[2016] JMCA Civ 60

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 23/2014

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**MELVIN CLARKE**	**APPELLANT**
AND	**LENIVE MULLINGS-CLARKE**	**RESPONDENT**

Leonard Green and Miss Sylvan Edwards instructed by Chen, Green & Co for the appellant

Samuel Smith for the respondent

12 and 15 October 2015 and 20 December 2016

MORRISON P (AG)

[1] I have read the draft reasons for judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing to add.

MCDONALD-BISHOP JA

Introduction

[2] This is an appeal against the decision of the Resident Magistrate (now Parish Judge) for the parish of Saint Elizabeth who, on 28 March 2014, granted an order for

recovery of possession, in favour of the respondent, in respect of a parcel of land situated at Barbary Hall, in the parish of Saint Elizabeth ("the property").

[3] On 12 and 15 October 2015, we heard the appeal and made the following orders following the submissions of counsel:

> "1. The appeal is allowed.
>
> 2. The order for possession made by the learned Resident Magistrate for the parish of St. Elizabeth on 28 March 2014 is set aside.
>
> 3. The costs of the proceedings before the Resident Magistrate to the appellant to be agreed or taxed.
>
> 4. The costs of the appeal to the appellant fixed at $15,000.00."

[4] We promised then to give the reasons for our decision at a later date. As promised, these are my reasons for concurring in the decision of the court.

The background facts

[5] The parties met in or around 1976 and got married on 10 December 1977. They cohabited for 30 years in the dwelling house constructed on the property, until their separation in 2007. They eventually divorced on 4 November 2011. Prior to the divorce, the respondent had removed from the property, leaving the appellant in occupation of it. The respondent made several attempts to get the appellant to vacate the property, which all proved futile.

[6] On 26 September 2011, the respondent commenced proceedings against the appellant to recover possession of the property, pursuant to section 89 of the

Judicature (Resident Magistrates) Act ("the Act"). In her particulars of claim, she averred:

> "1. The [respondent] claims in her own right and as agent for her two children, Rudyard and Patrice Gordon, as joint owners of a parcel of Land situated at Barbary Hall known as Walton in that [sic] parish of Saint Elizabeth with a dwelling house thereon butting South by a property leading from Williamsfield to the Main Road, North and East by property belonging to Maud Mullings and West by property, which land contains by estimation one quarter of an acre more or less.
>
> 2. By virtue of her marriage to the [appellant], [sic] the 10th December 1977, the [respondent] extended a licence to the [appellant] to reside with her in the dwelling house on the said property, but the [appellant] became physically abusive to the [respondent], who as a consequence was forced to vacate said property in 2007 to reside with relatives, and is now in an advanced stage of the dissolution of said marriage.
>
> 3. Despite numerous demands made against the [appellant] by the [respondent] to vacate the said property and deliver up possession thereof, the [appellant] continues to occupy said land illegally and wrongfully without title or any right to possession.
>
> 4. The [respondent] now seeks an order from this Honourable Court under and by virtue of Section 89 of the Judicature (Resident Magistrates) Act for possession of the said land to be given up to the [respondent] forthwith or within such time as the Honourable Court deems just."

[7] The respondent's basic claim, therefore, was that the appellant had no legal and/or equitable rights to the property and that he has occupied the property as a mere licensee.

[8] The record of proceedings reflects that at the commencement of the trial, Mr Green, counsel for the appellant, "raised three (3) points in *limine".* However, only the

following two points were specifically outlined by the learned Resident Magistrate in the notes of evidence in these terms:

> "Firstly, he submitted that the circumstances cannot be grounded in a claim for Recovery of Possession as the parties are husband and wife. He submitted further that the house which forms the subject matter of this claim is a family home and is so described under the Property (Rights of Spouses) Act. The [appellant] would therefore, in Law, be a joint owner of the property and is not a tenant/licensee in these circumstances.
>
> Secondly, that there is no Jurisdictional basis for this Application to be placed before the Resident Magistrate's Court as there is no statement as to the value of the property."

[9] Counsel for the respondent, Mr Smith, contended, in response to the preliminary objection, that the property would not fall within the definition of "family home" under the Property (Rights of Spouses) Act ("PROSA") because the land was bought by the father of the respondent and eventually passed to the respondent through her mother as a gift. He contended further that the respondent's father built the house on the land for her and her two children at a time when the respondent had not yet met the appellant and so the appellant could have no legal or equitable interest in the property.

