[2012] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 5/2011

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**DONALD CUNNINGHAM** **AUDLEY HARRISON** **IVETTE JAMES**	**APPELLANTS**
AND	**HOWARD BERRY** **JOSEPH MATTHEWS** **ERROL MYRIE**	**RESPONDENTS**

Michael Brown instructed by Michael PB Erskine and Company for the appellants

Mrs Ann Marie Lawrence Grainger for the respondents

23 June, 29 July 2011 and 13 July 2012

HARRIS JA

[1] This is an appeal against the decision of Her Honour Mrs Vivene Harris in the Resident Magistrate's Court for the parish of Westmoreland, made on 14 September 2009, whereby she ordered as follows:

> "1. Surveyor's Report is confirmed
> 2. Judgment for the Plaintiffs

3. Order for Recovery of Possession on or before November 30, 2009
4. Costs to be agreed or taxed."

On 29 July 2011, the appeal was dismissed and the judgment of the learned Resident Magistrate affirmed. It was also ordered that the appellants should pay costs of $15,000.00. These are the promised reasons for that decision.

[2] On 5 February 2004, the respondents commenced proceedings seeking to recover, from the appellants and others, possession of property situated in Negril in the parish of Westmoreland, which, it was claimed, the appellants occupied as "squatter[s]" and whose tenancies had been terminated by a notice to quit on 16 October 2003. On 2 February 2005, the matter came up for hearing before Her Honour Mrs Frankson Wallace and the following orders were made by and with the consent of the parties:

> "1. That the matter be referred to Mr Andrew Broomfield & Associates, Commissioned Land Surveyor… for him to prepare and submit to the Court a Surveyor's report in Triplicate (original for the Court and one copy for the Attorney-at-Law for the Plaintiff and one copy for the Attorneys-at-Law for the Defendant) to establish whether the Defendant is occupying land at Negril registered at Volume 957 Folio 23 of the Register Book of Titles.
> 2. That the parties hereto shall be bound by the Surveyor's report.
> 3. Each party to pay one-half costs of the said Surveyor's report."

[3] On 17 February 2006, Mr Broomfield filed, in court, his report with a sketch plan annexed thereto. This report reads as follows:

"Re: PLAINT # 79-81/04
JOSEPH MATTHEWS, ERROL MYRIE, HOWARD BERRY VS
IVET JAMES, BOBBY HARRISON, LARRY HARRISON_____

As instructed I visited the captioned property on December 1, 2005. Notices of the survey were served on the Plaintiffs and the Defendants. Mr Matthews, Mr Myrie, Ms James, [sic] Mr Bobby Harrison were present. Ms Elizabeth Wallace (mother) represented Mr Larry Harrison.

I had in my possession a copy of the Certificate of Title registered at Vol. 957 Fol. 203 registered in the name of the Plaintiffs. The plan attached to this Certificate of Title was surveyed by Mr C.N. Clarke on July 1956.

My findings are as follows:

1. The Defendants are all occupying lands part of the lands contained in the Certificate of Title registered at Vol. 957 Fol. 203.

2. There are several buildings both wooden and concrete occupied by the Defendants on this property.

3. Please see sketch plan attached where the occupation of the lands registered at Vol. 957 Fol. 203 is given in more detail. Section A on this plan is occupied by Mr Errol Myrie, Section C on this plan is occupied by Mr Larry Harrison in care of Ms Elizabeth Wallace and Section D is occupied jointly by Mr Bobby Harrison and Ms Ivet James.

Please note that the correct registration for the property in question is Vol. 957 Fol. 203 and NOT Vol. 957 Fol. 23."

[4] There appears to have been no further action in the matter until 22 January 2007 when one of the appellants, Audley Harrison, filed a defence of title by possession asserting that he had been "in possession unmolested, and openly for over twenty (20) years exercising acts of ownership and every person so applying for possession of the

said piece of land their rights have been extinguished". The matter then came on for hearing on 31 August 2009 when Her Honour Mrs Harris heard preliminary arguments in relation to how the matter should proceed. On that day, there was an attempt to rely on the special defence filed. The learned Resident Magistrate was of the view that on the date on which the referral to the surveyor was made, the disputed matter was that the land occupied by the appellants did not belong to the respondents, and therefore the appellants could not raise the issue of title by adverse possession subsequent to the filing of the surveyor's report. She ruled that pursuant to the procedure outlined in section 101 of the Judicature (Resident Magistrates) Act (the Act), a date was to be appointed to consider the report. On 14 September 2009, the agreed date, the learned Resident Magistrate, after hearing arguments raised by the appellants in objection to the report and counter arguments by the respondents, made the orders referred to in paragraph [1] above.

