



[2022] JMSC Civ 125

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO SU2021CV05156

BETWEEN	KATHLEEN GENTLES	CLAIMANT
	(Administratrix of the estate of WALDIE WALLENSTEINS HASTINGS MUNROE GENTLES)	
AND	THE COMMISSIONER OF LANDS	1ST DEFENDANT
AND	THE REGISTRAR OF TITLES	2ND DEFENDANT

IN CHAMBERS

Ms Gillian Mullings instructed by Naylor and Mullings for the Claimant.

Ms Kristen Fletcher of the Attorney General's Chambers instructed by the Director of State Proceedings for the Defendants

Heard: June 24 and July 21, 2022

**Considerations for an Injunction; Section 155 Registration of Titles Act;
Requirements of Land Surveyor's Act; Fraudulent Vesting Application**

S. Barnes J (Ag)

The Application

[1] This is an application filed on February 10, 2021 against the Defendants, seeking the following:

An injunction to restrain the 1st and 2nd Defendants until the trial of this matter or further Order in the meantime, whether by themselves or their

servants and/or agents or otherwise from selling, mortgaging, pledging, assigning or dealing in any way howsoever with all that parcel of land part of Hampstead in the parish of Trelawny and being the land comprised in the Certificate of Title registered at Volume 1497 Folio 312 in the Register Book of Titles,

The Claim

[2] The Claim Form and Particulars of Claim were filed on December 3, 2021, seeking the following Declarations:

- i. That the alleged sale agreement of 1976 between Waldie Wallensteins Gentles, Stewart Gentles, Glaister Gentles and the Commissioner of lands is invalid and unenforceable against Waldie Gentles and his estate
- ii. That the Claimant is entitled to recovery of all that parcel of land part of Hampstead in the parish of Trelawny being land comprised in Certificate of Title Volume 1497 Folio 312 from the 1st Defendant
- iii. That the miscellaneous No 959427 Vesting Instrument relating to Certificates of Title registered at Volume 1111 Folio 163 and Volume 1111 Folio 165, vesting same to the 1st Defendant is void and/ or a nullity.
- iv. That the 2nd Defendant has infringed the Constitutional rights of the Claimant embedded in Section 15(1) of the Charter of Fundamental Rights and Freedoms by instituting Caveat No 1688183 on fraudulent representations that the said lands were compulsorily acquired under the Land Acquisitions Act therefore preventing the Claimant from dealing with the said lands as provided for under the Constitution.
- v. That the 2nd Defendant acted in breach of Section 155 of the Registration of Titles Act by dishonestly representing that they were satisfied that the representatives of the estate were absent from Jamaica or impracticable to obtain their signatures.
- vi. That the Certificate of Title registered at Volume 1497 Folio 312 was procured by fraud and/ or error occasioned by omission, misrepresentation or misdirection.

The Claim Form also sought the following orders:

- vii. That the Certificate of Title registered at Volume 1497 Folio 312 be transferred to the Waldie, Stewart and Glaister Gentles' estates.
- viii. That the 1st Defendant refund any and all monies collected from occupants of the said lands along with interest pursuant to the Law Reform (Miscellaneous Provisions) Act, under fraudulent representations that they are the owners of the lands
- ix. That the Claimant is entitled to Damages from the 1st Defendant or property damage
- x. In the alternative to orders (i) and (vii), damages for fraud, trespass, unjust enrichment and mense profits against the 1st Defendant.

[3] The Particulars of Claim sets out that the Gentles brothers (Waldie, Stewart and Glaister) were, in the 1950s, gifted approximately 5,000 acres of land in Hampstead, Trelawny from their parents. In the 1970s, then Minister of Agriculture Desmond Leaky, acquired 2,971 acres from the brothers under Project Land Lease, to lease agricultural lands from private individuals then sub-lease to small farmers.

[4] Waldie Wallensteins Gentles (hereinafter referred to as "Waldie") then resided on the land and was the main contact with the Ministry of Agriculture. It was about half the land that was to be leased, not inclusive of any portions on which their dwelling houses sat, "such lands having been dedicated for **residential** purposes at all material times." (Paragraph 7). In 1974 the brothers brought parcels of land under the Registration of Titles Act: Volume 1111 Folio 163, Volume 1111 Folio 164 and Volume 1111 Folio 165. Those encompassed 1,224 acres of the land, the rest standing as unregistered land. In November 1980, Volume 1111 Folio 164 (about 56 acres) was sold.

