IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. CV 66 of 2007

BETWEEN:

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Applicant

and

JONATHAN BURGOS

First Respondent

EMILCAR BURGOS

Second Respondent

REGISTRAR OF LANDS

Interested Party

Appearances:

Mr. Jaraad Ysaguire for the Applicant
No appearance for the Respondents
Mr. Jhawn Graham for the Registrar of Lands

---

15 June 2024

16 September 2024

JUDGMENT

Writs of execution – Whether a CPR 55 order for the sale of land is a writ of execution – CPR 46.1 – Whether absent renewal, a CPR 55 order for the sale of land lapses after twelve months – CPR 46.10(1) - Legality of sale of land pursuant to a lapsed CPR 55 order for the sale of land – Requirements to be satisfied to secure further directions on order for sale of land - CPR 55.6 – Requirements to be satisfied to secure an order nominating an alternative person to sign land transfer documents – Section 179 of Senior Courts Act, 2022 - Duty of candour in ex parte applications – Process servers – Validity of service by a process server with a potential or real conflict of interest

[1] **HONDORA, J.**: In 2007, the applicant obtained a default judgment for a specified sum of money against the first and second respondents. In 2009, the applicant sought and was granted an order for the sale of the second respondent's land. In August 2023, the applicant sold the second respondent's land pursuant to the 2009 court order. Now, in an ex parte application filed on 24 April 2024, the applicant seeks:

(a) further directions, pursuant to Civil Procedure Rule (CPR) 55.6, relating to its sale of the second respondent's land; and

(b) an order, pursuant to section 179 of the Senior Courts Act, 2022, nominating and authorising the Registrar of the High Court to sign documents required to effect transfer of the second respondent's freehold title to the alleged purchasers of his land.

[2] I shall refer to (a) the First Caribbean International Bank (Barbados) Limited, the claimant in the main matter, as the applicant; and (b) Jonathan Burgos and Emilcar Burgos, the defendants in the main matter, as the first and second respondents.

[3] In my consideration, this case turns principally on:

(a) whether the applicant's use of this court's 23 December 2009 CPR 55 order to sell the second respondent's property on or around 26 August 2023 was lawful;

(b) whether the applicant has satisfied the requirements for an order under CPR 55.6 for further directions relating to the applicant's sale of the second respondent's property; and

(c) whether the applicant has satisfied the requirements for an order under section 179 of the Senior Courts Act, 2022 nominating and authorising the Registrar of the High Court to sign documents necessary to effect the legal transfer to the alleged purchasers of the second respondent's freehold title.

I. Chronology

[4] On or around **20 May 2004** the applicant, a financial institution, entered into a loan agreement with the first and second respondents for the sum of $66,500. The loan amount carried an annual interest rate of 14.68%. Although the exact dates are not provided, the respondents fell into arrears after repaying $62,086.54 towards the loan amount.

[5] On **20 June 2007** the applicant secured through the court office a default judgment against the respondents. The terms of the default judgment were as follows:

> "The…defendants not having acknowledged service of the Claim Form and Statement of Claim, it is this day adjudged that the Claimant recover against the Defendants the sum of $31,588.87 with interest on the outstanding loan principal sum of $15,538.35 at the rate of 14.68% per annum or $6.25 from the 18th June, 2007 until payment and costs to be taxed or agreed."

[6] On **23 December 2009** the applicant secured the following CPR 55 order from the then Registrar of the High Court, i.e.:

> "(1) The freehold property situate at Ann Gabourel Registration Section, Block 1, Parcel 18 belonging to the Second Defendant be sold with vacant possession free from all claims on the Second Defendant and of all persons claiming through him by public auction by Fitzgerald Joseph;
>
> (2) The Claimant's attorney shall have the conduct of the said sale;
>
> (3) Reserve price for the said freehold property is fixed at $40,000.00 and the remuneration of the auctioneer shall be 5% of the sale price together with expenses reasonably incurred in attending to the same;
>
> (4) In default of sale by public auction the Claimant shall have the right to sell the said property by private treaty at a price not far below the reserve price;
>
> (5) The Defendant do pay to the Claimant costs of this application to be subject to detailed assessment in default of agreement." [Emphasis added]

[7] In my judgment, the applicant's 2009 application did not satisfy the requirements necessary for a CPR 55 order for the sale of land.

[8] CPR 55.2 provides:

> "An application for an order for sale must be supported by affidavit evidence.

(2) The evidence under paragraph (1) must –
  (a) identify the land in question; and
  (b) state -
    (i) the reason for seeking an order for sale;
    (ii) the grounds on which it is said that the court should order a sale of the land;
    (iii) the full names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land;
    (iv) the nature and extent of each such interest;
    (v) the proposed method of sale and why such method will prove most advantageous;
    (vi) any restrictions or conditions that should be imposed on the sale for the benefit of any adjoining land of the judgment debtor; and
    (vii) whom it is proposed should have conduct of the sale; and
  (c) exhibit a current valuation of the land by a qualified land valuer or surveyor."

