

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 02/07

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag)**

BETWEEN	MAVERNIA LEE	1ST APPELLANT
	LEVAL LEE	2ND APPELLANT
	ELVIS LEE	3RD APPELLANT

AND	ADA REBECCA SMITH	1ST RESPONDENT
	STANLEY GEORGE SMITH	2ND RESPONDENT

Mr. Debayo Adedipe, instructed by **Clarke, Nembhard & Co.** for the appellants.

Miss Sandra Johnson instructed by **Sandra Johnson and Co.** for the respondents.

21, 22 May and 31 July 2008

SMITH J.A.:

I have read in draft the judgment of Morrison J.A. I agree with his reasoning and conclusion and there is nothing further that I wish to add.

MORRISON, J.A.:

1. This is an appeal from the judgment and order of Her Honour Mrs. Marlene Malahoo-Forte, Resident Magistrate for the parish of Saint Elizabeth, delivered on 31 March 2006, whereby judgment was entered for

the respondents on their claim against the appellants for damages in the sum of \$100,000.00 and an injunction restraining them from trespassing on the lands which were the subject matter of the claim. The appellants' counterclaim was also dismissed, with costs on the claim and counterclaim to the respondents.

2. This is the learned Resident Magistrate's summary of the claim and counterclaim which were before her, which I gratefully adopt for the purposes of this judgment:

"The Plaintiffs' claim against the defendant (as set out in the Particulars of Claim and as amended) is to recover the sum of One Hundred Thousand dollars for Damages for Trespass, for that on Thursday April 20, 2000, the Defendants entered the Plaintiffs' property at Ridge Pen, St. Elizabeth and prevented the plaintiffs' workmen and equipment from clearing the Plaintiffs' property and again on Saturday April 22, they also prevented the Plaintiffs and their agent and workmen from working on their property, to great costs and damage of the Plaintiffs.

The Plaintiffs pray that this Honourable Court will grant an injunction restraining the Defendants by themselves, their servants and or agents from trespassing on the parcel of land part of Ridge Pen, St. Elizabeth being by estimation seven acres butting and bounding northerly on lands of Samuel Constantine and partly on lands of Lance Bildon, southerly on lands of Winston Hutchinson and partly on lands of Joseph Green's estate, easterly on lands of Willie Nation's estate, westerly on the Mountainside to Watchwell parochial road or howsoever the same may be bounded, butted or distinguished.

The Defendants counterclaimed against the Plaintiff and are seeking to recover the sum of Two Hundred and Fifty Thousand Dollars as and for Damages for Trespass to land for that on divers occasion including April 2000 they trespassed upon the Defendants' land situate and lying at Ridge Pen District in the parish of Saint Elizabeth butting and bounding as follows: North on a 10 foot reserved road and on lands of Advira James; South on lands of Winston Hutchinson; East on lands of Shirley Gordon; West on the Kildare parochial road, and thereon trample herbage and clear sections thereof to the great loss and damage on the Defendants.

By way of defence, both sides have denied the acts of trespass complained of."

3. The dispute between the parties and their predecessors in title over these lands at Ridge Pen District in the parish of Saint Elizabeth is more than four decades old, going back to at least 1960, necessitating a regrettably longer than usual summary of the facts. The documentary and other evidence indicates that in that year Sybil Lee ("Sybil"), who was the wife of Clarence Lee ("Clarence"), by an indenture dated 1 August 1960 (exhibit 3), conveyed to Advira James ("Miss James"), a parcel of land "containing by estimation two and a half acres less or more and butting and bounding on the Northerly by Lambert Wright, Southerly by Clarence Lee, Easterly by Willie Nation's estate and West by Edson Rowe" ("the 2 acre plot").

4. Two years later, by an indenture dated 10 July 1962, (exhibit 4) Clarence conveyed to Miss James another parcel of land "containing by estimation five acres less or more and butting and bounding East by Willie Nation, West by the Parochial Road and Terrence Lee, North by a private road leading to the properties of Edson Rowe and the same Advira James and a part of that of Terrence Lee, South by Winston Hutchinson and Joseph Green" ("the 5 acre plot").

5. The respondents' case was that after these purchases Miss James took possession of both parcels, which adjoined each other, fenced and cultivated them and operated a marl quarry on them. Miss James died on 26 November 1973, devising the land to the 1st respondent, Ada Rebecca Smith, who in due course, by a Power of Attorney dated 15 May 2000, appointed the 2nd respondent as her attorney in respect of all matters concerning the said land. Over the years, the respondents say, they have remained in possession of the land, paying the taxes and exercising all rights of ownership. By the time of the trial, the 1st respondent was 95 and the 2nd respondent was 72 years of age.

