

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO: 12/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A  
THE HON. MR. JUSTICE FORTE, J.A  
THE HON. MR. JUSTICE BINGHAM, J.A (AG.)

BETWEEN LANCE MONCRIEFFE DEFENDANT/APPELLANT  
A N D FIFTH AVENUE FASHIONS  
LIMITED PLAINTIFF/RESPONDENT

Mr. Rudolph Francis for Appellant

Mr. Peter Goldson instructed by Myers,  
Fletcher and Gordon for Respondent

June 3, 4, 5 and 26, 1991

FORTE, J.A

This is an appeal from an order from the learned Resident Magistrate, St. Mary refusing an application to set aside a consent judgment previously entered by him on the 20th August, 1990. Having heard the arguments of counsel on the 5th June, 1991, the appeal was dismissed and cost fixed at \$500 awarded to the respondent.

The respondent had claimed against the appellant to recover possession of land situate at Tower Hill in the parish of St. Mary, registered at Volume 819 Folio 18 of the Register Book of Titles. When the matter came up for hearing on the 20th August, 1990, a request was made by counsel for it to be 'stood down' while discussions were pursued with the intention of settling the claim. Time was granted, after which counsel announced the settlement in the presence of their clients, and

the learned Resident Magistrate made the order in the terms requested by counsel, viz.

"By consent Judgment for Plaintiff  
Order for possession 30th November,  
1990 costs to the Defendant \$3,500.00  
not to be paid unless Defendant  
vacates by 30th November, 1990."

Nevertheless on the 21st September, 1990, the appellant filed an application for an order to set aside the judgment so entered, and for the case to be tried on its merits. In support of the application he filed an affidavit to which the respondent replied by filing several affidavits. The appellant then filed a second affidavit in response to those of the respondent. The content of these affidavits will be referred to only in so far as they are relevant to the determination of this appeal.

The learned Resident Magistrate on hearing the application refused it. It is from this latter order that the appellant comes before us.

The appellant filed the following grounds of appeal:-

- "1. The learned Resident Magistrate was wrong in law when he refused to accept the submissions from the Attorney-at-law for the Defendant/Appellant that he (the learned Resident Magistrate) has power to set aside any verdict or judgment in any civil proceedings and order a new trial on such terms as he thinks reasonable. (The Judicature Resident Magistrates Act section 201).
2. The learned Resident Magistrate failed to assess adequately or at all the evidence in support of the application and in particular to take into account the facts that land registered at at least three different volumes and Folio numbers have been quoted by the Plaintiff/Respondent and the two persons who have sworn affidavits to support him, as being the land which is the subject of the Plaintiff's claim."

The first ground which alleges that the learned Resident Magistrate refused to accept the submissions of counsel that he had the power to set aside the judgment, was correctly abandoned by Mr. Francis in the face of the learned Resident Magistrate's statement in his reasons for judgment, viz.

"Although I am aware of Section 201 of the Resident Magistrate's Act, in the circumstances I did not think it was reasonable to set aside the Judgment of the 20th August, 1990."

Mr. Francis, however, persisted in advancing the complaint made in ground 2, and moved the Court to allow the appeal on that basis. The short answer to his contention, however, appears in the reasons of the learned Resident Magistrate who stated:-

"After examining the Affidavits of the Parties and having heard from both Counsel the application to set aside the Judgment was refused."

Also

"At no time was anything in his Affidavit mentioned when the Consent Order was agreed to."

It is very clear from these words that the learned Resident Magistrate considered the affidavits filed in coming to his conclusion as to whether to set aside the judgment or not. On that basis alone this ground is obviously without merit, and the appeal could consequently be dismissed.

Mr. Francis, however, argued strongly that the appellant was not occupying the land which is the subject matter of the consent judgment, but was in fact occupying another lot of land registered at Volume 932 Folio 498 of the Register Book of Titles. This allegation he contended was not given any or any adequate consideration by the learned Resident Magistrate in coming to his conclusion. He relied on the following paragraphs of the appellant's affidavit:-

- "2. That in 1965 Mr. William Milton Doherty who was and still is the registered Proprietor of a Lot of Land at Tower Hill in the parish of Saint Mary, put me in possession of the said Lot of Land as caretaker.
3. The said Lot of Land which Mr. Doherty put me in possession of is Lot No. Forty-nine (49) on the Plan of Tower Hill and is registered at Volume 932 Folio 498 of the Register Book of Titles.
4. That sometime after Mr. Doherty put me in possession of the said Lot of Land he left Jamaica and I have never seen or heard of him since. As far as I know he has never returned to Jamaica.
5. That I have been in sole quiet and undisturbed possession of the said Lot of Land ever since exercising all acts of ownership thereover, being in receipt of the rents and profits and paying the Land Taxes payable thereon to The Collector of Taxes for the parish of Saint Mary."

In support of his application, the appellant also filed an affidavit sworn to by his attorney-at-law and which exhibited a photocopy of the original Certificate of Title which is registered at Volume 932 Folio 498 of the Register Book of Titles. The appellant, therefore intended, if his application was successful to set up as his defence, adverse possession in the lot of land he occupied which he maintains is that registered at Volume 932 Folio 498, and not the lot registered at Volume 819 Folio 18.

The respondent, however, had claimed originally the recovery of possession of land registered at Volume 528 Folio 86, and by amendment granted at the hearing changed that to Volume 819 Folio 18. It was revealed by the evidence that the land was originally registered at Volume 518 Folio 86, but was subsequently sub-divided and each lot registered separately

- hence lot at Volume 819 Folio 18, and lot at Volume 932 Folio 498, are part of the land originally registered at Volume 518 Folio 86.

The copy of the registered title at Volume 932 Folio 498 to which the appellant lays claim shows that this land was transferred by Mr. William Doherty to Kenneth Leopald Williams and his wife Joyce on the 5th November, 1965 for the sum of £800. The land was thereafter transferred under power of sale in a mortgage to Humphrey Alfred Taylor and his wife Paulette Lorraine for the sum \$7,500. Significantly also in 1982, a mortgage was registered to the Jamaica National Building Society for the sum of \$65,000.

The land to which the appellant claims adverse possession is shown by his own evidence to be the property of a third party who has not yet discharged a mortgage executed on the 17th May, 1982.

In so far as the affidavit of the respondent is concerned it is sufficient to state that it exhibited also a copy of Certificate of Title registered at Volume 819 Folio 18, which shows it to be the registered owner of that property. In the light of that evidence, it is my opinion that the learned Resident Magistrate having examined the affidavits, correctly exercised his discretion, to refuse the application to set aside the judgment.

I therefore acquiesced in the dismissal of the appeal.

WRIGHT, J.A

I agree. It is plain that for the learned Resident Magistrate to have acted otherwise than he did would have been to engage in an exercise in futility since it is clear beyond a peradventure of a doubt that the appellant had no defence to the respondent's claim for recovery of possession.

BINGHAM, J.A (AG.)

I agree.