SUPREME COURT OF NAURU
YAREN
CIVIL JURISDICTION

Civil Case No. 14 of 2021

BETWEEN

PHYLLIS MICHAEL — Plaintiff

AND

RAELYNE JORAM — Defendant

Before : Fatiaki CJ.

Date of Hearing : 6 & 17 August , 2021
Date of Ruling : 2 September , 2021

CITATION : Michael v Joram

CATCHWORDS:

"serious question to be tried" ; "damages an adequate remedy" ; "balance of convenience" ; "preserve the status quo" ; "no reasonable cause of action" ; "principles for summary dismissal" ; "locus" ; "misjoinder or nonjoinder of party" ;

LEGISLATION : Civil Procedure Rules 1972 ; Order 15 rule 19(1) ; Order 12 rule 7.

CASES REFERRED TO :

American Cyanamid Co v Ethicon Ltd (1975) AC 396 ; Pitcher v Ronphos [2012] NRSC 6 ; K Sheridan v Colin Biggers & Paisley [2019] NSWSC 528 ; General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 ; Hanoman v Rose [1955] AC 154.

APPEARANCES:

Counsel for the Plaintiff : J. Olsson
Counsel for the Defendant : A. Lekenaua

RULING

INTRODUCTION

1. This case concerns an unfortunate dispute that has arisen between two (2) sisters over the use of family land situated in Buada District and more particularly described as , Land Portion 269, Bitiati. Both sisters are equal share owners of the land but only the defendant has built and lives on the land.

2. Initially there were attempts to settle their differences over where the plaintiff should build her home, and , whether the defendant had permission or consent to build more than one homestead on the land. Matters escalated with accusations and counter-accusations and eventually culminated in the plaintiff issuing a Writ with Statement of Claim and an Originating Summons with supporting affidavit seeking various injunctive orders against the defendant. All documents were filed on 18 June 2021 and served on 21 June 2021.

3. On 24 June, 2021 the injunction application was heard in chambers and given the shortness of time , the application was adjourned for a fortnight until 8 July 2021 to allow the parties time to attempt a reconciliation and amicable settlement of their differences. In the meantime an interim injunction was issued to maintain the *"status quo"* and the defendant was directed to file and serve a response affidavit.

4. On 8 July 2021 defence counsel sought more time to file the affidavit in response to the two (2) affidavits filed by the plaintiff in support of the injunction. Defence counsel was given till 21 July 2021.

THE DISCHARGE APPLICATION

5. On 22 July 2021 when the case was again called in Court, defence counsel filed a Notice of Motion and affidavit of the defendant seeking the discharge of the plaintiff's interim injunction granted on 24 June 2021.

6. The discharge Motion was adjourned for hearing on 6 August 2021 and the defendant was directed to serve a defence by 29 July 2021. No defence was filed , instead , on 4 August 2021, twelve (12) days before the day fixed for the hearing of the discharge motion , a Summons to strike out the claim was filed by the defendant on the sole basis that :

   "...The claim discloses no reasonable cause of action..."

   The defendant's Summons to strike was adjourned to be heard on 17 August 2021.

7. The grounds advanced for the discharge of the injunction are nowhere disclosed in the Motion as they should have been , instead , counsel relies on the defendant's affidavit. The affidavit which was filed in support of the Motion on 22 July 2021 has 23 paragraphs of which the following three (3) are directly relevant to the discharge application namely :

   *13. "..**There is no question to be tried in this case** , Ryllis's and I are aware of our respective use of the land. There is no encroachment and the issue of 75% consent is immaterial as I have been given consent to use the land to build from the year , 2000. The Department of Lands and Survey advised that I am in compliance with the*

process of building on the land and that consent was not required because of the family agreement which were reflected in my authorisation form to build on the land.

14. ***The balance of inconvenience*** **(sic)** ***is not on the plaintiff's side. She has no locus.*** *Ryllis's is collecting the landowner's signature to build and not the Plaintiff, Phyllis Micheal* (sic). *She is not inconvenienced, I am being inconvenienced on the basis that I followed the process based on the advice provided to me and I am the one incurring expenses.* ***The Plaintiff has been given locus despite of the fact that she is not the person building on the land.*** (whatever that means).

