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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. E.219/93

IN THE MATTER of an Application by MYRA WILLS, widow of the late ALEXANDER GEORGE WILLS, deceased under Sections 3,4,9 and 14 of the Limitation of Actions Act of Jamaica 1881.

AND

IN THE MATTER of Sections 531A and 532 of the Judicature (Civil Procedure Code) Law of Jamaica.

AND

IN THE MATTER of Estate ALEXANDER GEORGE WILLS, deceased, intestate, Builder and Contractor, Kingston 19 in the parish of Saint Andrew.

MYRA WILLS	**APPLICANT**
ELMA ROSELINA WILLS	**RESPONDENT**

Duke Pollard and Mrs. Lee-Clarke Bennett for Applicant
Ms. Carol Davis for Respondent

IN CHAMBERS

Heard: July 5, 13 & 14, 1994
November 7, 1996.

CHESTER ORR, J

By an Originating Summons the applicant Myra Wills sought the following declarations:

"(a) Whether by virtue of Sections 3,4,9 and 14 of the Limitation of Actions Act of Jamaica 1881, the deceased ALEXANDER GEORGE WILLS being in sole possession of properties registered at Volume 836, Folio 35 and Volume 986 Folio 295 to the exclusion of ELMA ROSELINA WILLS the Joint Tenant registered on the Certificate of Title for the said properties, during his life time, acquired an absolute title against the said ELMA ROSELINA WILLS during his life time prior to his death;

(b) (i) the legal separation between the deceased and ELMA ROSELINA WILLS with respect to their marriage;

(ii) the bringing into the said properties of the Applicant MYRA WILLS and consequent physical exclusion of the said ELMA ROSELINA WILLS;

(iii) the collection of all rents and absolute possession of

the said properties by the deceased for his exclusive use and benefit;

(iv) the non-occupation and non-possession of the said properties by or in the alternative a dispossession of the said ELMA ROSELINA WILLS for upwards of twelve (12) years.

all have the effect at law by virtue of section 4(a) of the Limitation of Actions Act of Jamaica as a discontinuance of possession by the said Elma Roselina Wills;

(c) Whether the Applicant having been in possession and occupation of the aforesaid properties for upwards of twelve (12) years as a Tenant-at-will to the exclusion of the said ELMA ROSELINA WILLS, the latter is now debarred by virtue of Section 9 of the Limitation of Actions Act from taking any action to re-possess the said properties;

(d) Whether the Applicant is entitled by virtue of being the Widow of the deceased to a grant of administration and to administer the estate of the deceased ALEXANDER GEORGE WILLS."

The applicant is the widow of Alexander George Wills deceased, who died on the 28th day of December, 1992.

The deceased had been previously married to the respondent Elma Roselina Wills in 1935. He divorced her in 1985 on the ground of her desertion.

The deceased and the respondent are registered as joint tenants of two properties registered at Volume 836 Folio 35 and Volume 986 Folio 295 of the Register Book of Titles situate at 6 Newleigh Avenue, Kingston 6 and 84 Sunrise Crescent, Kingston 19, respectively. The title for the latter premises was originally in the deceased's name but was transferred to both names on the 22nd February, 1966. The consideration is stated to be by way of gift. The parties lived at 84 Sunrise Crescent as the matrimonial home. There was a flat on these premises which was rented and the premises at 6 Newleigh Avenue was also rented. The respondent left for the United States of America either in 1964 or 1967 to reside permanently. She visited Jamaica on a number of occasions and lived at 84 Sunrise Crescent. The deceased also obtained permanent residence in the United States of America but did not reside there.

The applicant has lived at 84 Sunrise Crescent since 1973. She states that she went there "as a tenant-at-will of the deceased Alexander George Wills at his request, in

order to nurse, take care of him and be his companion". They were married on the 22nd day of January, 1986.

The deceased collected the rental from both premises. The respondent did not receive any but states that he collected as her agent pursuant to a family arrangement. There is no evidence to support this assertion.

On the 3rd January, 1985, the respondent's Attorney wrote to the deceased as follows:

"3rd January, 1985.

Mr. George Wills,
330B Glenwood Road,
Brooklyn New York 11210,
U.S.A.

Dear Mr. Wills,

Re: Suit No. D. W-029 of 1984
George Wills vs Elma Wills

Your wife has entered an appearance in this matter. However, she is not interested in fighting the Divorce. She wants a portion of the properties which she lists as follows:-

(1) 6 Newleigh Avenue;
(2) 84 Sunrise Crescent
(3) Five (5) acres of land at Kitson Town;

Kindly let me know at your earliest convenience whether you in fact own these properties and if so your attitude towards an amicable settlement.

Yours faithfully,
(Sgd.) Norman O. Samuels
NORMAN O. SAMUELS.

c.c. Rattray, Patterson & Rattray"

On the 20th January, 1987, the deceased's Attorneys wrote to the respondent thus:

"January 20, 1987.

Mrs. Elma Roselyn Wills
605 Overlook Place
Englewood
New Jersey 07631
U.S.A.

Dear Madam

RE: Suit No. D.W.029 of 1984 - George Alexander Wills vs. Elma Roselyn Wills

The Attorney-at-Law acting on your husband's behalf has made an offer to you of Twenty-five Thousand Dollars ($25,000) to satisfy your claims to premises at 84 Sunrise Crescent and 6 Newleigh Avenue.

Please indicate, in writing, whether you are willing to accept that sum as a full and final settlement of your claim.

We note that you are registered on the titles of the abovementioned properties as a joint tenant. This means that the Courts will presume that you have a 50% interest in those properties. However, this presumption may be rebutted by direct evidence of contribution.