[5] In December 2015 the Claimant became aware that the 1st defendant had transferred Volume 1111 Folio 163 and Volume 1111 Folio 165 under the Crown

Property (Vesting) Act and became the new proprietor with the lands now registered at Volume 1497 Folio 312. Thereafter, the Claimant lodged a Caveat against the newly issued Title.

[6] The Claimant then said she conducted investigations and gleaned the following:

- a) The 1st Defendant's vesting of the lands was on a fraudulent and dishonest sale agreement of 1976 entered into between the parties for 2224 acres of land
- b) In 1976 the land was in the Gentles family for some 11 generations and the only leasing agreement with the Government was under Project Land Lease
- c) When the sale agreement was purportedly executed, Waldie was blind
- d) The signature is not that of Waldie so the sale agreement is invalid and/ or null and void and not binding on Waldie
- e) That there ought to be a survey to establish the exact acreage of the land
- f) By the requirements of the Land Surveyors Act, the vendors, their agents or legal representatives would have had to participate in the process; there is no approved plan attesting to notification, involvement of the vendors and compliance with the other rigours of an approved plan is subject "nor any document showing that the vendors had agreed to or had knowledge of the exact acreage of the lands subject of the agreement; **there was no meeting of the minds of the parties to the contract and no valid agreement could exist in the circumstances.**" (paragraph 18)

The Claimant deemed the Vesting Application fraudulent, because:-

- g) Waldie had been in possession of the land from before 1976 and until his death in 1993, and in 2015 when vested to the 1st Defendant, the Claimant and relatives was in open, undisturbed possession of same
- h) Contrary to the representations by the 1st defendant, the representatives of the estate of the Gentles brothers were not dead, absent from Jamaica or impractical to obtain their signatures and that the Claimant was never approached or contacted in relation to any transfer

- i) Prior to the transfer to the 1st Defendant in 2015, a Grant of Administration was made by the Supreme Court in the estate of Waldie Gentles in April 2014 and similar grant made in the estate of Glaister Gentles and it was due to dishonest intentions why no effort was made to find the abovementioned representatives.
- j) The sale agreement refers to consideration of \$378,000 for 2224 acres but \$321,300 was paid.

[7] The Claimant also averred to particulars of fraud and dishonesty on the part of the 1st Defendant in having the lands transferred to them including an assertion that they had taken possession of the land and the vendors had acquiesced when in fact the vendors were still in possession and occupation of the subject lands.

[8] It was also submitted that the 2nd Defendants breached their statutory duty under Section 155 of the Registration of Titles Act, claiming that they had satisfied the requirements of said section of the Act when they had not. And “by instituting a caveat on this basis contravened the constitutional right of the Claimant embedded in the Charter of Fundamental Rights and Freedoms under the Constitution of Jamaica Section 15(1) to deal with their property as they so desired.”

[9] The Index to Judge’s Bundle with respect to this Application for Court Orders (Injunction), contains the Notice of Application (as referred to above) along with the Claimant’s affidavit in support of her claim with exhibits:

1. The Indenture agreement gifting the subject lands to the 3 brothers from their parents
2. Certificate of Title for Volume 1111 Folio 163
3. Certificate of Title for Volume 1111 Folio 165
4. Certificate of Title for Volume 1497 Folio 312
5. Miscellaneous Vesting Instrument

6. Certificate of Title for Volume 483 Folio 72, representing property owned by Waldie Gentles in Duncans, Trelawny as an undertaking to damages in respect of the grant of injunction.

[10] The Bundle also contained Affidavits of Delroy Anderson, Desmond Leaky and Wilmot Smith, speaking to *inter alia*, their personal acquaintance with Waldie Gentles, the agreement regarding the Land Lease arrangement, as well as their knowledge of him to have been visually impaired from some time in the 1970s.

[11] There is also the Supplemental Affidavit of the Claimant to which she Exhibits a report from handwriting expert, George Dixon, Assistant Superintendent of Police of the Question Document Section of the Jamaica Constabulary Force, in which he opined that the handwriting on the Agreement for Sale was not that of Waldie Gentles, though noting “it is my recommendation that the Original Questioned Document and more known be made available for viewing.”

[12] All the above is averred to in the Claimant’s Affidavits as filed on February 10, April 21, and June 3, 2022.

