



[2012] JMSC CIV. 179

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2010 HCV O6406**

In the Estate of **ALBERTHA MONTAGUE**,
Deceased (Probate)

AND

In the matter of property registered at volume
1256 Folio 918 of the Register Book of Titles

AND

In the Matter of section 140 of the Registration
of Title Act.

BETWEEN	SARAH MONTAGUE	CLAIMANT
A N D	DERRICK WILLIE	1st DEFENDANT
A N D	JOAN WILLIE	2nd DEFENDANT

**Sherry-Ann McGregor instructed by Nunes, Scholefield, Deleon
& Co. Attorneys-at-Law for the Claimant.**

**John Givans, Sasha Vacciana-Riley instructed by Givans & Company for the
Defendant**

Heard: 1st & 2nd October 2012. 22nd & 7th December 2012

**Trespass to Land – whether land sold prior to deceased owner’s passing –
Whether documentation forged – Expert Handwriting evidence**

Coram: Justice David Batts

[1] By an amended Fixed Date Claim Form filed on the 23rd February, 2011 the Claimant Sarah Montague the daughter and one of the beneficiaries of the Estate of Albertha Montague (deceased) claims the following relief:

1. A Declaration that the paper writing dated the 21st day of October, 2002 purporting to be the Last Will and Testament of Albertha Montague is null and void and of no effect.
2. A Declaration that the paper writings purporting to be receipts evidencing the purchase by the Defendants of an interest in property registered at Volume 1256 Folio 918 from Albertha Montague, deceased, are null and void and of no effect;
3. A Declaration that the Defendants have no interest in the property registered at Volume 1256 Folio 918 of the Register Book of Titles;
4. Damages for trespass.
5. An Order that caveat number 1519154 which was lodged by the Defendants against the Title registered at Volume 1256 Folio 918 be removed;
6. An Order for immediate possession of property registered at Volume 1256 Folio 918 of the Register Book of Titles;
7. An injunction to prevent the Defendant, his servants, agents or assigns from occupying continuing to occupy or entering upon property registered at Volume 1256 Folio 918 of the Register Book of Titles;
8. An Order that the Defendant demolish and remove from the property registered at Volume 1256 Folio 918 of the Register Book of Titles, all structures on the said property, together with all materials of any type or nature, which the said Defendant, his servants and/or agents have placed upon the said property.
9. Costs to the Claimant to be taxed if not agreed;
10. Such further and other relief as this Honourable Court deems just.

[2] The Claim is supported by Particulars of Claim in answer to which the Defendants filed an amended Defence and Counterclaim. In their counterclaim the Defendants seek the following relief:

- i. A Declaration that the document dated October 21, 2002 executed by Albertha Montague, deceased is the valid last will and testament of the said deceased.

- ii. A Declaration that the two receipts dated August 21, 2002 for \$100,000.00 and September 8, 2002 for \$200,000.00 are valid, having been issued by the said deceased and that they evidence the payment by the Defendants of the purchase price for the said parcel of land.
- iii. A Declaration that the Defendants are the beneficial owners, entitled to possession of the said land.
- iv. An Order that the Claimant effect the transfer of the said land to the Defendants within such period as may be ordered by this Honourable Court.

[3] By Order dated 23 June 2011 the Honourable Mr. Justice Rattray Ordered among other things that:

- (a) The matter is to be treated as if commenced by way of Claim Form
- (b) The Claimant be appointed the administrator of the Estate of Albertha Montague deceased pending the determination of these proceedings pursuant to Rule 68.65 of the Civil Procedure Rules 2002.
- (c) Notice of these proceedings to be served on the children of the deceased Albertha Montague by one (1) advertisement in the United Kingdom edition of the Gleaner newspaper.

[4] On or about the 1st February 2012 the Honourable Mr. Justice K. Anderson made inter alia orders for specific discovery and also ordered that the matter be tried in Open Court. By Order dated 9th July 2012, the Honourable Miss Justice K. Beckford ordered among other things that:

- (a). Ms. Beverly East handwriting expert is certified as an expert witness.
- (b). The Claimant is allowed to rely on the written report of Ms. Beverly East dated 22nd August 2011.
- (c). The Claimant shall serve a copy of the report dated 22nd August 2011 on the Defendant's attorneys at law within 7 days of the date of this Order.

