[2017] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 9/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**CLIVE ROYE**	**APPELLANT**
AND	**JOYCE ELLIS**	**RESPONDENT**

Debayo A Adedipe for the appellant

Miss Tamara A Greene instructed by Cecil R July for the respondent

12 November 2015 and 26 September 2017

BROOKS JA

[1] I have read, in draft, the reasons for judgment of my learned sister McDonald-Bishop JA. They accurately reflect my reasons for agreeing to the decision made in this matter.

MCDONALD-BISHOP JA

[2] This appeal involves a consideration of the statutory power of a judge of the Parish Court (formerly Resident Magistrate) to transfer civil proceedings from the

Parish Court (formerly Resident Magistrate's Court) to the Supreme Court of Judicature, pursuant to section 130 of the Judicature (Parish Courts) Act (formerly the Judicature (Resident Magistrates) Act) ("the Act").

[3] The appeal is brought by Mr Clive Roye ("the appellant") against an order made by the learned judge of the Parish Court for the parish of Saint Elizabeth ("the learned judge"), on 13 January 2012, by which she transferred to the Supreme Court proceedings instituted by Ms Joyce Ellis ("the respondent") against the appellant. Two separate but identical proceedings were brought by the respondent by way of plaints, numbered 162/2008 and 483/2008, filed on 6 March 2008 and 17 September 2008, respectively, in which she sued in her personal capacity in the former and as agent for Errol and Sandra Parry ("the Parrys") in the latter. The two plaints were consolidated for hearing before the learned judge but during the course of the hearing, and without any input from counsel appearing for the parties, she transferred the consolidated suit to the Supreme Court, of her own motion. The order was purportedly made pursuant to section 130 of the Act.

[4] On 12 November 2015, we heard the appeal and, following the submissions of counsel, we made the following orders:

> "(1) The appeal is allowed.
>
> (2) Order of the Learned Resident Magistrate made on 13th January 2012 to transfer the matter to the Supreme Court pursuant to section 130 of the Judicature (Resident Magistrates) Act is set aside.

(3) Matter is remitted to the Learned Resident Magistrate [now Judge of the Parish Court] to consider the reports of Christopher Grants & Associates, Commissioned Land Surveyors dated 1st June 2010 and 2nd May 2011 and the plans attached thereto, pursuant to section 101 of the Judicature (Resident Magistrates) Act.

(4) Costs to the appellant in the sum of $30,000.00."

[5] We promised then to put the reasons for our decision in writing. This is in fulfilment of that promise.

The proceedings in the Parish Court

[6] The properties being claimed by the respondent are situated at Underhill District, Bull Savannah, in the parish of Saint Elizabeth. The property, subject matter of plaint no 1409/2008, is registered in the name of Joyce Rochester at Volume 1409 Folio 556 of the Register Book of Titles. The property which is the subject matter of plaint no 483/2008 is registered at Volume 1416 Folio 262 in the names of the Parrys. The appellant is the registered proprietor of adjoining property, registered at Volume 1422 Folio 617 of the Register Book of Titles.

[7] The respondent's primary complaint in both suits was that sometime in December 2007, the appellant wrongfully entered lands owned by her and the Parrys and without permission demolished a fence, "thereby creating a nuisance and trespass" and causing them to suffer "loss and damage".

[8] In so far as is material, the respondent sought the following remedies in both plaints:

> "1. A declaration that the [appellant] is not entitled to enter or cross the [respondent's] property.
>
> 2. An injunction to restrain the [appellant] whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the [respondent's] said property for any purpose.
>
> 3. An order that the [appellant] do forthwith reconstruct the fence that was demolished by the [appellant] on the [respondent's] said property.
>
> 4. Damages for trespass.
>
> 5. Damages for nuisance."

[9] In response, the appellant on 20 May 2009, filed a defence and counterclaim to the plaints, denying the respondent's claim. The appellant alleged that the respondent entered onto his property, sometime in November and continuing to December 2007, and erected a fence, without his consent. He averred that the portion of the property, being claimed by the respondent and on which the fence was erected, is owned by him as evidenced by his certificate of title. He claimed, among other things, damages for trespass as well as a perpetual injunction against the respondent.

