IN THE SUPREME COURT OF BELIZE A.D. 2015

ACTION NO. 3 of 2008

DOUGLAS LENARTZ **APPLICANT**

AND

RAMONA E. LENARTZ **RESPONDENT**

Hearings
2014
25th November
2015
22nd January

Mr. Philip Palacio for the Claimant.
No appearance by the Respondent.

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

DECISION

1. Justice Legall on the 15th December, 2011 made the following order as part of his judgment in this matter:

> *"(1) A declaration is granted that the applicant is beneficially entitled to ownership of sixty percent share of Parcel 89 Block 23, Esperanza Village, Cayo District, and the respondent is entitled to forty percent of the said parcel.*
>
> *(2) A declaration is granted that the said parcel 89 be partitioned in the shares mentioned at (1) and that the structures on the Parcel 89 are owned by the applicant.*

(3) A declaration is granted that the applicant is entitled to the sum of $3,635.00 from the respondent and an order is made that the respondent shall pay to the applicant the said sum of $3,635.00.

(4) Paragraphs 3 and 6 of the summons are dismissed.

(5) Respondent shall pay to the applicant costs in the sum of $1,500.00."

2. There is now before the court an application for enforcement of paragraph 2 of that Order pursuant to Rule 43.6(1) which reads:

> *"43.6(1) If*
>
> *(a) the court orders a party to do an act; but*
>
> *(b) that party does not do it,*
>
> *the judgment creditor may apply for an order that –*
>
> *(i) the judgment creditor; or*
>
> *(ii) some person appointed by the court,*
>
> *may do the act."*

3. The successful Claimant states that the Defendant has refused to sign the application for partition. He therefore requests by his application an Order that:

> "*The Registrar of Lands sign the application for the subdivision to effect the subdivision of Parcel 89 Block 23, Esperanza Village Registration section*."

4. His request to have the Registrar of Lands sign an application which is to be made to his or her good self is of initial concern. But beyond this, the issue which falls now to be determined is whether or not the Order made by Legall J, (which is couched as a declaration) is in fact purely declaratory and therefore not subject to enforcement.

A Declaratory Order:

5. This is simply a court's statement resolving a dispute as to the meaning or application of the law. It states the respective rights and obligations of the parties. By itself it does not order any action by a party. In a strict sense it has no mandatory or restraining effect at all. It must be accompanied by consequential relief ordering or restraining certain conduct or it cannot be executed or enforced. Counsel agreed with this view when he presented the case of ***The Attorney General et al v Jeffrey Prosser et al Belize Civil Appeal No. 7 of 2006 at page 22*** where Sosa JA relied on the case of ***Chief RA Okoya & Ors v S Santilli & Ors SC 200/1989:***

> *"First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, eg to pay damages or refrain from interfering with the plaintiff's rights, such order being enforceable by execution if disobeyed.*
>
> *Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.*
>
> *Second: A declaratory judgment may be the ground of subsequent proceedings in which the right having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it."*
>
> *Agabje J continued thus:*
>
> *"It appears to me that the starting point ... is the consensus that a declaratory judgment may be the ground of subsequent proceedings in which the right ... violated receives enforcement but in the meantime there is no enforcement nor any claim to it. So, until subsequent proceedings have been taken on a declaratory judgment following its violating or threatened violation there cannot on the clear authorities I have referred to above, a stay of execution of the declaratory judgment because prior to the subsequent proceedings, it merely*

proclaims the existence of a legal relationship and does not contain any order which may be enforced against the defendant."

6. He also presented the Jamaica Court of Appeal case of ***Norman Washington Manley Bowen v Shahine Robinson and Neville Williams Civil Appeal No. 114/2010*** and I quote from paragraph 10:

> *"[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Wool as follows (in 'The Declaratory Judgment', 2nd edn. Para. 102):*
>
> > *"A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties, and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is*

invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

A Consideration of Paragraph 2:

7. When one looks at that Order it seems in my view only to be decreeing a partition in certain shares. It orders no one to do anything. Could Legall J have simply worded the judgment strangely or was it an intentional and precise statement of his decision. In order to determine this one must look to the words used by him in his judgment, the authorities he followed and the flow of his discussion. We must begin by scrutinizing the judgment as a whole.

8. On the issue of partition Legall J said this at paragraphs 10, 11 and 15:

"10. Parcel 89 is held jointly by the applicant and the respondent. They are therefore joint owners or joint tenants of Parcel 89. As joint owners, they are seized of Parcel 89 per mie et per tout, that is to say, each joint tenant holds the whole or holds nothing, that is, they hold the "whole jointly or nothing separately": see ***Neilson Jones v. Fedden 1974 3 A.E.R. 38, at p 43****. The applicant by clause 4 of his summons above has asked for an order of partition of parcel 89 under section 107 of the Registered Land Act which applies to land owned in common. Under the said section 107 it is the Registrar, on an application, who is authorized to effect the partition. I have not been able to find any local legislation authorizing the court to order partition where land is owned jointly. But it seems at common law, the Court of Chancery possessed the jurisdiction to decree partition of lands owned jointly: see* ***Patal v. Premabhal 1954 AC 35****. In that case their Lordships considered the old case of* ***Turner v. Morgan (1803) 8 Ves 143****; the principle of which case, their Lordships said, "may be succinctly stated as declaring that in a bill praying partition, the court*

must decree partition, however inconvenient and undesirable partition may be. Indeed the Lord Chancellor in that case adjourned the hearing in order that the parties might come to terms whereby one might sell and the other purchase, but in default of agreement, found himself compelled to decree partition." It does not seem that a partition order has to include particulars of the division or sub-division of the land, see ***Patel*** *above at page 46.*

