

**SUPREME COURT LIBRARY
KING STREET
KINGSTON, JAMAICA**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV 01732

BETWEEN THOMAS LAZARUS ANDERSON CLAIMANT
AND GAIAN LUDOFF THOMPSON DEFENDANT

Mr. B.E. Frankson and Miss J. Hammitt instructed by B. E. Frankson & Co. for the Claimant.

Mr. B. Barnes instructed by Wilson Franklyn Barnes for the Defendant.

Heard: 8th & 9th December 2010 and 20th December 2011

G. Brown, J.

This matter concerns the ownership of a parcel of land situated along a tributary of the Rio Grande River in the parish of Portland known as Section C, measuring about an acre or less and being part of Whydah registered at Volume 577 Folio 3 in the Register Book of Titles. This piece of land adjoins the defendants' property.

The claimant is a retired attorney at law residing in California and makes periodic visits to the island. He alleges that he is the owner of all that parcel of land part of Whydah in the parish of Portland containing by survey twelve acres and being the land comprised in the Certificate of Title registered at Volume 577 Folio 3 of the Register Book of Titles. He claims that the defendant is in possession of a portion of the land and refuses to remove. He filed a claim seeking possession and damages.

The defendant is a retired teacher and resides in the parish of Portland. He alleges that the disputed parcel of land is owned jointly with his brother and he is entitled to possession. In the

alternative he claims that they had acquired a title by virtue of the Limitation Act as they have been in possession for over twelve years.

THE CLAIMANT'S CASE

The claimant alleges that he purchased the property from Vernon Harris sometime in 1980 however the transfer was not registered on the title until 31st August 1990. The purchase price was \$20,000 and Ian Grossett, attorney at law, had the carriage of sale.

He said that the vendor showed his brother and himself the boundaries to include the disputed land referred to on survey diagram attached to the registered title as Section C. In order to get to the disputed land they had to go under a bridge because there was an estuary formed at the mouth of the stream.

He said that he took possession of the property in 1980 and returned to the United States of America. His brother was put in charge and began rearing cows on it. He claimed that sometime in the 1980's the defendant's brother Sunny B who was also rearing cows was permitted by his brother to allow his cows to enter onto the land to access water. A small portion of the dividing fence was then removed.

In 1990 he returned to the island and found the property unoccupied and over grown with bushes. He employed one 'Bob Marley' to bush the property. He was unable to identify the boundary as the trees that were planted to identify the boundaries were cut down and removed. He then employed Mr. Melvin Dyce, a Commissioned Land Surveyor to re-establish the boundary between the two properties.

In 2005 he discovered that the land was been cultivated and that the defendant rented out his land. The surveyor's pegs that were marking the boundary were also removed. As a result he instructed his attorney to write the defendant.

THE DEFENDANT'S CASE

The defendant also claims the ownership for the disputed parcel of land. He said he and his brother Terrence Van Thompson (Sunny B) on the 12th day of November 1977 entered into an agreement with Helen May Whittingham and Michael Ruthven Whittingham to purchase two parcels land. The purchase price was two thousand five hundred dollars. The first parcel known as Burlington and registered at Volume 935 Folio 67 was transferred to the defendant and his brother on the 7th March 1978 for the consideration of two thousand dollars. The second parcel was described in the sale agreement as all that parcel of land part of Wydah or Whydah in the parish of Portland comprising 2 roods 1.6 perches and being the land comprised in the diagram of D.K. Byles, Commissioned Land Surveyor. This parcel was never transferred to the defendant as the vendors did not have a title.

The defendant said he had in 1976 leased the property from the Whittinghams and have been in possession since then. It was during the sale he discovered that the land was registered in Vernon Harris and not the vendors. As a result he contacted Harris who assured him that he had no interest in it and would execute the transfer. The diagram was handed over to F.V. Grossett & Co., Attorneys at Law, to obtain a registered title for this land. However Mr. Grossett died without doing the part of land transfer and the diagram cannot now be located.

The defendant denies the claimant's assertions that the latter has been in possession of the disputed land since 1980 and that in the 1990's his brother had permitted him to enter onto the

said land to water his cows on it. He claims that the claimant was never in possession and that the claimant's predecessor had abandoned his rights to the Whittinghams who subsequently sold him.

THE ISSUE

Counsel for the claimant, in his written submission, argued that the questions that arise for determination in this suit are:

- (a) Whether the defendant was a trespasser having the use and occupation of the land in dispute from and since May, 2005 and if yes, whether the claimant is entitled to damages and or mense profits?
- (b) Whether the claimant's legal title is extinguished by adverse possession?

