IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 330 OF 2006

BETWEEN:

ORALIA DEL CARMEN REYES
YOUSEF AHMAD
IVONNE AHMAD **Claimants**

AND

GUADELUPE ROSADO **Defendant**

In Chambers.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

July 29 & August 12, 2014.

Appearances: Ms. Tanya Moody for the Claimants.
Mrs. Marilyn Williams for the Defendant.

JUDGMENT

[1] By Notice of Application filed on June 26, 2014, the Applicant/Defendant, Guadelupe Rosado, applied for the following orders:

> "1. An Order granting the Applicant leave to appeal the Summary Judgment of the Honourable Chief Justice Benjamin dated the 9th day of June 2014.

2. An Order that the Claimants shall not enforce the Summary Judgment dated the 9th day of June 2014, directly or indirectly until the conclusion of any final appeal in this Claim."

The application was supported by the affidavit of the Applicant/Defendant.

[2] The substantive Claim was commenced by Fixed Date Claim on July 11, 2006. The Defendant acknowledged service on October 3, 2006 and filed an affidavit of defence on October 19, 2006. Subsequently, by order of Court made on February 23, 2007, the second and third Claimants, Yousef Ahmad and Ivonne Ahmad, were added to the Claim and an amended Claim Form was filed on July 19, 2007. At that stage of the proceedings, the Claimants were represented by Mr. Oswald Twist and the Defendant by Mr. Lionel Welch (now deceased). By Order of Court entered on July 20, 2007, the trial of the matter was adjourned to a date to be fixed by the Registrar. Thereafter, the matter remained dormant.

[3] By Notice filed on December 1, 2010, the firm of Barrow & Williams, Attorneys-at-Law, was appointed to act as the Attorneys for and in place of Mr. Oswald Twist for the Claimants. That notice was addressed to both Mr. Twist and Mr. Lionel Welch. It is well-known that Mr. Welch has since passed. On the record, the Defendant remained unrepresented until a notice was filed on July 23, 2014 appointing Mrs. Marilyn Williams to act as his Attorney-at-Law in place of the late Mr. Lionel Welch.

[4] The matter came on for case management before me on April 28, 2014 and there was no appearance for or by the Defendant. The Court directed that notice be served on the Defendant for his attendance on the adjourned date. It is to be noted that the listing notice for the hearing on April 28, 2014 was addressed to Bradley Law Firm as 'Attorney for the Defendant'. There is no evidence on the record of the Defendant being served notice personally nor as to why the Bradley Law Firm was served. Be that as it may, the matter was adjourned to May 19, 2014 for further case management. On the latter date, Mr. Richard Bradley appeared for the Defendant who was not present.

Mr. Bradley informed the Court that the Defence was being withdrawn and the Court proceeded to enter judgment for the Claimants. The Order was entered on June 9, 2014 and served on the Defendant personally on June 17, 2014.

[5] To complete the narrative, I must pause to make reference to a document addressed to the Registrar General dated May 15, 2014, and signed by 'D. Bradley' as Attorney-at-Law for the Plaintiff (sic). The body of the document under the original rubric in Claim No. 330 of 2006 reads:

> "TAKE NOTICE that the above Plaintiff (sic) in Claim No. 330 of 2006 wholly withdraws his appeal in this matter, set for hearing in front of the Honourable Chief Justice for Monday 19th May 2014."

This document was before the Court having been sent by fax on May 18, 2014.

[6] The foregoing represents the background to the present application which was stated to be made pursuant to Rule 26.1(2)(e) of the Supreme Court (Civil Procedure) Rules 2005, and Rule 19(1) of the Court of Appeal Rules or alternatively under Rule 17.2(1) of Part 17 of the Supreme Court (Civil Procedure) Rules 2005 and the inherent jurisdiction of the Court. The Claimants/Respondents opposed the application with disproportionate vigour and filed affidavits in opposition thereto.

[7] The affidavit sworn to by the Applicant/Defendant in support of the Notice of Application stated the following simple facts: (a) He has never met Mr. Richard Bradley, Jnr. far less has he retained him and given him instructions; and (b) he was never served with any documents pertaining to the present matter save for the order dated June 9, 2014. It should be at once pointed out that the record reflects that the Defendant has entered an appearance and filed an affidavit of defence as earlier iterated in the chronology of this matter.

