



[2016] JMSC Civ. 162

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 2009 02598

BETWEEN	KENNETH BLAINE	CLAIMANT
AND	JUNIOR DIGGS-WHITE	1ST DEFENDANT
AND	JANETH DIGGS-WHITE	2ND DEFENDANT

Ms. G. Mullings instructed by Mullings & Co. for the claimant.

Mr. G. Haisley instructed by Page & Haisley for the defendants.

June 30, July 29 and September 27, 2016

Limitation of Actions - Land - Adverse possession - Initial possession by virtue of family arrangement.

TIE, J. (AG)

[1] The claim herein seeks the following:-

1. A Declaration that Mr. Kenneth Blaine is the lawful owner of 14 and 16 Cedar Valley Road, Kingston 6 in the parish of St. Andrew.
2. An injunction to prevent Junior Diggs-White and Janet Diggs-White from taking possession of the premises at 14 and 16 Cedar Valley Road.

3. An injunction to prevent Junior Diggs-White and Janet Diggs-White from building on, modifying or interfering with the premises at 14 and 16 Cedar Valley Road.

The background

- [2] The claim involves two parcels of adjoining land, lots 14 and 16 Cedar Valley road, Kingston 6, which are unregistered. The evidence presented by the claimant against the defendants was limited to lot number 16. It is noted that the claimant's witness made certain allegations against the defendants in relation to tenants at lot number 14, however on a totality of the evidence this appears inconsistent with the entire thrust of the case. Moreover, the defendants accept that the claimant has been in control of lot 14 and that they themselves have no such interest therein.
- [3] The primary issue for the court is whether the claimant's possession of lot 16 amounts to adverse possession. The defence raises two issues. Firstly that "the claimant is not entitled to lot 16 Cedar valley Road Kingston 6 by adverse possession as his occupation of the said property was pursuant to consent and permission granted by the late Laretta Blaine" and further that the possession has not been undisturbed.
- [4] I reviewed the evidence in its entirety and find that the claimant and the second defendant who are siblings, are ad idem on a number of matters. From the evidence, it is accepted that they were raised in their family home on lot 16, which property was occupied by their parents. They are agreed that after the death of their father, their mother took charge of the property until she became ill and went to reside with the second defendant in May Pen. At this point the claimant commenced looking after the premises with the consent of their mother. He eventually rented out lot 16 which rental he retained as his own and even placed an agent in charge to collect rent on his behalf when his family commenced migrating around 1981. Their mother died in the late 1970's whereupon he maintained control of the property.

- [5]** Challenges arose to the claimant's control of the premises when his nephews, the sons of the second defendant commenced living at the premises. He received information that Andrew Diggs White was harassing the tenants so as to force them out. The timing and basis of this occupation are in conflict as the claimant insists that he allowed him to reside at the premises in 2006 having employed him to do work there. He lamented that later that year the second defendant took control of a part of 16 Cedar Valley Road by force and brought her other son, Junior Diggs-White to the property who currently resides there. On the other hand, the second defendant contends that in 2000, she gave Andrew permission to occupy a room and thereafter her other son, the 1st defendant in August 2005. She denies any allegations of harassment.
- [6]** The claimant and second defendant are also disagreed on the issue of taxes, each claiming responsibility for paying same. The claimant indicates that for the past twenty six (26) years he alone paid the taxes and managed the property whilst the defendant insists that she has been paying taxes for the property since obtaining letters of administration in August 2005 and prior thereto maintains that no taxes were paid on the property. Neither party assisted the court with documentary evidence in this regard.
- [7]** The parties clashed on the issue of whether demands were made by the second defendant and their mother for the claimant to remove the tenants and as to whether the claimant had given the second defendant a power of attorney to collect rent on his behalf whilst he was outside of Jamaica.
- [8]** The claimant regards himself as the true owner of the land and maintains that he has been in control of 16 Cedar Valley for the past 30 years, which control has been interrupted by Junior Diggs since 2005. Further the second defendant evicted his tenants in 2006 through a court order, which court proceedings he himself attended.
- [9]** He complains that his efforts to have a title issued in his name have been thwarted by the actions of the second defendant who has threatened the

surveyors and other professionals who he has sent on the land. This is denied by the defence.

