

**IN THE HIGH OF THE SUPREME COURT OF JUDICATURE
CIVIL JURISDICTION**

BETWEEN:

1. ERIC BACKER, represented herein by his duly constituted attorney in Guyana SYBIL PATTERSON under power of attorney No.1303/92 registered in the Deeds Registry at Georgetown on the 22nd day of February, 1992.

2. JAMES SHEPHERD administrator ad litem of estate of LUCILLE SHEPHERD, represented herein by his duly constituted attorney in Guyana MARVA PATTERSON under power of attorney No. 2836/2007 registered in the Deeds Registry at Georgetown on the 3rd day of May, 2007.

**Plaintiffs
(jointly and severally).**

-and-

1. CAROLINE THOMAS, represented herein by her duly constituted attorney in Guyana YUTSE KELMAN under of power of attorney No. 414 of 2006 registered in the Deeds Registry at Georgetown on the 23rd day of January, 2006.

2. SUNDELL BABB
3. DIANE BABB.

**Defendants
(jointly and severally).**

Ms. A. Wong-Inniss for Plaintiff.

Mr. R. Forde for Defendant.

Ruling on Merits of the Affidavit of Defence.

The Plaintiffs are owners by Title No.2275B/2006 of the Property situate at Lot 8 Plantation Relief, East Bank Demerara. The Plaintiffs claim that the defendants are unlawfully trespassing and continue to unlawfully trespass on the said lands by

erecting and maintaining houses thereon, despite repeated warnings to desist from so doing.

The Plaintiffs obtained an order for prescriptive rights from the Commissioner of Title and Judge of the Land Court in 2006 of Sublots 'a-1' and 'c-1' part of subplot C part of Lot 8 of Plantation Relief. The Defendants had opposed the Petition of the Plaintiffs to the Land Court and after a hearing was held, the Commissioner of Title granted an order in favor of the Plaintiffs for the aforementioned lots. A stay of 6 weeks was granted. A subsequent summons filed by the Defendants for a re-hearing was also dismissed by the Commissioner of Title. A Notice of Appeal was then filed in July 2006. The defendants disregarded the order of the Land Court and an interim injunction was granted on 24/07/2008 and made inelocutory on 16/12/2008. An Affidavit of Defence was filed, a Supplementary affidavit of Defence and a further affidavit of Defence was filed 07/06/2011 by order of this Court, after hearing arguments by both sides.

In their Affidavit of Defence the Defendants claimed that the Plaintiffs applied for Prescriptive Rights for Land at Relief and Support on the East Bank of Demerara. They claimed that the Plaintiffs lived outside the Jurisdiction and based their claim on a purported will made by the Plaintiffs mother leasing the Land to the Plaintiffs, and swore that they were in occupation of the said lands. The Defendants claimed that they opposed the said Petition on the grounds that they were in occupation for over 12 years continuously and denied that the Plaintiff's were ever in occupation.

The Commissioner of Title in granting the order in favour of the Plaintiffs found that one of the lots i.e a2 was not supported by the evidence led by the Plaintiffs and there upon granted the Order in favour of the Plaintiffs for sublots 'a1' and 'c1' only. On 18/01/2006 a summons to set aside the Land Court Judgement and for a new hearing of the opposition was filed and this was dismissed on 17/07/2006. An

appeal against the decision of the Land Court was filed and has not yet been heard up to the time of filing of this action. There is no stay against the Order.

The Defendants claim that Plaintiffs claim is fraudulent in that the Plaintiffs misrepresented the facts to the Land Court Judge, and asks this Court to give leave to defend in order to seek a declaration that they have been in occupation for in excess of 12 years, and that the land Court's Order be set aside for fraud.

This Court has no Jurisdiction to review the decision of the Land Court Judge, nor can this Court set aside the order on the ground of fraud, claimed in the Affidavit of Defence. The Jurisdiction lies in the Court of Appeal which is the only Court that can review the Land Court's Order. (Court of Appeal Act 3:01, s.6 (2) and s.7 (1) .) This Court has no Jurisdiction to entertain a claim for fraud on an Affidavit of Defence. The Defendant has to file an action claiming fraud and this must be done within one year of knowledge of the fraud. This Court cannot look into allegations of fraud and the Plaintiff is entitled to rely on the order granted by the Land Court Judge until it is set aside. There is no stay granted of the Plaintiffs rights under the order either by the Court of Appeal or by the Land Court itself.

The High Court Rules, Order 46 Rule 18, clearly states that an Appeal does not operate as a stay of any proceedings in the High Court or any order therefrom. This Court cannot review the evidence led in the Land Court with a view to finding whether or not the Defendants have a lawful claim to the land. This is the Purview of the Court of Appeal. The Defendants are appealing to this Court to grant leave to defend since they claim that this Court ought to hear this matter despite an appeal is pending. The Summons filed for a new hearing of the Petition and the Summons filed to stay these proceedings cannot operate as a stay of the order granted by the Land Court Judge. The defendants have not shown how these applications can deny the Plaintiffs their rights under the order. The defendants submit that the Plaintiffs

perjured themselves in their evidence before the Land Court and that the Commissioner of Title ought not to have accepted the Plaintiffs evidence in the Land Court. Even if this allegation were true, this Court has no Jurisdiction to look into the evidence to find out whether or not the Plaintiffs gave perjured evidence. That is within the purview of the Court of Appeal and not this Court. This Court cannot set aside the order of the Land Court on this ground.

Order 46 Rule 29 of 3:02 states:

“Every application for a new trial or to set aside a finding or Judgement where has been a trial shall be made to the Full Court or the Court of Appeal as the case may be”

The cases cited by defence counsel dealing with perjury would only apply if during the course of the Trial in the Land Court , the plaintiffs were found by the Trial Judge to have committed perjury, and in such cases the Judge would render his order accordingly, or take the necessary steps to deal with the perjured evidence. Where in this case, the Judge heard all the evidence and purportedly did not find Plaintiffs guilty of perjury, and thereafter granted an order in favour of the Plaintiffs then this Court cannot revisit the evidence to find whether or not the Plaintiffs were guilty of Perjury and set aside the order. The Defendants have to file a separate action Re: Fraud/Perjury to set aside the Judgement on those grounds. The Defendants have not done so. The Judge having made his Order, is deemed to have done so lawfully, and the defendants having already filed an appeal against the Judge’s decision then it is only the Court of Appeal that can review the evidence. This Court is not saying that the Judge’s decision cannot be reviewed nor is this Court saying that if the Plaintiffs have committed perjury, they cannot be found guilty, or that the Defendants do not have a remedy, but this Court has no Jurisdiction in this matter. The defendant’s remedy lies in the Court of Appeal to which the defendants state they have already filed an appeal. In the Circumstances the order is valid until set aside by the Court of

Appeal. The plaintiffs have a valid and subsisting order and are entitled to the fruits of their Judgement. The defendants have continued in occupation of the Plaintiffs property inspite of the Judgement handed down by the Land Court Judge in finding for the Plaintiffs within respect to sublots 'a1'and 'c1'. The Defendants have no authority to remain in possession thereof, and for the reasons already given, the Defendants Affidavit of Defence does not disclose a Defence to the Plaintiff's claim. The Affidavit of Defence is hereby struck out and Judgement entered for the Plaintiffs in terms of paragraph 3 (a) (b), (c) and (d) of the statement of claim dated 23/07/2008. Damages in regard to paragraph 3 (b) being in the sum of \$50,000.00.

Costs in the sum of \$25,000.00

.....
Diana F. Insanally

Dated the 26th day of September, 2011.