[5] The appellants initially filed four grounds of appeal, but before this court, only two of these grounds (grounds (a) and (c)) were argued, Mr Brown having indicated that the appellants would be abandoning the others.

Ground (a)

> "That the Learned trial Judge erred in confirming the said surveyor's report, having regards [sic] to the fact that the reference to survey referred to land to be surveyed as land registered at volume 957 Folio 23 of the register book of titles, while the said survey report referred to land registered at Volume 957 Folio 203 of the Register book of Title [sic]."

[6] Mr Brown argued that the appellants, having signed their consent on the particulars and again on the formal order, the surveyor was not at liberty to amend what was consented to. He submitted that there was no error on the part of the appellants as to the volume and folio number of the title for the land that they had agreed to have referred to the surveyor. The surveyor, it was submitted, should either have presented a report which established that the appellants did not occupy the lands registered at volume 957 folio 23 or sent back the matter to the court for further directions whereby the Resident Magistrate should have enquired of the appellants as to whether they would agree to the matter being referred to the surveyor in respect of the land registered at volume 957 folio 203. The survey, he contended, was in breach of the court order, which was a specific order that identified the land by volume and folio number only.

[7] Mrs Grainger did not seek to dispute that the incorrect volume and folio numbers had been stated on the reference to the surveyor. She submitted, however, that the relevant question that needs to be answered is whether the correct land was surveyed. It was further submitted by her that the surveyor had sent out the relevant notices informing the parties of the date of the survey, that all the appellants and two of the respondents were present at the survey on lands registered at volume 957 folio 203 and no one had objected then or thereafter that the incorrect land had been surveyed. Subsequent to that, the parties had been before the court on numerous occasions and had made no complaints, she argued.

[8] The matter was referred to the surveyor pursuant to section 101 of the Act, which reads:

> "In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose of determining the matter in issue, the Magistrate, if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor, or, with the consent of both parties, to some other fit person or persons whom he shall nominate; and the person or persons so appointed shall, under the control and direction of the Court, make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands… or such other matter at issue as aforesaid, … and shall, if necessary, make a plan or diagram of the said lands, indicating fee boundary line, or the right of way, or other easement or matter as aforesaid, and shall make a report thereof to the Court, and shall file the report in Court; and the Court shall, on a day to be appointed for that purpose, take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear argument upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require."

[9] It is readily perceptible that the purpose of this section is to allow the court recourse to external resources to assist in settling disputes. It is only where the court is satisfied that the referral to the surveyor is desirable for the purpose of determining the matter in issue that the court may make the order for the referral. The plaints and particulars claiming recovery of possession were lodged on 5 February 2004 and the consent order in relation thereto was made on 2 February 2005. The statutory limitation defence was filed on 22 January 2007. Obviously, this was done subsequent to the filing of the surveyor's report. Upon the matter coming on for hearing on 2 February

2005, in accordance with the prescription of section 184 of the Act, the appellants were required to have provided an answer to the plaints by stating their defences. There is nothing on the evidence to indicate any deviation from the procedure laid down by section 184, nor has any complaint been raised in relation thereto. It is not unreasonable therefore to conclude that when the matter first came on for hearing a defence would have been advanced which prompted the making of the consent order for the carrying out of the survey, and it could not be said that such a defence related to one of adverse possession by the appellants.

[10] In speaking to the issue as to whether the wrong property had been surveyed, the learned Resident Magistrate said:

> "As to the particulars of the parcel of land in issue, it was clear to me that there was an error made in the reference to the surveyor as to the Folio number of the land in question and that this error was subsequently corrected by the surveyor. I am supported, in my view, by two factors. Firstly, in the surveyor's report it was stated: Please note that the correct registration for the property in question is Vol. 957 Fol. 203 and NOT Vol. 957 Fol. 23 (Emphasis supplied). Secondly, the plaintiffs and all the defendants with the exception of Mr. Larry Harrison (who was represented by his mother Ms Elizabeth Wallace, also a defendant in this matter) were present when the survey was done. I would have expected, at the very least, that if the wrong parcel of land was being surveyed that objections would have been made to the survey by either the plaintiffs, the defendants or both."

