



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV03197

BETWEEN	RUDOLPH MURRAY	CLAIMANT
AND	KINGSLEY COKE	1ST DEFENDANT
	NADINE HOLMES	2ND DEFENDANT
	FRANKLYN COLE	3RD DEFENDANT
	ROBERT THOMAS	4TH DEFENDANT

Land - Registration of Titles Act – Limitation of Actions Act – Whether First Registration defeats a possessory title – Whether a subsequent transfer also defeats possessory title.

G. Gibson-Henlin and Kamou Ruddock instructed by Henlin Gibson Henlin for the Claimant.

M. Thomas for the 1st, 3rd and 4th Defendants

Heard: 19th, 20th and 29th November 2013

Cor: Batts J.

1. This judgment was orally delivered on the 29th November 2013. I have now reproduced it in a permanent form.
2. On the first day of trial, the Claimant's counsel indicated that judgment had already been obtained against the 2nd Defendant (Nadine Holmes) and that

damages would not be pursued against her. That Defendant had since removed.

3. Both parties agreed that the following affidavits contained in the bundle before me would stand as evidence in chief (subject to the admissibility rules). The exhibits attached to them would not be admitted. The affidavits agreed were:

- i. Rudolph Murray sworn to on 10th May, 2011
- ii. Rudolph Murray sworn to on 11th April, 2012.
- iii. Rudolph Murray sworn to on 27th July, 2012.
- iv. Kingsley Cole sworn to on 30th September, 2011
- v. Franklyn Cole sworn to on 11th October, 2011.
- vi. Robert Thomas sworn to on 11th October, 2011.
- vii. Douglas Thomas sworn to on 14th October, 2011

4. The following documents were agreed and admitted by consent as follows:

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| Exhibit #1: | Certificate of Title registered at Volume 1234 Folio 81 of the Register Book of Titles. |
| Exhibit #2: | Certificate of Title registered at Volume 1460 Folio 753 of the Register Book of Titles. |
| Exhibit #3: | Certificate of Title registered at Volume 1460 Folio 754 of the Register Book of Titles. |
| Exhibit #4: | Order of the Hon. Mrs. Justice Cole Smith dated 27 th September, 2010 in Suit 2008/HCV 03318 |
| Exhibit #5: | Copy Surveyors plan/diagram by Dennis Clay re Vol. 1234 Folio 81. |
| Exhibit #6: | Copy Notice to Quit dated 12 th November, 2010 to Franklyn Cole. |
| Exhibit #7: | Copy notice to Quit dated 12 th October, 2010 re Robert Thomas. |

5. At the joint request of Counsel I also ordered that the time provided for the filing of various documents, which had been filed out of time, be extended accordingly. By consent also, I ordered that the affidavits identified above be treated as the witnesses' evidence in chief but without any attachments.
6. I am grateful to both counsel for the steps taken to agree that the affidavits stand as evidence in chief and to agree certain documentation. Without such agreement, the case would have lasted much longer or possibly might not have started. This is because, although commenced by Fixed Date Claim, the matter involved issues of fact which ought to be resolved after a trial. However, no orders, for disclosure of documents or for the filing of witness statements or for expert reports, had been obtained. Nowadays trials are most efficiently conducted when such interlocutory matters are dealt with prior to the trial date.
7. Be that as it may, the Claimant Mr. Rudolph Murray was the first witness called. An objection was taken to Paragraphs 5 and 9 of his further affidavit sworn to on the 11th April 2012 and an application made that they be struck out. There was no objection to the application as the paragraphs contained hearsay and were inadmissible. I therefore struck out paragraphs 5 and 9.
8. An application was made to amplify Para. 4 of the Affidavit dated 10th May 2011 and, there being no objection, this was granted. The witness was asked how many titles he had when he went before the Honourable Mrs. Justice Cole Smith, and he said one which is Vol. 1234 Folio 81 (Exhibit 1). Since then, the witness stated, a severance had occurred as he had two titles: Vol. 1460 Folio 753 (Exhibit 2) and Vol. 1460 Folio 754 (Exhibit 3).
9. The evidence in Chief of the Claimant may be shortly summarised. He is the registered proprietor of land amounting to some 321 acres 9 perches and 2/10th of a perch located in Liberty Hill, St. Ann. On the 27th September, 2010 the Hon. Mrs. Justice Cole Smith made an Order for severance of the said property. He states that without his knowledge and consent the Defendants entered and took possession of approximately 50 acres of his property. His attorneys served Notices to Quit on them. These notices expired in December 2010 and the Defendants had not removed. He had not served a written notice on the 1st Defendant but on several occasions made demands on him to vacate the premises. In his further affidavit, the Claimant stated that he purchased the land from his brother Carlton Murray who is now deceased. He had hoped or planned to develop the property with his brother and therefore obtained a proposed subdivision plan by Dennis Clay a commissioned land surveyor. After being

