**[2024] JMCA App 7**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE STRAW JA**
**THE HON MRS JUSTICE V HARRIS JA**

**APPLICATION NO COA2020APP00113**

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| **BETWEEN** | **BARON DRUMMOND** | **APPLICANT** |
| **AND** | **MARK MONCRIEFFE** | **RESPONDENT** |

**Leroy Equiano for the applicant**

**Miss Catherine Minto instructed by Nunes, Scholefield, Deleon & Co for the respondent**

**26 April 2023 and 22 March 2024**

**Civil procedure – Application for extension of time to serve notice and grounds of appeal – principles applicable – Limitation of Actions Act, sections 3, 30 – Adverse possession – Documentary evidence disproving oral assertions**

**F WILLIAMS JA**

**Introduction**

[1] This matter came before us as a relisted notice of application for court orders filed by Mr Barron Drummond ('the applicant') on 3 October 2022. By it, the applicant sought an extension of time to serve notice and grounds of appeal on Mr Mark Moncrieffe ('the respondent'), or for the late service effected on the respondent's attorney-at-law on 3 June 2020 to stand. Ultimately, the applicant was seeking to appeal a decision of Graham-Allen J ('the learned judge') made on 31 January 2020, in summary, dismissing his claim and entering judgment for the respondent with several consequential orders.

[2] After hearing the parties' submissions on 26 April 2023, we made the following orders:

> "1. The relisted application dated 29 September 2022 and filed on 8 October 2022 is refused.
>
> 2. Costs to the Respondent to be agreed or taxed."

[3] This judgment is a fulfilment of our promise made then to provide brief reasons for the making of those orders.

## Grounds of the application

[4] The grounds on which the application was based are set out in the applicant's relisted notice of application as follows:

> "i. The Notice and Grounds of appeal were filed on March 9, 2020 and were not served on the Respondent's Attorneys-at-Law until June 6, 2020.
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> ii. The time for service of the Notice and Grounds of Appeal has expired;
>
> iii. The non-service of the Notice and Grounds of Appeal on time was due [to] circumstances outside of the control of the Applicant/Appellant.
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> iv. The delayed service will not cause any inconvenience to the Respondent."

[5] With regard to the orders that are being appealed, they are to be found in the notice and grounds of appeal and are set out below as follows:

> "1. The Court finds in favour of the Defendant and grants the following orders and declarations sought in the Further Amended Notice of Application for Court Orders filed May 16, 2016 in terms of paragraphs 1, 5, 6;
>
> > *1. A declaration that the action herein is barred and the Claimant's right or title to the lands which are subject of this action extinguished, by virtue of sections 3 and 30 of the Limitation of Action [sic] Act.*
> >
> > *5. A Declaration that the defendant is beneficially entitled to a part of ALL THAT parcel of*

*land part of Claremont Pen the parish of Saint Mary registered at Volume 1238 Folio 855 in the Register of Titles and described as* ***Lot 2*** *on the plan Clermont Pen, and Lot 1 on the Subdivision Plan prepared by Ruel C. Campbell, Commissioned Land Surveyor and submitted to the St. Mary Parish Council and approved on December 17, 2002.*

*6. An Order that the Claimant specifically performs and take all necessary steps to effect a transfer of* ***Lot 2*** *on the plan Clermont Pen, and Lot 1 on the Subdivision Plan prepared by Ruel C. Campbell, to the Defendant within 45 days of the date.*

2. Paragraph 7 as amended to read: "The Registrar of the Supreme Court is to appoint a surveyor [to] prepare a report specifically delineating and highlighting the portion of land occupied by the Defendant and comprising ¼ acre."

