

**HAJAH LATIPAH BINTI SHEIKH HAJI YAHYA
HAJI ABDULLAH BIN HAJI SHEIKH YAHYA**

AND

**HAJI ABD KHALID BIN SHEIKH HAJI YAHYA
HAJI SAID BIN HAJI SHEIKH YAHYA**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 8 of 2017)**

Before: Mortimer P, Leonard and Burrell JJA.
21st November 2017

Headnote: Appeal from a refusal to grant an amendment to a consent Summons relating to a family dispute over the ownership of land. Appeal allowed

Mr Eugene Loh Jit Kuan and Mr Pg Khairul Nizam bin Pg Hj Mohd Yassin (Messrs Yusof Halim & Partners) for Appellant
Mr Sheikh Noordin Bin Sheikh Mohammad (Messrs Sheikh Noordin Mohammad & Associates) for Respondent

Burrell, JA.:

This is an appeal against a refusal to amend a consent order by Chief Justice Kifrawi after a short summons in chambers hearing on 29th July 2017.

The two appellants and the two respondents have the same family name, Yahya. They are siblings. These are four out of eight children of Hjh Hadijah binti Awang Sulaiman, their mother, who died in 9th April 2014. The deceased had another child from an earlier marriage and her husband (the father of the parties) who died in 1989 had three further children by an earlier marriage. There are therefore 12 children who may have an interest in the estate of the deceased.

In broad terms the dispute between the parties to this appeal concerns the true ownership of a parcel of land upon which six residential units were built in the 1980s.

On 30th May 2015 the respondents filed an Originating Summons No 24 of 2015 which sought a total of eighteen orders against the appellants including:-

- (1) *An order generally restraining the Defendants from having any or all dealings whatsoever in respect of all that parcel of land referred to as EDR No 9220 Lot No 9807 situate at Kg Kumbang Pasang , Mukim Kianggeh, Brunei Darussalam,*

containing an area of 0.234 acre more or less, including the six (6) units of flats erected there on ("the Kumbang Pasang Property");

(12) a declaration that the proposed transfer and registration of the Kumbang Pasang property into the joint names of the Defendants is also null and void for fraud;

(14) an order requiring both Defendants to withdraw add/or cancel their application for transfer of the Kumbang Pasang property and to execute transfer from (Borang A) for transfer of the same into the names of the 1st and 2nd plaintiffs as joint administrators;

An allegation of fraud by the respondents against the appellants in relation to the transfer of ownership of the properties to the appellants permeates these proceedings.

On 29th October 2015 the respondents were granted an ex-parte order by which the appellants were restrained from collecting rents from the properties and that the rents thereafter collected be placed in a trust account opened for that purpose. The inter parties hearing was scheduled for 18th January 2016.

At the same time the respondent had filed Originating Summons No 57 of 2015 which set out the orders they were seeking as follows:-

- i. that the Defendants be forthwith restrained whether by themselves or by their servants or agents from collecting any further rentals from all six (6) units of flats situate on that parcel of land known as EDR No 9220 Lot No 9807 Kg Kumbang Pasang ("the said property") until after final determination of Originating Summons No 24 of 2015 of further order of this Honourable Court;*
- ii. that the Plaintiffs be given the power and authority to collect and receive rentals from all tenants of the said Property for the month of September 2015 and all subsequent months until after determination of Originating Summons No 24 of 2015 or further order of this Honourable Court;*
- iii. that the said rentals for the month of September 2015 and all subsequent months be credited or paid into a trust account to be opened by the Plaintiffs in a bank within Brunei Darussalam pending final determination of O.S 24 of 2015 or until further order of this Honourable Court .*

At the inter parties hearing on 18th January 2017 the following order was made. We have been informed by the parties to this appeal that the order was by consent, although the order itself does not so state. It is necessary to set it out in full:-