[5] The trial commenced on the 1st October 2012 and continued until the following day. Thereafter it was adjourned for the parties to file and exchange written submissions. On the 22nd November the parties attended before me to speak to the submissions of each other. I then reserved to consider my decision which in this written judgment I now deliver.

[6] The case for the Claimant was supported by evidence from herself as well as by the expert report of Beverly East.

[7] The Claimant gave sworn evidence that she lived in England and that she was a teacher. She had signed an affidavit and a witness statement in relation to these proceedings. Her affidavit dated 28th October 2010, was admitted as Exhibit 1 and her witness statement dated the 25th June 2012 was ordered to stand as her evidence in chief. It is convenient to note at this juncture that the affidavit of Derek and Joan Willie dated 19th May 2011 was admitted as Exhibit 2; the Affidavit of Eloida Shirley dated 19th May 2011 was admitted as Exhibit 3; and the second affidavit of Sarah Montague dated 22nd July 2011 was admitted as Exhibit 4.

[8] Objections were taken to various paragraphs of Sarah Montague's witness statement. After hearing submissions from the parties the following resulted:

(a) Paragraph 5 in both her witness statement and her Affidavit dated 28/10/10 - (Exhibit 1) were struck out.

(b) Paragraph 26 of witness statement was struck out.

This Court urges parties to make these applications at the pre-trial review as it will save trial time and better allow for the preparation at trial. The days of trial by ambush should have been long past. This matter of ambush is a something to which I will have to return.

[9] The Claimant applied for and there being no objection, was granted permission to amplify the witness statement. The witness stated that in paragraph 9 the reference to a letter of the 3rd February 2010 making reference to a copy of paper writing dated 21st October 2002 was an error. As regards paragraph 14 there was an error as she arrived in Jamaica on the 14th September 2002 and stayed until the 28th or 29th December 2002. The purported sale therefore occurred prior to her arrival in Jamaica.

[10] The Claimants evidence in chief was therefore to the effect that to her best knowledge information and belief both her parents died without making a will. The property at Lot 92 Hart Hill Portland registered at Volume 1256 Folio 918 of the Registrar Book of Titles was registered in her mother's name and that of her father. That on the 8th January 2010 a Notice to Quit was served on the Defendants and by letter dated 11th January 2010 her attorneys advised the Defendants that legal action would be taken if they failed to remove off the property.

[11] A letter dated 3rd February 2010 from Mr. Malcolm McDonald attorney-at-law on behalf of the Defendants indicated that the Defendants had purchased an interest in the property from her mother. The letter contained supporting documents as well as a copy of a caveat lodged on the 27th August 2008. Also enclosed in the letter was a copy of a paper writing dated 21st October 2002 which was said to be her mother's last will and testament. At paragraph 10 the claimant states:

"I have no knowledge of my mother ever having sold an interest in any portion of the property to any person, nor am I aware of either of my parents leaving a will. At all times when I discussed the property with my mother, it was her intention that the house should go to my daughter, Naomi, and that everything else should be

shared among my siblings and I. in fact my mother called me a week before she died and repeated this.”

It should be noted that this paragraph was one of those objected to on the ground of hearsay, I overruled the objection and allowed the evidence to stand because the statement had been served on the Defence since the 28th June 2012 and falls within the exception contained in Section 31E of the Evidence Act. I have exercised my discretion to allow the evidence.

[12] The Claimant further stated that her mother became a member of the Defendant’s church in 1999 after the death of her father. In early 2002 her mother became ill and so she returned in September to spend time with her. She enrolled her daughter in Titchfield High School so they could stay until after Christmas day. They left Jamaica on about the 28th or 29th December 2002.

