[2010] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 20/2006

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN	**DOREEN PHILLIPS**	**APPELLANT**
AND	**LOUISE EWAN**	**RESPONDENT**

Mrs Janet Taylor instructed by Cecil July for the appellant

Oswald James instructed by Donovan Foote for the respondent

28 January and 4 June 2010

PANTON, P

[1] I have read the judgment of my brother Morrison JA and agree with his reasoning and conclusion. I have nothing further to add.

MORRISON JA:

[2] This is an appeal from a judgment given on 6 April 2005 by Her Honour, Mrs Marlene Malahoo-Forte in the Resident Magistrate's Court for the parish of St Elizabeth. At the conclusion of the hearing of the appeal on 28 January 2010 it was announced that the appeal would be dismissed and the judgment of the learned Resident Magistrate affirmed, with costs

to the respondent, fixed at $15,000. These are the promised reasons for that judgment.

[3] In this matter, the respondent sought an order for recovery of possession of a house and land occupied by the appellant at Brompton District in the parish of St Elizabeth. The respondent served notice to quit dated 13 July 2001 on the appellant, who was described in the notice as a tenant at sufferance, and in due course instituted proceedings for recovery of possession against her when she refused to vacate the premises.

[4] The appellant in her defence denied that she was a tenant and asserted that she had bought the parcel occupied by her from the respondent's late husband, Mr Joslyn Ewan, in 1981 and had been in occupation of it since that time. She also asserted that when she bought the land there had been a one room building on it and that she had built the house currently occupied by her on the land, incorporating the original structure. By way of counterclaim, she claimed damages of $250,000 against the respondent for trespass to the land, alleging that the respondent and her relatives and hired hands had broken and entered her home, removed and replaced the locks on the doors and ransacked various rooms in the house.

[5] This is how the learned Resident Magistrate described the factual matrix out of which the litigation in this case had its origins:

> "The evidence led by both sides tells a very sad story, of a not so unpopular feature of Jamaican life. Both Plaintiff [the respondent] and Defendant [the appellant] shared a relationship with the same man (now deceased): the Plaintiff being the wife and the Defendant the girlfriend/baby mother; and based on the turn out of supporters during the trial there appears to be almost equal support for each side, by members of the community."

[6] The respondent's case was that the land in question was part of a larger parcel owned by her late husband and herself containing (by survey) some 14 ¼ acres. She produced and tendered in evidence a copy of the Certificate of Title registered at Volume 1164 Folio 325 of the Register Book of Titles dated 4 August 1981, which showed the names of Joslyn Ewan and Louise Ewan as "proprietors of an estate as joint tenants in fee simple" of the entire parcel of land. At the time when the land was purchased, the respondent told the court, there was an old board house on it, which was the house in which she still lived. There was a second house on the land, which had been built by her husband and herself and which was rented to tenants from time to time. The appellant was the third tenant to occupy that house, the late Mr Ewan having rented it to her some time in the 1980s.

[7] The respondent discovered at some point thereafter that her husband and the appellant "were in a relationship" (as a result of which, the respondent said, she and the appellant "did not get on well" while her husband was alive). However, the appellant remained in the house and in due course gave birth to a child who carried the late Mr Ewan's surname, although, the respondent said, "When I asked my husband he said he didn't own it" (sic). Mr Ewan died in 2001 and was actually buried (over the appellant's objection) on the disputed parcel of land. Thereafter, the appellant remained in possession of the house, keeping it locked up, even after she herself had actually moved out some time in 2001 as well. The respondent testified that she received no rent from the appellant after Mr Ewan died and that, although she had given the appellant notice to quit the premises, the appellant had refused to leave, telling the respondent that she would have "to take her to court".

[8] The respondent called two witnesses, both of whom supported her in saying that the appellant was at all times a tenant of the part of the property which she occupied and that she had had no part in the extension to the house in which she lived, which had in fact been done by Mr Ewan in his lifetime.

[9] The appellant gave a significantly different account of the circumstances in which she came to the land in question and of her

interest in it, stating that she had purchased an acre "more or less" from the late Mr Ewan in 1981 for $150,000, that that was where she had lived ever since then and that her 17 year old daughter Doreen (who was Mr Ewan's child) had been born "right here at the one room". In answer to the question whether she had ever paid rent in respect of the one room structure occupied by her, she responded emphatically, "Not even one cent. How can I pay rent and I did pay for the house?" She had, she testified, made additions to the one room structure and she produced and tendered in evidence a number of receipts (11 in all) for various items of building material purchased by her for this purpose. There were several others which she had been unable to find because her house had been burgled. She had had no problems with the respondent before Mr Ewan died.

