[2012] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 21/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**OLATUNJI LUMUMBA**	**APPELLANT**
AND	**SEBERT LINDSAY**	**RESPONDENT**

Carlton Williams and Mark Williams for the appellant

Mrs Verleta Green for the respondent

2, 5 and 13 July 2012

BROOKS JA

[1] On or about 22 July 2003, the respondent Mr Sebert Lindsay objected to Mr R. L. Wilson, a commissioned land surveyor, conducting a survey of land situated at Plowden in the parish of Manchester. The survey had been commissioned by Mr Lindsay's first cousin, Mr Olatunji Lumumba.

[2] On 11 February 2008, Mr Lumumba filed a plaint in the Resident Magistrate's Court for the parish of Manchester. He claimed damages of $250,000.00 for "Obstruction of Survey".

[3] The claim was heard on 8 and 15 May 2009 and two weeks later, on 2 June, the learned Resident Magistrate gave judgment for Mr Lindsay. The learned Resident Magistrate accepted that the right to survey land was a part of the bundle of rights comprised in the ownership thereof. He found, however, that because of the history of the land in question, and the family and succession issues connected to it, Mr Lindsay was "within his rights to object to a survey which failed to acknowledge his proprietary rights". Mr Lumumba is dissatisfied with the judgment and has appealed against it.

[4] It is apparent from the grounds of appeal that were filed, and on the written submissions placed before this court, that the parties, or at least Mr Lumumba, seems to be of the opinion that the learned Resident Magistrate had made a declaration that Mr Lindsay is the owner of the parcel of land in question. That view was confirmed when the parties, along with their respective counsel, appeared before us.

[5] Upon airing that concern, Mr Carlton Williams, appearing for Mr Lumumba, accepted that the learned Resident Magistrate had no authority, based on the claim that was before him, to make any declaration as to ownership. Mr Williams asked however that we make the position clear by way of a written judgment.

[6] We, therefore, dismissed the appeal, made no order as to costs and promised to put our reasons in writing. We now fulfil that promise. In order to make the matter plain to the parties, we shall seek to identify the issue, state the relevant law, apply the law to the instant case and set out our conclusion thereon.

The grounds of appeal

[7] Mr Lumumba's original grounds of appeal contended that the learned Resident Magistrate erred in conducting an assessment of proprietary rights to the land and making, what amounted to, a pronouncement of the ownership of the land by Mr Lindsay. The written grounds, filed by Mr Lumumba's attorneys at law, criticised the learned Resident Magistrate for making findings that were not supported by the evidence. The grounds also complained that there was insufficient evidence on which the learned Resident Magistrate could properly make any findings as to ownership.

The issue

[8] The issue, which was before the learned Resident Magistrate, was whether Mr Lindsay had wrongfully objected to Mr R. L. Wilson conducting the survey of the land. A perusal of the relevant law indicates that in assessing that issue, the learned Resident Magistrate was entitled, indeed was obliged to consider, whether Mr Lindsay was a "person interested in and affected by the survey of such land" in question.

The relevant law

[9] The words quoted in the last sentence are from section 29 of the Land Surveyors Act (the Act). The section bestows the right to object to a survey. It states:

> "Where the survey is undertaken by appointment of the owner of any land then every owner of any land upon whom notice has been served, **and any person interested in and affected by the survey of such land, may cause to be served upon the surveyor, prior to the completion of the survey, notice of objection, in the prescribed form, to such survey**. Upon service of such notice of objection the surveyor shall not proceed with the survey in so far as it affects the land in respect of which notice was

> given until notice of withdrawal, in the prescribed form, is served upon such surveyor." (Emphasis supplied)

[10] Section 41 of the Act stipulates that any person who causes a notice of objection to a survey, to be served on a surveyor, without that claim being founded on an interest in land or a *bona fide* claim to an interest in land, is guilty of an offence. Such an offence does not, however, preclude any other court action being taken against the objector. Indeed, there is precedence for a civil claim being made for damages for a wrongful and unlawful stopping of a commissioned survey of land.

[11] In **Gurzel Buchanan v Eustace Irving** (1972) 12 JLR 1036, this court considered such a claim, although it had been coupled with a claim for damages for trespass. It was held in that case, that a person, who attends on land pursuant to a notice of survey, does not, thereby, commit trespass. The court also decided in that case, that it is a valid defence to a claim for damages arising from the stopping of a survey, that the defendant had a genuine belief that he had an interest in the land to be surveyed. It did not matter, the court pointed out, that that belief subsequently was proved to be unfounded in law. Luckhoo JA, at page 1039 A, of the report said:

> "…once the objector who has been served with a notice [of survey] *bona fide* claims to have, i.e. **genuinely believes himself on reasonable grounds to have, an interest in the land to be surveyed it matters not that such a claim is later proved to be unfounded in law**…." (Emphasis supplied)

[12] The land in issue, in that case, formed part of the estate of the respondent's father William Irving. The respondent claimed to be his father's heir at law. William

Irving's widow, who was the respondent's mother, applied to have the land registered in her name and the respondent lodged a caveat against the application. The mother died without taking any further step in respect of the land. In her will, however, she devised the land to the appellant. After the mother's death, the appellant was granted probate of the mother's will and lived in a house on the land. The mother had raised the appellant and the respondent together, although they were not related by blood.

[13] The matter became litigious when the respondent sought to have the land surveyed. The appellant said that she had been served with a notice of the survey and she attended at the appropriate time and objected to the survey. This court decided that she had a *bona fide* claim to an interest in the land and her objection was made in good faith. The objection was, therefore, not wrongful or unlawful.

[14] The importance of that decision, for the purposes of this case, is that this court did not decide the proprietary interests of the respective parties. It merely decided that the objection was not wrongful even if it should, later, be proved that the appellant was not entitled to an interest in the land.