[10] Having heard the submissions of counsel for the parties in respect of the preliminary points raised by Mr Green, the learned Resident Magistrate ruled:

> "The Court formed the view that it could not make a determination on these issues without hearing the evidence of the parties involved. The Court therefore ruled that the trial of the matter ought properly to proceed."

[11] She then embarked on the trial of the matter, with the preliminary points raised by Mr Green subsequently adopted by him as constituting the appellant's defence to the action. At the foundation of the appellant's defence, therefore, would have been the jurisdictional issue arising from the absence of a statement of the annual value of the property in the respondent's particulars of claim, as pointed out by Mr Green.

The evidence at trial

The respondent's case

[12] The respondent gave evidence at the trial and also called one witness, Ms Maudlyn Sylvia Roach, a justice of the peace. The critical aspect of the respondent's evidence concerning the ownership of the property was that on 1 March 1968, her father, Herbert Mullings, along with three other men, bought property located at Walton in the parish of Saint Elizabeth, registered at Volume 942 Folio 346 of the Register Book of Titles, as tenants in common. The land was subsequently subdivided and her father received lot number eight, which the subdivision plan reflects as amounting to 4 acres. On 7 May 1969, her father sold the 4 acres of land to her mother, Maud Mullings, and on 4 May 1988, he purported to give her mother "title" for the property by way of a common law indenture. Of the 4 acres that her mother received, her mother gave her and her children a quarter (¼) of an acre by way of gift, which is the property, the subject matter of the action. On 13 October 1975, she also purportedly received "title" from her mother, for the property, by way of a common law indenture.

[13] Prior to meeting the appellant, her father, in 1975, built a dwelling house on the property for her and her two children and upon her marriage to the appellant, she gave permission for him to reside with her there. The appellant neither assisted with the acquisition of the property nor with the construction of the dwelling house on the property.

[14] The essence of Ms Roach's evidence on behalf of the respondent was that she knew the history of the ownership of the land and that she, in her capacity as a justice of the peace, had witnessed the signing of the common law indenture, purportedly transferring the land from the respondent's mother to the respondent. She testified that she knew the land to have been owned by the respondent.

[15] The common law indenture, which the respondent said was given to her by her mother, was presented at the trial but was not admitted into evidence based on the objection of Mr Green that, among other things, it was unstamped.

The appellant's case

[16] The prominent features of the appellant's case were as follows. He has known the respondent since 1974 and that contrary to the respondent's assertions, he was the one who had purchased the property from the respondent's father. The receipt evidencing his purchase was witnessed by Ms Roach (the same justice of the peace who gave evidence for the respondent), but it was taken from him by the respondent. He constructed the dwelling house, bought material for the construction of it and also paid workmen during the course of construction. The respondent's father did not build

the house for her and the children. He also incurred expenses for undertaking improvement to the house (he produced several receipts for payments made for windows for the house). He also operated a business with the respondent and provided food for the household. He is not a tenant or a squatter but is statutorily entitled to an interest in the property by virtue of PROSA or, alternatively, by his acquisition of an equitable interest due to his contribution towards the original construction of the house, contribution to the family business and the substantial improvement to the house that he has made over the years.

The findings

[17] The learned Resident Magistrate found that the respondent had proven her case on a balance of probabilities and that she was entitled to recover possession of the property. She made the following order:

> "Upon hearing of this action at a Court holden this day, in the Resident Magistrate's Court for the parish of Saint Elizabeth, IT IS ORDERED that the [appellant] do vacate and deliver up to the [respondent] possession of certain premises situate at Barbary Hall known as Walton, in the parish of St. Elizabeth, with a dwelling house thereon butting south by a property road leading from Williamsfield to the main road, north and east by property belonging to Maud Mullings and west by property road, which land contains by estimation one quarter (1/4) of an acre more or less, on or before the **11th day of April 2014; AND IT IS ADJUDGED** that the [respondent] do recover against the [appellant] Cost [sic] to be taxed or agreed."

[18] The learned Resident Magistrate, in coming to her decision, highlighted what were, in her view, the issues for her determination. She noted in this regard:

> "The issue to be determined in the case at bar is whether the [respondent] can properly bring a claim for Recovery of Possession pursuant to section 89 of the **Judicature (Resident Magistrates) Act** against the [appellant].
>
> [b] Does the subject property form part of the matrimonial property of the parties as defined by the **Property (Rights of Spouses) Act?"**

[19] Having considered those issues, she found in favour of the respondent and made the order for recovery of possession on the following grounds, as summarised:

(i) The appellant took no issue with the facts relating to the acquisition history of the property and that the respondent's father had built the house on the land for her and her two children. He, however, contended that he made monetary contributions towards improvements made to the house.

