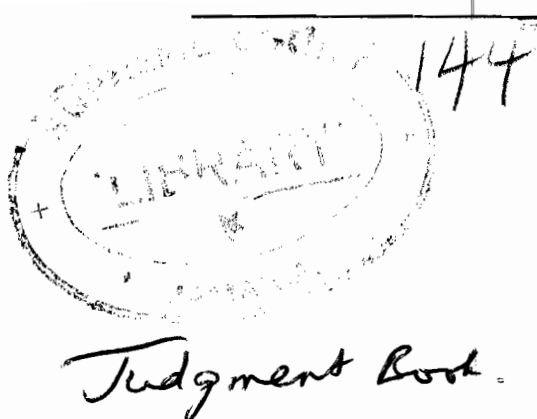




IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. E187/1981

BETWEEN ESMENA MORRIS PLAINTIFF

A N D GEORGE WHITE DEFENDANT

H. Haughton-Gayle for the Plaintiff.

N. Samuels for the Defendant.

Hearing on: 4th - 6th July, 1983; 18th - 21st October, 1983

Delivered on: 12th March, 1984

JUDGMENT

Bingham J:

The plaintiff's Claim and the defendant's Defence and Counter-Claim in this matter arose out of an oral agreement made between the parties during the month of September 1976 concerning a parcel of land situated at Treadways in the parish of Saint Catherine.

The land in question is part of a larger parcel of land in respect of which the defendant is the registered fee simple owner, being registered at Volume 501 Folio 20 of the Register Book of Titles.

That there was an oral agreement between the parties with respect to a portion of these lands, whereby the plaintiff was put into possession by the defendant is not in dispute; what is disputed is:-

- (i) The subject matter of the agreement.
- (ii) The size of the land.

The Pleadings

From the amended Statement of Claim, the plaintiff is contending that there was an outright sale of two squares of land at a purchase price of Sixty Dollars, the lands being bounded as follows:-

North by the defendant's land (boundary line approximately 95 feet).

South by Doc Dixon's land (boundary line approximately 95 feet).

East by the Bermaddy Parish Council road (boundary line approximately 121 feet).

West by a gully (boundary line approximately 121 feet).

Following the plaintiff being put into possession of the land in September 1976, she proceeded to construct a three bedroom block and steel house on the land. These premises were completed in November 1977.

Following the completion of the house the relationship between the families of the plaintiff and the defendant became somewhat strained.

In early 1979 the defendant's goats were tied at a spot which caused them to come over into a portion of the land which the plaintiff was up to then occupying and some crops which the plaintiff had planted were damaged. This incident triggered off certain court proceedings in which the plaintiff brought an action against the defendant for cattle trespassing. This action was tried at the Linstead Court. The plaintiff lost the case.

The defendant then sought to reassert his claim as owner to the entire property and set about doing so by seeking to confine the plaintiff to the mere occupation of the house by planting growing stakes to three sides of the plaintiff's house, that is, to the northern, southern and western boundaries of the said lands.

The plaintiff's claim for relief is of a threefold nature:-

1. Specific performance and damages for breach of contract.
2. In the alternative for damages for breach of contract.
3. A declaration that the plaintiff is the owner of the two squares of land in dispute.

The defendant in the Defence and Counter Claim alleged that the agreement in question was a lease of approximately one square of land and further contended that the plaintiff was given permission to construct a temporary building on the land. According to the defendant the boundaries of the land were:-

North by adjoining land part of the defendant's property registered and situated as aforesaid.

South by adjoining land owned by the defendant.

East by a Parish Council road leading from Treadways to Bermaddy in the parish of Saint Catherine.

West by adjoining lands owned by the defendant.

The defendant contends that the dimensions of the land is 84ft long x 86ft wide.

It is further alleged by the defendant that the land was pegged around by growing stakes at the time the plaintiff was put into possession.

At paragraph 11 of the Defence and Counter Claim it is further alleged that:

"In October 1976 an improvised room was constructed on the small portion of land and the plaintiff took up residence therein."
(Underlining mine)

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At paragraph 12 of the said Defence and Counter Claim it is further contended that:

"Despite the protestations of the defendant, the plaintiff continued to enlarge the said building and refused to quit and deliver up possession of the small portion of land to the defendant."

At paragraph 13 defendant alleged that he attempted to get the plaintiff to execute a formal lease when the building was completed. She refused to sign any such document.