In our view, the learned Resident Magistrate cannot be faulted for this approach. She would have satisfied herself as to jurisdiction to hear and determine the matter. A consent order for the survey of the land was in place. At the date of the consent order,

the property which the appellants occupied was that property, possession of which, the respondents sought to recover. There is no evidence that at the time of the consent order, the appellants raised an issue as to the existence of an equitable interest in the land in their favour. Consequently, there can be little doubt that the issue was whether the respondents were the owners of the land occupied by the appellants and not whether the appellants had an equitable interest in the land. The appellants having been served with the notices to survey, by their presence on the property while the survey was being conducted, accepted that it was the property for which recovery of possession was sought. As indicated by the surveyor, on the day of the survey, he had a copy of the title to the land being surveyed, which was registered in the respondents' names. There is no evidence of any objection by the appellants that they were under the impression that the land being surveyed was any other than that which they had agreed to have surveyed. It is clear that the order was aimed at having that particular plot of land occupied by the appellants surveyed, irrespective of the volume and folio numbers recorded on the certificate of title. In these circumstances, it was clear that the land on which the survey was conducted was the subject of the consent order. There was no reason for the matter to have been remitted to the Resident Magistrate for her to ascertain whether the appellants would have agreed to have the land registered at volume 957 folio 203 surveyed. In any event, under section 101 of the Act, it would not have been necessary for the Resident Magistrate to have obtained the consent of the parties for the referral to be made. It is patently clear that there was an error by the court in correctly recording the volume and folio numbers of the document

of title. The appellants' position that in surveying land registered at volume 957 folio 203, the surveyor had been in breach of the court order is clearly without merit. This ground must therefore fail.

Ground (c)

> "The learned trial Judge should have nonsuited the Plaintiff having regards [sic] to the fact that the Particulars of Claim did not contain a full description of the property sought to be recovered."

[11] Mr Brown submitted that the use of the words "shall" and "in all actions" in Order VI rule 4 of the Resident Magistrates Court Rules would make it obligatory for a plaintiff, bringing an action for recovery of possession, to include in his claim a description of the property and the annual value of the land regardless of whether the claim was founded on section 89 or section 96 of the Act. He further submitted that the judge had wrongly stated in her reasons for judgment that the fact that the appellants had not placed the respondents' title in issue would make the rule inapplicable. The learned judge, he argued, would not have been in a position to definitely state that the appellants were not disputing the respondents' title by looking at the notation on the file made by the magistrate who referred the matter to the surveyor. The notation, he pointed out, was, "defence['s] land occupied [and] not part of [the] plaintiff's land". He stated that the Resident Magistrate had relied on **Brown v Bailey** (1974) 12 JLR 1338 in holding that Order VI rule 4 did not apply. However, he argued, the issue in that case had been the omission of the annual value in the plaint and not the absence of the description of the property. Failure to state what was required in Order VI rule 4 went

to the issue of jurisdiction and if jurisdiction is lacking ab initio, as it was in this case, it cannot be obtained ex post facto, he submitted.

[12] In response, Mrs Grainger submitted that jurisdiction is conferred on the Resident Magistrate by the Act and not by the rules. Relying on **Brown v Bailey**, she submitted that the annual value of the land was irrelevant as this was not a claim made pursuant to section 96 of the Act as the notations on the file and the pleadings indicated that there was no dispute as to title. Section 89 was therefore the relevant section. She referred to **McNamee v Shields Enterprises** [2010] JMCA Civ 37 and submitted that the requirements in Order VI rule 4 apply to section 96 claims for recovery of possession and not cases falling under section 89. She submitted that by virtue of the decision in **Brown v Bailey**, the Resident Magistrate would have had to look at the state of the pleadings before her to see whether they were of such a nature as to call in question the title of the respondents.

[13] As an alternative basis for supporting the decision, Mrs Grainger relied on **Elsie Raffington v Joseph McIntosh** RMCA No 5/2007, delivered 24 April 2009 and submitted that the use of the word 'shall' does not necessarily make the provision mandatory. Furthermore, she submitted, the purpose of the rule is for identification; there is no public interest involved and therefore the rule should not be mandatory. She submitted that the appellants had been represented by counsel, had fully participated in the proceedings, had paid their share of the costs for the surveyor's report and had vigorously defended the matter. Based on these circumstances, she argued, it could be said that they had accepted the jurisdiction of the court and had impliedly waived these

requirements. For this submission, she relied on **Rose v Senior** (1967) 9 JLR 602 and **Burchell Melbourne v Anderson & Anderson** RMCA No 30/2002, delivered 11 April 2003. Finally, she submitted that by virtue of order XXXVI rule 23, non-compliance did not render the proceedings void and that since the Resident Magistrates' Courts are not courts of pleading, anything lacking in the particulars may be obtained from oral evidence.

