Rozi bin Noor v Mat Zin bin Mat & Ors [2020] MLJU 877

Malayan Law Journal Unreported

HIGH COURT (KOTA BHARU)

WAN AHMAD FARID BIN WAN SALLEH, J

GUAMAN NO: DA-21NCVC-5-02/2019

7 January 2020

Mohd Khuzaimi bin Mohd Salleh (Wan Jawahir & Takiyuddin) for the plaintiff.
Hizri bin Haashan (Yong Ke-Qin with him) (Akram Hizri Azad & Azmir) Nik Nur Adila (Federal Counsel) for the defendant.

Wan Ahmad Farid bin Wan Salleh J:

JUDGMENT

[1]There are three separate applications before me. The first two, which are in Encls 15 and 16 are made by the 3rd, 4th and 2nd defendants to strike out the writ and statement of claim. The application in Encl 15 is filed by the 3rd and 4th defendants under O 18 r 19 (1)(b) and/or (d) of the Rules of Court 2012 ("ROC"). The 2nd defendant's application is in Encl 16 made under O 18 r 19(1)(a) of the ROC.

[2]The third application, which is in Encl 35, is filed by the 3rd and 4th defendants in order to obtain leave from this Court under O 14 r 4 and O 14 r 9(2) of the ROC to use the affidavits of Mazli bin Muhammad Nor ("Mazli") in Encls 15 and 25.

[3]For practical purposes, I will deal with the application in Encl 35 first.
Enclosure 35

[4]The background facts that lead to the application is this. The application by the 3rd and 4th defendants to strike out the writ and SOC in Encl 15 is supported by the affidavit of Mazli. Mazli also affirmed the affidavit in reply to the plaintiff's affidavit in Encl 35. Mazli is the District Valuer from the Valuation and Property Services Department, the 3rd defendant herein.

[5]Learned counsel for the plaintiff has a preliminary objection the affidavits of Mazli in Encl 15 and 25. The reason is this. In both the affidavits the notes showing on whose behalf they were filed state as follows:

> Afidavit Sokongan ini diikrarkan oleh Peguam Kanan Persekutuan untuk dan bagi Pihak Defendan Ketiga dan Keempat yang beralamat penyampaiannya di Jabatan Peguam Negara, Bahagian Guaman, No. 45 Persiaran Perdana 62100 Putrajaya.

In his preliminary objection, learned counsel for the plaintiff referred me to O 41 r 9(2) of the ROC which provides as follows:

> Every affidavit shall be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so endorsed may not be filed or used without the leave of the Court.

[6]It is not in dispute that Mazli is not the "Peguam Kanan Persekutuan" and that there was an error in the endorsement. Hence the application in Encl 35.

[7]Learned counsel argued that the word “shall” as provided for in r 9(2) denotes mandatoriness. I have no problem in accepting this argument. I believe we have a plethora of authorities to support the aforesaid proposition. It would be mere surplusage to repeat all those authorities in this judgment.

[8]But the solution in the error made can be found in the same rule itself, in that, the Court, in an appropriate situation, can give leave for the affidavits, despite their shortcomings, to be used in the main application.

[9]What then is the legal position? First, in an application under O 41 r 9(2), the seriousness of the irregularity is a more important ground to consider rather than its prejudicial effect on the other party. Thus an affidavit may not be accepted if the irregularity is so serious despite the fact that it may not prejudice the other side. Secondly, the plaintiff should have made a proper formal application for leave under O 41 r 4 of the RHC at the earliest opportunity. Thirdly, the deviation from the prescribed format must in the circumstances of the case be trivial in nature; see *Utama Merchant Bank Bhd v Dato' Mohd Nadzmi Mohd Salleh* [2001] 1 MLJ 317.

[10]I have gone through both affidavits in Encl 15 and 25 and take cognisance that at no time did the deponent, Mazli, mislead the Court. On all occasions, he affirmed that he was the District Valuer of the Kuala Krai Branch. Nothing in the body of both the affidavits that states that he was a senior federal counsel. The mistake was only in the notes showing on whose behalf the affidavits were filed. The irregularity, in my considered opinion, was not serious. It was not even a deviation from the prescribed format.

