[2016] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 124/2005

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

BETWEEN	**CHARLES GARDENER**	**1ST APPELLANT**
	INEZ WALKER	**2ND APPELLANT**
AND	**EDWARD LEWIS (BY REPRESENTATIVE HARRIS AUGUSTUS LEWIS)**	**RESPONDENT**

Gavin Goffe instructed by Myers Fletcher & Gordon for the appellant

Carlton Williams instructed by Williams, McKoy & Palmer for the respondent

25, 29 January and 19 February 2016

MORRISON P

[1] At the conclusion of the hearing of this appeal on 29 January 2016, the appeal was dismissed with costs to the respondent to be agreed or taxed. These are my reasons for concurring in the decision of the court.

[2] This purports to be an appeal from a decision given by R Anderson J on 11 November 2005. I have put it that way because we have not been shown a copy of a formal order and counsel who now appear were not involved in the matter at that time.

We were told that the Supreme Court's file has been lost, misplaced or destroyed and this may account for the paucity of documentation on some aspects of the matter.

[3] But there is evidence that an application for leave to set aside an earlier decision given by R Anderson J on 25 July 2002 was fixed for hearing on 11 November 2005; and that when this application came on for hearing before R Anderson J on that date, the learned judge refused to grant the order.

[4] In order to understand how the matter arises, it is necessary to recount its long and complex history in some detail. The case concerns an 8 acre parcel of land, situated at Belmont in the parish of Westmoreland (the Belmont land). The Belmont land is registered at Volume 1206 Folio 63 of the Registered Book of Titles, in the name of the appellants, Charles Gardener and Inez Walker as joint tenants. In this judgment, I will refer to them collectively as the appellants and individually by name.

[5] In this action, which was commenced by originating summons in 1993, the respondent, Mr Edward Lewis[1], claimed against the appellants for a declaration that, under the will of his mother, Alice Gardener, he was entitled to an interest in the Belmont land to the extent of 3½ acres. Mr Lewis' case was that Miss Gardener was given the land by her father in 1922; that she occupied the whole of the land as owner until 1975 when she died; and that under her will he was bequeathed 3½ acres of the land, his brother Clement Noble was bequeathed 3½ acres and Charles Gardener was

[1] Mr Lewis died on 17 June 2017, while this appeal was pending. By order of this court made on 13 March 2015, Mr Lewis' son, Harris Augustus Lewis, was appointed as a representative party for the purpose of substituting for him in these proceedings.

bequeathed 1 acre. In their defence to this action, the appellants relied entirely on the fact of their registered proprietorship of the land.

[6] Judgment in this action was originally given for Mr Lewis and upheld by the Court of Appeal. However, the appellants appealed to the Privy Council, where they were successful (**Gardener and Another v Lewis** (1998) 53 WIR 236). In the view of the Board, strongly expressed by Lord Browne-Wilkinson, none of the relevant evidence had been before the trial judge and the matter had therefore to be remitted to the Supreme Court for a rehearing, "at which all the relevant facts can be investigated" (page 241). The Board was particularly critical of the stance adopted by the appellants, who placed reliance solely on the fact of their registered title, without providing the court with any evidence of the basis upon which they had first come to be registered as proprietors. This is how Lord Browne-Wilkinson puts it (at pages 240-241):

> "This leaves the case in an impossible position. The unchallenged evidence is that Alice Gardener had title to the land at her death and that it accordingly formed part of her estate. On that basis, Alice Gardener's estate, represented by the executors to whom probate has been granted, may have an equitable right enforceable against the legal estate vested in the appellants to recover the whole land and then administer it properly by transferring three and a half acres each to the respondent and his brother and the remaining one acre to Charles. Alternatively, the respondent, as an underpaid devisee, may have an equitable claim *in personam* and *in rem* against the appellants either on the grounds that they have intermeddled in the administration of the estate of Alice Gardener or, alternatively, on the grounds that they have a claim in equity against the property comprised in the estate. Accordingly, on one view either the executors or the respondent have personal claims in equity enforceable against the appellants which may enable the court to make an order against the appellants, as registered

> proprietors, to give effect to the equitable rights of the respondent.
>
> On the other side, it may be that, when the facts are known, the appellants obtained registration of their title on the grounds that they had acquired title by adverse possession against Alice Gardener during her lifetime or against her estate after her death. On that basis, the appellants would have obtained a title paramount to that of Alice Gardener and therefore paramount to any claims arising under her will. On this view, the appellants' registered title would be unchallengeable, save on the grounds that they had obtained it by fraud.
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> The truth of the matter is that none of the relevant evidence is before the court. There is therefore no option but to remit the case for a rehearing at which all the relevant facts can be investigated."

