

**Prunias v Darou
(1997) SLR 87**

John RENAUD for the Plaintiff
Jacques HODOUL for the Defendant

Ruling delivered on 1 day of July 1997 by:

PERERA J: This action was filed by Andre Prunias, the plaintiff, as the owner of a parcel of land at Glacis, bearing no H. 1011, claiming damages from the defendant for trespass and a restraining order on her from entering the land. This action, filed on 10 January 1992 has since then had a chequered history.

The instant ruling arises from a preliminary objection raised by the defendant that the plaintiff cannot maintain this action as the land which forms the subject matter is co-owned and that hence the plaintiff as one co-owner cannot act on his own.

Mr Renaud, counsel for the plaintiff moved to file an amended plaint wherein the caption had been amended to read as –

Andre Prunias acting on behalf of himself and on behalf of Mrs Lucie Prunias, who are fiduciaries - Plaintiff.

Counsel also produced a copy of an appointment of fiduciary made before a notary on 26 September 1979 wherein the plaintiff and his wife, Lucie Prunias, had been appointed as fiduciaries in respect of the said land. This appointment has been duly registered in the Land Registry on 9 October 1979.

As regards fiduciaries, article 823 provides inter alia that –

..... they shall act jointly or severally as the notarial document provides. If there is no provision all fiduciaries shall be deemed to act jointly.

The notarial document produced in the case does not make provision for one fiduciary to act on his own, and hence the original plaint should have been filed by both fiduciaries jointly.

Mr Hodoul, counsel for the defendant, submits that the amendment seeks to permit the plaintiff to bring an action in a different legal capacity, thus altering the nature of the action substantially. Secondly he submits that pleadings cannot be amended after the close of the plaintiff's case.

Section 146 of the Code of Civil Procedure (Cap 213) provides that –

The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that a plaint shall not be amended so as to convert a suit of another and substantially different character.

The amended plaint sought to be filed contains averments identical to those in the original plaint and hence there is no change in the cause of action pleaded. Mr Hodoul's contention is that the original cause of action was pleaded by Andre Prunias as a co-owner in his own capacity and that presently he and his wife are seeking to plead the same cause of action in different legal capacities as fiduciaries, and consequently the proposed amendment of the caption would convert a suit of one character into a suit of another and substantially different character. He relies on the case of *Fisherman's Cove hotel v Dumbelton Ltd*_1978 SLR 15 wherein Sauzier J, in interpreting section 146, cited the English case of *Raleigh v Goschen* [1898] 1 Ch 73, where some members of the board of admiralty and naval officers were sued for trespass in the discharge of their official duties. It was held that no action lay against them in tort as they were agents of the Crown. It was also held that an action would lie against them for trespass as individuals. At that stage an application was made to amend the plaint so that the defendants be sued in their personal capacities. The Court refused the application on the basis that such amendment could change one action into another of a substantially different character.

The rationale of that decision seems to be that once it has been averred that the tort was committed by agents of the Crown in the course of their official duties, a subsequent averment that that tort was committed by them in their personal capacities was clearly a changing of one action to another. Such reasoning was consistent with both equity and the law.

The position of a plaintiff is somewhat different. A plaintiff must have capacity to sue. Just as a minor cannot sue in his own capacity, a co-owner, in view of article 818 of the Civil Code, can only act through a fiduciary. In paragraph 4 of the original plaint it was averred that-

4. the plaintiff avers that he and his co-owner are owners of the aforesaid land

At the time of institution of the action, the plaintiff and his wife, the other co-owner, had been lawfully appointed as fiduciaries to the co-ownership. Hence there had been an error or omission in the drafting of the plaint. In the case of *Inqall v Morgan* [1944] KB 160 the plaintiff claimed in a representative capacity as the administrator of his son's estate. However he received letters of administration only two months after the institution of the action. It was held that, as an action under the Law Reform (Misc)

Provisions Act 1934 for an accident claim can be brought only by an administrator, the plaintiff was incompetent at the date of institution. Similar decisions were made in the subsequent cases of *Hilton v Sutton Steam Laundry* [1946] KB 68, *Burns v Campbell* [1951] All ER 965 and *Finnegan v Cementation Co Ltd* [1953] 2 All ER 1130.

The instant case has to be distinguished on the basis that the plaintiffs had the capacity to sue as fiduciaries at the time of institution of the action although the caption was not properly drafted. They were both de jure and de facto fiduciaries. Under section 146 of the Code of Civil Procedure, a pleading can be amended at "any stage of the proceedings" as long as such amendment does not convert a suit of one character into another. As there is no change in the cause of action and as the plaintiffs had the capacity of fiduciaries at the time of institution of the action, allowing the application for amendment will not prejudice the defendant in a way that cannot be compensated by awarding costs.

Accordingly the application for amendment of caption is allowed and the amended plaintiff dated 1 April 1997 is accepted. The defendant however will be entitled to R500 as costs. The defendant may also file an amended defence, if so advised. If not, the case for the defence can proceed.

Record: Civil Side No 9 of 1992