[2019] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 10/2018

APPLICATION NO 262/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**HUBERT SAMUELS**	**APPLICANT**
AND	**PAULINE KARENGA**	**RESPONDENT**

Norman Godfrey instructed by Brown, Godfrey & Morgan for the applicant

Mrs Emily Shields instructed by Gifford, Thompson & Shields for the respondent

14 November, 3, 19 December 2018 and 17 May 2019

PHILLIPS JA

[1] I have read in draft the reasons for judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion. There is nothing I wish to add.

SINCLAIR-HAYNES JA

[2] Mr Hubert Samuels (the applicant) had applied to this court by way of a notice of application for an extension of time within which to file grounds of appeal against the decision of the Senior Parish Court Judge for the parish of Manchester, Her Honour Ms.

Desiree Alleyne, ordering him to quit and deliver up possession of property situated at Bloomfield District, in the parish of Manchester.

[3] Mr Samuels, dissatisfied with the Senior Parish Court Judge's decision, on 24 January 2017, filed a Notice of Appeal and paid the requisite costs and security for the due prosecution of the appeal. He, however, failed to file the grounds of appeal within the time stipulated.

[4] The appeal was listed to be heard during the week of 14 November 2018. On 14 November 2018, Mr Canute Brown held for Mr Godfrey on the applicant's behalf and sought permission to apply for an extension of time within which to file the grounds of appeal. We acceded to his request, adjourned the matter to 3 December, 2018 and made the following case management orders:

> "1. Preliminary objection to be heard on 3 December 2018;
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> 2. Applicant to file and serve application seeking permission to file grounds of appeal by 21 November 2018; and
>
> 3. Respondent to respond by 26 November 2018.
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> 4. Costs of today to the respondent in the amount of $15,000.00."

[5] On 3 December 2018, counsel for the respondent, Mrs Emily Shields, objected to Mr Samuels' application for an extension of time within which to file the grounds of appeal. She submitted that the application was filed in breach of the order of this court.

Consequently, Mr Godfrey verbally applied for the application filed on 27 November 2018 to stand.

[6] Mr Godfrey explained to the court that counsel who had held for him on 14 November 2018, had mistakenly advised him that the application was to be filed by 26 November 2018. Accordingly, he believed he was only one day out of the time stipulated.

[7] Notwithstanding the applicant's failure to file and serve the application within the time specified, we allowed his application filed on 27 November 2018 to stand as being properly filed.

[8] The following proposed grounds of appeal were exhibited to Mr Samuels' application for extension of time within which to file grounds of appeal:

> "1. The Learned Parish Judge erred in law when she found that the plaintiff/respondent had standing in law to initiate and maintain the action for recovery of possession, she claiming through the unadministered assets of the estate of the deceased.
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> 2. The Learned Parish Judge erred in law when she admitted in evidence a document purporting to be a will, which had not been admitted to probate, as evidence of the truth of its contents that the respondent was named as a beneficiary and therefore is the owner of the legal or equitable estate in the land.
>
> 3. The Learned Parish Judge failed to recognise that a beneficiary under a will or intestacy has no legal or equitable interest in the unadministered assets of the deceased's estate.

4. The Learned Parish Judge gave judgement for the respondent/plaintiff on an action which she did not bring and which the appellant/defendant was not required to answer to.

5. The Judgement is against the weight of the evidence which favours the appellant/defendant by any standard of proof, is unreasonable and unlawful."

[9] It was counsel's argument in support of the application that:

> "(a) The grounds of appeal were not filed within the time allowed because of the inadvertence of counsel who had conduct of the matter.
>
> (b) The provisions of section 266 of the Judicature (Parish Court) Act enable the court to admit the applicant to impeach the judgment appealed from.
>
> (c) The appeal has a real prospect of success, because the respondent, who sued the applicant for recovery of possession of land, had no standing in law to maintain the action.
>
> (d) The parish judge wrongly admitted into evidence a document purporting to be a Will, that had not been admitted to probate, as evidence of the truth of its contents, that the respondent was named as a beneficiary and therefore is the owner of the legal or equitable estate in the land."

[10] On 19 December 2018, we refused his application for an extension of time within which to file grounds of appeal and ordered the applicant to pay costs to the respondent to be agreed or taxed, which effectively directed him to quit and deliver up possession of the premises. We promised to provide our reasons and this is a fulfilment of that promise.

Background

[11] Mrs Pauline Karenga (the respondent) instituted proceedings against Mr Samuels for recovery of possession of premises situated at Bloomfield District, in the parish of Manchester. He was described in the plaint as a tenant-at-will whose tenancy had terminated on 26 February 2015 by way of a notice to quit which was served on 26 January 2015. The plaint note stated "Recovery of Possession" as the reason.

[12] The action was instituted in Mrs Karenga's personal capacity. She sought at the trial to claim *locus standi* by virtue of being the sole beneficiary under her mother, Miss Ivy Morris' will, as well as being the person in possession of the property.

[13] Miss Ivy Morris was the only child of the owner of the property, Mr Hubert Morris. In 2012, she obtained letters of administration for her father's estate. The property was however, not transferred.

[14] It was Mrs Karenga's contention that, Miss Ivy Morris had, by her will, gifted the property to her, she being her only child. Of importance is that Miss Ivy Morris' will was not probated at the time Mrs Karenga instituted proceedings for recovery of possession.

The preliminary points

[15] At the commencement of the trial, counsel for the applicant, Mr Godfrey raised the following points *in limine:*

> "1) There was no relationship of landlord and tenant between Mr Samuels and Mrs Karenga although the particulars of claim referred to him as a tenant-at-will.

2) The respondent's claim of having a right to the property by virtue of her mother's will is unsustainable because the Executrices named in the will are alive.

3) Mrs Karenga, as a beneficiary and not one of the Executrices, has only an equitable interest and therefore no *locus standi* to bring the action.

4) The proper parties to bring this action would be the Executrices in the Estate of Ivy Morris and they could only have commenced the action if they obtained Probate of her Will."

For those reasons, counsel submitted, the action was ill-conceived and could not be maintained.

Defence of the preliminary points

[16] Miss West, counsel for Mrs Karenga during the trial, asserted that there was in existence a lease agreement between the persons on the property and Mrs Karenga. She however conceded that there was no relationship between Mrs Karenga and Mr Samuels. Counsel nevertheless contended that by virtue of the letters of administration granted to Miss Ivy Morris, the will naming Mrs Karenga as the sole beneficiary, and Mrs Karenga being a person in possession of the property, she was the proper person to bring the action.

