[2017] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO 4/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**LEROY MORRISON**	**1st APPELLANT**
AND	**MARVETTE MORRISON**	**2nd APPELLANT**
AND	**ISAIAH CAMPBELL**	**RESPONDENT**

John Clarke for the appellants

Ruel Woolcock for the respondent

20, 24 October and 20 December 2017

MORRISON P

[1] I have read in draft the reasons for judgment of my sister Straw JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

PHILLIPS JA

[2] I too have read have read the draft reasons for judgment of my sister Straw JA (Ag) and agree with her reasoning and conclusion. There is nothing I wish to add.

STRAW JA (AG)

[3] This is an appeal against the decision of the learned parish court judge for the parish of Saint Catherine dated 17 February 2017, in which she granted judgment and costs to the respondent. We reserved our judgment and on 24 October 2017, delivered our decision where we ordered that:

1. The appeal is allowed.

2. The judgment of the learned parish court judge, dated 17 February 2017, is set aside.

3. Recovery of possession of the premises situated at 33 Way, 672 Easy Chedwin, registered at volume 1269 folio 469 of the Register Book of Titles is granted against the respondent.

4. The respondent is to quit and deliver up the premises on or before 30 January 2018.

5. Costs granted to the appellants in this court and the court below to be agreed or taxed.

The court promised that written reasons would follow shortly. This is a fulfilment of that promise.

Background

[4] The 1st appellant is the joint owner of premises located at 33 Way, 672 East Chedwin, Greater Portmore, registered at volume 1269 folio 469 of the Register Book of

Titles (the property); and the 2nd appellant is the duly appointed agent of the 1st appellant. The respondent is in occupation of the said premises.

[5] The appellants in the court below filed, on 31 March 2016, a plaint seeking recovery of possession of the property from the respondent, pursuant to section 89 of the Judicature (Parish Court) Act (the Act), on the basis that the respondent had refused or neglected to deliver up possession of the said property after having been requested to do so.

[6] The respondent claimed that he had cohabited with Sharon Morrison, the other joint owner of the property (and daughter of the 1st appellant), had come on to the property in 1997, and had resided there with her up until 2007, when she moved out. He however continued in occupation of the property.

[7] In her reasons for judgment, the parish court judge, at paragraphs 5 and 6, noted that three issues were raised before her by virtue of the respondent's submissions, although not specifically pleaded. These were promissory estoppel, equitable interest and adverse possession. In relation to the defence of adverse possession, the respondent contended that as a result of his undisturbed, continuous and open possession of the property since 1995, the appellants' claim for recovery of possession was barred by operation of section 3 of the Limitations of Action Act and that the notice to quit served on him by the 2nd appellant was unlawful. In relation to the other two defences, he alleged that, with the knowledge of the appellants, he had

acted to his detriment by expending significant sums to improve and maintain the property with the belief that he would acquire an interest therein.

[8] In her ruling, the learned parish court judge rejected all the defences of the respondent. She also found that the respondent was a mere licensee of Sharon Morrison up to 2007, and that the service of the notice to quit and the initiation of court proceedings in 2016 were an attempt to revoke that licence.

[9] However, the learned parish court judge also found that Sharon Morrison was not a party to the suit, that no application had been made to join her as a party and that the 2nd appellant did not act for Sharon Morrison, therefore the 1st appellant could not unilaterally evict the respondent and so gave judgment in the respondent's favour.

The appeal

[10] Mr Clarke, on behalf of the appellants, filed an amended notice of appeal on 6 October 2017, and was granted permission to argue the five grounds contained therein. The grounds argued were stated as follows:

> "1. The learned Parish Court Judge erred in law when she held in paragraph 64 of her judgment that in relation to "the recovery of possession that the process was flawed in that both owners must be joined to a suit to be a valid recovery of possession especially under these types of circumstances.
>
> 2. The learned Parish Court Judge erred when she granted judgment to the Respondent after finding in paragraph 60 of her Judgment that the Defendant has failed on all 3 grounds raised in the defence.

> 3. The learned Parish Court Judge erred when she made her judgment on a point of law which was not raised by the defence or canvassed by either party before her.
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> 4. The learned Parish Court Judge erred when she failed to give the Appellant or the Respondent an opportunity to make representations to her on the decisive point of law she relied on to grant judgment to the Respondent.
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> 5. The learned Parish Court Judge erred or misapplied the evidence when she essentially found that the Respondent was occupying the premises with the consent of Sharon Morrison. This finding was made despite the clear evidence from the defendant that Sharon Morrison came from foreign and took him to court and told the court that she asked him to vacate her premises."

