



[2018] JMSC Civ 49

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. HCV 04800 OF 2015**

<b>BETWEEN</b>	<b>ELAIN AREM</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>VIVIENNE ANCILIN MYRIE</b>	<b>DEFENDANT</b>

**OPEN COURT**

**Ronald W.M. Paris instructed by Paris & Co. for the Claimant**

**Michael Alexander Brown instructed by Michael B.P. Erskine & Company for the Defendant**

**Cancellation of transfer – fraud – authenticity of signature – forgery – knowledge of forgery**

**HEARD: April 20, 21, May 23, October 18, 2017 and April 11, 2018**

**LAWRENCE-BESWICK J,**

[1] The claimant Ms. Elain Arem seeks the rescission and cancellation of an instrument of transfer which she alleges has fraudulently transferred her land to the defendant Ms. Vivienne Myrie and to another (now deceased). She alleges that her purported signature on the transfer was known by Ms. Myrie to be a forgery.

## **BACKGROUND**

### **Claimant's Case**

#### ***The friendship***

- [2] Ms. Arem was living with her uncle in Jamaica from 1985 until 2001. It was in 1986 that a friend of Ms. Arem introduced her to Ms. Myrie, and to Mr. Oliver Gunning, Ms. Myrie's boyfriend.
- [3] According to Ms. Arem, as the years went by she came to view Ms. Myrie and Mr. Gunning as her family. Indeed, she regarded Ms. Myrie as her "virtual stepdaughter". Ms. Myrie started to visit Ms. Arem in Florida and in New York where Ms. Myrie lived part of the time and where she maintained homes. Indeed, on some occasions Ms. Arem paid for Ms. Myrie's airplane tickets.

#### ***The land and the title***

- [4] Ms. Arem's evidence is that her uncle Mr. Hogg who was over 100 years old, gave her about 10 acres of land in Negril, and that she also paid him for a portion adjoining those 10 acres. She was issued with a duplicate certificate of title for the land on November 11, 1993.
- [5] Ms. Arem constructed a building on the land which remained incomplete and she wished to sell the land with the building as she had decided that she would not return to Jamaica to live permanently.
- [6] Sometime around 1999, when Ms. Arem was about 63 years old, Mr. Gunning told her that he wanted to borrow the title for the land as he wanted to use it to obtain a loan for himself from the bank. In furtherance of her plan to assist her "family", Ms. Myrie and Mr. Gunning, to borrow the money from the bank, she gave the title pertaining to the land to Mr. Gunning for him to use for that purpose because of the relationship which she had developed with him and with Ms. Myrie. Mr. Gunning, according to the evidence, told her that in any event he would just keep the title because he had found a buyer for the property and he

knew that Ms. Arem wished to sell it. He spoke of two prospective purchasers. However, neither met with Ms. Arem's approval.

- [7] He did not return the title but instead reassured her that she should not worry as he was trying to find a purchaser for the land.

### ***Agreement for sale***

- [8] According to her, on May 15, 1999 she went with Ms. Myrie alone to the Titles Office and there she signed a prepared agreement to sell the land registered at Vol. 1265 Fol. 465 to Ms. Myrie and Mr. Gunning for US\$400,000.00. Mr. Gunning was not there. Ms. Arem's evidence is that no money was paid to her on the agreement. All of this she thought was to help them to obtain a loan. She did not know which bank was to provide the loan or the purpose for the loan.

### ***The mortgage***

- [9] Ms. Arem did however expect that a mortgage would be placed on the land and that Mr. Gunning would bear the responsibility to pay off the mortgage. However, Mr. Gunning later told her that the interest rate he would get from the bank was too high and therefore he would not take out the loan but he would nonetheless keep the title as he was continuing to procure a buyer for the land. He reassured her that the title was safe in the bank and she agreed to that arrangement with Mr. Gunning, not Ms. Myrie.
- [10] Mr. Gunning produced potential buyers but their offers were inadequate. When Ms. Arem returned to the United States to live she would receive information from Mr. Gunning which she testified made her think she was being scammed by Ms. Myrie and Mr. Gunning.