[10] The parties are nonetheless agreed that the claimant has been in exclusive possession of the said lot in excess of twelve years. The filed defence however denies that the claimant is entitled to lot 16 by way of adverse possession as his occupation was pursuant to the consent and permission of their mother. It further denies that he has been in undisturbed possession as their mother, and subsequent to her death, the second defendant repeatedly demanded that he remove the tenants from lot number 16.

[11] In 1982 the second defendant applied for a grant of letters of administration, went to England for a few years, returned to Jamaica in 1987 whereupon she discovered that the claimant had removed the fence separating the two properties, treating them as one lot. She received a grant of letters of administration on 31st August 2005, served the tenants with notices to quit and commenced and succeeded in an action for recovery of possession in 2006.

[12] She claims to have an interest in lot number 16 along with her other siblings. She insists that even though the claimant collected rental for lot number 16 for over two decades which he never apportioned, he was not in total possession because according to her, “she was always on his case. He was never comfortable.”

Analysis

[13] In considering whether the claimant has established on a balance of the probabilities that he is entitled to the declarations sought, the court must determine whether the claimant has been in possession of the premises for the requisite time as stipulated by the Limitation of Actions Act and also whether the nature of the possession was of a particular character.

[14] To this end the following issues must be addressed:-

[15] Issue 1- What is the status of the claimant?

Counsel for the defendant in written submissions delved into the issue of the distinction between a tenant at will and a licensee and argued that the “claimant is and has always been a mere licensee.” Perhaps this approach was adopted out of anticipation that the claimant would have relied on section 9 of the Limitation of Actions Act which, inter alia, provides that a tenancy at will can be deemed to be determined at the expiration of one year after its commencement. As such, time would have started running at this point in computing the twelve year mark in a claim for adverse possession. Counsel for the claimant however did not seek to label the claimant nor was reliance placed on section 9.

[16] As regards his status it is evident that the most suitable classification would be that of a licensee. It is well recognized that a tenancy at will is one in which the tenant is in possession and determinable at the will of either party, namely, the landlord or tenant. For a tenancy at will to be inferred, the circumstances must show that the parties intended to create legal relations. Occupation arising out of “family arrangement, an act of friendship or generosity” tends to rebut any inference that the parties intended to create legal relations. (**Ramnarace v Lutchman**, [2001] 1 WLR, 1651 at p 1657.) The grant of exclusive possession in a family arrangement has been held to confer no more than a licence on the occupant. (**Errington v. Errington and Woods** [1952] 1 K.B. 290.) Needless to say, an occupant in these circumstances cannot acquire title by adverse possession since his possession is based on consent. (**Cobb v. Lane** [1952] 1 All E.R. 1199.)

[17] The uncontroverted evidence is that the claimant commenced looking after the property after his stint in the JDF when his mother became ill. His looking after the property in these circumstances would not have the requisite ingredients to establish the commencement of occupation in an adverse possession claim as it was clearly with his mother’s consent. At that time there would have been no ouster on his part of his mother nor any discontinuance of possession by his

mother with the intention of abandoning her interest in the land. There being the approval of his mother in his tending to the property, the issue of adverse possession is not relevant at that juncture on the claimant's case.

[18] Issue 2 – What are the implications of his mother's death on his status?