The Claimant’s Submissions

[13] The Claimant’s submissions in support of the application for Injunctive Relief were filed on May 6, 2022 and further submissions filed on June 6, 2022. These were substantially expounded upon in the court hearing by Attorney-at-Law, Gillian Mullings.

[14] The Claimant placed reliance on Rule 17.1(a) of the Civil Procedure Rules as well as **American Cyanamid Co v Ethicon [1975] All ER 504**. The former she says gives the court the power to grant interim remedies, including an interim injunction. The latter sets out the “fundamental considerations” for granting an injunction as:

- i. Whether there is a serious issue to be tried
- ii. Whether damages would be an adequate remedy, and

iii. Whether the balance of convenience lies in favour of granting an injunction

[15] In deciding whether (i) above applies, the Claimant said that as per **American Cyanamid** what should be decided is whether the case was “strong” or “merely arguable”. To bolster their argument that the case is a strong one, they contend that the signature on the agreement for sale is not that of Waldie Gentles, and that there were dishonest representations in the vesting agreement that the representatives of the proprietors were *inter alia* dead or could not be found; that the entire consideration had been paid and that the 1st Defendants had taken possession and the vendors had acquiesced to them doing so.

[16] This they said raised the issue of fraud, constitutionality and whether the vesting order should be revoked or declared a nullity. As such the 1st Defendant should be restrained from using the property until those issues were adequately adjudicated upon.

[17] In looking at *Damages as an Adequate Remedy* as per (ii) above, the Claimant referred to **National Commercial Bank v Olint [2009] UKPC 16**.

*As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd [1975] 1 ALL ER 504**, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

[18] The Claimant submitted that damages would be inadequate as, *inter alia*, the property is of great sentimental value to the Claimant Estate and it was needed for the benefit of said estate and that of his siblings. Additionally, the Claimant has also put its cross-undertaking of another property should the case not go in their

favour. This is the land at Volume 483 Folio 72 owned by Waldie Gentles in Duncans, Trelawny which the Claimant says is valued at approximately one million United States dollars, as per the value of similar property in the vicinity.

- [19]** On the question of *The Balance of Convenience*, (per (iii) above), the Claimant said that in light of actual possession and control of the subject lands still being in them, the Defendants' "use/assertion of his title ... will not cause irremediable harm." Also, the award of an injunction would not be prejudicial to the Defendants, due to the sentimentality and cross-undertaking already mentioned.
- [20]** In the Further Submissions filed on June 8, 2022, the Claimant said that in addition to the triable issues of negligence and fraud, there was also that of due process. She claims that the Survey to facilitate the transfer of land, was improperly obtained as the requirement to contact occupants and neighbours was not fulfilled as per the Land Surveyors Act. "This may very well affect the validity of the Sale Agreement as well as the subsequent vesting application." (paragraph 7).
- [21]** She further questioned the "purported" issue of land bonds to the value of \$243,000 as consideration – bonds which they have never seen. They also stated that the absence of the Grant of Probate from documents exhibited, did not invalidate her bringing this action. The Claimant continues to pay the taxes, Waldie is buried on the land and the beneficiaries and their leaseholds still occupy the lands.
- [22]** There was, she contends, no evidence of efforts made to find the representatives of the brothers' estates.
- [23]** In court, Miss Mullings added that her client feared that the Defendants had set about to sell the lands, thus the urgent need for an injunction until the substantive issues can be tried.

The Defendants' Submissions

[24] These were filed on May 18, 2022 in opposition to the application to the injunctive relief among other things. The portions relevant to this application started at paragraph 25 of those submissions where Miss Kristen Fletcher for the Defendants, asserted that there was no fraud. She referred to **Thomas Anderson v Monica Wan [2020] JMCA Civ 41** and section 70 of the Registration of Titles Act (RTA), noting that "fraud must be actual fraud. Dishonesty of some kind." She quoted further from paragraphs 38 and 39 of said judgement which said (as per the submissions):

"A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

[25] With respect to the 1st Defendant, the Commissioner of Lands, it was contended that there was no fraud as an agreement was entered into with the brothers to purchase the lands, pursuant to Cabinet decision 10/76 dated March 1, 1976 for \$378,000.00. The brothers were then represented by Attorney-at-Law Captain Allan Douglas. The land was surveyed and found to be less than that initially agreed and so the payment sum was reduced to \$321,000.00 by cheques and land bonds. Also the Certificate of Possession was signed by Waldie Gentles as vendor, the 1st Defendant as purchaser, as well as witnesses and stood as evidence of the handing over of the land.