[10] On 10 September 2009, before any evidence had been taken, the learned judge heard arguments from counsel appearing for the parties and thereafter, with their consent, referred the matter to Mr Christopher Grant, commissioned land surveyor. The salient terms of the referral were as follows:

"This matter be referred to Mr. Christopher Grant, Commissioned Land Surveyor to carry out the following directions and ascertain and report on the several matters and things referred to him as hereinafter stated AND to make and file a written report in the Court of such survey as he has made along with a plan thereof as a result of having carried out this reference:

1. That the parties hereto do provide the surveyor with copies of all deeds documents titles and diagrams in their possession in respect of the land they respectively claim

2. That the parties point out to the surveyor where the respective acts of trespass allegedly took place

3. That the parties point out to the surveyor the boundaries of the land that they respectively claim

4. That the surveyor determine whether the land claimed by the plaintiff forms a part of the land claimed by the defendant

5. That the surveyor determine and report whether the land claimed by the parties relates to their respective certificates of title..."

[11] On 1 June 2010, Mr Grant submitted his written report to the court. Subsequently, counsel for the parties were permitted by the learned judge to make submissions on the report. On 10 February 2011, Mr Grant also gave sworn evidence in which he sought to clarify the findings contained in his report and the procedures adopted by him in coming to his conclusion.

[12] In that report, Mr Grant concluded that based on the boundaries claimed by the appellant, the parcel of land claimed by the respondent is "partially dually registered" and that the parcel of land registered in the names of the Parrys is "dually registered at Volume 1416 Folio 262 and Volume 1422 Folio 617". The report confirmed that the lands owned by the appellant were previously registered at Volume 1164 Folio 393 in the name of Berita Roye but that that certificate of title was cancelled and the new certificate of title, held by the appellant, was subsequently issued. The report showed that the lands owned by the appellant had been brought under The Registration of Titles Act before the lands owned by the respondent and the Parrys.

[13] Mr Grant made no specific reference in that report to the location of the fence, which was the subject matter of the dispute. Despite that omission, following the submissions of counsel and the evidence of Mr Grant, the learned judge endorsed the record thus: "The report of Christopher Grant is confirmed and accepted by court as such".

[14] Having confirmed and accepted that report with the omission in relation to the fence, the learned judge then referred the matter back to Mr Grant with a directive that he returned to the property to identify the location of the fence and to prepare a further report and plan illustrating the area in dispute.

[15] In compliance with the order of the court, on 30 April 2011, Mr Grant revisited the disputed property and following on that, he prepared and submitted to the court a further report, dated 2 May 2011. In this report, he opined that the area of the lands

on which the fence was constructed by the respondent and subsequently removed by the appellant was dually registered in the names of Errol and Sandra Parry (the respondent's principals) and in the name of the appellant. The survey, therefore, among other things, did not establish that the fence in question was located on lands in the name of the respondent herself, which would have had an implication for her personal claim against the appellant on plaint no 162/2008 and his counterclaim in relation to that plaint.

[16] The learned judge, upon receiving this follow-up report with all these issues arising for resolution, ordered that the matter be transferred to the Supreme Court for hearing.

The reasons for the order

[17] The learned judge gave two undated written reasons for making the order. Both were comprised in the transcript of the proceedings submitted to this court. It is not clear, on the face of them, which is first in time and also which is to be treated as the formal reasons for the decision. In the face of that uncertainty and given the relevance of the reasons of the learned judge to the ultimate determination of the question before us as to whether she had acted judicially in transferring the matter, it was considered prudent to consider the main aspects of both sets of reasons she gave for her decision. They are set out below.

[18] In the reasons for the decision under the heading, "FOR TRESPASS" (which was served on counsel), the learned judge explained her decision in these terms, in part:

> "FOR: TRESPASS
>
> On the day of 12th day of January, 2012, an order was made to transfer the instant matter to the Supreme Court of Judicature of Jamaica pursuant to section 130 of the Judicature ([Parish] Courts) Act, which is set out below:
> ...
>
> There was no evidence heard in the matter, however lengthy written submissions were filed by counsel with a view to determining the real issue to be tried. The order was made declining jurisdiction in error and this matter has not yet been physically transferred to the Supreme Court. If the reviewing court agrees the matter should remain in the [Parish Court] for hearing, then the correct determination as to jurisdiction can be made."