[11]The preliminary objection is therefore dismissed.

The pleaded case of the plaintiff

[12]The pleaded case of the plaintiff is as follows. Sometimes in 2002, the plaintiff herein, Rozi bin Noor, who is a member of the Armed Forces, had entered into a loan agreement with the 2nd defendant (then known as Bahagian Pinjaman Perumahan, Perbendaharaan Malaysia). The agreement is for the purchase of that piece of land known as PM 250 Lot 9222, Mukim Pasir Genda, Kg Padang Siam, Jajahan Tanah Merah, Kelantan (the "said Land").

[13]Subsequently, the plaintiff entered into another agreement with the 1st defendant to construct a house on the said Land. The 2nd defendant is a building contractor trading in the name and style of Serantau Bistari Trust & Co.

[14]For the purpose of financing the construction of the house the plaintiff, for the second time, applied for another loan ("the second loan") from the 2nd defendant which loan was also approved on 6.10.2004. The total sum for both loans is RM126,774.86

[15]Since there were two loans involved, two separate legal charges under the National Land Code, 1965 were registered on the said Land. After the charges were registered, the repayment of both loans were made through the deduction of the plaintiff's monthly salary.

[16]The 2nd defendant had disbursed the second loan in 3 stages, the last being on 27.7.2005 for the sum of RM13,300. Up to the aforesaid date, it is the 2nd defendant's position that it had disbursed 80% of the second loan. The respective percentage of the progressive disbursements was approved by the 3rd defendant before any payment was made to the 1st defendant by the 2nd defendant.

[17]While the alleged construction of the house on the said Land was ongoing, the plaintiff was then serving in Johor. After the purported progress of work reached 80%, as

approved by the 3rd defendant and paid by the 2nd defendant, the plaintiff, realising that something was amiss, had visited the site where the construction was supposed to be made. To his surprise, the plaintiff discovered that there was no building on the said Land at all.

[18]Subsequently, the plaintiff became aware that the house was not constructed by the 1st defendant on the said Land but on the adjacent land.

[19]The plaintiff then filed this amended writ and statement of claim ("SOC") against the defendants for negligence. The plaintiff prays *inter alia,* for the following reliefs:

(a) For the 1st defendant to pay the damages for the sum of RM300,000;

(b) For the 2nd and 4th defendant to refund whatever sum that had been deducted from the plaintiff's salary in respect of the second loan; and

(c) For the defendants to pay the damages to be assessed by this Court.

The application in Encl 15

[20]I will first proceed with the application to strike out the amended writ and SOC by the 3rd and 4th defendants in Encl 15. The grounds of the application in Encl 15 as affirmed by Mazli in his affidavit in support dated 21.3.2019 can be summarised as follows:

(a) That the amended writ and SOC is barred by limitation;

(b) There was no contractual relationship between the plaintiff and the 3rd and 4th defendants;

(c) There was no duty of care existed between the plaintiff and the 3rd and 4th defendants; and

(d) The 3rd and 4th defendants are not to be vicariously liable on the act or omission of the 2nd defendant since they are of separate entities.

Is the claim barred by limitation?

[21]The learned Senior Federal Counsel ("SFC") referred me to s 2(a) of the Public Authorities Protection Act 1948 which provides any suit against any public authority must be instituted within 36 months from the alleged cause of action. My attention was then drawn to the fact that the 2nd loan was approved on 6.10.2004. If we take that as the time starts to run the said date, the last date for the plaintiff to file the suit would be 6.10.2007 which means that the amended writ and SOC are well out of time.

[22]Even if we were to take the matter one step further, in arguing that the cause of action arises from the date the 3rd defendant's valuation report that the progress of work had reached 80%, which was on 30.6.2005, the plaintiff is still out of time. The last date for the plaintiff to file the amended writ would be on 30.6.2008.

[23]In contrast, learned counsel for the plaintiff argued that the cause of action arises in the middle of 2017 when the plaintiff was informed by the 2nd defendant that there was no house constructed in the said Land.