### ***Non-production of title***

- [11] As time went by, Ms. Arem became uncomfortable with the state of affairs where she had no title and no purchaser for the land. She discussed the matter with a friend who encouraged her to retrieve the title. She tried, to no avail.

- [12] In her evidence, Ms. Arem says that the dealings concerning the land were done with Mr. Gunning. She did not have much conversation with Ms. Myrie on this issue but she believed that Mr. Gunning kept the title in a safe and that Ms. Myrie had the combination for the safe.
- [13] Later, Mr. Gunning died in November 2013 and Ms. Arem asked Ms. Myrie for the duplicate certificate of title. Ms. Myrie did not return it, telling her instead that she had found a buyer and wanted to sell the land.
- [14] The relationship between Ms. Myrie and her eventually soured because of accusations concerning unkind words being spoken after Mr. Gunning's death. The title was not returned.

### ***The transfer***

- [15] On the advice of her lawyers, Ms. Arem investigated at the Registrar of Titles and found that there was a transfer dated July 24, 2004 purportedly transferring her land to Ms. Myrie and Mr. Gunning as joint tenants for \$500,000.00.
- [16] Ms. Arem insisted that the signature on that transfer document is not hers although at first she had testified that it was hers. She explained that her eyes are 'not okay' now. She did not agree to sell the land to anyone for any sum at all. According to her, the land is worth far more than \$500,000.00; in her estimation it is worth about \$16 million.

### ***The suit***

- [17] Ms. Arem filed this suit, seeking rescission and cancellation of the transfer document, the delivery up of the title, to remain in possession of the land and other reliefs which were not later pursued.

## **Defendant's case**

### ***Purchase of land***

- [18] Ms. Myrie, the defendant, is adamant in her evidence that the transfer reflects the true state of affairs, that is, that Mr. Gunning and she purchased the land from Ms. Myrie. Ms. Arem had arranged for the transfer document to be made at the office of the Registrar of Titles and in fact signed the transfer there in her presence. Consequently, they became the registered owners of the land as joint tenants with no remaining obligation to Ms. Arem.
- [19] Ms. Myrie testified that in 2004 Ms. Arem had told Mr. Gunning that the sale price was US\$400,000.00 and on April 24, 2004 she took US\$50,000.00 to Ms. Arem in the United States of America and got a receipt for that amount. Thereafter, Ms. Arem herself handed the certificate of title to Ms. Myrie. It was in those circumstances that Mr. Gunning and herself obtained the title as they had purchased the land. It was neither to facilitate a bank loan nor to procure a purchaser for the land.
- [20] The next payment of US\$40,000.00 occurred in Jamaica in July 2004. Over a period of three years Mr. Gunning and Ms. Myrie paid Ms. Arem a total of US\$390,000.00 but Ms. Myrie has been unable to locate those receipts because shortly before his death Mr. Gunning moved out of their home taking the documents with him. She had no further access to them.
- [21] She denied that her actions were fraudulent and she maintained that Ms. Arem signed the transfer document only after having been paid the purchase price for the land.
- [22] According to Ms. Myrie in 2007 Ms. Arem admitted to them that she had been paid US\$400,000.00 in full for the land. They remained in communication and there was never a question about the title.

### ***The friendship***

[23] Ms. Myrie acknowledged the close friendship which she shared with Ms. Arem. According to her, it was in 1997 that she and Mr. Gunning had met Ms. Arem when they purchased a car from her. Thereafter, the friendship developed and continued between Ms. Arem and herself even after Ms. Arem had moved back to the United States of America.

### ***Financial assistance and purchase***

[24] According to Ms. Myrie Ms. Arem made her aware of financial hardship which she was experiencing and she, Ms. Myrie, helped her by sending US\$2000.00 to her on October 18, 2003 and US\$1700.00 on January 2, 2004.

