[2018] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

PARISH COURT CIVIL APPEAL NO 5/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**CLAUDE JENINE (Duly appointed Attorney of VERNIS PARCHMENT, owner of land part of Hopewell, in the parish of St Elizabeth)**	**APPELLANT**
AND	**CYNTHIA BLAIR**	**RESPONDENT**

Miss Audrey Clarke instructed by Judith M Clarke & Co for the appellant

Miss Tamara Green instructed by Cecil R July for the respondent

20 June and 7 December 2018

MORRISON P

Introduction

[1] Section 96 of the Judicature (Parish Courts) Act ('the Act') provides for the resolution of disputes as to title to land in the Parish Court in the following manner:

> "Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed five hundred 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 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 plaintiff's 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…"

[2] By virtue of this section, as is well known, the jurisdiction of the Parish Court in any dispute concerning title to land, is limited to land the annual value of which does not exceed $500,000.00. It is therefore necessary for the plaintiff in any action in the Parish Court in which such a dispute arises to plead and prove that the annual value of the property in question falls within the statutory limit[1].

[3] In relation to disputes as to the boundary line between adjoining properties, section 97(1) of the Act provides as follows:

> "Whenever a dispute shall arise between the occupiers of adjoining lands or hereditaments respecting the boundary line between the same, either of the parties may lodge a plaint in the Court, and thereupon a summons shall issue to the other party; and if the defendant shall not, on a day to

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[1] See, among many other cases, **McNamee v Shields Enterprises** [2010] JMCA Civ 37 and **Cunningham et al v Berry et al** [2012] JMCA Civ 34; and see Order VI, rule 4 of the Resident's Magistrate Court Rules, which states 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…"

> be named in such summons, show cause to the contrary, then on proof of the respective occupation of the plaintiff and defendant, and of the dispute, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may hear and determine the matter in dispute."

[4] However, section 97(2) provides that where during the hearing of a dispute as to the boundaries between adjoining properties a question of title arises, the Parish Court judge "shall take all the evidence offered; and shall have power if he thinks desirable and without the consent of the parties to refer the matter to a surveyor or surveyors to make such survey or surveys and lay down such boundary line as the evidence and the law shall justify and in his final judgment shall lay down and determine the boundary in settlement of such dispute".

[5] The upshot of these provisions is that the Parish Court has jurisdiction over (i) disputes as to title to land in cases where the annual value of the land does not exceed $500,000.00; and (ii) boundary disputes between the occupiers of adjoining properties, irrespective of value, even where in the course of the hearing of such a dispute a question of title arises. But, in the latter case, the judge hearing the boundary dispute may also refer the matter to a surveyor for the purpose of determining the boundary line and settling the dispute.

[6] This appeal concerns two adjoining parcels of land in Hopewell District in the parish of Saint Elizabeth and the issue is which of section 96 or section 97 applies. Her Honour Mrs Sonia Wint-Blair ('the judge'), then a Resident Magistrate for the parish of

Saint Elizabeth, held that the matter was covered by section 96, while the appellant contends in this appeal that she ought to have applied section 97.

Background

[7] The brief background to the matter is as follows. The appellant is the duly appointed attorney and agent of Ms Vernis Parchment ('Ms Parchment'). Ms Parchment asserted ownership of one of the parcels ('Parcel A'), on the basis of a sale to her in 1968. The relevant conveyance, which was tendered and received as an exhibit at the trial, stated that the parcel was "by survey half an acre"[2].

[8] The respondent's evidence was that she was "in charge" of the other parcel ('Parcel B'), it having been owned by her late father, Mr Raphael Blair. The relevant conveyance, which was also tendered and received as an exhibit at the trial, stated that the parcel contained "by survey three quarter [sic] of an acre"[3].

[9] By the time the litigation commenced in 2014, Ms Parchment and the respondent claimed to have been in occupation of Parcels A and B for over 40 years respectively.

[10] In an action filed in the Resident Magistrate's Court[4] for the parish of Saint Elizabeth on 20 February 2014[5], the appellant claimed against the respondent for, firstly, damages for trespass and recovery of possession of approximately one square of

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[2] Indenture dated 10 October 1968, Estriana Jones to Vernis Parchment
[3] Indenture dated 7 August 1982, Ellen Edmond to Raphael Blair
[4] Now known as the Parish Court – see section 2 of the Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2015
[5] Plaint No 115/2014

land; and secondly, in the alternative, "for resolution of boundary dispute" [sic]. The basis of the claim was that the respondent had, "on divers dates between June 20, 2013 to present … unlawfully entered upon [Parcel A] and continues to date to unlawfully occupy one square of the said property".

[11] In a counterclaim filed on 30 May 2014, the respondent counterclaimed for damages for trespass. The basis of the counterclaim was that on 5 August 2013 the appellant, accompanied by workmen, had entered Parcel B, torn down a portion of the respondent's wire fence, chopped down plants and shrubbery growing on the property, and attempted to conduct a survey of a portion of it. The respondent also sought an injunction restraining the appellant from trespassing on Parcel B.