[10] The appellant commenced giving her evidence on 17 March 2004, but when the adjournment was taken on that day she was still being examined in chief. When the matter resumed some three weeks later on 7 April 2004, the appellant now produced and tendered in evidence what purported to be a Duplicate Certificate of Title dated 11 March 1987 and registered at Volume 1204 Folio 784 of the Register Book of Titles in the name of Joslyn Ewan, in respect of a parcel of land described (by estimation) as "Fourteen acres more or less", being land part of "Warlodge" in the parish of St Elizabeth. The appellant testified that the

late Mr Ewan had given her this certificate of title (which I will refer to as "the second certificate of title") about one month before he died in 2001, telling her that this was the title for the parcel of land on which she lived. Under the rubric "Incumbrances referred to" on the front page of the second certificate of title, the following notation appeared:

> "One (1) acre of land off this parcel with one (1) bedroom house thereon sold by me to Doreen Phillips. The land touches the Brompton to Cotterwood to Fyffes Pen main road. The land was sold from 1981 before this title was registered.
>
> (Sgd) Joslyn Ewan
> JOSLYN EWANS
>
> (Sgd) S. Lewis.
> WITNESS"

[11] As will be seen above, this notation on the face of the second certificate of title produced by the appellant purported to have been signed by 'Joslyn Ewans' in the presence of one "S. Lewis". It appears from the record of appeal that, by letter dated 21 April 2004, in response to an enquiry made by the court itself by telephone, the National Land Agency ("the NLA"), over the signature of the Senior Deputy Registrar of Titles, advised as follows:

> "Reference is made to our telephone conversation of even date (Nembhard/Williams).
>
> We have perused the copy of Volume 1204 Folio 784 faxed by you on the 17th instant. The entry

> made on the duplicate Certificate of Title was not endorsed by the Office of Titles. The entry is of no legal effect as only the Registrar of Titles can make entries on Certificates of Title".

[12] While the precise status of this letter is not at all clear from the record (it certainly does not appear to have been marked as an exhibit), no objection seems to have been taken to it and indeed, on appeal, some reliance was placed on it by the appellant herself (see para. [16] below). I therefore consider that it can be treated without controversy as an agreed part of the record of appeal.

[13] The appellant also called witnesses, two of whom testified to having done construction work on the one room house at her request and two police officers who testified to having gone to the house at the request of the appellant in connection with the ongoing dispute between her and the respondent over the property and, in particular, an incident in which the locks to the house had been changed.

[14] Although counsel on both sides made extensive submissions on the law to the Resident Magistrate, when all the evidence was in, she took the view, unexceptionably, that "the applicable law will depend on which facts are found by the Court, because the law does not operate in a vacuum". In this regard, she obviously considered the question of the circumstances in which the appellant had come to be put in possession

of the land in dispute as paramount and this is how she resolved the differing accounts disclosed by the evidence:

> "I disbelieve the Defendant when she said that she bought the land in question from the Plaintiff's deceased husband. I find that she took possession as tenant, but that she later developed an intimate relationship with the Plaintiff's husband and bore him a child. I could understand if were [sic] staking her claim on that basis; but she did not do so. Instead, I find that she contrived a defence about purchasing the land. From her demeanour in the witness box, it was clear that she was being untruthful. I was left with no doubt that she was rehearsed, without appreciating the significance of what she was told to say. I note that when her evidence was not according with the rehearsal, her Attorney at Law became so upset with her, which also tells an interesting story.
>
> The Defendant initially testified that all of the documents that were given to her for the land she allegedly bought were stolen, at the time when her house was broken into. That was to give the Court the impression that the Plaintiff had in fact stolen those alleged documents. She was adamant that she had nothing left to show that she had purchased the land. Then the trial was adjourned. On resumption, she presented a title, which she claimed was given to her by the Plaintiff's husband, who had long died. Of course I cannot help but wonder from whence it came. That title is highly questionable in light of evidence. I reject it as relating to the land in question. What is even more interesting is the endorsement of the face of that title document, which attempts to record this so called interest/purchase of the Defendant. Having seen the Defendant and having had the opportunity to assess her demeanour and her level of intelligence, I don't believe that she could have

> secured such a document, without the assistance of someone with legal knowledge, but I will say no more on that."

[15] The learned Resident Magistrate then went on to consider the question of the annual value of the land (in the light of section 96 of the Judicature (Resident Magistrates) Act) and, having determined that it was below the statutory maximum for her jurisdiction of $75,000, she accordingly found for the respondent on the basis that, as joint tenant with her deceased husband, the right of survivorship applied to entitle her to ownership of the land. She expressly rejected the appellant's case, describing her defence as "contrived" and the evidence given in support of it as "incredible".