[7] As a result of the Board's view of the unsatisfactory way in which they had conducted the litigation, the appellants, although in point of fact successful in the appeal, were ordered, unusually, to pay the respondent's costs of the appeal to the Privy Council and in the courts below.

[8] The decision of the Privy Council having been given on 22 June 1998, the respondent obtained an order from Reckord J in the Supreme Court that he be given full inspection of all the documents evidencing title upon which the appellants had relied in obtaining registered title. When this material was disclosed, it revealed that the title was first issued on 14 May 1987, on the application of Mr Gardener, supported by Miss Walker. In his application for first registration, Mr Gardener claimed to be the owner in fee simple of the Belmont land. The basis of his claim was set out in his statutory declaration sworn to on 15 December 1983, in which he deponed as follows:

"1. That I am 48 years old and reside at Belmont Dist., Bluefields P.O., in the parish of Westmoreland and I am a fisherman.

2. That I know and am well acquainted with the land subject of this application being by estimation eight (8) acres.

3. From my earliest recollection I knew Alice Gardener to be the owner of the said land using the rents and profits therefrom for her own exclusive use and benefit until the year 1970 when she sold the said land to me and from thence I have similar open, quiet and continuous possession of the said land using the rents and profits therefrom for my own exclusive use and benefit until the present time.

4. That when I purchased the said land from Alice Gardener I was given a Conveyance conveying the said land to me but notwithstanding an exhaustive search amongst all papers in my possession the said Conveyance cannot be found and I verily believe the same has been lost.

5. The said land is completely enclosed by permanent wire fencing.

6. That since the sale of the said land to me Alice Gardener has died."

[9] Miss Walker, who was Mr Gardener's common law wife, also provided a statutory declaration (sworn to on 22 September 1986), in which she stated that Mr Gardener "is registering the title for the said lands in the names of both of us in consideration of my love and affection for him".

[10] Having seen this material, the respondent filed an affidavit dated 25 April 2000, in which he made a number of allegations of fraud against the appellants in support of his prayer that "the title issued to them at Volume 1206 Folio 63 be cancelled and a new title issued in the names of myself Edward Lewis and Clement Noble and Charles

Pinnock (Gardener) as tenants-in-common to 3½ acres to me and my brother and 1 acre to the said defendants". Among the allegations of fraud were the following:

> "(a) The Defendant, Charles Gardener, has falsely declared in exhibit 'E. L-6'. That the land was sold by Alice Gardener to him; while stating he was given a Conveyance, he fails to state the purchase Price, if it was paid and how, if the Conveyance was registered and to give any other details to support the due execution of the alleged Conveyance;
>
> (b) The said Defendant falsely declared that my brother Clement Noble and myself lived in Belmont District in September 1986 when he well knew we were both residing in England.
>
> (c) The said Defendant falsely declared that he was in possession of the full eight (8) acres in 1983 when he was only in possession of 1 acre and was not there nor ever has been in occupation of the entire eight (8) acres.
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> (d) The tax toll was in the name of Alice Gardener up to August 31, 1984.
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> (e) The advertisements were published at a time when my brother and I were in England and I believe that if the said Defendant had truthfully told the Registrar of Titles that we resided in England, a different type of notice would have been ordered to bring this application to our attention."

[11] On 17 January 2001, the respondent filed an amended originating summons. Added to his original claim for a declaration that he was entitled to an interest in the land to the extent of 3½ acres, was a claim for a declaration "that the [appellants] falsely and fraudulently represented to the Registrar of Titles that they were the owners of an estate in fee simple of all the lands in Certificate of Title registered at Volume 1206 Folio 63".

[12] After a number of false starts, the respondent filed a notice of motion for judgment on 2 April 2002 and the motion was fixed for hearing on 25 July 2002. The orders sought in the notice of motion mirrored faithfully the orders sought on the amended originating summons. From affidavits of service sworn to on 24 July 2002, it appeared that the notice of motion and supporting affidavits were served on the appellants on 17 and 27 June 2002 respectively. However, the court has been shown no affidavit which speaks in terms to service of the amended originating summons itself on the appellants.