15. ***For damages as an adequate remedy ,*** *the land area for portion 269 is 1.6974ha. The site which I am building covers a very small land area. The remaining land area is available to Ryllis's or any interested persons."*

(my highlighting)

8. Defence counsel also submitted orally that the plaintiff is <u>not</u> building on the disputed land and the defendant has a signed consent to build on the land and is building on a different site than that of the plaintiff's daughter. Furthermore , because the land covers a large area, the plaintiff's daughter can always choose another site to build on. As for the *"balance of convenience"* , counsel submits that it favours the defendant who has incurred considerable expenses to clear the site and build a concrete slab.

9. In the plaintiff's affidavit opposing the defendant's discharge application , she relevantly deposes :

"3. ***...There are some 264 co-owners of LP269, Buada ;***

and further :

24. ***My status as customary landowner allows me to speak on what happens on Bitiati. Any benefits that come from the land will come to and through me. Through me*** *, my daughter is enjoying the benefits of Bitiati when she obtained consent to use the land and build a house for her family.* ***It is through me*** *that my daughter is able to obtain consent from other landowners to use and build on the land.* ***It is on my instructions*** *that the land is cleared ;* ***it is on my instructions that surveyors*** *are on the land to survey and put in pegs; and ,* ***it is I who speak with landowners on behalf of my daughter to use and build on "our" land.***

25. ***My daughter does not have title;*** *and, equitable if any is availed to her at my consent and or the consent of all co-landowners, if such is the case.*

26. *My customary land role will automatically transfer to my daughter the moment I make peace with my Maker."*

and finally :

"28. ***I engaged 2 different companies to clear the site for my daughter's house.*** *(1) the first company was Tropical Tree Services, that cut down the big and small trees. The first phase project lasted from 15th – 22nd April 2021. (2) The second phase was when the NRC bulldozed down and uprooted the stubborn tree trunks. NRC took 3 days to complete this second phase (11th, 12th & 13th May 2021). (Para 11).."*

(my highlighting)

10. Counsel for the plaintiff also orally submitted that the plaintiff's substantive claim and affidavits raises several serious and triable issues as follows :

- whether the defendant's consent to use the land authorises her to erect more than 1 residence or building on the land ?
- whether the defendant's consent to use the land entitles her to claim an exclusive *"boundary"* in excess of the foundation and immediate surrounds of her original house site ?
- Is the defendant authorised by the original consent to use the land , to invite or permit labourers to enter and build a third structure on the land ?
- damages are an inadequate remedy because there are 262 other land owners who are also entitled to a house site on the land which should be shared and divided equitably amongst all landowners ;
- there is a serious factual dispute over whether the defendant cleared the site on which she is building or whether it was cleared and paid for by the plaintiff ? and
- the defendant built at her own risk and must bear the inconvenience of being stopped. The balance of the risk of doing an injustice rests in the plaintiff's favour in that prevention is the only viable response. Once fully built the defendant's house becomes a *"fait accompli"* hence , the justice of the case favours the maintenance of the *"status quo"* until the determination of the claim.

11. On 6 August , 2021 the defendant's application to discharge the injunction was heard and refused . The Court has also considered the following authorities :

"(1) American Cyanamid Co v Ethicon Ltd (1975) AC 396 ;
(2) Pitcher v Ronphos and NRC [2012] NRSC 6

12. The House of Lords laid down the guiding prinicples for the grant of an interlocutory injunction in American Cyanamid v Ethicon Ltd (1975) AC 396 where Lord Diplock in delivering the only judgment in the case with which the other members of the Court agreed, said at p 406 :

"...the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it , or both , is uncertain and will remain uncertain until final judgment is given in the action"

later :

"...the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights... ***The court must weigh one need against another and determine where the ' the balance of convenience lies'.....***

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination".

