

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 382 of 1989

BETWEEN	ARNOLD RICKETTS	PLAINTIFF
AND	FRANK BROWN	
AND	WINSTON ROWE (Executors by representation Estate Elkanah Simms)	DEFENDANTS

Dr. Lloyd Barnett and Huntley Watson for the plaintiff,
instructed by Daly, Thwaites, Watson and Campbell

Ernest Smith for the defendants

24th, 25th June, 1991; 29th, 30th June, 1992
and 11th May, 1993

PANTON, J.

In this action, the plaintiff is seeking specific performance of an agreement that he alleges is in existence between him and the late Elkanah Simms in respect of the sale of lands owned by the said Elkanah Simms at Rio Bueno, Trelawny, and registered at Vol. 538 Folio 86 of the Register Book of Titles. In the alternative, the plaintiff seeks damages for breach of contract. Further, or alternatively, he seeks a declaration that he is the legal and or equitable owner of the said lands and or that he has acquired a possessory title thereto.

In his statement of claim, the plaintiff pleads that the agreement was made by correspondence conducted during 1961 and 1962 on behalf of himself, on the one hand, and Elkanah Simms, on the other hand. He pleads further that Elkanah Simms died in 1965 and that in 1968 Simms' executors agreed to complete the agreement for sale. This was eventually followed by the remittance by the plaintiff's attorney-at-law of the amount requested by the executors for completion. Those executors have died and the land has passed by transmission to the present defendants. At the beginning of the trial, the Court was informed that the defendant Rowe had died. The plaintiff alleges that he has been in continuous, undisturbed possession of the lands as owner since at least 1969 and that repeated requests made by him to Elkanah Simms and the subsequent personal representatives have not borne fruit in that they have failed to complete the transaction.

The defendant deny the existence of any agreement between the plaintiff and Elkanah Simms. The only interest of the plaintiff, according to the defence, was as a lessee for a period which ended in 1960. The defendants deny the claim of continuous possession by the plaintiff, and allege that one Stanley Simms, a beneficiary and relative of Elkanah Simms has been in continuous and undisturbed possession of the lands since 1965. Indeed they deny that title to the property has passed by transmission to them.

The main issue for determination by the Court is whether a contract was formed between the plaintiff and the late Elkanah Simms. In this regard, it is necessary to consider the correspondence between them. It is noted that the defence objected to the admission in evidence of the correspondence between the solicitors although the defence had been served with a notice to produce. This objection was not entertained as there is no doubt that original letters are admissible in these circumstances on proof of authenticity and that copies are admissible where notice to produce the originals has been served but the party served has ignored the notice. The Court's ruling at the time of the objection was in keeping with the statement of the law and practice in the sixth edition of CROSS ON EVIDENCE, Chapter XX, pages 600 to 606. In the instant situation, the Court was quite satisfied that the documents were genuine, were coming from proper custody, and related to the issues for determination.

On the 17th July, 1962, Messrs Allwood and Barrett, solicitors for Elkanah Simms, wrote to Mr. R.C. Livingston, solicitor for the plaintiff, in the following terms:

'We refer to previous correspondence herein and ask that you send us rent for the current quarter. Please note that another quarter commences on the 1st August next.

Our client now states that he will sell the land which your client is occupying for the sum of £1,500.00. He says, however, that this is subject to same being surveyed and both of them being able to agree at the time of the survey on the boundaries of the said land.

Our client will accept payment as follows:

1. £500.00 on the signing of the agreement of sale.
2. £500.00 when the boundaries are agreed on the land being surveyed.
3. The balance when registered title is obtained in the name of the purchaser.

Interest of 7% will be payable on the balance of the purchase money owing after the first payment.

Our client agrees to bear half the survey costs.'

This letter was admitted as exhibit 4.

On the 20th August, 1962, the plaintiff's attorney-at-law replied as follows:

'I beg to acknowledge the receipt of your letter of the 17th July, 1962 and I have discussed the matter with my client and he is not prepared to make payments as suggested.

My client is prepared to purchase the eastern half of your client's land being the side of the land where the stone crusher now is and the dividing line to run from the main road in a southerly direction to the southern boundary of your client's land for the sum of £1,500.00.

He is prepared to make a deposit of £500.00 on the signing of the agreement of sale and he is prepared to pay the balance of the purchase money when registered title is obtained.

