

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.19 OF 2003

BETWEEN:

JOSEPH MAYNARD

and

CARLYN LAWRENCE MAYNARD BARZEY

The duly appointed Attorney of record of Norma Barnes Maynard

Appellants

and

MICHELLE KALSKI

The intended Administratrix of the Estate of Pamela Kalski dec'd.

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C.

Justice of Appeal

The Hon. Mr. Michael Gordon, Q.C.

Justice of Appeal

The Hon. Madame Suzie d'Auvergne

Justice of Appeal [Ag.]

Appearances:

Mr. John Cato for the Appellant

Mr. Theodore Hobson for the Respondent

2004: November 2;
November 23.

JUDGMENT

- [1] **ALLEYNE, J.A.:** Until his death on January 28th 1942, Charles Egbert Maynard was the undisputed owner of approximately 77 acres of land on the island of Nevis known as and commonly called Hanley's, Bachelor Hall, Dudley Ground and Indian Castle Estate. He died intestate survived by his lawful wife Annie Eugenie Maynard, and his sister Maude Maynard. There were no children of the marriage.

- [2] The deceased was described by learned counsel for the Appellant in his skeleton argument as 'somewhat of a village ram', and counsel asserts that he had seven children by three different women, one of whom was Alice Lawrence, the mother of the Appellants, who claim to be children of the deceased. Counsel further asserts that there are four children now living, including the Appellant Joseph Maynard who still lives on Nevis on the very land where he was born. The others live abroad.
- [3] At the date of the death of Charles Maynard in 1942, under the provisions of the Intestates Estates Ordinance¹, the beneficial interest in the land would have vested in his widow for life with remainder over to his sister. However, during the lifetime of the widow, she made a will, dated June 23rd 1948, by which she purported to devise part of the land to a certain person for life, and subject to that, the land was to go to Gloria Browne, Lilith Crooke and Cecil Amory, as tenants in common. The widow, Annie Maynard, died on May 1st 1957, and probate of her will was granted to the executor named therein.
- [4] Thereafter, Gloria Browne collected all the rents from the various tenants occupying different portions of the land, paid the taxes on the land and disposed of the proceeds at her discretion. She also raised cattle on the land. She thereby effectively entered into possession of the tenanted and other portions of the land, notwithstanding that the widow had no title beyond her life interest which she could legally confer upon Gloria Browne.
- [5] Maude Maynard, who was entitled on the death of the widow in 1957 to the beneficial ownership of the land, did nothing to assert her ownership save to make futile requests to the tenants to pay the rent due on the land to her, which they refused to do. She also instituted an unsuccessful action against one tenant for rent which she claimed was due. She applied for and was granted letters of administration de bonis non of the estate of Charles Maynard

¹ Now Intestates Estates Act Cap. 36 of the Laws of St. Christopher and Nevis, section 4(1)(a).

deceased, and on 30th October 1972 executed a deed of conveyance of the land in favour of Pamela Kalski, registered as deed No. 5222 of 1972. She died on 3rd November 1972, some 4 days after executing the deed. During her lifetime she made no entry on the land. Pamela Kalski, however, on the basis of her deed, offered portions of the land for sale, but never completed any sale. She paid taxes on the land, visited the land, and unsuccessfully litigated against a tenant for rent. Gloria Browne continued during all this time to collect the rents from tenants who lived on and farmed the land. Gloria Browne also continued to graze her cattle there. Her brother Winston Maynard and his family lived on the land with her permission.

[6] In 1974 Pamela Kalski brought proceedings against one of the tenants for non-payment of rent, but her solicitor eventually withdrew the action. In 1975 Gloria Browne and her brother and sister claimed a declaration against Kalski, in High Court suit No. 28 of 1975, seeking an order that they were owners of the disputed property by virtue of their undisturbed and uninterrupted possession as owners since 1957. They withdrew this case as a result of Kalski withdrawing her case against the tenant and in light of the fact that since the issue of the writ and statement of claim, she had not sought in any manner whatsoever to challenge their entitlement or possession of the land. Since that event, neither Gloria Browne nor the Appellants took any steps in pursuance of their claim to the land until Pamela Kalski applied to the Court for the grant to her of a First Certificate of Title on 24th May 1988. Gloria Browne filed a caveat in opposition to the grant.

