ANISH CHAND v ISHWAR CHAND (ABU0033 of 2008S)

COURT OF APPEAL — CIVIL JURISDICTION

BYRNE AP, INOKE and WATI JJA

23 March 2012

Evidence — fresh evidence — leave to adduce further documentary evidence — valuation report — distribution of estate — Crown lease — whether report should be admitted — conditions to be satisfied — ease of obtaining report — influence on case — credibility — no special circumstances — no merit in grounds of appeal — Court of Appeal Rules r 22(2).

The appellant appealed against a decision of the High Court, distributing an estate comprising of a Crown Lease between the parties. The High Court granted lots 1 and 3 of the residential subdivision and the entire agricultural lot to the plaintiff, while the defendant was given lots 2 and 4 of the residential subdivision. The plaintiff sought leave to adduce further documentary evidence on appeal, namely a valuation report.

Held –

(1) The valuation report could have been obtained by the parties very easily for use at the trial, and the plaintiff cannot be remedied at the appellate stage for his omission at the trial. Further, the valuation report could not have had an important influence on the case, as the plaintiff had agreed to give the defendant two blocks and had mentioned that the value of each lot was the same. The valuation report was not credible due to many obvious discrepancies. In addition, there were no special circumstances pursuant to r 22(2) of the Court of Appeal Rules, Cap 12.

Ladd v Marshall [1954] 3 All ER 745, applied.

(2) The plaintiff's submission that the Court erred in holding that the respondent had incurred expenses when no evidence supporting such assertions was provided in Court is baseless. Similarly, the Court did not err in law or fact by distributing lots 2 and 4 to the respondent.

Application for leave to adduce further evidence refused. Appeal dismissed.

A. Sen for the Appellant.

M. Sadiq for the Respondent.

Wati JA.

Judgment of the Court

[1] The appeal was heard by the Full Court comprising of the retired Acting President the Honourable Justice John E. Byrne, the Hon Justice S Inoke, JA and the Hon Justice A Wati, JA. Subsequent to the Hon Acting President retiring from office, the parties have consented to the remaining Justices of Appeal to deliver the judgment. On the parties consent we proceed to deliver our judgment.

[2] The appeal arises from the trial judge's decision to distribute the estate of Munnu, between the parties to this action, who are the remaining beneficiaries in the said estate. The estate comprises of Crown Lease Number 9714.

[3] The Crown lease 9714 consisted of two separate lots. One agricultural and the other residential. The two lots are about a mile apart. The agricultural lot is 27 acres 1 rood and 13 perches. The residential lot is 1 acre and 36 perches.

[4] In The High Court, the plaintiff filed a writ claiming that the defendant was subdividing the residential crown lease without the consent of the beneficiaries and in the process blocked the driveway of the plaintiffs dwelling. The claim also stated that the defendant had take over the entire cane farm and was stopping the plaintiff from entering the same. The plaintiff therefore had to lodge a caveat No 601428 over the crown lease. In his writ claim, the plaintiff prayed for an extension of the caveat, an injunction restraining the defendant from interfering with the plaintiffs occupation of his residential lease and from subdividing the crown lease no 9714 and/or allocating it to any other person, from uplifting any cane proceeds, and for the defendant to provide an account of the estate of Munnu. General damages and costs were also claimed.

[5] Munnu was the grandfather of the plaintiff and the father of the defendant. Munnu died on the 23rd day of March, 1985. Munnu was the lessee of crown lease number 9714. The letters of administration in the estate of Munnu were granted to the plaintiff's father Dewan Chand and the defendant Ishwar Chand on the 23rd day of April, 2004.

[6] The grant was made 19 years after Munnu's death, the 19 years being taken up by the battle for trusteeship. For the 19 years the estate remained unadministered and the land unfarmed. The cane contract 159 Wailevu sector was cancelled. No one paid land rent and the arrears accumulated to $5219.67 by 30th June 2004.

[7] Mr Dewan Chand and Ishwar Chand discussed matters and decided to save the lease. The brothers used their personal funds to pay off the arrears. Dewan Chand paid $2873.00 and Ishwar Chand paid a sum of $3288.65 which included rent for the year 2006 and part of 2007 rent.