The judge's ruling

[17] Having heard the preliminary points raised, the learned Senior Parish Judge ruled that the matter should proceed to trial because she was unable to decide the matter solely on the preliminary points.

The evidence

[18] Mrs Karenga sought to prove her claim against Mr Samuels by providing evidence that she and her mother had continuously been in possession of the property since her grandfather's death in 1977. She testified that, her grandfather died without a will, but her mother obtained letters of administration for his estate in 2012. It was Mrs Karenga's evidence that her mother was the only child for her grandfather. Prior to her mother's death in 2013, Mrs Karenga was her agent by virtue of a power of attorney, however subsequent to her death, she became the beneficiary under her will, which was executed in her presence in 2012.

[19] After the execution of the will, she visited the property later in 2012 and noticed several squatters. She consequently gave them notices to quit and deliver up the possession, in 2013. Her evidence is hereunder stated:

> "I paid property tax after my mother died. I visited the property real often from Kingston. I knew Mr Knight was there. In 2013 I spoke to Delano Knight. The son of Mr. Leroy Knight who is alive. I saw Hubert Samuels on the property. **I know Hubert Samuels and Delano Knight came on property in 2011 also Ucal Sinclair**. They are all still on the property**. I gave Delano Knight a lease which was formalized. He did not come on the property with permission by me.** Delano Knight is here in court. Delano Knight's girlfriend Priscilla Reid is here in court today. I see Mr Samuels here in court today. (Mr. Samuels identified). I wanted to survey the property to know the property. He stopped my surveyor. This was 2014/2015. It was April I remember. **I was there when Mr Samuels refused to sign the document**. (Objection to survey marked 'A' for identity.) I was visiting my grandfather property from I was a child going to high school fifth form. I remember his funeral quite well. I was going there often. I was always going there. I saw people there. Mr Knight was

always on the property. He is living next door now while his son watches over it." (Emphasis supplied)

[20] Under cross-examination the following exchange occurred:

"Q. Has he ever paid rent to you?

A. No he has never paid rent to me

Q. He was not a Tenant of yours at any time?

A. At no time.

Q. The Will of your mother has it been probated?

A. It is now being processed."

No evidence was advanced that Mr Samuels was a tenant-at-will. The evidence spoke to him being a trespasser.

[21] Mrs Karenga disagreed with Mr Godfrey's suggestion that Mr Samuels had lived on the property since his infancy with his father who had lived there for some 20 years. It was her evidence that he went on the property in 2011 having been evicted from another property. Mrs Karenga's testimony was supported by four witnesses.

Mr Delano Knight's evidence

[22] Mr Delano Knight testified that he moved to the Bloomfield property in August 2011 and was adamant that it was he who had invited Mr Samuels onto the land. He supported Mrs Karenga's evidence that Mr Samuels' father never lived on the property. Mr Delano Knight instead asserted that Mr Samuels' father lived at 14 Perth Road, in the parish of Manchester until his death.

[23] Mr Delano Knight's evidence was that, prior to moving to the Bloomfield property, he resided at 14 Perth Road, for five years and Mr Samuels also resided there. He and about 11 or 12 others including Mr Samuels, were ordered by the court to vacate those premises. Consequently, in 2011 he went to the property in issue, which his father, Mr Leroy Knight was "taking care of" for Mrs Karenga. Mr Delano Knight stated "[w]hen I went to occupy the land my father was there watching it, he lived topside next door. They call it 'caring' for it."

[24] Mr Delano Knight testified that he invited Mr Samuels onto the property because he (Mr Samuels) told him that he had an option of living at Knockpatrick or Hillside, but the cost of transportation would "stress him". They both dismantled and removed their wooden houses from 14 Perth Road and moved to the Bloomfield property. In 2012, he and Mr Samuels "decided to take care" of the land. In furtherance of that decision, they repaired an old tank which was on the property.

[25] It was Mr Delano Knight's evidence that:

> "A next man top side ah we name Ucal Sinclair get two (2) piece of paper. He showed it to me and Mr Samuels 2 and a ¼ acre- that paper states $168,000.00. He gave Mr Samuels the paper. He gave Mr Samuels the paper with 1 and ¾ acres. When he gave him the property taxes paper, he said to Mr Samuels 'see it now my youth we get the paper so the two (2) of us can make up and pay the back tax on the property.' I said "my youth a people property you know." He said 'you ah idiot see we can own it.' I said 'alright we can own it'."

On that evidence, Mr Ucal Sinclair was apparently asserting that they could acquire the land by paying the property taxes.

[26] Mr Delano Knight and Mr Samuels agreed that they would each pay $84,000.00. Mr Delano Knight was not able to pay the sum agreed in one payment; however, Mr Samuels assured him that he would pay the sum on his behalf and allow him to reimburse him. On that agreement, Mr Delano Knight gave him $4,000.00 towards the property taxes. Two weeks after, Mr Samuels returned the sum of $4,000.00; notified Mr Delano Knight that he, Mr Samuels was "the new owner of the property" and demanded a monthly rental of $4,000.00.

[27] Mr Delano Knight informed Mrs Karenga and she immediately gave them notice to leave the property. Mr Samuels, he said, was in the process of constructing a concrete structure on the land in disobedience of his instructions not to. Mr Samuels subsequently gave Mr Delano Knight notice to quit and deliver up possession of the property.

[28] It was Mr Delano Knight's evidence that upon receiving the notice from Mrs Karenga, he (Mr Delano Knight) "behaved badly because everyone wanted to steal the property".

[29] On Mr Delano Knight's evidence, in 2015, Mrs Karenga attempted to survey the property but Mr Samuels objected and the surveyor left. He asserted that Mr Samuels often used violence and his behaviour resulted in regular visits from the police to the property.

[30] Mr Delano Knight entered into a lease agreement with Mrs Karenga in 2015 and he declared that he knew her to be the owner of the land and that Mr Samuels wanted to "thief it".

Miss Vivienne Facey's evidence

[31] Miss Vivienne Facey's evidence was that she knew Mr Leroy Knight, and Mr Delano Knight and his siblings, but she did not know Mr Samuels. She further testified that, after the death of Mr Delano Knight's mother, her mother fed him and his siblings. It was her evidence that it was Mr Hubert Morris, Miss Ivy Morris, (Mrs Karenga's grandfather and mother) and Mrs Karenga who occupied the property. She lived on the adjoining property for many years and the Morris' were her neighbours.