[12] In her defence to the claim, the respondent denied trespassing on Parcel A and stated that it was the appellant who had come on to Parcel B claiming to be its owner. For his part, the appellant in his defence to the counterclaim made the point, firstly, that his role in the case was purely in a representative capacity. He asserted that he had at all material times acted on the authority of Ms Parchment. But, in any event, he denied that either he or any person acting on his behalf had trespassed on Parcel B or damaged any property on it.

[13] At the trial, in addition to his own evidence, the appellant called seven witnesses, while the respondent gave evidence on her own behalf.

The judge's decision

[14] In her reasons for judgment, the judge indicated that she had not found it necessary to make any findings of fact based on this evidence[6]:

> "There are many and varied issues raised in this matter. However, based on the conclusion at which I have arrived and which is set out below it will not be necessary to wade through nor to decide them."

[15] Then, after reviewing section 96 and some of the relevant authorities on the question, the judge stated her conclusion as follows[7]:

> "The plaint filed and both the defence stated and the counterclaim filed indicate that a question of title will be raised at the trial. In fact, it is undoubtedly the case that both plaintiff's [sic] are in possession of their land and that they can prove their title. The trial had to commence and evidence had to be heard in order to determine the issue of jurisdiction. Neither plaintiff pleaded the annual value of the property, as required by Order VI, rule 4, nor did they seek to amend their pleadings at trial. The trial commenced and neither plaintiff led evidence of the gross annual value of the land."

[16] Accordingly, having found that neither the appellant nor the respondent had satisfied the evidential requirement of section 96, the judge nonsuited them both, pursuant to the power given to the court by section 181 of the Act. Section 181 provides that:

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[6] At para. 27
[7] At para. 36

> "The Magistrate shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court."

[17] The judge also awarded costs to the defendants on the claim and counterclaim, such costs to be agreed or taxed.

The grounds of appeal

[18] In grounds of appeal filed on his behalf on 26 September 2016, the appellant contends that the judge was wrong for two reasons. Firstly, that the judge erred in finding that his case "gave rise to a dispute as to title and that section 96 of the [Act] applies"; and secondly, the judge's decision was "inconsistent with the weight of the evidence which is primarily concern [sic] with a boundary dispute between the parties".

[19] In her written and oral submissions on behalf of the appellant, Miss Clarke took both grounds together. She submitted that, on the evidence, the real issue before the judge had to do with the correctness of the boundary line between Parcels A and B. The judge's finding that the matter fell within section 96 was therefore inconsistent with the weight of the evidence and proof of annual value was unnecessary. Instead, the judge ought to have taken the more reasonable approach of requiring an independent Commissioned Land Surveyor to "attend the properties for the purposes of assisting the

Court in determining whether the true boundary between the parties was in accordance with either claim or otherwise"[8].

[20] For the respondent, Miss Green submitted the matter before the judge was more than simply a boundary dispute. She submitted that it was clear from the appellant's claim and the evidence on both sides that the matter related to one square of land and that there was therefore a dispute as to title. In these circumstances, she submitted, the judge was clearly right in thinking that it was necessary to consider whether the annual value of the two parcels of land fell within the limit set by section 96 of the Act. No evidence as to this having been produced by either party, the judge was also right to apply the provisions of section 96.

Some aspects of the evidence

[21] As I have already mentioned, the judge did not find it necessary to make any findings of fact. However, as the opposing positions taken by the parties on appeal have raised a question as to the true nature of the dispute between the parties, I must consider briefly some aspects of the evidence.

[22] Despite having power of attorney from Ms Parchment, the appellant himself knew little of the circumstances surrounding the dispute (though he strenuously denied having entered Parcel B in company with others and caused damage to property and plants, as the counterclaim alleged). The principal witness as to the facts was therefore

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[8] Appellant's Skeleton Arguments filed 12 June 2018

Ms Parchment's sister, Mrs Pearline Mullings, who knew Parcel A well and was the person responsible for the payment of land taxes over the years.

[23] Mrs Mullings's evidence was that the respondent had "taken off" one square of Parcel A. In order to demonstrate this, she testified that the respondent's father had built a house on Parcel B after Parcel A was acquired by Ms Parchment. Originally, the step of the house on Parcel B was close to the boundary with Parcel A ("you could stretch out and reach the step"). As a result, before the respondent took the square off of Parcel A, she could not drive her car up to the house. However, since the square of land had been taken off Parcel A, the respondent now had a driveway and "the car is parked on our land".

[24] So, sometime in 2013[9], Mrs Mullings took a Mr Rogers, the retired superintendent of roads and works for the parish, to the property to do some measurements. Unfortunately, Mr Rogers did not get very far: although he did make some measurements, a quarrel erupted between Mrs Mullings and "the two ladies that live next door" about the boundary between the two parcels. During the exchanges, on Mrs Mullings' account, the defendant said[10], "… take off oonu half acre of land even if it have to go through the (expletive deleted) house".