6. The appellants for their part also stake their claim on two indentures of conveyance from Clarence to his son Terrence Lee ("Terrence") in 1960 and 1962. The first is dated 24 March 1962 (exhibit 25), by which Clarence conveyed to Terrence one and a half acres of land at Ridge Pen "butting and bounding in the north by a private road, on the south by lands

belonging to the said Clarence Lee, on the east by lands belonging to the said Clarence Lee and on the west by parochial road leading from Mountainside to Watchwell". It is on this parcel that Terrence, the father of the appellants, built his house.

7. The second indenture relied on by the appellants is dated 3 March 1962 (exhibit 26) and records a conveyance by Clarence to Terrence of a further two acres "butting and bounding north on Terrence Lee, south on Clarence Lee, east on Clarence Lee, West on Parochial Road." The total holding of three and a half acres, the appellants contended, was occupied by their father from the time they were children right up to the time of his death in 2002. The taxes for this parcel were also paid by the Lee family over the years.

8. The 2nd respondent's evidence was that "there was problem about this land before". Firstly, he said, at some point before Clarence sold the five acre plot to Miss James, he had to take Terrence to court to recover the land and "was awarded ownership of the land". It was after this that Clarence sold the land to Miss James. On the second occasion, Miss James took Terrence to court, "won the case and was awarded the 5 acre piece of land", after which she "took possession of the land and wired it around". According to the 2nd respondent, he was a witness in both cases.

9. Admitted in evidence as an exhibit was the court sheet in the matter of Plaintiff No. 1092/62, which indicated that on 13 March 1963, His Honour Mr. S.E. Ingram gave judgment for Miss James (the plaintiff) and made an order for recovery of possession against Terrence (the defendant). It was pointed out to the learned Resident Magistrate in the instant case that in the top right hand corner of exhibit 4 (the conveyance from Clarence to Miss James) is a notation suggesting that this document had also been an exhibit (exhibit 1) in the matter of Plaintiff No. 1092/62.

10. The current dispute between the parties arose on 20 April 2000 when, according to the 2nd respondent, a tractor working at his request on the 5 acre plot was stopped and prevented from continuing by the appellants, who then claimed the land as theirs. Two days later, on 22 April, he returned with the tractor and was again obstructed by the appellants, who "objected violently to the tractor going on the land". Since that time, the appellants have been in possession of both the 2 acre and the 5 acre plots claimed by the respondents. According to the 2nd respondent, he has remained off the land because of various threats of violence from the appellants, which he reported to the police.

11. This action was filed by the 1st respondent on 21 June 2000 and, before the commencement of the trial, Terrence died on 2 October 2002, giving rise to a further confrontation between the parties once it became clear that the appellants intended to bury their father on the disputed

land. An injunction sought and obtained by 1st respondent to prevent this proved to be unavailing and Terrence was in fact buried on the land. The location of the Lee family burial ground was indeed a major flashpoint in the litigation, with the respondents (the 2nd respondent was added by consent as a plaintiff during the trial) insisting that not only was Terrence buried on the 1st respondent's land (on the 5 acre plot), but that so was his mother Sybil. The appellants on the other hand maintained strongly that the burial ground is on the two acres sold to Terrence by Clarence in 1962 (exhibit 26).

12. At the trial before the learned Resident Magistrate, the main thrust of the appellants' case was to demonstrate that neither Sybil nor Clarence had sold any land to Miss James because, as at the date of the purported conveyances in 1960 and 1962 (exhibits 3 and 4) they were both already dead. As the 1st appellant (Terrence's daughter) stated emphatically in evidence:

"Advira James didn't buy 2 acres of land from Sybil Lee. She didn't buy 5 acres from Clarence Lee... I have tomb stone to say Sybil Lee died before date of Conveyance and Death Certificate to say Clarence Lee died before date of conveyance."

13. The appellants supported this contention by evidence that Sybil's tombstone, which was on the disputed land, bore an inscription "Sybil Lee, March 1960", and of a purported death certificate (exhibit 21) which stated Clarence's date of death to be 3 July 1962. So that, in the first

case, it was contended, Sybil was already dead some four months before and, in the other, Clarence had died some seven days before, the alleged conveyances to Miss James. This evidence, if believed, would obviously have been conclusive proof of a mighty fraud on the appellants perpetrated either by Miss James or her successors in title.

14. But, as it turned out, it was the appellants who were demonstrated at the trial to be the fraudsters. In the case of Sybil, a death certificate was produced in evidence certifying the death of "Sebell Lee" wife of Clarence Lee, of Ridge Pen, St. Elizabeth on 14 February 1961, that is a full six months after the date of the conveyance to Miss James (who, incidentally, is also shown on the certificate to have been the informant who was present at the date of death). The learned Resident Magistrate had no difficulty in concluding, as it is plain must have been the case, that the "Sebell" Lee referred to in the document was "one and the same person" as Sybil Lee referred to as the vendor in the conveyance to Miss James.