[8] The affidavit in opposition sworn to by the 1st and 3rd Claimants/Respondents recounted the history of the matter and asserted that the Applicant/Defendant has no real prospect of succeeding in his Defence on the Claim as the Claimants are the rightful owners of the property in dispute. There was filed a second affidavit unadvisedly sworn to by Counsel for the Claimants/Respondents. Given her status of Counsel, the affidavit ought to have been deposed to by another person or the deponent ought to have declined to appear as Counsel. The said affidavit added nothing further save to exhibit letters exchanged in 2013 between the Attorneys-at-Law for the parties and orders of Court dated February 23, 2007 made by Justice Awich and by myself made on May 19, 2014 entering summary judgment in favour of the Claimants.

[9] In her submissions in support of the Application, learned Counsel for the Applicant/Defendant emphasized that no notice of the hearing of May 19, 2014 was received at the office of Mr. Welch and that Mr. Bradley was never retained or instructed by her client. The Court was told that the Defendant has been for the last 12 years in occupation of the house upon which he has spent moneys to make it his residence.

[10] Learned Counsel for the Claimants/Respondents commenced her submissions in response by stating that Counsel for the Applicant/Respondent was the third Attorney-at-Law appearing in the matter. With respect, the Court does not accept this as accurately reflecting the true position. It may be that Mr. Bradley purported to appear for the Applicant/Defendant. However, upon a perusal of the notice faxed on May 18, 2014 by the erroneous reference to an appeal, he displayed a lack of knowledge of the matter. This gave credence to the assertion made by the Applicant/Defendant that Mr. Bradley was never his legal representative. In addition, the record shows that the Defendant was never served with notice of the hearing on April 28, 2014 and May 19, 2014 nor was notice sent to the office of the late Mr. Welch. Rather, notice of the hearing on April 28, 2014 was wrongly addressed to, and probably delivered to Bradley Law Firm. It follows then that Mr. Bradley, Jnr. was not authorized to withdraw the Defence and the Court acted upon a wrong premises in entering summary judgment.

[11] That having been said, there is merit in the submission made by learned Counsel for the Claimants/Respondents that the application is misconceived. The Court proceeded to hear the matter pursuant to Rule 27.2(3) which provides:

> "(3) The Court may, however, treat the first hearing as the trial of the Claim if it is not defended or if the Court considers that the Claim may be dealt with summarily."

The application was heard for all practical purposes in the absence of the Applicant/Defendant. Therefore, Rule 39.5 appears to be apposite to the circumstances in which the Applicant/Defendant has found himself. Rule 39.5 reads:

> "(1) A party who was not present at trial at which judgment was given or an order made in his absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
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> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended, some other judgment or order might have been given or made."

It cannot be gainsaid that no application that satisfies the requirements of Rule 39.5 is before this Court.

[12] The inappropriateness of the present application is reinforced by section 14(4)(f) of the Court of Appeal Act, Chapter 90 which enacts:-

> "(4) No appeal shall li under this Part –
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> ...
>
> (f) where an order has been made against a party in default of his appearing or filing a defence or where the party is otherwise in default:
>
> Providing that nothing in this paragraph shall be deemed to affect the right of such party to move the court of first instance for the setting aside of the default order."

The law is clear that the proper procedure resides in Rule 39.5 of the Supreme Court (Civil Procedure) Rules, 2005 and not by way of appeal.

[13] Learned Counsel for the Claimants/Respondents addressed the Court on the issue of whether the Applicant/Defendant has any real prospect of successfully defending the claim. It was urged that the 2nd and 3rd Claimants/Respondents are the rightful owners being the proprietors by Land Certificate obtained in 2005 in respect of the property sold and transferred to them by the 1st Claimant in 2005. However, at this stage, the Court is not required to consider this matter.

[14] In the premises, the application shall stand dismissed with costs to the Claimants/Defendants fixed in the sum of $1,500.00.

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KENNETH A. BENJAMIN
Chief Justice