[19] A revocable licence, as is the case with a tenancy at will, is automatically determined by the death of the licensor. (**Ternnase v Terrunnase** (1968 AC 1086)). I cannot therefore find favour with the defendants' contention that "the claimant is and *has always been* a mere licensee.'(emphasis supplied) It could never be the case in circumstances such as these that the claimant could be entitled to remain there indefinitely under the cloak of this initial permission. Consequently, upon the death of the mother of the claimant, his right to remain on the premises also ended. He however remained there and exercised acts of control. Any computation of time as regards a claim for adverse possession must commence at this point.

[20] Issue 3- Has the claimant proved on a balance of the probabilities that he has enjoyed possession for a period of twelve years of the nature required to establish adverse possession?

[21] Section 3 of the Limitation of Actions Act prohibits the entry upon, or commencement of legal action to recover possession of land where 12 years have elapsed since the right to enter on the land or the right to bring an action to recover the said land has arisen. As per section 30, once this period has elapsed, the right to enter upon the land or to commence legal action to recover possession of same is extinguished.

[22] I accept the evidence of the second defendant as regards the time of their mother's death to be 1979 given that the claimant had challenges in remembering dates. In any event their accounts as to when she died are not significantly different. For the purpose of the Limitation of Actions Act, time

would therefore commence running in 1979, provided that his possession was of a particular character.

[23] In **Farrington v Bush**, (1974) 12 JLR 1492, Graham-Perkins JA summarised the position as to acts of possession as follows:

“It involves the co-existence of two essential elements, namely the assumption of actual physical possession by, and the presence of a particular mental element directed towards the true owner in the adverse possessor. It is in our view a mistake to think that mere entry upon, and user of the land of another can, without more, be equated with an assumption of possession. It must be possession of such a nature as to amount to an ouster of the original owner of the land....there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner.”

[24] The length of time that the claimant has been in possession is not in issue. The issue is whether the possession is of the requisite character to establish adverse possession. The uncontroverted evidence is that after the death of their mother, the claimant maintained tenants at the premises. He ignored the second defendant's demands to remove the tenants. In fact the second defendant herself declared in her evidence in chief that “For over two decades, the claimant collected rent from tenants he put in possession of lot 16 and has never given my sister or me one cent.” According to her, he also fenced both lots as one.

[25] His behaviour is consistent with the guidance provided by Graham-Perkins J.A. as set out above. He dealt with the land as an owner would have, to the exclusion of all others. The absence of documentary proof as regards the payment of taxes is therefore of no moment in these circumstances.

[26] **Issue 4-** Has the claimant's possession been undisturbed?

[27] In order to prevent an adverse possessor from acquiring an indefeasible title under the Limitation of Actions Act, an individual so challenging possession must

show that before the expiry of the limitation period, he performed acts amounting to dispossession of the occupier and resumption of possession by him. Lord Diplock in **Ocean Estates Ltd. V Pinder** [1969] 2AC 19, p25 noted that “The slightest acts by the person having title to the land or his predecessors in title, *indicating his intention to take possession* are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title...”

[28] It is evident that the second defendant is not the title owner. However even if she were, using the approach of the learned judge as stated above, her actions would not be sufficient to prevent the claimant from acquiring title under the Limitation of Actions Act. On her evidence their mother died in 1979. It therefore means that as at 1991, twelve years thereafter, any right to bring a claim for recovery of possession would cease.

[29] There is nothing on the evidence to suggest that the second defendant did anything within the time frame required, to challenge the possession of the claimant. Her evidence is that she complained to the claimant about the presence of the tenants. This was denied by the claimant. Even if this were true, there has been no indication as to her reason for wanting the tenants to leave. In any event, these complaints (which on her own evidence were ignored by the claimant), without more, could not be regarded as seeking to dispossess the claimant, or as evidence of an “intention to take possession” during the relevant time frame.