[8] On 12th February 2005, Dewan Chand died. Ishwar Chand became the sole surviving administrator of the estate of Munnu. Anish Chand became the administrator in the estate of his father Dewan Chand through letters of administration granted to him on 6th March, 2007.

[9] The fight started once again and the plaintiff brought the High Court action.

[10] The terms of his Lordship's order was that the plaintiff be given lots 1 and 3 of the residential subdivision and the entire agricultural lot namely 27 acres 1 rood 13 perches. The defendant was given lots 2 and 4 of the residential subdivision. The defendant was ordered to execute all transfer and assignment of cane contract within 14 days of presentation to him and the plaintiff was to bear all costs of transfer and assignment of cane contract.

[11] In arriving at the conclusion, his Lordship had correctly found that the defendant would only be entitled to 1/7 of the estate as there were 7 beneficiaries in the estate of Munnu and the 5 other beneficiaries had renounced their share in favour of the plaintiff who therefore held 6/7 of the share in the estate. His Lordship found that the value of lots 2 and 4 will give the defendant one seventh in value of the estate and so the orders were made in the form. His Lordship had also noted that the defendant had spent certain amount of monies in the estate. The defendant's expenditure had a bearing on the final orders.

[12] The plaintiff, aggrieved with the decision filed this appeal. He avers that the trial judge erred in law and in fact:-

- *In holding that the respondent had incurred expenses when no evidence supporting such assertions was ever provided in Court or was discovered by the respondent.*

• In holding that lots 1 and 3 of the residential subdivision be given to the respondent without ascertaining the actual value of the respective holdings in the scheme of distribution.

• In making orders for distribution that were unjust and unfair to the respondents having regard to the value of respective holdings and lots for which distribution was not prayed for and was not the intention of the appellant.

[13] Upon filing the appeal, the plaintiff filed a notice of motion for leave to adduce further documentary evidence on appeal pursuant to r 22(2) of the Court of Appeal Rules, Cap 12.

[14] The further evidence that is sought to be adduced is a valuation report which contains the valuation of each residential lot and the agricultural lot. The application was robustly opposed.

[15] I will deal with the aspect of leave to adduce further evidence before delving into the grounds of appeal.

[16] The grounds upon which leave to adduce further evidence are sought are that at the trial stage, the valuation report was not necessary as the purpose of the trial was to provide the parties a scheme for distribution and their entitlement. The other ground that was raised was that the trial judge did not have the evidence of the value of the lots before him and so the actual dispute could not have been decided. The counsel for the appellant argued that the valuation report is essential as it would not have been rebutted by the respondent at the trial and would have greatly influenced the outcome of the decision. It would have assisted in working out the true entitlement of the parties.

[17] The opposition for leave to adduce the valuation report is based on the premise that it is too late in the day to adduce such a report when the appellant could have adduced the same at the hearing in the High Court. It was also argued that the valuation report is in incorrect and falsified in the following ways:-

• On page 2 the report shows lot 1 to be vacant and swampy. The appellant has his house on this lot and the lot is not swampy. A subdivisional plan from the Ministry of Lands was adduced to show that lot 1 had a wooden and iron building on it.

• On page2, the report shows lot 3 to be a swampy land. It is not and a building could be erected on it.

• Lot 4 is shown in the valuation report to be worth $28,000 which is not correct as the wooden and iron building was built by the deceased Munnu so many years ago and is in a dilapidated condition. It needs a lot of repairing. The value is about $4,000.

• The cane farm of 27a 1r 23p is a good flat land with cane contract number 13122 and worth about $50,000 and not $15,000. There is sugarcane growing on the field and it will generate much value.

[18] S 22(2) of the *Court of Appeal Rules Cap 12* is the guiding provision on adducing of further evidence at an appellate level. It reads:

"22(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon merits, no such further evidence (other than evidence as to matters which have occurred after the trial date or hearing) shall be admitted except on special grounds."

[19] Fresh evidence is generally not admitted unless three conditions laid down by the Court of Appeal in *Ladd v Marshall* [1954] 3 All ER 745 are satisfied. The conditions are:-

"(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

(3) The evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible".

[20] In order to decide the question of leave, I will examine the three conditions laid down in Ladd's case.

[21] Firstly it must be shown that the valuation report could not have been obtained with reasonable diligence for use at trial.