THE LAW

It is the claimant's contention that he is the registered proprietor of the disputed land (portion "C"), which is endorsed on his Certificate of Title registered at Volume 577 Folio 3 and has the title in law and is therefore entitled to possession until the contrary is proved. Thus, the burden was on the defendant to prove that he has acquired a title by possession. Lord Lindley MR said in *Littledale v Liverpool College (1900) 1Ch 19 at page 21*:

"in order to acquire by the Statute of Limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it."

Counsel for the claimant submits that the registered title of the claimant is sacrosanct until set aside and the agreement to purchase by the defendant is defeated by the title and the Court will not look behind the title in respect of an agreement made to a previous purchaser. He relied on Section 70 of the Registration of Titles Act.

The claimant filed his action on the 4th day of April 2008 alleging that in June 2005 the defendant without his consent entered upon and took possession of about one acre of his land and have been in possession since. Thus, it was his contention that his action is not statute barred as he filed it within the limitation period of twelve years.

Section 3 of the Limitation of Actions Act states:

No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

The claimant maintains that under the Limitation of Action Act, time does not begin to run against the owner of land so as to extinguish his right thereto unless it has been established that:

- (a) He has been dispossessed of the land or
- (b) He has discontinued his possession of the land: and that, in either event,
- (c) Some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of the land. Time then runs against the true owner at the time adverse possession is taken of the land.

Lord Millett in *Goomti Ramnarace v Harrypersad Lutchman* (2001) UKPC 25, 59 WIR 511 at page 515 explained the meaning of 'adverse possession.' He said:

"Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by lawful title, or with the consent of the true owner."

In this instant case the defendant's contention is not that he dispossessed the claimant of his land but that the claimant's predecessors in title had discontinued their possession for a period in

excess of twelve years. In other words the defendant's proprietary interest had been crystallized by acquisition or operation of the law when the claimant became the owner.

"The difference between dispossession and discontinuance of possession might be expressed this way: the one is where a person comes in and drives out the others from possession, the other is where the person in possession goes out and is followed in by others." per Fry, J. in Rains v Buxton (1880) 14 Ch D.

I am therefore satisfied that the defendant as a claimant to land by adverse possession needs to show that for the requisite period (he and any necessary predecessor) had:

- (i) A sufficient degree of physical custody and control of the claimed land.
- (ii) An intention to exercise such custody and control on his own behalf and for his benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land.

The claimant and the defendant both claim to have purchased the disputed parcel of land from two separate vendors and have been in open, peaceable, exclusive and undisturbed possession. They further claim that they have exercised all acts of full ownership over the land.

The defendant exhibited his agreement of sale in which he sought to purchase the disputed parcel as described in a survey diagram by D.K. Byles, a Commissioned Land Surveyor. He admitted that the Vendors were not the registered proprietors and a part of land transfer was never done. He claims that the survey diagram was handed over to the Solicitor who had also prepared the agreement to so. He has since died without doing it or returning the diagram. He said that at the time he executed the sale agreement he was in possession of the land as the vendor's tenant. He also spoke with the claimant's predecessor in title who was then registered as the proprietor. He said the latter assured him that the Whittingham's were the owners of the disputed parcel.

The agreement of sale show that the defendant was purchasing two separate and distinct parcels of land from the Whittingham's and that F.C. Grossett & Co had the carriage of sale. The first parcel known as Burlington Estate containing by survey six acres thirty perches and one-tenth of a perch and being the land registered at Volume 995 Folio 67 was transferred to the defendant on the 7th March 1978 for the consideration of two thousand two hundred dollars. With regards to the second parcel the agreement stipulates that the costs of title to be borne by the defendant.

It was the defendant's evidence that he has been in open, peaceable, exclusive and undisturbed possession since 1978 as the owner of the disputed land. He admitted that in 2004 he removed the surveyor's pegs that were placed there. In January 2005 he rented it to Eugene Williams who then began cultivating crops such as bananas. However in 2006 the latter advised him of a discussion he had with the claimant who was claiming the land.

The claimant on the other hand denied the defendant's claim that he was entitled to possession and exhibited his duplicate certificate of title at Volume 577 folio 3 that clearly shows him as the registered proprietor of the disputed land. He testified that he purchased the property and was placed in possession in 1980. His brother Lloyd Anderson was then left in charge as he returned to the U.S.A. The land was transferred to him on 31st August 1990, that is twelve years after the defendant had purchased his parcel.

He said that they were shown the land and observed the dividing barb wire fence attached to trees at the boundary between the adjoining properties. In order to see the disputed parcel he had to walk under a bridge. He did not see the defendant or his brother, Terrence Thompson ('Sunny B'), on the land. He returned to the island in 1990 and found the land overgrown in bush and paid someone to clean it.

In 1995 he employed Mr. Dyce to re-establish the boundary as he observed that the trees and other things to identify the boundary had been cut down. He also said that on the 24th April, 1994 he called the defendant and had a discussion with him over the ownership of the property. He said that the defendant said he had a document. He said he had the meeting as his brother told him that the defendant was claiming the land.

