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Re Goscinski

Jurisdiction: Belize

Judge: Ponnambalam, J.

Judgment Date: 12 February 1991

Reported In: BZ 1991 SC 4

Court: Supreme Court (Belize)

Docket Number: Action No. 229 of 1986

Date: 12 February 1991

PDF

Supreme Court

Ponnambalam, J.

Action No. 229 of 1986

Re Goscinski

Appearances

Mr. Denys Barrow S.C. for the applicant.

Mr. Lionel Welch for the respondent.

Practice and Procedure - Order — Setting aside of order made in chambers — Order that certificate of title to land be given to one applicant — Later applicant asking to have it set aside on ground that it was made in error — Application granted.

Ponnambalam, J.

This is a motion to set aside the order that I made in the earlier application upon summons heard in Chambers. In September 1986, Anthon Goscinski made application to Court by summons for an order under Section 62 of the *General Registry Act* (Chapter 258) that a first certificate of title to lands owned by him situated at **Ambergris Caye** be granted to him. In his affidavit in support he stated that he was the owner of 42 acres of land situated in **Ambergris Caye**, which land was also described As one half of a plot of land formerly owned by Adam Smith and J. Charles Seviarese. He stated that, by an agreement in 1969, Adam Smith's portion was divided from J. Charles Seviarese. He also stated that the said land was bought by him from Adam Smith in 1971 and was recorded in Deeds Book Volume 4 of 1971, Folios 449–452 and was also properly described therein. He further stated that he applied at the General Registry for the issue of a first certificate of title to his property as described but it was disapproved and that on the 23rd January 1984 he received a letter from the General Registry stating that the grounds for refusal were as follows:

“(1) Form 9 regarding service of notice of intending application for a first certificate of title is not in order and

(2) The written partition agreement dated 4th June 1969 was not recorded therefore it is not acceptable.”

That application for title was heard in Chambers. This was in terms of the general rule in regard to jurisdiction acquired by statute that where a statute in general terms and without any special limitation gives any power to the superior court that power may be exercised by a judge at Chambers: *Smeeton v. Collier* (1847) 1 Ex. 457. The applicant served a copy of the summons

on the Registrar as required by section 62 of the *General Registry Act*. He did not serve notice on anybody else. At the conclusion of the hearing I made order as prayed for that a first certificate of title be issued to the applicant. Accordingly the Registrar issued to the applicant a first certificate of title dated the 8th October 1986.

The applicant to the present motion was not a party to the earlier application for title. This applicant applied for extension of time to make this application to set aside the earlier order on grounds inter alia that the order was a nullity owing to the failure to serve notice of the proceedings on her. This application was granted in the exercise of the discretion of court. Application was also made and granted to continue the further proceedings between Milsolawa Goscinski, the widow and executrix of the applicant for title.

In the interim, the applicant to the motion, as plaintiff instituted S.C. Action 291/1987 against the (substituted executrix as defendant contending in the Statement of Claim that the original applicant wrongfully procured himself to be erroneously registered by first certificate of title and for orders inter alia directing the defendant to deliver to the Registrar the proprietor's duplicate of the first certificate of title and for the Registrar to cancel the same. From the ruling made against her claims upon questions and issues tried as preliminary questions or issues, the plaintiff appealed to the Court of Appeal (Civil Appeal 7/1989). By judgment dated the 27th September 1990, the Court of Appeal has held that the original applicant to title had only an equitable interest to an undivided half share of the land with legal interest vested in the trustees. This, for all purposes, is not an interest in respect of which the original applicant can apply for or be granted an order for a first certificate of title. Both the application and the order granting it have been demonstrated to be errors.

As to the law in regard to the jurisdiction and power of the court to set aside by motion an order made in Chambers, counsel for the motion cited and relied on section 62 of the *Supreme Court of Judicature (Consolidation) Act, 1925*, which reads:

“ 62 DISCHARGE OF ORDERS MADE IN CHAMBERS:—

Subject to the provisions of this Act with respect to appeals in matters of practice and procedure, every order made by a judge of the High Court in Chambers, except orders as to costs only which by law are left to the discretion of the court, may be set aside or discharged upon notice by any Divisional Court, or by a judge sitting in court, according to the practice of the Division to which the cause or matter in which the order was made is assigned”.