[19] The second set of reasons (which were not served on counsel but were seen by them at the hearing at the appeal, at the instance of this court) were, in so far as is immediately relevant, in these terms:

> "FOR: DUAL REGISTRATION OF TITLE
>
> On the day of 13th day of January, 2012, an order was made to transfer the instant matter to the Supreme Court of Jamaica pursuant to section 130 of the Judicature ([Parish] Courts) Act, which is set out below:
>
> ...
>
> There was evidence from one witness, Christopher Grant, commissioned land surveyor. His evidence was contained in a notebook which has just now been located. Counsel had been asked to provide their notes to supplement the record. No notes were provided.
>
> The matter involves the issue of dual registration of title. The submission of counsel for the plaintiff indicated that he would be challenging the title of the defendant as the disputed land is dually registered. I formed the view that the

> court was being asked to delve into issues surrounding the registration of title. As this court would not have the jurisdiction in law to decide such an issue, the order was made for the matter to be transferred."

The appeal

[20] The appellant, through his counsel, Mr Adedipe, argued before us four grounds of appeal as follows:

> "1. The learned [judge] erred in law in transferring the case to the Supreme Court (of her own motion) when she had already made a reference to a Commissioned Land Surveyor, confirmed and accepted the main part of his report after he testified in Court and referred the report back to him for him to conclude the task that had been assigned to him.
>
> 2. The learned [judge] erred in failing to recognize that the report of the Commissioned Land Surveyor, which she had already confirmed and accepted, and the further report consisted of material on the basis of which she could have disposed of the case.
>
> 3. The learned [judge] erred in failing to confirm and accept the further report of the Commissioned Land Surveyor.
>
> 4. The learned [judge] erred in failing to enter Judgment for the [appellant] on the question of liability (having regard to the fact that the addendum to the report showed that the wall was, in relation to this claim, on the land that was dually registered 1422/617 & 1416/262) and thereafter proceed to assess the damages that ought to have been awarded to the [appellant]."

Discussion and findings

[21] Having examined the appellant's four grounds of appeal in their entirety, it was recognised that there was one simple but fundamental question for consideration by

this court which would be dispositive of the appeal and, that is, whether the learned judge erred in ordering the transfer of the matter to the Supreme Court for determination, in the circumstances she did. The resolution of this question did give rise to a consideration of several subsidiary issues, such as the factual and legal issues that arose on the case that was before the learned judge for consideration; her treatment of those issues within the context of the applicable law and the reasons she gave for the decision she made to transfer the matter to the Supreme Court.

[22] At the time of the order of the learned judge, section 130 of the Act read:

> "130. No action commenced in any Court under this Act shall be removed from the said Court into the Supreme Court by any writ or process, unless the debt or damage claimed shall exceed twelve thousand five hundred dollars; and then only by leave of the Magistrate of the Court in which such action shall have been commenced, in any case which shall appear to the said Magistrate fit to be tried in the Supreme Court, and subject to any order of the Supreme Court upon such terms as he shall think fit."

[23] On reviewing this section of the Act, it is clear that it does give a judge of the Parish Court a discretionary power to transfer a case before her to be heard in the Supreme Court. The discretion is, however not absolute, as Mr Adedipe rightly contended. It is required to be exercised judicially, and therefore not capriciously or arbitrarily. It is for this reason, that this court is permitted by law, to interfere with the exercise of the discretion of the learned judge that is conferred on her by the section where it is clear that she relied on a wrong principle of law, incorrectly applied a correct principle, or failed to consider relevant factors; or if the decision, if left undisturbed, will lead to injustice. This is in keeping with the oft-repeated admonition of Lord Diplock in

Hadmor Productions Limited v Hamilton [1983] 1 AC 191, which has been applied consistently by this court. In so far as is immediately relevant see, for instance, **George Graham v Elvin Nash** (1990) 27 JLR 570, a case in which the exercise of a judge's discretion under section 130 of the Act was under consideration.