[32] On Miss Facey's evidence, Mr Leroy Knight (Delano Knight's father) was Mr Hubert Morris' friend. Prior to his death, Mr Hubert Morris placed his daughter, Miss Ivy Morris and Mr Leroy Knight "in charge" of the Bloomfield property. She testified that "[Mr Leroy Knight] kept saying 'ah soon gone is my one daughter I will leave it for her and Mr Knight will help her continue with it' ".

[33] Mr Leroy Knight, she said, lived on the property with his children, which included Mr Delano Knight, in a dirt house. After Mr Morris' death, Mr Leroy Knight assisted Miss Ivy Morris in caring for the property.

[34] It was her evidence that Miss Ivy Morris eventually became ill and she willed the property to Mrs Karenga in 2012. Not only was the will executed in her presence, she

was named as an executrix. Upon Miss Ivy Morris' death, Mrs Karenga began caring for the property.

[35] Mr Leroy Knight and Miss Priscilla Reid also testified. They supported Mrs Karenga's and Miss Facey's evidence that Mrs Karenga had in fact been in continuous possession of the property by her regular visits to the property and acts which demonstrated that she was in possession.

Mr Leroy Knight's evidence

[36] Mr Leroy Knight testified that he had known Mr Samuels from he was about eight or 10 years old. He further testified that since Miss Ivy Morris' death, he has been overseeing the property for Mrs Karenga who visits the property often. His son (Mr Delano Knight) had taken Mr Samuels to his residence and about five years ago he took Mr Samuels onto Mr Hubert Morris' land where he used to live, and they "cut out fifty-eight (58) bunches of banana" and "build land in my ground".

[37] After his son had taken Mr Samuels on the land and Mr Samuels had destroyed his "ground", he asked his son to tell Mr Samuels "not to build any concrete house" on the property and that his (Mr Leroy Knight) ground was on the property. It was his evidence that:

> "I still control over there. They want something easy. I am a big man. I control Ms Ivy land. My ground still over there same way."

[38] Mr Leroy Knight was asked if he still lived on the land, and his answer was in the affirmative. When asked if he lived next door to Mr Morris' land, he said:

> "Same line and line. Ms Brown and Mr Morris - two of them I responsible for."

[39] That statement was apparently a colloquialism which the attorneys and the learned judge understood. In interpreting those words, the learned judge, relied on Miss Priscilla Reid's evidence that:

> "Bloomfield district is 'side by side' to Perth Road, and only a stone wall separates them."

[40] Mr Delano Knight, however, explained that Mr Leroy Knight lived on Perth Road, on property owned by Miss Brown, who is deceased. That property adjoins Mrs Karenga's property (the property in issue). Prior to that, he (Mr Leroy Knight) had lived on Mrs Karenga's property until 1988. Mr Delano Knight's evidence supported Mr Leroy Knight's evidence that although he has occupied Miss Brown's property for 15 to 16 years, he continued to care for the Bloomfield property on behalf of Mrs Karenga.

Miss Priscilla Reid's evidence

[41] It was Miss Priscilla Reid's evidence that she and her common law spouse, Mr Delano Knight and others, including Mr Samuels were evicted from land on which they had been squatting at Perth Road. At that point in time, Mr Samuels enquired of Mr Delano Knight where he would live. Upon being told by Mr Delano Knight that he intended to move to the Bloomfield property, Mr Samuels asked whether he could temporarily move to that property. Consequently, she, Mr Delano Knight and Mr Hubert Samuels took occupation of the Bloomfield property in 2011, five years prior to the trial.

[42] She supported Mr Delano Knight's evidence that Mr Samuels paid the property taxes in an effort to own the land. She also testified that Mrs Karenga served Mr Samuels with notices to quit the premises.

[43] It is noteworthy that Miss Priscilla Reid's evidence was that "Mrs Karenga visited the property very often". On her evidence, she considered her to be the owner.

The defence

[44] Mr Samuels did not testify; instead, he rested on Mr Godfrey's submission that Mrs Karenga should be non-suited because as a beneficiary, she lacked the necessary *locus standi* to institute the claim for possession. Mr Godfrey stated the defence as adverse possession and his submissions on the applicant's behalf were three-pronged. The first, was that Mr Samuels had been in possession of the property in excess of 12 years and had thereby acquired same by way of adverse possession. The second, was that Mrs Karenga is not the executrix of the property and consequently has no right to institute proceedings. The third submission was that, Mrs Karenga having sued Mr Samuels as a tenant-at-will, could not pursue a claim that he was a squatter.

The judge's treatment of the applicant's case

[45] The learned Senior Parish Court Judge rejected Mr Godfrey's submission that Mrs Karenga, having sued Mr Samuels as a tenant-at-will, could not pursue a claim that he was a squatter. In rejecting his claim, at paragraphs 61- 64 she said:

> "61. Although [the respondent] sued [the applicant] on the basis that he was a tenant at will, the evidence presented by [the respondent] which the court accepts is that he is a

> squatter, he captured the property in 2011 (so no issue of adverse possession arose) then told Mr Delano Knight and Miss Priscilla Reid that he paid the overdue taxes on the property so he now owns the Bloomfield property. The Court does not make any finding that [the applicant] did indeed pay taxes for the Bloomfield property, as there was not sufficient evidence that he did so and in any event, the Court accepts Ms Karenga's evidence that she paid the taxes on her grandfather's property.
>
> **62. [The respondent's] mistake in suing [the applicant] as a tenant at will would not mean that the Court should deny her justice, and rule that she is not entitled to judgment in her favour.**
>
> 63. The Court is also of the view that [the respondent] and her witnesses gave persuasive evidence that [the applicant] is a squatter, that he came onto the property of [the respondent] without her consent, and he did not properly set up or raise the issue of adverse possession for the court's consideration and **therefore in the circumstances, the annual value of the property is irrelevant as the matter fell under section 89 of the Judicature (Resident Magistrate's) (now Parish Court) Act.**
>
> 64. In all the circumstances, the Court rules that [the respondent] is entitled to recover possession of the Bloomfield property from [the applicant] Mr. Hubert Samuels and he must vacate the property forthwith." (Emphasis supplied)

Submissions on the merit of the application

[46] Regarding the merit of the proposed grounds, it was Mr Godfrey's submission that the important issue to be determined is whether the respondent has proven that the applicant was her tenant-at-will, which would afford her the *locus standi* to institute and maintain an action against Mr Samuels for recovery of possession.

[47] In the alternative, he argued that in order to find in Mrs Karenga's favour, the learned Senior Parish Court Judge converted the cause of action into one that the respondent never initially pleaded or sought to maintain. In support of that submission, he cited the case of **Sonia Edwards & Ors v Stephanie Powell** [2016] JMCA Civ 33 ('**Sonia Edwards**').

