



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 3144

BETWEEN	SYDNEY THOMAS	CLAIMANT
AND	JOSEPHINE THOMAS	DEFENDANT

Miss Judith Clarke and Miss Audrey Clarke instructed by Judith Clarke and Company for the Claimant.

Mrs. Antonnette Haughton-Cardenas and Mr. Terrence Ballyntine instructed by Haughton & Associates for the Defendant.

**Limitation of Action-Possession of Title-Land brought under the Registration of Titles Act-Sections 68 & 70 Registration of Titles Act-Whether Fraud established-Meaning of Fraud**

Heard: March 4, 5, 6, 9, 10, 11, 2009; April 27 & 28, 2009; November 9, 2009 & September 14, 2011

THOMPSON-JAMES, J

**Introduction**

The Claimant Sydney Thomas and the Defendant Josephine Thomas are children of Loretta Thomas. Their paternal grandmother was Irene Thomas.

Shorn of the multiple side issues raised by both sides and in reasonably simple terms, the Claimant Sydney Thomas contends that late 1970's to early 1980's he was put in possession of 2 acres of land at Mt. Plymouth by his uncle Clifford Williams and his cousins Cynthia and Hubert Williams. It is common ground that this land was owned by Irene Thomas.

Irene was the mother of Joscelyn Thomas. Joscelyn Thomas married Loretta Thomas. Irene was also the mother of Lucille Williams. Lucille Williams married Clifford Williams. They produced Cynthia and Hubert Williams. Sydney married a lady living in Elgin. She died in 1986. He contends that he used to go between Elgin and Mt. Plymouth, asserting that his wife had to take care of her father who was not well. Within days of her death he relocated with his children to the house in Mt. Plymouth. On a section of the land that he occupies was a one room dirt house that he converted to a walled house.

He lived there continuously from the late 1970's to early 1980's in quiet undisturbed possession until the year 2004 when Josephine informed him that she was now the registered owner of the entire 12 acres of which his 2 acres formed a part.

Josephine Thomas on the other hand contends that in 1988 she purchased the entire 12 acres from her mother Loretta Thomas.

Prior to 1992 Sydney lived in Elgin with his family. In 1992 Sydney moved into his mother's house at Mt. Plymouth on lands near to the 12 acres. When she purchased the 12 acres there was a house on it which she refurbished. She calls this her house. In 1996 in order to facilitate her children's access to education she relocated to Mandeville. Thereafter, Sydney took possession of this house without her consent and has continued to occupy despite her objections. On numerous occasions she has given him notice to vacate. He has refused to budge.

December 29, 2003 she became the registered owner of the 12 acres. She sued in the Resident Magistrate's Court for recovery of possession. Arising out of this action Sydney countersued and the matter was transferred to the Supreme Court (this suit).

For clarity the parties first names are used and this does not of course convey any disrespect.

### **The Claim**

The Claimant Sydney Thomas claims against the Defendant amongst other reliefs;

- 1) A declaration that the certificate of title registered at volume 1367 folio 697 in the name of the Defendant Josephine Thomas was obtained by fraud.
- 2) An order that the said certificate of title be cancelled.
- 3) That the Defendant has no legal or equitable interest in the land registered at volume 1367 folio 697.
- 4) That the Claimant has an equitable interest in the said property in that the Claimant is the equitable owner in possession of 2 acres of the said land which he occupies and on which he has constructed a house.
- 5) That the Claimant is hereby permitted and authorized to obtain a survey to establish the boundaries of his said portion.
- 6) Inter alia that the Defendant, her servants and/or agents are hereby restrained from interfering with the Claimant's right to possession and a

declaration that the Claimant is the equitable owner of the said property (2 acres).

Along with this claim form is filed a further amended Particulars of claim outlining the Particulars of the Defendant's fraudulent representation.

### **The Defence and Counterclaim**

The Defendant in response filed a further amended defence outlining amongst others:

- (i) That she is the registered proprietor of the said land registered at volume 1367 folio 697 and is entitled to possession by virtue of section 68 of the Registrations of Title Act.
- (ii) That the Claimant entered on to her land in 1996 without her consent.
- (iii) Denying that any portion of the land is situated at Plymouth District.
- (iv) The Defendant denies the "Particulars of the Defendant's Fraudulent Representation."

And counterclaimed for:

- (1) Special damages in the sum of \$1,543,265.00 for (a) value of trees destroyed; (b) loss of income for the period March 2004 to December 20, 2005 and continuing and value of fencing destroyed.

At the outset I must point out that the claim for these special damages must fail as they were not proven.

The Defendant further claims for possession of the said land registered at volume 1367 folio 697 of the Registrar Book of Titles.

2. An injunction restraining the Claimant by himself, his servants or agents from exercising rights of ownership over the land and preventing the Defendant from enjoying the said land.

3 Damages and (4) aggravated damages for trespass.

### **The Claimant's Account**

Stripped of all side issues, in brief **Mr. Sydney Thomas** testifies that late 1970's to early 1980's he was put in possession of 2 acres of land on which he lives at Mt. Plymouth by his first cousins Cynthia and Hubert Williams as well as his uncle Clifford. This 2 acres is a portion of 12 acres. His portion is separated from the remainder by a stone wall.

When he first knew the land it was owned by his grandmother Irene Thomas. At that time his parents were living on another piece of land located to the back of the 12 acres.

When Irene died he and his brother Basil were living in Kingston. They lived in Kingston between 1965 and 1982. Basil did not live on the disputed land. Basil never took care of the disputed land when he (Sydney) went on the land in the 1970s. On the section he was given to occupy was a one-room house which belonged to Easton Thomas. He broke down this and started to construct a walled house, comprising four (4) bedrooms, one (1) bathroom and kitchen along with an outside kitchen, two (2) outside toilets and a water tank. This took him 8 years to construct. At this time he had a wife living at Elgin. He would go and come to the house he was building.

His wife lived at Elgin as she had to take care of her father who was not well.

His wife died in 1986 and he took his 6 children to live with him at Mt. Plymouth. From the time he went on the land in 1975 he farmed the land.

There were about 6 houses on the 12 acres as far as he can recall. His 87 year old aunt-in-law lives with her son Clarence in one of them. Peter Myers built a concrete house on the land. Josephine has never lived on the land.

In 2004 he discovered that a title was issued in 2003 in Josephine's name. The said year (2004) that Josephine sued him for damages to the land. He had cut trees from his yard to burn. His light was disconnected as a result, he was informed, of Josephine claiming the land.

The land he lives on is not near to the adjoining District of Prosper.

He lays claim to the 2 acres due to his occupation since the late 1970's to early 1980's. Since he commenced occupation he has paid rent to no one, no one has disturbed him, no one has made any claim to the section he occupies. He was first disturbed when Josephine took him to court (2004). He has occupied since Josephine was a child.

Loretta has never owned the land neither has she disturbed or molested him on the land. Before 1988 he had never seen her come on the land as if she owned it. She only passes through the track to go to her land.

Josephine lied when she declared that she was in quiet and continuous possession between 1988 to 2001. She did not do anything on the land. She never lived on the land.

She did no livestock farming or cultivate the land during the period 1988 - 2001. She lived all over the place. His aunt Lucille gave him permission to work on the land before he started building his house.

In 1996 he received no notice from Josephine to leave the land.

A surveyor came to survey the property on one occasion and he stopped the survey. He does not know the witness Dawn Campbell.

In **cross-examination** he testifies that he has no home at Elgin. He lived in his father-in-law's house there. Elgin is 9-10 miles from Mt. Plymouth.

He returned to live in his mother's house in 1992. Between 1992 - 1996 Josephine lived with her mother. She did not move into the house that he lived in.

He maintains that the relationship between him and Basil broke up in 2004 and he never received any notice to quit.

Darlene lived on the land as well as his sister Deloris.

The surveyor attended the property in 2004. He did not know that Josephine was claiming the property before she took him to court. He did not realize that she was claiming all the property.

He commenced his house in 1979 and completed it in 1993. He took his children to this house 3 - 4 days after his wife died.

He can identify seven houses on the property. The reference to his mother's house in his witness statement is not in relation to the house that he grew up in. It is in relation to the house at Hebad. His mother had 2 houses. Presently no one lives at Hebad.

The only land he knows his mother owns is at Breezy Hill. His mother told him. He was shown a will when he was placed on the land by the Williams'.

When his grandmother died Lucille Williams and Clifford Williams were right there. Lucille Williams did not live in Hebad. She lived on the said land. Clifford did not leave the land after a court case. He left the land in the 1980's to the 1990's.

He does not know about Basil losing his belongings in a fire. He did not curse his mother neither did he request land paper from her or burnt her documents and as a result she asked him to leave. He does not know about his grandmother Irene selling land to his mother.

There is a stone wall around his 2 acres. Josephine never occupy any house on the disputed land.