[14] In an action for the recovery of possession of land in the Resident Magistrates' Court, the jurisdiction of the court is founded on sections 89 and 96 of the Act. The (relevant) sections read as follows:

> "89. When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the Magistrate shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such premises to the plaintiff."
>
> "96. Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed seventy-five thousand

> dollars, any person claiming to be legally or equitably entitled to the possession thereof may lodge a plaint in the Court, setting forth the nature and extent of his claim, and thereupon a summons shall issue to the person in actual possession of such land or tenements and if such person be a lessee, then a summons shall also issue to the lessor under whom he holds; and if the defendant or the defendants, or either of them, shall not, on a day to be named in such summons, show cause to the contrary, then on proof of the plaintiffs' title and of the service of the summons on the defendant or the defendants, as the case may be, the Magistrate may order that possession of the lands or tenements mentioned in the said plaint be given to the plaintiff on or before such day, not being less than one month from the date of the order, as the Magistrate may think fit to name; and if such order be not obeyed, the Clerk of the Courts, on proof to him of the service of such order, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such lands or tenements to the plaintiff."

[15] Section 89 is intended to deal with claims by owners of land against persons in possession of the land who are not entitled to possession - see **McNamee v Shields Enterprises**. Where a dispute as to title arises section 96 becomes the operable section conferring jurisdiction on the court to hear and determine a plaint for the recovery of possession of land, the annual value of which does not exceed $75,000.00. The oral statement of a defendant that there is a bona fide dispute as to title does not deprive the court jurisdiction to hear matters under section 89 or 96. In **Brown v Bailey**, this court, after reviewing a number of cases, propounded the test for determining whether there is a genuine dispute as to title as follows**:**

> "All the authorities show with unmistakable clarity that the true test is not merely a matter of a bona fide intention, but rather whether the evidence before the court or the state of

> the pleadings is of such a nature as to call in question the title, valid and recognizable in law or in equity."

[16] It is for the court to inquire into the matter to decide whether a bona fide dispute, as to title, as alleged, exists. If the court, after inquiry, is of the view that its jurisdiction lies under section 89 it may proceed to hear the plaint. However, if in its opinion, its jurisdiction does not exist under section 89 but under 96, it may hear and determine the matter under section 96.

[17] Order VI rule 4 of the Resident Magistrates' Court Rules provides for the inclusion of the description of the land and its annual value in the particulars of claim. It reads:

> "In all actions for the recovery of land the particulars shall contain a full description of the property sought to be recovered and of the annual value thereof and of the rent if there be any, fixed or paid in respect thereof."

[18] The learned Resident Magistrate, in dealing with the issue raised by the appellants as to the applicability of Order VI rule 4 in claims for recovery of possession of land, said:

> "The annual value of the land was not stated in the particulars of claim. Mr. Brown took exception to this as well as what he termed the absence of "a proper description of the land"…. Order 6 Rule 4 of the Resident Magistrates Court Rules provides that 'in all action [sic] for the recovery of land the particulars shall contain a full description of the property sought to be recovered and of the annual value thereof'… (Emphasis supplied) However, the defendants did not at the outset put the plaintiffs' title in issue. Had this been the case, the reference to the surveyor could not have settled 'the matter in issue or controversy'. The plaintiffs were alleging that the defendants were squatters on their land

> and consequently I am of the view that section 89 of the Judicature (Resident Magistrates) Act would be applicable and the failure to state the annual value of the land in the particulars of claim would not be fatal to the plaintiffs' claim. Order 6 Rule 4 is applicable to section 96 claims for recovery of possession. (See **Arnold Brown v AG** 1968 11 J.L.R. 35 and **Danny McNamee v Shields Enterprises Ltd.** Resident Magistrate's Civil Appeal No. 15 of 2007 (24.09.2010). The surveyor's diagram and report clearly set out the borders and boundaries of the land in issue and provided an adequate description of the land. (See **Elsie Raffington v Joseph McIntosh (Agent of Paulina Lindsay and Margaretta Anderson**) Resident Magistrate's Civil Appeal No. 5 of 2007 (24.04.2009). I also formed the view that there was no merit to this exception and disallowed it."