[24] The question whether the learned judge properly exercised her discretion within the provisions of section 130 necessitated firstly an identification and examination of the core issues that had emerged before her for consideration on the claim, defence and counterclaim.

[25] The parties had a dispute concerning the ownership of a parcel of land on which a fence was erected by the respondent and later demolished by the appellant. They each claimed to be the registered owner of the portion of land on which the fence was erected and so alleged, among other things, trespass against each other. It goes without saying then, that the identification of the disputed area was critical to the resolution of the dispute between the parties, even if, at first blush, it could properly be regarded as a dispute as to title. Whatever nomenclature could be ascribed to the suit, the irrefutable fact is that the learned judge could not have resolved the matter in controversy between the parties without a surveyor's identification of the parcel of land in dispute relative to the parties' certificates of title. It was a case in which a reference to a commissioned land surveyor was, therefore, absolutely necessary.

[26] Mr Adedipe, in making his submissions on behalf of the appellant, referred the court to section 101 of the Act and to relevant case law, which he contended have

established that the learned judge was empowered to make the reference, as she did, to the commissioned land surveyor. Section 101 of the Act reads as follows:

> "101. **In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose of determining the matter in issue, the [Judge], if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor,** or, with the consent of both parties, to some other fit person or persons whom he shall nominate; **and the person or persons so appointed shall, under the control and direction of the Court, make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands, or the right of way or other easement in dispute, or such other matter at issue as aforesaid,** and shall ascertain and settle the said boundary line or right of way, or other easement or matter as aforesaid, and shall, if necessary, make a plan or diagram of the said lands, indicating the boundary line, or the right of way, or other easement or matter as aforesaid, and shall make a report thereof to the Court, and shall file the report in Court; and the Court shall, on a day to be appointed for that purpose take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear argument upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require:
>
> Provided, that the Court may refer back the report to the persons who made it, or to any other surveyor or person nominated as aforesaid, for a further report, with such instructions as the Court may think fit to give, and on the making of such further report the Court may proceed as it might have proceeded on the first report." (Emphasis added)

[27] As contended by Mr Adedipe, the learned judge was empowered by virtue of section 101 of the Act to refer the matter to a commissioned land surveyor. Miss Greene's contention, on behalf of the respondent, that section 101 of the Act is only

applicable in cases of boundary dispute could not be accepted in the face of the clear wording of the section. The section not only provides that matters arising under certain specified sections of the Act are referable but goes on to state that "any other suit where it may be desirable for the purpose of determining the matter in issue" is referable, if the judge thinks it expedient to make the referral. Although in this case, the parties consented, the learned judge could have made the referral without the consent of the parties (**Charles Swaby v Gerald Lyn** [2010] JMCA Civ 14 paragraph [21]).

[28] The learned judge, having invoked her power under section 101 of the Act, ought to have adhered fully to the procedural requirements laid out in that section. The complaint in this case by the appellant is that the learned judge failed to fully comply with the statutory requirements in treating with the case following on the referral to the surveyor. Mr Adedipe relied on the decision of this court in **Whitelock v Campbell** (1970) 12 JLR 67 in advancing the appellant's case that the learned judge failed to comply with the dictates of the statute in section 101 of the Act and therefore fell into error.

[29] Smith JA, in speaking on behalf of this court in **Whitelock v Campbell**, albeit within the context of a boundary dispute (properly so called), stated that:

> "The court is required to appoint a day for the purpose of considering the report. On that day either of the parties may take exceptions to the report. The court is required to hear argument upon the exceptions and "shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require". Here there is no provision made for the hearing of evidence. Even in relation to the exceptions taken, what the court is required to hear is

> arguments, not evidence. There is power in the proviso to refer the report back to the surveyor who made it or to any other surveyor for a further report, when the procedure to be followed is the same as on the first report.
>
> In my opinion, it is clear beyond question that the purpose of a reference under s 101 is to settle the dispute between the parties. The decision is the surveyor's. The confirmation of the report fixes the boundary lines as ascertained and settled by him. As Lucie-Smith, C.J., said in the passage in *Holmes v. Ricketts* [(1879), 2 Stephens' Repts. 1909], quoted above, this is a summary way of deciding the dispute. It seems to be the sensible and only way of deciding such disputes where the only question is the true boundary line and there are plans and/or diagrams from which this can be ascertained."

