

GOMME v MAUREL

(2012) SLR 342

Joel Camille for appellant
Basil Hoareau for respondent no 1
Frank Ally for respondent no 2

Judgment delivered on 7 December 2012

Before Domah, Fernando, Msoffe JJ

DOMAH J:

The appellant has moved for an order of a new trial of a civil action involving a property transfer where he had averred that the sale of a particular parcel: namely, V 6331, should be annulled for fraud committed by the two above respondents. The Supreme Court had gone into the merits of the case before upholding the plea *in limine* which the respondents had raised to the effect that the matter was *res judicata*.

The appellant has challenged the decision on the single ground that the Supreme Court erred in its decision in holding that the matter was *res judicata* as against both respondents. On the day of hearing of this appeal, the appellant sought to introduce new grounds of appeal. We declined to grant the motion of counsel. We gave our reasons. Had we granted the motion, it would have constituted an evil precedent of condonation of delay. The motion was made in breach of rules 25 and 26 of the Court of Appeal Rules. The appellant had shown no good cause, as he was required for a belated eleventh hour application. Allowing the motion would have looked so much as condoning the appellant's continuing in the conduct of the case, encouraging him to make a further abuse of the process of the court and giving scant regard to the right of the respondents to be entitled to a finality in a judgment in a case that had started in 2001. Allowing the motion would have protracted the case to April 2013. That is the reason which prompted the court to comment on the responsibility of counsel in the conduct of a case. In giving this judgment, however, we shall not confine ourselves to the only ground which was raised by the appellant.

The Facts, the Determination and the Issue before the Supreme Court

The facts relevant to this appeal are by and large as follows. Respondent no 1, a public notary, had made a transfer of sale of property of V6431 to the appellant and his common law wife, now deceased. The appellant's claim was that he was also meant to effect the transfer of the sale of property V6331 which the notary had failed to do. The appellant later learned that, on 11 June 1999, V6331 had been transferred in the name of respondent no 2. The appellant, accordingly, started an action where he sought, inter alia, an order that the transfer of 1999 of V6331 be declared null and void on the ground

that there had been fraud. Both respondents had raised preliminary objections to the suit being heard on the merits. The plea of respondent no 1 was that the matter was *res judicata*; the plea of defendant no 2 was that the matter was prescribed in time. The preliminary objections were not heard *ex facie* the pleadings but along with the merits. This, we should add, was the correct approach because such issues as were raised could not have been dealt with on the face of the pleadings only. They could have been dealt with in one of the two ways: either the shorter method of hearing after adducing some evidence just on the issues raised to determine the objections on the plea *in limine*; or, alternatively, the longer method of hearing all the evidence before deciding those preliminary issues along with the merits. The Chief Justice decided to take the more elaborate and painstaking route.

At the hearing, evidence was adduced by the appellant himself who was the only one who deposed for his version of facts whereby he had paid R60,000 and R90,000 for two plots (V6331 and V6431) and not just for one (V6431). He produced two cheques: one dated 6 June 1990 for the sum of R30,000 and another dated 15 June 1990 for the same sum to make the sum of R60,000, stating that the difference was paid by the Seychelles National Housing Corporation (SNHC) from which he had taken a loan of R90,000. He was able to later repay his loan. He went on to state that the two transactions were conducted at the same time but, to his dismay, the transfer was not made for V6331 by respondent no 1 who only transferred plot V6431 in his name and that of his then wife. He stated that he occupied the plot claimed by a construction and a chicken coop and only learned about the "fraud" when in 1999 he got a letter from the attorney of respondent no 2 following which he started an action which he lost and a second action which he again lost. Both these actions had proceeded on appeal and confirmed on appeal.

Doubt was cast on whether the document whereby the transfer was made from the original owner, Antoine Collie, to respondent no 2 was an authentic one since the above transactions had taken place at an arms length. Both were living abroad: the latter had signed in Hull, the United Kingdom and the former in Australia. The lawyers involved were of foreign jurisdictions.

The Reasons for the Dismissal of the Action in the Court Below

The Chief Justice, in a well written judgment, had concluded that the plaintiff could not be believed. He gave a number of reasons for not accepting the version of the appellant. One reason he gave is that oral evidence could not be admitted for the transaction alleged of V6331. It was caught by the prohibition in article 1341 of the Civil Code unless it fell within the exception provided under article 1347. Article 1347, in his view, was inapplicable because there was no beginning of proof in writing. There was no beginning of proof in writing as the documents produced could not be linked to the transaction alleged. That the documents suggested a transaction consistent with a sale of only V6431 for the sum of R150,000.