(ii) The appellant was unable to substantiate his claims that he made monetary contributions. Additionally, he was unable to state precisely what he purchased for the improvement of the property. The court was unconvinced by his behaviour and demeanour as he gave evidence.

(iii) The appellant in his statement of defence advanced that his interest in the property arose as a result of it being the matrimonial/family home of both parties. During the trial, he also claimed an equitable interest in the property as a result of

contributions made towards its improvement. No special defence was filed.

(iv) The property did not fall within the definition of matrimonial property under PROSA.

(v) Based on the provisions of the Registration of Titles Act, the indenture created an equitable interest in the land for the respondent and not a legal interest. The indenture demonstrated the 'intention' of the parties, that intention being, to give a quarter (¼) of an acre of land to the respondent and her children.

(vi) The respondent was a witness of truth, and her evidence was supported by Ms Roach. The evidence of both witnesses was that the transaction relating to the land and the construction of the house was both done before the respondent met the appellant.

(vii) The property, not owned by either or both spouses, could not fall under the definition of matrimonial property and even if legal interest could have been passed by the indenture, it would have passed to the respondent and her two children and so would not have fallen under the definition of matrimonial property.

Ground of appeal

[20] The appellant, being aggrieved by the decision of the learned Resident Magistrate, filed his appeal relying on a solitary ground, which states:

> "1) The Learned Resident Magistrate erred in that she exceeded her jurisdiction when she entered an order against the [appellant] for the recovery of possession of matrimonial property on which the [appellant] has been in continuous occupation for a period of twenty-five (25) years and more."

Submissions of the appellant

[21] Counsel for the appellant, in arguing the single ground of appeal, advanced several bases for challenging the decision of the learned Resident Magistrate, which for expediency will not all be detailed, as they are not relevant to the reasons for the decision of this court. What is of materiality, for our purposes, are the submissions on the jurisdiction point, which was dispositive of the appeal. In that regard, the key aspects of the contention of the appellant were as follows:

> (i) The learned Resident Magistrate had no jurisdiction to make an order for recovery of possession in the special circumstances of the case and the respondent had not produced any evidence to establish the jurisdiction of the court as is required by section 96 of the Act.
>
> (ii) She failed to properly determine the status of the appellant when she commenced the trial and having

proceeded with the trial, she dealt with the case as if the appellant had no legal rights beyond that of a tenant, a tenant at will or a squatter. The respondent is not the legal owner and both parties have an entitlement to the property that is determinable by a court of competent jurisdiction. The proper application ought to have been one for division of the property and not for recovery of possession.

(iii) The learned Resident Magistrate fell into error when she concluded that she had jurisdiction since "the evidence from the [respondent] was that the house was not a cheap house it was a valuable house". The learned Resident Magistrate ought to have given consideration to section 96 of the Act as to the jurisdiction of the court and in failing to do so wrongly relied on section 86 [sic 89?].

[22] Reliance was placed on the dictum of Morrison JA (as he then was) in **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37.

Discussion

[23] Both sections 89 and 96 of the Act are reproduced below:

> "89. When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the Magistrate shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the court to give possession of such premises to the plaintiff.
>
> …
>
> 96. Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed seventy-five thousand dollars [now five hundred thousand dollars], any person claiming to be legally or equitably entitled to the possession thereof may lodge a plaint in the Court, setting forth the nature and extent of his claim; ... and if the defendant or the defendants, or either of them, shall not, on a day to be named in such summons, show cause to the contrary, then, on proof of the plaintiff's title and of the service of the summons on the defendant or the defendants, as the case may be, the Magistrate may order that possession of the lands or tenements mentioned in the said plaint be given to the plaintiff…"

[24] Although not specifically relied on by learned counsel for the appellant, consideration should also be given to Order VI rule 4 of the Resident Magistrates Court Rules (now Parish Court Rules), which provides that:

> "4. In all actions for the recovery of land the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof."

[25] Upon a review of sections 89 and 96, it becomes clear from the outset that both sections apply to cases where a party seeks to recover possession of land. However, the necessity for the annual value of the land to be particularised seems to be more critical in matters arising under section 96 of the Act than those under section 89.