He never destroyed fruit trees on the property. At the time he commenced building the house he was not living in it. He was living between his wife's and his mother's house.

In brief **Miss Cynthia Williams** testifies that Sydney and Josephine are her first cousins. Her mother was Lucille Williams' sister to Joscelyn Thomas their father and her father was Clifford Williams. She grew up on the land. Her mother lived on the land until her death. She was buried on the land. Her mother left a will. After her grandmother died her mother remained on the property and continued to occupy it along with their father Clifford Williams and the children. Her father died in 1993. They lived nowhere else but on the land.



Loretta never lived on the land. She lived with her husband nearby on a 3 acre plot which he owned. Loretta still lives there. That is where Josephine was born. Basil (Loretta's son) lived there as well. Sydney used to work the land before her mother's death. He assisted in reaping crops and taking care of the land. After her mother's death, along with her father and brother Hubert, she gave Sydney 2 acres of land and told him to build a house. He commenced building his house on the site that Easton Thomas has an old house. She paid the taxes in Irene's name.

Prior to her mother's death there were three houses on the land. After her mother's death other persons build on the land, some were concrete structures. These persons occupied openly and continuously.

Of the 3 houses, Darlene occupied one. Her son Clarence still resides there. This house was destroyed in 2004.

Josephine has never lived on the land. She did nothing to show that she occupied the land or carried out activities on any portion of the land. In 2004 she discovered that Josephine had a title to the land in Prosper. She lodged a caveat against this title.

Prosper is a neighbouring District and does not even adjoin Mt. Plymouth. At the time Josephine obtained the title other persons were living on the land, including Sydney. (Death certificate of Clifford and Lucille Williams tendered and admitted as exhibit "1")

She did not ask Josephine's or Lucille's permission to bury her mother on the land as Loretta was still living on her 3 acres at this time.

In **cross-examination** she testifies that the reason for lodging a caveat is that she had received a letter from the Titles Office indicating Josephine's application for a title. She can't recall when this caveat was discharged. She instructed her attorney-at-law to file action against Josephine in the Supreme Court. She did not continue the action as she had no money. She is of the view that Sydney and herself are entitled to a portion of the land.

She does not know of Darlene relocating to the main 20 years ago.

She knew Josephine for the first time when the case between Sydney and Josephine came up in King Street.

She grew up in St. Elizabeth and left when she was 14 years old. Since then she would go back and forth. She knew Loretta from she was a little girl.

Presently there are 3 houses on the land, Sydney's, Darlene's and her grandmother's.

Sydney did not live in Elgin for long.

In the late 70's she lived in St. Elizabeth on her grandmother's land. Sydney was there from in the 60's. She does not know of Sydney moving into his mother's house in 1992. She does not know of Peter Myers building a house on the land.

It is not true that her family was raised in Mt. Hebad.

In brief **Nadine Thomas** testifies that Sydney is her father. Loretta is her grandmother. She has been living in a house built on the land at Mt. Plymouth since 1986. She came to Mt. Plymouth 4 days after her mother's death. At that time she was 12 years old. She has never lived anywhere else. Before this

her father would go and come visiting at their mother's. When she went to the house to live it was a dirt house that she remembered being there, her father built a 3 bedroom house.

She does not remember seeing Josephine or Loretta on the land. They did nothing on the land. They did not reap any crop on the land nor plant any trees.

No one molested her father as he planted his crops and took care of the land with their (the children) help. Things changed in 2004 when Josephine came on the land claiming that she had a title to it. Since then there has been a lot of war and misery.

There are other houses on the land including Hezekiah Williams', and Peter Myers'. Clarence lives in his mother Deloris' house. These houses were there in 2001. Her aunt Deloris had a house on the land. This was burnt down.

In 2004 along with her father and brothers she stopped a survey being done on the land. She does not know Dawn Campbell, has never seen her on the land.

In **cross-examination** she testifies that in 1992 her father lived in her grandmother's house. She does not know of any written notice that her father received from Josephine.

It is not true that before 1986 her father lived in Elgin. He used to come and go. It was to the disputed land that they returned after her mother's death.

She does not know of any dispute between her father and grandmother resulting in her father moving to the disputed land in 1996.

### The Defendant's Account

Again putting aside all side issues, in essence **Josephine Thomas** testifies that she is a livestock farmer. She was born and grew up on the land adjoining the disputed land. Her aunt Lucille lived with her husband Clifford on a separate piece of land called Hebad in Mt. Plymouth.

Her mother Lurretta granted Lucille's children the favour of burying their mother on the land.

In 1988 she purchased the disputed 12 acres of land from her mother for \$1.25m. On the land were 3 houses as well as lumber, pimento and fruit trees. After she purchased she lived undisturbed on the land for 4 years. She has been paying taxes on the land.

Sydney came to live with her mother in 1992. In 1996 she moved to Mandeville and learnt that Sydney had taken occupation of her house. She went to the land to speak with him. He threatened to kill her.

Since 2005 she has not visited her property for fear of her life.

She applied for a registered title to her land. She received a request for the death certificate of Irene Thomas from the titles office (exhibit 13i). She visited the office of Registrar of Birth and Death in Mandeville. She did not get one.

Sydney was not on the land in the 1970's. He did not "come and go". He lived in Hebad. She built the house that Sydney is occupying now. He moved there in 1996 not 1986. When Nadine Thomas testifies that she has not seen her on the land she is not speaking the truth. She still occupies the land. Her

livestock farm is there and she still reaps crop. The first time she left the District was in 1996.

She has not seen Cynthia Williams coming to the land to live.

She has a problem with the Mt. Plymouth Hebad address. The property is at Prosper which is below Mt. Plymouth.

She does not know of Easton Thomas' dirt house on the property.

She denied that she obtained the registered title by misleading, by lying to persons at the titles office.

She does not know what a common law title is. No one occupied the land.

In 1992 Sydney asked Luretta for the documents to the land. She refused to give him. He kicked down her door and burnt the documents. Lucille did not live on the land up until the time of her death.

In **cross-examination** she testifies that she grew up seeing her mother occupying the land. She does not remember the year Lucille Williams died.

When she purchased in 1988 there were 3 houses on the property. Her grandmother owned all 3 houses but she does not know who occupied them.

She paid her mother \$1.25m all at once but in 2001 she declared to the Registrar of Titles that the value of the land is \$250,000.00. While applying for title no valuation was done on the land. All that she got from her mother in relation to papers for the land was a receipt.

When Sydney came back in 1992 she was living with her mother. She cannot recall if when she purchased Darlene was occupying. All her life she operated a bar and did livestock farming.

Before she applied for the title she did not seek to get the land surveyed. Prior to 1996 and up to 2001 she had a quiet life on the land. Since Sydney came it is pure problems.

She lived in her mother's house up until 1992. Between 1988 and then she moved between both houses. When she purchased in 1988 there was a 3 bedroom dirt house. There is no upstairs there that she knows of.

Easton Thomas never occupied a house on the property.

When she applied for the title she knew Peter Myers would be entitled to a title. He still lives on the land. Hezekiah built his house there in 1991 and Deloris was living on the land at the time she applied for the title. She did not indicate to the Registrar that Sydney was on the property.

She planted fruit trees on the land in close proximity to Sydney's house.

Sydney does not plant or work on the land except to plant ganja. She does not rear chicken on the land but she has livestock there.

She gave Sydney notice to leave the land. Her mother still lives in Schoolfield.

#### **In re-examination**

She testifies that her lawyer never asked her who lived on the land. He asked her about taxes. She told him where the land was and she did get 2 papers from her mother.

In brief **Mrs. Loretta Thomas** testifies that she is 88 years old and knows the subject for upwards of 60 years. She is the mother of the Claimant and the Defendant. She lived on the land since she was 16 years old with her children's father Joscelyn Thomas.

The land belonged to his mother Irene Thomas. After 3 years they moved to an adjoining land. Mid early 60's to early 70's her mother-in-law sold her the 12 acres of land at Prosper Schoolfield, St. Elizabeth. A paper witnessed by her children, Basil and Deloris (dec'd) and Hilda (dec'd) was prepared for the transfer of the land by JP Mrs. Marshall (dec'd). She cannot recall how much she paid for the land.

When she purchased the land none of the Williams was living on the land. She enjoyed peaceful, open and continuous possession. She used the profits from the land for her own use and benefit and payment of land taxes.

Her sister-in-law Lucille Williams lived with her husband Clifford on his land at Hebad Mt. Plymouth. When Lucille died, as a favour, she permitted her children to bury her on the land.

In 1988 she sold the 12 acres to Josephine with 3 houses on it for the sum of \$1.25m. No lawyer was involved in the transaction.

The JP Mrs. Marshall as well as her children Deloris and Basil along with Leroy Robinson were involved in the signing of the papers.

In 1992 Sydney left from Elgin to her house situated on land adjoining Josephine's. He requested the land papers and when she refused he started ill-treating her and burnt her belongings. After this he moved onto Josephine's land in 1996. Josephine gave him both written and oral notices to leave the land.