We have gone through the record of proceedings and the documents and we are unable to say that the Chief Justice reached the wrong conclusion on that aspect. Our own assessment is that there arises nothing in the documents and the surrounding circumstances which render the version given by the appellant “*vraisemblable aux faits allégués*.” To qualify as an exception to article 1341, the facts and the circumstances should lend verisimilitude to what is alleged. There is no such semblance of verity in the allegations of the appellant. Accordingly, it cannot be said that the Chief Justice erred in his appreciation of the facts with regard to this aspect of the case of the appellant.

A second reason which the Chief Justice gave was that we had only the word of the appellant for such a serious transaction as a land transfer following sale. The Chief Justice found that the appellant was not worthy of belief. In our view, counsel for the appellant has been unable to show to us that that conclusion is perverse. In fact, as far as may be gathered from the record of proceedings, the appellant treated the importance of his deposition in Court with the same levity with which he had treated the transaction. For a matter involving R60,000 he did not bother to find out from his transfer documents as to what he and his wife had actually bought when those documents were sent to him. He stated that, at the notary, the document was not read to him and that he only learned of the omission in 1999 and that until then he had assumed that parcel V6331 belonged to him. That is hard to believe. The record shows that he is a man of knowledge of society and the world. The Court commented that there was “no convincing explanation as to how he could have appended his signature to a document which was contrary to his express instructions to the notary public.” We agree with that reasoning. It is worthy of note that to crucial questions raised in cross-examination, the appellant stated that his glasses were not with him to enable him to answer one way or the other.

In our final analysis, we are unable to disturb the finding of fact of the Chief Justice to the effect that the notary public followed the instructions he had been given by the appellant for a single transaction of V6431 and not two transactions of V6331 and V6431.

A third reason given in the judgment was that for an action based on fraud, it is not enough to just adumbrate it. One who alleges fraud should have material to ground his allegation on. In this case, the decision reads: “there was no scintilla of evidence to bear out the claim that the transfer of parcel V6331 was a sham and a fraud.” We cannot but agree with the judgment both in law and on the facts. The appellant called no witness nor produced any document in support of his allegation which, on the record, seems to be based simply on his personal perception of things.

A fourth reason he gave is that *res judicata* applied to the transaction. The Chief Justice referred to the Civil Case Cause Number 215 of 1999 to decide that the three elements required for a plea of *res judicata* were satisfied in this case: namely, the subject-matter of the dispute, the nature of the action and the parties to the action. He applied the decision of *Hoareau v Hemrick* (1973) SLR 272.

We find no reason to depart from the conclusion he reached on the matter of *res judicata*. The question in the previous case of the appellant involved the title to the land in V6331. That in the present case involves the same issue, if approached differently. The prayer sought in that action was the recovery of parcel V6331 and the rectification of the title to reflect the name of the appellant. This is exactly what the appellant sought in the present case.

Res Judicata and Abuse of Process

We consider that it is apposite that at this state we state a few things about multiplicity of litigation. The plea of *res judicata* provided for in article 1351 of the Civil Code was designed to stop such abuses. It reads:

The authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the demand relate to the same subject matter; that it relate to the same class; that it be between the same parties and that it be brought by them or against them in the same capacities.

For interpretation one may refer to the cases of *Heirs Rouillon v Alderick Tirant* (1983) SLR 169, *Pouponneau and Others v Janisch* (1979) SLR 130, *Seychelles Housing Development Corporation v Fernandez* Supreme Court (Civil Side) No 131 of 1989, *Julienne v Julienne* Supreme Court (Civil Side) No 68 of 1991, and *Hoareau v Hemrick* (1973) SLR 272.

The rationale behind the rule of *res judicata* and its strict application is grounded on a public policy requirement that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case. Because of the imaginative use that has been made to go round the rule, courts have developed the rule of abuse of process. The rule of abuse of process encompasses more situations than the three requirements of *res judicata*. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients. Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial process: see *Bradford & Bingley Building Society v Seddon Hancock & Ors* [1999] 1 WLR 1482, *House of Spring Gardens Ltd & Ors v Waite and Others* [1990] 2 All ER 990, and *In Re Morris* [2001] 1 WLR 1338.

The proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehashing the same issue in multifarious forms. Litigation should be reserved for real and genuine issues of fact and law. The dictum of Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at 115, reproduced in the case of *Bradford & Bingley Building Society* (supra), is worth reproducing:

where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In the case of *Bradford & Bingley Building Society*, Auld LJ had this to say on the difference between the two rules:

In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and in its issue estoppel form also, save in "special cases" or "special circumstances": see *Thoday v Thoday* [1964] P. 181, 197-198, per Diplock L.J and *Arnold v National Westminster Bank Plc.* [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

The wider scope of abuse of process is put succinctly by Auld LJ in the case referred to:

Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.

