

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 1983/G186

BETWEEN BRYNHILD M. GAMBLE PLAINTIFF
AND HAZEL HANKLE DEFENDANT

W. B. Frankson Q.C. and Mrs. Margaret Forte for Plaintiff.
Defendant does not appear and is not represented.

HEARD: MAY 18, 1987 AND MARCH 21, 1990.

CORAM: WOLFE J.

The Plaintiff seeks in this action to recover possession of all that parcel of land part of King Street, Lionel Town in the parish of Clarendon registered at Volume 1121 Folio 195 of the Register Book of Titles.

This action was commenced by Writ of Summons on the 28th day of July, 1983. The Defendant was duly served with the Writ of Summons and entered Appearance on the 2nd day of September 1983. A Defence to the Action was duly filed by the Defendant. The defendant did not appear at the Summons for Directions and was not represented by Counsel.

Notice of Trial was duly served upon the Attorney-at-Law on record as appearing for the defendant.

The action was set down for hearing on the 18th day of May, 1987. The defendant when called did not answer and was not represented by Counsel. The court in the circumstances ordered the trial of the action to proceed.

The plaintiff in support of her claim tendered in evidence Duplicate Certificate of Title registered at Volume 1121 Folio 195 of the Register Book of Titles. This certificate evidenced that the plaintiff and one Robert Hankle were registered "proprietors of an estate as Joint Tenants in fee simple" of the land subject matter of the claim.

A certified copy of Death Registration Form No. HAK 2529 was tendered in evidence in proof of the fact that Robert Hankle the other registered proprietor had died since the 9th day of August, 1981.

Also tendered in evidence was an Indenture dated the 21st day of November 1980 whereby Robert Hankle purported to convey to the defendant, the subject matter of the action by way of a deed of gift.

The plaintiff contends that, by virtue of the jus accrescendi, upon the death of Robert Hankle she became the sole proprietor of the disputed land.

It is further contended by the plaintiff that the purported Deed of Gift is of no effect. In this regard the plaintiff relies upon section 88 of the Registration of Titles Act which states:

"The proprietor of land, or of a lease, mortgage or charge or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth schedule hereto."

The argument for the plaintiff is posited thus. The Deed of Gift being a document which does not comply with the stipulated forms in the Fourth Schedule of the Registration of Titles Act does not have the effect of transferring the share of Robert Hankle to the defendant. It follows therefore that the joint tenancy remains unsevered at the date of the death of the deceased and, by virtue of the jus accrescendi, the plaintiff becomes the sole proprietor of the land. The argument appears attractive upon a cursory reading of the section. However, upon a more in depth examination of the section it is clear to see that the provisions of the section are directory and not mandatory. The section does no more than set out some of the formats which may be used to convey interests in registered land. The provisions are by no means exhaustive.

In any event even if the document does not have the effect of transferring the interest of Robert Hankle to the defendant under the Registration of Titles Act, the question arises whether or not the document evidences a dealing with an interest in land which manifests a clear intention to sever the joint tenancy and to create a tenancy in common.

In William v. Hensman (1861) 1 John and Hem 546, 547 Sir William Page Wood V.C. said:

"A joint tenancy may be severed in three ways. In the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share secondly, a joint tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson v Bell* (1843) 5 Eq. R501 and *Jackson v Jackson* (1804) 9 Ves. Jun, 591."

I am satisfied that the Deed of Gift is an act which comes within the ambit of the first of the three ways of severing a joint tenancy mentioned by Sir William Page Wood V. C. in *Williams v Hensman* (supra).

The decision in *In re Draper's Conveyance Nihan v Porter and Another* [1969] 1 Ch. p. 486 is instructive.

"By a conveyance dated October 10, 1951 a house which became the matrimonial home was conveyed to a husband and wife as joint tenants. On November 17, 1965, the wife obtained a decree nisi of divorce which was made absolute on March 3, 1966. On February 11, 1966, the wife issued a summons in the Probate, Divorce and Admiralty Division under section 17 of the Married Women's Property Act, 1982, asking for an order that the house be sold and the proceeds of sale distributed in accordance with the parties' respective interests thereto. In her affidavit in support of the summons the wife, inter alia, relied on the presumption of advancement arising from the fact that the house was brought in their joint names and added a further reason why she was entitled to a half share. The Registrar made an order for sale and declared that she was entitled to half interest in the property. The husband remained in occupation of the house and on August 16, 1966, the Registrar made an order for possession. On January 6, 1967 the husband died intestate and the property remained unsold.