[9] The applicant's pleadings did not set out any grounds justifying the issuance of a CPR 55 order for the sale of the second respondent's land beyond the fact that it had obtained the 2007 default judgment order.

[10] The applicant was required to, but did not, plead or evidence that it was "*necessary or expedient that the [second respondent's] land be sold*" in satisfaction of the judgment debt (CPR 55.1(b). The applicant loaned the respondents $66,500 to purchase a motor vehicle. As of the date of the default judgment, the respondents had repaid $62,086.54 of the loan amount. A reasoned judgment was required to explain why it was "necessary or expedient" for the second respondent's land to be sold in satisfaction of the judgment debt as opposed to the seizure and sale of the motor vehicle, which the respondents purchased with the proceeds of the loan they obtained, and which was listed in the loan agreement as security for the said loan. In its application, the applicant did not aver that the motor vehicle had been damaged or that the respondents had sold it.

[11] In addition, it is peculiar that the application was supported by affidavits provided by the applicant's lawyer and Mr Joseph, an auctioneer and not any affidavit deposed by any of the applicant's authorised officers who are the only persons who could, at law, properly attest to the amount due and owing by the respondents as of the date of the application for the sale of the second respondent's property. The applicant's lawyer's averments on the amounts due under the loan agreement were at best inadmissible hearsay.

[12] In addition, it does not appear that there was any current valuation of the property (as of 2009) that was attached to the application for that CPR 55 order.

[13] Further, in its 2009 application for the sale of the second respondent's land, the applicant did not make any averments regarding the existence, if any, of any third parties that may have had "an interest in the [second respondent's] land" (CPR 55(3). In addition, the Registrar did not issue directions mandating the applicant to declare its knowledge and to serve its application on any third parties. Yet, the Registrar's 23 December 2009 order affirmed that the applicant was entitled to dispose of the second respondent's property "*free from all claims on the second defendant and of all persons claiming through him*." In my view, the then Registrar fell into error in issuing the 23 December 2009 CPR 55 order. The Registrar had not received any evidence relating to third parties' rights to and interests in the second respondent's property. In the circumstances, it was not open to the Registrar to rule that the property could be sold free from third-party claims. In its 24 April 2024 application as supplemented by submissions, the applicant argued that there was no appeal against the 23 December 2009 order. However, that is neither here not there.

[14] Assuming that, as of 23 December 2009, there were, as a matter of fact, no third-party interests or claims impacted by the CPR 55 order, the same is no longer true since the second respondent who is the owner of the property that was sold but has not been transferred is now deceased. The 23 December 2009 order did not extinguish the second respondent's real rights over his land, and these have devolved by operation of law to his estate (see section 4 of the Administration of Estate Act, Cap 197).

[15] That said, nearly fifteen (15) years later, i.e., on **24 April 2024** the applicant applied for an order on the following terms, that:

> "The Court give further directions for the sale of land of (*sic*) the second Respondent to grant authority to the Registrar of the High Court to execute the transfer of the land form *(sic)* <u>for the property sold in accordance with the Court Order dated 23rd December, 2009</u> *(sic*)." [Emphasis added]

[16] I note for emphasis that it is the applicant's case that it sold "*the [second respondent's] property <u>in accordance</u> with the Court Order dated 23rd December 2009*." This assertion

is relevant to the questions (i) whether the applicant did in fact sell the second respondent's property in accordance with the 23 December 2009 court order; (ii) whether the 23 December 2009 order is – at law - a writ of execution that is subject to the rules set out in CPR 46; and (iii) whether, in the circumstances, the applicant's disposal of the second respondent's property was lawful.

[17] In its **24 April 2024** application, the applicant indicated that on or about **26 August 2023**, it sold the second respondent's property known as Ann Gabourel Registration Section, Block 1, Parcel 18 for the price of **$12,000** to persons identified as Izra and Conzie Zetina. That was all the information, which the applicant was prepared to disclose in its application. Notably, the applicant did not consider it necessary to add or request the court to add the alleged purchasers as interested parties. Although, following my 10 May 2024 directions, the alleged purchasers were served with the applicant's pleadings it appears that they chose not to assert any legal or equitable interest in the second respondent's property.

[18] This case was assigned to me at the beginning of May 2004. Exercising my CPR 26 case management powers and with the objective of expediting the proceedings, I issued, without a hearing, the following **10 May 2024** directions:

(a) adding the Registrar of Lands as an interested party;

(b) granting the Registrar of Lands leave to file observations on the applicant's 24 April 2024 application;

(c) requiring the applicant to (i) serve its 24 April 2024 application on the first and second respondents; (ii) file affidavits of service; and (iii) file skeleton arguments in support of its application and addressing whether the party with respect to whom the court should issue the order sought was the Registrar of Lands or the Registrar of the High Court, and the impact, if any, of the Limitation Act on the enforceability of the 23 December 2009 judgment order[1]; and

(d) setting the matter down for a Case Management Conference for **15 June 2024**.

[1] The applicant filed submissions that adequately addressed the question relating to the Limitation Act. Its submissions adequately addressed the issue relating to the application of the Limitation Act, which I accept does not apply to the present proceedings.