- i. that the Ex-Parte Order granted on 29.10.2015 is set aside with no order as to costs;*
- ii. all rentals from all six (6) units of flats situated on that parcel of land known as EDR No 9220 LOT No 9807 Kg Kumbang Pasang (" the said property") for the months of November 2015 and subsequent months are to be collected by Messrs Sheikh Noordin Mohammad & Associates to be placed in a trust account, until the*

full and final settlement of the matter or upon such further order(s) of this Honourable Court, whichever comes first;

- iii. *that Messrs Sheikh Noordin Mohammad & Associates shall give to Messrs Yusof Halim & Partners a monthly update of the status of the said trust account including but not limited to furnishing copies of the monthly bank statement for the account with effect from February 2016 until such further order of this Honourable Court;*
- iv. *that any lawful expenses to be incurred in respect of the said Property shall be notified in writing to the Defendants' solicitors for their approval prior to incurring the expenditure;*
- v. *that Originating Summons No 24 of 2015 is hereby withdrawn by the Plaintiffs with no order as to costs;*
- vi. *that the Plaintiffs are at liberty to institute a fresh action via a Writ of Summons as soon as possible; and*
- vii. *that there shall be no order as to costs.* *(Dated 15 June 2016)*

Thus, as of 18 January 2016 Originating Summons 24 had been withdrawn together with its allegation of fraud and the respondents were given leave (which they did not need) to serve a fresh writ. No such writ has been filed to date. There are no current fraud proceedings filed in the Brunei High Court.

By an order of the Sultan in Counsel the transfer of ownership of the disputed Property to the appellants was approved on 4th August 2016 and registered as such on 16 August 2016. This prompted the appellants to apply, pursuant to order 86 rule 4 of the Rules of the Supreme Court CAP 5, for an amendment to the above Order; in particular that paragraphs (ii), (iii) and (iv) be deleted and replaced with the following:-

- ii. *that the 1st and 2nd Defendants as the registered owners of the land known as EDR No 9220 LOT No 9807 Kg Kumbang Pasang ("the said Property") be entitled to deal with the said Property including but not limited to collecting all rental income due and owing without any further hindrance, interference or trespass by the Plaintiffs or any of their agents, servants or trustees;*
- iii. *that Messrs Sheikh Noordin Mohammad & Associates do pay to Messrs Yusuf Halim & Partners as solicitors for the 1st and 2nd Defendants all the rentals collected by the Plaintiffs from November, 2015 to August, 2016 **SEVEN (7) days** from the date of this Order failing which the 1st and 2nd Defendants should be entitled to charge interest at the rate of 6% per annum on the overdue amount until the date of the payment; and*
- iv. *that the Plaintiffs do account for every expenses incurred during the period between November, 2015 to August, 2016 in respect of the said Property and failing which in the absence of the maintenance of the said Property, to repay the said amount to the 1st and 2nd Defendants forthwith failing which the 1st and 2nd*

Defendants should be entitled to charge interest at the rate of 6% per annum on the overdue amount until the repayment of the same to the Defendants.

At the hearing before the Chief Justice on 29th July 2017 the application was further updated so that "August 2016" in paragraphs (iii) and (iv) to read "July 2017".

The notes of proceedings relating to the 29th July 2017 hearing in chambers record that after a brief exchange between counsel the court ordered as follows:-

"To be practical, I make the order for the Plaintiff (respondents) to give account to Defendants (appellants) as mentioned by plaintiff's counsel until further order. No order as to costs".

The Judge plainly took the view that until the dispute as to ownership was resolved it would be more practical to keep the rental income in a trust account.