[26] The Defendants contend that the vesting of the land was valid, as 20 years had passed since the agreement for sale was signed and the transfer had not been effected. That was not a dishonest act on the part of the 1st Defendant. There being no fraud, the Commissioner is entitled to enjoy unrestricted rights of ownership and possession over the subject lands.

[27] With respect to the 2nd Defendants, The Registrar of Titles, section 160 of the Registration of Titles Act (RTA) was referenced:

The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or proceeding, for or in respect of any act or matter bona fide done or omitted to be done in the exercise or supposed exercise of the powers of this Act.

- [28] The submissions referred to **Registrar of Titles v Milfitz Limited and Keith Duncan Reid SCCA No 9 of 2003** as the authority which clarifies the circumstances in which liability against the 2nd Defendant could arise. The affidavit of Cherieese Walcott, CEO of the National Lands Agency/Commissioner of Lands filed on May 17, 2022 stated that the representation of the 2nd Defendant that the land was acquired under the Land Acquisition Act and that \$378,000 was paid to the vendors, was an error but not a material discrepancy as by S 160 of the RTA, no liability can be ascribed to the Registrar in the circumstances.
- [29] The property was thereafter vested in the 1st Defendant (2015) after the 2nd Defendant was satisfied that the application was properly made as per S155 of the RTA.
- [30] With respect to the claim for constitutional breach, the Defendants submitted that the Claimant was never the registered owner and that the land was not compulsorily acquired, as she claimed.
- [31] They also relied on the cases of **American Cyanamid** and **National Commercial Bank v Olint** and content from those principles, there is no serious issue to be tried.
- [32] With respect to the fraud alleged, they submitted that:
1. There was no medical evidence that Waldie was “blind”
 2. The brothers were represented by an Attorney at the material time
 3. The report of the handwriting expert is unhelpful and cannot be relied upon.

[33] It is their assertion that damages would be an adequate remedy in this case and that “the balance of convenience lies in refusing the grant of an injunction.”

[34] Miss Fletcher made further oral submissions stating that the full purchase price was paid and even more than should have been paid. She also said that the requirements of S 155 of the RTA had been met, as there was no need to satisfy **all** the elements. She said the fraud which needs to be proved is that the 1st Defendant was aware that Waldie had not signed the documents and that had not been done.

Response

[35] Miss Mullings’ response substantially was that ALL the requirements of S155 had to be satisfied and this was not done in the instant case.

LAW AND ANALYSIS

[36] The relevant authorities have already been referred to by both Counsel in the matter. As such, the court will consider each element of those stated.

WHETHER THERE IS A SERIOUS ISSUE TO BE TRIED

[37] The parties have opposing views on this issue.

[38] Section 70 of the Registration of Titles Act states that:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title...

[39] The Claimant alleges fraud when she states that Waldie was blind in the 1970s and incapable of having signed the instrument of transfer. She further alleges that

when the survey was being done to complete the transfer, neither the occupants or neighbours were served with notices as required under the Land Surveyor's Act.

[40] While this court agrees that there is no medical evidence in proof of Waldie's blindness/visual impairment, that defect may very well be cured before the matter comes to trial.

[41] However, Section 27(1) of the Land Surveyor's Act states:

No surveyor shall enter upon any land for the purpose of surveying it until the owners or occupiers of all adjoining lands which may be affected by the survey have been served, in the prescribed manner, not less than ten days prior to the date of such entry with a notice of survey, in the prescribed form

[42] There is no distinction in the Act between Surveyors from the Commissioner of Lands, an agent of the state, and any other Surveyor. The law applies to all. The Defendants have raised no argument as to whether Notices were served – even if such were not brought to the attention of the Claimant herself.

[43] But the Defendants say there is no fraud. Further to that enunciated in their submissions above, it is prudent to refer to paragraph 39 of the **Thomas Anderson** judgement (supra).