[13] It is against this background that the matter came on for hearing before R Anderson J on 25 July 2002. In the absence of the appellants, who were neither present nor represented, the learned judge made orders in the respondent's favour in terms of the amended originating summons filed on 17 January 2001.

[14] By summons issued on 26 September 2002, the second appellant, Miss Inez Walker, applied for leave to set aside R Anderson J's order and all subsequent proceedings. The grounds of this application were that (i) the second appellant has a good defence to the action and (ii) the court has not yet heard the case on its merits. The application was supported by an affidavit sworn to by Miss Walker on 24 September 2002. At paragraphs 3 and 4 of the affidavit, Miss Walker explained the reasons for her non-appearance on 25 July 2002 as follows:

> "3. That when the Originating Summons was served on myself and Mr. Gardener an Attorney-at-Law was consulted to act on our behalf and he was requested to enter an Appearance and file a Defence in this suit.

4. That Mr. Gardener and I believed a Conditional Appearance was entered and the Defence filed."

[15] Miss Walker then referred to Lord Browne-Wilkinson's judgment, before going on to give the following account of how, as she put it, she "came to be the owner of the said land":

"9. That based on the Judgment, I endeavour to show this Honourable Court how I came to be the owner of the said land which was originally owned and occupied by my grandmother, Catherine Walker and her sister Jum. That when Catherine died, Jum became the owner of the property. When Jum died her only son, Charles Kannahs became the owner of the said property.

10. That the said premises was occupied and owned by my cousin Charles Kannahs, until his death in February 1978.

11. By will dated the 16th May, 1975 Mr. Charles Kannahs left the said Belmont property to me. We exhibit hereto the original copy of the Will marked 'IW3' for identification.

12. That at no point in time was Alice Gardener owner of the land. In fact Alice Gardener as a child was under the care of my said grandmother Mrs Catherine Walker, whose family had owned the property and lived on the property from the latter part of the 19th century. The said Alice Gardener's father John Gardener had been the overseer on the said property.

13. That ever since I started living together with my common-law husband Mr. Charles Gardener in 1963, we both combined resources to assist with the care of Mrs Alice Gardener, who was his aunt.

14. That when Ms. Alice Gardener lost her sight in 1966, Charles Gardener and I re-doubled our efforts to assist with her care.

15. That I am certain that Ms. Alice Gardener never wrote a will in her blind state and that any Will that has been exhibited as such is a forgery; but in any event, Alice

> Gardener never owned the said land and was therefore never in a position to devise it."

[16] On 16 December 2002, a document headed "Proposed Defence" was filed, again on behalf of Miss Walker only, in which the statements made in her affidavit were repeated, virtually verbatim.

[17] It will immediately be seen that Miss Walker's account of how the appellants came to be the owners in fee simple of the Belmont land ran completely contrary to the account which had led the Referee of Titles to approve the issue to them of the Certificate of Title registered at Volume 1206 Folio 63. As has already been seen, Mr Gardener applied for title on the strength of an alleged purchase of the Belmont land from Alice Gardener and Miss Walker, who was also a party to that application, had been at that time content to say that Mr Gardener was "registering the title for the said land in the names of both of us in consideration of my love and affection for him". But now, nearly 20 years later, Miss Walker asserted that Alice Gardener, through whom Mr Gardener claimed to have derived title, "never owned the said land". Then, as if to compound matters, the purported last will of Charles Kannahs o/c Charles Connors, under which Miss Walker claimed to have acquired ownership of the Belmont land, made absolutely no reference to the Belmont land.

[18] Despite being re-issued several times in the interim, the application to set aside the judgment was not heard until 11 November 2005, when, as it now appears, it was refused by R Anderson J.

[19] In the notice of appeal filed on 21 November 2005, the appellants purport to challenge both the order of R Anderson J made on 25 February 2002 and 11 November 2005. However, it is clear from the grounds of appeal, as Mr Goffe confirmed to us, that the challenge on appeal is to the latter order, by which the learned judge refused to set aside the former order.