[30] This dictum of the learned judge of appeal would be applicable, with equal force, to any matter properly referred to a commissioned land surveyor under section 101 of the Act, even if not a boundary dispute, because the section is wide enough to cover all cases in which it is desirable for the matter in controversy to be referred to a surveyor.

[31] Mr Adedipe submitted that the learned judge not only had the power to refer the matter to a commissioned land surveyor under section 101 of the Act but that where the report had been filed, confirmed and accepted (as it was by the learned judge) that would have sufficed to determine the issue. Accordingly, he argued, the first report having been accepted by the learned judge, the only issue that remained to be determined was whether the area in which the alleged act of trespass is said to have occurred fell within or outside the land registered in the name of the appellant.

[32] Ms Greene submitted that that whilst section 101 of the Act does give the learned judge the power to refer a dispute to a commissioned land surveyor, the

learned judge could not have relied on this section solely to dispose of the case. According to her, the matter before the court involved issues of trespass, nuisance and title and so the learned judge would have been required to take all the evidence before disposing of the matter. In the circumstances, counsel contended, the learned judge did not err in transferring the matter to the Supreme Court without considering the report.

[33] Miss Greene's submissions could not be accepted in the glaring light of the statutory provision and the relevant authorities. The learned judge, having determined the issue that was in controversy between the parties, evidently regarded it as being expedient to refer the matter to a commissioned land surveyor. The parties consented to the referral. The learned judge could not be faulted for making the referral. So, the question to be resolved is what should have ensued upon her receipt of the report from Mr Grant.

[34] The record of the proceedings revealed that the initial report which was submitted by Mr Grant was, in fact, "confirmed and accepted by [the] court", after the hearing of submissions from counsel and after evidence was taken from him to clarify the report. With the report having been accepted and confirmed, the learned judge referred the matter back to Mr Grant, as she was empowered to do under section 101 of the Act, for him to determine, among other things, "where the respective acts of trespass allegedly took place" or to clarify any further issue that needed to be clarified" (as she stated in the referral).

[35] Having referred the matter back to the commissioned land surveyor to resolve the matters in dispute, the learned judge would have been required to consider the follow up report in the same way as the principal report and to proceed to treat with it in the manner prescribed by section 101 of the Act and as stipulated by this court in **Whitelock v Campbell**. In specific terms, she was obliged to appoint a day for the purpose of considering the follow up report and to allow either party or both to take exceptions to the report, hear arguments upon the exceptions, if any, and then allow or disallow the exceptions or confirm the report as the justice of the case required. Instead, she transferred the matter to the Supreme Court without any opportunity given to counsel to take exceptions if it was considered necessary to do so, and or to make submissions regarding the follow-up report. The fact that the survey did not disclose that the fence was built on lands comprised in the respondent's certificate of title, as distinct from that of her principals, would have warranted consideration at that stage. The finding of the commissioned land surveyor could have disposed of that particular plaint, at least, once the report was confirmed and accepted by the learned judge. There would have been no proper basis for the proceedings emanating from that plaint to be transferred to the Supreme Court for determination.

[36] The learned judge, by transferring the matter without any consideration of the report, would have failed to correctly apply the relevant law in treating with the report and the case before her and by so doing would have been plainly wrong in exercising her discretion under section 130 of the Act. This finding was sufficient, in and of itself, to justify interference by this court with the exercise of her discretion.

[37] Quite apart from this error on the part of the learned judge, however, the reasons advanced by her for transferring the matter are themselves not free from difficulty and also lent themselves to a further finding that she did not exercise her discretion judicially.