Lloyd Anderson, the claimant's brother, also testified. He said in his cross examination that in 1981, he was given possession verbally after making the final payment to Mr. Grossett. He started rearing cows and occupied the disputed land between the years 1986 to 1989. He said he gave Sunny B permission to enter the property to water his cows. As a result he removed a small portion of the dividing fence so as to allow access of the cows to Section C where the water was located.

The defendant denied the claimant and Lloyd Anderson's assertions that they were in possession or occupation since 1980 or 1981. He also denied that permission was given to his brother by Lloyd Anderson to enter the disputed parcel to water his cows. He called three witnesses including his brother Terrence (Sunny B) to support his case that the claimant or his predecessor in title was never in occupation.

Terrence Thompson corroborated his brother's testimony in all material aspect. They had purchased the two parcels of land jointly from the Whittinghams and had been in open and undisturbed occupation and ownership of the disputed parcel since then. On the other hand he denies that he was permitted by Lloyd Anderson to enter onto the land to water his cows.

The other witnesses, Eugene Williams and Caswell Noland reside in the area and claim to have known both the Whittinghams and the Harris and the history of the land.

Eugene Williams is the defendant's tenant and the person who the claimant saw cultivating the land in 2005. He said that the disputed land was in fact owned by the Harris family but they had great difficulty to access it across the water way. Since the mid to late 50's he said Mr. Whittingham took over the piece of land from Mr. Harris and planted banana on it.

The defendant also relied on the testimony of Caswell Noland a resident of the area and a former employee of the Whittinghams.

It was evidently clear that one of the parties could not be speaking the truth as it relates to possession of Section C. The defendant is in possession and therefore has the burden to prove adverse possession against the claimant who is the registered proprietor. He produced a copy of his sale agreement with the Whittinghams as the vendors of two separate parcels of land. The first one known as Burlington Estate was transferred to his brother and himself but the second parcel was not as described in the survey diagram. F.V. Grossett and Co. were the attorneys involved with his sale and also from Mr. Harris.

The claimant's agreement of sale was never exhibited although was referred to in the witness statement. This would have shown the date it was actually executed and corroborate his account that he had purchased the property in 1980. He proffered no documentary evidence to support this assertion although the transfer was registered more than 10 years later.

The claimant asserted that he was given possession by the vendors in 1980 and then left the island leaving his brother in charge. The latter however stated that in 1981 he was verbally placed in possession by the attorney after he paid the balance of the purchase price. It would appear that the claimant never visited the disputed land until in 1990, the year the transfer was endorsed on the title. He said there was no dividing fence between the defendant's property and

the disputed parcel. Notwithstanding this, the only action he took was to have the Commissioned Land Surveyor identify the boundary and place wooden pegs without advising the neighbouring land owner. He made no attempt to erect a fence to enclose and separate his land.

He said he returned to land in 1995 and the Surveyor identified the boundary once again without serving any notice as the pegs were removed. However he volunteered in cross examination that in 1994 he was aware that the defendant was claiming ownership of the parcel and said he had his document to prove it.

It was not until 2005, after he had seen Eugene Williams cultivating the land and also the defendant's objection to a survey, that this action was filed. Thus between 1994 and 2008 the claimant took no action to interfere with the defendant's possession. I therefore conclude that the claim is statute barred as the limitation period of twelve years has passed.

It was quite obvious that the defendant was claiming that he had purchased the disputed parcel and had his sale agreement to prove it. I therefore find it quite strange and inconsistent for his brother who is a co-owner to seek permission from the claimant's brother to enter onto the land to water his cows.

I also find it odd that although Lloyd Anderson resides in the parish and had been left in charge he was unaware that the boundary fence had been removed and the trees marking the boundary had been chopped down. He also allowed the land to be overgrown in bushes. This forced the claimant on his periodic visits to the island to employ persons to clean it. It would appear that Lloyd Anderson never visited or paid any attention to the disputed land. This would support the defendant's case that the disputed land was never in the claimant's possession.

I do not believe the claimant or Lloyd Anderson that the defendant's brother got their permission to enter onto the disputed land. I find that they concocted this. I accept the defendant's account that he had leased the land from the Whittinghams who later agreed to sell him and that he was advised by Harris he had no interest in the land. Thus, the claimant's predecessor in title had discontinued his possession of the land to the Whittinghams. In 1978 they sold their interest to the defendant and Terrence Van Thompson who have occupied the land openly, peaceable, exclusively and undisturbed since that date.

It was the failure by the defendant to secure the part of land transfer and his registered title that have caused the claimant to claim the land.

The claimant's claim is therefore dismissed and judgment entered for the defendant.