13. Then further at p. 407 in rejecting a *"supposed rule"* that the court is not entitled to take account of the *"balance of convenience"* unless it has first been satisfied that if the case went to trial the plaintiff would be successful in getting a permanent injunction , Lord Diplock said :

"Your Lordship should in my view take this opportunity of declaring there is no such rule. The use of such expressions as 'a probability' , 'a prima facie case' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. ***The court must no doubt be satisfied that the claim is not frivolous or vexatious in other words , that there is a serious question to be tried.***

It is no part of the courts' function at this stage... to try to resolve conflicts of evidence on affidavits as to facts *on which the claims of either party may ultimately depend nor to decide difficult question of law.....These are matters for trial"*

(my highlighting)

14. The last three (3) extracts that I desire to cite can be found at p. 408 beginning :

"...unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim..., the court should go on to consider...(whether)*...the balance of convenience lies in favour of granting or refusing.....* (the injunction)*....."*

15. Lord Diplock then explained :

"As to (the balance of convenience) ***the governing principle is that the court should first consider whether , if the plaintiff were to succeed at the trial....he would be adequately compensated by an award of damages.....*** *If damages..... would be an adequate remedy and the defendant would be ...*(able)*...to pay them , no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage..... If on the other hand , damages should not provide an adequate remedy for the plaintiff...the court should then consider whether, ...the defendant.....would be adequately compensated under the plaintiff's undertaking as to damage for the loss...*(the defendant)*...would have sustained by being prevented...*(from doing what he was restrained from doing)*... If damages under ...*(the plaintiff's)*...undertaking would be an adequate remedy and the plaintiff...*(could)*.. pay them, there would be no reason upon this ground to refuse an interlocutory injunction .*

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party... that the question of the balance of convenience arises...

Where other factors appear to be evenly , balanced , it is a counsel of prudence.... to preserve the status quo. *If the defendant is enjoined temporarily from doing something*

that he has not done before , the only effect of the interlocutory injunction.....is to postpone the date at which he is able.....(to resume)... "

16. And finally at p. 409 :

"..... the decision to grant or to refuse an injunction will cause... some disadvantages.....The extent to which the disadvantage would be incapable of being compensated in damages.....is always a significant factor in assessing where the balance of convenience lies ; and....(if disadvantages are finely balanced).... , *it may not be improper to take into account in tipping the balance , the relative strength of each party's case* .....(However) *the court is not justified in embarking upon... a trial of the action on conflicting affidavit in order to evaluate the strength of each party's case."*

17. From the foregoing , the sequence of considerations for a court dealing with an interlocutory application for an injunction are :

- to consider on the papers whether there is a serious question(s) to be tried ;
- to consider whether damages would afford an adequate remedy for both parties in the event of the grant or refusal of the injunction ; and
- Where damages is inadequate , the court should then consider where the *"balance of inconvenience"* lies and the relative strengths of each party's case on the papers filed and undisputed evidence.

[***see*** : *per* Eames CJ in Pitcher v Ronphos (ibid) at para 7]

18. On the basis of the foregoing and after considering the pleadings and affidavits filed by the parties , and counsels' oral submissions , I was not persuaded that there was no serious question to be tried or that the plaintiff lacked any *"locus"* to bring the claim or that damages was an adequate remedy for the plaintiff or an inadequate remedy for the defendant. Lastly , I was not satisfied the *"balance of convenience"* favoured the defendant. So much then for the application to discharge the injunction.

THE STRIKE OUT APPLICATION

19. On 17 August 2021 when the defendant's strike out application was listed for hearing , defence counsel sought an adjournment because she had not been able to print her submissions (which were not ordered by the Court) and also to enable her to amend and extend the grounds for seeking the strike out which was then limited to there being *"no reasonable cause of action"*. The oral application to amend the grounds was refused and defence counsel was given time to prepare to argue the application invoking Order 15 Rule 19(1) CPR.

20. Defence counsel relied on K. Sheridan v Colin Biggers & Paisley [2019] NSWSC 528 for the relevant principles for the summary dismissal of a Statement of Claim for the absence of a *"cause of action"* , as set out in General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69 ; (1964) 112 CLR 125 at 129 as follows :

(1) "The claim was "so obviously untenable that it cannot possibly succeed" ;
(2) "manifestly groundless";
(3) "so manifestly faulty that it does not admit of argument" ;

(4) "discloses a case which the court is satisfied cannot succeed" ;
(5) "under no possibility can there be a good cause of action" ; and
(6) " be manifested to allow (the pleading) to stand would involve useless expense."