In or about 2001 - 2002 she accompanied Josephine to the lawyer Mr. Cecil July to draw up a new agreement to register the land in Josephine's name and to

get a title. Delores Thomas and Roland Williams were involved in the signing of the documents.

In 2003 Josephine received her title. She served notice on the squatters on the land including Sydney. After the land was surveyed, Sydney and his children threatened and attacked Josephine making it impossible for her to visit her own place. In 2005 she was unable to attend her son Donald's, funeral.

She strenuously denied that Sydney lived with her after he got married. He only used to come and go. She would glimpse him one or two times when he was in the District.

She is sure that she purchased the land in 1970. She lived on it until she sold it back. When she sold it nobody was left on the land. She does not know anything about a will.

Clifford never lived on the land. He was stopped from erecting a fence. When she purchased the land there were 2 houses on it. Irene's and a half broken down one that Darlene lived in. She did not put Darlene there. Darlene was living there when she purchased the land.

When she sold the land to Josephine, the house that is making the worries comprised a 3 bedroom, a hall made of blocks with outside kitchen and a tank as well as a fowl coop.

She knows Easton Thomas. She cannot tell directly where he was living. She only knows he never lived there. She does not know where Irene was living from she sold her the land she does not know where Irene died. It is not out



here. She did not come back out here. From she went away she has not seen her.

In **cross-examination** she testifies that Sydney has land in Mt. Olivet. The house Sydney lives in now has no upstairs. Long time she has not seen it. Sydney moved to her house in 1992 with 3 children. He moved onto the land in 1996. After she sold the land to Josephine nobody lived on the land except Sydney. No house has been built on the land since Josephine purchased it. All three of Josephine's children were born in her house.

She accompanied Josephine to the lawyer's office to get the title. When exhibit 13"D" [her declaration under the Registration of Titles Act] was shown to her she denied telling the lawyer about receiving rent from the land or where she lived. He never asked her but she did tell the lawyer that Irene had gone abroad. After she sold her the land she "gone".

When she purchased the land Clifford and Lucille were not living on the land.

In brief **Basil Thomas** testifies that he was born and grew up on the land adjoining the disputed land. He has been taking care of the land since his mother purchased it in the 1960's to 1970's. His aunt Lucille Williams and her husband Clifford Williams grew up their family of 6 children at Hebad.

In 1976 - 79 Clifford Williams put up a fence saying he is going to survey the land. He took Clifford to court and based on the judge's order Clifford left.

In 1988 their mother sold the land to his sister Josephine. He was one of the witnesses on paper to the transaction. A lawyer was not involved.

In 1992 Sydney left Elgin to live in his mother's house and started mistreating her. Sydney told him that he had lands at Mt. Olivet St. Elizabeth.

In 1996 Josephine moved out of her house in Prosper and went to reside in Mandeville. Sydney moved into her house without permission. She gave him several notices to leave, both written and oral. Sydney threatened to kill Josephine and made several attempts on her life.

February to March 2004 the land was surveyed.

He saw Sydney destroy fruit and lumber trees on the land selling and giving to his friends. Sydney is still destroying the land.

In 2003 Sydney burnt down a 3 bedroom house on the land that he (Basil) occupied. A 5 year old house was burnt as well (This he laid to Sydney's charge).

In **cross-examination** he testifies denying that Clifford took him to court for assault.

His mother paid for the property in two installments and received a receipt from his grandmother (Irene). Sydney was not living on the disputed land in the 1990's.

He said he witnessed the sale of the land and by this he meant that he was present. His mother's and his sister's place in Schoolfield are two different places. When he came down from Kingston in 1965 his grandmother was living in one of the houses on the land, the other two were unoccupied.

Easton Thomas never lived on the property. Sometime in the 80's Hezekiah built a one room house to the back of the property that his sister purchased.

Lucille died in Hebad. A house is there. His grandmother sold the land to his mother in the 1970's. His mother never lived on the land.

He does not know of Cynthia and her siblings growing up on the disputed land.

Before 2004 nobody took Sydney to court but he received "notices".

Darlene lived in a small one room house on the property. After she left in the 1980's her son Clarence occupied and he is still living there.

Josephine purchased the land with a 3 ½ room house on it. She rebuilt it.

**Dawn Campbell** testifies that she knows Josephine since 1988. She knows that she lived on the subject property until 1996 when she relocated to Mandeville.

This property adjoins Luretta's where she resides with her son Basil.

Three houses are on the said property. Two are run down and unoccupied.

Josephine resides on the other. No one lives on the property apart from Josephine. She often visits Josephine assisting her on the property and with selling pimentos.

Sometime in 1997 she went to the house that Josephine used to live in and saw Sydney living there. In or about the same period she accompanied Josephine to the house. Josephine asked Sydney to leave and he threatened her.

In 2004 she accompanied Josephine to the property where Josephine served Sydney with a notice to quit.

In **cross-examination** she testifies that she knows Josephine since 1988. She used to accompany her mother to the disputed land at crop time. Her mother would go there to work. Josephine lived on the disputed land.

She witnessed when the property was sold to Josephine. Along with Delores Thomas, Basil Thomas and Leroy Thomas she witnessed the transaction. She was in a relationship with Josephine's nephew Jason.

She related that of the 3 dirt houses on the property only the 3 ½ bedroom house could be lived in.

Darlene lived across the road from Josephine's property.

It was after 1996 that Sydney and his children lived on the property.

In 2003 Darlene lived in a two bedroom house on the property.

### **Submissions on behalf of the Claimant**

Learned counsel for the Claimant Miss Judith Clarke submits that the Claimant Sydney Thomas is seeking declarations that the registered title (volume 1367 folio 697) obtained by the Defendant Josephine Thomas in 2003 has been obtained by fraud and ought therefore to be cancelled.

He is also claiming an equitable interest in the approximately 2 acres of the property by virtue of the fact that he remained in quiet, open, continuous and undisturbed possession and occupation thereof since the late 1970's or early 1980's to the year 2004 when his occupation was first challenged by the Defendant.

The Claimant particularized the Defendant's account of fraudulent misrepresentation as follows:-

Representing to the Registrar of Titles that Irene Thomas sold the subject property to Loretta Thomas in the year 1970.

Representing that she bought the land from Loretta Thomas.

Representing that she remained in open, quiet possession of the said land from 1988 - 2001.

Representing that since 1988 she has been exercising all rights of ownership over the land including the payment of taxes.

Representing that she derived and used rents and profits from the land for her exclusive use and benefit between 1988 - 2001.

Representing that she was given a common law conveyance by Loretta Thomas.

Representing that she has been paying taxes for the land since the date of its purchase.

Representing that she is the owner of the land.

Representing that the land is occupied by her.

She submits that any findings of facts on a balance of probability relative to any or all of these particulars would serve to support a determination that she obtained the title to the subject land by fraud.

The learned counsel further proposes that despite the disturbing litany of discord spanning a period from about 1976 to the present, the period which is of paramount significance in determining the issue is that period preceding and including the time of the Defendant's application for title, that is the 1960's up to 2002 when the declaration was submitted at the Office of Titles. She further argues that the accounts of burnings and other instances of disturbances between the parties after 2001 can only serve as an indication of longstanding mayhem and discord. These accounts coupled with events of preceding years belie any claim/representation by the Defendant to the

Registrar of Titles or to the court that she has been in quiet possession before she applied for the title.

After outlining the evidence as given by the Claimant and his witnesses, Miss Clarke submits that in relation to Cynthia Williams' evidence and in particular defence counsel putting to her that "there has always been objection to Sydney's occupation of Josephine's land" as the case unfolds it becomes clear and undeniable and even on the Defendant's case that her representation to the Registrar of Titles asserting her own quiet, continuous and "peaceful" occupation between 1988 and 2001 had to be deliberately untruthful and dishonest/fraudulent.

Referring to Sydney's (the Claimant) evidence the learned counsel asserts that his testimony in relation to a "Suitation Summons" from a lawyer as indicated by exhibits 10 - 12 (Summons and Particulars filed by the Defendant against the Claimant in the R.M. Court in 2004 and 2005) strongly supports the assertion that he and his children occupied his 2-acre allotment peacefully and continuously until 2004 when Josephine first took him to court. During the period of his occupation he even applied for and obtained a supply of electricity from JPS. This was in 1999 (exhibit 3) which supply was disconnected after Josephine produced her title to the JPS in 2004. From his evidence, in 1996 he would have been living in his house on the land for "about 15 years or more".

Further Sydney asserts that it was Clifford who took Basil to court for coming on the land. Basil hit him with a stone. Significantly the Defendant's

suggestion to the Claimant is that it was Basil who took Clifford to court for erecting a fence on the land. It is clear either way that these court proceedings came about because Clifford by his actions was asserting rights over the land from as far back as 1976 - part of the period during which Luretta claimed by her sworn declaration (exhibit 13e) that she occupied the land peacefully and continuously and exercised all rights of ownership there over.

