

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. W019 OF 1992

BETWEEN	GEORGE WILSON	FIRST PLAINTIFF
A N D	DOREEN WILSON	SECOND PLAINTIFF
A N D	DORIS WILLOCKS	DEFENDANT

Miss Ingrid Mangatal instructed by Dunn
Cox & Orrett for the Plaintiffs.

Mr. Sylvester Morris for the Defendant.

HEARD: 7TH AND 12TH MAY, 1992.

SMITH, J.

This matter concerns a Summons for Summary Judgment.

By Writ dated the 29th January 1992 and accompanied by a statement of claim, the plaintiffs claim possession of premises, 7 Stanley Terrace from the defendant.

The plaintiffs are and have been from the 5th December, 1991 the registered proprietors of the aforesaid premises being the land comprised in Certificate of Title registered at Volume 1059 Folio 896 of the Register Book of Titles. These premises were purchased by the plaintiffs from the Bank of Nova Scotia Jamaica Limited (the Bank).

The Bank sold the premises to the plaintiffs in exercise of Power of Sale pursuant to a Mortgage Instrument signed by the previous registered proprietor of the property one Mr. Prince Hall (now deceased) to support his liability to the Bank as a guarantor.

The defendant, Ms. Doris Willocks, was the common law wife of the late Prince Hall. Her name was not on the registered title. The plaintiffs, in vain, made repeated requests of the defendant to leave the premises. Hence the Writ already referred to.

This Writ of Summons accompanied by a Statement of Claim was served on the defendant on the 5th February, 1992 and an appearance was entered for

and on behalf of the defendant on the 12th February.

On the 27th February a Defence was filed. In her defence the defendant admits that she is in occupation of the aforesaid premises. She states that she cohabited there with Prince Hall up to the time of his death and that by reason of her financial contribution to the purchase of the property she claims half share of the said property. For easy reference and convenience paragraphs 5, 6, 7, 8, 9 and 10 of the Defence are reproduced below:

- (5) The Defendant further states that the Bank of Nova Scotia Jamaica Limited had neither the right nor authority to sell the premises known as 7, Stanley Terrace and that any such purported sale was in breach of law and that therefore, the bank of Nova Scotia Jamaica Limited could not and has not passed a good and proper Title to the Plaintiffs herein by any such purported sale.
- (6) That on the 31st day of August, 1990 the Defendant herein by way of Suit No. C.L. W190/90 brought an action as Plaintiff against the Bank of Nova Scotia Jamaica Limited claiming inter alia a beneficial interest in the said premises 7, Stanley Terrace, Forrest Hills, St. Andrew and further seeking a declaration that the mortgage held by the Bank of Nova Scotia Jamaica Limited was not valid.
- (7) That Appearance was entered for and on behalf of the Bank of Nova Scotia Jamaica Limited but to date the Bank has not filed a Defence.
- (8) That on the 8th day of October, 1991 the Bank of Nova Scotia by way of Plaint No. 4520/91 brought proceedings against the Defendant herein for Recovery of Possession in the Resident Magistrate Court for the Parish of St. Andrew but those proceedings were defended by the Defendant herein and the proceedings were eventually adjourned Sine

die on the 22nd January, 1992.

- (9) That a Caveat was lodged on behalf of the Defendant herein against the said property known as 7, Stanley Terrace, Forest Hills, St. Andrew on the 3rd September, 1990 and has not been released by the Defendant.
- (10) That by reason of the matters set out in the Statement of Claim filed in Suit No. C.L. W190 a copy of which is attached hereto as "Exhibit 1" the Bank of Nova Scotia Jamaica Limited could not and has not lawfully passed a Title to the Plaintiffs herein and hence the Plaintiffs herein cannot succeed where the Bank of Nova Scotia Jamaica Limited has failed since the Plaintiffs herein seek to make their claim through the said Bank of Nova Scotia Jamaica Limited.