[26] A thorough review of the distinction in the application of both sections was undertaken by Morrison JA in **Danny McNamee v Shields Enterprises Ltd**, where he stated at paragraphs [35] to [37]:

> "[35] It will immediately be seen from a comparison of these two sections of the Act that, while in both the person seeking to recover possession is put to the proof of his title, the question of the annual value of the land does not arise under section 89, while under section 96 it is explicitly made a limiting factor in relation to the court's jurisdiction...
>
> [36] It seems to be clear, therefore, that an order under section 89 is appropriate in cases in which the defendant's occupation of the property is not attributable to any kind of right or title. This is how Shelley JA put it in **Arnold Brown v Attorney General** (at page 41):
>
> > 'In short, this section shows how to deal with the squatter. The question of annual value does not arise in proceedings under it. The plaintiff is required to prove that the defendant is a squatter…'
>
> [37] Section 96 on the other hand, is appropriate to cases in which a dispute as to title to property has arisen, in

> which case the plaintiff claiming to be entitled to possession on either legal or equitable grounds may lodge a plaint setting out the nature and extent of his claim, whereupon a summons will issue to the person in actual possession of the property. If when the matter comes on for hearing that person does not show cause to the contrary, the plaintiff, upon proving his own title, will thereupon be entitled to an order for possession of the property. However, in any such case, the jurisdiction of the resident magistrate is limited to property the annual value of which does not exceed $75,000 [now $500,000.00]. The requirement in Order VI, rule 4 of the Resident Magistrate's Court Rules that in all actions for the recovery of land 'the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof…' is obviously, in my view, particularly applicable to section 96 claims for recovery of possession."

[27] The primary basis of the respondent's claim was that the appellant was a licensee and as such her claim for recovery of possession would properly fall within section 89 of the Act. The appellant alleged, on the other hand, that he had purchased the land and that the receipt for its purchase had been witnessed by Ms Roach. He also claimed to have done improvements to the house. So at minimum, he too, was claiming an equitable interest in the land.

[28] The decision of this court in **Ivan Brown v Perris Bailey** (1974) 21 WIR 394 provides some useful guidance on the issue relating to the applicability of section 96 in a case for recovery of possession in the Resident Magistrate's Courts. It was held, in so far as is relevant, that in an action for the recovery of possession of land in a Resident Magistrate's Court, a dispute as to title cannot be said to arise within the meaning of section 96, "unless the evidence is of such a nature as to call in question

the title, valid and recognizable in law or in equity, of someone to the subject matter in dispute. If there is no such evidence the *bona fides* of a defendant's intention is irrelevant".

[29] Before addressing the question of whether the case fell within section 96, as contended by the appellant, it is incumbent on us to treat with one aspect of the finding of the learned Resident Magistrate, which is of critical importance to the question of whether a dispute as to title had arisen between the parties. In her reasons for judgment, the learned Resident Magistrate noted:

> "13. The Court has also observed that in the Statement of Defence it was being advanced that the [appellant] had an interest in the said property by virtue of the fact that it was the matrimonial/family home of both [parties].
>
> 14. In mid-trial the Court is being told that the [appellant] allegedly made financial contributions towards the improvement of the property and as such would have an equitable interest in the property. It is also to be noted that no Special Defence was filed in this case."

[30] The learned Resident Magistrate, in stating that no special defence was filed, clearly had in her contemplation section 150 of the Act, which provides that no defendant shall be allowed to set up certain defences, unless notice of the defence is given to the clerk of the court who would give notice of it to the plaintiff. The appellant was, in fact, relying on defences that would require such a notice but obviously none was given.

[31] The learned Resident Magistrate, however, had the discretion under section 151 of the Act to allow the appellant to set up a special defence under section 150, although no notice of it was given. That provision reads:

> "151. It shall be lawful for the Magistrate [now Parish Judge] to allow any defendant to set up any of the defences mentioned in section 150 although he has not given the notice required by the said section:
>
> > Provided that where it shall appear to the Magistrate that plaintiff is taken by surprise by any such defence, or that it is otherwise unjust to allow the defendant to avail himself of any such defence without having given notice thereof, he shall allow such defence only on such terms as to him seem just."

