

EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHPT2021/0010

IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF
POSSESSORY TITLE OF LAND

SIGBERT MALDORF BAILEY

Applicant

And

DANN DUNCAN

Interested Party

Before: Her Ladyship the Hon. Justice Gertel Thom (Ag.)

Appearances:

Mr. Jemalie John of Counsel for the Applicant

Mr. Chrislon Fraser for the Interested Party

2024: May 31,
June 14, 28
September 20

JUDGEMENT

[1] **Thom J (Ag):** This is an application for possessory title to a parcel of land pursuant to the Possessory Titles Act Cap.328.

Background

- [2] On the 26th day of March, 2021, Sigbert Bailey (Mr. Bailey) made an application pursuant to section 3 of the Possessory Titles Act ("The Act") for a declaration that he is the lawful owner of a parcel of land situate at Chester Cottage in the Parish of Charlotte in the State of St. Vincent and the Grenadines.
- [3] In his application Mr. Bailey alleged that he has been in exclusive and undisturbed possession of the parcel of land in excess of twelve years commencing from 1983. The land was owned by Malachi Toney who migrated to the United Kingdom and has since died. His application was supported by Ms. Nepha Williams who filed an affidavit in support of the application on the 26th March, 2021, and Ms. Ada Burke who also filed an affidavit in support on 26th March, 2021. Mr. Bailey filed his affidavit in support of the application which is dated 7th December 2020, on the 17th September 2021.
- [4] Ms. Dann Duncan by her Attorney on Record Mr. Avalyn Patmos Richards (Mr. Richards) filed an entry of appearance on August 3rd, 2021, pursuant to Section 7 (2) of the Possessory Titles Act. I pause here to say that the entry of appearance was filed out of time, since the last publication of the application was on the 14th day of May 2021 and the entry of appearance was required to be filed by the 14th day of June 2021. No objection was taken by the applicant. In my view the late filing was not fatal. Ms. Duncan however, failed to file her written claim pursuant to section 9 of the Act, which requires the written claim to be filed within twenty-one days from the date of the entry of appearance.
- [5] On the 31st of January 2022, the learned judge granted Ms. Duncan an extension of time to February 2, 2022 to serve her entry of appearance and an extension to February 23, 2022 to file and serve her claim.
- [6] Ms. Duncan served her entry of appearance but failed to file her written claim. However, on 23rd February 2022, the date she was required to file and serve her written claim, Ms. Duncan's Attorney on Record Mr. Richards filed an affidavit pursuant to section 15 of the Possessory Titles Act. In his affidavit, Mr. Richards stated that Arthur Samuel now deceased was the owner of the land. He left surviving him two children, Benjamin Toney and Leila Goddard, who were the uncle and aunt of Ms. Duncan. During her lifetime, Ms. Leila Goddard entered into an oral lease agreement with Mr. Bailey for the land. Mr. Bailey paid a yearly rent. After Ms. Goddard died, Mr. Benjamin Toney collected rent from Mr. Bailey. He exhibited two documents which he alleged were receipts for rent paid by Mr. Bailey. Prior to his death Mr. Toney retained counsel to institute proceedings against Mr. Bailey in relation to ownership of the land.
- [7] Ms. Duncan having failed to file her written claim, on 23rd March, 2022, Mr. Bailey filed an application seeking to have the entry of appearance struck out.
- [8] On July 11, 2022, the matter came before the learned judge. For reasons which will become apparent shortly, it is useful to outline the order of the learned judge in full. It reads:

"The applicant having made an application for an order pursuant to section 12 (3) of the Possessory Titles Act to permit him to proceed Ex-Parte;

AND the Respondent having opposed the Applicant's application to proceed Ex Parte has not contested the application so far as it seeks to strike out the Entry of Appearance;

The Respondent having submitted that she is entitled to proceed under section 15 of the Possessory Titles Act to oppose the application for a Declaration of Possessory title merely by filing an affidavit; the Applicant conceding that notwithstanding the tardy filing by the Respondent of an Affidavit under section 15 of the Possessory Titles Act, such default is not fatal; and the court taking into account the overriding objective of the Civil Procedure Rules 2000 and the prejudice or advantage to be to the respective parties from an Order in respect of this application.

The oral and written submissions of the parties and being satisfied that an Interested Party may object to an application for a Declaration of Possessory Title in person or through an agent under the common law principle of agency.