The Defence and Counter Claim ends with a prayer for:-

1. Recovery of possession of the land now in possession of the plaintiff.
2. In the alternative for a declaration that the subject matter of the agreement was a lease.
3. An Injunction restraining the plaintiff from going unto the land outside the staked area.

The Issues

From pleadings the following were the issues which emerged for determination:-

1. Was the agreement one of a sale or a lease?
2. Irrespective as to the subject matter what was the size of the land?

Having regard to the pleadings and the evidence which subsequently emerged at the trial from the mouth of the defendant it may be convenient at this stage to make a few comments insofar as they touch on the pleadings. It is to be observed that in paragraphs 8 and 11 of the Defence and Counter Claim the defendant sought to allege the granting by him to the plaintiff of an oral

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lease to "allow her to erect a temporary building and further of the erection in October 1976 of an improvised room. This gave one the distinct impression that the defendant was alleging from the pleading in the Defence that the structure for which permission was given to the plaintiff to construct was one which was not when erected to last for any reasonable length of time. When the defendant came to give evidence, however, the nature of his case had now altered to an account in which he admitted giving permission to the plaintiff to construct a one bedroom block and steel building a structure far removed from that which is contended in paragraphs 8 and 11 of the Defence and Counter Claim.

The Evidence

It was common ground and not in dispute that the plaintiff and the defendant were known to each other for ~~many~~ years and that this relationship went back to when the defendant was a boy growing up in the same district in which the plaintiff then lived.

The plaintiff who is now well past her middle age knew the defendant's mother well. From the evidence of both the plaintiff and the defendant the two families were very closely knit. The plaintiff then lived at Treadways where she remained until she left the district to reside in Kingston where she eventually got married.

When the plaintiff's father died in the early 1960's the plaintiff inherited the said property which she later sold to the defendant. The entire parcel of land consisted of some $3\frac{1}{4}$ acres.

The plaintiff who is an Informal Commercial Vendor (a higgler) by trade of many years standing in the Linstead Market, continued to visit the area in question from time to time and sold her produce weekly in the Linstead Market.

When the violence which was characteristic of the 1976 General Election campaign erupted in January 1976 the plaintiff's home was set on fire causing her to have to vacate these premises taking along her personal effects which included her furniture which were saved. The plaintiff sought refuge in the Banbury Church in Saint Catherine.

It was in answer to her need for accommodation that the defendant answered her call and the agreement to put her into possession of a portion of the said land that she had originally sold the defendant came about.

The plaintiff stated that although she was uncomfortable being in the Church she did not readily accept the defendant's offer to "give her back a portion of the land to allow her to build a house." This was because she had sold off all the lands which she had owned to the defendant and was not anxious to move back to the area. She sought therefore, to acquire lands elsewhere in the parish of Saint Catherine without any success. It was after her efforts in this area proved futile that she sought to take up the defendant's offer. She was not prepared, however, to accept the land as a gift. She was determined to pay for it.

Following a meeting between the plaintiff and the defendant at the Linstead Market on a Saturday in September 1976, the plaintiff along with her nephew, one Bertie Graham, went to the defendant's home at Bermaddy, Treadways

the following day and the defendant pointed out the section which he was prepared to sell her and the respective boundaries.

Following this, plans were made by the plaintiff to commence building a house. The defendant offered her a plan and the services of one Taffe to construct the house. Her "son-in-law" George Sutherland dissuaded her from this course for as he was of the view that the house could be built for a lesser sum. Following upon this, materials were delivered on the site. They were received by the defendant and his wife and some were actually stored with their permission at the defendant's home. The plaintiff was during this period still in residence at Banbury Church.

The ground work was then laid out at the building site for the construction of a three-bedroom house by the digging of a foundation and the lining out of the house.

Among the materials delivered at the site were steel and concrete blocks.

At first two-bedrooms and a bathroom were completed. The plaintiff then moved in but as the house had no ceiling the plaintiff caught a cold and had to move back to the Church. The building of the house then continued and the ceiling was done and after a few months the plaintiff moved back into the house.

The building in its present state was eventually completed in November 1977.