registered as proprietor he visited it and observed persons living there. He advised them he was the owner and they would have to remove. Some of them did. The Defendants did not. After his brother's death his other relatives would not join the proposed venture. This was why he had his ½ interest severed and a new title for that ½ interest issued in his name. He states that he is advised by his attorneys at law and verily believes that the Defendants are unlawful occupants of the said property who continue to occupy the said land as trespassers.

10. In his third affidavit, the Claimant makes reference to other Affidavits filed. He said when he purchased the land his brother told him there were squatters on the land. This was also confirmed by the surveyor Mr. Clay. In or about the year 2000 he installed a Mr. Donald Stephens as an overseer. He said that Mr. Robert Thomas had not put up a structure. Mr. Thomas he said, put up a structure of wood at first and later added concrete. He said no one resides there now. He states that he has spent millions of dollars developing the property, and that he built a parochial road. He stated that there is no significant farming activity on the land and only small backyard farming. He said he has never been served with a Surveyor's Notice by Ivor Stewart and that he has paid taxes for the property since being in possession. He denied that the Defendants are entitled to an interest in the land.
11. When cross-examined the following relevant facts emerged. The Claimant was not alleging that the Defendants occupied 50 acres. He said in all the Defendants occupy approximately 3 acres. He made specific reference to Kingsley Coke, Franklyn Cole and Douglas Thomas. He admitted that his affidavit which made reference to 50 acres was incorrect. He also admitted that he did not intend to say that the Defendants entered possession of his ½ portion after 27 September, 2010. He identified Exhibit 5 as the diagram Mr. Clay, commissioned Land Surveyor, had produced. He then admitted that the only person he spoke with was Mr. Coke although it could be Mr. Coke and Mr. Cole,

“but I don't know the rest of people as I am a stranger there.”

12. In cross-examination, the Claimant stated that Mr Coke was served with a Notice. When confronted with his affidavit at Para 14, which was to the opposite effect, he stated that Mr. Coke was served afterwards. The witness denied there was a lot of cultivation in various areas of the land. He said that bananas grew wild, coconut was there, cane, pear, breadfruit. Only backyard farming he said was on the land.

13. In re examination the witness among other things stated that Mr. Clay had done more than one plan. He said Lot 3 has the squatters.
14. The Claimant then closed his case. The first Defendant to give evidence was Mr. Kingsley Coke. He admitted that he was unable to read. I therefore ruled that his evidence in chief be given orally notwithstanding the parties' earlier agreement about affidavit evidence standing as evidence in chief. The affidavit did not have any indication on it that it had been read over to the witness before he signed it. I made it clear at the time that if the Claimant was faced with any surprises as a result, then they would be entitled to time to take instructions. The witness stated that the size of the land he occupies in Liberty Hill, St. Ann is $3\frac{1}{3}$ square. He stated that he had purchased the land for Shirley Johnson from Mr. Leslie Nathan. This occurred in 1982. He paid \$2,000 to Mr. Nathan. He said in 1986 Mrs. Shirley Johnson passed it over to him and he paid her back her money. He built a house and farmed on it. He farmed coconut, pear, bananas, ackee, mango, cane, breadfruit and sweet potato. He says he started farming when he got it from his sister in law and continued farming "until now."
15. He built a block and steel house. Building commenced in 1988. It now has 5 bedrooms, 3 bathrooms, living, kitchen and dining rooms. His family lives there. He has a water and electricity supply to the house. He says he paved an 800 foot road to his house from the main road and that others including Mr. Murray's workers use the road he made. He denied that Mr. Murray ever came and told him he had to leave. He admitted receiving a Notice on 12 November 2010 but he has not left. He said Mr. Leslie Nathan was now abroad. He last saw him in 1984. Since he had paid Shirley Johnson for the land, no one had molested him on it.
16. When cross-examined it is fair to say that Mr. Coke remained adroit in his account. He was asked if when he purchased he got a receipt. The witness answered in the affirmative and said he gave the receipt to his lawyer. He finished paying for the land last year he said. He paid the balance to D. Headley agent for Anthony and Leslie Nathan. He explained the process he went through to get water from the Water Commission.
17. After re examination the court asked the witness where is the receipt he says he received from his sister in law when he purchased the land from her. The witness said that his lawyer had it. In his questions arising the Defendants' counsel then showed a document to the witness which the witness identified as

