[2010] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 11/09

BEFORE: **THE HON. MR JUSTICE PANTON, P.**
THE HON. MR JUSTICE MORRISON J. A.
THE HON. MISS JUSTICE PHILLIPS J. A.

BETWEEN	**HUBERT EVANS** **JACKIE WILLIAMS-EVANS**	**APPELLANTS**
AND	**MERLENE WATSON**	**RESPONDENT**

Leonard Green instructed by Chen, Green & Co. for the appellants

Miss Althea McBean instructed by Frater, Ennis & Gordon for the respondent

26th January & 26th February 2010

PANTON, P.

[1] This appeal was from the decision of His Honour Mr Collymore Gordon, Resident Magistrate for the parish of Westmoreland wherein on 9th March 2009, he ordered the appellants to quit and deliver up possession of a parcel of land, registered in the name of the respondent, on or before 14th September 2009.

[2] We heard submissions on behalf of the appellants on 26th January 2010, and without calling on the respondent, made the following order:

> "Appeal dismissed. Order of the court below affirmed. Costs of $15,000.00 to the respondent. Written reasons to follow."

Hereunder are those reasons.

The Plaint

[3] Before the learned Resident Magistrate was a plaint for recovery of possession of premises situated at 123 Dalling Street Savanna-la-Mar, Westmoreland. The respondent, the holder of a registered title to the premises, claimed in her particulars of claim that the appellants were squatters and that, having been served notices to quit, had failed to deliver up possession. The appellants filed a special defence under Rule 8 of the Resident Magistrate's Court Rules. They contended in that special defence that they had been in continuous and undisturbed possession of the premises for a period in excess of 20 years and at no time had they been tenants of the respondent.

The evidence

[4] The evidence presented to the learned Resident Magistrate revealed that the respondent and her husband Joseph Ethelbert Watson were tenants in common in respect of the premises registered at Volume 839 Folio 24 of the Register Book of Titles. Joseph Watson and Alfred Hewitt entered into an agreement for sale in respect of a portion of the property. The respondent objected to the transaction and the sale was not proceeded with. Mr. Hewitt was then a tenant on the premises. This was in the early nineteen eighties. After

the failed sale effort, Mr. Hewitt defaulted in his payment of rent. The failure to sell resulted in the filing of an action in the Supreme Court by Mr. Hewitt against the Watsons who counterclaimed for possession. That action ended on 3rd July 2006, when Reid, J dismissed the claim by Mr. Hewitt for want of prosecution, and entered judgment for the respondent on the counterclaim for recovery of possession of the said land now in dispute. Reid, J also ordered that the agreement for sale dated 2nd December 1981, be rescinded. Incidentally, both Messrs Hewitt and Joseph Watson were dead at the time Reid, J made the order for possession in favour of the respondent. Subsequent to the order of Reid, J the respondent has been persistent in her endeavour to obtain recovery of possession of the premises, firstly with service of notice to quit in November 2006 (Exhibit 10) and then by plaint 23/2007 filed in the Resident Magistrate's Court.

[5] The appellants are relatives of Mr. Hewitt, who died in March 2006. The male appellant (Hubert Evans) was his stepson whereas the female appellant (Mrs. Williams-Evans) was his granddaughter. In the case of Mr. Evans, he began to reside on the premises in 1996, whereas Mrs. Williams-Evans has been living there since 1983 when she was three years old. Neither appellant paid rent.

The Findings

[6] The learned Resident Magistrate held that the claim of the appellants that they had been in undisturbed possession for more than 20 years was unsustainable. He did so because Mr. Evans had been on the land only since 1996 and such possession as there may have been was permissive and not adverse, and also because action for recovery of possession had been taken against him in the Resident Magistrate's Court on 7th February 2007. In respect of Mrs. Williams-Evans, he found that she held under Mr. Hewitt and court action had been instituted within three years after she had started to live on the premises. The learned Resident Magistrate might well have gone on to point out that Mrs Williams-Evans was only three years old when she started to reside on the premises and so could not have, by any stretch of the imagination, formed an intention to possess the property.

Ground of Appeal

[7] The appellants filed and relied on one ground of appeal. It reads thus:

> "...the learned Resident Magistrate erred when he ruled that he had jurisdiction to order possession of lands in respect of which the defendants were legally in possession under and by virtue of a contract to purchase the said property and as such the court had no jurisdiction to make the order for possession in the circumstances."

It was pointed out by the Bench to Mr. Leonard Green, who appeared for the appellants before us and below, that this ground of appeal was not in keeping with the defence that was put forward at the trial. As indicated in paragraph 3

above, the respondent claimed that the appellants were squatters. The appellants' response was that they had been in continuous and undisturbed possession for more than 20 years. It is noted however that although the case was not conducted on the basis of a lack of jurisdiction, Mr. Green did submit to the Resident Magistrate at the end thereof that the basis of the action was section 96 of the Judicature (Resident Magistrates) Act and that there had been no proof that the annual value of the land did not exceed $75,000.00. He submitted further that if the Resident Magistrate were to find that the appellants were not squatters, the nature of their holding would be as tenants at will or at sufferance. That finding, he said then, would have imposed a legal duty on the respondent to ground jurisdiction by providing proof of annual value.