And being satisfied that it is just in all the circumstances to strike out the Entry of Appearance and to permit Dann Duncan to proceed with her objection under Section 15 of the Possessory Titles Act through the Affidavit of Avalyn Patmos Richards, her Attorney on Record;

And the Court considering that it is just to make an Order to regularize the tardy filing:

IT IS HEREBY ORDERED:

- (1) The Entry of Appearance filed August 3 2021 is struck out
- (2) Dann Duncan is removed as the Respondent to this claim
- (3) The affidavit of Avalyn Patmos Richards filed on February 23, 2022 is deemed properly filed.
- (4) This matter is to proceed to trial and the case Management Directions issued on January 31, 2022 shall guide the progress of this matter going forward.
- (5) The Respondent shall on or before July 21, 2022 pay to the Applicant wasted costs agreed in the sum of \$250.00.
- (6) The Applicant has carriage of this Order which must be filed on or before July 21, 2022."

[9] The matter next came before the Court on the 11th March 2024, at which time it was set down for hearing. On the 31st May 2024 when the matter came on for hearing, the issue arose whether Mr. Richards had a right to cross examine Mr. Bailey and his witnesses. At the direction of the court submissions were filed by Counsel.

[10] Mr. Fraser submitted that there was no provision in the Act or CPR 2023 Revised which gives a person who files an affidavit pursuant to Section 15 a right to cross-examine the applicant or any of his/her witnesses. Likewise, there is no provision which prohibits cross-examination. However there appears to be a practice in St. Vincent and the Grenadines where a person who files an affidavit pursuant to section 15 is permitted to cross-examine the applicant and his/her witnesses. Learned Counsel referred to the cases of **In the Matter of An Application by Marie-Lawrence Mertz For a Declaration of Possessory Title of Land** SVG HCV 2013/0038; **In the Matter of an Application by Thomas Gellizeau for a Declaration of**

Possessory Title of Land and another v FiliusAckie and another SVG HCV 2012/0029;
andDavid Culzacv Timothy Edwards SVGHPT 2018/0005.

- [11] In **Marie-Lawrence Mertz**, an affidavit was filed by Mr. Thomas Gellizeau pursuant to section 15 of the Act. At paragraph 15 of the judgment, the learned judge referred to evidence of the applicant under cross-examination, and also awarded costs on the dismissal of the application. Mr. Fraser submits that this shows that Counsel for the deponent was allowed to cross-examine the applicant.
- [12] In relation to the **Thomas Gellizeau** case, FiliusAckie filed an entry of appearance and pursuant to section 9 of the Act he made a claim in the matter. Mr. David Ackie filed an affidavit pursuant to section 15 of the Act. Two other persons also filed affidavits.
- [13] In her judgment, the learned judge in referring to the evidence of the applicant's witnesses under cross-examination did not indicate whether it was on cross-examination by counsel for the respondent or also by Counsel for Mr. David Ackie. Mr. Fraser submitted that it should be presumed that Counsel for the deponentMr. David Ackiewas also allowed to cross-examine the applicant and his witnesses.
- [14] In **David Culzac's** case, Timothy Edwards filed an entry of appearance pursuant to section 7 (2) of the Act and an affidavit pursuant to Section 15 of the Act. He did not file a written claim pursuant to section 9 of the Act. In paragraphs 41 and 42 of the judgment, the learned judge reasoned that the affidavit could be treated as the written claim since it contained the information required to be contained in the written claim.
- [15] Mr. Fraser submits that this case shows that a person who has filed an affidavit pursuant to section 15 is in the same position as a person who files a claim pursuant to section 9 and can therefore cross-examine the applicant and his witnesses.
- [16] Mr. John in response submitted that the case of **David Culzac** could be distinguished from the case at bar in that there was an entry of appearance and the learned judge treated the affidavit filed as the written claim. In the case at bar there was no entry of appearance as the entry of appearance was struck out by the learned judge.

Discussion

- [17] I agree with the assumption made by Mr. Fraser in view of the judgment in **Marie-Lawrence Mertz** and **Thomas Gellizeau**. However, it must be noted that there was no discussion in any of the judgments of the legal effect of section 15 of the Act. In my view these cases are not authority for the principle that a person who simply files an affidavit pursuant to section 15 of the Act is entitled to cross-examine the applicant or any witnesses on behalf of the applicant. I am not bound to followthe approach taken in those cases. Rather what is required is an examination of the legal effect of section 15 of the Act.
- [18] Section 15 of the Act reads as follows:

"Person who has information may file affidavit

- (1) A person who has information in relation to the nature of possession of the piece or parcel of land by the applicant, may file an affidavit with the Registrar whether or not he has an interest in the said piece or parcel of land or whether or not he intends to file an opposing claim with the Registrar.
- (2) An affidavit filed pursuant to subsection (1) shall-
 - (a) Attest the truth of the facts set out therein;
 - (b) Be filed with the Registrar; and
 - (c) Be served on all parties to the proceedings.
- (3) At the hearing of the application the Court may require the attendance of the person who files an affidavit pursuant to this section.
- (4) The court may make an order or give a decision as it sees fit if the person who is required to attend Court pursuant to this section fails to do so.

