

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry San Fernando

No. S. 264 of 1988

IN THE MATTER OF THE WILLS AND PROBATE ORDINANCE
AND IN THE ESTATE OF BOBBY ALI HOSEIN DECEASED

Between

ROSA FARIDA HOSEIN

Plaintiff

And

KAMAL HOSEIN
(executor of the Will of
Bobby Ali Hosein, deceased)

Defendant

JUDGMENT/APPLICATION TO VARY ORDER OF COSTS

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Devindra Rampersad for the Plaintiff

Mr. Edwin Roopnarine and Ms. C. Sinanan for the Defendant

1.1 This is the Plaintiff's application brought by motion dated 9th March 2006 for leave for "further hearing for the recall/variation of the order for costs, the final judgment not having been delivered and/or perfected to date pursuant to the inherent jurisdiction of the court and/or liberty to apply as per paragraph 4605 of the White Book 1998."

- 1.2 On 8th March 2006 this Court, after hearing submissions from both Attorneys, ruled that the Plaintiff do pay half of the Defendant's costs of the trial of this issue of the location and extent of the area originally occupied by Bobby Ali Hosein deceased and which is referred to as the "house spot"¹, to be taxed in default of agreement. The Plaintiff on the same day and upon delivery of that decision applied for and was granted leave to appeal that judgment pursuant to section 38(2) of the Supreme Court of Judicature Act.
- 1.3 It is undisputed that there is power under the rules of Court and the inherent jurisdiction of the Court to correct any clerical mistake in the Court's judgment or order or some error arising in it from any accidental slip or omission or to vary the judgment or order so as to give effect to the Court's meaning and intention. Further it is undisputed that it is open to the Court to review and reconsider its decision right up to the point when the order has been drawn up, perfected and entered or when an appeal has been filed with the Registrar of the Court of Appeal See *Halsbury Laws of England* 4th Ed 1999 Cumulative Supplement Volume 26 paragraph 557 and *Abdool Latiff v Tani Persaud* (1968) 14 WIR at pg 57 cited with approval by Bernard JA in *McKnight v McKnight* (1983) 44 WIR at 355.
- 1.4 The power exercised by the Court to recall or vary its orders after it is drawn up is curative and not appellate in nature; it is limited to those cases of manifest omissions, clerical slips or errors; and is an exercise conducted by the court in the interest of justice. The power to recall before it is drawn up is considerably wide as wide as the interest of justice demand but the Court must act within its jurisdiction. See *Re Harrison's Share of a Settlement [1955] Ch 260*.
- 1.5 This Court will not be acting within its jurisdiction were it to attempt to recall or vary an order after an appeal has been filed². It would appear from *Latiff v*

¹ See written judgment delivered 8th March 2006

² See *Mc Knight v McKnight* at page 355 paragraph G.

*Persaud*³ that once a step has been taken to invoke the jurisdiction of the Court of Appeal such as the filing of a notice of appeal it brings to an end the judge's power of recall. The Court is functus officio.

- 1.6 It is accepted in this case that the Court's order as to costs has not yet been perfected and a notice of appeal has not yet been filed. However the Plaintiff cannot be allowed to blow hot and cold. She has applied for and obtained leave to appeal against the order of the Court in relation to costs, indicating to this court its desire to file its notice of appeal to vary and/or quash that order by the appellate court. She having obtained leave is now constrained to act pursuant to Order 59 rule 6 of the Rules of Supreme Court where the time limits for the filing of a notice of appeal commence from the date leave was granted.
- 1.7 This Court does not consider it prudent in the circumstances of this case and will be very slow to vary or recall its order which will be in effect an attempt to argue the appeal before this Court be way of a side wind. It borders on being an abuse of the process of this Court.
- 1.8 The Court finds comfort in the dicta of *Latif v Persaud*:⁴

"I consider it impelling to say from the circumstances revealed in this case that though the learned judge does have the right to rescind and vary his previous order he ought to have been very slow to do so after counsel's verbal intimation that an appeal was contemplated and that grounds in respect thereof has already been settled. Unless justice demanded the recession of his previous order, he ought to have stayed his hand."

³ See pg 57 paragraph F

⁴ See page 58 paragraph C

- 1.9 There is nothing in the nature of this application to suggest that it is an application under the slip rule, nor a variation to carry out the intention of the Court. It is an application to reconsider the judgment and to make a new or fresh one based on new authorities cited to it in circumstances where the parties were previously given an opportunity to address the Court or the issue and where leave to appeal has been granted.
- 1.10 I have considered the new authorities cited by the Plaintiff and they do not detract from the principles of law enunciated before this Court by Attorney at law for the Plaintiff on the previous occasion. There is no fresh material, which is being brought before this Court for it to exercise its power of recall, even if it was available, in the interests of justice. Justice does not demand the recall of the Court's previous order.
- 1.11 In the event therefore that this Court has jurisdiction to vary its order it would not do so for the following reasons:
- (a) The Plaintiff has intimated its intention to lodge an appeal and has so taken a step to invoke the jurisdiction of the Court of Appeal;
 - (b) The Plaintiff has not brought any material before this Court to suggest that it is in the interest of justice to alter the previous order;
 - (c) The authorities cited do not add nor change the Plaintiff's original submissions that costs should be paid from the estate on the basis that the issue resolved was an administration issue and involved a dispute over the constriction of the will. It is noted at this juncture that it is this Court that introduced the issue of whether the estate should bear the costs of this trial and that it did not emanate from the submissions of the Plaintiff. The Plaintiff's original position was that the Defendant should bear the costs of this application.
 - (d) The Court will not saddle the estate with the costs of a dispute between two beneficiaries which can be classified as hostile litigation and will act

in conformity with the general principle that in cases where the litigation is hostile in spirit, costs as between party and party, normally follow the event.⁵

- (e) The Court's order as to costs will stand until reversed by appeal.

1.12 At the risk of repetition and for clarification for Attorneys at law that order was made for the following reasons:

- (a) The Court followed the general rule in the award of costs that costs will follow the event.
- (b) The main action was not before this Court, this being satellite litigation arising out of a direction from the Court for the proper disposition of one of the issues arising from the main action
- (c) In that main action the Plaintiff herself did not seek the order of which she is now seeking, but a personal order as to costs.
- (d) The Plaintiff bore the burden of demonstrating that the executor/beneficiary was taking more than what he was entitled to under the will. The issues are set out in the rivaling contentions of the parties in the Statement of Case, Defence and Reply filed in these proceedings. This is not an action brought by the trust with permission of the Court, nor a pure construction exercise. In substance it was to determine rivaling interests. It dealt with issues of user and allegations that the Defendant took more than what was due to him. There were subliminal and overt allegations of breach of trust and maladministration. The pursuit of this issue was not for the benefit of all the beneficiaries but to settle a private dispute between neighboring beneficiaries and ultimately to determine the competition interests of beneficiaries to interests in land.⁶
- (e) In any event the Court acted equitably and fairly in the circumstances taking into account inter alia the fact that the Defendant's contention failed with regard to the extent of the Southern boundary and the "offer"

⁵ See *In re Buckton* [1907] 2 Ch 415

⁶ See *Chen v Quinn Lee* (1967) 10 WIR 222

made by the Plaintiff of what it considered a larger plot than the one to which she thought the Defendant was entitled to under the will.

- 1.13 The Plaintiff's application is therefore dismissed. The Plaintiff shall pay to the Defendant the costs of this application to be taxed in default of agreement. These costs are not certified fit for advocate Attorney-at-Law.

Dated this 21st day of March, 2006

Vasheist Kokaram
Judge.