[8] In his skeleton arguments, Mr. Green said:

> "2. The issue for determination is whether the Appellants are squatters and depending on the finding of the court on that critical issue, the learned judge would then be able to make a determination as to whether he has jurisdiction to make an order for possession.
>
> 3. It is submitted that exhibit 11 establishes that the occupants cannot be squatters. Exhibit 11 establishes as well that the existence of a credible narrative of events pointing to the existence of an interest in part of 123 Dalling Street in the town of Savanna-La-Mar (sic). The evidence establishes the existence of a dispute to the Plaintiff's title.
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> 4. In the circumstances the judge wrongly assumed

> jurisdiction and wrongly made the order for possession.
> See ***Ivan Brown v Perris Bailey*** (1974) 12 J.L.R. 1338."

[9] Mr. Green's oral submissions to us may be summarized thus:

> (i) where there is a genuine issue as to title, the matter should be placed before the Supreme Court. The appellants have an interest in the registered title in the case and this was evidenced by exhibit 11.
>
> (ii) the respondent and her husband were tenants in common, and there was no evidence that the respondent is entitled to her husband's share.

[10] The ground of appeal relied on by the appellants challenges the Resident Magistrate's jurisdiction on the basis that the appellants were in lawful possession under and by virtue of the contract entered into between Mr. Watson and Mr. Hewitt. It was surprising that Mr. Green seriously tried to maintain this position, notwithstanding the hopeless nature of such a claim. According to him, the interest of the appellants in the property is evidenced by exhibit 11, so it is necessary to look at that exhibit.

Exhibit 11

[11] Exhibit 11 reads, in part, thus:

> "THE AGREEMENT is made the 2nd day of December One thousand nine hundred and Eighty-one BETWEEN JOSEPH ETHELBERT WATSON and MERLINE EVADNIE WATSON Both of Mount Pleasant, Santoy

Postal Agency in the Parish of Hanover, Electrician and Housewife respectivly (sic) (hereinafter called "THE VENDOR") and ALFRED HEWITT of 123 Dalling Street in the Town of Savanna-la-mar in the Parish of Westmoreland, Farmer and MYRTLE his wife (hereinafter called "THE PURCHASER") WHEREBY the Vendor agrees ...

1. Description of land - ALL THAT piece and parcel of land situate at DALLING STREET in the Town of Savanna-la-mar in the Parish of WESTMORELAND containing by estimation ONE HALF ACRE more or less (which land has already been surveyed by Mr. R. H. Anderson, Commissioned Land Surveyor) and being a portion of the lands mentioned and comprised in Certificate of Title at Volume 839 Folio 24, together with dwelling house thereon, and being $17,000.00 for the land and dwelling house annexed thereon and $10,000.00 for the moveable dwelling house.

2. Consideration - TWENTY SEVEN THOUSAND DOLLARS ($27,000.00)

3. Terms of Payment - $3,300.00 already paid by the Purchasers to the Vendors, the receipt whereof the vendors doth hereby acknowledges (sic). A further sum of $1,600.00 paid by the Purchasers to the Vendors, and a further sum of $ (illegible) already paid by the Purchaser to the Vendors the receipt whereof the Vendors doth hereby acknowledges (sic). The Balance of $ (illegible) to be paid with interest at the rate of 12% per annum...."

[12] The agreement, though purporting to involve both Mr. and Mrs. Watson, was not signed by Mrs. Watson. The latter's unwillingness to be a party to the

transaction was communicated to Mr. Watson by the respondent's attorney-at-law in a letter dated 24th November 1982 (Exhibit 2). That letter reads thus:

> "Your wife Mrs. Marline E. Watson of Santoy in the parish of Hanover came here to see us and has advised us that she is not prepared to affixed (sic) her signature to any sale whatsoever of the lands comprised in Certificate of Title at Volume 839 Folio 24.
>
> In the circumstance we ask that you come in to see us immediately upon receipt of this letter, as the sale cannot go through without your wife's signature. We suggest that you come in to see us along with your wife so that we can have this matter thoroughly (sic) aired.
>
> We are sending a copy of this letter to the purchaser Mr. Alfred Hewitt and to the surveyor Mr. R.H. Anderson so that that (sic) can be aware of the present position."

Further, there is nothing in the agreement that includes or involves either appellant, even in the remotest way. Assuming the agreement is valid and enforceable, the appellants face the hurdle of having to show that they are privy to this contract. Although the common law doctrine of privity of contract has been attacked over the years, it is still the law that for a person to sue on a contract there has to be proof that he is a party to it.