[19] I added the Registrar of Lands as an interested party because the government agency could assist the court in determining who should be required to execute the land transfer documents if I were to issue the order sought by the applicant. In addition, it was important that it had notice of this court's ruling and order. Relatedly, I was also not persuaded on the papers that it was appropriate for the applicant to seek an ex parte CPR 55.6 order without citing the respondents. I read CPR 12.13(c) to require defendants to be heard on matters of enforcement of default judgments. As of 10 May 2024, I was unaware that the second respondent was deceased as the applicant had not made the relevant disclosures in its pleadings.

[20] On **15 June 2024**, Mr Jaraad Ysaguirre of Messrs Barrow and Co. appeared for the applicant. As of that date, learned counsel had not complied with my 10 May 2024 directions. I granted him time to comply and adjourned the matter to 30 July 2024. During the hearing, I asked Mr Ysaguirre to address the court on whether prior to selling the second respondent's property pursuant to the court's 23 December 2009 order, the applicant needed to apply for an order renewing the 23 December 2009 court order pursuant to CPR 46.10(1). I also directed learned counsel to file written submissions on that point of law.

[21] I am grateful to Mr Ysaguirre for his written and oral submissions as I am to Mr Jhwan Graham who appeared for the Registrar of Lands. The latter did not file any written submissions. As a general rule of practice, legal practitioners representing parties to litigation, including interested parties, whom the court has invited to submit observations must provide written submissions, however brief, explaining their position on the matter.

[22] I now turn to address the issues of law arising in this matter. To recap: in these proceedings, the applicant is seeking (a) further directions pursuant to CPR 55.6 on its sale of the second respondent's land; and (b) an order nominating and authorising the Registrar of the High Court to sign the papers necessary to transfer the second respondent's freehold title to the alleged purchasers drawing on the court's power as set out in section 179 of the Senior Courts Act.

II. Was the applicant's sale of the second respondent's property lawful?

[23] I hold that the applicant is not entitled to the order it seeks nominating and authorising the Registrar of the High Court to sign relevant land transfer documents because:

(a) the applicant sold the second respondent's property pursuant to a lapsed writ of execution, i.e., the 23 December 2009 court order for the sale of the second respondent's land; and

(b) in any event, the applicant sold the second respondent's property in breach of an express condition imposed by the Registrar in his/her 23 December 2009 order on the price at which the property was required to be sold and the applicant has not sought condonation for its breach.

(a) Was the 23 December 2009 order for the sale of land a writ of execution?

[24] It is the applicant's case that (a) the 23 December 2009 order was not a writ of execution as defined in CPR 46.1 but rather an order of the court whose validity was not time limited by CPR 46.10(1); and (b) it was entitled to use the 23 December 2009 court order to sell the second respondent's property at any time it wished. I disagree.

[25] Part 46 of the CPR sets out the general rules of law and procedure regulating writs of execution. These rules also regulate, and specifically refer to, CPR 55 court orders for the sale of land. CPR 46.1(c) provides:

> "In these Rules, a "writ of execution" means [among others] an order for the sale of land…"

[26] Relatedly, CPR 46.10 provides:

> "(1) A writ of execution is valid for a period of twelve months beginning with the date of its issue.
>
> (2) After that period the judgment creditor may not take any step under the writ unless the court has renewed it." [Emphasis added]

[27] CPR 46.10 contains substantive rules of law, which determine a writ of execution's period of validity and the actions that a judgment creditor may take. It is not a Rule of procedure. Relatedly, that Rule does not say that writs of execution, save for court orders for the sale of land, are valid for a period of twelve months. If that were the intention of the legislature,

it would have would have expressly excluded court orders for the sale of land from the definition of legal process that constitute writs of execution. In addition, that rule does not give this court discretion to ignore or override the limitation period imposed on the validity of writs of execution.

[28] CPR 46.11 provides for the procedure relating to applications for the renewal of writs of execution as defined in CPR 46.1.

[29] Relatedly, CPR 46.12 provides:

> "On an application for renewal of a writ of execution the court may renew it for a period of not more than 6 months."

[30] It is clear that the court has discretion to renew, on application, a writ of execution. However, that is where its discretion ends. It may not renew a writ of execution for more than six months. In other words, this court has no power to extend the validity of writs of execution beyond the statutory period set in out in CPR 46.12.

[31] CPR 46.12 also provides that the renewal of a writ of execution does not change its effective date, i.e., to say, its effective date is the date on which it was originally issued. In my reading, it follows that save in the instance of interpleader proceedings (see CPR 46.14) in relation to seized goods, writs of execution are valid for a period of twelve months (CPR 46.10) and can be extended only for a period of six months (CPR 46.12).

[32] Resultantly, beyond those stipulated periods, a writ of execution is invalid and is of no force and effect. In my consideration, a judgment creditor that secures a CPR 55 order for the sale of land (a writ of execution) cannot use it beyond the periods beyond set out in CPR 46.10(1) as read with CPR 46.16.