[48] Counsel submitted that in actions for recovery of land pursuant to sections 89 and 96 of the Judicature (Parish Courts) Act (JPCA) and Parish Court Rules Order VI Rule 4, the authorities are clear as to what is required to establish such claims.

[49] It was his further submission that Mrs Karenga had commenced the action in her personal capacity but at the trial she sought to invoke standing in law through the unadministered assets of the estate of her deceased mother. It is trite law, he posited, that a beneficiary under a will or on intestacy has no legal or equitable proprietary interest in the unadministered assets of the deceased's estate. For that proposition counsel relied on **Winston O'Brian Smith & Ors v Constantine Scott & Ors** [2012] JMSC Civ 152.

[50] Counsel submitted that the learned Senior Parish Court Judge erred in allowing Mrs Karenga's mother's will into evidence, which at the time of the trial, had not been probated. He posited that the findings of the learned Senior Parish Court Judge and her reasons are unreasonable and unlawful in light of his defence of adverse possession. He contended that the weight of the evidence favours Mr Samuels by any standard of proof.

Respondent's Submissions

[51] Mrs Emily Shields, counsel for the respondent, in response, relied on the affidavit of Miss Shantell Johnson, assistant clerk at the Manchester Parish Court, whose evidence it was, that the bundles which included the transcript in the matter, were delivered to Mr Godfrey's office on 16 February 2018. Mrs Shields argued that the grounds of appeal ought to have been filed on or before 12 March 2018. On her calculations, the grounds of appeal were at least eight months out of time.

[52] Counsel directed the court's attention to the fact that in the month of November 2018, when the appeal was listed to be heard, several documents were filed and served on Mr Godfrey but no action was taken by him. In those circumstances, counsel submitted, Mr Godfrey was expected to explain why nothing was done. His mere stating that his failure was due to inadvertence on his part was not sufficient, she submitted.

[53] Mrs Shields contended that there is no merit in the appeal which would allow this court to exercise its discretion in favour of granting the application sought by the applicant. Counsel pointed out that the common law title clearly states that Mr Hubert Morris owned the property at Bloomfield, and that letters of administration for his estate were granted to Miss Ivy Morris, who on Mrs Karenga's evidence was his only child. She submitted that Miss Ivy Morris willed the Bloomfield property to her only child, Mrs Karenga, who since her childhood, frequently visited the property.

[54] It was counsel's further submission that Mrs Karenga did not only rely on her status as beneficiary, instead she demonstrated that she had a "better right" to the property than the applicant. In support of her contention, Mrs Karenga presented evidence that she and her family were always in possession of the property, that she regularly visited the property, and that the applicant entered the property in 2011, without her permission.

[55] The evidence, Mrs Shields submitted, is that after Mrs Karenga's grandfather died, Mr Leroy Knight was given the task of caring for the property by her mother and upon her mother's death, he continued to do so on Mrs Karenga's behalf.

[56] Counsel also submitted that the learned Senior Parish Court Judge recognized that Mrs Karenga's evidence demonstrates that she was not claiming possession of the Bloomfield property merely as a beneficiary, but also as a person who has always been in possession of the said property.

[57] In response to Mr Godfrey's submission that the learned Senior Parish Court Judge gave judgment for Mrs Karenga on an action which she did not bring and which the applicant was not required to answer, Mrs Shields submitted that, based on counsel's response to the preliminary point, there was no challenge to Mrs Karenga's assertion that there was no relationship between her and the applicant, nor did counsel apply to amend his defence.

[58] She contended that the trial therefore proceeded on the understanding that the applicant was a trespasser because counsel abandoned her pleaded claim that the

applicant was a tenant-at-will. This, Mrs Shields submitted, was also borne out on the evidence, including cross-examination by Mr Godfrey.

[59] It was her further submission that in any event, section 190 of the JPCA allows the Parish Court Judge to amend the particulars based on the evidence before her. Counsel submitted that having stated the legal and applicable principles, the learned judge made a finding of fact on the evidence, that the respondent was entitled to sue for recovery of possession, because she was in possession of the land.

[60] Mrs Shields submitted that the learned judge was correct in her decision, and that her findings of fact were arrived at on the evidence and should therefore not be impeached by this court unless they are plainly wrong. Counsel relied on the principle enunciated in **Watt (or Thomas) v Thomas** [1947] 1 All ER 582, that an appellate court ought not to interfere with the trial judge's decision unless it is plainly wrong. She postulated that the learned judge's statement of the law regarding possession and of a beneficiary in *de jure* possession, was therefore correct.

Law and Discussion

[61] The procedure to initiate a civil appeal from the Parish Court is set out at section 256 of the JPCA which reads:

> "The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Courts, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of

> taking or lodging the appeal, deposit in the Court the sum of five thousand dollars as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of fifteen thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
>
> …
>
> On the appellant complying with the foregoing requirements, the Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree, or order appealed against.
>
> Such statement shall be lodged with the Clerk of the Courts, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.
>
> The appellant shall, within twenty-one days after the day on which he received such notice as aforesaid, draw up and serve on the respondent, and file with the Clerk of the Courts, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine. …"

[62] Section 266 of the JPCA, confers on the Court of Appeal the power to allow a party who has not complied with the requirements of section 256, to nevertheless challenge the judgment, order or proceedings which is appealed. Section 266 states:

> "The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case **any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed** it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from **inadvertence, ignorance, or necessity, and if the justice of the case shall appear** to so require, with or without terms, to admit the applicant to impeach the judgment, order or proceedings appealed from." (Emphasis supplied)

[63] Section 12(2) of the JPCA, further confers on the Court of Appeal the power to grant extensions in the matters referred to in section 256 of the JPCA. Section 12(2) states:

> "12 (1)…
>
> (2) Notwithstanding anything to the contrary the time within which-
>
> (a) notice of appeal may be given, or served;
>
> (b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;
>
> (c) grounds of appeal may be filed or served, in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

[64] Rule 1.7(2)(b) of the Court of Appeal Rules, under the heading "[t]he court's general powers of management", provides:

> "1.7 (1) …
>
> (2) Except where these Rules provide otherwise, the court may-
>
> …
>
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.
>
> …"

[65] In accordance with section 256 of the JPCA, the applicant filed and served the notice of appeal and paid the requisite costs and security for the due prosecution of the appeal. He however, did not file the grounds of appeal within 21 days of receiving the bundle with the judge's reasons. In the circumstances, the applicant is seeking an extension of time within which to file the grounds of appeal, pursuant to the powers conferred on the court in the aforementioned provisions.