[22] Mr Sen argued that his client had filed the claim and sought extension of caveat, injunctive relief and for accounts of the estate. The Court erroneously went on to distribute the estate. If it ventured into such an exercise it ought to have had the valuation report to distribute the parties share. When it did not have the report, there was miscarriage of justice.

[23] I find counsel Mr Sen's argument very unrealistic and improper. The parties went to trial. They abandoned the relief initially sought and by a pre-trial conference minutes dated the 17th day of April 2008 wanted the Court to try only one issue which was *"the Court to decide on the distribution of the Estate of Munnu"*. It is very clear thus that the Court did not err or go outside its powers in granting the relief of distribution.

[24] Further the entire trial was run on the basis of the relief of distribution.

[25] The parties very well knew what they asked the Court for and that was for distribution of the estate. In that circumstance, it was incumbent upon the parties to provide a valuation of the property for an efficient distribution. They failed. This valuation report could have been obtained by the parties very easily. At an appellate stage the plaintiff cannot be remedied for his omission at the trial.

[26] A number of English cases have emphasised that where there had been a fill hearing, it would in most instances work a grave injustice if a successful party were deprived of his judgment by the emergence of material which should have been before the Court originally.

[27] Mr Sen is noted to have acknowledged in the Court records that the Court will distribute the estate. The Court said that the option is open to Court and it will leave lots 1 and 2 as they are to which Mr Sen said that *"value of the residential lots are far greater than agricultural lots and there must be some balancing act done"*.

[28] Having said that, it is improper for Mr Sen to argue that he did not know that the Court would distribute the estate but propose a scheme for distribution.

[29] It takes only common sense to deduce that after a full trial, the Court is not going to propose a scheme for distribution. A proposal is a settlement in the circumstances. The parties were free to suggest to each other a scheme but when they went to trial the only effective relief or remedy would be distribution of the estate and not a proposal or scheme of distribution.

[30] I also wish to comment that matters like extension of caveat, injunctive relief and providing of accounts are not matters for trial. They are normally dealt by affidavits and having opted for trial the parties were sure that their initial claim has been abandoned to substitute a new relief of distribution of the estate.

[31] Let me examine the second condition. The valuation report could not have had an important influence on the case. The plaintiff himself had agreed to give the defendant blocks 2 and 3. His evidence in chief was:-

"…I say the first defendant should only get one house block and I get 3 house blocks plus cane land. House blocks are worth $10,000 each and cane farm $30,000. If I give him house block, I will not give him cane farm share…".

Then in cross- examination, the plaintiff stated:-

"…I do not want to share half- half. I can give one other house block but nothing else. I say he takes block 3 and I take block 4. I can give him block so it covers money he spent…".

[32] If the Court gave the respondent blocks 2 and 4, instead of 2 and 3, that does not make a difference in any way as according to the plaintiff the value of each lot is the same.

[33] I will later discuss more on this aspect as to why the distribution was fair and equitable when dealing with ground 2 of the appeal and explore why the introduction of the report would not have made a difference to the distribution by the trial judge.

[34] I find that the second condition of *Ladd* (supra) has not been met.

[35] The third condition of *Ladd* is that the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.

[36] I find the valuation report to be incredible. The report has many obvious discrepancies. I will outline each in turn:-

(i) In his evidence the plaintiff stated that he occupied Lot 1. He also stated that the house blocks are worth $10,000 each. He never mentioned that block 1 is vacant and swampy land. If all the house blocks had equal value then they would be equal in size and form. The valuation report erroneously notes lot 1 to be vacant and swampy.

(ii) The valuation report also states the value of lot 3 to be $7,000 whilst noting it to be swampy land as well. This is totally contradictory to the plaintiff's evidence who valued all the blocks to be equal. The plaintiff never mentioned this residential lot 3 to be swampy land.

(iii) The valuation report values the agricultural lease as $15,000. Indisputably this land has 10 acres of cane standing on the same. The valuer said that similar type of farm was sold between $7,000 to $22,000. He then very conveniently stated that the value is $15,000 with no explanation why he could not value it more than that. Interestingly, this agricultural lot is a lifetime income earning asset and to allocate it a value of $15,000 is on the face of the report incredible and a sham. The plaintiff himself had assigned to the agriculture lot a value $30,000. This also indicates how erroneous the valuation could be.