[33] In these proceedings, the applicant needed, but has failed to demonstrate that:

(a) the 23 December 2009 order issued by the Registrar authorising the disposal of the second respondent's property in satisfaction of the 20 June 2007 default judgment was not a writ of execution as defined in CPR 46.1(c), i.e., to say, "an order for the sale of land"'; and

(b) in its disposal of the second respondent's property, it was not obliged to comply with the rules set out in CPR 46.10.

[34] In support of the applicant's case, Mr Ysaguirre argued that CPR 46.1(c) was restricted to orders for the sale of land that were "issued" by the court office and not those "promulgated" by the court. Learned counsel also argued that Part 55 court orders for the sale of land were "promulgated" and were "not issued" and that only writs of execution were issued. In this regard, learned counsel argued that writs of execution were administratively issued by the court office and that the process did not involve the exercise of judicial discretion unlike a Part 55 court order for the sale of land. These submissions have no merit since the rules make no such distinction. Learned counsel did not propound on why any such distinction was necessary as a matter of fact or law or provide any authority supporting his submission.

[35] The definition of a writ of execution is not limited to judgment enforcement orders "issued" by the court office as an administrative act. CPR 46.1 Rule includes within the definition of "a writ of execution" (i) court orders for the seizure and sale of goods; (ii) writs of possession; (iii) writs of delivery; and (iv) court orders for seizure of assets. Similar to an order for the sale of land, an order for the seizure and sale of goods or an order for the seizure of assets is made by a judge exercising the court's inherent powers and typically, although not in all cases, following an adversarial process. Those judgment debt enforcement processes/writs are included in the definition of a writ of execution. This puts paid to the distinction that learned counsel sought to draw regarding the 23 December 2009 CPR 55 order for the sale of the second respondent's property and other categories of writs of execution.

[36] The procedure for satisfying a judgment debt through the sale of a judgment debtor's land is, of course, set out in Part 55 of the CPR. Likewise, the procedures for satisfying judgment debts through other orders targeting a judgment debtor's other assets are set out in Part 45 – 53 of the CPR. These Rules set out the different options available to a judgment creditor to satisfy its judgment debt depending on the facts of each case. However, irrespective of the procedure utilised, writs or orders issued by the court be it

by a judge or the court office have similar legal effect, i.e., each such legal process permits a judgment creditor to execute, i.e., to satisfy part or all of its judgment debt.

[37] In addition, the definition set out in CPR 46.1 on what constitutes a "writ of execution" applies to the CPR as a whole and is not subject to any caveat to which my attention was drawn. It provides: **"*In these Rules***", i.e., the Civil Procedure Rules, a '*writ of execution'* means, among others, "*an order for the sale of land*" issued by the court. The words used to define what constitutes a writ of execution are not ambiguous and Mr Ysaguirre did not argue that they are. An order for the sale of land, when issued in the context of enforcing a judgment debt is a writ of execution, i.e., a legal process, issued by the court to a successful litigant to enable it to execute against a defendant's assets in satisfaction of the judgment debt.

[38] As noted in **paras. 15-16 above**, the applicant based its 24 April 2023 application on the ground that the 23 December 2009 was an order for the sale of the second respondent's land in satisfaction of its 20 June 2007 judgment debt, which court order, per CPR 46.1(c), is classified as a writ of execution. The applicant accepts and must acknowledge that the 23 December 2009 order was a writ of execution, and that the order was made in the specific context of its efforts to satisfy its judgment debt. That 23 December 2009 order did not grant the applicant any real or equitable rights over the second respondent's property. In other words, it was not a judgment that awarded the applicant any real rights over the second respondent's property.

[39] I hold (a) as set out in CPR 46.1(c), that the 23 December 2009 order was a writ of execution; and (b) that in executing the 23 December 2009 order, the applicant was required to comply with the general rules set out in CPR 46 on writs of execution.

[40] Learned counsel raised an interesting, related point. He contended that the 23 December 2009 court order was not subject to a time limitation and that ergo, it could be enforced at any time at the Applicant's discretion, including as it did in August 2023. It is correct that the 23 December 2009 order was not explicitly time limited. However, attractive as that argument is, nothing turns on it. The Registrar did not need to make it explicit in the 23 December 2009 court order for the sale of the second respondent's property that it

was time limited. The reason: the time limit on the execution of that and similar-type orders for sale of land is imposed by law, i.e., by CPR 46.10(1).

[41] In summary, I declare that the 23 December 2009 order for the sale of the respondent's land, which was issued pursuant to CPR 55 is a writ of execution whose enforcement is governed by the general rules set out in Part 46 of the CPR.

[42] Following from the above, I also declare that:

(a) consequent to CPR 46.10(1), the 23 December 2009 order for the sale of the Respondents' property was valid for twelve months calculated from the date of its issue, i.e., 23 December 2009;

(b) in the absence of an order issued by this court renewing the 23 December 2009 order, CPR 46.10(2) precluded the applicant from taking any steps (i.e., selling the second Respondent's property) from 1 January 2011; and

(c) the applicant had no right to sell the second respondents' property on or around 26 August 2023, i.e., over a decade later, pursuant to the lapsed and invalid 23 December 2009 order.