[19] Section 15 must be read in the context of the Act. The Act outlines the procedure for making the application, making an opposition to the application, the hearing of the application, the grant of the declaration of title and for the vitiation of a title granted as a result of fraud or mistake.

[20] Section 7(2) and a 9(1) of the Act provide for persons who claim to have an interest in the parcel of land to file an entry of appearance and within 21 days of so doing to outline their interest in a written claim which must state the name of the person who has title to the land and outline the facts on which they base their claim.

[21] A careful reading of section 15 shows that any person who has information concerning the possession of the parcel of land may file an affidavit with the Registrar. The Act gives the Court wide powers to make a declaration of title to land to an applicant who is not the registered holder of the land on the basis that he/she has been in adverse possession for a continuous period of twelve(12) years. The Act sets out a transparent procedure for the Court's power to be exercised. Anyone can provide information to the Court to assist the Court in determining whether the applicant has satisfied the requirements of the Act irrespective of whether or not the application is opposed or whether the person providing the information has any interest in the land.

[22] While subsection (2) requires the affidavit to be served on all parties to the proceedings, notably, there is no requirement for any document filed in the proceedings to be served on such a person. Subsection (3) gives the court a discretion whether to require him/her to attend the hearing. Such a person has no right to attend and or participate at any stage of the proceedings.

[23] The provisions of the section do not treat such a person as a party to the proceedings with any of the attendant rights. The Court on considering the affidavit is required to determine whether to require such person to attend the proceedings. In exercising the discretion, the Court would undoubtedly consider the relevance of the information. The purpose of his/her attendance is to allow the applicant and where there is a respondent for the parties to question the veracity of the information and also for the Court to seek clarification where necessary and assess the credibility of the informant in determining whether the applicant has met the requirements of the Act.

[24] I find on the plain meaning of the words of Section 15, a person who files an affidavit has no right to cross-examine the applicant or his/her witnesses. Ms. Duncan through her Attorney on Record who filed an affidavit pursuant to Section 15 has no right cross-examine the applicant or any of his witnesses. The fact that the learned judge added Ms. Duncan as an Interested Party is of no moment. That was only a nomenclature to describe Ms. Duncan. Ms. Duncan may have had an interest in the land, but she has not claimed any interest in the land since she did not file a written claim and outline the facts on which she claims to have an interest in the land and her entry of appearance was struck.

[25] I turn now to whether a declaration of title to the parcel of land should be made in Mr. Bailey's favor.

[26] The Act sets out the criteria for the grant of Possessory Title. Pursuant to Section 3 of the Act, in order for an applicant to be able to obtain a declaration of possessory title to land, the applicant must have been in adverse possession of the land for a continuous period of twelve years. Adverse possession is described in section 2 of the Act as follows:

“(2) Adverse possession means factual possession of an exclusive and undisturbed nature of a piece or parcel of land in Saint Vincent and the Grenadines for a continuous period of twelve years or more accompanied by the requisite intention to possess the said land as owner thereof.”

[27] Mr. Bailey was therefore required to produce cogent evidence to show that he was exclusively in undisturbed possession of the land for a continuous period of twelve years with the intent to possess it as the owner. There must be factual possession of the land and an intent to possess the land as owner.

[28] The House of Lords in the seminal case of **JA Pye (Oxford) Ltd and another v Graham and another** [2002] 3 WLR 221, in considering what amounts to factual possession, adopted the words of Slade J in **Powell v McFarlane** (1977) 38 PLCR 452:

“Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession though there can be a single possession exercised by or on behalf of several persons jointly: thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...Everything must depend on the particular circumstances but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have expected to deal with it and that no one else has done so.”

[29] The intention required is an intent to possess the land as owner.

Evidence

[30] To satisfy the requirements of the Act, Mr. Bailey along with his two witnesses Nepha Williams and Ada Burke gave sworn testimony.