3. Paragraph 8 as amended within 90 days of this order;

*8. An order directing the Claimant to remove and relocate the trench which the Claimant has excavated along the boundary between the parties' land and which is channeling [sic] water from the Claimant's land on to the lands owned and/or occupied by the Defendant.*

4. Paragraph 9 as amended within 90 days of this order;

*9. An order directing the Claimant to remove and relocate the septic pit which he has excavated along the boundary between the parties' land and which is causing and/or creating a nuisance for the Defendant and his family.*

5. Paragraph 11, and;

*11. Damages for Nuisance and Damage to the Defendant's property.*

6. That the Assessment of Damages be held on June 3, 2021;

7. Liberty to apply;

8. Costs to the Defendant to be taxed if not agreed."

**Background facts**

[6] The land that this case concerns falls within lands originally owned by one Ms Merline Adina Kitchener ('Ms Kitchener'). In 1992, pursuant to an agreement for sale dated 3 March 1992, Ms Kitchener sold to the applicant a part of the lands, described in the said agreement as lot 3. By way of another agreement for sale, dated 11 February 2000, Ms Kitchener sold another part of the lands (approximately ¼ acre) to the respondent and others (who are not parties to these proceedings). That lot was referred to in the agreement as lot 2. Ms Kitchener continued to occupy the remainder of the lands until she died testate in 2008.

[7] In the certificates of title and agreements for sale, the relevant land is described as "land part of Clermont Pen in the parish of SAINT MARY… on the plan of Clermont Pen aforesaid deposited in the Office of Titles on the 16th day of October, 1990 of the shape and dimensions and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 979 Folio 329" (see, for example, the applicant's certificate of title registered at Volume 1238 Folio 855). In the documents, the land is variously referred to as being a part of "Claremont Pen" and "Clermont Pen". This variation is of no significance to the issues that fell to be resolved in this application, and both phrases describe the same property.

[8] By way of plaint number 127 of 2009 and particulars of claim filed on 10 June 2009, the applicant brought an action in the Parish Court for the parish of Saint Mary, alleging that the respondent and one Ms Daphney Pinnock ('Ms Pinnock', Ms Kitchener's executrix) were encroaching on his land, and seeking: (i) the sum of $250,000.00 in damages for trespass; and (ii) "…an Order in the Nature of a Mandatory Injunction ordering [them] to remove [their]… buildings which encroaches [sic] on the Plaintiff's land".

[9] In response to this claim, the respondent, through his attorney-at-law, filed a document headed "Notice of Special Defences" dated 20 October 2009. Paras. 7, 8, 9, 10, 13 and 14 of that document are relevant to the case and, if accepted as true, provide helpful background to the history of the land and the transactions involving

the parties. They read as follows (with references to 'the 2nd Defendant', being to the respondent, and references to 'the Plaintiff' being to the applicant):

> "7. In 2000 Merline Kitchener sold a part of her land which she occupied to the 2nd Defendant and caused Ruel Campbell, Commissioned Land Surveyor to attend on the property to conduct surveys to subdivide her land.
>
> 8. Ruel Campbell attended at the property and in conducting surveys discovered that a portion of the land which was occupied by Merline Kitchener, including the part planted in cane and yam, the mango tree, Kitchener's water tank, part of her driveway and house and a part intended to be sold to the 2nd Defendant, was actually by the surveyed measurements located within the Plaintiff's Title.
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> 9. Merline Kitchener (whose house was built before she agreed to sell land to the Plaintiff) did not intend selling her tank, driveway and part of her house to the Plaintiff and the Plaintiff knew that no such parcel had been intended to be sold or was sold to him and that an error in the surveys had occurred.
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> 10. The Plaintiff, Merline Kitchener, Ruel Campbell and the 2nd Defenndant were all present at the above surveys carried out by Ruel Campbell in 2000 and on being advised of the surveying error both the Plaintiff, Merline Kitchener and the 2nd Defendant acknowledged that a boundary adjustment would be necessary to cure the error and it was orally agreed between the said parties at the time of the aforesaid survey that:
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> > a. The dividing line (growing stake) would be changed and the same would be moved further into the land occupied by Merline Kitchener almost to her water tank giving the Plaintiff approximately 8 more feet in width of land running along the common boundary and which would include the lands cultivated by Merline Kitchener in yam and cane and including the mango tree, but not Merline Kitchener's water tank, driveway or any part of her house.
> >
> > b. A boundary adjustment would be made with respect to the new dividing line.