[43] I also hold that it would be improper for this court to ignore and validate the applicant's unlawful disposal of the second respondent's property in August 2023 by issuing new orders pursuant to Part 55.6 and nominating and authorising the Registrar of the High Court, pursuant to Section 179 of the Senior Courts Act, to sign documents enabling the transfer of the second respondent's freehold title to Izra and Conzie Zetina.

(b) Did the sale comply with the terms of the 23 December 2009 order?

[44] My ruling above, notwithstanding, I also rule that the applicant's purported sale of the second respondent's property was unlawful in that it breached an express provision of the 23 December 2009 order.

[45] The 23 December 2009 court order set a reserve price of $40,000 if the property was sold through a public auction. The order also stipulated that (a) if the applicant was unable to dispose of the property through a public auction, it was permitted to sell the property by

"*private treaty at a price not far below the reserve price*"; and (b) "The Claimant's attorney shall have the conduct of the said sale".

[46] According to the applicant, it sold the second respondent's property in August 2023 to Izra and Conzie Zetina for **$12,000**. That $12,000 value cannot be described as (a) "not far below the reserve price" of $40,000, which was the value ascribed to the property in 2009 by the applicant and its preferred auctioneer; and (b) being in strict compliance with the terms of the 23 December 2009 order.

[47] I take judicial notice of the fact that property prices in Belize have appreciated since 2009. Obviously, it is not beyond the realms of possibility that since 2009, the relevant property's value may have depreciated. However, the applicant was required, prior to its disposal of the second respondent's property and certainly before the expiration of the 23 December 2009 order, to approach the court and to seek new CPR 55.6 directions permitting it to sell the property at a different and substantially reduced price and provide a cogent explanation for any radical departure from the price set by the court.

[48] In agreeing, as it did in 2009, to have conduct of the sale, the applicant's legal practitioners' conduct also comes into question regarding the price at which the second respondent's property was sold, which was in breach of the express terms of the 23 December 2009 court order.

[49] In my judgment, the disposal of the second respondent's property for the sum of $12,000 was unlawful because the applicant and its legal practitioners had no authority to sell the second respondent's property at the time they did and at a price that was significantly below the set price of $40,000. The property was sold at 30% of the value that was set by the court in 2009. This should not be taken as a criticism of Mr Ysaguirre, who I know has not had conduct of this case since it came before this court in 2007 nor did he play any part in the proceedings that resulted in the 23 December 2009 order for the sale of the second respondent's property.

[50] To avoid a multiplicity of proceedings (see section 45 of the Senior Courts Act), I set aside the applicant's and its legal practitioners' sale of the second respondent's property. I rule

as such because when the second respondent's property was sold in August 2023, neither the applicant nor its legal practitioners had authority to do so, and they sold the property well below the price set by the court without securing new directions permitting the disposal of the property. In addition, the alleged purchasers had ample opportunity to participate in these proceedings to assert any rights or actionable interests they may have. However, they chose not to and must be held to their election.

[51] The facts of this case gave me pause for thought. Consideration should be given to amending CPR 55 or introducing a practice direction requiring parties in possession of CPR 55 orders and those with conduct of sales of land, including legal practitioners, to provide an account of their disposal of such land, which must be supported by a "statement of truth" affirming that a sale of land pursuant to a CPR 55 order was undertaken in strict compliance with the court's directions. This mitigates against fraud or the intentional or inadvertent short-changing of judgment debtors and other interested parties and other improper and unjustified actions. It would also provide a framework that enables judgment debtors and other interested parties to assess, and if necessary, query the accounts provided by those with conduct of court ordered sales of land. Such a legal framework would also promote the overall integrity of the system of court-ordered sales of land.

[52] Although my ruling on the aforementioned points of law disposes of the applicant's application, it is important that I address other legal issues that arise in this matter. I do so in part to clarify the law as it relates to applications made under CPR 55.6 and section 179 of the Senior Courts Act. I note, in particular, that in his oral submissions, the applicant's legal practitioner stated that it is common practice for legal practitioners to seek and secure orders such as the one the applicant sought in his case. Learned counsel also added that this was the first time he had been requested to specifically address the court on the implications of CPR 46.1(c) and 46.10 as read with CPR 55.6 and section 179 of the Senior Courts Act. I am grateful to learned counsel for his candour.

III. Applicant's entitlement to further directions pursuant to CPR 55.6

[53] As noted above, in its 24 April 2024 application, the applicant indicated that it was approaching the court for *"further directions for the sale of land belonging to the Second Respondent to grant authority to the Registrar of the High Court to execute the transfer of the land form for the property sold in accordance with the Court Order dated 23rd December, 2029*." It added that: "*The Court is empowered by CPR 55.6 to give further directions as it relates to the sale of land by order of the court*."

[54] CPR 55.6 provides:

> "Any party or the person having the conduct of the sale may apply to the court to vary the directions or to make further directions."