[66] In determining whether or not to exercise its discretion in favour of such an applicant, the paramount consideration for the court is the overriding objective, which is dealing justly with the case. In furthering that objective, the court must consider whether an extension, in the circumstances, will result in prejudice to the respondent. The court therefore considers the length of the delay, the reason for the delay, and the prospects of the proposed appeal succeeding.

The length of the delay

[67] Counsel explained that the failure to file the grounds of appeal within the time prescribed was a result of inadvertence on the part of counsel who had conduct of the matter. Mr Godfrey swore to an affidavit that his staff had not informed him about the judge's reasons for her decision. He consequently was unaware that the time within which to file the grounds of appeal had elapsed.

[68] In support of his argument, Mr Godfrey placed reliance on the case **Shawn Marie Smith v Winston Pinnock** [2016] JMCA Civ 37. He also deponed that by filing the notice of appeal and paying the security for costs and due prosecution, within the

time prescribed, he demonstrated that from the outset, the applicant expressed a desire and intention to prosecute his appeal.

[69] The applicant's grounds of appeal ought to have been filed within 21 days upon the receipt of the bundles which included the judge's reasons which were served on his attorney on 16 February 2018. The application for extension of time to file his grounds was made on 27 November 2018. The delay in filing the grounds of appeal was therefore eight months outside of the prescribed time. The delay was inordinate and this court frowns upon contumacy. This court must nevertheless examine the reason for the delay and his chance of succeeding on appeal.

The reason for the delay

[70] Mr Godfrey's unhesitating and frank *mea culpa*, which he ascribes to inadvertence and factors relating to his conduct of other matters was regarded as unacceptable by Mrs Shields. Although the reasons advanced by counsel for the delay are feeble, this court, in its quest to deal justly with matters, is loath to have a litigant with a meritorious case suffer because of counsel. As expressed by Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 at page 866:

> "So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merit in [the applicant's] case. If we extended his time it would only mean that he would be throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application."

In the court's endeavour to deal justly with the matter, an examination of the applicant's prospect of succeeding is therefore necessary.

Is there a chance of the applicant succeeding on appeal?

Ground 1

> "The learned parish judge erred in law when she found that the plaintiff/respondent had standing in law to initiate and maintain the action for recovery of possession, she claiming through the unadministered assets of the estate of the deceased."

Did the learned judge err in failing to non-suit Mrs Karenga?

[71] Standing in law was not ascribed to Mrs Karenga by the learned Senior Parish Court Judge by virtue of her merely being a beneficiary of the unadministered assets of her mother's estate, but by her also being a person in possession. The learned judge's following statement at page 103 of the record makes that palpable.

> "The Court recognises that the evidence presented by [the respondent] Ms Karenga shows that she is not suing for possession of the Bloomfield property merely as a beneficiary, but also as a person who has always been in possession of the said property, as her caretaker Leroy Knight took care of the property on her behalf." (Paragraph 43)

[72] In support of her finding that a beneficiary "in *de jure* possession" has the requisite standing to institute proceedings for recovery of possession, the learned Senior Parish Court Judge in relying on **Thelma Grant (by Attorney Dotlyn White) v Beatrice Barnes** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil

Appeal No 16/2000, judgment delivered 7 June 2001 ('**Thelma Grant**'), a decision from this court, said at paragraphs 44 and 45:

> "44. …This case also laid down the principle that a beneficiary does not have any legal or equitable interest in the estate until the estate is fully administered, that, however, [the respondent] who claims for recovery of possession of property will not be non-suited where it is proven that [the respondent] is entitled to possession of the property.
>
> 45. The evidence presented by [the respondent], in the instant case, which is accepted by the Court is that [the respondent] exercised her right of possession and ownership of the property before [the applicant] entered the property in 2011. Halsbury's Laws of England 4th Edition para. 1394 states that:
>
> > 'Actual possession is a question of fact. It consists of two elements: the intention to possess the land, and the exercise of control over it to the exclusion of other persons. The extent of control which should be exercised in order to constitute possession varies with the nature of the land, possession means possession of that character of which the land is capable'.
>
> …"

[73] In response to Mr Godfrey's submission that Mrs Karenga lacked the authority to sue and ought to be non-suited, because "only the executor in Ivy Morris' will should sue for recovery of possession on behalf of the estate", the learned judge at page 105 referred to Panton JA's (as he then was) statement in **Sydney Rowe v Michael Levy** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 31/2000, judgment delivered 16 May 2002 ('**Sydney Rowe**') that:

> "On the question of a non-suit, section 181 of the Judicature (Resident Magistrates) Act provides that a Magistrate shall have power to non-suit [the respondent] where satisfactory proof has not been provided to entitle either [the respondent] or [the applicant] to judgment. However, if the power 'is to be exercised when no just cause for it exists and merely because there is a conflict, then such an exercise will be a denial of justice and a desertion of duty by the Resident Magistrate'." (Page 15)

[74] The learned Senior Parish Court Judge referenced Mr Leroy Knight's evidence that he cared for the property on behalf of Mrs Karenga and her family throughout the years, and further that Mrs Karenga visited the property regularly. She accepted Mr Leroy Knight's evidence that he has always farmed on the land with Mrs Karenga's permission. She also accepted that Mr Samuels entered the property in 2011 and destroyed his (Mr Leroy Knight's) "ground". She further accepted Mr Delano Knight and Ms Priscilla Reid's evidence that they occupied the property pursuant to a lease agreement with Mrs Karenga. On that evidence she concluded that:

> "There is therefore abundant evidence that [the respondent] is entitled to sue for recovery of possession of the property."

[75] The learned Senior Parish Court Judge considered the case of **Sonia Edwards** in support of her finding that a residual legatee is able to pass her interest to her children. She also relied on Harris JA's decision in **George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26 ('**George Mobray**') in support of her conclusion that Mrs Karenga, as a beneficiary of an unadministered estate, possessed the authority to "pursue her action", and thereby held that:

> "Non-suiting [the respondent] in these circumstances will be denying justice to her and that there is ample evidence presented to entitle [the respondent] to judgment."

[76] The learned Senior Parish Court Judge was indeed correct in her conclusion that although Mrs Karenga, had no proprietary interest in the unadministered estate, by virtue of being a beneficiary, she had a "chose in action" which entitled her to the due administration of the estate. As stated by Harris JA in **George Mobray**:

> "... (iii) each such legatee or person so entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (iv) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered."