[7] The matter was heard before Satrohan Singh J. as he then was in February and April 1991, and on 25th April 1991, against the above background of facts as found by him, the learned trial Judge sustained the caveat and refused the application for the grant of a First Certificate of Title. The caveatee, Pamela Kalski, appealed against this judgment and on 26th March 1993, the Court of Appeal, upon the joint application of Mr. J.S. Archibald Q.C. (Dr. Henry Browne

and Ms. Myrna R. Walwyn with him) for the Appellant Pamela Kalski, and Mr. Charles L. Wilkin (Miss Deborah Brookes with him) for the Respondent Gloria Browne, entered a consent order in the following terms:

“1. A First Certificate of Title be issued to the Appellant PAMELA ELDORA KALSKI in respect of the land comprising Hanley’s Bachelor’s Hall, Dudley Ground and Indian Castle Estate in the Parish of Saint George in the Island of Nevis as shown on an original plan by Charles A. Pinard dated the 26th day of February 1926 and copied by Hilton Lawson a Licensed Land Surveyor and dated the 11th day of February, 1988 which copy was filed with the Caveatee/Appellant's application for a First Certificate of Title save and except:

(a) The areas of land described below totaling 20.5 acres, occupied by the tenants named below which lands are owned by Gloria Browne, the Estate of Cecil Amory and Lilith Crooke as tenants in common in equal shares, that is to say:

<u>Name of Tenant</u>	<u>Acreage</u>
DOROTHY WEBBE	2
FLORENTINA MERCHANT	2
DERRICK HENDRICKSON	2
LENNOX TROSS	3
EMMA LIBURD WEBBE	0.5
NORTON BROWNE	0.5
SYLVANIE MAYNARD	3.5
LOUISA WEBBE	0.5
WILLIAM JEFFERS	3.5
MADLINE BROWNE	0.5
AGATHA BROWNE	0.5
JOSHUA LIBURD	2

(b) The area of land comprising one half acre on a site commonly known as Sherriff’s occupied by Joseph Thurston Maynard which land shall be vested in the said Joseph Thurston Maynard by the Appellant and the Respondent upon his presentation of a Deed of Conveyance and Survey Plan of the said land.”

- [8] There was no appeal from this order. On 31st May 1996, more than 3 years after the decision of the Court of Appeal, the Appellants and others lodged a caveat against the issue of the certificate of title to Pamela Kalski, on the basis that they are the legal owners of the land. Kalski applied for the removal of the caveat. The matter came before Smith J. on 29th April 1998, and he ordered the removal of the caveat. There was no appeal by the Appellants against this

order. On 14th June 1999 a First Certificate of Title was issued to Kalski pursuant to the order of the Court of Appeal of 26th March 1993.

- [9] In their statement of claim in Fixed Date Claim No. NEVHCV 2002/0223 (from the judgment in which this appeal arises) the Claimants/Appellants pleaded at paragraphs 17 and 18 that the caveator Gloria Browne had held out at the time of the caveat proceedings leading to the appeal which was disposed of in March 1993, that she was acting as surrogate for the rest of the family who were entitled to the estate of Charles Egbert Maynard, and that 'in concert with Gloria Browne, the Claimants (that is, the Appellants) retained a Solicitor [and] swore affidavits in testimony of their claims to the said estate of Charles Egbert Maynard'. They further pleaded in paragraph 20 that after certain submissions were made as to their status in those proceedings, it was agreed that Gloria Browne would proceed in the matter in her name only but on behalf of the descendants of Charles Egbert Maynard who were then alive and 'entitled to succeed to his estate'.
- [10] The Appellants sought to argue that, although at the date of his death in 1942 his children born out of wedlock were not entitled by law to inherit his real estate, by the passage of the Status of Children Act 1984 they thereby at that time became entitled to a beneficial interest in the estate of Charles Egbert Maynard deceased. They admitted that certain steps had to be taken under the Act to establish a claim to paternity, and did not pursue the argument on appeal, nor did the Appellants pursue the ground of appeal against the learned trial Judge's finding on *res judicata*, but followed the Court's suggestion that they focus on the issue of the indefeasibility of a Certificate of Title.
- [11] The issue on the appeal centered around and arose from the judgment of Baptiste J. in the Fixed Date Claim No. NEVHCV 2002/0223 and in Claim No. 2003/0026, following an application by the administratrix of the estate of Pamela Kalski, who had died, to strike out the Fixed Date claim and statement of claim

in No. NEVHCV 2002/0223. The learned trial Judge also considered and decided at the same time an application by Kalski's administratrix for the removal of caveats against her certificate of title and the removal of a caveat against the grant of letters of administration in the estate of Pamela Kalski . His Lordship struck out the claim form and statement of claim and ordered the removal of all caveats, and the grant of letters of administration.