The learned counsel further submits that again the misrepresentations in the application for title by the claimant are evident from the Defendant's own act.

In relation to the Defendant's evidence Miss Clarke submits that in her opening statement defence counsel expressed that the Defendant will say the Claimant's occupation started in 1996 and Josephine lived there from 1992 - 1996 further the Defendant continued in possession by visiting and keeping control of the property. This very assertion coupled with the evidence by and on behalf of the Defendant and also the evidence from the Claimant admits to a crucial fact that the Claimant had been in possession of a portion of the subject property from at least 1996 and continued, up to the time of the court proceedings in 2004, to assert his right to remain on the property.

Learned counsel further argues that the evidence as given by the Defendant and her witnesses emphasizes areas of inconsistency on the part of the Defendant as well as other witnesses. In relation to the Defendant propounding that when she made the application for title in 2001 she stated that she was a livestock farmer yet in her application she states that she is a housewife. This she asserts is questionable.

Valuation report categorizing the land as agricultural farm land indicates that what was on the land at the time of valuation was several small patches of cash crops. Livestock farms were in the general neighbourhood.

In the same light reference was made to the Defendant's claim that she purchased the land for \$1.25m cash in 1988, yet in her declaration in support of her application for title she asserts at first that the value of the land in 2001 was \$250,000.00(exhibit 13b) later upon request for valuation the value was \$735,000.00 based on a valuation done in 2002. Noticeably that valuation recognizes one building on the property despite evidence from both sides that Hezekiah Williams and Peter Myers would have had houses on the property as well as Deloris' house being there.

In the same vein if there were other persons in possession of the land at the time of her application and she has been contending with these persons as to the validity of their possession she could not have properly and honestly make a representation that it was she who occupied the land and that benefits derived from the land were applied to her exclusive use and benefit.

The efforts by the Defendant to misrepresent and mislead are evident from the data she has sent to obtain her title. That the valuation report is indeed tainted data is not an unreasonable inference.

In relation to the Registrar of Titles' request for death certificate of Irene Thomas and the consequent search taken, along with the evidence of her witnesses Loretta and Basil that Irene migrated after she sold the land and they never heard from her again assumes importance and one is curious as one is



constrained to ask why Josephine would have done such a search if Irene had left Jamaica after she sold the land and was never heard of again. This must be assessed against the evidence of Cynthia Williams that Irene Thomas died in 1965 and they attended her funeral and she was buried on the land.

Referring to the Defendant's evidence that she commenced paying taxes in 1988, Miss Clarke submits that it must not escape attention that the tax papers exhibited by the Defendant are dated 2001 (exhibit 7).

Tax papers (exhibit 6) produced by the Claimant indicates payment from 1995 - 2001 paid by Rosaleen Williams (Cynthia's sister). Continuing she asserts that sadly the process by which one can obtain a certificate of payment of taxes to support an application for title does not require any proof as to which date the applicant started to pay taxes. Any person may secure such a letter by simply paying up arrears which are outstanding as at the date when the certificate is being sought. In this respect she concludes that a finding on a balance of probabilities that the Defendant has not been paying taxes for the land since 1988 is justifiable. She would have made a false representation to the Registrar in this regard as well.

She asserts that Loretta did not at all corroborate the Defendant's account that she (Loretta) did a transaction for the Defendant by which she (Loretta) sold a portion of the subject land to Peter Myers after Josephine bought it. Therefore the cumulative evidence of and for the Defendant is flagrantly inconsistent and not believable. The Defendant and her witnesses were already detached from any dealings with the land prior to 2001.

Referring to the witnesses for the Defendant being completely at variance as to whether and which houses were on the land when Josephine “bought it” and who occupies which house as from when and who is currently occupying, Miss Clarke submits that the witnesses are not in accord on some crucial issues hence their account is not grounded in truth. Clearly the Defendant did not buy the land in 1988 (particular reference being made to Peter Myers’ house on the land).

The Claimant has said, she asserts, that Peter Myers has a house on the land. The Defendant acknowledges this but says that she (through her mother Luretta) sold a portion to him.

Further the chasm between the accounts of the witnesses for the Defendant can only be explained on the basis that they were not on the land. The accounts as to time, state of the property, who was or was not in occupation over the period between 1970 and 2001 and the ensuing events are too varied and conflicting to be believed.

Miss Clarke further asserts that the Defendant’s pleadings and her evidence are nothing short of unwitting disclosure on her part that her representations to the Registrar as to the fact, time and quality of her occupation are entirely false and fraudulent.

In relation to the law she submits that a registered title is indefeasible except upon a finding that it was obtained by fraud.

Section 70, 161(d) of the Registration of Titles Act.

The law requires that actual fraud be proved. **Edward Lynch and Dennis Lynch v Dianne Ennevor and Eli Jackson 19 JLR 161**

It must be shown on a balance that the applicant for the title or her agent(s) made false declarations/representation to the Registrar, knowing them to be false and with the intention that these false assertions be relied upon and result in the issue of a registered title in her favour.

This, Miss Clarke submits, certainly does not mean that a declarant and those who supported him/her with other sworn voluntary declarations can ever be heard to say that the facts in the sworn date which has led to the issue of a registered title in her name were not, at the material time correctly represented by her attorney or that he/she did not read the declaration which has been presented to the Registrar on his/her behalf duly sworn, signed and witnessed by a Justice of the Peace.

After outlining the facts in the Edward Lynch case and the stance taken by the court in assessing the evidence, Miss Clarke concludes that in the course of his reasoning the learned judge concluded that the falsehood of the 2<sup>nd</sup> Defendant was not an innocent representation but actual fraud.

She submits that in **Herbert Eldemire (Executor-Estate Alice Eldemire) v Peter Honiball # CLE 36/1981 (consolidated with Peter Honibal vs Herbert Eldemire suit # E381/1981 unreported)** the judge observed that the evidence given by the plaintiff [Eldemire] was at variance with that contained in the documents supporting his application for title. It was as it is in this case “blatant” that the documents supporting the application for the issue of the

title contained declarations that were false. The learned judge concluded as follows:-

“This being so, the title issued thereon was in my view fraudulently obtained.”

In the instant case she submits “matters which are crucial to securing the registration of land were described (by the Defendant and her agent Luretta Thomas) to be true when in fact they were not known to be true. In fact the declarations were known to the Defendant to be false.

One of the conspicuous declarations is that of the Defendant herself in her application for title where she swears that when she first knew the land it was owned by Irene Thomas who sold it to her mother Luretta in 1970. Apart from the age incongruity which bears striking resemblance to the one observed by the court in Edmond Lynch as her evidence at trial is that her earliest recall of the land was when she was 13 - 14. As has been seen there are several other accounts which show clearly that the representation by or on behalf of the Defendant in her application for title was false. In point of law and fact, the title obtained by the Defendant is not indefeasible. It is clear that it has been obtained by fraud and ought to be cancelled.

The court must find that the Claimant having been in open, quiet, continuous and undisturbed possession and occupation for upwards of 20 years prior to the Defendant’s challenge to his title in 2004 has acquired a possessory title to the portion occupied by him and therefore has an equitable interest in the land.

The Defendant's counterclaim is bound to fail having regard to the evidence. She has brought absolutely no evidence to support her claim for damages (special or general) under any head sought.

### **The Submissions on Behalf of the Defendant**

Learned counsel for the Defendant, Mrs. Antonnette Haughton-Cardenas, after outlining the orders and declarations applied to the court for the Claimant, submits that the evidence of Cynthia Williams does not in fact reveal any fraud on the part of the Defendant as she is unable to provide any evidence as to whether the Defendant's mother Loretta bought the land from Irene. As Miss Williams asserts that only her mother was entitled to ownership of the land however she does not tell the basis for this assertion. She does not provide a will and if her grandmother died intestate all of her children would have been entitled.

With respect to adverse possession despite seeking to say that the Claimant was made a caretaker of the land by her family, Miss Cynthia Williams does not tell on what authority they did so. She said the Claimant moved onto the land in the 60's while still living in Elgin with his wife and children. She further says she cannot remember if Sydney came to live on the land in the 1996. Cynthia has not proved that Sydney gained rights through adverse possession.

The second witness Nadine's evidence is unable to support the Claimant's allegations of fraud by the Defendant and is unable to ground a claim of adverse possession as she contends that she has been living with her father in a house that he built on the land since 1986. She further states that she has

never seen Loretta or Josephine on the land. Her father was taken to court in 2004 and from that time there has been a dispute about the land.

Mrs. Cardenas therefore asserts that the issues of adverse possession can only now arise after the time of the acquisition of the registered title by the Defendant in 2003.

