

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2013/CLE/gen/00042

BETWEEN

PENELOPE ANN HOGG
(in her capacity as Personal Representative of the Estate of
Marie Gwendoline Kemp Langer)

Plaintiff

AND

STEPHANIE ROBERTS

First Defendant

AND

ROSITA ROBERTS

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Richard H. Lighbourn of McKinney, Bancroft & Hughes for the Plaintiff
Mr. Sidney A. Dorsett of Sidney A. Dorsett & Associates for the Second Defendant.
First Defendant is deceased

Hearing Date: 7 October 2019 (heard on submissions)

Practice and Procedure – Boundary dispute - Report of Surveyor agreed to by the parties – Report self-explanatory – No need to call Surveyor to testify – Final Order – Review of Final Order

This action concerns an ongoing dispute between the parties over the location of a mutual boundary between their property. After much efforts, they managed to find an affordable surveyor.

They agreed that the results of the Surveyor Report would be accepted. In accordance with the Surveyor's Report, the Court, on 1 August 2018, made a Final Order.

Since the making of the Order, Counsel for the Plaintiff has been relentlessly seeking to encourage Counsel for the Second Defendant to agree to the terms of the Order. Instead, the Second Defendant has since filed two Summonses seeking either to set aside the Order (First Summons) or review the Order (Second Summons). To date, the Second Defendant has done little or nothing to pursue the Summonses.

HELD: dismissing the two Summonses filed by the Second Defendant with costs to the Plaintiff in the sum of \$5,000.

1. The Court is unable to discern on what basis it ought to set aside or review its Final Order which is based on the Report of the Surveyor which both parties had agreed to accept.
2. Since the filing of the two Summonses, the Second Defendant has done little or nothing to pursue her applications. To date, the Second Defendant has not filed written submissions which was ordered by the Court on two separate occasions. It appears to me that the Second Defendant is not interested in pursuing her two Summonses and has abandoned them. Judges cannot sit idly by and permit lawyers and litigants alike to disobey orders of the Court with impunity.
3. This Court is unable to revisit its final order. Since the Second Defendant appears to be aggrieved by the Order, the proper course may be to appeal to the Court of Appeal.

RULING

CHARLES J:

[1] On 1 August 2018, this Court made a Final Order ("the Order") in favour of the Plaintiff declaring that the Second Defendant is not entitled to enter, cross or remain on the lot of land owned by the Estate of Marie Gwendoline Kemp-Langer comprising Lots 140, 141 and 142 situate at Dunmore Town, Harbour Island, Eleuthera and being bounded on the North by Lot 139 on the South by land originally owned by Thomas Cash on the East by Ripley Street and on the West by Lots 136, 137 and 138. The Court also granted a perpetual injunction restraining the Second Defendant whether by herself, or by their servants or agents or otherwise howsoever from entering or remaining upon or crossing the land and costs to the Plaintiff to be taxed if not agreed.

- [2] The Order was made on the strength of a Report prepared by Surveyor, Mr. Roderick C. Wood (“the Surveyor”) whose findings the parties, at prior hearings, had agreed to accept.
- [3] Since the date of the Order, Learned Counsel for the Plaintiff Mr. Lightbourn has been relentlessly seeking to encourage Counsel for the Second Defendant to agree to the terms of the Order without success.
- [4] Instead, the Second Defendant has since filed 2 Summonses in this matter since 1 August 2018: the first on 2 August 2018 (“the First Summons”) and the second on 2 April 2019 (“the Second Summons”). The First Summons was forwarded to the Plaintiff by letter dated 20 August 2018 (see exhibit P.A.H.6 to the Affidavit). From the wording of the First Summons it appears that the Second Defendant is appealing the Order (to the wrong court) and, by the terms of the Second Summons, it appears that the Second Defendant has abandoned the First Summons. So, I shall proceed to deal with the Second Summons.
- [5] As Counsel for the Plaintiff, Mr. Lightbourn correctly submitted, by the wording of the Second Summons the Second Defendant is requesting that the Order “be reviewed in the interest of justice” and if “justified” certain orders would follow.
- [6] After this Court granted the Order, the Plaintiff’s attorney prepared a draft order and sent it to the Defendant’s attorney as is the practice in this jurisdiction. The Defendant’s attorney objected to the terms of the draft order prepared by the Plaintiff’s attorney by printing on the face of the draft order (exhibit PAH.4) the words “it is false due to the false “paraphrase”” but barring those words it is entirely unclear to the Plaintiff as to the basis on which the Second Defendant is requesting the Court to review its Order or why the Second Defendant’s attorney would not propose to rephrase the terms of the Order.
- [7] So, before I venture to deal with the Second Summons any further, I might be helpful to recount the chronology of events after the Order was made.

[8] As previously stated, the Second Defendant filed two Summonses seeking either to set aside the Order as stated the First Summons or review it (the Order) as stated in the Second Summons.

[9] At a hearing on 6 May 2019, both Counsel made brief oral submissions and the Court ordered that they both provide written submissions by 16 August 2019. The matter was then adjourned to Tuesday 3 September 2019 at 10: 00 a.m. for brief oral submissions. Counsel for the Plaintiff appeared but Counsel for the Second Defendant did not. No reason was proffered for his absence but the Court observed that it was shortly after Hurricane Dorian decimated two of the Family Islands. The matter was then adjourned to Wednesday 9 October 2019 at 12:00 noon for one hour.