It is our advice that, at this state, you do not accept the offer of Twenty-Five Thousand Dollars ($25,000) as you are, on the face of it, entitled to a half-share of these properties.

Please let us have your instructions in this matter as quickly as is possible.

Yours sincerely
RATTRAY, PATTERSON, RATTRAY

....
WALTER H. SCOTT"

The respondent states that she instructed her Attorney to refuse this officer "as it was too low". In 1991 or sometime thereafter she received further advice from her Attorneys and as a result decided to await her share as the survivor of the joint tenancy.

The relevant sections of the Limitation of Actions Act are as follows:

"3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

4. The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say -

(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

14. When any one or more of several persons entitled to any land or rent as copartners, joint tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares, of such land or of the profits thereof, or of such rent, for his or their own

> benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

Counsel for the applicant submitted that the deceased was in possession of the properties since 1964 or 1967 for his sole use and benefit and the respondent's claim was barred by 1976 or 1979. The mere act of visiting the premises does not constitute a sufficient act of ownership to prevent the statute from running. Great reliance was place on *Paradise Beach and Transportation Co. Ltd. and others vs Cyril Price- Robinson and Others [1968] A.C. 1072.* This is a decision concerning sections of the Real Property Limitation Act which save for the period of limitation are identical to the local Limitation of Actions Act.

Lord Upjohn said at 1084:

> "It seems to their Lordships clear from the language of the Act and the authorities already referred to that subject to the qualification mentioned below where the right of entry has accrued more than 20 years before action brought the co-tenants are barred and their title is extinguished whatever the nature of the co-tenants' possession.
>
> The qualification mentioned above rises upon section 12 of the Act of 1833. The "separate possessions" (to adopt the phrase of Denman C.J.) obviously only start when the occupation is "for his or their own benefit". This is the crucial question as Lord Greene M.R. pointed out in *In re Landi.* That is primarily a question of fact though the law may sometimes imply that one co-tenant is in possession for another co-tenant, e.g., a father for his infant but not adult son, see *In re Hobbs;* otherwise it is a question of proving some agency or trusteeship or acknowledgment of title on the part of those in possession."

Section 12 referred to is identical to section 14 of the Limitation of Actions Act.

Counsel for the respondent submitted that there was no evidence to show that the deceased was in sole possession of the properties for his own benefit or that the respondent had been excluded from the properties. It is necessary to show separate possession by the deceased and dispossession or discontinuance of possession by the respondent. She cited *Archer v. Georgina Holdings Ltd. [1974] 21 W.I.R. 431 Swaby J.A.* giving the judgment of the Court said at 436:

> "Under the Limitation of Actions Law, Cap. 222, time does not begin to run against the owner of land so as to extinguish his right thereto unless it has been established that:

> (a) he has been dispossessed of the land; or
>
> (b) he has discontinued his possession of the land; and that, in either event,
>
> (c) some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of the land. Time then runs against the true owner at the time adverse possession is taken of the land.
>
> (See ss, 3, 4(a) and 30 of the Limitation of Actions Law, Cap. 222).
>
> The onus of proving that the true owner has been effectively dispossessed is on the party who alleges it. The question whether this onus has been discharged does not always admit of a ready answer. At the outset it is necessary to appreciate the difference between 'dispossession' and 'discontinuance' of possession.
>
> > "The difference" said Fry, J. in *Rains v. Buxton* (1) between 'dispossession' and the 'discontinuance' of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others."
>
> The mere fact that the true owner does not make use of his land does not necessarily mean that he has discontinued possession of it. *Leigh v. Jack (2).* Non user is equivocal. To establish discontinuance it must be shown positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. Evidence of lack of user which is consistent with the nature of the land in issue and the circumstances under which it is held is not sufficient to justify a finding of an intention to abandon and thus of discontinuance. *Techild Ltd. v. Chamberlain (3)."*

This decision was criticised by Counsel for respondent as being per incuriam because *Paradise Beach and Transport Co. Ltd. v. Price Robinson*, supra, was not cited to the Court.

In my opinion the instant case is not concerned with the accrual of a right of entry. The respondent a co-tenant was in possession of the properties up to the time of her departure to reside in the United States of America. The question is whether the deceased, the other co-tenant occupied the properties for his own use and benefit for the

relevant period as a result of the respondent having discontinued her possession or having been dispossessed by him.

Lord Upjohn in _Paradise Beach Transportation Ltd. v. Price Robinson supra at 1084_ said:

> " 'the separate possessions' (to adopt the phrase of Denman C.J.) obviously only start when the occupation is 'for his or her own benefit'. That is the crucial question as Lord Greene M.R. pointed out in _In re Landi_ that is primarily a question of fact."

From the available evidence it is clear that the respondent has not abandoned her claim to an interest in the properties. The correspondence between the respective attorneys indicate that this claim was recognised by both parties. Her decision to await the death of the deceased in order to benefit as survivor of the joint tenancy is further proof of her intention not to discontinue possession.

The applicant also claimed as a tenant-at-will of the deceased. No evidence has been produced to establish this relationship.

The applicant has failed to discharge the onus of proving that the respondent has been effectively dispossessed or has discontinued possession of the properties.

In the circumstances, the Declaration sought at paragraphs (a), (b) and (c) of the Summons are not granted.

The declaration at (d) as to the entitlement of the applicant to apply for a grant of Letters of Administration is not a contested issue which requires determination on this Summons.

The summons is dismissed with costs to the respondent to be agreed or taxed.

I wish to express my regret at the delay in delivery of this Judgment.