Abuse of process is not a new discovery under the rule of law and the court's control of cases coming to court. The "source of the doctrine of abuse of process" may be traced to a 1947 decision of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257. The scope may be found in the following pronouncement of the court. Abuse of process is:

... not confined to the issues which the court is actually asked to decide, but ... covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them:

Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590A, stated that such cases may still be aborted by the application of the rule of *res judicata* in "its wider sense"; and Stuart-Smith LJ in *Talbot v Berkshire Country Council* [1994] QB 290 at 296D-E made similar comment when he referred to the application of *res judicata* in a "strict" or "true" sense.

So much for the scope. Now for the limit. That may be found in what Lord Wilberforce, delivering the opinion of the Board in *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 425, stated when he confined it to its "true basis": namely, the prohibition against re-litigation on decided issues. Abuse of process -

.... ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

As Kerr LJ and Sir David Cairns respectively emphasized in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at 137 – 139, the courts should not attempt to define or categorize fully what may amount to an abuse of process and that the doctrine should not be "circumscribed by unnecessarily restrictive rules" inasmuch as the purpose was to prevent abuse by not endangering the maintenance of genuine claims.

For a recent application of the doctrine, one may refer to Sir Thomas Bingham MR as he then was, in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260:

The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

To come back to the present appeal, we have gone through the record and the history of the dispute which started some 11 years ago. The decision of the Chief Justice cannot be impugned when he found that the appellant was engaged in re-litigation. The case of *Bradford & Bingley Building Society* [supra] is pretty clear on this point that even parties who were not originally in the case may be caught by the doctrine of abuse of process if they seek a re-litigation of a case which has already been decided upon.

The very fact of engaging in a second action to re-litigate an issue resolved in an earlier matter should raise professional eyebrows. As Auld LJ stated:

In my view, it is now well established that the Henderson rule, as a species of the modern doctrine of abuse of process, is capable of application where the parties to the proceedings in which the issue is raised are different from those in earlier proceedings where such a course is reasonably practicable, and whenever it is so and is not taken then, in an appropriate case, the rule may be invoked to render the second action an abuse: see *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132; *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547; *M.C.C Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 678 and *Morris v Wentworth-Stanley* [1999] 2 WLR 470.

Auld LJ had followed the above from the pronouncement of Kerr LJ in the *Bragg's* case:

it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppels on the ground that the parties or their privies are the same.
(*Bragg* [supra] at 137)

The rule has also been applied in a case where a plaintiff who could and should have pursued his claim in an earlier action against the same defendant: see eg *Ashmore v British Coal Corporation* [1990] 2 QB 338, *Johnson v Gore Wood & Co* 919980 EWCA Civ 1763, and *(A Minor) v Hackney London Borough Council* [1996] 1 WLR 789.

We agree with the decision of the Chief Justice that *res judicata* applies. However, it is more a case of abuse of process, judged by the foregoing citations. It is hard to imagine that a buyer of two plots of land who proceeds to have two transfers effected returns home after signing the papers and only discovers some 9 years later that the transfer was effected only as regards one land and not the other! That is simply implausible. It is hard to accept such a story from, as was pointed out by the Chief Justice, a man of the plaintiff's literacy. The more plausible story is that after the paper was served in 1999 by the attorney for encroachment at the boundary line by a CIS structure and chicken coop and occupation by his chickens, the appellant decided that he could attempt to sell to the court that story.

The other reason apparent in the judgment is the sheer coherence and plausibility in the defence version and evidence compared to those of the appellant. Defence evidence included the deposition of Mr Barry Cesar, the accountant of SHDC whose evidence, even if of a general nature, yet contained one statement important which discredited the version of the appellant: The NHDC would not have given a loan to the appellant if it was being asked to buy two plots inasmuch as the policy was that of giving a loan to a person limited the purchase of one property. If he was to buy two plots, he was disqualified for an NHDC loan.

The first respondent also deponed stating that the appellant and his concubine had come for the transaction with regard to parcel 6431 and that he had explained the document to them without any complaint whatsoever. The second respondent deposed as to why the sale took place at arm's length. She was herself at the time residing in Hull, United Kingdom. She needed to secure access to her property V7895 by a proper access road. Her uncle who owned V6331 gave her permission to do so. But the authorities would not approve unless the property was in her name. She, accordingly, bought the plot from her uncle. She signed the papers in Hull and her uncle signed in Australia where he had retired by that time. To enable the development to take place, she had to cause a legal notice to be served on the appellant to remove the chicken coops and the CIS structure not because they were, at the time on the property but because they were encroaching over boundary line. If anything the occupation, in her view, was by the chicken and not by the appellant.

Mr Chang Seng deponed as to the neighbour who had also built the access road. His evidence does not show an occupation of parcel V6331 by the appellant. He also stated that at the time, the property was deserted, slopy and rocky.

In light of the above, we uphold the decision of the Chief Justice. We find no merit in the appeal. We dismiss it with costs.