"Similarly , the Court may strike out pleadings in plain and obvious case...(and)
The court may strike out pleadings where for example, a claim is :
(1) Doomed to fail .... ; or
(2) Untenable in the admitted (pleaded) circumstances: ....."

21. With the foregoing in mind , defence counsel submits that there is no cause of action *"in trespass"* which is a wrongful interference with a person's goods or property nor does the plaintiff have any *"locus"* to complain as it is her daughter that has the consent to use the disputed land and not the plaintiff , and finally , the defendant as a part-owner has a right to be on the land and to use it under the terms of a consent that she obtained from a requisite number of part owners of the disputed land in the year 2000.

22. Defence counsel also points to the permanent injunctions sought in the claim as being the only reliefs sought and which have been effectively granted in the plaintiff's interlocutory application and further the relief sought *"covers the world"* and *"is wide and obscure"* and the plaintiff should be confined to a remedy in damages.

23. Plaintiff's counsel for her part submits , that the plaintiff is a part-owner of the disputed land and is thereby entitled to question and object to any and all unlawful use of the land whether by another part-owner or by a stranger brought onto the land. In this particular regard , the plaintiff is entitled to challenge the lawfulness of the defendant's construction works on the land beyond that of her original residential home site which was erected on the basis of a single consent to use obtained by the defendant in 2000.

24. Specifically the plaintiff pleads several *"causes of action"* as follows :

(1) the defendant did not obtain the prior consent of landowners (including the plaintiff), to build a third (3rd) house on the family's land ;

(2) as a corollary , the defendant's *"consent to use"* obtained in 2000 did not permit or authorise the building of more than one (1) residential structure on the land ;

(3) the defendant's workers and builders are trespassing on the land by building a third (3rd) structure for the defendant for which no separate consent has been obtained ; and

(4) The defendant has effectively ousted the plaintiff's daughter from the land by wrongfully utilising the , agreed building site marked and cleared by the plaintiff for her daughter's house. **ie.** the plaintiff had incurred considerable cost and expenses to clear and level the said building site only to find the defendant building on it without any prior notice, agreement or permission from the plaintiff.

25. As for the absence of any claim for damages , plaintiff's counsel submits that, that is not being pursued as the defendant is the plaintiff's real sister and presumably because damages is an inadequate remedy given the scarcity of usable land in Nauru and the potential loss of the plaintiff's valuable building site. Counsel also denies that the permanent injunctions sought were either *"obscure"* or *"too wide"* since the party(ies)

who are restrained and the location and nature of the works that are being restrained are clearly limited to those expressed in the claim.

26. In considering the pleadings and counsels submissions , I am aware of the clear wording of Order 12 rule 7 concerning the misjoinder or non-joinder of parties , namely , that : *"No suit shall be defeated by reason of the misjoinder or nonjoinder of any party"*. I am also mindful of the Court's unfettered power to remove or add a party *"on application"* by the existing parties to the action or even by a person who is not a party to the action under subrule (3).

27. In the words of the Privy Council in Hanoman v Rose [1955] AC 154, allowing the appeal and remitting the case for continuation on the merits , the Court said at p. 168 :

"..... There was here a real issue raised by the action and which vitally affected the two persons who were parties to the action and who in view of the injunctions.....sought in the claim..... , were necessary parties to the action. If it is necessary to prevent the action being defeated that... (the plaintiff's daughter) *...should be joined as a party there exists ample power under.....the Supreme Court Rules.....to achieve this result , and in their Lordship's view these powers should have been exercised by the Court of Appeal in the circumstances of the present case."*

28. Accordingly I am not satisfied that the defendant's application and submissions meets the high threshold of proof or argument that would enliven the court's power to strike out the present claim. The defendant's application to strike out the claim is dismissed with costs of $250.00 payable to plaintiff's counsel within 14 days.

29. By way of further directions , the defendant is ordered to file and serve a defence to the claim within 21 days from the date hereof.

30. The action is adjourned to 22nd September 2021 for mention.

DATED : this 2nd day of September , 2021

SUPREME COURT OF NAURU

D.V.FATIAKI
CHIEF JUSTICE