[77] The learned Senior Parish Court Judge had correctly stated and applied the relevant law. Her conclusion cannot be regarded as plainly wrong. Mrs Karenga had demonstrated by evidence that was not controverted, that not only had she openly exercised custody and control over the property, but she was also entitled to a chose in action, to the benefits of the estate upon administration.

[78] Lord Hatherley's statement in **Bristow v Cormican** (1878) 3 AC 641 confirms the argument that Mrs Karenga's possession of the property as a beneficiary *de jure* entitled her to enforce her right to possession against intruders such as the applicant. At page 657 he said:

> "There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, - as a mere stranger; that

> is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

[79] Mrs Karenga has demonstrated that she has both factual possession by virtue of the custody and control she exercised over the property, and also the *animus possidendi* that is, the intention to possess, by her regular visits, appointing a caretaker (Mr Leroy Knight), paying for the property taxes, attempting to survey the property, establishing her ownership by entering into lease agreements with the persons who had unlawfully entered the property, and by instituting these proceedings against the applicant. Undoubtedly she has dealt with the land "as an occupying owner might have been expected to deal with it". See **Powell v McFarlane** (1977) 38 P & CR 452.

[80] The learned judge also differentiated the instant case from that of **Dorrett Thompson, Carmelita Cole and Gifford Stone v Wilmot Campbell** [2010] JMCA Civ 17. She observed that in that case, a plaintiff who sought to rely on his status as a beneficiary in possession, had failed to establish factual possession as he could not state the location of the property, or provide evidence of the contents of the will or that it had been probated.

[81] The learned Senior Parish Court Judge was guided by Langrin JA's statement in the case of **Thelma Grant,** in which the administration of the estate had not been completed, that:

> "It is trite law that possession is, prima facie, evidence of ownership. It is nine tenth of the law which means that it is good against all the world except a person who has a better right e.g. the owner."

The court, in that case, found that the plaintiff had satisfactorily provided evidence which established that she had exercised possession over the land for the relevant period.

[82] Section 251 of the JPCA speaks to the powers of the Court of Appeal in determining appeals. The section reads:

> "And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearsing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
>
> **Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause**:" (Emphasis supplied)

[83] A Parish Court Judge is empowered by section 181 of the JPCA to non-suit a plaintiff who has not provided satisfactory proof for his claim. Brown J in **Perkins v McGahn** (1925) SCJBll p 5 SCJ (1917-1932), admonished that the power ought not to be exercised in the absence of just cause and "merely because there is a conflict". He indicated that "such an exercise will be a denial of justice and a desertion of the duty of

the Resident Magistrate". His stricture was referred to with approval by this court in **Clarence Powell v Amy Caine** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 10/1998, judgment delivered 8 March 1999.

[84] Notwithstanding the fact that Mr Hubert Morris' estate had not been administered and her mother's will was not probated, the evidence adduced by Mrs Karenga established her entitlement to possession pursuant to the root of title which she said dated as far back as her grandfather, Mr Hubert Morris' lifetime.

[85] Mrs Karenga's possessory title has been derived from her and her family's possession of the property for a number of years, as well as the continuous acts of possession exercised by Mr Leroy Knight, on her and her mother's behalf to the exclusion of all others. Mrs Karenga therefore demonstrated to the court that, by virtue of her possessory title she has a better claim to the property than the applicant.

[86] In the case of **Mendoza Nembhard v Rafel Levy** [2014] JMCA Civ 49, Estelle Brown nee Sellers was the sole child of Charles Sellers the owner of the land. Charles Sellers appointed his brother (Harold Nembhard) to care for the land on his behalf. Harold Nembhard allowed the appellant to farm the land, which continued after Harold Nembhard's death. Estelle Brown died without obtaining letters of administration in her father's Estate.

[87] The appellant sought to claim possession of the land by virtue of adverse possession and the respondent sought to claim recovery of possession on behalf of Estelle Brown's estate, as her personal representative.

[88] McIntosh JA pointed out that the findings of the learned Resident Magistrate made it clear that her decision was not based on Estelle Brown's right of succession to the estate of her father, as there was no proof that Charles Sellers had died or that his estate had been administered. The Resident Magistrate in that case, with whom the Court of Appeal agreed, indicated the necessity in the circumstances to establish a possessory right to title.

[89] McIntosh JA also agreed with the learned Resident Magistrate that Estelle had established her possessory title by demonstrating that she had both the *animus possidendi* and factual possession of the property. This was established by her continuous occupation of the land, that is, employment of a caretaker who the court found, had behaved in a manner consistent with the recognition that "Estelle was the owner of the land and the person to whom he was accountable".

[90] Similarly, in this case, Mrs Karenga's evidence indicated that she possessed the *animus possidendi* and factual possession of the property. Her evidence further maintained that Mr Leroy Knight recognized her as the owner of the property. It was his evidence that he cared for and occupied the property for her mother and thereafter on her behalf.

[91] In light of the authorities and the copious evidence supporting Mrs Karenga's entitlement to the property, the learned trial judge, in the circumstances, was correct in her finding that Mrs Karenga had the requisite standing as a person in possession. Denying her the justice she seeks would be contrary to the overriding objective of our

courts, which is to do justice between the parties. In the circumstances, the learned judge was not plainly wrong. Ground 1 therefore has no chance of succeeding.

Ground 2

> "The learned parish judge erred in law when she admitted into evidence a document purporting to be a will, which had not been admitted to probate, as evidence of the truth of its contents that the respondent was named as a beneficiary and therefore is the owner of the legal or equitable estate in the land."

Ground 3

> "The learned parish judge failed to recognise that a beneficiary under a will or intestacy has no legal or equitable interest in the unadministered assets of the deceased's estate."

[92] The proposed grounds 2 and 3 can be conveniently dealt with together. The learned Senior Parish Court Judge's findings were not predicated on Mrs Karenga's status as a beneficiary. By her statements, it is pellucid that the learned judge appreciated Mrs Karenga's limitation in pursuing an action pursuant to an unprobated will. The unprobated will was relied on merely to demonstrate the history of her occupation of the property as a beneficiary in possession.