[16] The appellant filed a number of grounds of appeal (10 originally, supplemented by four additional grounds). These grounds challenged the Resident Magistrate's findings with regard to the credibility of the appellant and her witnesses, her rejection of the second certificate of title as fraudulent, her imposition of "her own moral views on the case" and her failure to deal adequately with the question of severance of the joint tenancy. The appellant further complained that the Resident Magistrate had failed to investigate properly or at all both certificates of title produced by each party, despite the evidence which suggested that

they were in respect of the same parcel of land and that her findings were not in keeping with the evidence.

[17] When the appeal came on for hearing, Mrs Janet Taylor, who had not appeared for the appellant in the court below, concentrated on what she submitted was the legal consequence of the late Mr Ewan having caused the land to be "reregistered" in his name alone on the second certificate of title in 1987. By this act, she submitted, he had effected an act of severance of the joint tenancy upon which the land was previously held with the respondent, thus defeating the respondent's right of survivorship. The deceased had therefore validly alienated a part of the land to the appellant as she alleged. In this regard, the letter of 21 April 2004 from the NLA spoke only to the invalidity of the purported endorsement, but did not suggest that the second certificate of title itself was not genuine.

[18] Mrs Taylor referred us to a number of authorities on severance, including ***Williams v Hensman*** (1861) 70 ER 862, which emphasized that severance can take place in any one of three ways, viz., by the act of one joint tenant operating upon his own share, by mutual agreement or by a course of dealing. She also referred us to ***Gamble v Hankle*** (1990) 27 JLR 115, a decision of Wolfe J, as he then was, in which it was held that a deed of gift executed by one joint tenant in favour of a third party was an

act of severance which had created a tenancy in common and thus extinguished the right of survivorship of the other joint tenant.

[19] With the greatest of respect to Mrs Taylor's spirited efforts on behalf of the appellant, I consider these submissions to be wholly theoretical in the context of the clear evidence and the Resident Magistrate's findings in this case. In order to get to the point Mrs Taylor makes, it is first necessary to get past the question of the validity of the second certificate of title, since it is the act of obtaining this document which Mrs Taylor relies on as an act of severance. In this regard, it appears to me that there is much to be said for the learned Resident Magistrate's view that that document was "highly questionable in light of the evidence".

[20] There is, in the first place, its unexplained appearance after a three week adjournment, the court having been given the distinct impression by the appellant before the adjournment that she had already produced all the documentary evidence in her possession. Then there is the curious fact that, while the certificate of title produced by the respondent referred to the acreage of the land contained in it as having been established by survey ("Fourteen Acres Three Roods Twenty-six Perches and Eight-tenths of a Perch") and annexed the surveyor's diagram to the title, the second certificate of title could do no better than to describe the land as "containing by estimation Fourteen Acres more or less". It is not

clear to me why, assuming, as the appellant submits, that both certificates were in respect of the same land, the second certificate of title should not have utilised the same (more precise) formula in describing the land.

[21] But even if it is correct, as Mrs Taylor points out, that the NLA letter of 21 April 2004 did not say in so many words that the second certificate of title had not been validly issued, it is clear beyond doubt that the operative part of the document upon which the appellant essentially relies, that is, the purported endorsement, supposedly signed by the late Mr Ewan, of a sale to her of an acre of land "off this parcel", was not made by the Office of Titles and is, as the NLA letter states, "of no legal effect". It seems clear in the circumstances that that entry could only have been made with the fraudulent intention of representing the second certificate of title to be something which it was not, that is, as a document evidencing the interest in the disputed property claimed by the appellant.

[22] So that at the end of the day, I do not think that the act of obtaining the second certificate of title, in the light of its uncertain provenance, can be relied on as an act of severance by the absent hand of the late Mr Ewan, it being highly questionable, to put it mildly, whether it was in fact his act at all.

[23] But further, and quite apart from this, the appellant faced the substantial obstacle on appeal of how to overcome the learned Resident

Magistrate's clear finding that the appellant's evidence given before her was deliberately untruthful. It is no doubt in recognition of this obstacle that Mrs Taylor sought to concentrate her efforts primarily on the 'legal' point that her submissions on severance represented. But, those efforts having failed, the case turned, as the Resident Magistrate perceived, purely on questions of fact and it seems to me that absolutely no basis has been shown to support the contention that her findings were anything other than fully in keeping with all the evidence in the case.

[24] In respect of the complaint that the Resident Magistrate imposed "her own moral values" on the case, the appellant has not demonstrated what those views were or how they were brought to bear on how the case was determined. Neither has it been shown that the Resident Magistrate's determination of the annual value of the disputed property was flawed in any way.

[25] These are my reasons for concurring within the decision of the court which was announced on 28 January 2010.

PHILLIPS JA

I too agree.