On the wife's summons to determine whether on the true construction of the conveyance of 1951 and section 36 of the Law of Property Act, 1925, and in the events which had happened, she as trustee, held the property for herself absolutely or for herself and the estate of the husband as tenants in common in equal shares or on some other and what trusts:-

Held, that the wife's summons under section 17 of the Married Women's Property Act, 1882, coupled with her affidavit in support of it, showed an intention inconsistent with a continued joint tenancy and operated to sever her beneficial joint tenancy during the husband's lifetime; and that, the severance being effected by the summons and affidavit and not by any order that was made, on the true construction of the conveyance of 1951 and section 36 of the Law of Property Act 1925, and in the events which had happened, the wife, as trustees, held the beneficial interest in any proceeds of sale of the property, after discharge of encumbrances and costs, for herself and the estate of the husband as tenants in common in equal shares."

Plowmand J. in arriving at his decision relied upon and applied the dictum of Havers J. in Hawkesly v May [1956] 1 Q.B. 304.

In Hawkesly v May supra "A settled fund was held by trustees upon trusts under which on attaining the age of 21 the plaintiff and his younger sister became absolutely entitled as joint tenants." The question was whether that joint tenancy had become severed and Havers J. said:

"As regards the severance, I hold that when the sister wrote the letter dated March 18, 1942, in which she said: 'Thank you for your letter of the 17th instant with the particulars of the investments.' I should like the dividends to be paid into my account at ~~Martins~~ Bank, 208 Kensington High Street (which was a letter in reply to the first defendant) that was a sufficient act on her part to constitute a severance of the joint tenancy. If I am wrong about that, there clearly was a severance when her share of the trust funds were transferred to her in September 1942."

Following the line of cases referred to above I hold that the Deed of Gift executed by Robert Hankle in favour of the defendant had the effect of severing the joint tenancy which existed between himself and the plaintiff.

Mrs. Forte submitted that even if the tenancy was severed section 63 of the Registration of Titles Act makes the Deed of Gift of no effect as it has not been registered. Section 63 states as follows:

"When land has been brought under the operation of this Act no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature;....."

It is patently clear that section 63 of the Registration of Titles Act does not operate to make the unregistered instrument void. The section only postpones the passing of the interest created by the instrument until the instrument is registered.

Until registration, it is my view that, the plaintiff holds the estate in the land upon trust for the defendant to the extent of the other joint tenant's share. The defendant would be entitled to call upon the plaintiff to execute a transfer, to her, of the share of Robert Hankle as tenants in common.

For the aforesaid reasons I hold that the plaintiff is not entitled to recover possession. Each joint tenant or tenant in common is entitled to possession providing he or she does nothing to exclude the other tenant from possession or does not commit any act which is inconsistent with the interest of the other tenant.

The question of mesne profits would only arise if the plaintiff were entitled to possession. In the event that I have erred in denying the plaintiff recovery of possession let me deal with her claim for mesne profits.

To succeed in a claim for mesne profits the plaintiff must satisfy me that the defendant is wrongfully in possession. The plaintiff testified that the defendant has been on the land since 1980-1. Robert Hankle died on the 9th August, 1981. If the plaintiff's evidence is accepted on this point, and it is, then there is every likelihood that the defendant entered into possession during the life time of Robert Hankle. In the absence of any evidence to the contrary, and there is none, it is reasonable to infer that she entered upon the land with the approval of Robert Hankle a person with an interest in the land.

Robert Hankle would have been entitled in law to allow the defendant to share his possession of the land. This fact coupled with the Deed of Gift which he executed in favour of the defendant would in my view disentitle the plaintiff to any relief by way of mesne profits even if she were entitled to an order for Recovery of Possession.

For the reasons adumbrated there will be judgment for the defendant on the claim.

I make no order as to costs as the defendant did not appear to contest the action.