[2017] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 11/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA

BETWEEN	**SYLVESTER SOLOMON**	**APPELLANT**
AND	**DAPHNE SMITH**	**RESPONDENT**

Maurice Smith for the appellant

Kevin Harriott instructed by Robertson Smith Ledgister & Co for the respondent

15 March 2017

MCDONALD-BISHOP JA

[1] This is an appeal against the decision of the Senior Parish Judge (formerly Senior Resident Magistrate) for the parish of Manchester who, on 15 April 2014, dismissed the appellant's claim that he instituted against the respondent by plaint note filed on 1 December 2006. By that plaint, the appellant sought an order for recovery of possession of lands situated at Smithfield in the parish of Manchester. The appellant

brought his claim pursuant to section 89 of the Judicature (Parish Courts) Act (formerly the Judicature (Resident Magistrates) Act) (The Act).

[2] In his particulars of claim, the appellant averred that the respondent, without his lawful authority, had taken possession of four parcels of land situated at Smithfield and has refused to give up possession. The respondent, he averred, "has no estate or interest in the said lands and that [her] intention is to frustrate the true owner of the said land".

[3] The first two parcels of land were described in paragraph 2(a) and (b) of the particulars of claim as being 1 acre and 1½ acres, respectively, that he had acquired under the will of his uncle, Marriett Smith, which was admitted to probate in 1978.

[4] The other two parcels were described at paragraph 3(a) and (b) of the particulars of claim as comprising 3/4 acre and 3½ acres, respectively, that he had inherited from his mother, Mavis Smith.

[5] At the commencement of the trial, the appellant's counsel indicated to the court that the appellant was proceeding in relation to only two of the four parcels of land specified in the particulars of claim; those were the 1½ acres he inherited from his uncle (paragraph 2(b)) and the 3½ acres (paragraph 3(b)) he inherited from his mother.

[6] Thereafter the respondent, through her counsel, stated her defence as follows:

> "The will is at best fraudulent and also ADVERSE POSSESSION is claimed. The [respondent] has lived at the

> premises all her life from 2008 [sic]. It was her family home from 1939 and they operated a shop to the front of the property."

[7] The trial then proceeded without any issue raised by the appellant concerning the oral statement of the respondent's defence.

[8] The appellant gave evidence, which, in outline, was as follows:

(i) He owns lands comprising 5 acres, which he is seeking to recover from the respondent. 3½ acres (located at the rear) was devised by will to his mother and his two aunts by his grandfather; his mother and aunts are deceased and his aunts had no children. He was born on 12 June 1939 in a house that was on this piece of land; the "house is empty, gone, it is waste land".

(ii) The remaining 1½ half acres (located at the front) was devised by will to him by his uncle; "[n]o one living on that land".

(iii) The reason he has filed his claim for recovery of possession was that the respondent had surveyed the entire property and had caused "her name to be inserted on the Title".

(iv) The respondent is not living on his part of the land at Smithfield. There was a shop, which was illegally built at the front of the property; it is no longer occupied by anyone; "the shop...is an old broken-down shop".

(v) He went to live in England in May 1960. He returned to Jamaica in 2002. In May 2002, he commenced a claim for recovery of possession against the respondent's mother, Zettie Smith, who was married to his uncle Samuel Smith. He knew Zettie from 1945 and when he migrated to England, he left Zettie living on her husband's land. He was able to distinguish Zettie's land from his grandfather's land because the land had been shared by the executor of this grandfather's estate in 1971 and "[t]here are markers".

(vi) He tried to get the land surveyed in 1970 and up to 1990. He had not built on it because he was not in Jamaica, but he sent a letter in the 1990s "warning [Zettie]". The executor of his uncle's estate had warned his uncle in 1978 when the will was being probated not to "have the shop".

[9] That was the extent of the evidence in the case as the respondent gave no evidence. At the close of the appellant's case, the learned Senior Parish Judge made a ruling in these terms: "The Plaintiff's claim Dismissed - Adverse Possession Applies".