The Defendant's Case

Far from the generous offer which the plaintiff has stated the defendant made to her when she was in her distressed condition in January 1976, he is saying that he told the plaintiff from the outset that he could not sell her any land. He further states that the plaintiff kept on begging and pleading with

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him for somewhere to build a temporary shelter because of the misfortunes which she was encountering at the Church where she was staying. Her personal belongings were being stolen. It was on this account that he finally gave in to her entreaties and decided to lease her a small portion of his land to build a temporary one room house. When he saw the large amount of materials which included steel and concrete blocks he asked her why she had ordered so much materials and was told that some of the materials were belonging to her nephew, Bertie Graham, who was going to build a house on lands which he had in the same district. When he saw the house getting bigger and bigger he went down to the site to protest to the plaintiff and he was threatened by the workers that if he came back there to molest them they would use M16s to kill off his entire family. He became afraid and did nothing further.

Evaluation and Assessment of the Evidence

When both accounts are examined it is clear that the defendant has not been a frank and truthful witness. Although it is alleged in the Defence and Counter Claim at paragraphs 8 and 11 that permission was given to the plaintiff to construct a temporary house his account at the trial had by then altered to be one in which he had now given the plaintiff permission to build a one room block and steel house which he offered to purchase from her when she removed from the area. This change in the defendant's position can be seen as no doubt due to the fact that realising that his admitted conduct in receiving materials such as concrete blocks and steel on behalf of the plaintiff not only tended to show that he was offering moral assistance and encouragement to her but also that this went towards establishing that he knew or ought to have known from the

outset of the type of structure which was to be constructed. His evidence at the trial can therefore be seen as being in direct conflict having regard to his allegations in the pleadings.

Whereas he has testified that he protested when the house was getting larger than the one bedroom to which his consent had been given; he merely alleged in the pleadings at paragraph 13 of the Defence and Counter Claim that it was after the completion of the house when he went to see the plaintiff about the execution of a formal lease and that she abused him. There was no such allegation of threats being issued to him in response to his protestations. One is therefore lead to ask the question why? The answer is not far off. This I see as another ploy being used by the defence to what is in effect a strong inference to be drawn from the facts based on his own account on the pleadings that he stood idly by and watched the plaintiff's house being constructed and that far from protesting he gave encouragement to her actions in this regard.

It is for this reason at the trial when faced with the obvious question as to why he stood idly by and allowed this large house to be constructed on his land against his wishes and without his permission and did nothing his account was now changed to one of threats being issued to him by the workers on the site; threats which he took so seriously as to refrain from making even one report to the police.

The defendant admitted that although the building went up fast he passed the site at least twice each working day.

The weight of the evidence points to the fact that far from being afraid because of threats issued to him by the workers the defendant was not put in any

fear and was the one more bent on aggression. There is the incident in which he chased George Sutherland off a section of the land while Sutherland was billing it. There is also more serious incident in which he wounded Sutherland with a machete. Conduct of such a nature on his part does not strike me as that of a person who allowed himself to be threatened into a passive submission while the house was allowed to be extended against his wishes to its present state. What the weight of the evidence suggests is a defendant who by his conduct gave at least moral encouragement and support to the plaintiff in the building of her house. He received most of the materials delivered on the site, as well as storing some at his home. He watched the building as it progressed from the foundation stages and taking shape until completion as he passed day by day going to and coming from work. There is no evidence of any bitter episodes or confrontation between the parties during the construction and for some long time following the completion of the house.

The pleadings therefore as to the allegation that the defendant protested when the one room was being extended can be seen as being too vague to say the least as there is nothing alleged in the pleadings or on the evidences as to what form these protests took. It may, therefore, be reasonable to conclude that no such evidence was lead because there was never any such incident.

The plaintiff's account on the other hand was frank and straightforward. Her conduct following the goat case shows how truthful a witness she undoubtedly is. She admits that as a result of loosing the case she felt that she has lost the land outside the staked area. When the evidence is examined, however, it is

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clear that the size of the land was in fact the area as stated by the plaintiff and that the grown stakes were not in fact planted until after the goat case in 1979. In April 1979 the plaintiff was served by the defendant with a notice seeking to confine her to the land within the staked area.

As there was no evidence of any incident of significance following the completion of the house in November 1977 and certainly up to the goat incident in early 1979 it is inconceivable to believe that had the defendant's account of the stakes having been planted around three sides of the land from in September 1976 when the land was pointed to the plaintiff, that the plaintiff could have sought in the face of all this to allege a trespass against the defendant in relation to the area of land outside the stakes. Grown stakes being planted to mark out boundaries between adjoining land owners in the rural parts is a well-known and established practice in Jamaica and part of the customary law of this country. This fact would also have been known to the plaintiff who grew up in that area where the land was situated.