> c. The Plaintiff would make an application to subdivide his lands into lots with the intent of transferring to Merline Kitchener two lots representing the lands to be taken out of the Plaintiff's title for the boundary adjustment.
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> …
>
> 13. Merline Kitchener and her successors in title have occupied and been in adverse possession of the lands claimed to have been trespassed on in the within action, being Lot 1 and Lot 2 for in excess of twelve years whereby any right of entry or right to bring action which the Plaintiff may have had, is extinguished and barred, and the 1st Defendant specifically pleads and relies on the Limitation of Actions Act and in particular Section 3, thereof.
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> 14. The reputed boundary line referred to in paragraphs 10 and 11 above has been acquiesced in and submitted to between the Plaintiff and the Estate of Merline Kitchener and their respective successors in title for more than seven (7) years before action herein and as such is now the true boundary line between the respective lands and the Plaintiff is barred by Section 45 of The Limitations of Action [sic] Act from maintaining an action of trespass or claim to such lands being Lot 1 and Lot 2." (Emphasis added)

[10] By notice of discontinuance, dated 30 October 2012, the applicant wholly discontinued that suit against the respondent. However, the claim continued for a while against Ms Pinnock. That aspect of the claim appeared to have been settled by mediation on 7 June 2013, as reflected in the terms of a mediation agreement at page 30 of the record of exhibits.

[11] On 23 November 2012, the applicant, by way of fixed date claim form, filed an action against the respondent in the Supreme Court of Judicature of Jamaica ('the court below'). In the amended fixed date claim form, filed 16 July 2013, the main order sought was for "Recovery of possession of part of lands registered at Volume 1238 folio 855 of [the] Registered [sic] Book of Titles…". The ground on which the order was sought was that the respondent was in unlawful occupation of a part of the applicant's said land and had refused to remove a structure which he had built there, despite being requested to do so by the applicant. The applicant further contended

that, having become suspicious of the respondent's construction, it was he who caused a survey to be conducted by Ruel C Campbell in 2009.

[12] In his affidavit in response, filed 21 March 2013, the respondent denies the applicant's version of events and specifically and categorically rejects the applicant's account of the circumstances leading to the conducting of the survey. He also provides some history leading to a survey in the year 2000 by Mr Ruel Campbell. He averred that that survey was done with the knowledge of Ms Kitchener and in her presence and that of the applicant and himself. He further averred that the context in which that survey was done was in furtherance of the sale of the land to him. There is also documentary evidence indicating the applicant's participation in this discussion and agreement to deal with issues that arose in a particular way, he asserted.

[13] The result of that claim were the orders made by the learned judge.

[14] Unfortunately, we have not been provided with any reasons for the making of the orders in this matter.

**Issues**

[15] Based on the submissions and the application itself, it was clear to us that there were two issues that arose on this application. One was whether there was any good reason for the delay and for the requested grant of the extension of time. The other was whether the application disclosed any merit.

**Summary of submissions**

For the applicant

[16] In relation to the delay in serving the notice and grounds of appeal, which necessitated this application for an extension of time, Mr Equiano contended that when the process server attended upon the office of the respondent's attorneys-at-law on 11 March 2020 to effect service of the notice and grounds of appeal, the staff there refused to accept service. Mr Equiano further contended that the process server was told that they would not be accepting any documents by hand because of the Coronavirus Disease 2019 ('COVID-19') restrictions. He stated that, the notice and grounds of appeal were filed at the Court of Appeal Registry within the requisite time,

and that, had it not been for the heightened COVID-19 alert and anxiety that engulfed the country, the document would have been served within time.

[17] Mr Equiano also submitted that the application had merit in that the applicant had been in possession of his lot before the respondent moved to the lands and so the limitation defence advanced by the respondent would not apply. He went on the property in 1992, and the respondent was observed building there in 2002.

For the respondent

[18] Miss Minto submitted that the applicant gave different reasons for his non-compliance, and it was not until 23 March 2023, three years later, that he was stating that his process server was told by someone at their office that the documents would not be accepted and that he should serve them by email. She submitted that, even if he was told that the physical documents would not be accepted, there was no effort made to serve the documents via email (as the process server says he was told) or facsimile transmission. There was, therefore, no good explanation for the failure to serve or for the delay.