She points out that Lord Jenkins at page 221 of **Chisholm v Hill 1 WIR page 413** said:

“The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provision as to the investigation of the title to the property and as to notices and advertisement which are considered a sufficient protection to anyone claiming any right of that description”.

Further at page 422 Lord Jenkins went on to say:

“The issue of a new certificate in whichever circumstances and for whatever reason would destroy a complete title by limitation, after it has been acquired.”

She further submits that any adverse possession before 2003 has been extinguished by the issuing of a new title in 2003 to Josephine Thomas. She therefore submits that the claim of adverse possession cannot arise in this matter, since a new registered title was issued in 2003.

In relation to the Claimant’s claim for fraud the learned counsel further submits that in relation to the representation to the Registrar of Titles that Irene sold the land to Loretta in the 1970’s no evidence was led to prove that this is not so.

On the other hand the Defendant’s witness Loretta gave cogent evidence and no evidence was led on a balance of probability to disprove this.

In relation to the second allegation of fraud by the Claimant i.e representing that Josephine bought the subject land from Loretta Thomas in 1988 or at all, Mrs. Cardenas submits that this must fail as Loretta gave cogent evidence concerning the 1988 sale of the land supported by that of Basil Thomas.

The Claimant she argues has failed to successfully challenge the evidence of the Defendant and her witnesses and has only managed to make an assertion that it did not happen. He led no evidence that could effectively disprove the evidence of the Defendant's witnesses that the Defendant bought the land.

The law requires that allegations of fraud be strictly pleaded and specifically proved this has not been done on a balance of probability. She submits that the third allegation of fraud is that the Defendant had represented that she remained in open, quiet and continuous possession of the said land from 1988 to 2001. Mrs. Cardenas submits that the evidence of Loretta indicates that the Claimant sought to interfere with the Defendant's quiet enjoyment of the property and Josephine speaks to Sydney's trespass and interference with her quiet enjoyment.

She asserts that the issue is whether the Defendant's declaration in her application for a registered title that she enjoyed open, continuous and peaceful possession of the land amounts to fraud in light of the evidence given by Josephine and her witnesses. The case of **Enid Timoll-Uylett v George Timoll 17 JLR page 295** she asserts is instructive in this regard.

In Timoll's case there was a will, which gave the applicant for first registration a life interest with the fee simple interest going to her granddaughter after her death.

The applicant for first registration made a declaration on her application that:

“That the deeds document or any other evidence on which I rely in support of any title of the said land is set forth in the schedule to the best of my knowledge and belief and there are no deed documents or evidence invalidating any title to the said land.”

With regard to whether this was dishonesty the court held that:

“If she bona fide believed as she is entitled to believe that she was the owner of the land she was justified in treating the devise as an old man's whim or impishness”.

The court she said stated that she did what was required of her in the circumstances that is to give due notice of her intention to bring the land under the Registration of Titles Act.

It was held by the court that the plaintiff in the circumstances fell short of establishing fraud in the application of Lucy Timoll.

The Defendant in this case called the Claimant a mere trespasser on whom she had served more than one notice.

The purpose of advertisement for new registration is to enable people having claims or interest in the land an opportunity to take appropriate action.

The Claimant is saying that he gained rights by virtue of the Limitations Act not through a will or purchase. The Defendant claims he is a trespasser and as such he has no rights that the Defendant was required to acknowledge in the application, which a failure to acknowledge would amount to actual fraud and



deceit. The Defendant through her witnesses and consistently objecting to the Claimant's trespass has proved that she has paid for and exercised rights of ownership since 1988 and that she has earned income through farming.

The Defendant and her mother gave cogent evidence of the purchase of the land.

In respect of the allegation that she omitted to disclose in the application for title that other persons were in open occupation of the land, Mrs. Cardenas proposed that these parties were trespassers with no rights and could in no way prevent the Defendant from succeeding in the application for a Registered Title. Indeed the requirement by the Registration of Titles Act that all new application be advertised would allow anyone making a claim by virtue of the Limitations Act to do so before Registration is granted. This failure does not amount to actual fraud as required. At the most it may be described as an innocent misrepresentation as there was no intention to defraud and certainly no actual fraud.

### **Inconsistencies and Discrepancies in the Evidence**

#### **On Sydney Thomas' Evidence**

In his evidence-in-chief Sydney testified that he was put in possession by Cynthia. Hubert and Clifford. He later testified that it was Clifford's wife Lucille Williams who put him in possession.

In cross-examination, at first, he testified that before he went to court he knew that his sister was claiming all the land. He then went on to say that it was since he came here (at court) that he knew.

In **examination-in-chief** he testified that Josephine did not live on the land. He then went on to say that she lived with her mother on the land when she was in her 20s.

At first he denied seeing any notice to leave the property. He then went on to say this is what is on the notice that I get “the notice paper said 2 houses were burnt down”.

In examination-in-chief he testified that there were 6 houses on the property. In cross-examination he testified that there were 7 when this inconsistency was put to him he stated that 6 is not correct. It was a mistake. At first he testified that he left his parents home when he was 17 - 18 years he later testified that he left when he was 25 year old. In re-examination he sought to explain this by saying that he left first when he was 17 -18 years old to work in Kingston, he returned and then left when he was 25 years old.

#### **On Cynthia Williams’ Evidence**

In cross-examination initially she testified that Sydney and herself are entitled to portions of this land, Josephine is not. She later testified that she did not say Josephine was not.

In her evidence-in-chief she testified that Darlene relocated. In cross-examination she testified that she did not know of Darlene relocating. She did not tell the Attorney-at-law that Darlene relocated. Later still in cross-examination she testified that Darlene relocated but she come and go. She did not tell her lawyer she go and come.

In examination-in-chief she testified that she did not know Josephine very long. She then testified that Josephine was born in 1966. In cross-examination she testified that I come to know Josephine; first when this court case started about the land. I heard about her but I did not meet her face to face until the case came up at King Street. However she cannot remember when this case was.

At one stage she testified that she is in her 60s and Sydney was in his 70s. She then went on to say I don't know his age I think I am older than he is.

At first she testified that Sydney went in possession since the 60s she then went on to say that she cannot recall if it was in the 1996 that he went in and took up occupation. She then went on to testify that she does not remember if it was in the 1960's or 1970's that he went to the disputed land, then again she testified that it is true that he came there in the 60's or 70's.

In re-examination she testified that in relation to Sydney commencing occupation in the 1996 she was mixed up.

#### **On Nadine Thomas' Evidence**

Nadine's testimony is that she went on the land in 1986. She was 12 years old. She remembers a dirt house being there. She left school when she was 16 years old. She does not remember if the concrete house was built at all.

#### **On Josephine Thomas' Evidence**

In paragraph 5 of exhibit 13"b" (declaration re the registration of titles) she declared that she purchased land from her mother. She was given a common law conveyance. In answer to her attorney-at-law in her evidence-in-chief she

testified that she did not know what a common law conveyance is. She later testified that all she got from her mother was a receipt; that is all the paper she got.

In cross examination at first she testified that she did not witness Lucille's children asking her mother's permission to bury their mother on the land. She then testified that she was there, she heard when they asked. They all asked at once.

She testified that she is able to say that Lucille and Clifford Williams raised their children on the Hebad property. She then testified that she did not know the Williams' children from birth. She was not there to see when they were growing up.

Her testimony is that she paid her mother \$1.25m all at once in cash for the disputed property. She later declared to the Registrar of Titles that the value of the land is \$250,000 (exhibit 13'a').

Her testimony is that all her life she operated a bar and did livestock farming. However in 2001 she would write housewife as her occupation that is the occupation still in her passport and she would also write housewife as her occupation and not only because it is in her passport.

Initially she testified that she can't remember what the house on the disputed property looked like in 1988. She then went on to say that the house never had 3 bedrooms, a kitchen, a tank and a ½ finished room. She testified further that it was a 3 bedroom dirt house with most of it concrete.

In paragraph 9 of her amended Defence her evidence is that she purchased the land with two houses. Thereafter two additional structures went on. In cross - examination she testified that when she purchased the land there were 3 houses on the land.

It would not be true if someone said there were 2 houses.

When it was put to her that she gave two different statements she responded I signed the documents with two different things. Errors could have been made. She then went on to say “true it is an error.”

In relation to exhibit 13'b' the (declaration to the tax officer) it was suggested to her that \$250,000 is the declaration value of the land. She testified that it was \$1.25m that she paid for the land and she did not make the declaration to the tax office. Further it is the lawyer who made up the argument about her living off the rent and profits of the land.

### **On Loretta Thomas' Evidence**

Initially she testified that when Deloris died her daughter Josephine provided everything for the burial, food stuff and liquors. She later testified that she gave some of the money realized from the sale of land to bury her child.

She testified that she lived on the land for about 30 years. She then went on to say that she lived on the land until she sold it, however, she testified further that she is sure she never lived on Irene's land before she sold it.