[13] The witness deponed that her mother and herself were very close and her mother mentioned nothing to her of the purported sale even though it would have occurred during her stay in Jamaica between September to December 2002. They walked through the property every morning to tie out the goats and feed chickens and would have seen a fence if it was there. During her stay also she said she hired two young men Clive and Craig to clear the land and she often went to observe their work. She is positive no fence or vegetable plot was there. She also visited Jamaica twice in 2004 and on neither occasion was a fence there.

[14] She first saw a fence some time after her mother died and she sought the advice of her then attorney Olive Gardner and made arrangements for it to be removed.

[15] At paragraph 19 the witness states that her mother died on 26th March 2004 and after her funeral she telephoned Mrs. Shirley and told her she had found a document that appeared to be a will. She asked Mrs. Shirley to come to the

house and read the document but she declined. Mrs. Shirley came to the house upon the claimant's insistence and when shown the purported will stated,

"This can't go to a lawyer. Don't worry with that. Your mother told me that she wants you to administer and do the sharing."

- [16] The witness stated that one Derrick Willie approached her and said he had purchased land from her mother. She asked him to come to her home and bring any proof of that with him. She asked her mother's neighbor Devon Baldie to be present. Both Mr. and Mrs. Willie (the Defendants) attended the meeting. They produced two (2) photocopy receipts. No mention was made of a survey diagram, bank statements, fence or crops. She said she told them she did not believe them and would not accept photocopy receipts. She told them:

"When they were able to provide this proof I would give them back the \$300,000 they allegedly paid. The Defendants agreed to this."

- [17] The Claimant stated that her mother was meticulous and very organized and would have ensured that the transaction was completed. She states that she gave no further thought to the Defendant's contention until she received information in January 2010 about the Defendant's activities on the property.

- [18] As a result of the response in Mr. Malcolm McDonald's letter she provided documents she knew to have been signed by her mother along with the purported will and receipts to Beverley East a handwriting expert and asked for an opinion. That opinion unequivocally states that neither the will nor the purported receipts were signed by her mother. Mrs. East's detailed report was subsequently prepared and is dated 22nd April 2011.

- [19] The Claimant was then cross-examined by Mr. John Givans. She stated that her mother's property consisted of approximately 8 acres. It was suggested to her that the statement in the will suggests that the parcel was already sold and does

not bequeath anything to the Defendants. Her response was that the clause was unclear to her, it was confusing.

[20] The witness stated that her mother had been quite seriously ill in 2002 but at the time she was unaware of the nature of the illness. She now knew it was cancer.

[21] The witness was asked whether she had any documentary proof that she was in Jamaica in 2002. She said she was unaware of any. She stated that her daughter Naomi who was here with her was now 24 years old. She was asked why Naomi was not called and responded that she had no reason why she did not call her. The witness was asked whether she was aware that her mother had the land surveyed in 2002 by a surveyor named Mr. Bloomfield and said no. She said it was possible she had a part of it surveyed but that she was unaware. She admitted it could have taken place. She denied knowing that a sale took place of $\frac{1}{4}$ acre of the land. She disagreed with the suggestion that her mother had sold $\frac{1}{4}$ acre of the land.

[22] It was suggested to her that by the time she came back to Jamaica in 2004 the land had already been surveyed. She said she neither agreed or disagreed as she does not know. She said she called Mrs. Shirley some time after the funeral. It was her sister Rachel and herself who found the will. They found it in her mother's bedroom. She had a bag in the bottom of wardrobe. A blue leather bag where she kept some important documents. She also had a small briefcase as well. The following important exchange occurred:

“Q: “Your case is will is bogus. What do you want court to believe about the document you found in blue bag?”

A Mummy was hospitalized. I was not there when she died. A lot of people had access to the house. Somebody else had keys to the house.

Q: Who had keys to house?

A: I was not there. It was not me.

Q: The wardrobe is in bedroom. Where in house is it?

A: Upstairs.

Q: Handbag or pouch?

A: No small handbag.

Q: Where did you find the blue bag?

A: When I came to house room had been searched. I found the blue bag and other things were on top shelf of wardrobe. It is a two (2) door wardrobe. Pull open but not lock and key.

Q: How did it get into the blue bag in the wardrobe?

A: I cannot say. Was not there.

Q: Before she was ill who live with her?

A: By herself.”