[10] The learned Senior Parish Judge later prepared her written reasons for judgment for the benefit of this court, pursuant to section 255 of the Act. Having remarked that the appellant's "testimony is difficult to comprehend", she found as follows:

i. The appellant has not provided any evidence that he is entitled to 1½ acres of land; the will without more, is inadequate (**George Rowe v Robin Rowe** [2014] JMCA Civ 46).

ii. There was no evidence that the appellant entered into possession of the 1½ acres that was devised to him through the will, or that he paid taxes, or fenced off the property, as would be usual in exercising his right to possession.

iii. The appellant failed to provide evidence that the respondent was in possession of the land he was claiming.

iv. Recovery of possession cannot be granted to the appellant when no evidence was given that the respondent is on the land of the appellant.

v. The evidence given by the appellant "states clearly that even if the [respondent] was on some property he is claiming, adverse possession will apply as the [appellant] left for England in the 1970's and returned in 2002, and was therefore not in Jamaica when family members were on the land" and so "[t]heir residence on the property would not have been permissive, so it would have been adverse". Also, the appellant did not, by his actions or that of the executor, do enough to stop adverse possession from applying.

vi. Although the appellant claimed to have brought the action because the respondent surveyed the entire land and got title in her name, if he is suggesting a title dispute, "he must show at least that the title to the land is in the [respondent's] name". Further, pursuant to section 96 of the Act, there must be "a finding of the annual value of the land to ground the [Parish Judge's] Jurisdiction" where a dispute arises as to title to land

(**Francis v Allen** (1957) 7 JLR 100). No such evidence was led. There was no evidence to establish jurisdiction.

[11] The appellant has appealed the decision of the learned Senior Parish Judge on four grounds which he set out as follows:

> "1. That the Learned [Parish Judge] erred in making an Order that Adverse Possession applies.
>
> 2. That the Learned [Parish Judge] erred in considering adverse possession when no Defence had been file [sic] by the [respondent].
>
> 3. That the Learned [Parish Judge] erred in finding that there [is] sufficient evidence to ground a claim for adverse possession.
>
> 4. That the Learned [Parish Judge] erred in ruling that the claim failed because of adverse possession."

[12] It is observed that the grounds of appeal were filed before the reasons for judgment were drawn up by the learned Senior Parish Judge. The appellant did not seek to expand his grounds beyond the issue of the treatment of adverse possession by the learned Senior Parish Judge and the disposal of the claim on that basis as indicated in her ruling that appears on the record. No issue was taken by the appellant with the other aspects of the reasons for the decision.

[13] Although the appellant had filed four grounds of appeal and had filed comprehensive submissions in respect of these grounds to which the respondent had

filed equally comprehensive submissions in response, at the hearing of the appeal, the issues arising for the consideration of this court were considerably narrowed.

[14] It is accepted by Mr Smith, for the appellant, that issues as to title did arise on the evidence preferred by the appellant and so there is no basis on which the appellant could challenge the reasoning of the learned Senior Parish Judge in that regard. According to counsel, the appellant does not take issue with the reasoning of the learned Senior Parish Judge that the claim would have evolved from a claim under section 89 of the Act to one under section 96 on the appellant's case. As such, proof as to annual value would have been required to establish the jurisdiction of the court. With no such proof, then jurisdiction would not have been established and so the learned Senior Parish Judge was wrong to declare on the merits of the case that adverse possession applies. By doing so, she would, in effect, be saying that the respondent had obtained title by prescriptive rights and this could be used by her to establish her title to the property to the detriment of the appellant, when the court would have had no jurisdiction to determine the issue on the claim.

[15] Mr Smith's contention was that an order that the claim was dismissed would have been the proper order and so the aspect of the ruling that adverse possession applies should be set aside.

[16] Mr Harriott, for the respondent, agreed that the part of the order that adverse possession applies should be removed and that the order dismissing the claim should stand because the learned Senior Parish Judge could not be faulted in her approach to

the consideration of the evidence and in her findings that a dispute as to title had arisen which would have moved the case from being a section 89 case to being a section 96 case which would warrant the need for jurisdiction to be established through the proof of the annual value. He relied on **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37.