[15] A careful reading of section 29 reveals another important principle. It is that a person need not have been served with a notice of a survey in order to object to the survey. The section allows two categories of persons to object. The first category comprises owners of adjoining land who have been served with a notice of survey. The section, however, goes on to add, as a second category, "any person interested in and affected by the survey of such land".

[16] In **Buchanan v Irving**, the appellant said that she had not been served with a notice. Nonetheless, the judgment spoke of an objector who had been served with a notice. In our view, however, as explained above, the service of a survey notice is not essential to entitle a person to object to that survey.

Application to the instant case

[17] The facts in the instant case are not dissimilar to those in **Buchanan v Irving**. Messrs Lumumba and Lindsay have a common maternal grandfather. Their respective mothers were sisters. Mr Lumumba's mother was Lucy Grant, nee Johnson, while Mr Lindsay's mother was Anitta (Anita) Johnson. The land in question comprised three acres. Their grandfather had willed one acre of the land to Anitta and another sister, Miriam (Merriam). He willed the other two acres to Lucy and three other sisters.

[18] Mr Lindsay's evidence before the Resident Magistrate was that his mother, Anitta, died when he was two years old and he was raised by Lucy. He testified that he was an adult when Mr Lumumba, then named Hearldon Grant, was born. He further said that Lucy lived on the property and no one disturbed her occupation. In respect of his claim to the land he said that she had showed him his mother's portion of the land and that his aunt Miriam gave him a room, adjoining a shop on the land, to live in. He said that he farmed the land for many years and then turned it over to his son, Delroy, who, he said, since 1986, and at the time of the trial, had been cultivating crops and operating a shop thereon.

[19] It does not appear that Mr Lindsay was served with a surveyor's notice. He however attended on the date of the survey and objected. His objection to the survey was reduced to writing. It stated, in part, as follows:

> "I SEBERT LINDSAY do hereby object to the survey of land known as PART of PLOWDEN in the parish of MANCHESTER by R. L. WILSON Commissioned Land Surveyor at the instance of Healdon Grant for the following reasons:
>
> (1) Not the owner of land."

The notice was signed by Mr Lindsay, dated 22 July 2003, and witnessed by C Johnson.

[20] Although the learned Resident Magistrate rejected Mr Lindsay's evidence that he had cultivated the land, there was no express finding concerning Delroy's occupying it. What the learned Resident Magistrate found was that "[i]t seems more likely than not that Lucy Grant did" point out the land to Mr Lindsay's as belonging to Anitta. From that finding he divined that Lucy was not asserting any claim of ownership of that portion of the land. He went on to conclude that, as Mr Lumumba was claiming ownership by virtue of Lucy's estate, that Mr Lumumba's "assertion of ownership becomes nothing but a vacuous claim".

[21] It may be that that final statement was a strong one in the circumstances, but placed in context, it should not be understood to be a declaration of ownership of the land. The learned Resident Magistrate was aware that the court had not been asked to declare ownership. He, at page 2 of his judgment, correctly identified the issue that was to have been decided. He said:

> "Although he did not receive any formal notice of the survey, the Defendant [Mr Lindsay] was present on the day of the

> survey. Purporting to exercise his right under section [29] the Defendant executed a notice of objection (Exhibit 2) and thereupon the surveyor acted as enjoined by section 29. That objection forms the basis of this action. **So, was the objection frivolous or *bona fide*?**" (Emphasis supplied)

Having identified the issue, the learned Resident Magistrate, after analysing the various issues of fact and law, reached a conclusion on that issue. He said at page 7 of his judgment, "[t]he Defendant was therefore within his rights to object to a survey which failed to acknowledge his proprietary rights".

[22] The phrases, "assertion of ownership becomes nothing but a vacuous claim" and "failed to acknowledge his proprietary rights", we accept, would give the impression that the learned Resident Magistrate had decided Mr Lumumba had no proper claim and that Mr Lindsay had proprietary rights. Those statements were not matters to have been decided by the learned Resident Magistrate and to that extent, he would have been in error. What he should have said, is that Mr Lindsay had a claim to a proprietary right and "was therefore within his rights to object to a survey".

[23] The learned Resident Magistrate's unfortunate phraseology should, however, not have given rise to an appeal, as he did not attempt to define what those rights were. Had the parties been properly advised, they would have been aware of the fact that, to the extent that the learned Resident Magistrate went beyond his remit in his comments, those comments should not be considered as being a part of his decision. His decision was that Mr Lindsay was within his rights to object to the survey. We find that that decision was, based on the authorities cited above, correct.

Conclusion

[24] Based on the findings of the learned Resident Magistrate, Mr Lindsay, although not having been served with a notice of the survey, had, through his mother's interest, and through his, and, with his permission, his son's occupation of the land, a genuine belief that he had an interest in the land.

[25] Following the learning in **Buchanan v Irving** and a reading of section 29 of the Land Surveyor's Act, it is implicit in the learned Resident Magistrate's findings, that Mr Lindsay's objection to the survey was, therefore, made on the basis of a genuine claim to a portion of the land, made in good faith and was neither wrongful nor unlawful. In our view, he correctly gave judgment for Mr Lindsay.

[26] We wish to make it clear, however, that neither the learned Resident Magistrate nor this court has decided the question of ownership of the land. It may well be that Mr Lindsay's claim is not well founded, that is not for us to decide. Even if it is later decided that it was not well founded, that will not mean that the objection was a frivolous one, in the context of the Land Surveyors Act. The parties, if they cannot resolve the matter of ownership between themselves, will have to pursue other litigation in order to conclude it.

[27] It is for those reasons that we ruled that the appeal is dismissed, the judgment of the learned Resident Magistrate is affirmed and there would be no order as to costs.