



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 285

Record No. 2016/114

High Court Record No. 2015/3195P

**Irvine J.
Whelan J.
Stewart J.**

BETWEEN/

THOMAS KENNEDY

PLAINTIFF / APPELLANT

- AND -

**JOAN HARRAHILL AND WILLIAM HARRAHILL AND MR. PADDY CADDEL PRACTISING UNDER THE STYLE AND TITLE OF BUTLER,
CUNNINGHAM AND MALONEY SOLICITORS**

DEFENDANTS / RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 13th day of October 2017

1. This is the appeal of the plaintiff ("Mr. Thomas Kennedy") against the order of the High Court, Gilligan J., made on the 3rd December 2015 whereby the within proceedings were dismissed as frivolous and vexatious and as an abuse of the court's process.
2. The within proceedings were commenced by plenary summons dated the 24th April 2015 following which Mr. Thomas Kennedy delivered his statement of claim on the 2nd June 2015. Briefly stated, the proceedings centre upon Mr. Thomas Kennedy's claim that in 1972 he purchased from his brother, the late Mr. Bartholomew Kennedy, a farm at Killkilahara, Thurles, comprised in folio 6265F in the County of Tipperary, for a sum of £12,000.
3. Mr. Bartholomew Kennedy died on the 20th January 2001 and by his last will and testament he bequeathed his estate to his two sisters, Maura Larkin, now deceased, and Joan Harrahill, the first named defendant to these proceedings. He appointed Augustine I. Cunningham, Solicitor, and Eoin Harrahill, his brother-in-law, to be the executors of his will. Mr. Thomas Kennedy maintains that by reason of his purchase, in 1972, of the lands contained in folio 6265F, those lands did not form part of his late brother's estate.
4. The first named defendant to these proceedings is, as already stated, a sister of Mr. Thomas Kennedy and her husband, William Harrahill, is the second named defendant to the proceedings. The third named defendant is a member of the firm, Butler, Cunningham and Maloney solicitors, who Mr Thomas Kennedy maintains acted on his behalf in relation to the purchase of the farm at Killkilahara in 1972.
5. The relief sought by Mr. Thomas Kennedy in the proceedings is an order declaring that he is the owner of the farm at Killkilahara contained in folio 6265F. He also claims significant sums in respect of special damages arising out of the alleged interference on the part of the defendants with his enjoyment of the aforementioned farm land. He also seeks, *inter alia*, aggravated and / or exemplary damages for alleged financial loss, distress, trauma and inconvenience arising out of his deprivation of those lands and the fact that as a result of the actions of the defendants he has been falsely imprisoned on five occasions.
6. In support of his claim to ownership of the lands contained in folio 6265F for the County of Tipperary, Mr. Thomas Kennedy maintains that he paid a deposit for those lands of IR£3,000 in February 1972 and that he paid the balance of IR£9,000 in April of the same year. He maintains that he was then given lawful possession of the farm by his brother and remained in possession and farmed the lands for twenty nine years until his brother's death.
7. I do not intend in the course of this judgment to set out details of all of the litigation which has arisen as the result of the death of Mr. Bartholomew Kennedy and the content of his last will and testament. Suffice to state, that in the course of what can only be described as an immensely detailed judgment dated the 11th June 2010, (proceedings Record No 2005/2267) McKechnie J. describes in detail three sets of Circuit Court proceedings, two of which were instituted by Mr. Thomas Kennedy and the other by the executors. He also details the result of the appeals brought by Mr. Thomas Kennedy against the decisions of the Circuit Court in those proceedings.
8. Of even greater import is the fact that the proceedings before McKechnie J. required him to adjudicate upon what he described as "a simple and straightforward" issue, namely whether Mr. Thomas Kennedy was the owner of the lands at Killkilahara comprised in folio 6265F for the County of Tipperary as a result of an alleged purchase of those lands in 1972.
9. Following a detailed consideration of all of the evidence advanced the High Court judge expressed himself satisfied, for reasons I will later refer to, that Mr. Thomas Kennedy had not established his ownership of the lands in folio 6265F and that what he in fact purchased in 1972 were lands owned by his brother at Athnid More and which were contained in folio 24284 for the county of Tipperary.
10. Following the delivery of the statement of claim in the within proceedings the defendants, who are the respondents to this appeal, issued an notice of motion seeking to strike out Mr. Thomas Kennedy's claim on the basis that the claim was frivolous and / or vexatious and / or an abuse of the court's process. They did so principally on the basis that the issue concerning the ownership of the farm lands contained in folio 6265F had earlier been determined by McKechnie J. as per his judgment of the 11th June 2010 and on the grounds that Mr Kennedy's appeal to the Supreme Court against that decision had been rejected.