the receipt he got from Shirley Johnson his sister in law. He said that was a copy but he had the original at home. The Claimant's counsel objected to the document being tendered on the basis that she was seeing it for the first time. As there had been no orders for discovery in this matter, I ruled that that was not a basis to object. I admitted the document as **Exhibit 8**. I granted an early adjournment to enable the Claimant's counsel to take instructions.

18. Upon the resumption at 2 pm on the 20th November 2013, the Defendant was further cross examined on Exhibit 8. The witness was shown a document which he said he recognised. He said he did not recall if he gave a copy to his lawyer. He said that once he made the down payment he was told to take charge of the place. The cross examination was otherwise innocuous and so was the further re-examination.
19. The 3rd Defendant, Franklyn Cole, then gave evidence. He too, the court was advised, was unable to read. He therefore gave oral evidence in chief. He stated that he purchased the land from Mr. Leslie Nathan for \$35,000. He paid a deposit of \$12,000 in 1983. He cleared the land and did farming. He states that he had a survey done on the land. He could not remember the surveyor's name. Mr. Nathan had told him not to pay any more money until it was surveyed. He said he had a copy of it and took out some folded papers from his back pocket. These were handed to his attorney in court. He said the original was at home. He stated further that he received a receipt for the deposit from Mr. Nathan. This he identified. It was admitted without objection as **Exhibit 9**.
20. He said he paid the balance of \$2000 to Miss Headley and the receipt for that was admitted as **Exhibit 10**.
21. He detailed the crops and fruit trees farmed. He stated that he lived on the land. He had been cultivating it since 1983 until now. He was asked whether he had ever stopped and said "continuous cultivation." He started building his house in 1989 and completed it in 1999. It has 4 bedrooms, 2 kitchens, 3 bathrooms, 2 dining and 2 verandahs. It is made from block and steel. He and his wife lived there since 1999. The witness said the first time he had ever seen the Claimant was at court in 2011. He got a Notice to Quit in 2011. His wife handed it to him. This is exhibit 6. He said he had occupied the land without challenge from the time he paid the deposit.
22. When cross-examined this witness also maintained his position. He admitted his cultivation was "Not really so much." This is not surprising as he gave his

occupation as being a machinist. The admission however goes to his credit. There was no re-examination. However in answer to the court the witness said that he did not pay the balance purchase price until 2011 because

“I used to contact Miss Ellen the agent for Leslie Nathan, she miss me up I couldn’t find her cause she leave the work.”

There were no questions arising from either side.

23. The 4th Defendant Mr. Douglas Thomas then gave evidence. His affidavit dated 14 October, 2011 was allowed to stand as his evidence in chief. The examiner was allowed to tender through the witness a receipt dated 24th March 1982 which was admitted without objection as **Exhibit 11**. Another receipt for the balance was admitted as **Exhibit 12**, this is dated 19 October 2011.
24. In his Affidavit dated 14th October 2011 the witness said he is a retired carpet fitter. He resides at 134 Boston Road, Waterford P.O. St. Catherine. He grew up in Lime Hall St. Ann. In 1982 he received information that Mr. Leslie Nathan was selling land at Liberty Hill, St. Ann. He went to him and was shown a lot which Mr. Leslie Nathan said was $3\frac{1}{3}$ squares. The land was not surveyed. He paid his deposit. He gave his brother Albert Thomas permission to occupy the said land and farm it and raise pigs. His brother did so with his son’s assistance. In 1994 Albert sold the pigs and migrated. His son, Robert, continued to farm the land and planted fruit trees and bananas and plantains. He consented to Robert’s daughter constructing a board house on the said land and she now lives there with her boyfriend. The witness said that about 4 years after purchasing he visited a lawyer whose name he can’t recall. That lawyer confirmed he was Mr. Nathan’s lawyer and advised him to have the land surveyed. He along with 3 other purchasers employed Mr. Johnson commissioned land surveyor of Claremont, St. Ann to have the land surveyed. However to date the surveyor has not produced a diagram.
25. When cross-examined the witness said he did not know that Mr. Nathan had got a title to the land. He said he knows the land as he grew up near it and he visits it regularly. He was last there 2 months ago. He said the reason he had not paid the balance due was because he could not find Miss Headley. He did not find her until he got in touch with Mr. Thomas the lawyer. There was no re-examination and the case for the Defendants was closed.