11. It seems that the court having made an order for partition, the parties may then apply under section 107 of the Registered Land Act to the Registrar for the land to be divided in such portions as described in the application. The court may at common law, make an order for partition in accordance with the claim and the evidence to support the claim. But I believe the Registrar is authorized to effect the partition in accordance with the application made under the above section, by making a division of the property, because a decree for partition of property and division are two different matters: see ***Patel*** *at page 45.*

15. I have no evidence of any other contributions the applicant as wife made, such as house work and caring for her ill husband. But the respondent is the wife of the applicant and joint owner of Parcel 89. She perhaps did, as most wives do, some housework at least in the initial stages of the marriage which, on the evidence, broke down about a year after marriage. The magistrate's court issued a separation order on 17th February, 2006, on the grounds of the respondent's cruelty. On the basis of the evidence and reasons considered above, I declare that the parties have rights to Parcel 89 in the shares of the applicant 60% and the respondent 40%."

9. In paragraph 11 Legall J makes it clear that the parties **<u>may</u>** apply for the division (emphasis mine). His use of the permissive 'may' rather than the mandatory 'shall' speaks volumes. His pronouncement on the difference between a decree of partition and actual division informs that he is well

aware that two very distinct concepts exist. What is most telling however is his reliance on the case of ***Patel v Premabhai (1954) AC 35*** (it seems there was a typographical error in the spelling of the name in the judgment). At page 41 of that judgment, Lord Porter, while discussing subdivision (under the Subdivision of Land Ordinance) pursuant to a decree of partition states:

> *"... - the fundamental question in issue is whether its provisions prevent the making of a decree of partition of certain categories of land or merely prevent the carrying out of the decree by prohibiting the material division of the land as a result of the decree."*

10. At page 45:

> "It was urged, however, that a decree for partition necessarily included an order for division, and if an order for division could not be made then a decree for partition was likewise impossible.
>
> In support of this proposition reference was made to Seton's Forms of Judgments and Orders, 7th ed. (192), vol. II, p. 1812, where a form of order for partition in chambers is set out. It is, in the example given, first ordered that a partition be made, and then as part of the same order that the land be divided into a number of parts, and it is contended that both parts of the order are essential elements in a decree for partition. Their Lordships are not persuaded that a decree for partition cannot be made unless an order for subdivision forms part of the decree."

11. Page 47:

> "In their Lordships' opinion the natural inference from these authorities is that a decree of partition might be made although a right to a division of the land did not follow its pronouncement without the further step leading to the later and principal judgment. But, indeed, the same result would be reached even if the second judgment followed the first in due course. In such circumstances an order for partition and division could be made, but the latter part of the order could not

be carried out in Fiji owing to the terms of the Ordinance. It is, in their Lordships' view, not the making of the decree which is prohibited, but the subdivision of the land which would otherwise result from the making of the decree."

12. Then finally at page 48:

> *"What is forbidden is the carrying out of the order by actual partition unless and until the approval of the board, set up by the Ordinance, has been obtained …"*
> *"The making of a decree is not prohibited, and as such a decree might have been made (though it could not be implemented by actual division of the property) …"*

This case makes a clear distinction between making an Order for partition and making an Order for carrying out said partition. In my view, Legall J was well aware of this.

13. If we also consider the words of the originating summons filed by the Claimant it also sends a strong indicator:

> *"1. A Declaration under section 16(1) of the Married Women's Property Act, Chapter 176 Revised Edition 2000, that the Applicant is beneficially entitled to a 75% share in Parcel 89, Block 23, Esperanza Village Registration Section, which is presently registered in the joint names of the Applicant and the Respondent, or to such shares as the Court deems just."*

> *"4. An Order that Parcel 89, Block 23, Esperanza Village Registration Section be partitioned in accordance with Section 107 of the Registered Land Act, Revised Edition 2000 so as to reflect the parties' beneficial entitlement, and allowing the Applicant to retain the portion of the property to which he has made substantial improvements."*

14. That is what was prayed but Legall J instead of wording his Order in the terms prayed he chooses to make a declaration instead.

15. Furthermore, consider paragraph 3 of Legall J's Order (ibid). There he makes a declaration and then he goes on to order a particular action which makes it capable of enforcement. He however refrains from taking this approach with the paragraph under consideration. It is deliberate and precise.

16. I am not convinced that the Order is anything more than a declaration of the Claimant's right to partition. I am even less convinced that I can interfere with a Judge's Order in the way I am being invited to do. It may be tantamount to a variation for which this court lacks jurisdiction. For fear of imputing a new dimension to his Order I decline the invitation and dismiss the application.

SONYA YOUNG
JUDGE OF THE SUPREME COURT