JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO: 15/06

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**NALDI HYNDS**	**APPELLANT**
AND	**FELMANDO HAYE**	**RESPONDENT**

Miss Gillian Mullings instructed by Patrick Bailey & Co., for appellant

Ewan Thompson for respondent

19th & 20th February 2007

HARRISON, P.

This is an appeal from the judgment of Her Honour Mrs. Malahoo-Forte, Resident Magistrate for the parish of St. Elizabeth on 23rd November 2004 giving judgment for the respondent for trespass by the appellant with costs to be taxed if not agreed. An injunction was also ordered.

The relevant facts are that land at Winchester, St. Elizabeth consisting of 3.2 acres was owned by Richard Hynds, who died intestate in 1970 pre-deceased by his wife and leaving – 3 children, Charles, Arnold o/c Naldi and Gloria. No will of Richard Hynds was produced nor tendered. No probate exists. The appellant's assertion to the respondent that:

> "I am the owner of this land. This is Hynds family land and I bought it from my brother. My brother come to sell the land to me pertaining to my father's will."

is misconceived.

On Richard Hynds' death in 1970, the land would pass under the rules of intestacy in accordance with the Intestates Estates' and Property Charges Act to his three children equally.

The legal estate would vest in, he who applies for and obtains letters of administration, failing which the Administrator General would apply. No Letters of Administration were issued. The legal estate would remain in the estate of Richard Hynds.

No legal estate vested in Charles Hynds to pass a legal title.

The respondent, 71 years old, a retired pensioner who left the area of Barbary Hill and went to England in 1955, returned home in 1974. He left again in 1975 and returned in 1981 to live in Jamaica.

On 20th August 1994 Charles Hynds purported to sell ¼ acre of land at Winchester to the respondent who bought it for his daughter Patricia Haye. See conveyance – exhibit 1 – for $25,000.00. The indenture was witnessed by Maudlyn Roach, J.P.

On 23rd February 1995 Charles purported to sell ¾ acre of said land to the respondent who bought it for his daughter Patricia – the indenture was witnessed by Buchanan, J.P. and Minister of Religion for $60,000.00 – exhibit 2.

The respondent put his cows on the 1 acre property in 1995. This act of possession could be sufficient but is inconclusive. Charles Hynds died in April 1995.

On 23rd May, 1999 the appellant entered the land, drove off the respondent's cows, replacing them with his own, locked the gate and posted up a "no trespasser sign."

The respondent filed his claim for damages for trespass and an injunction on 15th June 1999.

At the trial the appellant stated to the learned Resident Magistrate in his defence that:

> (i) the land was in the possession of the defendant and the Hynds family for 65 years up to the time that the plaint was filed,
>
> (ii) the possession was undisturbed and "Evidence will put question of Title in dispute."
>
> (iii) "Purported recorded title is insufficient to convey the title to any parcel of land."

Significantly, there was no defence stated to the effect that the appellant purchased the land from Charles Hynds.

The appellant contends in evidence that his brother Charles Hynds "came back from America at the end of 1993 to 1994" that he "bought the land" from his brother "in 1993 … paid my brother $15,000.00 USD…"

Tendered was receipt – exhibit 5 – dated 25th February 1993 signed by Charles Hynds of a Bronx NY address for $15,000 "payment on three acres of

land less or more known as Winchester in the parish of St. Elizabeth, Bequeath to me by my late father Richard Martin Hynds in accordance with his will dated 28th June 1977." It was notarized and stamped.

Counsel for the respondent had objected to the admission of receipt exhibit 5, in that, that was the first occasion it was being said that the appellant had bought the land.

Counsel for the appellant had not mentioned the existence of a receipt previously and had merely indicated that she had only one document to tender, namely a tax receipt.

The appellant contended that he "came home from New York … in 1994 as a returning resident". He cleaned, bushed and surveyed land. He returned to America in 1994. His sister Gloria Reid was caretaker for the land. Charles was "in and out of hospital."

The appellant acknowledged that he knew the respondent from Barbary Hall where they grew up. "About 1997 or 1998" he (Felmando) came on the land. The appellant said that he told the respondent:

> "Mr Haye I am owner of this land. This is Hynds family land and I bought it from my brother."

The appellant paid the taxes on the land a tax receipt dated 25th September 2000 was tendered as exhibit 6.

The grounds of appeal were:

> (1) The Learned Resident Magistrate misdirected herself as to the purport and effect of section 96 of the Resident Magistrate's Judicature Act

and the cases of *Ivan Brown vs. Perris Bailey* 12 JLR 1338 and *Marsh v Dewes* (1853) 17 Jur. 558 and the Learned Resident Magistrate failed to consider whether she had the jurisdiction to hear the matter at all.

(2) The Learned Resident Magistrate failed to consider the evidence that is the Estate of Richard Hynds remained in open and undisturbed possession of the land.

(3) The Learned Resident Magistrate made a finding on Hearsay Evidence that a Will which was not before the Court was valid (duly executed etc.) and conferred legal rights.

(4) The Learned Resident Magistrate erred in deciding that the matter of title was irrelevant to her finding on the issue of trespass.

(5) The Learned Resident Magistrate erred in holding that she could properly have granted an injunction and ruled in favour of the Plaintiff on the state of the evidence.

(6) Her Honour's verdict was inconsistent with the evidence."

Grounds 2, 4, 5 and 6 were abandoned. Grounds 1 and 3 were argued.

The land is unregistered land. A good root of title needs to be shown in order to effect a valid conveyance to pass the legal estate.