[12] The essential fact in this matter is that Pamela Kalski is the registered proprietor of the disputed land, having been issued a First Certificate of Title in respect thereof on 14th June 1999 following the striking out of the Appellants' caveat, which order was not appealed. The Appellants therefore are faced with the hurdle of *res judicata*.

[13] More important, and this is the issue on which the appeal was argued, is the nature and effect of a certificate of title. Section 4 of the Title by Registration Act CAP. 279 provides that immediately after the issue of a first certificate of title the former title to the land shall 'cease and determine'. Section 8 of the Act provides that 'All certificates of title granted under this Act ... shall be indefeasible.' The word 'indefeasible' is defined in the First Schedule to the Act ² as 'express(ing) that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any Court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, ... except on the ground of fraud *connected with the issue of such certificate of title*, ... or that the title of the registered proprietor had been superseded by a title acquired under the Limitation Ordinance, by the person making the challenge...'

² Section 2(3) of the Act.

- [14] Clearly, the Respondent's title having been issued only in 1999, it could not possibly have been superseded by a title acquired under the Limitation Ordinance³, and the Appellants did not suggest that it had. Their ground of challenge is fraud.
- [15] Whatever the right, title or interest of the Appellants to the disputed property might have been, upon the issue to the Respondent of a First Certificate of Title to the land on 14th June 1999, all such right, title or interest ceased and determined in accordance with section 4 of the Title by Registration Act, and the Respondent obtained an indefeasible title, which was open to challenge only on the basis of fraud '*connected with the issue of the title*'⁴.
- [16] In their statement of claim in Fixed Date claim NEVHCV 2002/0223 the Claimants/Appellants allege in paragraph 27 and 28 that the Claimant/Appellants were not 'included', that they were not parties to the settlement which resulted in the consent order in the appeal. They say that the Court of Appeal made the consent order 'without considering the claims of the present claimants or any of the other children of Charles Egbert Maynard'. The claimants alleged that the settlement 'constituted a fraud on the true and legitimate owners of the land', that is the claimants and others, who were 'deceived by the representations of Gloria Browne'.
- [17] Under 'PARTICULARS OF FRAUD' the Appellants pleaded that both Pamela Kalski and Gloria Browne, the litigants at the Court of Appeal, were well aware of the findings of High Court Judge (as he then was) Singh holding that the conveyance on which Kalski relied was a nullity as were Annie Maynard's purported testamentary dispositions to Gloria Browne. They said that 'by these facts alone the litigants ought to have been put on notice that they had no real entitlement to the lands...and are therefore presumed to be acting in concert in

³ CAP. 381.

⁴ First Schedule to the Act, definition of 'indefeasible'.

perpetrating the subsequent fraud on the claimants...By surreptitiously dividing up the lands between them to the exclusion of the real owner.' The Claimants/Appellants assert that they were deceived by the representations of Gloria Browne made to them as regards her interest in the estate of Charles Egbert Maynard and believed the representation made to them by the said Gloria Browne that she had opposed the title of Kalski on behalf of all the descendants of Charles Egbert Maynard.

[18] The Appellants' case seeks to ignore and take no account of the fact that, having unsuccessfully opposed the grant of the certificate of title to the Respondent, they did not appeal the decision of the learned Judge in dismissing their caveat and ordering the issue of the certificate of title to the Respondent, but permitted matters to take their course and the certificate of title to be issued.

[19] More importantly, the certificate of title was issued in compliance with the order of the Court of Appeal, albeit a consent order, and the statement of claim in the action, including the particulars of the alleged fraud, do not assert, nor form the basis for proving, that there was fraud '*connected with the issue of the certificate of title*'.

[20] In the premises, the learned trial Judge was right in ordering that the Fixed Date claim and statement of claim in the action be struck out, that the caveat against the grant of letters of administration in the estate of Pamela Eldora Maynard Kalski and the caveats against the certificate of title be removed, that a grant of letters of administration in the estate of Pamela Eldora Maynard Kalski be issued, and that the Appellants pay the costs of the proceedings.

[21] No order was made as to the quantum of costs. I would order that the matter of costs be remitted to the High Court for assessment under Part 65.11 of the Civil Procedure Rules 2000, and that the Appellant pay the costs so assessed, and the costs of the appeal being two thirds of the amount assessed as costs below.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Suzie d’Auvergne
Justice of Appeal [Ag.]