[23] The witness was asked whether she knew the account numbers that were mentioned in the will. She stated that her mother had three (3) bank accounts but she did not know the numbers. Nor does she know who else knew the three (3) bank account numbers. She knew that Mrs. Shirley assisted her mother to place her (the witness' daughter) on one of those accounts.

[24] In relation to paragraph 22 of witness statement she was asked who is Mr. Baldie. She said he was her mother's neighbor also known as Devon. She says he said nothing at all during the meeting. She was asked why was he not called to give evidence and responded:

“Because I had conversation and he said he knows nothing about it and had nothing to say.”

She was also asked whether she was aware it was Mr. Baldie who got the surveyor to survey the land. She indicated she was unaware.

[25] The meeting with Baldie and the Willies took place on the date her sister and herself were to leave Jamaica. It was suggested to her that at the meeting a copy of the surveyor's diagram was shown to her. This she denied. She was asked why did she say if she received proof of payment she would refund the money as that, would mean there was a sale. She responded:

"My intention was to call their bluff"

The following exchange followed:

"Q: But they show you photocopy so original would read to refund?

A: I have never seen original. Concrete proof did not mean the original receipt it meant a bank statement and I actually told them that.

Q: But that is not in witness statement?

A: I told them that in paragraph 24.

Q: Look at line 2 in paragraph 24 your problem was with photocopy receipts?

A: The original would not have sufficed. More concrete proof like a bank statement.

Q: If they produce a bank statement like you would give a refund of money?

A: No, not what I am saying. My intention was to call their bluff.

Q: Not true. Suggest you really intended to refund the money?

A: I would have and did return to Jamaica and call a lawyer.

Q: Suggest that based on what is in witness statement if this concrete proof had been given to you it was your intention to payback the money?

A: True with explanation.

Q: What is explanation?

A: I told them land cannot be sold by simply giving someone \$300,000 in cash and needed to be subdivided and separate titles."

[26] It was in the end suggested to the witness that she objected to any sale and her intention was to call off the sale. The witness responded that she could not speculate because they (the Defendants) did not give proof.

[27] Later in her cross-examination she was asked about the documents given to the expert. She said she gave the expert letters a passport and a lease agreement but admitted that she had not seen her mother sign any of these documents. It was also suggested among the several suggestions put that her expert's opinion was erroneous. She was also asked whether a report had been made to the police about false receipts and will but she said no, it was a consideration for later.

[28] In re-examination the witness was asked why did the meeting take place on the day herself and her sister were to leave Jamaica. She said:

“After will was read my brother and sister were still in the island. I said to my brother and sister let us not say anything about it. If he has bought land he will say something. So it was later Pastor Willie called me. I then asked him to come with proof of sale and we agreed to a date and time.”

The Claimant also explained in relation to the suggestion about intending to return the money to the Willies, that,

“My intention was to find out the truth. My mother spoke a week before she died, Mr. Baldie was unaware and I asked other people.”

This latter bit of evidence being obviously hearsay this court disregards it.

When asked how a bank statement would have assisted her the witness said:

‘I came to Jamaica in 2002 and I noted the date of the receipts so I would correlate the date on the bank statement.’”

[29] At the end of the Claimants evidence the expert report of Beverly East was admitted as Exhibit 5. As indicated at paragraph 4 above an order of this Honourable Court had already provided for this. By consent the letter of opinion of Beverly East was tendered as Exhibit 6. These documents will be discussed in great detail later in this judgment. That was the Claimants case.

[30] The Defendants called several witnesses. Apart from giving evidence themselves they called Mr. Benjamin Bloomfield a surveyor and Mr. Omar Haye from the Jamaica National Building Society as well as Eloida Shirley a Justice of the Peace.