Section 66 (1) of the Conveyancing Act reads:

> "Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand, which the conveying parties respectively have in, to or on, the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to or on, the same."

The appellant is claiming the ownership of the land "3 acres more or less" by means of a purchase from Charles by him on 25th February 1993 for US$15,000.00, vide receipt exhibit 5.

The respondent is claiming ownership of the land one (1) acre by means of a purchase and conveyance, by indentures exhibits 1 and 2, dated 20th August 1994 and 23rd February 1995 respectively for a total of $85,000.00.

A dispute involving the question of title therefore arose, in this case, in respect of each party.

Section 96 of the Judicature (Resident Magistrate) Act provides:

> "Whenever a dispute shall arise respecting the title to lands … the annual value whereof does not exceed seventy-five thousand dollars, any person claiming to be legally or equitably entitled … may lodge a plaint in the Court … on proof for the plaintiff's title … the Magistrate may order that possession of the lands … mentioned … be given to the plaintiff…"

In ***Brown v Bailey*** [1974] 12 JLR 1338, relied on by both counsel in the appeal before us, the respondent bought and paid in full for an acre of land from one M. She received a certificate of title issued under the Registration of Titles Act. The appellant built a board house on the land claiming that he had paid money to M, in purchase of ½ acre of the land, but admitted that he knew, that the respondent was the owner of the land. The respondent's suit for recovery of possession succeeded. It was confirmed on appeal, that no bona fide dispute of title arose within the provisions of section 96 of the Judicature (Resident Magistrate) Act. The title of the respondent under the

Registration of Titles Act did not give rise to a dispute as to title, unless the evidence discloses a credible narrative of events indicating an equitable interest. This case is unhelpful to the issue before us.

In ***Marsh v Dewes*** [1853] 17 Jur. 558, a claim for trespass, the defendant at the initial stage maintained that a question of title arose and therefore the Court had no jurisdiction to proceed. The trial judge ruled that he would hear the evidence and if a bona fide question of title arose he would proceed no further. On hearing the evidence, question of title arose but the judge held that it was "too slight and inconclusive to be left to the jury and therefore there was no bona fide question to be tried." It was held that the trial judge was in error, a question of title arose. The trial judge had no authority to proceed, and the question of the bona fides of the defendant was irrelevant.

In ***Pilcher v Rawlins*** [1871] L.R 7 Ch. App. 259, it was held that a legal estate which had passed to mortgagees, who were bona fide purchasers for value, without notice of the fraud of a mortgagor and trustee, was valid and unassailable. The cestui que trust could not gain priority over the mortgagees. This case was relied on before us by Mr. Thompson for the respondent. It does not assist him.

In the instant case the question of title clearly arose. Each party claimed to have purchased from Charles Hynds, who had not been granted probate of any supposed will, nor issued with letters of administration under

the estate of Richard Hynds, deceased. Charles could not convey a legal estate to either the appellant or the respondent. There was no estate vested in Charles which he could convey.

No will was put in evidence before the learned Resident Magistrate. Although the appellant relied on his purchase from his brother, his evidence may well have been correctly seen by the learned Resident Magistrate as unreliable. The receipt tendered by him, exhibit 5, as having been signed by Charles in the United States of America evidencing the sale of the 3 acres to him in 1993, recited that the said land was –

> "Bequeath (sic) to me by my late father Richard Martin Hynds in accordance with his will dated 28th of June 1977." (Emphasis added)

Richard Hynds died in 1970 – such a will could not be his.

Under the provisions of section 96 of the Judicature (Resident Magistrate) Act, where the question of title arises, a Resident Magistrate is authorized to proceed to try the issue of title to the land to completion provided that the plaintiff provides evidence to the court that:

> "… the annual value whereof does not exceed seventy-five thousand dollars …"

There was no evidence led that the land in question was not in excess of seventy-five (75) thousand dollars. On the contrary, on the respondent's case, he had bought the two pieces of land amounting to one acre for $85,000. On the appellant's case, he had bought the three (3) acres of land for US$15,000 in 1993. Both are clearly in excess of the statutory limit of the Resident Magistrate.

The learned Resident Magistrate failed to address her mind to the fact that the question of title arose on both sides and as a consequence she was in error. The further relevant question of the statutory value limiting her jurisdiction was not addressed. The learned Resident Magistrate had no authority to proceed with the trial to its conclusion. Her jurisdiction was ousted, (See ***Marsh v Dewes*** (supra)).

The respondent had not proven his case. Charles could not have sold him that which he Charles was not empowered to sell – namely, title to the one (1) acre of land on behalf of his daughter.

Neither did the appellant lead any credible evidence that could, if required, support any bona fide right to title. This Court, in the circumstances, can make such a finding (***Watt v Thomas*** [1947] 1 All ER 582). The appellant's case is conflicting, in that, if there is no will or no valid will of Richard Hynds in existence, the land in question would devolve to the children on intestacy. In such circumstances the appellant would not need to rely on a purported purchase from Charles, as evidenced by exhibit 5. The determination of this issue of title resides with a judge of the Supreme Court.

The appeal should be allowed. The plaintiff/respondent should be non-suited in accordance with section 181 of the Judicature (Resident Magistrate) Act. It reads:

> "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."

In all the circumstances there should be no order as to costs.

HARRISON, J.A.

I agree.

McCALLA, J.A.

I agree.

HARRISON, P.

The appeal is allowed. The plaintiff is non-suited. There is no order as to costs of this appeal and in the court below.