[25] Ms. Myrie's evidence is that she was actively involved in the business transactions with Ms. Arem. It was she whom Ms. Arem had told that the land was for sale, it was she who had paid the initial US\$50,000.00 deposit, it was she who had received the certificate of title and it was Ms. Arem and herself who had been present when the transfer document was being prepared and executed. She therefore was most aware of all the transactions.

### ***The meeting***

[26] Time for the second payment arrived and it is the evidence of Ms. Myrie that Ms. Arem took her to the Titles Office in Kingston to a named person, explaining that she had always done her business with him concerning her uncle's land.

[27] It was that person according to Ms. Myrie, who prepared the instrument of transfer and both signed the document before him. Ms. Myrie then took the document to Westmoreland to obtain Mr. Gunning's signature. Thereafter, both parties returned to the Titles Office and handed over the signed transfer document with the certificate of title to an officer there.

[28] According to Ms. Myrie the purchase price of \$500,000.00 appeared on the transfer document because Ms. Arem decided that that amount should be placed on the transfer in order to reduce the duty payable.

### **HANDWRITING EXPERT**

[29] The evidence of a handwriting expert therefore became of utmost importance to determine the authenticity of the signature on the transfer document.

[30] Ms. Beverly East, a forensic document examiner, examined several signatures known to be Ms. Arem's and also the signature purporting to be hers on the transfer document.

[31] She concluded that the signature on the document which purported to transfer the land from Ms. Arem was not that of Ms. Arem. She came to that conclusion because in her view there were numerous discrepancies on the transfer document as compared to the known signatures of Ms. Arem.

### **SUBMISSIONS**

#### **Defendant's Submissions**

[32] Counsel, Mr. Michael Brown, for the defendant urged the court to find that the land had been properly purchased by the defendant and that the documents showed that. He pointed out that Ms. Arem had admitted that she had signed the receipt dated April 21, 2004 which acknowledged that she had received US\$50,000.00 on the agreement for sale of the property although she later retracted this admission. He also pointed out that she had gone to the Office of the Registrar of Titles on July 21, 2004 to transfer the property to Mr. Gunning.

[33] Counsel recognised that the description of the land which was on the certificate of title was different from the description on the receipt of April 21, 2004. However, he argued that they should be accepted as relating to the same land because the defendant's evidence that both related to the same lot remained unchallenged, and the claimant had admitted that to be accurate.

- [34] Counsel argued that the evidence was that Ms. Arem had gone to the Titles Office for the purpose of transferring the land, and in the absence of a credible reason to doubt that, the court should accept that she completed the transfer to Mr. Gunning and Ms. Myrie.
- [35] His submission continued that her evidence of not intending to do any business with Ms. Myrie was shown to be untrue because she had admitted to signing the agreement for sale. In any event, Ms. Arem had conducted herself in such a manner that she appeared to be untruthful. She was tardy in answering questions and did not present as forthright a demeanour as did Ms. Myrie.
- [36] Perhaps the most important of the arguments of Mr. Brown for the defendant, was that the expert's opinion that the signature on the transfer was not Ms. Arem's was of no moment. This he maintained because Ms. Arem had admitted that she had signed the transfer.
- [37] It would therefore follow that there was no proof that the transfer had not been signed by Ms. Arem, moreso, when it is obvious that persons sign their names differently in different circumstances.

### **Claimant's submissions**

- [38] Counsel, Mr. Paris, for Ms. Arem urged the Court to recognise that she is not a young person and her memory is obviously not sharp and focussed. He argued that although she had at first stated that the signature on the transfer was hers, this was after a brief look and later, on four (4) other occasions, she maintained that it was not hers.
- [39] Counsel argued that the transfer document stated that the purchase price paid was \$500,000.00 whilst the agreement for sale stated the price was US\$400,000.00. Meanwhile Ms. Myrie relied on the receipt for US\$50,000.00 dated April 21, 2004 as proof of part payment.