[19] It appears to us that, when considering matters falling within the scope of section 89 of the Act, the failure to comply with Order VI rule 4 would not be fatal. Section 89 does not speak to the inclusion of a statement as to the annual value and a description of the land, in a plaint. Although Order VI rule 4 refers to the inclusion of such statements in a claim under section 89 for recovery of possession, it does not appear that their omission would in itself render the claim bad. In contrast to section 96, which specifically refers to the annual value and the need for the plaint to set out the nature and extent of the claim, section 89 does not contain these requirements. Strict compliance with Order VI rule 4 is not required under section 89. In any event, the claim describes the land as "premises situated at Negril in the parish of Westmoreland" which indicates that there was some description of the land albeit, not a full description. Even if compliance with section 89 is required, in consenting to the survey, the appellants would have waived that requirement.

[20] In **McNamee v Shields Enterprises Ltd**, Morrison JA, after embarking upon a comparative review of sections 89 and 96 and a number of authorities, said section 89 is appropriate "in cases in which the defendant's occupation is not attributable to any kind of right or title", while cases falling within section 96 are ones in which there is a dispute as to title but the jurisdiction of the Resident Magistrate is restricted to property of which the annual value does not exceed $75,000.00. Speaking to Order VI rule 4, he said:

> "The requirement in Order VI, rule 4 of the Resident Magistrate's Court Rules that in all actions for the recovery of land 'the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof…' is obviously, in my view, particularly applicable to section 96 claims for recovery of possession."

[21] In our opinion, this reinforces our view, that in claims for recovery of possession, section 89 being designed to deal with matters in which there is no dispute as to title, there would be no necessity to include a statement as to the annual value or a <u>full description</u> of the land in the claim.

[22] It is to be observed that the learned Resident Magistrate relied on **Brown v Attorney General**, in an effort to show that Order VI rule 4 was applicable to claims under section 96, and not on **Brown v Bailey** as Mr Brown stated. In **Brown v Attorney General**, the issue was whether the appellant, from whom possession was being sought, had set up a dispute as to title so as to take the action within the purview of section 96. It was held that the appellant had set up a dispute as to title, as he had demonstrated a bona fide intention to dispute title and therefore section 96 applied but

that the respondent having failed to prove the annual value, the Resident Magistrate had no jurisdiction to try the claim. The court in **Brown v Bailey** expressed doubt as to the test laid down in **Brown v Attorney General** that an oral statement of a defendant was sufficient to show a bona fide intention of raising a dispute as to title. However, the learned Resident Magistrate's reliance on **Brown v Attorney General** seems to relate to the fact that in a claim under section 96, for recovery of possession, the inclusion of the annual value of the land is mandatory.

[23] It appears from her reasoning that the learned Resident Magistrate was firmly of the view that the matter did not involve a dispute as to title, and therefore, there would have been no need for the claim to have included the annual value or a description of the property. However, Mrs Grainger has not sought to defend that finding on the description of the land and rightly so, as there was indeed no proper description of the land included in the particulars of claim.

[24] It was Mr Brown's contention that the Resident Magistrate could not have ascertained whether there was a genuine dispute as to title by looking at the notation on the file. The records do not reveal the contents of the note to which Mr Brown made reference. However, regardless of its content, the notation would have been just one aspect of the material before her that the learned Resident Magistrate was entitled to take into account. As Mrs Grainger submitted, on perusing the file, the learned Resident Magistrate would have been presented with the particulars of claim which referred to the appellants as squatters; the magistrate's endorsement on the file that the surveyor was to establish whether the appellants occupied the disputed premises; and a referral

to the surveyor by which the parties agreed to be bound. The learned Resident Magistrate was not entitled to consider the limitation defence which was filed subsequent to the referral.

[25] In our view, there was ample evidence before the learned Resident Magistrate from which she could have determined that there was no dispute as to title and that she could have assumed jurisdiction under section 89. We are also of the view that, that evidence was not of such a nature as to call in question the title of the respondents. There was sufficient evidence that the appellants were not disputing the respondents' title. The claim fell to be decided under section 89 and the appellants, having submitted themselves to the court's jurisdiction, have no reason to complain about the omission of the annual value and the description of the property. The learned magistrate was well within her jurisdiction to have proceeded with the hearing. Having been clothed with jurisdiction to consider the matter and having been satisfied that the exceptions to the report were baseless, she was entirely within her right and did rightly conclude that the surveyor's report should be confirmed.

[26] It was for these reasons that the appeal was dismissed with an award of costs to the respondents.