15. In the case of the date of Clarence's death, the appellants' undoing was even more spectacular, when the "death certificate" produced by them was conclusively exposed, by again plainly irresistible evidence from the Registrar General's Department, to be "bogus", as the 2nd respondent had spontaneously described it when it was first put to him in cross-examination. The authentic death certificate, which was

produced by the Chief Internal Auditor in the Registrar General's department, Mr. Gregory Gordon, confirmed that Clarence in fact died on 31 July 1962, that is, three weeks after the date of the conveyance to Miss James in which he was described as the vendor (exhibit 4).

16. The learned Resident Magistrate accepted Mr. Gordon's evidence and found specifically that the document produced by the appellants was a "false certificate". She also accepted a submission from counsel for the respondents "that by giving false evidence about the death of Sybil/Sebell Lee and producing a bogus death certificate for Clarence Lee, the [appellants] have made a brazen attempt to mislead the court and bring about a monumental miscarriage of justice". This, the Resident Magistrate concluded, "shows that [the appellants] would stop short of nothing to win their case and so keep the lands within their family".

17. In the result, the learned Resident Magistrate found, on a balance of probabilities, "that the seven acres, more or less, the subject matter of this action, were sold to the [respondents'] predecessors in title by the [appellants] ancestors", and that "the [appellants] have failed to establish their title".

18. It is against this background that I come at last to the grounds of appeal argued by Mr. Adedipe. Learned counsel did not pursue grounds 1, 3 or 4 of the original grounds, with the result that there was no challenge on appeal (and it is difficult to see how there could have been)

to the learned Resident Magistrate's findings with regard to the validity of the conveyances from either Sybil or Clarence to Miss James. He therefore confined himself to grounds 2 and 5, which were as follows:

"2. The learned Resident Magistrate erred in law in failing to recognize that the recorded conveyance of the two acre parcel of land from Clarence Lee to Terrence effected a transfer of the legal estate in the two acres to him and that this conveyance rendered the subsequent conveyance to Advira James ineffective in so far as it related to the same land.

...

5. The learned resident magistrate erred in her apparent finding that the proceedings in *Plaint No. 1092 of 1962* related to the land subject matter of this action. There is no evidence of the identity of the land subject of that action and that would certainly be necessary, as would strict proof of the judgment, for the principle of **res judicata** to apply."

19. The submission on ground 2, which had been foreshadowed to some extent in his final address by counsel who had appeared for the appellants in the court below, was predicated on the assumption that the two acres sold to Terrence by Clarence in March 1962 (exhibit 26) was part of the 5 acre plot conveyed to Miss James in July of the same year. The evidence disclosed that the former conveyance was recorded on 4 June 1962, while the latter was not recorded until 8 May 2001. The sale to Miss James having therefore taken place after the recording of the earlier conveyance to Terrence, so the argument ran, the subsequent

conveyance to Miss James “ cannot avail the respondent in a contest with the appellants over the two acres”.

20. Mr. Adedipe relied for this submission on the combined effect of sections 2, 6 and 7 of the Record of Deeds, Wills and Letters Patent Act and decisions of this court in **Ruddock v Harrison** (1967) 10 JLR 76 and **Dixon v Frederick** (1974) 12 JLR 1495.

21. On ground 5, Mr. Adedipe contended that there was no evidence of the delineation of the area of land that had been the subject of the action in Plaintiff No. 1092/62 and that it did not follow from the fact that the conveyance of the 5 acre plot from Clarence to Miss James (exhibit 4) had been an exhibit in that case, that the action necessarily related to the entire piece of land. Accordingly, the learned Resident Magistrate's conclusion that the appellants' “previous attempt to [re]claim the land was unsuccessful” was not warranted by the evidence.

22. Miss Johnson's response to ground 2 was to point out that the case below had not been fought on the basis of two indentures being “set against each other”: the gravamen of the appellants' case had been that the respondents were holders of bogus titles. And as to ground 5, while I did not understand Miss Johnson to put the case as high as *res judicata* in the light of the previous litigation, she did say that that litigation was one of the issues that the Resident Magistrate had had to grapple with, particularly in the light of the “systematic, consistent, devious

attempt" by the appellants to advance a fraudulent case in relation to the dates of the deaths of Sybil and Clarence.