[93] The learned judge said:

> "60. [The applicant] did not present any evidence, he decided to rest on the submissions that [the respondent] Ms Karenga did not have a right to sue for possession of the property; it was the executor who should have done so. The Court is of the view that the beneficiary Ms Karenga does have a right to sue for possession of the Bloomfield property, as shown in the above stated authorities canvassed. **However, [the respondent] did not only**

> **rely on her status as a beneficiary, she demonstrated that she had a right of possession to the Bloomfield property, a better right than [the applicant]**, as she presented evidence, that [the applicant] came on the property in 2011 without her permission and she and her family were always in possession of the property as after her grandfather Mr Morris died, Mr Leroy Knight took care of the property on the behalf of her mother and then on her own behalf after her mother Ivy Morris died. Ms Karenga also made regular visits to her property." (Emphasis supplied)

[94] The learned Senior Parish Court Judge relied on the case **Sydney Rowe** for her finding that:

> "46. … As the evidence on behalf of [the respondent] shows that not only is Ms Karenga a beneficiary of the Bloomfield property, but that she is also in possession of the said property, she can be successful in her claim for recovery of possession. A decision in her favour only means that she will hold it on trust for any other beneficiary which may arise, as her mother's will has not been probated, although the uncontradicted evidence presented to this court is that her mother Ivy Morris was the sole issue of the title owner Mr Hubert Morris and was also the administrator of Mr Morris property and Ms Karenga is the issue of her mother Ivy Morris who died and left all her property to her in her will."

Was the judge plainly wrong in allowing the will into evidence?

[95] Mrs Karenga sought to prove her right to claim recovery of possession, by asserting, that she had been in continuous possession of the said property since her mother died and that she had a "better right" to the property.

[96] The learned judge's finding that, Mrs Karenga's possessory title was supported by her witnesses, cannot be faulted. Her mother's will and the letters of administration

in her grandfather's estate, supported the evidence that the root of title to the property remained with her family for a number of years.

[97] It is the unchallenged evidence that, Miss Ivy Morris was the sole beneficiary entitled to the Bloomfield property and it was her expressed intention, during her lifetime that the said property should devolve upon her death to her only child Mrs Karenga. There is also no evidence that Mr Hubert Morris died leaving issue other than Miss Ivy Morris or that Miss Ivy Morris died leaving issue other than Mrs Karenga.

[98] Mrs Karenga's reliance on the said will, was not to clothe her with *locus standi* to institute the claim, but rather, the learned Senior Parish Court Judge accepted the will into evidence, in support of Mrs Karenga's claim that she has a "better right", as against Mr Samuels. There was also ample evidence from Ms Vivienne Facey and Mr Leroy Knight which the learned Senior Parish Court Judge accepted and which supported Mrs Karenga's *viva voce* evidence as to the historical occupation of the property.

[99] The learned judge found that Miss Ivy Morris' will was tendered to establish Mrs Karenga's chose in action, which she is entitled to protect by legal action. In considering the case of **Sydney Rowe**, she referred to Panton JA's judgment:

> "46. … "A beneficiary who takes possession prior to the completion of the formalities that the law requires, has to be taken, in the ordinary course of things, to be doing so with a view to holding any such property in trust for himself and the other beneficiaries' …".

[100] Relying on **Sonia Edwards**, a case from this court, the learned Senior Parish Court Judge opined:

> "48. Ivy Morris would have had an interest in her father's estate as residual legatee if it had remained unadministered. However following the **Sonia Edwards** case which is apt to the instant case, the Court of Appeal ruled that, that did not mean that the residual legatee could not pass on her interest to her children, therefore Ms Ivy Morris' interest could still be passed on to her daughter, [the respondent] Ms [sic] Pauline Karenga."

For that conclusion, the learned Senior Parish Court Judge also cited Harris JA's statement in **George Mobray**, that:

> "49. ... 'What is the nature of the interest of a beneficiary of an estate prior to or during the administration process? ... In an unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate.
>
> ...
>
> Such chose in action is a transmissible interest enabling him to receive the benefits which may accrue to him from the estate.'
>
> …"

[101] It is settled law that the equitable and legal interest of a beneficiary named in an unprobated will only become effective upon the administration of the estate. Until such time, all that a potential beneficiary has is *espere.* Scrutiny of the learned judge's reasons, confirmed that although the will was admitted into evidence, her recognition of Mrs Karenga's entitlement to the property, was grounded in her evidence that the possessory title remained with her and her family.

Did the learned judge fail to recognize that a beneficiary under an unprobated will has no legal or equitable interest?

[102] The learned trial judge relied on the case of **Thelma Grant** in acknowledging that a beneficiary does not have any legal or equitable interest in the estate until it is fully administered. She recognized that while this is trite law, Mrs Karenga's right to sue was derived from her being a beneficiary in possession of the property and not as a beneficiary.

[103] The learned Senior Parish Court Judge has therefore, demonstrated her appreciation that Mrs Karenga as a beneficiary under the unprobated will of her mother has neither legal nor equitable interest in her mother's estate. It was her acceptance of the evidence adduced by Mrs Karenga of her possessory title that led to the learned judge's finding, that Mrs Karenga had a "better right" than Mr Samuels, who unlawfully entered the property in 2011.

[104] In any event, even if she was wrong in admitting the unprobated will into evidence, there was ample evidence, as observed by the learned judge, for her to have arrived at her finding that Mrs Karenga had been in possession of the property for many years before Mr Samuel's entry upon the land. Grounds 2 and 3 are also not likely to succeed.

Ground 4

> "The learned parish judge gave judgment for the respondent/plaintiff on an action which she did not bring and which the applicant/defendant was not required to answer to."

The judge's treatment of the issue

[105] The learned Senior Parish Court Judge did not expressly state that she amended Mrs Karenga's claim. It was apparently understood by the parties that the claim was amended because the trial proceeded by both parties as a claim against Mr Samuels for recovery of possession of land which he unlawfully occupied. In addressing this issue it is helpful, for ease of reference, to restate the learned Senior Parish Court Judge's findings. At paragraphs 61 to 63 of her judgment, she said:

> "61. Although [the respondent] sued [the applicant] on the basis that he was a tenant at will, the evidence presented by [the respondent] which the court accepts is that he is a squatter, he captured the property in 2011 (so no issue of adverse possession arose) then told Mr Delano Knight and Ms Priscilla Reid that he paid the overdue taxes on the property so he now owns the Bloomfield property. The Court does not make any finding that [the applicant] did indeed pay taxes for the Bloomfield property, as there was not sufficient evidence that he did so and in any event the Court accepts Ms Karenga's evidence that she paid the taxes on her grandfather's property.
>
> 62. [The respondent's] mistake in suing [the applicant] as a tenant at will would not mean that the Court should deny her justice, and rule that she is not entitled to judgment in her favour.
>
> 63. The Court is also of the view that [the respondent] and her witnesses gave persuasive evidence that [the applicant]is a squatter, that he came onto the property of [the respondent] without her consent, and he did not properly set up or raise the issue of adverse possession for the court's consideration and therefore in the circumstances, the annual value of the property is irrelevant as the matter fell under section 89 of the Judicature (Resident Magistrate's) (now Parish Court) Act."