[30] During this relevant period of time she also applied for a grant of letters of administration. Again this is not indicative of such an intention. In fact under cross examination she denied taking control of the property and explains that she has no title and according to her she was just “administering”. Her various acts in relation to the property must therefore be viewed in this context. Her act of serving the tenants with notice and commencing action, (albeit after the relevant period of time as regards the Limitation of Actions Act and therefore of no moment as the claimant would have already acquired his right) must be viewed,

as she stated, as her not seeking to take control of the property but rather 'administering' the property. This aspect of the evidence as regards her actions in relation to the tenants is indeed curious. The court was informed of the claimant's presence and participation in the court proceedings. However it was also her evidence that he disregarded her complaints as regards the tenants prior thereto. It is therefore unclear why and in what capacity he so participated. What however is clear is that by this time, he would have already acquired a right under the Limitation of Actions Act. What is also clear is that the second defendant at no time commenced any sort of action against him for possession of the property or challenging his retention of the entire sums collected in rent.

[31] The presence of the second defendant's sons on the premises must be examined. I reject her evidence that she placed Andrew on the premises. I accept that the claimant allowed Andrew to occupy the premises for the reasons he has given- for convenience as he had given him a job on the premises. The second defendant's assertion of putting her son there is not credible given the very picture she painted as to her brother's nature. It was her evidence that he expelled his uncle's wife from lot number 14 and disregarded her own complaints about the presence of tenants at lot number 16. It is not believable that the claimant, as she described him, would have stood by and allowed her to place her son on property. In any event, the presence of the sons of the second defendant on the property arose after the claimant would have acquired a right to claim adverse possession. I however accept on a balance of the probabilities that there has been interference with the claimant's bid to do the prerequisites to enable his application for title. Indeed it is clear that the defendants disagree with his bid do same. It is also clear from the evidence that this would have taken place after the claimant had acquired a right to claim possessory title.

[32] I am therefore satisfied that on a balance of the probabilities that the claimant's occupation has been undisturbed for in excess of twelve years. There have been no acts on the part of the defendants or anyone which would amount to a challenge to his claim to adverse possession.

- [33] **Issue 5-** Is lot 16 part of the estate of the parents of the claimant and second defendant, and if so does this affect the claimant's claim of adverse possession?
- [34] The second defendant claims that lot 16 forms part of the estate of her parents and that she is entitled there under. Firstly, there is no proof of ownership. The second defendant accepts that there is no title for the property and no documentary evidence of any sort was presented to establish the assertion of their ownership. Indeed any administration of the estate would require proof of this. The court recognises that any statement to this effect is hearsay evidence. Secondly, there is no evidence of any action having been taken on behalf of the estate as regards a claim of ownership of the property since the death of the parents. Lot 16 therefore cannot be regarded as part of their estate. The concept of the second defendant therefore 'administering' on the property as part of the estate is therefore misconceived.

Conclusion

- [35] I accept that the claimant has proved on a balance of the probabilities that he has been in adverse possession of lot 16 Cedar Valley Road for in excess of twelve years to the exclusion of all others.
- [36] In the words of the second defendant in her evidence, the claimant "captured" the property. I find that he assumed the character of owner and exercised the ordinary rights of ownership over the property. I find that there has been nothing on the part of anyone, including the second defendant, that would have disturbed his occupation prior to him acquiring possessory title. The rationale of the second defendant as to entitlement, as stated in cross examination, that she was born and bred there and hence they are all equally entitled is misconceived in these circumstances.
- [37] The court therefore makes the following orders:-

-It is hereby declared that Mr. Kenneth Blaine is the lawful owner of lot 16 Cedar Valley Road, Kingston 6 in the parish of St. Andrew. Given the lack of

evidence as regards any claim by the defendants to lot 14 I have restricted the order to lot 16.

-An injunction is hereby ordered preventing Junior Diggs-White and Janet Diggs-White from taking possession of the premises at lot 16 Cedar Valley Road.

-An injunction is hereby ordered preventing Junior Diggs-White and Janet Diggs-White from building on, modifying or interfering with the premises at lot 16 Cedar Valley Road.

[38] Cost to the claimant to be agreed or taxed.