[17] Both counsel, in particular Mr Smith, must be commended for their approach to the presentation of the matter in the hearing before this court, which has usefully served to narrow the issues for ultimate determination. It can simply be said, having taken into account counsel's written and oral submissions on both sides, that the learned Senior Parish Judge's finding that the appellant had not established his title to the land to give him the necessary standing to claim for recovery of possession is unassailable. Equally so is her finding that the appellant had given no evidence that the respondent was in possession of land belonging to him. Those fundamental findings were sufficiently pivotal to have been determinative of the claim.

[18] The learned Senior Parish Judge, however, saw it fit to go on to consider what would have obtained had the situation been such that the respondent was, in fact, in possession of land belonging to the appellant. The analysis on that alternate scenario (in the absence of evidence from the appellant) led her to conclude that, on the evidence presented, adverse possession applies; title is in dispute; the necessity to prove annual value arose, which the appellant failed to do; and so jurisdiction was not established.

[19] The highest that the learned Senior Parish Judge should have gone on this issue of adverse possession, in the light of the defence as stated and the evidence of the appellant, was that the issue had, *prima facie*, arisen on the case before her and that as a result, the claim was one that involved a dispute as to title. It would follow then that she would have had a basis to say that the claim fell within section 96 and not section 89, and so in the absence of proof of annual value, which is required under section 96, she had no jurisdiction to try the claim.

[20] Once the learned Senior Parish Judge ruled that she had no jurisdiction to determine the claim, then she would have had no power to make any ruling that reflects a decision on the merits of the case. So, by declaring in her ruling at the end of the appellant's case that adverse possession applies as the basis for dismissing the claim, she would have erred in principle and in law.

[21] There is therefore merit in Mr Smith's submissions that once the learned Senior Parish Judge had found that she had no jurisdiction because of the applicability of section 96 of the Act, then the correct order ought to have been that the claim was dismissed (or struck out), without more. In the result, the aspect of her ruling that adverse possession applies cannot stand and ought properly to be set aside.

[22] It should be indicated, in setting aside this aspect of the ruling, that we are not convinced that the mere assertion in the ruling that adverse possession applies would have been of sufficient gravity and authority to be used by the respondent to secure

registered title to the property, the prime consideration, it seems from Mr Smith's arguments, which had prompted the filing of the appeal. For this reason, we are of the view that it would be fair and reasonable in all the circumstances that there be no order as to costs in these proceedings and the order shall be made accordingly.

[23] Before disposing of this appeal, it is considered necessary to make a brief comment concerning the defence that was raised by the respondent at the commencement of the trial, which is the subject of ground two of the grounds of appeal. The complaint embodied in that ground is that the learned Senior Parish Judge erred in considering adverse possession when no defence had been filed by the respondent.

[24] It is beyond question that the defence of adverse possession, relied on by the respondent at the trial, was a special defence for the purposes of the proceedings by virtue of section 150 of the Act. As such, as contended by the appellant, a notice of special defence was required to be filed with the clerk of the courts for service on the appellant. See section 150 of the Act and Order X rules 8 and 12 of the Judicature (Parish Courts) Rules.

[25] As was indicated by this court, almost verbatim, in **Melvin Clarke v Lenive Mullings-Clarke** [2016] JMCA Civ 60, at paragraphs [31] and [32], the learned Senior Parish Judge 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 Judge of the Parish Court 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 Judge of the Parish Court 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 may seem just."

[26] There was no objection from the appellant's counsel (at trial) on the ground that the appellant was taken by surprise or that it was unjust for the respondent to be allowed to proceed with his defence as stated. It was in those circumstances that the learned Senior Parish Judge permitted the oral statement of the defence to stand and proceeded to hear the case. There is no basis on which this court could disturb the exercise of the discretion of the learned Senior Parish Judge in allowing the defence to be relied on by the respondent, notwithstanding the non-compliance with section 150 of the Act. Ground two has no merit and, therefore, fails.

[27] Except for the error in the ruling stating that adverse possession applies, the order of the learned Parish Judge dismissing the claim is, otherwise, unimpeachable. In the premises, the appeal succeeds, only in part.

ORDER

[28] Accordingly, the court orders as follows:

(1) The appeal is allowed in part.

(2) The ruling of the learned Senior Parish Judge that "Adverse Possession Applies" is set aside.

(3) The order of the learned Senior Parish Judge dismissing the claim is affirmed.

(4) There shall be no order as to costs.