[55] It is correct that CPR 55.6 permits a party to, or a person with conduct of, a court-authorised sale of land to apply for an order varying or making new directions in relation to the sale of land. However, the right to approach the court for an order varying or adding new directions to a CRP 55 order for the sale of land can be invoked only if the original court order has not expired. Where the original Part 55 court order for the sale of land has expired, an applicant is required to seek a new Part 55 order for the sale of land – assuming that it is still able to do so in view of the substantive rules of law set out in CPR 46.2.

[56] With respect to these proceedings, the 23 December 2009 order for the sale of land lapsed on 31 December 2010. That order could not be used thereafter (and certainly not in 2023) to sell the second respondent's property (see CPR 46.10(1)) or to seek in 2024 new directions pursuant to CPR 55.6.

[57] In the circumstances, I rule that prior to seeking further directions, as it did through its 24 April 2024 application, the applicant was required, but failed, to (a) apply pursuant to CPR 46.11 for the timely renewal of the 23 December 2009 order for the sale of the second respondent's property; and (b) request new directions pursuant to CPR 55.6.

IV. Applicant's entitlement to an order pursuant to Section 179 of the Senior Courts Act, 2022

[58] In his 25 June 2024 written submissions, the applicant's learned counsel stated that the correct party to be nominated and authorised to sign the land transfer documents was the Registrar of the High Court. In support of his assertion, learned counsel referred to section 179 of the Senior Courts Act.

[59] Section 179 of the Senior Courts Act provides:

> "Where any person neglects or refuses to comply with a judgment or order directing him to execute any transfer, conveyance, contract or other document, or to indorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the transfer, conveyance, contract or other document shall be executed or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and a transfer, conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it." [Emphasis added]

[60] Certainly, where a relevant person neglects or refuses to comply with a court order, which requires the transfer of land, a party with a relevant interest may approach the court for an order nominating and directing a different person, such as the Registrar of the High Court, to execute documents necessary to effect the transfer. However, in these proceedings, the applicant has not demonstrated that it is entitled to an order pursuant to section 179 of the Senior Courts Act.

[61] Notably, the applicant did not base its 24 April 2024 application on section 179 of the Senior Courts Act. The applicant referred to section 179 of the Senior Courts Act only in its written submissions and did not seek an amendment of its original application to squarely base it on section 179 of the Senior Courts Act. In the absence of any application supported by cogent reasons, it would be improper to permit the applicant to cure through submissions its defective pleadings, which do not disclose a valid cause of action under section 179 of the Senior Courts Act.

[62] However, even if the applicant had made such an application to amend its pleadings, I would have dismissed it because on the facts, the applicant would not have been able to satisfy the requirements for an order under section 179 of the Senior Courts Act. This is

to say: the applicant would not have been able to demonstrate (i) that there existed a court order directing an identified person "A" to effect transfer of a specified piece of land to "B"; and (ii) that "A" refused or neglected to effect transfer of specified land. The applicant has no remedy under Section 179 of the Senior Courts Act in the absence of these two essential preconditions.

[63] Consequently, I hold that the applicant's application does not satisfy the requirements set out in section 179 of the Senior Courts Act.

V. Issues of concern

[64] This case raises two issues of concern of which it would be remiss of me not to address. The first relates to the fact that the second respondent is deceased, which fact militates against the grant of an order permitting the transfer of the second respondent's property to the alleged purchasers. The second relates to the applicant's use of Mr Joseph as a process server.

(a) Death of second respondent

[65] In its application, the applicant did not inform this court that the second respondent is deceased. In support of its application, the applicant submitted an affidavit deposed by Mr Theofilus Mendez, a supervisor in the applicant's Recoveries and Lending Department. Mr Mendez made no mention of the fact that the second respondent, the owner of the freehold property, is deceased. In his submissions, learned counsel for the applicant did not bring this issue to the attention of the court or make any submissions in relation to the same.

[66] The fact that the second Respondent is deceased was referenced only by Mr Joseph, a process server, in his 11 July 2024 affidavit of service filed on 15 July 2024. In his affidavit, Mr Joseph indicated that he attempted "*to serve the executors of the estate of Emilcar Burgos but was unable to locate them*." Mr Joseph did not provide the executors' names, the dates when he attempted to locate them, and how and when he came to know that the second respondent, Emilcar Burgos, was deceased. In addition, Mr Joseph did not explain how he came to know that the second Respondent had left a will in which he

named the law firm, Messrs Marcel Cardona Cervantes and Co. as his (the second respondent's) legal practitioners. I presume that Mr Joesph brought these facts to the applicant's attention.

[67] Litigants that resort to ex parte proceedings seeking the court's assistance to enforce a judgment order owe the court a high degree of candour and must disclose to the court all material information in their knowledge that is relevant to the just resolution of the case. The intentional or inadvertent withholding of information material to the just resolution of the dispute and/or of matters before the court undermines the proper administration of justice. It may also attract censor, and potentially the denial of any relief sought since a breach of the duty of candour undermines the overriding objective of the just resolution of disputes.