[19] Ms Minto further submitted that the application is devoid of merit, as the applicant's contentions in his affidavits are controverted by the documentary evidence that were exhibits in the court below and that the learned judge considered in arriving at the decision. One hurdle that an applicant has to cross in an application such as this is to convince this court, she submitted, that the applicant has an arguable case with a prospect of success. She further submitted that the applicant had failed to surmount that hurdle. There was also physical evidence, Ms Minto submitted, in the form of trees and pegs that established that the respondent had a good case based on the Limitation of Actions Act ('the Act') (sections 3 and 30). The ruling of the learned judge was, therefore, justified, she submitted.

**Discussion**

[20] Based on the submissions of counsel, both agree that, for an extension of time to be considered, a main factor to be determined is whether there is any merit to the proposed appeal. This court was guided by the well-settled principles in the case of

**Leymon Strachan v Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered on 6 December 1999. From the principles outlined in that case, it is settled that the court must have regard to the following considerations: (i) the length of the delay; (ii) the reasons for the delay; (iii) whether there is an arguable case for an appeal and; (iv) whether there would be prejudice to the respondent if the application were to be granted.

[21] Having considered the law, we found that the length of delay, being three months, was not inordinate, and we took judicial notice of the fact that Jamaica confirmed its first COVID-19 case on 10 March 2020, which could have been an important factor in the delay of service. Considering, however, that the document could have been served via email, as the applicant's process server was told, but that that was not done, the applicant has not made out his contention in ground (iii), that is, that: "The non-service of the Notice and Grounds of Appeal on time was due to circumstances outside of the control of the Applicant/Appellant". On the contrary, despite the initial challenge posed by COVID-19 restrictions, there was an alternative method of serving the document, which he failed to use. Despite this, we did not consider as being fatal to the applicant's application the fact that there was no good explanation for the delay. However, when the substance of the applicant's case was considered, it became apparent that the applicant had failed to show any arguable ground of appeal with any prospect of success, as we shall shortly see.

[22] Although it was the applicant's claim that the respondent was trespassing on land for which he was the registered owner, there was documentary evidence submitted by the respondent that showed there was an agreement among the respondent, the applicant and Ms Merline Kitchener (the original owner of all the property, including the applicant's), to correct errors in the boundaries of lands being occupied by them. These errors caused an encroachment on the applicant's land by Ms Kitchener, including the portion being sold by her to the respondent. We found that the appellant provided no credible answer to the respondent's assertions set out in paras. 7 to 11 of the respondent's said affidavit. Those paragraphs (which are in substance the same as the contents of his witness statement filed 31 May 2021) are

sufficiently important to the resolution of the matter to be set out verbatim, despite their collective length. They read as follows:

> "7. That prior to this survey, there was no dispute in relation to the boundaries between the Claimant's land and the adjoining parcel Mrs Kitchener occupied; a portion of which was being sold to me. The physical boundary line between the Claimant's lands and the parcel occupied by **MERLINE ADINA KITCHENER'S** was well established and was identified by a stake fence which had been in existence since I was a child. I am now forty two (42) years old.
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> 8. That in or about the year 2000, the survey was conducted by Ruel Campbell a Commissioned Land Surveyor in furtherance of the sale and in the presence of Mrs Kitchener, the Claimant (who occupied an adjoining parcel) and myself. That after the boundaries were checked, the Surveyor advised that a portion of Mrs Kitchener's land was, by the surveyed measurements, included in the lands identified on the Claimant's certificate of title. This included a portion of Mrs Kitchener's dwelling house, driveway, water tank and the third parcel intended to be sold to me.
>
> 9. That, as the boundaries were well established and Mrs Kitchener's home and my home were affected, we proceeded to discuss how we would rectify the boundaries. The Claimant advised Mrs Kitchener in my presence and hearing and that of the Surveyor that as she had sold him his parcel at a 'reasonable price' he would do '**whatever it take to correct the boundaries, let's go ahead and do it'.**
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> 10. That it was then agreed by all the parties in the presence and hearing of the Surveyor, Ruel Campbell, that the following boundary adjustment would be effected:
>
> > (a) The Claimant would subdivide his parcel of land into four (4) lots. And. [sic] two of these lots **('Lots 1 and 2'**) would be transferred to Mrs Kitchener and included the portion of land which had been sold to me ('**Lot 2'**). The Claimant instructed the Surveyor Ruel Campbell to prepare the proposed Subdivision Plan and the new pegs and markers were inserted in the ground that very day in the presence of the Claimant, myself and Mrs Kitchener.