Initially she testified that Darlene lived in the “half bruk down house, that half bruk down house build after she bought the land” she then went on to say, “I can't tell when Darlene started living there; she was living there for a few

months when I bought the land. Darlene was living in the half bruk down house, after I buy the land she leave out of it”.

Initially she testified that Darlene has a son, Clarence. She then went on to say I don't know Clarence. I don't know that name there.

Further she testified that when she sold the land to Josephine nobody lived on the land except Sydney. She then went on to say that after Sydney burnt her paper is the same time he stepped out in 1992. She then stated that she remember it was 1996 that Sydney moved and in re-examination she testified that it is fair to say that it was in 1996 that he stepped out. When Exhibit 13 'd' (declaration in relation Registration of Titles Act) was shown to her she testified that she did not know of Irene Thomas getting any rent from the property neither did she tell the lawyer that she (Luretta) is getting rent from the property.

In cross-examination at first she testified that Josephine left her (Luretta's) house for Mandeville. She then went to say that Josephine was in her house, she then leave to the house in which Sydney lives now and then she went to Mandeville.

I find that I cannot reconcile her evidence. Therefore I cannot place reliance on it.

#### **On Basil Thomas' Testimony**

In examination-in-chief he testified at first that Sydney moved into his mother's house in 1992. Four years later he moved into Josephine's house. He then testified that Sydney first moved on the land in 2004. He then testified

that Sydney came to his mother's house in 2002 and left in 2004. In re-examination he testified that Sydney left in 1996.

He testified that the sale of the land was witnessed by him. His sister Deloris, Leroy Thomas, a JP and he signed. In cross examination he testified that by "witnessed" is meant that when his mother pay up the money to his grandmother.

His testimony is that Sydney told him that his wife left land for him in Elgin. He then went on to say that Sydney never directly told him but he said his wife gave it to him. He tried to explain this by saying that by 'directly' he meant that he never called him into the argument.

Further, his testimony is that Darlene is maybe about 20 -25 years older than he, yet he was around 12 when she was 18 years. He could be about 12 years when she was 18.

At first he made reference to three houses on the property. He then testified that Clarence lived in one, one Sydney into, one Sydney left and 2 burnt down. He then said there were five.

#### **On Dawn Campbell's Testimony**

In cross-examination at first she testified that she used to go to the disputed land often. She then testified that it is once per year. In re-examination she testified that from 1997 - 2004 she visited 7 times.

#### **Discrepancies on the Claimant's Evidence**

Sydney's testimony is that he never lived in the house whilst he was building. He would come and go. Cynthia's evidence is that he never lived in Elgin for long.

Sydney's evidence is that there are about seven houses on the land. Cynthia Williams' evidence is that there are three.

Sydney's testimony is that Cynthia Williams, Clifford Williams and Hubert Williams put him in possession of the land. Cynthia's evidence is that she could not put Sydney in possession.

Sydney is suggesting that from he entered on the disputed land in the 1970's to 1980's he commenced the construction of the house. Nadine's evidence is that when she went on the disputed land in 1986 it was a dirt house that was there.

#### **Discrepancies on the Defendant's Evidence**

Loretta's evidence is that she lives with Josephine. Josephine's evidence is that her mother still lives in Schoolfield. Since 2002 she has not lived with her. Josephine testified that in 1988 the house that Sydney occupied never had 3 bedrooms, a kitchen, tank and a half finished room. It was a dirt house owned by her grandmother. It was a 3 bedroom. In 1988 only the unfinished portion was concrete. She moved into a 3 bedroom dirt house but she repaired it.

This is Loretta's Testimony:

“When I sell the land to Josephine the house that make the worries, it is a build up house, with block and concrete. It was a 3 bedroom house made out of block cement build up wall, an outside kitchen and a tank, fowl coop. It is still the same way.”



Lurretta's evidence is that when she sold the land to Josephine, nobody except Sydney was on the land. Josephine's evidence is that when she purchased the land there were 3 houses on it.

The evidence from the other witnesses is that Josephine had her children whilst she was in her mother's house. Basil's evidence is that the children were born in the Mandeville hospital and Josephine returned to her own house. Basil's testimony is that Easton Thomas used to live in Manchester. He never lived on the property this is in contrast with the evidence of the other witnesses.

Basil's testimony is that when Josephine purchased the property Clarence lived on the property. Hezekiah Williams also lived on the property. Dawn Campbell's testimony is that of the 3 houses on the property when Josephine purchased, Josephine occupied one and the other two which were run down were unoccupied. Dawn Campbell's evidence is that in 1988 Josephine was living on the land. This conflicts with Josephine's, Lurretta's and Basil's evidence.

#### **The areas that I find that are not in Issue**

- (1) On the evidence there seems to be a debate as to whether the land in dispute lies in Mt. Plymouth or Prosper. I consider this to be a non-issue as the dispute concerns the 12 acres of land referred to in Exhibit 15, the Registered Title in the name of Josephine Thomas.
- (2) That Josephine Thomas grew up in her mother's house on the land adjoining the disputed land.

(3) At the time that Josephine purchased the land there were at least 3 houses on the land. This is Josephine's evidence. Sydney's testimony is that there were at least five.

(4) At the time when the application was made for a Registered Title in 2001, other persons lived on the property. It is Josephine's evidence that when she applied for the title Clarence lived on the property. Peter Myers lived on the property as well.

**I find that the following areas are in issue:**

- i. Whether Sydney's occupation has with the passing of time matured into a valid title.
- ii. Did Loretta Thomas purchase the disputed 12 acres from Irene Thomas?
- iii. Whether Josephine's declaration in her application for a registered title in 2001 that she enjoyed continuous, open and peaceful possession of the land since 1988 amounts to fraud.
- iv. Whether Josephine is an innocent purchaser through the dealings of Loretta Thomas.
- v. Whether the fact that Josephine became registered proprietor makes her title thereto indefeasible and unimpeachable.

**The Applicable Law**

Section 3 Limitation of Action Acts 1973 Jamaica page 267

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, or, if such right shall have not accrued to any 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.

**Sampson Owusu - Commonwealth Caribbean Land Law 2007.**

Title to land can be acquired by appropriating a piece of land of another person and remaining in undisturbed possession of it for a period prescribed by statute without acknowledging the title of the true owner. If the true owner fails within the prescribed period to assert his title to his land which is wrongfully possessed by the stranger, his title to the land will be extinguished by operation of the statute. The stranger's possession ripens into a valid title to the land if his possession is adverse to the rights of the true owner.

At page 283

There should be acts of physical custody and control of the land or some degree of physical occupation. --It depends on the nature of the land in dispute and the manner in which the particular type of land is used. --The circumstances should show sole and undisturbed possession, use and enjoyment deliberately adversely and exclusively exercised.

**J.A. Pye (Oxford) Ltd and another vs Graham and another (2002) UKHL30**

held

(1) That for the purpose of the 1980 Act the word "possession" and dispossession bore their ordinary meaning so that possession as in the law of Trespass or conversion. connoted a sufficient degree of occupation or physical control coupled with an intention to possess and dispossession occurred when the squatter assumed possession as so understood ---adverse possession -was on a proper construction directed not to the nature of the possession but to the capacity of the squatter, that to establish factual possession the squatter had to show absence of the paper owner's consent, a single and exclusive possession and such acts as demonstrated that in the circumstances in particular the nature of the land and the way it was commonly used he had dealt with it as an occupying owner might normally have expected to do and

that no other person had done so, that the requisite intention was not to own or acquire ownership, but to possess on one's behalf in one's own name to exclude the world at large, including the paper title owner, so far as reasonably possible.

**Ramnarace vs Lutchman (2001) WLR 1651 paragraph 10**

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

**Enid Timoll-Uylett vs George Timoll 1980 17 JLR page 257**

**Alric Astor Pottinger vs Traute Raffone Privy Council Appeal No.64 of 2005**

**Edward Lynch and Dennis Lynch vs Dianne Ennevor and Eli Jackson (1982)**

**19 JLR page 161**

**Suit C.L. E. 36/81 & 138/81 Hubert Eldermire vs Peter Honibal; Peter Honibal vs Hubert Eldermire**

**Section 68 of Registration of Titles Act**

“No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power”.

## Section 71

“Except in the case of fraud, no person contracting or dealing with, taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

### **Assets Company Ltd vs Mere Roihi 1905 AC 176 page 210**

--Further it appears to their Lordship that the fraud which must be proved in order to invalidate the title of a purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified by the Native Lands Act, must be brought home to the person whose registered title is impeached or his agents.

Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further enquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries from fear of learning the truth the case is very different and fraud may properly ascribed to him.

### **Stuart vs Kingston 32 CLR page 309 at page 356**

It is no longer in doubt that the fraud which can invalidate a registered title under those acts is actual fraud on the part of the person whose title is impeached and actual fraud is “fraud in the ordinary popular acceptation of the term i.e dishonesty of some sort” fraud carrying with it grave moral blame and not what has sometimes been called legal fraud or constructive fraud or fraud in the eyes of a court of law or a court of equity.