26. Each party had filed written submissions. Each was allowed to make oral submissions. Counsel will I hope pardon me for not repeating in the course of this judgment the submissions made. Suffice it to say, that when I asked counsel for the Claimant whether there was any evidence to challenge the Defendants’ account as to their possession, when it occurred and how it occurred, I received no satisfactory reply. Both counsel were it seems *ad idem* on the law related to the matter.
27. It was common ground that any right, title or interest acquired by possession was lost at the first registration of the land. The Judicial Committee in ***Chisholm v Hall (1959) 7 JLR 164*** decided that on a true construction of the Registration of Titles Act the first registration of land meant that the title holder took free from all encumbrances including possessory titles. Their Lordships in that case also make it clear that a subsequent purchaser may take subject to an adverse interest which is acquired by possession, per Lord Jenkins; at page 175-6 -

“The scheme of Section 69 is reasonably plain. The Registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission.”

28. I am aware of some dicta in other cases which suggests that a subsequent transfer after first registration may eliminate a possessory interest. That however is, with respect, not the law as stated by Lord Jenkins above. Not only the subsequent purchaser but also the original title holder, may lose rights to a

possessory title subsequent to first registration pursuant to the Limitation of Actions Act.

29. The law as to how a possessory title is obtained is similarly not in dispute. Both parties cited and relied upon *Wills v Wills* PCA No. 507/ 2002 and *JA Pye (Oxford) Ltd. v. Graham* [2002] 3 WLR 221. The Claimant's Counsel relied also on *Lungrin v Monelal* RMCA 8/03 decided on the 2nd April 2004. Both parties it is true repeatedly used the phrase "adverse possession" to describe the nature of the claim the Defendants sought to assert. This is regrettable, it is nowadays a phrase to be avoided. This is because a possessory title can be established without possession being "adverse" to the true owner or his intentions towards the land. It is now well established that, when applying the limitation statute to bar the legal owner's claim to possession, the party claiming the possessory title need only show that he or she has been in possession for the requisite period, and that he exercised that possession in the belief or knowledge that he was the owner. In other words his possession must not be by licence or referable to some other title or right. It is no longer necessary to prove that the possession or use was inconsistent with the legal owner's intended use of the land. Furthermore, although a court ought not to infer possession from relatively trivial acts, fencing is neither necessary nor sufficient to establish possession. Per Lord Browne – Wilkinson, in *Pye*, at page 234 C Para 40:

"So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for a friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession."

30. When the applicable legal principles are understood the determination of this case is not so difficult. The Defendants' evidence, which was not really countered, is evidence I accept as truthful. They provided documentary evidence to support the assertion of purchase. It does appear that the original owner agreed to sell parcels of $3\frac{1}{3}$ squares of the land. That owner took no step to obtain a title at that time. The Defendants therefore were put in possession and occupied as owners. Two of them built houses, substantial houses, on the land. The third put relatives in possession as licencees and/or agents and they farmed and built a not so substantial structure. It was nevertheless an act of possession to give permission to farm and build.
31. When registered title was first obtained in 1991 any claim the Defendants may have had, (1983-1991) was by law extinguished. Thereafter however time began to run again. The uncontradicted evidence, which I accept, is that the Defendants continued in possession in the manner aforesaid. So that between 1991 and 2003 another 12 years would have run pursuant to the Limitation of Actions Act. Since 2004 at the earliest, the Defendants were entitled to an interest in the land by virtue of their possession.
32. In the premises, I hold that the Claimant's action against the 1st, 3rd and 4th Defendants is barred by virtue of the Limitation of Actions Act. The claim therefore stands dismissed as against the 1st, 3rd and 4th Defendants with costs to these Defendants to be taxed if not agreed.

David Batts
Puisne Judge