(b) The dividing line (stake fence) between the Claimant and Mrs Kitchener's property would be adjusted. Mrs Kitchener's fence would be removed and adjusted inwards *(into her property)* by approximately 15 feet, granting the Claimant a portion of her land *(in exchange for the portion of land the Claimant was giving up)*, and which equated by measurement to more than what the Claimant had previously occupied.

(c) That I would demolish a portion of the dwelling structure I occupied and which extended to the existing stake fence, so that it would conform to the new boundary line. The portion of land yielded by me would revert to the Claimant as part of the boundary adjustment agreement.

11. That in reliance on this agreement between the parties, and acting on the faith thereof the following occurred:

(a) The Claimant engaged and caused Ruel Campbell, Commissioned Land Surveyor to prepare a Subdivision Plan, subdividing his lands into four separate lots. I attached a copy of the Subdivision Plan as '**Exhibit MM3'.**

(b) The Claimant applied to the St. Mary Parish Council for the said subdivision plan to be approved and the approval was finally granted on December 17, 2002. The Claimant's intention, and the parties[']agreement to the boundary adjustment is further evidenced by letter dated February 3, 2007 from Bishop and Fullerton, Attorneys-at-Law who represented the Claimant…"

[23] Most potent of the documentary evidence was a letter from the applicant's then attorneys-at-law, written to the Saint Mary Parish Council ('the Parish Council') and dated 3 February 2007. That letter addressed concerns with the subdivision approval dated 17 December 2002 granted by the Parish Council on the applicant's application for the land to be subdivided into four lots. Among other things, that letter set out the following information:

"We have noted that the documents refer to approval being granted for the land to be subdivided into two (2) residential lots while the subdivision plan indicates that the land has been subdivided into four (4) lots, two of which

> are to be transferred to our client's neighbour, Merline Kitchener in order to rectify the boundary between the adjoining lands."

[24] Lots 1 and 2 were to be transferred to Mrs Kitchener, who would, in turn, transfer the lots to the respondent and readjust the boundaries of her own land to compensate for the land returned to her by the applicant.

[25] There was also evidence of this readjustment by Mrs Kitchener's application to the Parish Council providing independent evidence of this 'land swap' by the three parties.

[26] Looking at the matter in the round, therefore, although no written reasons were provided to us for the orders that were made, in some cases, we were able to discern some of the likely reasoning from the orders themselves when viewed against the background of the documents that were before the learned judge. In relation, for example, to the declaration that the applicant's right or title to the land was extinguished by the Act, it can be discerned why that order was made, based on the affidavit and documentary evidence that were before the learned judge and that she would have considered. Having reviewed that evidence and the submissions, the court also found that there was no error in the learned judge's finding that the applicant's action was statute barred by sections 3 and 30 of the Act, which speak to a 12-year limitation on a right of re-entry or to bring an action; and the extinguishing of rights on the expiration of any period of limitation, respectively.

[27] We agreed with counsel for the respondent that the applicant's claim was also negatively affected by the existence of physical structures and boundaries on the ground established by the respondent on land which he occupied for more than 12 years either himself or through Ms Kitchener or both. Apart from the plethora of documentary evidence as to the agreement among the parties, the physical and actual possession of the land by the respondent and Mrs Kitchener (his predecessor in title) would have prevented the applicant from successfully establishing a possessory title.

[28] It was for the foregoing reasons that we made the orders indicated in para. [2] hereof.