*Fraud in this context therefore connotes dishonesty of some kind. Lord Buckmaster made the same point in **Waimiha Sawmilling Company Ltd (In Liquidation) v Waione Timber Co Ltd [1926] AC 101, 106**, another decision of the Privy Council on appeal from New Zealand*

*“If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear ... **each case must depend upon its own circumstances**. The act must be dishonest ...” (emphasis added)*

[44] The Defendants also looked to Section 155 of the RTA. It states:

If the Registrar is satisfied upon production to him of sufficient evidence –

- (a) that land under the operation of this Act has been sold by the registered proprietor thereof; and
- (b) (b) that the whole of the purchase money has been paid, and
- (c) (c) that by virtue of such sale the purchaser or any person claiming through him has entered upon the land and taken possession thereof and the vendor or his representative has acquiesced in such entry and taking of possession; and
- (d) that the land cannot be transferred to the purchaser or any person claiming through him either because the registered proprietor or his representative is dead or absent from Jamaica or cannot be found or because it is, for any other reason, impracticable to obtain the signature of the registered proprietor or his representative within a reasonable time,

the Registrar may in his discretion make a vesting instrument in the prescribed form and shall thereafter enter a memorandum thereof in the Register Book and issue a new certificate of title and the duplicate thereof in the name of the person in whom the instrument vests the land and that person shall become the transferee and the registered proprietor thereof.

[45] This sets out four (4) criteria which must be met, they being conjunctive. The Defendant says not necessarily all need be met, but that view runs *contra* to the stated law.

[46] The Claimant says herself and the representatives of the Estate could indeed be found, plus there is no evidence or proof that any attempts were ever made to find them, as required per S 155 (d).

[47] That, plus the alleged non-issue of Notices by the Surveyors, brings the Defendants' actions into question. It is disingenuous of them to use a vesting instrument to effect transfer so many years after they claim the land had been sold, without reference to the estate of the vendors. Had the Claimant been aware of

this purported sale, there may well have been no need to proceed to have the estate Probated – particularly with respect to the subject property.

WHETHER DAMAGES IS AN ADEQUATE REMEDY

[48] The Defendants submitted under this head, that damages would indeed be an adequate remedy as the Claimant asserts that Waldie had been paid less than agreed.

[49] The Claimant looked to the **National Commercial Bank** (supra) case, in which Lord Hoffmann said in relation to interlocutory injunctions:

*‘The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd [1975] AC 396**, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

[50] A cross-undertaking has already been made by the Claimant, of another property “to provide the 1st defendant with a sense of security should he find favour with the court at the end of the adjudication of the issues.” (Paragraph 14 of submissions filed May 6, 2022). The Defendants have raised no opposition to this being adequate security.

[51] The Claimant also speaks to the sentimental value of the property spanning eleven generations, particularly those portions with Waldie's grave as well as the dwelling house(s).

[52] It would therefore be fair to say that damages would not be an adequate remedy to the Claimant in the circumstances.

THE BALANCE OF CONVENIENCE

[53] Here the Defendants says the court has no basis upon which the court could exercise its discretion to grant an injunction at this time. They looked at the delay of the Claimant in bringing the case, since she was aware of the transfer in 2015.

[54] The Claimant reiterated the points raised under the two preceding heads.

[55] Lord Diplock said in the **American Cyanamid** case at 408:

'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

[56] That statement highlights the difficult question the court faces at this stage in the process and the fact that the 'Balance of Convenience' is really dependent on the two previously discussed heads: Damages *and* Serious Triable Issues.

Conclusion and Orders

[57] From the Claim, Particulars and subsequent submissions made on behalf of the Claimant, even with the valiant efforts at opposition and Defence from the Defendants, the Court is of the view that there are indeed serious issues to be tried between the parties. It is also the view of this Court that damages would be an insufficient remedy to the Claimant.

[58] As such, the court grants the order as per the Application for Court Orders filed on February 10, 2021:

1. An injunction to restrain the 1st and 2nd Defendants until the trial of this matter or further Order in the meantime, whether by themselves or their servants and/or agents or otherwise from selling, mortgaging, pledging, assigning or dealing in any way howsoever with all that parcel of land part of Hampstead in the parish of Trelawny and being the land comprised in the Certificate of Title registered at Volume 1497 Folio 312 in the Register Book of Titles.
2. Cost to the Applicant to be taxed if not agreed.
3. Leave to Appeal granted to the Defendants.
4. Case Management Conference is set for January 19, 2023 at 2:00 p.m. for 1 hour.
5. Parties are to attend and complete mediation by November 30, 2022.
6. Claimant's Attorney-at-Law is to prepare, file and serve these orders.