[32] It is quite evident that the learned Resident Magistrate, having heard the statement of defence by the appellant, prior to commencing the trial, allowed him to set up his defence in the absence of any notice of a special defence. There was no objection by the respondent's counsel that the respondent was taken by surprise or that it was unjust for the appellant to be allowed to proceed with his defence as stated, and the learned Resident Magistrate herself, evidently, did not form that view. Having heard the defence raised, she noted it and then commenced the trial. During the course of the trial, she noted the appellant's evidence and considered it extensively in coming to her finding that the respondent was entitled to possession.

[33] The appellant's defence was, therefore, treated by the learned Resident Magistrate as having been properly advanced in response to the claim for recovery of possession, even though she rejected it in the end. Therefore, in the light of these

circumstances, the learned Resident Magistrate's statement that "no special defence was filed" (for whatever reason this statement was made by her) would have had no bearing on the question whether a dispute as to title had emerged within the meaning of the law for the operation of section 96 to be invoked.

[34] The question to be considered now is whether a dispute as to title had arisen between the parties on the respondent's claim for recovery of possession. It is recognized that the issue to have been determined between the parties concerning the respondent's entitlement to recover possession of the property gave rise to a dispute between them (as former spouses) as to their entitlement to the property. In paragraphs 3–7 of her reasons for judgment, the learned Resident Magistrate recited the respondent's version of the case as it related to her acquisition of the land and the construction of the house. In arriving at her decision, she then stated:

> "8. The [appellant] has taken no issue with the facts represented at paragraphs 3 to 7 of the Reasons for Judgment but contends however that he made monetary, contributions towards improvements that were made to the house."

[35] The appellant's defence, as stated, was that he is entitled to share in the property because, among other things, it was the family home within the meaning of PROSA. He also averred that he was entitled to share in the property because he had made contributions to its improvement. Furthermore, in giving evidence, it is recorded that he stated (at paragraph 133 of the notes of evidence):

> "She doesn't own a house in Barbary Hall. I purchased the land from her father. He gave me no title. He gave me a

> receipt and she went and took it away. I built that house on that land."

[36] It was also put to the respondent in cross-examination, albeit that she did not agree, that she and the appellant had "pooled [their] earnings to acquire the house at Barbary Hall" and that "it is the joint contribution of [both of them] which made it possible for the house to be built". The respondent's evidence as to the acquisition of the property, was therefore, challenged, contrary to what the learned Resident Magistrate had stated that the appellant had taken no issue with the facts pertaining to the acquisition of the property and the construction of the house.

[37] The issues to be determined between the parties concerning title to the property would have integrally affected the question arising on the claim as to whether the respondent was entitled to recover possession of the property. The evidence, from all indication, did call in question the title of both parties to the property. It was a *bona fide* dispute as to the entitlement to property within the context of a marital relationship.

[38] Quite apart from the fact that there is a special regime that deals with matrimonial property disputes, this was a claim by the respondent for recovery of possession, which itself, is governed by special rules and principles of law. For that reason, the learned Resident Magistrate, in treating with the respondent's claim for recovery of possession, ought to have first paid due regard to Order VI, rule 4 of the Resident Magistrates Court Rules that require a statement of the annual value of the

property and, ultimately, section 96 of the Act, which requires evidence in proof of the annual value, where there is a dispute as to title to property.

[39] It is evident from the learned Resident Magistrate's distillation of the issues and her ultimate conclusion that the respondent was entitled to an order for recovery of possession that she had failed to have regard to the defence raised by the appellant concerning her jurisdiction to determine the action in the absence of a statement and ulimate proof of the annual value of the property. She had ruled prior to the commencement of the trial that she would have treated with that issue after hearing the evidence of the parties but she did not. She fell in error in not doing so.

Conclusion

[40] Accordingly, the appellant having set up a valid response to the respondent's claim, which was allowed by the learned Resident Magistrate, and which gave rise to a dispute as to title, meant that evidence of the annual value of the property was required pursuant to section 96 of the Act. Therefore, there being no statement and/or evidence of the annual value of the property in question, then it meant that the basis for the learned Resident Magistrate to exercise her jurisdiction in making an order for recovery of possession was not established. She therefore erred in law as contended by the appellant.

[41] For the foregoing reasons, I was impelled to agree with the learned President and my learned sister that the appeal should be allowed and the necessary consequential orders made, as stipulated in paragraph [3] above.

P WILLIAMS JA (AG)

[42] I have read the draft reasons for judgment of McDonald-Bishop JA. I agree with them and have nothing useful to add.