[38] As detailed in paragraph [18] above, in one set of reasons the learned judge stated that she had made an error, in that, no evidence was heard in the matter but that after" lengthy written submissions" by counsel to determine the real issue to be tried, the order was made declining jurisdiction. She gave no indication what had informed the view that she had no jurisdiction, particularly, in such circumstances where no evidence was taken. There was no evidence led of any matter on which she could have declined jurisdiction, without more. To the learned judge's credit, she did recognise her error in this regard and stated so in no uncertain terms. Her concession that she erred in law in declining jurisdiction and transferring the matter served to demonstrate that she, herself, had recognised that she had no proper basis on which to transfer the matter to the Supreme Court. On this basis alone she would have failed to exercise her discretion judicially but it did not stop there.

[39] The learned judge gave a second set of reasons for transferring the case as detailed in paragraph [19] above. Those reasons were set out under the heading, "DUAL REGISTRATION OF TITLE". Although the learned judge at no time expressly indicated that she had accepted the follow-up report that the location of the fence in issue was on dually registered lands, she, nevertheless, took the issue of dual registration into account in transferring the matter. She evidently made no attempt to

consider and treat with the report as required by law and then sought to examine the issue of dual registration within the context of the causes of action before her and the substantive law applicable to the issue, including section 70 of The Registration of Titles Act. Instead, her decision to transfer the matter was on the basis that the matter involved dual registration of titles and the fact that the respondent's counsel had indicated that he would be challenging the certificate of title of the appellant. She therefore formed the view that she was "being asked to delve into issues surrounding the registration of title". This was an obvious misapprehension on the part of the learned judge that led her into error.

[40] As Mr Adedipe argued, counsel for the parties had no opportunity to address the learned judge, for instance, on the applicability and effect of section 70 of The Registration of Titles Act on the issue of dual registration and the issues in dispute between the parties before the order for transfer was made. Miss Greene conceded that given the issue of dual registration that arose on the surveyor's report, section 70 of The Registration of Titles Act would have been relevant to the determination of the dispute. For completeness, it is considered useful to set out section 70 of The Registration of Titles Act. It reads:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, **the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such**

> **incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title**, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument." (Emphasis added)

[41] In addition to section 70, there is also section 68 of The Registration of Titles Act, which provides:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is

> seised or possessed of such estate or interest or has such power."

[42] It is therefore clear that in the absence of any allegation of fraud that was pleaded in the proceedings that were being heard, the issues that were before the learned judge for consideration did not require her to delve into any issue surrounding registration of title in respect of the disputed property in question. A claim was brought in tort against the appellant, and the appellant had, in turn, brought a counterclaim also in tort. The question of dual registration, which was a question of substantive law, would have been relevant to the question of liability, which was for the learned judge to consider and make a determination. She failed to do so. The learned judge was therefore wrong to exercise her discretion under section 130 of the Act on the mere basis that the matter involved dual registration of title and on the mere irrelevant assertion of counsel for the respondent made to her that a challenge would be brought against the appellant in respect of his certificate of title.

Conclusion

[43] We concluded that the learned judge failed to give the requisite consideration to the surveyor's report in order to determine the matters in controversy between the parties as was required of her under section 101 of the Act. She also invoked section 130 of the Act and transferred the matter to the Supreme Court, without sufficient regard to the law governing the material issues that were before her for consideration and on the mistaken belief that she had no jurisdiction to hear the case. In all the circumstances, the learned judge erred in law in exercising her jurisdiction under

section 130 of the Act. Accordingly, she failed to act judicially. There was thus a sound basis for this court to disturb the exercise of her discretion.

[44] It was for all the foregoing reasons that I concurred in the decision of the court that the appeal should be allowed. However, it was not considered appropriate and convenient for this court to deal with the matter and to enter judgment for the appellant on liability as posited by counsel on his behalf, given the stage where the proceedings had reached in the court below and the issues that remained for ventilation. For these reasons, the consequential orders detailed at paragraph [4] were made.

F WILLIAMS JA (AG)

[45] I too have read in draft the reasons for judgment of McDonald-Bishop JA. They accurately reflect the reasons for our decision that the appeal should be allowed. I have nothing useful to add.