Should the learned judge have allowed the transformation?

[106] Mrs Karenga's pleaded claim for possession on the ground that Mr Samuels was a tenant-at-will, transformed at the trial to him being a squatter. This was a direct response to Mr Samuels' stated defence of adverse possession. Mrs Karenga and her witnesses were trenchantly cross examined by Mr Godfrey. Mr Samuels was, therefore, prepared to and did challenge Mrs Karenga's claim for recovery of possession on her transformed case, that he was a squatter.

[107] The case thereafter progressed on the basis that Mrs Karenga had deemed him a squatter. Under those circumstances, Mr Samuels would not have been prejudiced by the transformation of the claim. Indeed, Mrs Karenga and her witnesses were thoroughly cross-examined by his counsel.

[108] Importantly also is that section 190 of the JPCA empowers a Parish Court Judge to amend defects in any proceedings in order to determine the "real" issues between the litigants. Section 190 provides:

> "The [Parish Court Judge] may at all times amend all defects and errors in any proceedings, civil or criminal, in this court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made, with or without costs, and upon such terms as to the [Parish Court Judge] may seem fit; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made."

[109] A plaintiff is required to set out his case so that a defendant is made aware of the case he has to meet. Parish courts are however, not courts of strict pleadings. Of

significance also is that the applicant's defence of adverse possession was only stated at the commencement of the trial. Mrs Karenga was therefore only made aware of his defence at the trial. She responded by providing evidence of her possession, which contradicted his claim and resulted in a transformation of her claim, therefore allowing allowed "the real question in controversy between the parties" to be determined. There was no prejudice to the applicant as the trial proceeded on his case, and not one that took him by surprise.

[110] In light of the circumstances of this case, justice certainly would not have been served by dismissing or non-suiting Mrs Karenga. The learned Senior Parish Court Judge cannot be faulted for proceeding with the transformed claim. The proposed ground 4 in my view, also has no chance of succeeding.

Ground 5

> "The judgment is against the weight of the evidence which favours the applicant/defendant by any standard of proof, and is unreasonable and unlawful."

Was the judgment against the weight of the evidence?

[111] There was more than sufficient evidence on which the learned judge could have arrived at her decision that, Mrs Karenga had proven on a balance of probabilities that the applicant was a squatter. She also provided compelling evidence in support of her contention that, she has a "better right" to the property than Mr Samuels. The uncontroverted evidence was that the Bloomfield property remained in Mrs Karenga family since her grandfather's lifetime, and since her childhood she regularly visited the property. Upon her mother's demise, she assumed custody and control of the property

by continuing her visits, paying the property taxes and engaging Mr Leroy Knight to continue overseeing the property on her behalf.

[112] On the other hand, the applicant provided not a shred of evidence to support his contention that he acquired the land by adverse possession. The learned judge was careful in examining his case. She rightly noted at paragraph 52 that:

> "The court notes that counsel Mr Godfrey stated the defence of adverse possession although there was no notice of that special statutory defence by [the applicant] as required under section 150 of the Judicature (Resident Magistrate) Act and under Order X Rule 8, nor was any application made to the Court to proceed with **this special defence pursuant to section 151 of the Judicature (Resident Magistrates) now Parish Judges Act, therefore the annual value of the property is not important."** (Emphasis supplied)

[113] Having so found, she cited the case of **Shawn Marie Smith v Winston Pinnock** [2016] JMCA Civ 37, where a defence of adverse possession had been raised, and the defence having complied with the requirements of the Resident Magistrates' Court Rules (now Parish Court Rules), the Court of Appeal ruled that the matter should be tried in the Supreme Court.

[114] Relying on **Sonia Edwards** she expressed the view that:

> "The omission to state the annual value of the land or the description of the land in a plaint and in accordance with Order VI rule 4 of the Resident Magistrates Court Rules would not be fatal provided that the matter is captured by **section 89 of the Judicature (Resident Magistrates') Act** which deals with squatters." [Paragraph 56] (Emphasis supplied)

[115] The learned judge however opined that:

> "54. …the entire claim of [the respondent] proceeded pursuant to section 89 of the said Act and not section 96 as there was no effective setting up of the defence of adverse possession by [the applicant]. Stating a defence is not enough..."

[116] She observed that there was no mention of the statute under which the applicant proceeded. She also expressed the view that merely stating the defence of adverse possession "was not enough". She remarked that the defence was obliged to:

> "54. …show continuous, undisturbed, peaceful, quiet, exclusive possession of the premises. He must also show that within these 12 years he demonstrated an intention to dispossess the owner of the property. …"

[117] The learned Senior Parish Court Judge further pointed out that:

> "54. …In none of the questions asked by counsel of [the respondent] or her witnesses, were these elements of the defence suggested. …"

[118] She relied on the principles enunciated by Harris JA in **Thomas Broadie and Donald Broadie v Derrick Allen** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 10/2008, judgment delivered 3 April 2009 which explains the requirements for establishing a defence of adverse possession. She also relied on Harris JA's consideration of **Powell v McFarlane** and **JA Pye (Oxford) Ltd v Graham** [2003] 1 AC 419. Additionally, the learned Senior Parish Court Judge observed that no dates were put to the witnesses concerning his claim for adverse possession.

[119] The learned judge's rejection of the applicant's stated defence of adverse possession, cannot be faulted. She rightly indicated that Mr Samuels had not provided

evidence of "continuous, undisturbed, peaceful, quiet, exclusive possession" for the required period of 12 years. Mrs Karenga instituted proceedings against the applicant in 2015, within the limitation period. Indeed, the trial was conducted in 2016, five years after Mr Samuels' occupation. On the other hand, the evidence demonstrated that Mrs Karenga's exercise of possession over the land had been continuous.

[120] Worthy of note also, is that Mr Delano Knight and Miss Priscilla Reid acknowledged Mrs Karenga as their landlord. The applicant's occupation of the land was therefore not to the "exclusion of all others".

[121] The applicant's complaints were therefore unmeritorious and had no chance of succeeding. It was in light of the foregoing, that I agreed with my colleagues that the application should be refused and the orders at paragraph [10] were made.

F WILLIAMS JA

[122] I have read the draft reasons for judgment of my sister Sinclair-Haynes JA and agree with her reasoning and conclusion. I have nothing to add.