The incident in early January 1979 when the defendant's goats were tied in such a manner as to allow them to go over into the section of the land which the plaintiff was up to then in undisturbed occupation of, was done in all probability to harass the plaintiff and when the Cattle Trespass case failed then the events of April 1979, in which the notice was served on the plaintiff seeking to confine her to the area staked in the morning of the same day; this can be seen as a positive attempt by the defendant to further embarrass the plaintiff with a view to eventually driving her off the land.

It is also of material significance that the defendant has not sought to offer to pay any compensation for the house even to the extent that he claimed he permitted the construction of a one room block and steel house. As there is a claim for recovery of possession of the land now in occupation of the plaintiff, it seems therefore that Mr. Gayle's observation is correct when he submitted that what the defendant is really after is the acquisition of the plaintiff's house. As he has not proffered any compensation it seems further that he wishes to have it free, gratis and for nothing.

Conclusions

On the evidence there can be little doubt that whichever version is accepted as to the subject matter of the agreement entered into, that is, whether it was a sale or a lease, an equity clearly arises in favour of the plaintiff.

On the plaintiff's own ^{account} which is supported by the testimony of both Reuben Graham and George Sutherland the fact that the agreement was oral would not ipso facto make it unenforceable by virtue of section 4 of the Statute of Frauds as there is ample evidence capable of amounting to acts of part performance, by the entry of the plaintiff into possession of the land and the expenditure of a considerable sum of money in erecting what is on the evidence a substantial building. These acts of part performance are sufficient to take the case out of the provisions of the Statute.

I find as a fact that there was an oral agreement for the sale of two squares of land as on the evidence it is highly improbable that had the agreement being a lease as the defendant contended, a lease of what on the evidence was

still a period of uncertain duration, that the plaintiff, a woman of mature age and some experience would have taken the risk of expending such a large sum amounting to \$40,000 to construct a house, which on the defendant's evidence is likely to last for at least sixty years. Her conduct therefore, is consistent with that of an absolute owner and that which one would expect from someone who had an interest in land nor merely of a certain duration but of some degree of performance.

If I am wrong in so finding that there was a sale then there is still the question of how the equity which clearly arises may best be satisfied and in my view it could only be done by:

- (i) The execution of a formal lease in the plaintiff's favour for 99 years at a fair rental with;
- (ii) A proviso for compensation to be paid to the plaintiff's successors in title based on the market value of the house at the expiration of the said term.

The Law

There were a number of submissions made and a multitude of authorities cited by Mr. Samuels seeking to establish a failure on the plaintiff's part to prove that there was an agreement. In short what he contends is that before the question of enforceability of the oral contract can be considered it has first to be established that there was a contract, either to sell or lease lands. I hope I have done justice to the way in which the argument was put. As such an issue does not arise on the pleadings I do not propose to comment or to make any further reference either to the submissions or the authorities referred to

as I find that Mr. Samuels seemed to have been labouring under a misconception as to what is the true purpose of pleadings. Suffice it to say that they were not supportive of any of the issues which arose on the pleadings.

What is abundantly clear from the authorities which do not in my view need mentioning, is merely to restate the principle which I have already enunciated as to the equitable doctrine of part performance stepping in and coming to aid the wronged party in seeking to do justice between the parties.

See Kingswood Estate Co. Ltd. vs Anderson /1963/ 2 Q.B. 169.

The defendant having on the facts in my view encouraged the plaintiff by his conduct on the faith of a promise to transfer the fee simple in a portion of his land to her thereby causing her to expend money in construction of the house, he is in my opinion estopped from insisting on his strict legal rights by seeking to recover possession of the said land. Where necessary a Court will also order specific performance of the oral agreement. See Dillwyn vs Llewellyn /1862/ 4 DEF & J 517, Chaproniere vs Lambert 1917 2 C.L. 356.

The cases cited by Mr. Haughton-Gayle were all supportive of the contention that the effect of the factual circumstances as I have found them to be is that an equity now fastens unto the fee simple of the whole estate which is vested in the defendant until he discharges his obligation under the agreement between the plaintiff and himself, that is, does equity. On the facts, therefore, as I have found, however, I am in complete agreement with the observations of Mr. Haughton-Gayle that as the evidence is overwhelmingly in favour of the existence of an agreement for a sale of two squares of land the equity is best

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satisfied by ordering a transfer of the fee simple ^{of the} parcel of land in question to the plaintiff.

Judgment accordingly for plaintiff for:

1. Declaration as prayed
2. Specific performance
3. Costs to the plaintiff to be taxed if not agreed.

J.