[20] I pause to observe at this stage that there can be no question that this order was an interlocutory order. As such, it is not appealable without leave, either of the court below or this court (section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act). In response to my enquiry whether leave was either sought or obtained in this matter, Mr Goffe told us, with admirable candour, that he was unable to say. Ordinarily, given the clear and unequivocal language of the statutory provision, this uncertainty would undoubtedly have been cause for concern. However, in all the circumstances of this very unusual case, especially the known fact that we may not have had sight of all the relevant documentation, I will approach the matter on the footing that leave to appeal was in fact sought and given.

[21] The grounds of appeal are as follows:

> "(a) In refusing to set aside the judgment the Learned Judge fail to properly address or deal with the fact that the amended Originating Summons based upon which judgment was sought and made, was never served upon the defendants.
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> (b) The learned Judge erred in finding that notwithstanding the Claimants failure to serve the Originating Summons on the Defendants, proof of service of the Motion for Judgment was sufficient to

validate the making of order's [sic] in terms of the amended Originating Summons.

(c) In arriving at his findings the Learned Judge misconstrued and misapplied the provision of parts 11 and 13 of the Civil Procedure Rules."

[22] In support of these grounds, Mr Goffe submitted that (i) there was no proof that the appellants were served with the amended originating summons and this omission could not be cured by proof of service of the notice of motion for judgment; (ii) an originating summons was an inappropriate means by which to adjudicate a case involving allegations of fraud; and (iii) the appellants were in any event entitled to claim the benefit of the Limitation Act as against the estate of Alice Gardener, they having been in undisturbed possession of the Belmont land for more than the requisite statutory period. In addition, in written submissions filed on 4 July 2011, upon which Mr Goffe also relied, the appellants contend that the will of Alice Gardener is fictitious and therefore cannot give the respondent "any entitlement to any portion of the property". Finally, Mr Goffe quite properly put before us the question of whether the application which was before R Anderson J fell under the Judicature (Civil Procedure Code) Act (the CPC) or the Civil Procedure Rules 2002 (the CPR).

[23] In response to these submissions, Mr Williams submitted that (i) the matter is governed by the CPC; (ii) proof of service of the amended originating summons was to be found in paragraph 3 of the affidavit of Inez Walker; (iii) the application for leave to set aside the judgment was made late; and (iv) the appellants had given no reason for their failure to attend the hearing before R Anderson J on 25 July 2002.

[24] In considering this matter, it is relevant to note that, although the appeal has been brought in the name of both appellants, the 1st appellant, Mr Gardener, was not a party to the application to set aside R Anderson J's judgment. In substance, therefore, this appeal has to do with whether R Anderson J ought to have set aside the judgment on the basis of the material put before him by Miss Walker.

[25] The first question to be considered is whether these proceedings are governed by the provisions of the CPC or the CPR. By rule 73.1(3) of the CPR, the commencement date of the CPR was fixed at 1 January 2003 and any proceedings commenced before that date were deemed to be "old proceedings". On the face of it, therefore, these proceedings, which were filed in 1993, are plainly old proceedings.

[26] Rule 73.3(1) of the CPR provides that the CPR does not apply "to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date, unless that date is adjourned and a judge shall fix the date". In this case, the amended originating summons was originally fixed for hearing on 6 November 2001 (see Notice of Appointment to hear Originating Summons filed 11 June 2001). On that date, however, D McIntosh J adjourned it for hearing in open court and it is by virtue of that order that the matter came on for hearing before R Anderson J on 25 July 2002. And on that date, as has been seen, the learned judge made the orders on the amended originating summons which Miss Walker would subsequently seek to set aside. It accordingly seems to me that these proceedings, having been heard and determined by the judge's order on 25 July 2002, were clearly old proceedings within the meaning of rule 73.1(3) of the CPR. They therefore remained subject to the CPC,

under section 354 of which an application to set aside a judgment obtained where a party did not appear at the trial was required to be made within 10 days of the judgment. In this case, the application was first made on 26 September 2002, that is, two months after R Anderson J's order. On the face of it, therefore, it was out of time.

[27] But the fundamental position of service of amended originating summons still remains to be considered. For, if this document was indeed not served, it is clear that R Anderson J would have been obliged to set aside the orders made by him on the amended originating summons *ex debito justitiae*.