[68] Since the court has notice that the second respondent is deceased, it would be improper to grant an order that enables the transfer of the second respondent's freehold property by the judgment creditor outside of the administration of estates' legal framework and the probate process. The applicant's claim against the second respondent's property, should it wish to persist with the same, must be addressed considering, and/or pursuant to, the provisions of the Administration of Estates Act, Cap 197.

[69] From the date of his death, the second respondent's freehold title to the property known as Ann Gabourel Registration Section, Block 1, Parcel 18 devolved by operation of law to his personal representative (section 4 of the Administration of Estates Act). In addition, there is no disputing that the applicant was required to cite in these proceedings the second respondent's representative and/or the executor of his estate. Certainly, the applicant should do so in any future proceedings relating to the second respondent's freehold property.

[70] Relatedly, it needs no repeating that it is a criminal offence for any person to administer, without lawful authority and outside the probate process, the assets of a deceased person

with the knowledge that the owner of the property is deceased (see section 62 of the Administration of Estates Act[2]).

[71] In view of (a) the applicant's purported sale of the second respondent's freehold property without notice to the second respondent's personal representative or the executors of his estate; (b) the applicant's attempt – via its 24 April 2024 application - to effect transfer of the second respondent's property outside probate process; and (c) the applicant's resort to ex parte proceedings, potentially to avoid citing and serving process on the second respondent's personal representative or the executors of his estate, I order that:

i. prior to taking any legal action with respect to the property known as Ann Gabourel Registration Section, Block 1, Parcel 18, the applicant shall give 14-days advance written notice to the executor of the second respondent's estate outlining the action proposed to be taken, the legal basis and reasons thereof; and

ii. the applicant is prohibited from unilaterally disposing, encumbering or alienating the second respondent's rights and interests in the property known as Ann Gabourel Registration Section, Block 1, Parcel 18 without the express agreement of the executor of the second respondent's estate or leave of the court.

[72] I make these orders to prevent the improper and potentially unlawful dissipation of the second respondent's property outside the probate process – which is what would have happened had I upheld the applicant's 24 April 2024 application. Notice is required to mitigate against unnecessary litigation on matters that are susceptible to resolution through timely negotiations.

(b) Use of Mr Fitzgerald Joseph – a witness - as a process server

[73] The second issue concerns the applicant's use of Mr Joseph as a process server. Mr Joseph has deposed an affidavit in these proceedings as the applicant's sole witness on

[2] Section 62 of the Administration of Estates Act provides that: "Every person who takes possession of and in any way administers any part of the personal estate and effects of a deceased person without obtaining probate of the will of that deceased person, or letters of administration of his estate and effects commits an offence and is liable on summary conviction to a fine not exceeding two hundred and fifty dollars, in addition to such sums as are equal to the amount of fees and duties chargeable on the estate so taken possession of and administered by him."

key matters of fact arising in this matter and is the person who was required under the terms of the 23 December 2009 order to auction the second respondent's property. In his 11 July 2024 affidavit filed on 15 July 2024, Mr Joseph asserted, without availing any proof, that he held 10 public auctions, including the one that resulted in the sale of the second respondent's property to persons referred to as Izra and Conzie Zetina.

[74] Further, Mr Joseph provided two affidavits of service, which were filed on 15 July 2024. The first dated 11 July 2024 related to his service of the applicant's 24 April 2024 application on Izra and Conzie Zetina, the alleged purchasers of the second respondent's property. The second, also dated 11 July 2024, related to the service of the applicant's 24 April 2024 application on Messrs Marcel Cardona Cervantes and Co. said to be the second respondent's legal representatives as outlined in his (the second respondent's) will. Mr Joseph indicated, but without providing any information, that he attempted to serve the executors of the second respondent's estate but was unable to locate them. Mr Joseph also indicated that he attempted to serve the first respondent at his last known address, which he gave. He stated that the first respondent no longer resided at the given address. However, he did not indicate how he came to know that that was the last known address for the first respondent.

[75] I hold that it was inappropriate for the applicant to use Mr Joseph as a process server in these proceedings. I do so for several reasons.

[76] In my 10 May 2024 order, I directed the applicant to serve its application on the first and second respondents and the Registrar of Lands. That order permitted the applicant itself or a process server authorised by the Registrar of the High Court to serve the relevant pleadings.

[77] It is important to emphasise that when serving legal process, a process server acts as an officer or agent of the court. This much is clear from section 78 and 81 of the Senior Courts Act. Consequently, a process server must not accept instructions to serve process, and legal practitioners must not instruct a process server to serve process, in relation to legal proceedings in which the relevant process server is a witness or in which they are currently or likely to be substantially involved in some material way. Their

objectivity in ensuring effective service may be compromised or called into question in view of their interest in the outcome of the legal proceedings and the court's findings of fact.