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[9] Although Mr Rogers' evidence was that he visited the property in 2014, the other evidence in the case suggests that it must have been in 2013.
[10] Page 16 of the Record of Appeal

[25] In response, the respondent decided, as Mrs Mullings put it[11], to engage the services of "a bigger surveyor" than Mr Rogers. Accordingly, by notice dated 7 June 2013, Mr Atneil Braham, a commissioned land surveyor, gave notice of his intention to carry out a survey between the hours of 2:00 and 4:00 pm on 20 June 2013. However, according to Mrs Mullings, when she arrived at the property at 1:30 pm on the appointed day, accompanied by her husband and others, the surveyor had completed his work: "they already took off one square into our land … It was done before we got there behind our back".

[26] According to Mrs Mullings, she therefore decided to get "my person Mr. Hendricks to come and survey the land", and arranged for the property to be surveyed by Patrick Hendricks and Associates, a firm of commissioned land surveyors. But when Mr Leonard Bromfield of Mr Hendricks' office visited the property on 5 August 2013, the respondent lodged an objection to the survey, on the ground that "my land is survey [sic] and I have title to prove"[12]. It is on this occasion, the respondent would later testify, that the appellant came onto Parcel B, hit down her fence and chopped down bushes and flowers.

[27] The only surveyor's report to emerge from these efforts was therefore Mr Braham's and, when the respondent testified at the trial, it was tendered and admitted in evidence without objection. But this report did not resolve the issue between the

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[11] Ibid
[12] Notice of objection dated 5 August 2013

parties, given the respondent's denial of having trespassed on, or "taken off", a square of land from Parcel A. She also maintained under vigorous cross-examination that the driveway on Parcel B had been there for 41 years.

Discussion and conclusions

[28] As to the nature of the dispute, it is true that the appellant's particulars of claim made specific mention of an alternative claim "for resolution of a boundary dispute"[13]. It is also true that Mr Rogers in his evidence agreed with the suggestion from the respondent's counsel in cross-examination that the dispute between the parties was "about where the boundary should be between [Parcel A and Parcel B]"[14]. However, it is not clear whether and, if so, to what extent the parties addressed the judge on the issue which now divides them on appeal; that is, whether this was a boundary dispute or a matter of disputed title to Parcel A.

[29] Be that as it may, in my view, the evidence produced on both sides clearly went to the wider issue of whether the respondent had, as the appellant claimed, trespassed on, and effectively annexed, one square of land out of Parcel A. Once the respondent denied this allegation, as she did, then this inevitably gave rise, as it seems to me, to a question of the ownership of that square of land. I consider this to be particularly so in the light of the obvious materiality of one square of land to the overall size of Parcel A, which was half of an acre, or five squares.

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[13] Particulars of Claim, para. 6
[14] Page 35 of the Record of Appeal

[30] I therefore think that this was not a matter falling within section 97(1) of the Act, which provides a mechanism for the resolution of "a dispute … between the occupiers of adjoining lands or hereditaments respecting the boundary line between the same …" Rather, as the judge held, this was a dispute as to title, in respect of which section 96 of the Act required the production of evidence as to the annual value of the land in question. For, as Harris JA pointed out in **Donald Cunningham et al v Howard Berry et al**[15], a case to which the judge referred in her reasons for judgment -

> "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**[16]." (Emphasis mine)

[31] Finally, in reference to the manner in which the judge disposed of the matter, Miss Green reminded us of Brooks JA's statement in **Lorna Taylor (Administratrix of the estate Wilbert Taylor deceased) v Eric Williams et al**[17], that "[i]t is always desirable that tribunals make a decision one way or other in respect of the evidence adduced before them". However, as Brooks JA also went on to observe, "… section 181 of [the Act] does allow a Resident Magistrate to enter a non-suit if he or she is not satisfied that the evidence is sufficient to support one side or the other".

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[15] [2012] JMCA Civ 34, para. [15]
[16] This amount was increased to $500,000.00 in 2013 by section 10 of the Judicature (Resident Magistrates) (Increase in Jurisdiction) Order, 2013
[17] [2014] JMCA Civ 53, para. [17]

[32] Against this background, and in all the circumstances, I have come to the conclusion that the judge was right in thinking that, in the absence of proof of the annual value of the parcels in question, there was no alternative to nonsuiting both the appellant and the respondent. I would therefore dismiss the appeal and award costs of $40,000.00 to the respondent.

A final thought

[33] I cannot leave the matter without observing that, notwithstanding the fact that both parties in the matter were represented by experienced counsel, it is a pity that the judge did not find it possible to indicate her thinking on the section 96 requirement before the end of the case. A word to counsel at some earlier stage of the proceedings might well have sufficed to cure the evidential deficiency which the court ultimately identified.

SINCLAIR-HAYNES JA

[34] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. I have nothing further to add.

F WILLIAMS JA

[35] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion.

MORRISON P

ORDER

Appeal dismissed. Costs to the respondent in the sum of $40,000.00.