On the 3rd of March, following upon the Defence, the plaintiffs through their attorneys-at-law filed a Summons for Summary Judgment and a joint affidavit in support thereof. On the 30th March the defendant filed an affidavit in reply.

Before me Miss Ingrid Mangatal submitted that there is no defence to the action for recovery of possession and that the document headed "Defence" and the purported exhibit thereto entitled "Statement of Claim" (in Suit W190 of 1990) disclose absolutely no defence to the Plaintiffs' claim. There is no triable issue, she urged. Counsel for the plaintiffs submitted that the defendant's claim against the Bank in Suit No. C.L. W190 of 1990 is not relevant to the plaintiffs' action for possession. She contended that even if the allegations in the "Defence" were established they would not constitute a valid defence to a claim by the registered proprietor for recovery of possession. She argued that the plaintiffs whose transfer was properly registered without fraud have obtained an indefeasible title. Reliance was placed on sections 68 and 70 of the Registration of Titles Act (the Act) and the Court of Appeal's decision in Horace Clinton Nunes and Appleton Hall Ltd. v. Roy Williams et al. Civil Appeals Nos. 64 and 67 of 1984 delivered 13th June, 1985 hereinafter referred to as the Appleton Hall Limited

case. She referred to paragraphs 9 and 10 of the Affidavit of the defendant dated 30th March, 1992.

In paragraph 9 the defendant claims that the plaintiffs know:

- (i) that the defendant was in possession of the said premises;
- (ii) that the defendant was claiming an interest in the said property and
- (iii) that the defendant had commenced court proceedings against the Bank to claim a share in the property.

In response to this claim Counsel submitted that actual or constructive notice of an equitable interest does not for the purposes of Registration of Titles Act constitute fraud. For this she relied on Section 71 of the Act.

In paragraph 10 of the affidavit just referred to the defendant asserts that a caveat was lodged to protect her interest in the property and that notwithstanding the caveat the property was transferred to the plaintiffs. In this regard Miss Mangatal also relied on Section 71 as well as Section 106 of the Act and the Appleton Hall Limited case supra.

Mr. Morris for the defendant submitted that the defendant is claiming that the mortgage document is void and thus the Bank had no power of sale in respect of the premises. He contended that the purported transfer of title to the plaintiffs is void ab initio. He further argued that the mortgage document was executed two days after the death of the mortgagor and the document signed by the mortgagor two days after his death. This he said clearly points to fraud.

Miss Mangatal in reply relies on the Privy Council's decision in Fraser v. Walker [1967] 1 All E.R. 649. She contended that for the defendant to raise a triable issue there must be some allegation of fraud on the part of the plaintiffs.

SUMMARY JUDGMENT

Section 79 (1) of the Civil Procedure Code states:-

"Where the defendant appears to a Writ of summons specially endorsed with or accompanied by a statement of claim under section 14 of this law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of

action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge there upon, unless the defendant satisfied him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

This section makes provision for a plaintiff to obtain summary judgment upon his claim without the delay and expense of a trial, if he can show that there can be no answer to his case. The provision of this section is only intended to apply to "cases where there is no substantial dispute as to the facts or the law."

The conditions precedent for the plaintiffs employing this summary process are:-

- (a) the defendant must have entered an appearance;
- (b) the Writ of summons must have been specially endorsed with or accompanied by a statement of claim;
- (c) the application must be supported by an affidavit which:
 - (i) verifies the facts and
 - (ii) contains a statement of the deponent's belief that there is no defence to the action.

These preliminary requirements having been met (it was not contended otherwise) the important question now is whether or not there is a real issue to be tried. If the facts alleged by the defendant do not amount to a defence to the action either in fact or in law, the judge will as a rule make an order that judgment be entered for the plaintiffs.

Is there a real issue which ought to be tried?

The plaintiffs, as stated before, are the registered proprietors of the premises in question. The defendant claims that the plaintiffs acquired their interest by virtue of an instrument that was void and consequently that they never became entitled to the benefit of registration.