Mr Kennedy's submissions

11. Mr. Thomas Kennedy in this appeal submits that the High Court judge erred in law in determining the defendant's application to dismiss the within proceedings in circumstances where there was pending before this court an appeal brought by him against the refusal of Gilligan J. to grant him an injunction restraining the sale of the lands contained in folio 6265F. He also maintains his claim is not vexatious, frivolous or an abuse of process and that he has a constitutional entitlement to have his proceedings fully heard and determined in the High Court. It is to be inferred from his submissions that he believes that his claim is not bound to fail and that if the proceedings are permitted to proceed to trial, he will be in a position to establish that he did indeed purchase the lands contained in folio 6265F from his brother in 1972 in the manner alleged by him in his statement of claim. In particular, Mr Thomas Kennedy relies on his assertion that the only property owned by his brother in 1972 was the farm land contained in folio 6265F. Accordingly, it was only those lands that could have been sold to him. The lands contained in folio 24284 were, he maintains, in the ownership of his mother, Mary Kennedy, in 1972. That being so the IR£12,000 he paid to his brother in 1972 could not have been for the purchase of folio 6265F.

12. Thus it is that Mr Kennedy maintains that his solicitors, the third named defendants to these proceedings, owed him a duty to transfer the lands contained in folio 6265F of the County of Tipperary into his name. They were negligent in their failure to do so. Further, they had fraudulently and negligently acted in a manner so as to permit those lands to be taken from him after many years of occupation by him. In these circumstances Mr Kennedy maintains that the present proceedings are different from those earlier commenced by him as they concern issues of negligence and fraud. He submits that he should be permitted to pursue his present proceedings as he will be in a position to demonstrate at trial the fraud which he maintains has been perpetrated against him and the incorrect, biased and unlawful nature of the conclusions reached by McKechnie J. in his judgment of the 11th June 2010.

13. Mr Kennedy also maintains that the trial judge erred in law in making an order restraining him from instituting any further proceedings against the defendants or any other persons in connection with the lands described in folio 6265F of the County of Tipperary without first obtaining leave from the President of the High Court. He has not been guilty of any conduct such as would warrant the making of such an order.

The respondents' submissions

14. The respondents contend that the trial judge was correct when he concluded that the within proceedings constitute an abuse of process insofar as Mr Thomas Kennedy is seeking to re-agitate issues already determined by McKechnie J. in the High Court in the course of a comprehensive judgment which was upheld by the Supreme Court. Core to the within proceedings is Mr Kennedy's claim to ownership of the lands described in folio 6265F of the County of Tipperary and that issue was resolutely decided in earlier proceedings. Counsel submits that Mr Kennedy cannot succeed in his action against these defendants in light of the judgment of McKechnie J. These proceedings, he maintains, are identical to his earlier action save that the identity of the defendants has changed and this was a strategy deployed by Mr Kennedy to avoid the *Isaac Wunder* order earlier made against him, restraining him from instituting proceedings against the executors of his late brother's estate. It is for this reason he has now sued his brother in law, his sister and his solicitor.

The High Court Hearing

15. There is no great dispute between the parties as to what occurred when the defendant's motion to dismiss Mr. Thomas Kennedy's proceedings came before Gilligan J. on the 3rd December 2015. It is accepted that Mr. Kennedy had argued that the High Court judge should not embark upon a consideration of the defendant's motion because he had an appeal pending before this court concerning the earlier refusal of the High Court judge to grant him an injunction restraining the sale of the lands contained in folio 6265F. He submitted that the Motion could not be heard until his appeal had been disposed of and he was in possession of the digital audio recording of the injunction application as well as a copy of the court's judgment in relation to that application. It is also not disputed that he stated he would take no further part in the proceedings because of his pending appeal which was due to be heard in May 2016. It was in those circumstances that the defendant's application was ultimately heard without any formal submission being advanced by Mr. Thomas Kennedy. Of relevance also is the fact that Mr. Thomas Kennedy had not filed a replying affidavit for the purpose of seeking to resist the relief sought.

The relevant principles

16. Before considering the decision made by the High Court judge, it is perhaps important to reflect briefly upon the principles that apply when a court is asked to dismiss a claim as frivolous and vexatious under Ord. 19, r. 28 and /or as an abuse of the court's own process under its inherent jurisdiction.