In appealing that order to this court the appellants rely heavily on two matters. First, that since August 2016 as registered owners of the land their rights and interests in the properties are absolute and unencumbered. Secondly, that since January 2016 no writ has been filed alleging that the transfer of the land was fraudulent. The law upon which the appellants rely in support of these two matters is contained in ss 9(1), 28 and 29 of the Land Code CAP 40 which provide as follows:-

s9(1) *"Every title by entry in the Register shall vest in the person named therein a surface right only to the land specified there in and such person shall have a permanent transmissible and transferable estate, interest and occupancy of his land subject to the provisions of this Act or such lesser estate as shall be specified in the entry".*

s28. (1) *When any land, charge or lease shall have been transferred or transmitted by virtue of any form of succession or under any order of Court or act of law a record thereof shall be made in the Register and on the extract.*

(2) *No record shall be made in the Register unless the extract shall have been delivered to the officer in charge of the Land Office except with the permission of the Minister.*

(3) *Every entry in the Register shall be taken as conclusive evidence that the person named therein as owner of the land is the absolute and indefeasible owner thereof for the estate specific herein subject to the conditions upon which the original entry was made and the title of such proprietor **shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.***

s29. *Any person claiming that he is entitled to be registered in respect of any land may apply **to the High Court** for an order that any Register, book or journal kept at the Land Office shall be rectified or that any entry may be made or interpolated in any such Register, book or journal or that any*

entry therein may be cancelled, and the High Court after giving such notices to the persons in occupation of or interested in such land as it may think fit may refuse the application, or if satisfied as to the justice of the case may make such order in reference thereto as it may think just and the officer in charge of the Land Office shall rectify the Register and the extract of title in accordance to with such order. (Emphasis added)

We are satisfied that absent an allegation of fraud the appellants are prima facie entitled to the amendments they seek.

Two matters arise. First, the appellants acknowledge that the allegation of fraud has not been abandoned. They accept that it remains in fact albeit not supported by legal proceedings. The family dispute continues. Secondly, when asked why no fresh writ alleging fraud had been filed Mr Sheikh Noordin, counsel for the respondents, answered that it was because parallel proceedings concerning the entire estate had been commenced in the Syariah Courts in which his two clients were joined with seven more Yahya siblings against the two appellants. He submitted that the allegation of fraud was an issue in those proceedings and so, as pointed out by the Chief Justice, it was more practical to leave the original consent order in place until the Syariah Court proceedings had been determined.

We disagree. The Land Code is clear. Only an application “to the High Court” can rectify a Lands Office entry (s.29 CAP 40). The appellants further submit that, in any event, there is no jurisdiction in the Syariah Courts to hear this particular dispute. The Syariah Court’s jurisdiction is governed by s15(b) (ix) of CAP 184 which provides for the hearing and determination of proceedings relating to “any part of the estate of a deceased Muslim . . .”. In the instant case however it is the appellant’s case that the disputed property was given to them by the deceased before her death.

It is understandable why the Chief Justice’s order seemed to be the practical solution at that time. However, on the other hand, its impracticability is that so long as the Syariah Court proceedings continue (and it is noted that they have only been instituted relatively recently) the appellants will be unable to exercise their unfettered rights over the land. Moreover, even when they are concluded there will be no outcome which will of itself alter the Lands Office registration in their favour.

Had the respondents issued a fresh writ timeously the situation would be different. There would be an allegation of fraud in the High Court.

We have two options. Either we allow the amendment sought by the appellants forthwith or we allow the amendments but stay the execution for a short period to enable Mr Noordin to issue the appropriate writ should he be instructed to do so by his clients.

Decision

We are satisfied that the former option is the correct one. We allow the appeal and grant the amendments as sought by the appellants. It remains open to the respondents to issue a fresh High Court writ. They may then apply to the court for an Order to

protect their position. Whether or not they do so is a matter for them and their legal advisors to consider.

Costs

The appellants have succeeded in their appeal. We grant a nisi order for costs of the appeal to the appellants. Any submissions in relation to costs must be in writing, limited to two pages and filed no later than 12.00 noon on 23rd November 2017. If no submissions are made this order shall become absolute immediately thereafter.

Mortimer, P.

Leonard, J.A.

Burrell, J.A