There are two questions that I must consider in disposing of this matter.

- (1) Has the defendant satisfied me that she has a good defence to the action on the merits?
If the answer is negative then,
- (2) Has the defendant disclosed such facts as may be deemed sufficient to entitle her to defend the action generally? I will now proceed to consider the first question.

THE DEFENCE

The gravamen of the Defence is, as stated at paragraph 5, that "the Bank.....could not and has not lawfully passed a Title to the plaintiffs herein and hence the plaintiffs herein cannot succeed where the Bank..... has failed since the plaintiffs herein seek to make their claim through the said Bank....."

I will for obvious reasons refrain from commenting on the statement of claim filed by the defendant in Suit No. C.L. W190, a copy of which was attached to the Defence to the instant action. For the immediate purpose it will be assumed that the mortgage instrument bearing the signature "P. Hall" was void. Mr. Morris argues that such invalidity renders the instrument of transfer in favour of the plaintiffs not only illegal but a nullity. However the authorities cited by Miss Mangatal clearly establish the principle that "even though the instrument presented for registration may have been irregularly procured and or executed, so rendering it void, once the transfer is registered in favour of a known and existing person it confers, in the absence of fraud, an immediate indefeasible title in favour of that transferee." See the Appleton Hall Ltd. case supra per Campbell, J.A. at p. 21.

The learned Judge of Appeal referred to Fraser v. Walker with approval and went on to say at page 25:-

".....the fact of the instrument

being illegal and void has no effect on nor any vitality in vitiating the title of a person who has been registered in respect of the land. As has been earlier repeatedly said, the vesting and divesting of title is exclusively derived from the fact of registration. Once the title is registered it is immune from adverse claims except as statutorily provided for in the Registration of Titles Act itself."

It is to be noticed that sections 70, 71 and 161 of the Act except the use of fraud. Sections 70 and 71 employ the words "except in case of fraud" and Section 161 (d) uses the words "as against the person registered as proprietor of such land through fraud." In Fraser v. Walker at 652 C Their Lordships stated that "the uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent."

In our system - the Torrens system, it is these sections together with Section 68 which establish the concept of the indefeasibility of the title of the registered proprietor, in the absence of fraud. It is interesting to note that in Fraser v. Walker it was alleged that the signature of the previous registered owner was forged by his wife and in the face of this allegation Their Lordships held that registration was conclusive to confer on the transferee an unimpeachable title. Here the defendant does not allege fraud in the plaintiffs. She does not seek to invoke any of the exceptions specified in the sections of the Act which provide protection to the registered proprietor. I must therefore conclude that the defendant has not pleaded any good defence to the action on the merits.

Are there other sufficient facts?

In her affidavit sworn to on the 30th March, 1992 the defendant at paragraph 9 stated,- inter alia, that the plaintiffs knew that she was in occupation of the said property and that she was claiming an interest therein.

I agree with Miss Mangatal that this is not a defence to the action and that such actual or constructive notice does not constitute fraud - see section 71 of the Act.

At paragraph 10 she claims that a caveat was lodged and was not released by the defendant. Here again no one proposing to take a transfer from the proprietor of any registered land is required to enquire into or be concerned with

the circumstances under which such proprietor or any previous proprietor thereof was registered.

It may well be that the caveator may have an action in personam, but the title of the registered proprietors is immune from attack. As I see it, the defendant's affidavit does not disclose any fact which would entitle her to defend the action for recovery of possession generally.

In the end judgment is entered for the plaintiffs/applicants and it is hereby ordered that the defendant do give the plaintiffs possession of the premises known as 7, Stanley Terrace and described in the Summons for Summary Judgment.

Costs to the plaintiffs to be taxed if not agreed.

Stay of execution pending appeal granted on condition that costs be paid to the plaintiffs' attorney-at-law within fourteen (14) days of costs being agreed or taxed on the plaintiffs' attorney's undertaking to return the said costs if the appeal be successful.