Pending the registered title my client is only prepared to pay £16.00 per quarter for interest on the unpaid purchase money and not interest at 7%, in other words he will be paying no more than he is paying for rent. In the alternative my client is prepared to purchase the whole of your client's land on the south of the main road for the sum of £3,000.00 and to make a deposit of £1,000.00 and to pay the balance on the obtaining of the registered title in his name.

My client is also prepared to pay £16.00 per quarter for the land which he now occupies and not to obtain possession of the other half until the registered title is obtained.

Please let me hear from you as early as possible so that I can endeavour to complete the matter without any further delay.'

That letter was admitted in evidence as exhibit 5. In a letter dated 31st August, 1962, (exhibit 6), the solicitors for Elkanah Simms replied thus:

"Our client accepts your client's offer to purchase the whole of our client's land south of the main road for the sum of £3,000.00. This land is registered in Certificate of Title at Volume 538 Folio 86, and is estimated to be 12 acres more or less in size."

In the said letter, the solicitors went on to indicate acceptance of the offer to pay £16.00 per quarter for the land that was occupied by the plaintiff until the registered title was issued. This payment was to be in lieu of interest on the unpaid purchase money. The solicitors also requested that the deposit of £1,000.00 be forwarded.

On the basis of these three letters (exhibits 4, 5, and 6), I am of the view that a contract was formed between the parties for the sale by Elkanah Simms of this twelve-acre parcel of land to the plaintiff for the sum of £3,000.00, with a deposit of £1,000.00 being payable by the plaintiff.

Subsequent letters from one party to the other confirm the existence of a contract. It is I think necessary to note these letters only in a summary form in order to appreciate their significance.

1. Exhibit 7 - dated 6th November, 1962, - from Elkanah Simms' solicitors indicating adherence to the contents of exhibit 5, and noting the arrears of rental totalling £32.00.
2. Exhibit 8 - dated February 26, 1963, - from plaintiff's solicitor, indicating continued willingness to purchase the land notwithstanding that Elkanah Simms had sold a quarter acre to someone else.
3. Exhibit 9 - dated 15th March, 1963, - from Elkanah Simms' solicitors, confirming that which was stated in Exhibit 8.
4. Exhibit 10 - dated 16th September, 1964, - from the plaintiff's solicitor stating that the transfer from Elkanah Simms was to be in the names of the plaintiff and one Rupert M. Edwards. The Agreement was enclosed in duplicate, having been signed by the plaintiff and Edwards. It should have been signed by Elkanah Simms and a copy returned to the plaintiff's solicitor.
5. Exhibit 12 - dated 16th September, 1968, - from the plaintiff's solicitor to the solicitors for the estate of Elkanah Simms - indicating the plaintiff's willingness to complete the matter, and making concessions to that end.

6. Exhibit 13 - dated 24th September, 1968, - from the solicitors for the estate of Elkanah Simms, referring to exhibit 12, expressing the agreement of their client, and setting out the monies payable by the plaintiff.
7. Exhibit 14 - dated 6th May, 1969, - from the solicitors for the estate of Elkanah Simms, referring to exhibit 13, pointing out that documents had been enclosed in the earlier letter for signature of the plaintiff, and expressing the hope that the matter would be completed in accordance with the terms agreed.
8. Exhibit 15 - dated 16th September, 1969, - from the solicitors of the estate of Elkanah Simms, stating that their letters had not been replied to and that they had information that the plaintiff had paid to his solicitor enough money to dispose of the matter.
9. Exhibit 16 - dated 10th November, 1969, - from the solicitors of the estate of Elkanah Simms, informing the plaintiff's solicitor that the plaintiff had attended at their office and had said that he had paid the required amount of money to him (the plaintiff's solicitor) 'months ago'.

After years of apparent inaction on the part of the plaintiff's solicitor, he sprang to life on the 27th November, 1969, and sent a cheque to the solicitors for the estate of Elkanah Simms in keeping with the agreement. His letter has been numbered exhibit 17. Further, on the 8th December, 1969, the plaintiff signed in the presence of his solicitor an authorisation (exhibit 7a) addressed to the Registrar of Titles for the withdrawal of a caveat that had been placed on the land at the instance of the plaintiff. Finally, in relation to the correspondence, it should be noted that on February 6, 1970, the plaintiff's solicitor wrote to the solicitors for the state of Elkanah Simms seeking information as to when he should expect to receive the title. That letter was admitted as exhibit 18.