Principles relevant to the order made by Gilligan J.

17. It has long been established that a claim may be regarded as frivolous or vexatious, in the sense in which those words are used in Ord. 19 r. 28, if it is brought to determine an issue which has already been determined by a court of competent jurisdiction: See for example the decision of O Caoimh J. in *Riordan v. Ireland (No.5)* [2001] 4 IR 166. In his judgment he referred with approval to the decision of the Ontario High Court in *Re Lang Michener and Fabian* (1987) 37 DLR (4th) 685, wherein the court identified some of the factors which might lead a court to conclude that a given set of proceedings might be considered vexatious to the point that they should be dismissed. Those identified are as follows:

- (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- (c) where the action is brought for an improper purpose, including the harassment and oppression of the parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in an earlier proceeding;
- (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceeding;
- (f) where the respondent persistently takes unsuccessful appeals from judicial decisions.

18. It is also worth remarking that where a court considers proceedings to be frivolous or vexatious, it will usually also conclude that the proceedings amount to an abuse of process. However, courts regularly dismiss proceedings as an abuse of process in the absence of a finding that the claim is being pursued for an improper purpose. It regularly does so if satisfied that the issues which the plaintiff

seeks to pursue are the same or substantially the same as those already raised and determined in prior proceedings.

Decision

Did the High Court Judge err in law in failing to adjourn the defendants' application to await the determination of Mr Kennedy's appeal then pending before this court?

19. Having considered the submissions of the parties, I am fully satisfied that as a matter of law the High Court judge acted within his discretion when he decided to adjudicate upon the defendant's motion to dismiss Mr. Thomas Kennedy's proceedings without awaiting the outcome of his appeal which was then pending before this court. In my view that appeal, which concerned the refusal of the High Court to grant an injunction restraining the sale of the lands contained in folio 6265F, could not bear upon the issue to be decided by the court on the defendant's application. Either the proceedings were an abuse of process, frivolous and / or vexatious and / or bound to fail or they were not. That being so, and in the interests of the proper administration of justice, particularly having regard to the lengthy history of litigation concerning these lands, I am satisfied that the High Court judge was correct as a matter of law and that he acted within his discretion when he refused to adjourn the defendant's application to await the outcome of the appeal then pending before this court.

Did the High Court judge err in law when he dismissed the proceedings under Ord. 19 r. 28 and pursuant to the inherent jurisdiction of the court?

20. Having considered the submissions of the parties, the judgments given and orders of the court made in these and other proceedings concerning the lands in issue in these proceedings, I am fully satisfied that the High Court judge did not err in law when he dismissed Mr. Thomas Kennedy's claim.

21. What is crystal clear from the statement of claim in these proceedings is that Mr. Thomas Kennedy is seeking to re-litigate the same issues that he pursued in the proceedings which he issued in 2005 and which were determined by McKechnie J. in his judgment of the 11th June 2010. Core to the present proceedings is his claimed entitlement to an order declaring that he is the owner of the lands contained in folio 6265F on the basis that he purchased them from his brother Bartholomew for £12,000 in 1972. That issue was determined against him by McKechnie J. in the course of his judgment. Mr Kennedy's appeal against that decision was later dismissed by the Supreme Court. Further, the documents upon which Mr. Thomas Kennedy would wish to rely in the present proceedings are those which are analysed in immense detail by McKechnie J. in the course of his judgment.

22. I do not intend to summarise the judgment delivered by McKechnie J. concerning the ownership of folio 6265F or indeed the ownership of the lands contained in folio 24284F for the County of Tipperary as of 1972, that being the year in which Mr. Thomas Kennedy maintains he purchased the first of the aforementioned folios of land from his brother, Bartholomew. However, what is clear from that judgment is that based upon the extensive evidence before him McKechnie J. was not satisfied that Mr. Thomas Kennedy had established that he had purchased the farm lands contained in folio 6265F from his brother in 1972.

23. In reaching his aforementioned decision McKechnie J., *inter alia*, concluded that Mr. Kennedy's evidence on the issue lacked credibility. Amongst other matters he relied on the following facts:-

(i) That notwithstanding his alleged purchase of the lands in 1972 the first time Mr Kennedy had asserted ownership of the lands in folio 6265F was more than thirty years later in May 2004.

(ii) That during the 1980's several portions of the lands in folio 6265F had been disposed of by Bartholomew Kennedy in his capacity as Vendor and that in the 1990 there had been about nine transactions whereby lands from the same folio had been sold or leased by Bartholomew Kennedy. These transactions were inconsistent with Mr Thomas Kennedy's claim to ownership of the lands in that folio.