- [40] Mr. Paris argued that these figures gave the lie to the purported sale. The purchase price on the transfer document was \$500,000.00. The alleged part payment of US\$50,000.00, when converted, would be far in excess of the total purchase price and would therefore make no sense. He urged the court to find that the transactions did not occur.
- [41] His submission continued that the defendant had not provided documents which supported her defence. She had not exhibited a stamped agreement for sale in the amount of \$500,000.00 which was the sum on the transfer. Neither had she exhibited a stamped copy of an agreement for sale to support her defence that the purchase price was US\$400,000.00.
- [42] In seeking to establish that Ms. Myrie ought not to be believed, Counsel, Mr. Paris, highlighted that the agreement for sale was dated May 1999; Ms. Myrie's evidence was that the date of payment towards the purchase was April 2004 and there was no explanation for the lapse of so many years between those dates.

## **DISCUSSION**

### ***Indefeasibility of title***

- [43] The certificate of title records Ms. Myrie as one of the registered proprietors of the subject land. The **Registration of Titles Act** "the Act" provides that:

*"...[E]very certificate.....shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, ...the land therein described is seized or possessed of such estate or interest or has such power."*<sup>1</sup>

- [44] However, the Act further provides that this conclusion can be reversed by evidence of fraud.

*".....[T]he proprietor of land ....under the operation of this Act shall, **except in case of fraud**, hold the same as the same may be described or identified in the certificate of title, .....absolutely free from all other encumbrances whatsoever, except the estate or interest of a*

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<sup>1</sup> S.68

*proprietor claiming the same land under a prior registered certificate of title...<sup>2</sup>.(emphasis supplied)*

- [45] Whilst protecting the indefeasibility of the title held by a registered proprietor, the Act empowers a person to challenge, by court proceedings, the registration on the title where he alleges that he has been deprived of the registered land by fraud.

*“No action....suit or proceeding, for the recovery of any land shall lie....or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in...*

.....

*d) ...the case of a person deprived of any land **by fraud** as against the person registered as proprietor of such land through fraud...”<sup>3</sup>(emphasis supplied)*

### ***Fraud***

- [46] The Act does not define “fraud”. It is accepted that the forms and methods of fraud are so varied that no definition of it can be attempted.<sup>4</sup> However, the authorities show a common thread of requiring evidence of a consciously dishonest act in the plain ordinary meaning of those words, some type of moral turpitude to prove fraud.<sup>5</sup>

- [47] It was Lord Lindley who, in the House of Lords, said,

*“...by fraud in these acts is meant actual fraud that is dishonesty of some sort;....”<sup>6</sup>*

- [48] Ms. Arem would have to prove fraud, some consciously dishonest act in causing her name to be entered as the proprietor of the land, before there could properly

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<sup>2</sup> S.70

<sup>3</sup> S.161

<sup>4</sup> *Stuart v. Kingston* (1923) CLR 309 at 359

<sup>5</sup> *Ibid*, *Timoll-Uylett v Timoll* (1980) 17 JLR 257, *Assets Co. Ltd v. Mere Roihi*(1905)AC176, *Sawmilling Company Ltd. v. Waoine Timber Company Limited* (1976) AC 101

<sup>6</sup> *Assets Co. Ltd. v. Merer Roiho* *supra*

be any interference with the registration of Ms. Myrie as the proprietor of the land.

[49] The major evidence on which Ms. Arem relies in that regard is that provided by the forensic handwriting expert that the signature on the transfer is not hers.

***Authenticity of the Signature***

[50] During cross-examination, Ms. Arem testified that the signature on the transfer document was hers. In re-examination she retracted that, explaining that she had said that in error and that her eyes are “not okay” now. I accept Ms. Arem’s explanation because this entire case is based on her assertion that the signature is not hers and Ms. Arem even engaged a forensics document examiner to support that assertion. It is quite obvious that Ms. Arem is a very senior citizen and that must be considered in assessing the manner in which she gave evidence.