[31] I will not repeat in detail the evidence of these witnesses which is contained in their witness statements and the notes of their cross-examination and re-examination. Suffice it to say that the pith and substance of each of these witnesses' evidence was as follows:

(a) **Derrick Willie:**

He is a Pastor at Windsor Castle Baptist Church and has been since 1976. Albertha Montague became a church member in the 1990's. In 2001 his wife had discussions with Albertha Montague who had heard that himself and his wife were interested in purchasing a piece of land. Eventually and after they had viewed the land they agreed to buy $\frac{1}{4}$ acre for \$300,000. The money was paid in cash in two installments. As they could not afford a lawyer to handle it they asked Mrs. Eloida Shirley a Justice of the Peace who lived in the area and worshipped at their church and who was known by Albertha Montague to be a witness. Mrs. Montague told them she would have the land surveyed and she subsequently gave them the original survey diagram. They played no part in having the survey done nor did they know the surveyor. They erected a wooden post and barbed wire around the $\frac{1}{4}$ acre of land.

(b) **Joan Willie:**

Her evidence in chief is to the same effect as that of her husband.

(c) **Benjamin Bloomfield:**

He stated that he is a Commissioned Land Surveyor and has been since 1995. He has a diploma in Land Surveying and was trained at CAST now UTECH. He gave evidence of his experience in the field. He does not know any of the parties to the proceedings. In 2002 to 2003 he was engaged by Albertha Montague to survey ¼ of land in Hart Hill in Portland. Contact was made with him by one Devon Baldie. After that discussion he made contact with Mrs. Albertha Montague and did a survey of the parcel of land. It was done on the 8th January 2003. He has no idea why she wanted the land surveyed. He prepared a prechecked plan number 298708. He gave it to Mrs. Montague and had no idea what happened to it after he gave it to her until he was now seeing it.

(d) Omar Haye:

He is the Senior Branch Manager at Jamaica National Building Society Annotto Bay. He knows of Derrick Willie and Joan Willie who are customers of the bank for at least ten (10) years. In 2002 they maintained a savings account. On the 12th May 2011 he prepared a printout showing transactions done by the Willies between June 2000 and March 2003. That printout shows that on August 21, 2002 the Willies withdrew \$100,000 from their account and on 6th September 2002 they withdrew \$200,000.00. Further that the \$200,000.00 was used to buy a manager's cheque from National Commercial Bank (Ja.) Ltd. He had the original cheque stub for the purchase.

[32] The following documents were admitted as evidence during the Defendants case:

- | | | |
|----|---|-------------|
| a. | Original receipt dated 21/8/02 | Exhibit 10 |
| b. | Original receipt dated 8/9/02 | Exhibit 11 |
| c. | Surveyor precheck plan dated 8/10/03 | Exhibit 8 |
| d. | JNBS printout dated 12 th May 2011 | Exhibit 7 |
| e. | JNBS cheque book with cheque stub 6 th September 2002 | Exhibit 9 |
| f. | One Envelope and document entitled last Will and Testament of Albertha Montague | Exhibit 12. |

[33] All witnesses were thoroughly cross-examined by the Claimants counsel. I will not rehearse the details of the evidence, suffice it to say that certain inconsistencies were uncovered and some irregularities particularly as to dates. The Willies for example were sure the transaction occurred on a weekday but the Calendar demonstrates that it was on another day of the week. These

inconsistencies counsel highlighted in her written submissions and are mentioned below. The cross-examination of the Willies demonstrated that they were unsure about dates. Mr. Willie was unable to say when the discussions took place whether in 2001 or 2002. He did say however that his wife conducted the negotiations. He could not even be specific about when they went to view the land save that it was shortly before the deposit was paid. The cross examination also disclosed that contrary to their evidence in chief the second of the 2 payments was by managers cheque and not cash. This is contrary to all the prior statements that both payments were by cash. Mrs. Willie was certain that the conversation about purchase of land with Mrs. Montague occurred in 2002 and that her witness statement contained an error when it referred to 2001.

[34] It is important to note that when Mr. Omar Haye was giving evidence in chief an effort was made to put in a document which had not been previously disclosed. This was evidence of a cheque issued for \$200,000.00. Upon objection being taken by the Claimant the court ordered that the document or documents intended to be adduced be disclosed and handed over to the claimant's lawyers for inspection. The witness for the bank (Omar Haye) was bound over to return on the following day. On the following day [2nd October 2012] the witness explained that after 7 years original documents are destroyed so he was not sure if the original cheque could still be located. The bank however still had the original cheque stubs. This was admitted in evidence and had been in the possession of Jamaica National Building Society. In cross examination he admitted not being able to say whether the manager's cheque was encashed.