[11] A perusal of these grounds reveals that there are essentially three issues to be determined by this court. These are:

i) Did the learned parish court judge err in law when she found that both title owners of the premises in question must be joined to the suit in order for there to be a valid recovery of possession?

ii) Did the learned parish court judge err or misapply the evidence when she found that the respondent was occupying the premises with the consent of Sharon Morrison?

iii) Did the learned parish court judge give the appellants a fair hearing when she relied on a decisive point of law which was not raised by either party but was raised by her for the first time in her judgment?

The issues on this appeal will be addressed accordingly.

Issue i): did the learned parish court judge err in law when she found that both title owners of the premises in question must be joined to the suit in order for there to be a valid recovery of possession?

Submissions

[12] Mr Clarke, argued that the finding of the learned parish court judge that both title owners must be joined to the action for recovery of possession ignores that section 89 of the Act empowers any person who is legally or equitably entitled to property to bring an action for recovery of possession. As such, he proffered that the learned parish court judge had erred in that finding and that the 1st appellant was able to properly bring the action for recovery of possession in his capacity as a legal owner of the property.

[13] Counsel further submitted that section 89 of the Act envisages that the court should be satisfied of the proof of the title of the plaintiff, that the defendant is still in possession of the relevant property and neglects or refuses to give up the premises and that there has been service of the summons. The defendant is then permitted, counsel asserted, to show good cause within the remit of the statute why he is still in possession of the property.

[14] Counsel for the respondent, Mr Woolcock, conceded that those submissions were a correct understanding of the law and that accordingly the learned parish court judge's pronouncement in that regard could not be considered a general exposition of the law. However, he further submitted that the parish court judge was correct to have found that Sharon Morrison should have been joined in the suit in the context of the

circumstances that existed in the case. He argued therefore that her ruling in relation to the process for recovery of possession was specifically related to the evidence.

Discussion

[15] Section 89 of the Judicature (Parish Court) Act provides that:

> "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."

[16] I agree with Mr Clarke's analysis and interpretation of the relevant section, that both owners do not have to be joined to the suit for a claim to recover possession of the land/property to be valid. The requirement of the section is that the person bringing the action proves his/her title.

[17] In the case of **Ruby Williams v Lucinda Williams** (1990) 27 JLR 143, Campbell JA, in his discussion of whether a memorandum in writing not signed by the

plaintiff was sufficient to transfer legal estate to her, expounded somewhat on the applicability of section 89 of the Judicature (Resident Magistrates) Act. It was held that:

> "Section 89 of the Judicature (Resident Magistrates) Act under which recovery of possession was undoubtedly sought, admittedly empowers not only the legal owner but an equitable owner to maintain an action for recovery of possession and damages for trespass against a person who could show no title."

[18] Likewise Cools-Lartigue JA made some pronouncement on the applicability of section 89 of the Judicature (Resident Magistrates) Law (the predecessor to the Act, section 89 corresponding in its provisions) in **Francis v Allen** (1957) 7 JLR 100, as against section 96 which also allows actions for recovery of possession. Writing on behalf of the Court of Appeal, he made the following comments at page 103 of the judgment:

> "There are two sections of the Judicature (Resident Magistrates) Law which give jurisdiction to the Court to hear actions relating to ownership of land, sections 89 and 96. The former section deals with plaints by owners of lands against persons in possession without any title or right to possession. This section is commonly known as the 'squatters' section. It gives unlimited jurisdiction to a Resident Magistrate's Court in so far as the value of the land in dispute is concerned."

[19] These passages strengthen the position that the jurisdiction of the court is invoked to hear actions relating to land ownership under section 89 of the Act where there is proof of title against persons in possession without a right of possession. On that basis the learned parish court judge, having rejected all of the respondent's

defences, would have erred in giving judgment for the respondent, on the sole premise that the 1st appellant could not maintain the action in the absence of the other joint owner. There would be merit therefore in this ground of appeal if the learned parish court judge meant her finding to be a general interpretation of section 89 of the Act.

Issue ii) did the learned parish court judge err or misapply the evidence when she found that the respondent was occupying the premises with the consent of Sharon Morrison?