[51] The scientific evidence, in my view, provides impartial support for her case. I am satisfied on a balance of probabilities that the signature purporting to be that of Ms. Arem on the transfer document is not hers. I so conclude because of all the evidence in the case and in particular, the detailed analysis of the forensic handwriting expert, Ms. Beverly East. I accept the evidence of Ms. East as being truthful and also accurate.

[52] Ms. East testified that she compared the signature purported to be that of Ms. Arem on the transfer document as against signatures known to be hers. In that regard, Ms. East examined;

- a. Elain Arem’s signature on the last page of the agreement for sale of the land dated May 15, 1999
- b. Samples of her known signatures dated May 11, 2015
- c. American Passport page with Elain Arem’s signature

d. TRN card of Elain Arem

e. Image of an American Express card with Elain Arem's signature

**[53]** Ms. East reported that the signature being questioned on the transfer document bears notable disparities that are often found in a simulated signature. They were too numerous to be attributed to chance.

**[54]** Ms East noted that in the questioned signature, there was lack of fluidity, uncharacteristic movement, and that the spacing patterns and heights of capital letters were significantly different.

**[55]** She opined that by contrast, the known signatures were consistent in letter formations. The pen lifts were in the same place in all four signatures. The spacing and height of the letters were consistent, as was the letter construction, especially the capital E and capital A. The questioned signature displayed none of those consistent characteristics and appeared to her to have been drawn.

**[56]** I accept as true, the expert's opinion that handwriting is subconscious behaviour and is as individualistic as one's fingerprints. The scientific evidence therefore satisfies me on a balance of probabilities that the signature on the transfer document is not the signature of Ms. Arem. The non-scientific evidence, to my mind, bolsters my view.

***Knowledge of the forgery***

**[57]** Having been so satisfied, the next issue I need to determine is whether Ms. Myrie was aware of the fact that the transfer document was not genuinely executed by Ms. Arem.

**[58]** In seeking to resolve that issue, I consider the surrounding circumstances including the evidence that Ms. Arem's attorneys-at-law informed Ms. Myrie that the signature on the purported transfer was not hers, inviting her communication to rectify that situation, and being met with silence.

**[59]** I also consider the circumstances in which the document came to be created.

*The surrounding circumstances*

**[60]** There is no challenge that the parties shared a friendship for several years and were willing to help each other. It is not clear who benefitted from the trips made to the United States of America by Ms. Myrie in order to visit Ms. Arem. However, Ms. Myrie testified that she offered to help Ms. Arem when the latter suffered financial hardship. I reject that evidence of Ms. Myrie assisting Ms. Arem and prefer that of Ms. Arem that it was she who helped Ms. Myrie and her then companion, Mr. Gunning. The evidence portrays the claimant as a senior citizen of some established means and the defendant as being of decidedly less means, trying to live a better life.

*Relationship between the parties*

**[61]** I accept that Ms. Arem was a land owner in her own right, and also through a gift from her uncle. I believe on a balance of probabilities that Ms. Arem sometimes provided the cost of the airplane tickets for Ms. Myrie to visit with her overseas.

**[62]** Ms. Arem is obviously a very senior citizen whereas Ms. Myrie does not so appear. Whereas Ms. Arem would not be assumed to be actively working now, I accept that she had been gainfully employed previously as a fashion designer and is currently a landowner with means. I readily accept that Ms. Arem regarded Ms. Myrie and her companion as family and tried actively to help them to achieve financial goals.

**[63]** In my view, Ms. Myrie capitalised on the obvious generosity of Ms. Arem who had demonstrated the extent of help she was willing to give when she signed the agreement for sale in her effort to assist Mr. Gunning, who at that time was a companion of Ms. Myrie.

*Subsequent absence of communication between the parties*

**[64]** I am fortified in my conclusion that a fraud was perpetrated by the evidence that Ms. Myrie has deliberately abstained from meeting with Ms. Arem's attorneys-at-law concerning the ownership of the property, when such a meeting could be expected to facilitate an obvious quick solution to the claim.