[10] In the intervening period and, on 6 September 2019, Counsel for the Plaintiff provided his written submissions. Counsel for the Second Defendant did not. Fully cognizant that the Second Defendant had not complied with the Order, on 3 October 2019 at 2:39 p.m., the Court emailed both Counsel requesting that oral submissions be adjourned to Thursday 10 October 2019 at 12:00 noon. Counsel for the Plaintiff consented to the adjournment but Counsel for the Second Defendant stated that the date was not convenient to him. He then suggested the month of November 2019.

[11] At 3:33 p.m., the Court responded as follows:

“The month of November 2019 is not available in my calendar. As such, I will revert to 12:00 noon on 9 October 2019.”

[12] On Friday, 4 October 2019 at 10:10 a.m., the Court again contacted both Counsel by email stating as follows:

“The Defendant, through her Counsel Mr. Dorsett, has not complied with my Order of 6 May 2019. The Order reads that both parties are to email written submissions to me by 16 August 2019. I have received both email and hard copies of submissions from Counsel for the Plaintiff, Mr. Richard Lightbourn.

I am once again extending the time to Monday, 7 October 2019 for Mr. Dorsett, on behalf of the Defendant to email written submissions (in word format) to me and I will then deal with the pending application on submissions. Consequently, there will be no need for an appearance before me on Wednesday, 9 October 2019 at 12:00 noon. I will give a decision in this matter on Wednesday, 16 October 2018 (sic) at 2:30 p.m.”

[13] Since then, Counsel for the Second Defendant has not responded. To date, the Court has not received any written submissions from him. These submissions were due since 16 August 2019. A further extension of time was granted to Monday, 7 October 2019. It appears to me that the Second Defendant is not interested in pursuing her two Summonses and has abandoned them. Judges cannot sit idly by and permit lawyers and litigants alike, to disobey orders of the Court with impunity.

[14] By the terms of the Second Summons, the Second Defendant seeks:

- (i) That the Surveyor be called to testify on the results of his Report dated 29 July 2018, he being an indispensable witness;
- (ii) That of necessity, the Second Defendant be permitted to be heard (*audi alteram partem*); and
- (iii) That alternatively, this matter be set for trial.

[15] The Summons did not prescribe under what rule(s) such an application is made. That said, it appears that the Second Summons is supported by the Affidavit of Rosita Roberts and perhaps also, the affidavit of Patricia Jarrett. Whether it is supported by one or two affidavit(s), the Court is at a loss to discern why the Second Defendant would seek to have this Court review a final order.

[16] Be that as it may, the Transcript of Proceedings accentuates what took place in Court on 1 August 2018. During the hearing, Counsel for the Second Defendant, on no less than 7 instances accepted the Surveyor's Report: see page 3 line 28; page 4, lines 1, 4 and 9; page 5 line 17; page 10 line 2 and page 24 line 13. Furthermore, he declined an offer by the Court to cross-examine the Surveyor: see page 18 line 6. In addition, when questioned by the Court whether the Second

Defendant wished for the matter to go to trial, the Second Defendant's attorney emphatically stated "No": page 24 line 30.

[17] Learned Counsel for the Plaintiff, Mr. Lightbourn surmised that the only major concern of the Second Defendant occurred once the issue of costs surfaced.

[18] Whether or not the issue of costs has any relevance to the institution of the two Summonses is immaterial. What is material is that this matter has been ongoing for six years. It involves a minor dispute concerning the location of a mutual boundary between the parties. Besides, this matter had been languishing for some time in this Court as the parties attempt to locate an affordable surveyor. When one was found, they agreed to accept the results of his Report. In addition, on the date when the Surveyor conducted the survey, the Plaintiff was not present. The Second Defendant was present and was given an opportunity to view the results and ask questions. The Surveyor stated in the Report the following:

"I showed her where her boundary lines were and explained to her that her fence should not be positioned where it was but instead be placed west of the boundary monuments (i.e. more toward her building) that are all clearly visible following the survey. I also pointed out to Ms. Roberts that the monuments shown on survey plan 821 EL made by her surveyor, fell along the same lines, therefore she should be on the western side of the boundary lines and monuments while the owners of lots 140 and 141 occupy east of the boundary. After our conversation, Ms. Roberts gave me the impression that she had a better understanding of the boundaries than she had before and was now willing to follow my suggestions.

The owners or their representatives for lots 140, 141 and 142 were not present during the surveys."[Emphasis added]

[19] There is no doubt in my mind that the Surveyor provided an independent Report. Indeed, both parties had agreed to accept the results of the Surveyor's Report. Even the expenses incurred by the Surveyor were equally borne by them.

[20] In my opinion, the Surveyor's Report is easy to follow and there is no need for him to appear to give any evidence. He could only be repeating what is contained in his Report. Any allegation that Counsel for the Plaintiff has clouded the

interpretation of the Report to the Court is without merit. The Report is self-explanatory. In addition, on 1 August 2018, the Second Defendant's Counsel was given every opportunity to cross-examine the Surveyor which he declined. This Court is unable to revisit its final order. Since the Second Defendant appears to be aggrieved by the Order, the proper course may be to appeal to the Court of Appeal.

[21] For the reasons stated above, I will therefore dismiss both Summonses filed by the Second Defendant with Costs to the Plaintiff in the sum of \$5,000.

[22] Learned Counsel for the Plaintiff may now perfect the Order which I pronounced on 1 August 2018.

Dated this 16th day of October, A.D., 2019

**Indra H. Charles
Justice**