Submissions

[20] Counsel for the appellant submitted that at paragraphs 61 to 64 of the learned parish court judge's judgment, she found that the respondent occupied the premises with the consent of Sharon Morrison until 2016. This finding, counsel submitted, was inconsistent with the evidence elicited before the court as the respondent gave evidence that Sharon Morrison had indicated to the court that she had asked him to vacate the property when she had just returned to the island and had taken him to court.

[21] Mr Woolcock pointed to the findings of the parish court judge that the respondent was a mere licensee on the property since 2007 when Sharon Morrison left the premises, that he continued to live there under licence until the revocation process began in 2016, and that up to 2016, he had the full permission and knowledge of the title owners.

[22] Counsel submitted further that the evidence revealed that there had been no revocation of the licence by Sharon Morrison as the respondent had stated (under cross

examination) that he had not been asked by Sharon Morrison to leave. He posed the question as to whether the learned parish court judge should have ignored the totality of the evidence which demonstrated that his possession was derived from the permission of Sharon Morrison. He submitted therefore that it would appear that he had a right derived from one of the title owners and it was reasonable of the learned parish judge, in the interests of justice, to have taken this into consideration. It is his contention therefore that the presence of Sharon Morrison in the claim would have been necessary to revoke the licence as there was no evidence of revocation presented by the appellants since the 2nd appellant only represented the 1st appellant.

Discussion

[23] At paragraphs 62 and 63 of her judgment, the learned parish court judge stated that:

> "62. However the Defendant was invited to the property by Sharon Morrison. I have found that he remained there with her permission with their 2 minor children (as they were then). That permission continued until 2016 at the start of these proceedings. Sharon Morrison is a joint owner. Any eviction of the Defendant must be with her consent and knowledge. This can only happen if she is a party to the suit. I am not of the view that Leroy Morrison can unilaterally evict the Defendant. Sharon Morrison must agree.
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> 63. At no point did the 2nd Plaintiff say Sharon Morrison wanted the Defendant out (although she did say she was told things by her). The 2nd Plaintiff did not act for Sharon Morrison. She must join the suit physically or by [power of attorney], but join she must."

[24] Based on the language used by the learned parish court judge, it would appear that her finding in law in relation to the joining of the title owners may have been coloured by her finding of fact that the case for the appellants did not reveal that Sharon Morrison "wanted the defendant out". However, Mr Clarke's challenge to this finding of fact is not without merit based on the evidence of the respondent himself. Page 97 of the transcript reveals a portion of the cross examination of the respondent by Mr Clarke:

Question:

> "Since [Sharon Morrison] left has she ever asked you to vacate?"

Answer:

> "No she never said that to me she said it to the court. She just come from foreign and take me to court."

Question:

> "Do you recall in 2009 when Sharon Morrison asking you to leave her house?"

Answer:

> "I can't recall."

[25] The evidence concerning whether Sharon Morrison had ever revoked the respondent's licence is therefore not without some controversy, although the 2nd appellant was not acting under a power of attorney for Sharon Morrison. It is to be noted that the learned parish judge, at paragraph 58 of the judgment, had remarked

that the respondent had contradicted himself and had failed to prove any of his assertions to the court. The issue of his credibility was therefore in question before the court.

[26] It is to be noted also that the respondent did not assert at any time that he had a licence from Sharon Morrison to remain on the premises after 2007. He did not rely on any such defence to the claim for recovery of possession. In light of the above, the learned parish judge erred in coming to any such inferential finding and ultimately erred in law by concluding that the process of recovery of possession was flawed by the failure to join Sharon Morrison to the suit as she indicated "especially under these type of circumstances".

I find that there is merit in this ground of appeal.

Issue iii) did the learned parish court judge give the appellants a fair hearing when she relied on a decisive point of law which was not raised by either party but was raised by her for the first time in her judgment?

[27] Although Mr Clarke submitted in relation to a breach of section 16(2) of the Charter of Fundamental Rights and Freedom in relation to this issue, we do not find it expedient or necessary to consider whether there is any merit in this submission bearing in mind our decision in relation to the penultimate ground of appeal.

Conclusion

[28] The learned parish judge erred in granting judgement for the respondent after rejecting all his defences for retaining possession of the property on the basis that the appellants' process for recovery of possession was flawed. The 1st appellant, Leroy

Morrison, had established his legal entitlement as a title owner and by virtue of section 89 of the Judicature Resident Magistrate Act was entitled to an order from the court for recovery of possession.

[29] In the light of the above, I had therefore proposed that the appeal be allowed and the judgment of the learned parish court judge be set aside, which order was made by the court on 24 October 2017, as stated at paragraph [3] herein.