***Disparity between the purchase price on the agreement and monies paid***

**[65]** The purchase price on the agreement of sale is US\$400,000.00 but on the purported transfer document is \$500,000.00 [presumed to be Jamaican dollars as there is no reference to the United States denomination] yet the receipt shows the amount paid towards the purchase price was US\$50,000.00 which when converted would be far in excess of the purchase price on the transfer. There is no evidence to explain this disparity. There is exhibited no agreement for sale reflecting the \$500,000.00 amount stated on the purported transfer.

**[66]** There is no evidence purporting to explain the initial payment of US\$50,000.00 in April 2004 towards an agreement for sale dated May 1999, some five (5) years earlier. This indicates to me that there is some dishonesty in the transaction.

**[67]** I reject the evidence of Ms. Myrie that Ms. Arem had admitted to her that she had received payment in full. The history of their business relationship shows that there was writing to record their transactions. The agreement for sale states that the purchase price is US\$400,000.00. The defendant has not provided evidence of the full payment of that amount.

**[68]** It is in my judgment not probable that the transfer would have been signed to pass the interest to persons who had not paid, moreso, when the amount involved is substantial, as here.

*Reliability of Ms. Myrie's evidence*

**[69]** I will not rely on Ms. Myrie's evidence as to the authenticity of the signature on the transfer. Her evidence has left important questions unanswered. It is worthy

to note that she testified that she was informed in 2004 that Ms. Arem intended to sell her land, yet the sale agreement was executed by her in 1999, years earlier. I regard the absence of a credible explanation for the time lapse as an indicator of the danger of relying on her evidence.

[70] In view of the circumstances surrounding the purported transfer of the land, I find on a balance of probabilities that Ms. Myrie was aware that the signature on the transfer document was not that of Ms. Arem.

### ***Possession***

[71] There is no evidence of Ms. Myrie, the defendant, having taken possession of the property or of Ms. Arem having relinquished possession in over a decade which has passed since the purported transfer of 2004.

### **CONCLUSION**

[72] Ms. Arem, in my judgment, did not sign the transfer document. The expert handwriting evidence by itself would lead to that conclusion. The other evidence of the surrounding circumstances supports that conclusion, as also the conclusion that Ms. Myrie was aware that the signature was fraudulent.

[73] In my view Ms. Arem fell victim to dishonesty by Ms. Myrie and this personal dishonesty, this fraud, resulted in the title being registered in the name of Ms. Myrie. The law provides for an entry such as that to be removed, based as it was, on fraud<sup>7</sup>.

### **DISPOSAL**

[74] The orders I make therefore are:

1. Rescission of Transfer Instrument #1310803 dated July 21, 2004 concerning land registered at Volume 1265 Fol. 468

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<sup>7</sup> S. 153 **Registration of Titles Act**

2. The defendant is to deliver the duplicate certificate of title registered at Volume 1265 Fol. 468 in the Register Book of Titles with survey plan attached to the Registrar of the Supreme Court within fourteen (14) days of this Order. The Registrar of the Supreme Court is to transmit said duplicate certificate of title with survey plan attached to the Registrar of Titles within seven (7) days of receipt thereof.
3. The Registrar of Titles is to cancel the transfer #1310803 dated July 21, 2004 endorsed on the said certificate of title registered at Vol. 1265 Fol. 468 by which all those parcels of land part of Redorney in the Parish of Westmoreland together containing by survey ten acres twenty-one perches and six tenths of a perch of the shape and dimensions and butting as appears by the plan thereunto annexed, were purportedly transferred by Elain Arem to Oliver Anthonio Gunning and Vivienne Ancilin Myrie.
4. In the event that the defendant fails to deliver the aforementioned duplicate certificate of title with survey plan attached within the prescribed time, the Registrar of the Supreme Court must forthwith so inform the Registrar of Titles and the Registrar of Titles must cancel the certificate of title and replace it by issuing a new certificate of title in the name of the claimant.

**[75]** The other reliefs on the particulars of claim of an injunction and possession of the property and mesne profits were not pursued.