[35]. It is a further point to note that the witness Elodia Shirley who deponed to witnessing the will as well as the receipt of money was also in error as regards the day and date. Her evidence in chief was that it was on a Saturday that the will was drafted and witnessed by her. In fact the calendar shows that it was a Monday. Her response to that was:

“It is possible it was ten years ago and I could have erred concerning the day.”

When confronted with the fact that the 8th September 2002 was a Sunday and her evidence in chief stated the money was paid on a weekday the witness maintained that it was a weekday and that she must have placed an incorrect date on the document. In answer to the court as to whether she could proffer an explanation for the wrong date she said,

“I could have erred miserably.”

[36]. At the close of the Defendants case the parties agreed to file written submissions and on the 23 November, 2012 attended to make oral submissions limited to a response to the written submission of the other. I thereafter reserved to consider my decision.

[37] I am indeed grateful for the submissions and the authorities presented. Both parties pointed to inconsistencies in the evidence. Mr. John Givans in his submissions relied heavily on the documentary evidence which he said corroborated the Defendant’s case, these were the 2 receipts, the bank documentation and the surveyors report. He eschewed reliance on the alleged will with these words,

“There has been talk that Mrs. Montague left a will in which the sale of the land is mentioned but the Defendants knew and know nothing about this will and place no reliance on it.”

This statement is surprising given the relief claimed in the Defendant’s counterclaim.

[38] Mr. Givans in his submissions attacked the expert opinion of Beverley East. He argued that expert handwriting evidence was not scientific or reliable and prayed in aid authorities from the United States. He also by reference to the report itself sought to demonstrate that the conclusions did not flow from the expert’s own

observations. In this regard Mr. Givans compiled a Table which demonstrated that Miss East had identified many more areas of similarity than of dissimilarity in the handwriting.

[39] Having considered Mr. Givan's submissions I do not think he is entitled, without having challenged the expert's qualifications either when the Order was made in chambers or by application to cross examine in this court, to make submissions as to her qualifications or to question the integrity of the science of handwriting. Surely issues as to whether Miss East is an expert or as to whether the science or expertise she espouses is a reliable one, are matters of fact. This court would therefore require evidence either from another expert or by way of cross-examination of Miss East before saying either that she lacked the qualifications stated in her evidence or that the science of handwriting is unreliable and not sufficiently probative to be relied upon. This latter submission, notwithstanding the cases from the United States which Mr. Givans cites, is rather startling given the fact of which judicial note can be taken, that expert handwriting evidence has been given and accepted in these courts for a long time. The days, as I have said before, of trial by ambush should now be behind us and I cannot but regard the approach of counsel for the defendant as an attempted ambush – taking no objection to the expert opinion and then seeking to dislodge it in this manner.

[40] Insofar as Mr. Givans submissions as to the internal inconsistency and contradictions in Mrs. East's report is concerned, I have studied the report carefully and have myself examined the original will and the receipts. I accept that this court is not bound to accept expert evidence and as with other evidence it is a matter for this court to consider and may be accepted or rejected. It does seem to me, with my layman's eyes that the handwriting on the documents and the comparisons made, are not really so different as to stand out. However I am no expert. I therefore decline to follow Mr. Givan's critique of the report and will not on that basis alone reject the expert evidence.

[41]. Miss Sherry-Ann McGregor in her written submissions on behalf of the Claimant highlighted the many discrepancies in the evidence of the Defendant's witnesses.

