demanding possession without compensating the me for my input in excess of twenty million dollars.



A claim for compensation is not a defence to possession and without more is not indicative of any proprietary interest in the property.

The Defendant while making a bald claim of an equitable interest has not averred facts which can reasonably support a defence of proprietary estoppel entitling him to leave to defend.

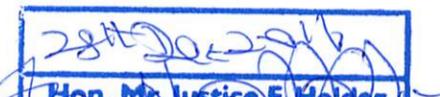
In my view the Affidavit of Defence does not condescend on particulars and taking into consideration the whole circumstances of this case there is no fair or reasonable probability that the Defendant has a real or bona fide defence to the Plaintiff's claim for possession.

The purported Summons filed by a third party does not affect my decision. It is an application by a third party asking to join in the proceedings as such it is not an interlocutory application the nature of which can properly or in any way forestall my decision. If the person intending to be joined perceives that he or she has a case then it is open to that individual to bring an action to prosecute their case.

In the premises leave is refused to the defendant to defend these proceedings and there will be judgment for the Plaintiff.

It is ordered that the Plaintiff do recover against the Defendant possession of the property situate at sub-lot lettered 'C' being all that piece or parcel of land part of the east part of lot numbered 45 Werk-en-Rust, Georgetown known on Hill House's Chart as parts of lots numbered 60 and 61 with the building and erections thereon and more fully described in transfer of lease No. 169/82.

It is further ordered that there be costs to the Plaintiff in the sum of \$50,000.00 Judgment is stayed for 6 weeks.

28th Dec 2016

Hon. Mr. Justice E. Holder,
High Court Judge
Supreme Court of Judicature
Puisne Judge