23. On the issue of priorities (ground 2), I agree with Miss Johnson that it was never the appellants' case at trial (notwithstanding the belated attempt to posit this in an address after the ignominious collapse of the main plank of their case), that the two acres sold by Clarence to Terrence were part of the 5 acre plot sold to Miss James; or, in other words, that Clarence had in fact sold at least part of the land twice. On the contrary, as evidenced by the elaborate deception already described, and as the learned Resident Magistrate put it in her reasons for judgment, "The essence of the case for the [appellants] rests on challenges to the alleged sales of the two parcels of land by their ancestors and their own claims to also being in possession of the lands". I therefore do not think that there is any basis in the manner in which the issues between the parties were joined at the trial for the application of the principles relating to priorities as contended for by Mr. Adedipe at this stage.

24. Neither does the evidence suggest in any event, it seems to me, that it is a necessary inference that the two acres sold by Clarence to Terrence were part of the 5 acre plot later sold to Miss James. Although this is a case in which I think that a reference to a surveyor pursuant to section 101 of the Judicature (Resident Magistrates) Act might have been of some value (a course which does not appear to have been canvassed at all in

the court below), I think that it is nevertheless possible to establish a view of the location of the four parcels of land from the descriptions in the indentures and the other evidence in the case. For this purpose, I take as the starting point the location of the Lee burial ground, which is obviously at the emotional heart of the case.

25. The 2nd respondent's evidence was that Terrence was buried on the 5 acre plot of land that is in dispute and that it was the respondents' objection to the digging of the grave that gave rise to the application for the interlocutory injunction referred to at paragraph 11 above. On his evidence (and also that of the respondents' witness, Gerald Rodgers), Sybil is also buried on the 5 acre plot to the "south of Terrence Lee's house. Although he was not sure where Clarence was buried, he insisted that "Clarence Lee sold Advira James the land ... his wife was buried on."

26. The 1st appellant's evidence-in-chief on this was as follows:

"Clarence Lee and Sybil Lee are dead. I know where Sybil Lee is buried. It is right on the 2 acre piece of land on which my father's house is to the south. This piece of land on which she is buried adjoins the house piece. My father's name is Terrence Lee. He is buried on that, same piece of land beside his brother Calvin Lee. My sister Jean Lee is also buried on that land although no grave is there for her. She died as a baby."

27. In cross examination, however, she added the following:

"The cemetery in which my father is buried is near the land of Winston Hutchinson. Another grave could go in the space to the wire. Sybil is

the last person before Terrence that was buried there."

28. And again, also in cross examination, this appellant agreed that the graves are "almost at the boundary with Winston Hutchinson" and that "the wire lines between Winston Hutchinson and where the graves are is the dividing line between Winston Hutchinson's land and the land in dispute" (see also the evidence of the 2nd appellant that "Winston Hutchinson is to the south of the burial piece").

29. Therefore, as I understand this evidence, the burial ground lies to the south on the 5 acre plot that the appellants insisted was never sold by Clarence to Miss James, almost at the boundary with Winston Hutchinson's land. As exhibit 4 shows, the southern boundary of the 5 acre plot is in fact lands belonging to the said Winston Hutchinson and one Joseph Green, unlike exhibit 26, which shows the southern boundary of the two acres sold to Terrence a few months earlier as being lands belonging to Clarence.

30. Which suggests that after he sold the two acres (exhibit 26) to Terrence, Clarence then sold the remaining five acres which he had retained to the south of that plot to Miss James and that the burial ground is in fact very close to the southernmost boundary of this 5 acre plot with lands owned by Winston Hutchinson. In concluding, as she did on a balance of probabilities, that the 5 acre plot was sold by Clarence to Miss James, the learned Resident Magistrate was fully entitled to assess the

sincerity of the appellants' contrary claim in the light of their totally discredited attempts to falsify the date of their grandfather's death.

31. The evidence of the previous court actions involving the parties, while in my view insufficiently definitive to support a plea of *res judicata*, does go some way towards tipping the balance in favour of the respondents' case. In all of this, I think it is relevant to bear in mind the 2nd respondent's unchallenged evidence that, when the case was in court in 1962, the appellants "were children below age 10 and younger". As the 1st appellant herself conceded in evidence, "I don't know that Advira James took my father to court but my father told me he and Miss Vie were in court over land – but I don't know which land, I didn't ask".

32. On this view of the case, which is obviously the one taken by the learned Resident Magistrate, the evidence in the case does not support the appellants' belated contention based on the theory of an overlap between Terrence's two acres and the 5 acre plot sold by Clarence to Miss James.

33. For these reasons, I would therefore dismiss the appeal and affirm the judgment of the learned Resident Magistrate, who clearly took full advantage of the opportunity which she had to see, hear and assess the credibility of the several witnesses who gave evidence before her. The respondents will have the costs of the appeal, fixed at \$15,000.00.

SMITH, J.A. (Ag:

I agree.

SMITH, J.A.:

ORDER:

The appeal is dismissed and the judgment of the learned Resident Magistrate is affirmed. Costs are awarded to the respondents fixed at \$15,000.00.