(iii) That in proceedings instituted by the executors of the estate of the late Bartholomew Kennedy by way of testamentary civil bill (record no. 762/02) and in particular in the course of an injunction hearing on the 16th October 2001 in those proceedings, counsel for Mr. Thomas Kennedy had maintained that he was in possession of the lands contained in folio 6265F as a tenant from year to year under an agreement with his late brother. As a result a notice to quit was served dated the 24th October 2001 following which correspondence issued from his solicitors which was solely consistent with the existence of a tenancy agreement.

24. Apart from the credibility issues to which I have last referred, McKechnie J. also rejected Mr Thomas Kennedy's claim to ownership of the lands contained in folio 6265F based on his assertion that these were the only lands owned by his brother in 1972. He also rejected his claim based on the assertion that the lands he purchased from his brother could not have been the lands in folio 24284 as these were owned by his mother at that time.

25. It is not necessary to set out each of the conclusions reached by McKechnie J. concerning the aforementioned submissions advanced by Mr Thomas Kennedy. Suffice to state that the aforementioned issues were fully litigated and determined by McKechnie J. and as we know Mr Kennedy's efforts to appeal that decision proved unsuccessful. Accordingly, I am satisfied that the issues which Mr Thomas Kennedy seeks to pursue in these proceedings are the same as those he pursued in the High Court before McKechnie J. in proceedings bearing record no. [2005 No. 2267]. Thus I have come to the conclusion that the High Court judge in the within proceedings was correct as a matter of law when he concluded that the within proceedings were oppressive, vexatious and an abuse of process such that they should be dismissed.

26. In circumstances where McKechnie J. has already determined the ownership of the lands contained in folio 6265F, it matters not whether Mr Thomas Kennedy intended when he instituted the within proceedings to pursue these proceedings for an improper purpose, such as to harass or oppress the defendants or others concerned with the ownership of the lands in that folio. However, that is the effect of what he has done even if it be the case that he truly believes he is the rightful owner of the aforementioned lands and that McKechnie J. incorrectly decided his earlier proceedings. The fact that Mr Kennedy has sought to canvass his claim before so many courts and has spent long periods in prison because of his claim to these lands would suggest that he genuinely believes he has not achieved a fair and just outcome in such proceedings as he has brought before the courts. That said, from my appraisal of all of that has been put before the Court for the purposes of this appeal this is simply not the case and I would now urge him to desist from engaging with any further litigation concerning his late brother's estate or the lands contained in folio 6265F for the County of Tipperary. His conduct has had serious consequences for all of those against whom he has pursued his litigation over the past 15 years. Clearly there are heinous costs implications for those against whom Mr Kennedy has brought proceedings, particularly in circumstances where to date he has, according to the evidence, not honoured any of the many costs orders made against him. Further, in his proceedings, he has made allegations which are blatantly untrue and which impact upon the professional standing and integrity of members of the legal profession whom he has named. In this regard the within proceedings bear many of the hallmarks of

abusive proceedings as identified in the decision of Ó Caoimh J. in *Riordan v. Ireland* to which I have already referred.

27. Of course every citizen has a right of access to the courts. However, that right is not unfettered. A citizen has a right to reasonable access and then only subject to the rules of court. In my view Mr Kennedy has been afforded his constitutional right of access to the court and the rules of court have been applied to him fairly and equitably. His claim to ownership of the lands contained in folio 6265F was heard over an eight day period in 2010 and he has been furnished with an exceptionally detailed judgment against which he appealed unsuccessfully. He is not entitled to re-litigate this issue again in these proceedings. To endeavour to do so is abusive and vexatious in the manner in which those words are used in Ord. 19, r. 28.

28. For the aforementioned reasons I am satisfied that Mr Thomas Kennedy's appeal against the order of Gilligan J. dismissing his claim must be rejected.

29. Finally, I am satisfied that Gilligan J. was fully entitled to make the Isaac Wunder order which he made. The effect of that order is to require Mr. Thomas Kennedy to obtain leave of the President of the High Court if he wishes to embark upon any proceedings concerning the lands contained in folio 6265F. Having regard to the access which Mr. Thomas Kennedy has already had to the court to make his claim to ownership of the lands contained in folio 6265F for the County of Tipperary and to the conclusion of this court that that issue has been finally determined against him, I am satisfied that there is no basis upon which this court could interfere with the order made by Gilligan J. which was entirely within his discretion on the facts before him.