### The Claimant's Occupation of the Two Acres of the Disputed Land

Sydney's testimony is that in the late 1970's to 1980's he was put in possession of this 2 acres by his cousins as well as his uncle. This land was originally owned by his grandmother Irene. This is not in dispute. At the time that he was put in possession, his mother Loretta and his sister Josephine were living on another portion. On this section that he moved on was a one room house originally owned by Easton Thomas. He broke this down and constructed a wall house comprising 4 bedrooms, a bathroom, and kitchen. There were 2 outside toilets and a water tank. It took him 8 years to build.

There were about 6 houses on the land. When he commenced construction Josephine was a little girl living with her mother. At this time his wife lived in Elgin and he would come and go between both places.

Shortly after the death of his wife in 1986 he moved onto the land. Since he moved on to the land he farmed it. He is claiming the land.

In 2004 he discovered that a title was issued in Josephine's name, (Exhibit '15') Issued December 29, 2003. Since he started occupying the 2 acres no one has disturbed him. He has paid rent to no one. No one has laid claim to the land. He was first disturbed in 2004 when Josephine took him to court. Prior to this he had never seen Josephine come on the land like she owned it. She only pass through the track.

In 1996 he received no notice to leave the land.

His witness, Cynthia's testimony, corroborates his evidence that Loretta lived on a separate portion from the disputed land.

Further Cynthia's testimony is that before her mother died in 1977 Sydney used to visit the land regularly to take care of it and to reap crops. Her father, her brother and herself gave Sydney 2 acres of land on which to build a house. Josephine has never occupied the land before 2004. Sydney's and other houses have been on the land for over 20 years before Josephine applied for title.

Nadine's evidence is that she came to live on the land in 1986 after the death of her mother when she was a young child. Since then she lived nowhere else. Prior to 1986 her father used to come and go between Elgin and the disputed land. She knows of no dispute between her grandmother and father that caused her father to move on to the disputed land.

Josephine's testimony is in stark contrast to the testimony of the claimant and his witnesses. Whilst agreeing that she was born and grew up on lands adjoining the disputed land she testified that in 1988 she purchased the disputed land from her mother for the sum of \$1.25m. There were 3 houses on the land. From the date of purchase she commenced paying property taxes. This portion of her evidence is not consistent with exhibit '9' special receipt of payment of taxes showing Rosaleen Williams as payee from 1994 - 2001 as well as exhibit '7' (certificate of payments). It means therefore that I reject her evidence when she testified that she commenced paying taxes from the date of purchase in 1988.

Josephine further testified that Sydney came to his mother's house in 1992 and then to her house in 1996. When she relocated to Manchester in 1996, he commenced occupying her house without her permission. She spoke to him

about it and he threatened to kill her. Subsequently she applied for and obtained a registered title in 2003.

Luretta's evidence is that she knows the disputed land for upwards of 60 years. In the mid 60's to early 70's Irene sold her the land. In 1988 she sold the land to Josephine for \$1.25m.

Her evidence as outlined in the areas of inconsistency earlier is unclear but she is asserting that in 1992 Sydney moved to her house and when she refused his request for land papers he burnt her documents.

He then moved to Josephine's house. I reject her evidence and that of Josephine's in this respect and accept that of Sydney and his witness Cynthia that he was on the land from in the early 1980's, as I find their evidence to be more reliable.

Luretta's testimony is that in 2001 - 2002 Josephine and herself went to an attorney-at-law to draw up new agreement to register the land in Josephine's name. In 2003 Josephine obtained title and in 2004 sent notice to Sydney to leave the land.

Basil's evidence to a large extent is along the line of that given by Luretta, that in 1988 Luretta sold the land to Josephine and in 1996 when Josephine moved out of her house Sydney commenced occupation.

I find that Dawn Campbell's evidence is not in harmony with that of the other witnesses for the Defendant as her testimony is that Josephine lived on the disputed land since 1988. All the other Defendant witnesses' testimony is that at that time Josephine lived with her mother.



I appreciate that there are inconsistencies and discrepancies on both sides but I find the evidence given by the Claimant and his witnesses more credible, more reliable than that of the Defendant and her witnesses.

I find Loretta's evidence as to her purchase of the land from Irene devoid of credibility. Basil's testimony is that Loretta purchased in the late 60's to early 70's but it is Loretta's evidence that she purchased the land in 1970 and thereafter Irene migrated. She further testified that Irene did not die out 'here' (Jamaica). She does not know where she died. Irene did not come back out here. This brings into focus Josephine's testimony that she attended the offices of the Registrar of Birth and Death in Mandeville to search for Irene's death certificate. If Irene died abroad what useful purpose would it serve to search for her death certificate in Jamaica? Clearly, I cannot accept Josephine's evidence in relation to this search.

This bit of evidence is totally contradicted by exhibit '19' (Irene Thomas' death certificate) which I accept. It must be noted that exhibit 19 was only tendered and admitted in evidence by consent on the 9<sup>th</sup> November 2009.

This exhibit shows that Irene Thomas died on February 15, 1967 at 90 years of age in Mt. Plymouth, Schoolfield, Malvern, St. Elizabeth. Her son Jocelyn Thomas being the informant. I find that Loretta must have known that her mother-in-law died in Jamaica and this brings clearly to my mind the Genesis biblical story of Esau and Jacob where a deception to rob Esau of his birthright was carefully planned and executed by both mother and Jacob.

I find as a fact that from at the latest in the early 1980's Sydney has been in quiet, continuous and undisturbed occupation of his 2 acres until 2004 when Josephine sent him notice to leave.

**How was the 12 acres of land brought under the operation of the Registration of Titles Act naming Josephine Thomas as the proprietor of the estate in fee simple?**

Luretta's evidence which I reject outrightly is that she purchased the disputed 12 acres from Irene in 1970. She sold this portion of land to Josephine in 1988 for the price of \$1.25m. A lawyer was not involved but a JP signed, witnessed by 3 persons. In 2001 to 2002 they went to Mr. July to register the land in Josephine's name. It is Luretta's evidence that she told the lawyer that Irene had gone abroad. She left after she sold the land. Exhibit '6' (special official receipt) shows that up to 2001 Rosalene Williams paid the taxes in the name of Irene Thomas exhibit '6' corroborates this. I find therefore that Josephine could not have been paying taxes since she purchased in 1988. I have to agree with Miss Clarke's submission in this respect as well as her comment that any person may secure a title by simply paying up arrears as at the date when the certificate is being sought. Of course I fully appreciate that payment of taxes does not necessarily signify that the person paying is in possession or owns the land.

Exhibit 13'C' is a declaration of Deloris Thomas under the Registration of Titles Act in relation to Luretta's purchase from Irene in 1970. Having found that Irene died in Jamaica in 1967 and not elsewhere then Deloris could not have

been speaking the truth as to Loretta's purchase and by the same token Ronald Williams' declaration and Loretta's declaration that she purchased in 1970, as at the time of purchase Irene would have been dead for 3 years.

This being the position, then on her declaration exhibit 13'd' Loretta could not have consented to the land being registered in Josephine's name as she did not purchase and could not have properly sold it to Josephine as Loretta is claiming ownership through purchase.

The consensus is that Deloris is Loretta's daughter. I find it interesting that in her declaration under the Registration of Titles Act dated February 24, 2002 Loretta is solemnly and sincerely declaring and affirming that she is 75 years old (Exhibit 13d). Deloris in her declaration of July 13, 2001 is declaring she is 70 years old! (Exhibit 13c) Loretta is Deloris' mother.

The evidence from the Defendant is that the land was purchased at a cost of \$1.25m in 1988. Exhibit 13'a' the application to bring the land under the Registration of Titles Act indicates that the land including all buildings and other improvements therein is of the value of \$735,000.00. If the value of \$735,000.00 is to be accepted how does this sum reconcile with the payment of \$1.25m 13 years earlier?

I find Exhibit 13 'n' (papers returned from the Registrar of Titles) requesting that the application in relation to the value of the land being \$250,000.00 as being unacceptable and the value of \$735,000.00 be substituted quite interesting. It seems to me that these several values put forward may well

indicate that Josephine did not purchase the land from her mother hence the several amounts.

Further that the sum of \$735,000.00 indicated on Exhibit 13 'f' the determined market value of the land may well be the correct value.

Josephine in her application Exhibit 13 'b' sworn to July 13, 2001 states that she is not aware of any other persons having any interest in the land. The evidence is that other persons lived on the land; as a matter of fact Josephine's evidence is that at the time she purchased 3 houses were on the land. Further this application states that she knew Irene Thomas to be the owner of the land living in open, quiet and continuous possession using rent and profits there from for her own exclusive use and benefit until 1970 when she sold it to Luretta. In 2001 she declared that she was 40 years old therefore in 1970 she would have been 6 years old. I find it unacceptable that at 6 years old she could be aware of Irene's use of profits and rents from the land. I must agree with Mrs. Clarke's submission in this respect. She could not be aware of what use rents and profits were put to.