In my judgment, the documentary evidence shows overwhelmingly that there was a contract between the plaintiff and the late Elkanah Simms. It shows further that Simms' executors have actively pursued the plaintiff encouraging him and pleading with him to perform his obligations under the contract. The evidence further shows

that the plaintiff has done all that was required of him under the contract, and that the estate of the deceased has benefitted from the payment of the deposit. It is now left for the plaintiff to pay the £16.00 per quarter that was agreed and which has been outstanding for years. The balance of the purchase money is also due on the provision of the title.

That is not an end to the matter, however, as the plaintiff has put his case in the alternative. Let us therefore, for the time being, ignore the documentary evidence which was objected to by the defence, and concentrate on the evidence of the witnesses. The plaintiff testified that he leased the land in 1957 and commenced business there in 1961. He has, he said, been in possession until the present time. He denied a suggestion that he has not been in possession since 1965. His factory was demolished, he said, about 1978 to 1980 and now he just goes by the vacant land occasionally. He has been contemplating for several years what to do with the land.

On the other hand, Stanley Simms gave evidence on behalf of the defence that he has been in charge of the land since the death of Elkanah Simms. That was in 1965. He has not seen the plaintiff on the land since then. He has made a distinction between possession and being in charge as he said that Frank Brown, the surviving defendant, has been in possession of the 'southern section' since 1972 but he (witness) has been in charge. Under cross-examination, he admitted knowledge of Brown's executorship. He (witness) has been living in the United States since 1958 but visits Jamaica regularly. He has purchased some of the property to the north. Here, it is to be remembered that there is no dispute in relation to the land to the north of the road. The dispute is in relation to that to the south.

I have formed the opinion that the plaintiff is truthful, and I accept that he has been in possession since the 1960's. On the other hand, I cannot place any reliance on a defence which has demonstrated serious inconsistency in its position. Two examples suffice. Firstly, the defence as pleaded in paragraph 10 asserts that Stanley Simms is 'a beneficiary ... of Elkanah Simms'. There could be nothing further from the truth as the will which is undisputed and was admitted into evidence as exhibit 11 without objection makes no mention of Stanley Simms. Secondly, the

the defence has denied in its pleading that Cleveland Simms died in 1980 and that the title to the said land was passed by transmission to the defendants Frank Frown and Winston Rowe the executors of Cleveland Simms. Yet, in his evidence on behalf of the defence, Stanley Simms said that Frank Brown is the sole executor alive and that his (Brown's) name is on the title. In addition, I have found to be untruthful Stanley Simms' evidence that between 1972 and 1989 he kept intruders off the land. This, he apparently did from his New York base. There is no mention of him receiving local help in achieving this feat given the Jamaican tendency to 'capture' lands belonging to others. It is to be noted that according to him it was only in 1989 that he placed four 'local farmers' on the land. Prior to that, his method of possession and control appeared to have been through regular visits. He described his visits thus:

'I would stop at the property on my way from the airport to Runaway Bay where I would stay. I would stop for an hour or two'.

Here is an individual who concedes that two sets of lawfully appointed personal representatives have been involved with the estate of Elkanah Simms and that these representatives have been resident in the very parish in which the land is situated. In the face of this evidence, Stanley Simms expects the Court to believe that notwithstanding his distant location and his lack of any visible standing, he is the person who has been in possession. The Court finds his evidence unacceptable as a serious challenge to the plaintiff's claim of continuous and undisturbed possession. It is obvious that he is in the role of an imposter, and that he is merely using the family name to get a hold on the land to the south. Presumably, this would give him control of the land on both sides of the road.

Whatever be the vantage point, the plaintiff succeeds. The correspondence proves the existence of a contract. If the correspondence is ignored, the plaintiff has been in continuous and undisturbed possession of the land in question. Looking at the will again, it is not without significance that it makes no mention of this sizeable property. This gives much credence to the view that Elkanah Simms did not regard himself as being in a position to dispose of the land as it had already been disposed of to the plaintiff.

In my judgment, the prevailing position is the existence of the contract. I therefore grant the plaintiff's claim for specific performance of the contract as contained in exhibit 6. This requires the issuing of the registered title in the names of the plaintiff and Rupert Edwards, and the payment of the balance of the purchase money, that is, £2,000.00. The plaintiff is also to pay rent due to the estate at the rate of £16.00 per quarter since 31st May, 1968. The rate of conversion of these sums into Jamaican dollars is to be the official rate in existence on the date of payment. The plaintiff is awarded the costs of these proceedings; such costs are to be agreed or taxed.