[37] The third condition outlined in *Ladd* is also not met.

[38] In the final analysis, I neither find existence of any special circumstances under s 22 (2) of the Court of Appeal Rules, Cap 12 nor any condition in Ladd's case to have been met for this Court to grant the appellant leave to adduce further evidence in Court.

[39] I therefore refuse the application for leave to adduce further evidence. The next aspect is the grounds of appeal.

[40] The first ground is that the Court had erred in holding that the respondent had incurred expenses when no evidence supporting such assertions was ever provided in Court or discovered by the respondent.

[41] The Court had found that the defendant had spent the following monies on the crown lease:-

$3, 288.65 - to pay arrears of rent for the said crown lease;
$168.13 - to pay for extension of crown lease.

$200.00 - to obtain a new cane contract.
$4000 - to plant 10 acres of cane.

[42] In respect of the sum of $3, 288.65, the plaintiff had agreed that the defendant had paid this sum. The Court therefore correctly held that the defendant had spent this sum of money to save the crown lease.

[43] The defendant did testify that he paid $168.13 for renewal of cane contract. This was substantiated by a receipt produced by the defendant dated 3rd October, 2005 and numbered 77218. There was therefore no error when his Lordship upheld this expense.

[44] The third expense was a sum of $200 for running around to get the cane contract. The Court held that the amount claimed is reasonable and so allowed the same. The defendant's evidence was not challenged that he acquired a new cane contract. It is thus reasonable to draw an inference that some money would have been spent to get the contract. The aspect of application for a new cane contract, seeing to the processing, and getting the contract is all a matter of physical activity for those who come from the farming background. To hold that $200 would be reasonably incurred in undertaking such a task is not a wrong inference and I do not find any error on which I can interfere with this finding of the Court.

[45] The Court had also allowed $4000 for planting 10 acres of cane. The plaintiff had asked for $8,000 for planting cane, supervision and wages. The Court said that there were no documents to prove the sum but it allowed a sum of $4,000 only. It was undisputed that the cane was planted by the defendant in an area of 10 acres. The defendant would have first worked the land to make it capable of farming, bought seeds, prepared the seeds for planting, planted the seeds and seen to the sugarcane to grow properly. It would cost quite a sum of money for all these acts to be carried out. I find nothing wrong, in the trial judge's exercise of discretion in fixing a sum of $4,000 for the expenses incurred by the defendant.

[46] Ground one is baseless as a result and ought to be dismissed.

[47] Ground 2 relates to the trial judges error on giving the respondent blocks 1 and 3. The respondent was not given blocks 1 and 3 but blocks 2 and 4. Block 2 is what the defendant occupied from the very beginning. He ought to have that. The plaintiff had agreed to give the defendant another block to cater his expenses. Since the plaintiff's valuation was that all residential blocks had the same value, his Lordship granted block 4 instead of block 3.

[48] The defendant had spent a total of $7656.78 in total on the land. The plaintiff valued the property to be $70,000 being $10,000 each for 4 residential blocks and $30,000 for cane farm. The defendants 1/7 share comes to $10,000 and that is one block. The next block was to be allocated to him to cover for his expenses of $7656.78 (on Courts calculation). I am sure the defendant had worked hard to increase the value of the cane farm without which, neither the farm would exist or value in the sum it does. Granting another block to the defendant was just and equitable.

[49] His Lordship used the plaintiff's valuation to work the distribution. I cannot fathom why the plaintiff is aggrieved when the Court has accepted his version of the agreement.

[50] I find no error of law or fact when his Lordship distributed lots 2 and 4 to the respondent and as such I refuse to interfere with his findings.

[51] Ground 3 is a complaint on the trial judge's act of distributing the estate when there was no relief claimed. I have aptly covered this ground whilst dealing with the subject of leave to adduce further evidence. I need not discuss the issue any further.

[52] I do not find the grounds of appeal to have any merits and as such I dismiss the same with costs to the respondent summarily assessed in the sum of $3,500.

[53] **Inoke JA.** I agree with the judgment and the proposed orders of Wati, JA.

ORDERS OF THE COURT

[54] The Orders of the Court are:-

(a) *The appeal is dismissed.*

(b) *The appellant must pay to the respondent cost of the appeal proceeding in the sum of $3,500.*

Appeal dismissed.