These were:

- a. Both defendants, who previously swore to an Affidavit in these proceedings, chose to affirm at Court.
- b. For the first time at Court the Defendants said that the second payment to Albertha was made via Manager's cheque. This contradicts their Affidavit and Witness statements, which stated that both payments were made in cash. It also contradicts Mrs. Shirley's Witness Statement in which she said that she was present when "money," which she said would mean cash, was paid to Albertha Montague. That evidence is to be contrasted with Sarah account, in which she consistently stated that when she met with the Defendants after mother's funeral, Derek Willie told her that the payments had been made in cash. This is why she requested concrete proof in the form of a bank statement to show contemporaneous withdrawals from their bank account.
- c. While Mr. Willie was still giving evidence under cross examination, he discussed the alleged payments with Mrs. Willie, who then altered her sworn evidence on affidavit and the facts certified to be true in her witness statement to match his new version of the facts. Both Joan and Derek Willie claimed that further investigations caused them to alter their evidence. According to Mr. Willie, the further investigations were carried out on the weekend before the trial when he read the Bank Statement, which he had exhibited to his affidavit in may 2011, for the first time.
- d. At different times during the course of his evidence, Mr. Willie vacillated between relying on the facts as outlined in his Affidavit and Witness Statement, not recalling the facts and giving an entirely new version of the facts at Court.
- e. For her part, Mrs. Willie could not quite recall whether she was present on both trips to the bank to withdraw the funds to pay Albertha Montague. She first said that she was not sure, and then she said that she was the one who requested the Manager's Cheque. It seems rather implausible that the Defendants would not recall the details of such a life-altering transaction as the purchase of property for the first time, but that is what they would have this Court accept.

- f. When Sarah challenged their assertion that they bought the property from Albertha Montague, it is curious that the Defendants did not call upon Eloida Shirley, who was so integral to the transaction, to verify and corroborate their account.
- g. Even if the Court accepts that there was an agreement to sell lands to the Defendants, there is no confirmation that the agreed payment was made. Even if a cheque was requested from Jamaica National to pay \$200,000.00 to Albertha Montague, the facts are that her name would not have been correctly spelt on the Manager's cheque they requested at Jamaica National and there is no proof that such a cheque was ever delivered or encashed. The question of whether Albertha Montague could negotiate a cheque with her name spelt incorrectly cannot be answered, since Mr. Haye could provide no information beyond a statement that the bank's records showed that a cheque for \$200,000.00 was requested in favour of "A. Monteque."
- h. Both Defendants say that they went to the bank, picked up Mrs. Shirley and then went to Albertha Montague's house on August 21 and September 8; and that both days were weekdays. Now that we know that September 8, 2002 was a Sunday, the Defendants say the calendar must be wrong, while Mrs. Shirley thinks she made a serious error.
- i. A similar, perhaps even more egregious error was made by Mrs. Shirley in relation to the purported will, if her account is to be accepted. If Mrs. Shirley, a Justice of the Peace of more than 30 years' experience, said the will was drafted and signed on Saturday, October 21, 2002. The problem is that October 21, 2002 was a Monday and not a Saturday, so it begs the question as to what the facts really are.
- j. Mrs. Willie's attempt to explain the source of the \$100,000.00 which was deposited in their Jamaica National Account on August 21, 2002 adds yet another layer of incredulity to their account; because she said that it may have come from another of their bank accounts.
- k. Coupled with Mr. Willie's evidence that the sum of \$300,000.00 was already in their Jamaica National Account when they agreed to purchase the land, more questions

arise, until the deposit of \$100,000.00 on August 21, 2002, the bank account balance was just over \$254,000.00.

- l. The Willies said at Court for the first time that Joan Willie's discussion with Albertha Montague regarding the purchase of the house spot was in 2002, and not in 2001, as previously stated in their Affidavit and Witness Statements. It is noteworthy that this so-called correction only came after Mr. Willie was pressed about timelines during cross-examination. The following day, under cross-examination, Mrs. Willie offered a similar correction.
- m. Mrs. Willie first gave evidence under cross examination that the survey diagram was given to her by Albertha Montague in January or February 2003. After Mr. Bloomfield gave evidence that the diagram was not given to Albertha Montague until after December 2003, Mrs. Willie then completed her cross examination and changed her evidence to say that it was given to her in January or February 2004 to coincide with Mr. Bloomfield's evidence.
- n. The evidence that the Willies took "immediate possession" of the property by erecting a fence and planting crops was also changed at trial to say that the fence was only erected after the survey diagram was given to them.
- o. Evidence from both Defendants is that they expected that further steps would need to be taken to complete the transaction, including further payments, and this leaves the entire transaction in doubt.
- p. Further evidence that no efforts were made by the Defendants to secure a title for the property they purchased (save for an enquiry Mr. Willie said he made at the tax office), suggests that there is little conviction in their statement that the transaction did occur.