[78] In my view, save with leave of the court it would be inappropriate for a process server to serve process relating to proceedings in which they are or likely to be an active participant, including as a witness of fact, or in whose outcome they have an interest. Permitting process servers to serve legal process in such situations will undermine public confidence in the administration of justice and the integrity of the statutory procedures for serving legal process. It opens the system of serving legal process by process servers to question and potential criticism. To sustain the presumption of the regularity of service effected by process servers and the integrity of the system, it is crucial that process servers' involvement be beyond reproach, including in relation to their actual or perceived interest in ensuing proceedings or their outcome.

[79] I rule that Mr Joseph has an apparent if not an actual conflict of interest since he is a witness for the applicant, and he was authorised by the court in 2009 to act as the auctioneer of the second respondent's property. Notwithstanding the contents of the 23 December 2009 CPR 55 Order, Mr Joseph sold the second respondent's property at a price significantly below the reserve price set by the court in that order. For unexplained reasons, it took him over a decade to sell the second respondent's property and when he did, he did so pursuant to a lapsed court order. Mr Joseph appears to be extraordinarily familiar with the second respondent's legal affairs, including the contents of his will. His familiarity with the second respondent's legal affairs is not explained. Subject to the decisions to be taken by the executor of the second respondent's estate, the applicant, and/or the alleged purchasers of the second respondent's property following my decision, Mr Joseph's role in this matter, including his disposal of the second respondent's property may well be called into question.

[80] In the absence of any explanations by Mr Joseph regarding his knowledge of the second respondent's affairs and the other issues I have referenced above, I am not prepared to assume that he took sufficiently adequate and appropriate steps to serve the first respondent and the second respondent's executor(s) with the Applicant's 24 April 2024

application. In addition, it cannot have been lost on the applicant, its legal representatives, and Mr Joseph that it was inappropriate to sell and seek the transfer of the second respondent's property after his death outside of the probate process. Relatedly, the attempt to secure an ex parte order without providing any cogent explanation for that course of action, which order would have resulted in the disposal of the second respondent's property without notice to the executor of the second respondent's estate suggests lack of good faith on the part of the applicant.

[81] In the circumstances, I hold that the applicant's service of its 24 April 2024 application on the first and second respondents was improper and invalid as it was effected by Mr Joseph who has a potential or actual conflict of interest. In addition, to remove this court's concerns surrounding, and to mitigate against potential disputes relating to, the proper service of this court's processes, I direct that Mr Joseph is not to be used as a process server for legal processes relating to any proceedings pertaining to the second respondent's estate.

[82] I also direct the court office to share this judgment with the Chair of the Rules Committee. I recommend that consideration be given to promulgating rules or a practice direction to regulate process servers to address, among others, the risks arising from the use of process servers in relation to pleadings in matters in which they have or are likely to have a real or potential conflict of interest. I make this recommendation because there is not at present any prescribed rules regulating process servers.

VI. Costs

[83] In these proceedings, the applicant has not sought costs. Having dismissed its application, the applicant should bear its own costs.

VII. Ruling

[84] Drawing on the above, I rule as follows:

(a) The applicant's CPR 55.6 application for further directions relating to the sale of the applicant's property known as Ann Gabourel Registration Section, Block 1, Parcel 18 is dismissed.

(b) The applicant's application for an order nominating and authorising the Registrar of the High Court to execute instruments necessary to effect transfer of the property known as Ann Gabourel Registration Section, Block 1, Parcel 18 from the second respondent's estate to Izra and Conzie Zetina is dismissed.

(c) The applicant's sale on or about 26 August 2023 of the property known as Ann Gabourel Registration Section, Block 1, Parcel 18 to Izra and Conzie Zetina was unlawful and is set aside.

(d) The applicant shall file a copy of this judgment and orders at the court office no later than **1 October 2024**, which filing shall be accompanied by a letter written by the applicant's legal practitioners requesting the Registrar to place a copy of this judgment and orders in the court's probate file relating to the estate of Emilcar Burgos, the second respondent.

(e) The applicant shall serve a copy of this judgment and orders on the executor of the estate of Emilcar Burgos no later than **15 November 2024** and shall file an affidavit of service at the court office no later than **22 November 2024**.

(f) The applicant shall not – without leave of the court - use Mr Fitzgerald Joseph as a process server with respect to any legal process relating to this case and the affairs of the second respondent's estate, including those relating to the property known as Ann Gabourel Registration Section, Block 1, Parcel 18.

(g) Prior to taking any legal action with respect to the property known as Ann Gabourel Registration Section, Block 1, Parcel 18, the applicant shall give 14-days advance written notice to the executor of the second respondent's estate outlining the action proposed to be taken, and the legal basis and reasons thereof.

(h) The applicant is prohibited from disposing, encumbering or alienating the second respondent's rights and interests in the property known as Ann Gabourel Registration Section, Block 1, Parcel 18 without the express agreement of the executor of the second respondent's estate or leave of the court.

(i) The court office shall bring this judgment to the attention of the Chair of the Rules Committee with the objective of determining the need for Rules or a Practice

Direction addressing service of legal process by process servers, including in matters in which a process server may have a potential or real conflict of interest.

(j) The Applicant will bear its own costs.

Dr Tawanda Hondora
High Court Judge