ISLAND ENTERPRISES LTD -v- REEF PACIFIC TRADING LTD

High Court of Solomon Islands
(Muria ACJ)
Civil Case No. 119 of 1990
Hearing: 15 March 1992
Ruling: 19 March 1992

J. C. Corrin for Plaintiff
R. H. Teutao for the Defendant

MURIA ACJ: The defendant by a Summons filed on 14 February 1992 seeks from the Court the following orders:-

"1. *That the Writ of Fieri Facias issued on 6th August 1990 ceased to be legally on foot when the judgment in default of appearance made on 6th June 1990 relied upon by the said Writ was set aside by the order of the Registrar on 17th September 1990.*

2. *That the said Writ of Fieri Facias, in the alternative, was invalid and unenforceable as the same was executed well after one year from the date of its issuance contrary to order 45, rule 20 nor was the said Writ renewed and executed before the one year period from the date of its issuance had expired also contrary to order 45, rule 20.*

3. *That pursuant to orders sought in (1) and/or (2) above for the following consequential orders:-*

   (a) That the "Walking Order" of 15th October 1991 was invalid and unlawful.

   (b) That the "Tender Notice" advertised in the "Solomon Star" on 18 October 1991 was invalid and unlawful.

   (c) That the sale commencing on 4th February 1992 and thereafter of the Defendant's properties to persons/companies who successfully tendered to the said "Tender Notice" was invalid and unlawful.

   (d) That the whole execution/enforcement process carried out from 15 October 1991 and to date was invalid and unlawful.

4. *That pursuant to orders sought in (3) for an order that all the Defendant's properties sold be returned forthwith by the purchasers to the Defendant's plant at Gizo.*

5. *That no new Writ of Fieri Facias be issued against the Defendant's goods and chattels until the appeal filed by the Defendant to Solomon Islands Court of Appeal on 31st January 1991 is determined.*

6. *Other order or orders as the court deems necessary.*

7. *That the cost of this application be costs in the cause."*

Counsel for the plaintiff objects to the application and submits that paragraphs 1 and 2 of the defendant's application ask for declaratory relief and should be struck out as not being properly brought. Further the relief sought in paragraphs 3 and 4 are directed at the Sheriff and the Sheriff should therefore be joined as a party to the proceedings. In any case, Counsel submits that the Court does not have jurisdiction to grant the relief sought in view of the decision of this Court given on 12 December 1991 refusing to stay execution. Counsel argues that what the defendant is doing is effectively another attempt to stay execution which has already been sought and refused. The present application, Counsel says, is therefore an abuse of process of the Court.

Mr Teutao argues that although the decision of the Court given on 12 December 1991 refused any stay of execution, this is a proper basis for a further application for stay of execution as the appeal has now been lodged and a stay of execution ought to be granted pending the appeal. He argued that it would be ironical to allow to appeal but refuse to stay execution.

This Court has inherent jurisdiction to prevent an abuse of its process. A clear instance of such an abuse of process is where the same question having been raised and disposed of in one case is again raised by the same party against whom the same issue has already been decided. There are a long string of cases on this point but I need only cite the case of ***Reichel -v- Magrath*** (1889) 14 App. Case 665. In that case the appellant claimed a declaration that he was vicar of Sparsholt cum Kingston Lisle and that the instrument of his resignation was null and void. He further claimed an injunction restraining the bishop from treating as valid the instrument of resignation and further restraining the bishop from instituting any other person into the benefice and further restraining the patrons of the benefice from presenting any person for institution into, the benefice. Judgement was given against the appellant on the basis that his vicarage was void because of his resignation with the consent of the Bishop. The respondent was then duly appointed to the benefice and brought an action against the appellant claiming a declaration that the respondent was vicar and further claimed injunction restraining the appellant from depriving the respondent of the use and occupation of the house and lands. The appellant in his defence set up the same case as that on which he had been defeated in his action against the Bishop when he was plaintiff. The Queen's Bench Division ordered the defence to be struck out on the ground of res

judicata. The Court of Appeal affirmed the Divisional Court's order not on the res judicata issue but on the basis that the defence set up by the appellant and attempting to prove it again was an abuse of process of the Court and there was an inherent jurisdiction in the Court to strike out the defence as it was frivolous and vexatious. The appellant appealed to the House of Lords which dismissed the appeal. The five law Lords unanimously held that the attempt by the appellant to set up his defence raising the same question which had already been decided against him was an abuse of the process of the Court. Lord Halsbury L.C. said at page 668:-

> *"I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr Reichel can resist the claim by Mr Magrath to occupy the vicarage is that he (Mr Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action.*
>
> *I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that appeal must likewise be dismissed."*

Lord Watson said also at page 668:-

> *".....this is an attempt by the appellant to retain the temporalities of the benefice of Sparsholt by re-trying with his successor in the benefice, the same issues which have already been conclusively decided against him in a question with his proper contradictor. The Court must, in my opinion, have jurisdiction to forbid any such abuse of its process."*

Lord Harschell said at page 669:-

> *"The majority of the Court of Appeal were of the opinion that the defence set up by the appellant had been properly struck out, on the ground that it was frivolous and vexatious. Your Lordships have heard the appellant in person, who has put before you what he proposes to prove as a defence to the action. After fully considering all that he has said, it appears to me that he has not a shadow of defence, and I am unable, therefore to differ from the conclusion to which the Court below came."*

Lord MacNaghten and Lord Fitzgerald concurred.