As to the application of this statute to the Supreme Court of Belize, counsel cited Section 17 of the *Supreme Court of Judicature Act* (Chapter 82) and submitted that it validates the provisions of the *English Judicature Act*, of 1925. The relevant part of Section 17 cited is as follows:

“There shall be vested in the court, and it shall have and exercise within Belize, all the jurisdictions, powers and authorities ... as are by the *Supreme Court of Judicature (Consolidation) Act*, 1925, vested in the High Court of Justice of England...”

As to the practice and procedure in regard to the application by motion to set aside an order made by a judge in Chambers and to the difference in practice as between the Queen's Bench Division and the Chancery Division, counsel referred to R.S.C. o. 58 r.7 and the notes thereunder in the Annual Practice. The material abridged part of the Order reads:

“APPEAL FROM JUDGE IN CHAMBERS

7 – (1) Subject to section 31 of the Act and section 15(2) of the *Admin. of Justice Act* (1960) ... in the Q.B.D. an appeal shall lie to the Court of Appeal from any judgment, order or decision of a judge in Chambers.

(2) ... in the Chancery Division an appeal shall lie to the Court of Appeal from any judgment, order or r decision of a judge in Chambers either –

(a) with the leave of the: judge or the court of Appeal, or

(b) after an application to set aside or discharge the judgment, order or decision has been made to the judge sitting in court ail and has been refused,

and not otherwise”.

As to the case law in elucidation of the law and practice as to motions to set aside orders made in Chambers, counsel cited and relied on *Boake v. Stevenson* (1895) 1 Ch. D. 358, in which Kekewich, J. stated:

“... judges of the Chancery Division are still at liberty to follow the old practice, that is, to allow an unsuccessful litigant in Chambers three alternatives — either he may move to discharge the order, or he may have the matter adjourned into court, or he may obtain leave to appeal direct upon the certificate of the judge that no further argument is required. I am satisfied that I am still competent to adjourn a matter in Chambers into court; that I am still competent to give a certificate to enable the litigant to carry the matter to the Court of Appeal; and that it is still competent to me to hear a motion to discharge an order made in Chambers on notice within 14 days and on the same materials as were before me in Chambers.”

What is important is that a motion to set aside or discharge an order made in Chambers is a rehearing on the same materials as were before in Chambers: *In re Giles* (1890) 43 Ch. D. 391; *Boake v. Stevenson* (supra); *Re Munns & Longden* (1884) 32 W.R. 675; *Re Rouse* (1888) 59 L.T. 887. It is a rehearing in which errors and mistakes made by the orders in Chambers are corrected by orders to set aside or discharge, or if refused, reasons given so that if appeal is

taken, the Court of Appeal would know the reasons for the decision: see *Holloway v. Cheston* (1881) 19 Ch. D. 516. And it appears from judicial dicta that correction of mistakes by setting aside or discharging the order made is about the principal object of the hearing on motion and the exercise of rehearing in court is to hear further arguments and to take a second look at the order made in Chambers. In *Boake v. Stevenson*, Kekewich, J. said: “Upon such motion he (the counsel) is not at liberty to bring in any new documents all he can do is to spew that the judicial conclusion arrived at in Chambers was wrong”. In *Dawson v. Hill* (1934) W.N. 218, while discussing the difference between the practice in the Chancery Division and the Queen's Bench Division as to appeals from orders in Chambers, Greer, L.J. stated:

“The appellant had referred to the practice prevailing in the Chancery Division, and had cited several cases in support of such practice, from which it appeared that for a very long time the judges in the Chancery Division had exercised the right of correcting mistakes made in Chambers by bringing the matter in court”.

Accordingly, to conform with the essentials of this practice, I reject the documents marked “D.A.B.2” to “D.A.B.8” filed with the affidavit of counsel and without adverting to the grounds of the application to set aside as set out in the notice of motion and argued by both counsel, I make order setting aside the order made in Chambers for the issue of first certificate of title as it was made in error as to the nature of the interest of the applicant to his land. The interest of the applicant to his land is not one for which a certificate of title can be issued in terms of section 13(3) of the *General Registry Act*. And in terms of the power conferred on this court by section 64 of the *General Registry Act*, I make order directing the Registrar to cancel the first certificate of title issued to Anthon Goscinski dated the 8th October 1986.

I make no order as to costs.