[28] As I have already pointed out, there is no affidavit of service of the amended originating summons on the appellants. However, it appears to me that there is in fact some internal evidence that the appellants were served with the amended originating summons. In the first place, Miss Walker's application to set aside the judgment given on 25 July 2002 does not advance non-service as a ground, despite the fact that it was reissued several times over a three year period before it was finally heard and determined on 11 November 2005.

[29] Secondly, and perhaps more substantially, Miss Walker's reference at paragraph 3 of her affidavit in support of the summons to set aside the judgment to having been served with "the Originating Summons" can only sensibly be read, in my view, as a reference to the amended originating summons. What Miss Walker was attempting to explain in her affidavit were the reasons for the appellants' absence from the hearing before R Anderson J on 25 July 2002. It is for this purpose that she referred to having

consulted an attorney-at-law who was expected to represent them at the hearing. Taken in its proper context, therefore, it appears to me to be inconceivable that Miss Walker could, in her affidavit sworn to on 26 September 2002, have intended to refer to the original originating summons filed in 1993, certainly not after the matter had been to the Privy Council and back in the intervening nine year period.

[30] I therefore consider paragraph 3 of the Miss Walker's affidavit to be a clear and unequivocal admission that she was served with the amended originating summons. In any event, as has been seen, there is no question that both appellants were served with the notice of motion for judgment in terms of the amended originating summons.

[31] Turning now to Mr Goffe's contention that proceedings by way of originating summons were not appropriate to the proper resolution of allegations of fraud, I am naturally inclined to agree with him. For, as Lord Templeman observed in **Eldemire v Eldemire** (1990) 38 WIR 234, 238, "[a]s a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts". However, Lord Templeman also went on to indicate (at page 239) that "the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification".

[32] By the time this matter came on for hearing before R Anderson J on 25 July 2002, there had already been a clear and unchallenged finding, as reflected in the judgment of the Board (see paragraph [6] above), that "Alice Gardener had title to the land at the time of her death and … it accordingly formed part of her estate". This

finding would remain unaffected even if the appellants were, implausibly as it seems to me, to succeed in proving that Miss Gardener's will, which was duly probated over 20 years ago, was "fictitious". It is against this background that R Anderson J would have had to assess the significance of the fact that the material disclosed by the Office of Titles had now revealed that Mr Gardener, supported by Miss Walker, had applied for title on the completely different basis of a purported sale of the Belmont land to him by Miss Gardener during her lifetime. The matter having been adjourned into open court, presumably precisely for the purpose of facilitating cross-examination and the like, it seems to me that the use of the originating summons procedure in this case could have had no negative impact on the fairness of the process to the appellants.

[33] Finally, as regards Mr Goffe's adverse possession point, it suffices to say, I think, that it is now far too late in the day for this to be raised, it never having been made an issue at any prior stage of these exceptionally long-running proceedings.

[34] So where does all of this leave the matter? In the first place, there is in my view sufficient evidence to show that, on a balance of probabilities, the appellants were served with the amended originating summons. On that basis, therefore, the matter was properly before R Anderson J on 25 July 2012. Secondly, as a matter falling under the CPC, it was incumbent on the appellants, who were absent from the hearing, to make an application to set aside the orders made by R Anderson J within 10 days of that date. This they did not do. Thirdly, there has been no application by Mr Gardener to set aside R Anderson J's orders. And fourthly, Miss Walker's application, which was in

any event made out of time without suitable explanation, rested on a basis that is, at best, hugely suspicious and, at worst, patently dishonest.

[35] In all of these circumstances, I am satisfied that it cannot possibly be said that the learned judge acted on any erroneous principle in refusing to grant Miss Walker's application to set aside his orders of 25 July 2002. My initial concern that it might be best, as the Board obviously thought, for the facts of the matter to be fully ventilated at trial has been fully allayed upon close analysis of all that has transpired since. In the light of those developments, it now seems to me to be impossible to say that the overall justice of the case has not been satisfied. I would therefore dismiss the appeal, with costs to the respondent to be agreed or taxed.

SINCLAIR-HAYNES JA

[36] I have read in draft the reasons for judgment of the learned President. I agree with his reasoning and have nothing further to add.

P WILLIAMS JA (AG)

[37] I too have read the draft reasons for judgment of the learned President and agree with his reasoning. I have nothing to add.