In the present case has the same issue been decided against the defendant previously in connection with the same facts? On 2 July 1991 this Court ordered that judgement be entered against the defendant. That judgement is for the sum of $52,305.52. By a Summons dated 28 November 1991 the defendant seeks an order for the stay of the Writ of Fieri Facias issued on 6 August 1990 and further a stay of

execution of the judgement obtained on 2 July 1991. The appellant further seeks an extension of time to appeal against the orders of this Court given on 9 May and 2 July. On 12 December 1991 the defendant's summons was heard by Chief Justice Ward who decided that in view of the importance of the procedural point raised by Mr Teutao, the extension of time to appeal was allowed. As to the question of stay of execution, Mr Teutao argued that in view of the appeal lodged execution ought to be stayed. The Court refused to order stay of execution. Ward CJ in refusing the application for a stay of execution said:-

> *"The general principle where there is an application for stay pending appeal is that, when the judgement is for payment of money, it will not be granted unless the appellant is able to produce evidence to show that, if the damages are paid, there is no reasonable possibility of getting them back if the appeal succeeds. No suggestion has been made by the defendant that this is the case."*

In the present application, the defendant seeks, in paragraphs 1 and 2 an order to invalidate the Writ of Fieri Facias issued on 6 August 1990 and for the consequential orders that all actions taken thereafter were invalid and unlawful and that no execution should have been done. Further the defendant seeks the orders that all properties seized pursuant to the Writ of Fieri Facias be returned to the defendant and no new Writ of Fieri Facias be issued against the defendant's goods and chattels until the appeal is determined.

Apart from the summons filed by the defendant on 28 November 1991, asking for a stay of execution, there have been other summonses in which the defendant have also prayed for stay of execution of the Writ of Fieri Facias. On 12 September 1991 the Court refused the defendant's application for a stay of execution of the Writ of Fieri Facias. On 5 November 1991 the defendant again applied for a stay of execution of the Writ of Fieri Facias and the Registrar granted the application ordering that the Writ of Fieri Facias issued by the plaintiff on 6 August 1990 be stayed *"until further order"* of the Court. Then on 28 November 1991, the defendant again by summons applied to stay the Writ of Fieri Facias and also to stay execution of judgement obtained on 2 july 1991. In none of the said applications did the defendant ever raise the question of the validity of the issue of the Writ of Fieri Facias or its continued existence or validity. All the applications made by the defendants were only to have the Writ of Fieri Facias stayed without any allegation that it ceased to be legally on foot or that it was invalid and unenforceable. The validity of the Writ of Fieri Facias must surely be a matter that ought to have been present in the mind of the defendant when it considered whether or not to apply to set aside or stay execution of the Writ of Fieri Facias or ought to have raised in any of those previous applications. The failure to do so in such circumstances can only be taken as an admission by the defendant that the Writ of Fieri Facias is valid and enforceable and that the judgement is only concerned with the stay

of it. The validity of the Writ is undoubtedly a material allegation which one expects the defendant, properly advised, to have raised. It fails to do so and cannot now be permitted to raise it. The defendant is estopped from doing so under the principle laid down in ***Humphries -v- Humphries*** [1910] 2 KB 531 and ***Cooke -v- Rickman*** [1911] 2 KB 1125. In the former case Bray J, in relation to an allegation of no consideration for the agreement under which the defendant admitted owing rent to the plaintiff stated at page 1129:-

> *"The defendant in this case could have raised the question of no consideration in the first action, and if she had done so, that would have been a matter necessitating proof, not by the defendant, but by the plaintiff. The defendant did not raise that question in the first action, and therefore, according to the principle laid down in* ***Humphries -v- Humphries*** *[1910] 2 KB 531, the defendant is estopped from raising it in the second action."*

Bankes J. agreeing added that it was not open to the defendant in a second action in respect of the "*same subject-matter*" to say that there was not a traversable allegation in the first action since he did not do so in the first action.

In this case the same principle must apply and the defendant is estopped from raising the validity of the Writ of Fieri Facias in this action.

I do not think it can be doubted at all that what the defendant is now asking the Court is that there should be no execution at all as the appeal has been lodged. Counsel for the defendant clearly submitted that as the appeal has now been lodged further execution should be stayed until the appeal is heard as it would be ironical to allow the defendant to appeal but to refuse to stay execution. Equally I do not think it can be doubted as well that the question of stay of execution had already been dealt with and refused on 12 December 1991. As such I cannot see how it can again be raised in the present Summons. The subject matter of the defendant's Summons which was determined on 12 December 1991 and the subject matter of the present Summons are basically the same. I feel, on the authorities I cannot allow the defendant to do raise the same matter again. It would be, to use Lord Halsbury's words, "*a scandal to the administration of justice if the litigant were to be permitted by changing the form of the proceedings to set up the same case again.*" See also ***MacDongall -v- Knight*** (1890) 25 QBD 1; ***Humphries -v- Humphries*** [1910] 2 KB 531 and ***Cooke -v- Rickman*** [1911] 2 KB 1125.

As the defendant's summons in this case seeks basically the same result as in the previous proceedings on 12 December 1991, but in another form of proceedings, I rule that this amount to an abuse of the process of the Court and as such in the exercise of the inherent jurisdiction of the Court to prevent such an abuse of its process I order that the application be struck out.

In the light of the order of this Court that the application be struck out, it is unnecessary for me to rule on the other matters urged upon me by Counsel.

Ruled accordingly.

(G.J.B. Muria)
ACTING CHIEF JUSTICE