> "The doctrine of privity of contract may be stated as follows: a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it". [***Chitty on Contracts*** (27th ed.) para 18-001].

It follows that for one to claim the benefits of a contract, one has to show either that one is a party to the contract or is entitled to those benefits through some

legislative intervention, or through equity for example being a trustee. In the instant case, the appellants are clearly not parties to the agreement and they have not advanced any principle by which they can properly claim and gain any benefits they perceive the agreement as providing or bestowing on them.

Res Judicata

[13] Quite apart from the doctrine of privity, there is in existence an order of the Supreme Court dated 3rd July 2006, giving judgment to the respondent on a counterclaim for recovery of possession of the said land and for rescission of the very agreement for sale on which the appellants have placed their reliance in their sole ground of appeal. That order was never appealed. It therefore remains a valid order for all purposes. In ***Strachan v The Gleaner Co. Ltd. and Another*** [2005] UKPC 33, Lord Millett delivering the judgment of the Board said:

> "...whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal" (para. 32);

and further:

> "As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata*" (para. 33).

The agreement between Mr. Hewitt and Mr. Watson no longer exists. It has been rescinded, and so there are no enforceable rights arising from it.

[14] In his oral presentation, Mr. Green submitted that the respondent and her husband were tenants in common, and there was no evidence that the respondent is entitled to her husband's share. This submission is posited on the thinking that Mr. Watson had intended to part with a portion of his property only, leaving the other portion as well as the respondent's portion intact; hence, the need to ascertain who is entitled to the portion left by Mr. Watson. This scenario is clearly not in keeping with the evidence. If there was to be a sale, it is clear that it was intended to be by both the respondent and Mr. Watson as joint owners in view of the manner in which the agreement was drafted with both as vendors. That submission clearly does not help the appellants' cause.

[15] There was still another formidable hurdle for the appellants. They said that they were claiming an interest by virtue of the contract; by extension, they were claiming entitlement in the estate of Alfred Hewitt. However, even if it were assumed that there is a claimable interest, there was no evidence to show the grant of probate or letters of administration in respect of the estate; nor was there evidence of their right to participate in any distribution of that estate. Here again, the appellants failed.

Dispute as to title

[16] At the trial before the learned Resident Magistrate, the appellants advanced a claim on the basis of adverse possession. That was rightly rejected for the reasons which have already been stated. Before us, the appellants

changed their stance. In setting up their claim to an entitlement under the agreement between Mr. Watson and Mr. Hewitt, they said there was therefore a dispute as to title. Mr. Green in putting forward this position said he was relying on the case ***Brown v Bailey*** (1974) 12 J.L.R. 1338. It is only necessary to refer to the headnote to dispose of the argument. It reads thus:

> "In June 1959 the respondent signed an agreement to purchase an acre of land from M and was put into possession having paid half of the purchase price. In due course she paid the balance and in August 1967 she received a certificate of title. Up to that time she had made very infrequent visits to the land. On one such visit in 1967 she discovered that a 'board house' had been erected on her land by the appellant who told her that he had some money for M "in connection with the land". She told the appellant that she knew of no transaction concerning her land. In an action in the Resident Magistrate's Court for recovery of possession the appellant's case was that he knew that the respondent was the owner of the acre of land but that he had purchased half of that acre in 1965 from M who had been authorized by the respondent to sell. He had paid the full purchase price to M. Apart from his own oral evidence as to the alleged purchase from M the appellant called no other evidence. The magistrate awarded judgment in favour of the respondent. On appeal it was contended that once there was evidence before the magistrate that the appellant had paid for the land and built his house thereon he would have laid the foundation for the magistrate to say that he had no jurisdiction to try the case since (i) a dispute as to title would have arisen within the meaning of s. 96 of the Judicature (Resident Magistrates) Law, Cap. 179, and (ii) there was no evidence as to the value of the land, the subject of that dispute.
>
> **Held:** (i) 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 s. 96 of Cap. 179 unless the evidence is of such a nature as to call in question the title, valid and recognisable 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.
>
> (ii) that where the party seeking to recover possession relies on a certificate of title under the provisions of the Registration of Titles Law, and no question arises as to that party's title having been barred by the operation of any statute of limitation then no dispute as to title can be said to arise in the absence of a credible narrative of events pointing to the probable existence in the other party of an equitable interest, albeit not registered."

[17] This case on which Mr. Green relies clearly establishes that there was no question of a dispute as to title being involved in respect of the instant matter. So, however the matter is viewed, whether from the angle placed before the Resident Magistrate or that argued before us, the appeal was wholly without merit. Given the existence of the order of the Supreme Court, it may well be that the appellants have abused the processes of the court by trying to resuscitate a matter that has been dead for some while.