[24]With respect, I cannot agree with this line of argument. The plaintiff by his own admission was aware of the "abandoned state of the house" after 80% of the progress payment was made to the 1st defendant which was in on 27.7.2005. this is reflected in para 25 of the amended SOC which says as follows:

> Setelah bayaran dibuat ke tahap 80 peratus, Plaintif pada masa material berkhidmat di Johor, telah melihat rumah berkenaan telah terbengkalai dan tidak disiapkan 100 peratus walaupun temph masa untuk siapkan rumah berkenaan dan untuk milikan kosong telah lama tamat tempoh.

[25]Since the plaintiff was aware of the alleged negligence, which according to him occurred after July 2005, the filing of this amended writ and SOC are well out of time. I

believe I state the law correctly in saying that 'a cause of action' means every fact which is material to be proved to entitle the plaintiff to succeed. This proposition which originally defined by Brett J in *Cooke v Gill* (1873) LR 8 CP 107; (1873) LR 8 CP 116 and was given the approval by the Court of Appeal in *Read v Brown* (1888) 22 QBD 128 CA. Lord Esher MR in his speech (with whom Fry and Lopes LJJ concurred) said:

> Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

[26]Applying the said proposition to the facts of the case, by July 2005, the plaintiff was appraised with every fact that was material to be proved to entitle him to succeed. Unfortunately, the plaintiff waited for 14 years to commence this action. The delay is therefore inexcusable and plainly unacceptable.

[27]On this ground alone, the amended writ and SOC must fail for being obviously unsustainable. There shall be no order as to costs.
Enclosure 16

[28]As to Encl 16, the application of the 2nd defendant to strike out the amended writ and SOC is supported by the affidavit of Fadzirulhisham bin Mohamad, who is the head of Legal and Secretarial Department of the 2nd defendant.

[29]In opposing the application in Encl 16, the plaintiff in para 9(xv) and (xvi) of his affidavit in reply in Encl 22 (AIR-16"), affirmed as follows:

> [xv] Saya terus membuat aduan kepada kesemua Jabatan dan Pihak Berkaitan, tetapi tidak terdapat apa-apa maklumbalas sehinggalah pada tahun 2016 Defendan Kedua memberi maklumbalas mengenai Aduan saya dan mengarahkan saya membuat aduan lagi kepada CIDB. Salinan surat Defendan Kedua bertarikh 13/6/2016 dikembarkan dan ditanda sebagai "EKSHIBIT RN-7".
>
> [xvi] Kemudiannya pada lebih kurang selepas pertengahan tahun 2017 saya mendapat panggilan daripada Pegawai atau

Kakitangan Defendan Kedua yang melawat ke Tanah Tersebut yang memaklumkan bahawa di atas Tanah Tersebut tidak terdapat rumah, yang ada hanya longgakan batu sahaja.

[30]From the averments of the plaintiff in the AIR-16, it seems that the 2nd defendant itself was not sure whether it had paid to the right person in respect of the right house situated in the right building. Both parties were aware of the allegation that there was no building in the said Land. Applying the proposition in *Read v Brown*, in my opinion, the cause of action against the 2nd defendant only arose in 2017.

[31]At this summary stage, the Court has to give a generous reading on the averments of the plaintiff.

[32]In the circumstances, it is my finding that:

(a) The plaintiff is not caught by the Limitation Act 1953.

(b) The 2nd defendant owes a duty of care to the plaintiff to ensure that the payment is made to the right contractor, constructing the right house on the right land.

[33]There is no doubt from the pleaded case of the plaintiff that he is the victim of the circumstances. He is now paying, by way of salary deduction, for a house that does not even exist. The 2nd defendant was instrumental in disbursing the said sum to the 1st defendant. In my considered view is that, the overriding consideration is the plaintiff should not be denied his day in court to pursue his substantive case against the 2nd defendant.

[34]The plaintiff's case against the 2nd defendant is not "obviously unsustainable" within the meaning of *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 SC.

[35]The application in Encl 16 is dismissed with a nominal costs of RM1,000.

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