Josephine's evidence is that when she applied for title in 2001 Peter Myers would be entitled to title yet she did not list him as one with interest.

Her evidence is that Peter had purchased the land through her mother in 1992.

Further at the time when she applied for title Hezekiah had his little house there that he had constructed in 1991. Deloris was on the land at that time as well.

Luretta's testimony is that when she purchased the land Darlene was already living there. She did not put her there.

It is also common ground that Deloris' son Clarence lives on the property. In the application for title his interest was not made aware of either. Basil Thomas' testimony is that Hezekiah Williams built a one (1) room house to the back of the property in the 1980's.

Josephine's evidence is that at the time of purchase she was given a common law conveyance which she cannot find. However she had testified that she did not know what a common law conveyance is and later still testified that all the paper that she got from her mother was a receipt. I reject this common law conveyance and find that this is all part and parcel of the tissue of false statements that the Defendant's case is made up of.

I am aware that there have been publications in the newspaper (Exhibit 13 'h') and this should be notice to Sydney in terms of the application to bring the subject matter under the Registration of Titles Act as well as Sydney not being aware of this notice and the importance of this notice in terms of lodging warnings against the title and the value thereof. But I hold that this does not in any way significantly affect my findings.

**In *Stuart vs Kingston* at page 329 Knox CJ points out that:**

The word "fraud" in sections 69 and 187 of the South Australian Act is to be construed as meaning something more than mere disregard of rights of which the person sought to be affected had had notice, and as importing something in the nature of personal dishonesty or moral turpitude.

Further I find Exhibit 13 'C' of significance. In this document the Registrar of Titles requested a statutory declaration by Irene Thomas supporting her prior possession of the land and consenting to the application for registration and If deceased a certificate of the entry of death should be lodged together with a statutory declaration listing names and addresses of surviving next of kin. Luretta's evidence is that Irene died abroad. Josephine's evidence is that she attended at the Registrar of Birth and Death in Mandeville but was not successful in finding one. Exhibit '19' the entry of the death of Irene Thomas speaks for itself. On the basis of the foregoing I do not find that Luretta Thomas honestly believed that the property was hers to do with as she pleased. I have to agree with Miss Clarke that the misrepresentations in the application for title by the Defendant are evident and I must add that they are many.

I have taken into consideration the inconsistencies and discrepancies on the evidence on both sides. I have taken all these contradictions into account. I have carefully considered the able and exhaustive submissions of learned counsel for the Claimant and the able submissions of counsel on behalf of the Defendant and stripped of all accretions on a balance of probability, I find the evidence of the Claimant and his witnesses more convincing than that of the Defendant and her witnesses.

#### **Application of the law to the Findings of Fact**

The limitation period for land claims in Jamaica is 12 years (section 3 Limitation Act). Under section 3 of the Act no action or suit to recover any land can be brought "but - within 12 years next after the time at which the

right ... to bring such action or suit shall have first accrued to the person making or bringing the same.

Title to land can be acquired by appropriating a piece of land of another person and remaining in undisturbed possession for a period prescribed by statute without acknowledging the title of the true owner. If the true owner fails within the prescribed period to assert his title to his land which is wrongfully possessed by the stranger, his title to the land will be extinguished by operation of the statute. The stranger's possession ripens into a valid title to the land if his possession is adverse to the rights of the true owner **(Sampson) Owusu Commonwealth Caribbean Land Law page 267).**

**In Pye vs Graham page 420 -**

It was held that to establish factual possession the squatter had to show absence of the paper owner's consent, a single and exclusive possession ---that the requisite intention was not to own or acquire ownership but to possess on one's own behalf in one's own name to exclude the world at large including the paper title owner.

I have found that Sydney has been in possession of the 2 acres of the disputed land since the early 80's at the latest. He mentioned that there is a stone wall on his portion. Irene Thomas it seems to me on the evidence is the only owner of that 12 acres.

I have also found that he has been in quiet continuous and undisturbed possession that is single and exclusive possession, until he was given notice in 2004 by Josephine. It follows therefore that he has been in this single and exclusive possession for upward of 12 years. Therefore in my view Sydney has gained a proprietary title to the 2 acres by virtue of his possession.

I have also found that Loretta could not have honestly believed that the 12 acres of land was hers to do with as she pleased.

I fully appreciate that the effect of Registration is to cancel all other interest and that a registered title is indefeasible except upon a finding that it was obtained by fraud (section 70 of the Registration of Titles Act).

I am fully cognizant that the caveats are considered a sufficient protection to anyone claiming any right of that description (**Chisholm v Hall**).

I have also found that the misrepresentation in the application for title by the Defendant are evident and many. The question that I am now left with is: Does the fact that Josephine has a registered transfer makes her title thereto indefeasible and unimpeachable?

No certificate is to be impeached or defeasible by reason of, or on account of any informality or irregularity in the application or in the proceedings leading up to registration (section 68 Registration of Titles Act).

**In Assets Co. Ltd vs Mere Roihi at page 210** it was pointed out that the fraud that must be proved in order to invalidate the title of a registered purchaser for value ---must be brought home to the person whose registered title is impeachable.

Fraud by person from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been vigilant ---and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him.



In **Stuart vs Kingston Starke J** at page 359 propounds:

No definition of fraud can be attempted so various are its forms and methods. But we may say thus: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of a person who acquires it by dishonesty, ---by fraud, by acting fraudulently or being a “party to fraud” in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act.

In **Enid Timoll vs George Timoll** at page 26 Kerr J.A points out:

Regardless of how careful has been the endeavour to interpret by precise language a word that has enjoyed a varied meaning in different branches of the law, there will always remain the difficulty of deciding whether the facts of the case fall within the ambit and scope of the relevant interpretation.

[Fraud] is concerned with limiting the challenge to the indefeasibility of a registered title.

Further in **Alric Pottinger vs Traute Raffone** at page 8 the Privy Council points out that:

The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor then the production of the certificate of title in his name is an absolute bar and estoppel to these proceedings, any rule of law or equity to the contrary notwithstanding. The only situation where a certificate of title is not a complete bar to proceedings are those listed in paragraph (a) to (f) --- proceedings by a person deprived of land by fraud against the person registered as proprietor of land through fraud.

I have found that Loretta misrepresented to her Attorney-at-law in the application for the Registration of title as well as to the court when she stated that Irene died outside of Jamaica. I have also found that Loretta must have known of Irene’s death in Schoolfield, St. Elizabeth, the same area that the

disputed land is located. In fact it was her husband Jocelyn Thomas who was the informant. I have found that Loretta Thomas could not have honestly believed that the property was hers to do with as she pleases.

I have also found that either Deloris, or Loretta or both misrepresented their ages in their declaration to the Registrar of Titles. I have found that Josephine misrepresented both in her testimony and in her application for title that at age 6 she was aware of Irene's use of the rents and profits for the disputed land.

I have found that Josephine misrepresented in her application as to the persons with interest on the land of whom she is aware and in particular Peter Myers to whom she had sold the land through Loretta. Further she misrepresented that she had received a common law conveyance from Loretta.

Taking into consideration the definition of fraud and the misrepresentations made on the part of Loretta and Josephine I find that both have been consciously dishonest, so obvious and direct in their dishonesty that Josephine cannot now say that there is an absence of dishonest intention on her part and on any reasonable view I find must justify an inference that they acted dishonestly.

In my view their misrepresentations amount to fraud. Josephine is a party to the fraud. Hence the title issued to her was fraudulently obtained and she is not protected under the act. Therefore in the circumstances her title is not unassailable or not unimpeachable as she has been registered as proprietor through fraud.

## **Conclusion**

Sydney has been in single and exclusive possession of the 2 acres of the disputed land for upwards of 12 years prior to 2001 when Josephine applied to bring the 12 acres under the operation of the Registration of Titles Act. Therefore he has gained a proprietary title to the 2 acres by virtue of his possession.

Josephine is not protected under the Registration of Titles Act and in the circumstances her title is not unassailable or unimpeachable as she has been registered as proprietor through fraud.

Hence it is judgment for the Claimant on the claim and counterclaim.

## **Order**

It is hereby ordered that:

- 1) The certificate of title registered at volume 1367 folio 697 in the name Josephine Thomas be cancelled as the said certificate was obtained by fraud.
- 2) That the Claimant has an equitable interest in the 2 acres of land that he occupies.
- 3) That a survey be carried out on the said property to establish the boundaries of the said 2 acres.
- 4) That the Defendant's her servants and/or agents are hereby restrained from interfering with the Claimant's quiet enjoyment of the 2 acres that he occupies.
- 5) Costs to the Claimant to be agreed or taxed.