SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 204 of 1992

BETWEEN:

FELINA FELIX

Plaintiff

and

KYLE ALEXANDER

Defendant

Miss F. Byron-Cox for Plaintiff
Mrs. P. Nelson for Defendant

1996: November 20 and 22.

J U D G M E N T

MATTHEW J. (In Chambers).

The case file reveals that the Plaintiff filed a writ of summons on April 10, 1992. The Defendant was served three days later and he filed a notice of appearance on May 21, 1993. Thereafter the Defendant filed a defence and counterclaim on June 16, 1993. The Plaintiff filed a defence to the counterclaim on July 28, 1993 and the Defendant filed a reply to the defence to the counterclaim on August 13, 1993.

Then there was filed an affidavit of service of the defence to the counterclaim on August 18, 1993, and on September 2, 1993 an affidavit of service of the reply to the defence to the counterclaim.

About thirty four months later the next document filed was an affidavit of service of a Notice of Intention to proceed after one year's delay. That affidavit says that the Defendant was served with the notice on June 26, 1996 but no copy of the notice was ever filed in Court.

To complete the record of documents filed before the present application was made, there is also a summons for directions filed by the Plaintiff on September 11, 1996.

On October 17, 1996 the Defendant filed a summons applying to deem the matter abandoned. The summons was supported by an affidavit filed by the Defendant on the said October 17, 1996. At paragraph 10 of the affidavit the Defendant says that he unequivocally states that he does not waive his right to have the matter abandoned and he does not consent to the continuation of the action.

At paragraph 12 of the affidavit the Defendant makes it clear that his application is under Order 34, Rule 11 (1) (a) for there he states that more than one year had elapsed from the date of the last proceeding had or filing of the last document prior to the filing of the notice of intention to proceed after one year's delay. In effect the Defendant is referring to the period September 2, 1993 to June 24, 1996 when the Notice of Intention to proceed was signed.

In the course of her submissions learned Counsel for the Defendant relied on the following authorities:

1. **HENRY ST. HILLAIRE** and **RAILFORD BAPTISTE v. ENA LEWIS Civil Appeal No. 21 of 1993** decided on February 6, 1995 especially at pages 7 - 8; and 13.

2. **PETER MAX AUGUSTE v. EDWARD JULES** High Court, St. Lucia, Suit 383 of 1990 decided on October 2, 1996 especially at page 2.

In opposition to the application learned Counsel for the Plaintiff submitted that she was relying on Order 34, Rule 3 (2) and the case of **BARBUDA ENTERPRISES LTD. v. ATTORNEY GENERAL** of **ANTIGUA 1993 W.L.R.** page 1052 and in particular at page 1058, A - C.

Counsel submitted that as soon as the pleadings are closed Order 34, Rule (2) comes into play and the matter becomes pending and that pending proceedings would prevent the application of the category of cases where no proceedings have been taken for a year since the last proceeding.

Rule 3 (2) on which learned Counsel for the Plaintiff relies comes under the sub-head: "When cause or matter ripe for hearing."

The concept of ripeness for hearing is not to be applied to applications under Order 34 Rule 11 (1) (a). This was indicated by Sir Vincent Floissac in Civil Appeal No. 21 of 1993 at page 6 when he said:

> "The importation of the concept of ripeness for hearing into Order 34 Rule 11 (1) (a) would have the effect of rendering that rule otiose."

The Barbuda Enterprises case was concerned with an application under Rule 11 (1) (b). This is gleaned from the headnote at page 1053 letter B where the decision of the Judicial Committee of the Privy Council reads:

> "; and that, accordingly, since no order fixing the place and mode of trial had been made, the Plaintiff's, action against the Attorney General had never become ripe for hearing, and therefore the action could not be deemed to have been abandoned pursuant to Rule 11 (1) (b)."

Therefore the concept of ripeness for hearing featured in that case. The case is not authority for the present application.

In Lewis, Singh J.A. stated at page 13:

"In my judgment therefore Order 34 Rule 11 (1) (a) applies to a cause or matter at any stage of the proceedings prior to the filing of a request for hearing or consent to judgment or the obtaining of

a judgment and is not limited in its application to such a cause or matter only after it becomes ripe for hearing".

I agree with that view.

The Defendant's application is granted and I rule that the matter be deemed abandoned and incapable of being revived.

The Plaintiff is to pay the Defendant's costs in the sum of $500.00.

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A. N. J. MATTHEW
Judge