[42] I bear in mind the above referred submissions. I also bear specifically in mind the caution stated in the Claimants submissions that this court should guard "jealously" the fact that Albertha Montague could not testify in these proceedings. I accept as a correct approach to the consideration of the evidence in this matter, the guideline of Lord Brett Master of the Rolls in **In re Garnett (1855) XXXI Ch. D. 1,**

“It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law.... the proposition seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion, but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd.”

[43] At the end of the day I have no doubt in my mind the witnesses for the Defendant were speaking the truth. I was impressed by the evidence and candour of Mrs. Eloida Shirley and I am satisfied that she was present and did witness the last Will and Testament of Albertha Montague as well as the receipt of payment for ¼ acre of land by Albertha Montague. I accept also Mrs. Joan Willie as a truthful witness who did her best to recall incidents of so many years ago. The evidence of Mr. and Mrs. Willie was corroborated by the evidence of Mr. Benjamin Bloomfield an unconnected person who conducted a survey of ¼ acres on behalf of Albertha Montague at about the same time as these events. What was her purpose, I ask myself?

[44] The Defendant's evidence was also corroborated by the evidence from Mr. Omar Hays another disinterested witness. He gave evidence of the withdrawals from the Willie's account totaling \$300,000.00 at approximately the same time as the date stated on the receipts, so too with the cheque stub which has a payee Albertha Montague. Some effort was made to say that the misspelling "q" instead of "g" on the stub showed it was either a different person or not genuine. However the Manager's cheque was being purchased by the Willies not Mrs.

Montague. As Mrs. Willie said some people spell the name with a 'g' and some with a "q." To my mind the difference is such that when purchasing the cheque the Willies could be forgiven for not noticing it.

[45] This then brings the court to consider the only expert evidence on handwriting provided in the case. On a balance of probabilities I prefer the evidence of the witnesses to fact as I find them to be witnesses of truth. I do not accept the findings and opinion of Mrs. Beverly East. I have examined the documentation referred to in the report. It is interesting to note that the body of the will spells the testator's name with a 'q' while the signature spells it with a 'g.' This suggests that the person signing was not the person writing the will consistent with the evidence of Eloida Shirley. Also the letter (K3) that Miss East uses as a known document was not signed. Mrs. Albertha Montague's signature may have changed overtime or she signed in different ways on different occasions, I do not know, however on the evidence and on a balance of probabilities I accept the receipts and the will as documents signed by Albertha Montague.

[46] In the result there will be judgment for the Defendants and the claim is dismissed. The relief asked for by the Defendants is cause for concern. Their written submissions indicate that they no longer seek a Declaration as to the validity of the will, no doubt because the will contains no bequest to them and/or they do not wish their case to be based on a bequest. On the other hand an order for Specific Performance of the agreement for sale may not be enforceable against the Claimant who is by virtue of an Order of this court an Administrator of the estate for the purpose only of conducting this litigation. Order 68.65(3) states that such an order ceases when a Final Order is made in the litigation. An order for Specific Performance should, I believe only be made against the legal personal representatives of the Estate Albertha Montague, in this case either the Executors of her will, or if the will is held invalid, her administrators. In the event I have not been asked to decide upon the validity of the will and therefore, save to say that I accept the evidence of Eloida Shirley will make no order in that regard.

It follows I believe that no injunctive order ought to be made against the Estate at this juncture.

[47]. I do however find as a fact that there was an agreement for sale of the $\frac{1}{4}$ acre of land entered into between the deceased Albertha Montague and the Defendants.

[48] I therefore dismiss the claim and grant Declarations in terms of Paragraphs (ii) and (iii) of the Defendant's counterclaim. Costs will be awarded to the Defendants to be taxed if not agreed.