- [31] Mr. Bailey testified that he lives on the parcel of land at Chester Cottage which measures two thousand six hundred- and three-square feet (2603 sq.ft.). He began living at Chester Cottage in 1980 after the eruption of the volcano. He occupied the parcel of land that was vacant. The owner of the land Malachi Toney was at that time residing in the United Kingdom. His employer gave him some lumber and he bought some galvanise and constructed a wooden house on the land. He continues to live there. He believes Mr. Toney died in the 1990s. He has no death certificate. Since his occupation neither Mr. Toney nor anyone objected to his occupation of the land or claimed to be owner of the land. He conducted a search of the Deeds Registry and did not find any registration of the parcel of land. He has always treated the land as his own. In February 1993, his application for electricity to be supplied to his home was granted. He tendered into evidence a letter from VINLEC verifying that he was a customer of VINLEC since February 22, 1993. Also, in 2009 his application for supply of water was granted.
- [32] In answer to the Court, he stated that around 1983 Malachi Toney came to St. Vincent to visit his mother. Malachi Toney gave him permission to plant the land. He planted a breadfruit tree. He built a shed. Then he built the house. Mr. Toney made two further visits to St. Vincent. Mr. Toney promised to sell him the land. The land was measured. Mr. Toney subsequently told him not to pay for the land.
- [33] Ms. Nepha Williams testified that she lives at Diamond. In her childhood days she lived in Chester Cottage. She knows Mr. Bailey, he is a family friend. She recalled that he lived in a wooden structure but she did not know when he went to live there or the circumstances in which he went to live in Chester Cottage. She recalled when she left St. Vincent to reside in St. Maarten in 1987, Mr. Bailey was living on the parcel of land at Chester Cottage. When she returned in 1990s he was still living on the land. She has never seen anyone else occupy the parcel of land.
- [34] Ms. Ada Burke testified that she is sixty-six (66) years old. She is a shop keeper. She was born in Chester Village but lived her childhood years in Park Hill where she met Mr. Bailey. When she was twelve (12) years old she returned with her parents to live in Chester Cottage. After the eruption of the volcano in 1979, Mr. Bailey moved to Chester Cottage. He built a wooden house on the piece of land. His children and their mother lived there with him at times until they moved to another house in Chester Cottage. Mr. Bailey remained at Chester Cottage. She has never seen anyone else occupy the land other than Mr. Bailey. Mr. Bailey lived in the house on the parcel of land since he constructed it and treats it as his home.
- [35] In answer to the Court, she testified that Benjamin Toney died about five years ago. Ms. Goddard died before him. Ms. Goddard lived in Chester Cottage. Mr. Benjamin Toney visited Chester Cottage regularly but she never saw any member of the family, Ms. Goddard or Mr. Toney visit Mr. Bailey.
- [36] Mr. Avalyn Richards testified that to his knowledge Arthur Samuel who is now deceased was the legal title holder of the property. After Arthur Samuel died, the land was left to his children Benjamin Toney and Leila Goddard who were the uncle and aunt of Ms. Dann Duncan. Benjamin Toney lived overseas for an extensive period and during this time Leila Goddard acted as landlord. She entered into an oral lease agreement with Mr. Bailey to lease a portion of

land and she collected a yearly rent from Mr. Bailey. After Leila Goddard died, Benjamin Toney appointed Stanley Samuel to collect rent from Mr. Bailey around 2010. Two photocopies of what appeared to be rent receipts were attached to his affidavit. The receipts bear the dates June 05, 10 and March 10, 12. Both receipts are in the name of Sigbert Bailey and are for a sum of \$80.00. Mr. Stanley Samuel is alive. He resides at Fountain. He does not recall where the original receipts are. At the time he signed the affidavit he did not have the original receipts

- [37] He further testified that from around 2012 Benjamin Toney visited St. Vincent regularly and he collected rent from Mr. Bailey between 2013 and 2018 when he died.
- [38] Before Benjamin Toney died, he had instructed Counsel to institute legal proceedings in relation to the ownership of the land.
- [39] Under cross-examination by Mr. John, Mr. Richards testified that his friend Ms. Duncan told him Mr. Arthur Samuel was the legal owner of the land. He did not know Arthur Samuel. He reiterated that Mr. Stanley Samuel is alive and that he collected rent from Mr. Bailey. He saw him collect rent from Mr. Bailey. Mr. Samuel gave him the receipts. The receipts were signed by Mr. Bailey. Mr. Bailey does not live on the land. He lives in Georgetown. He has lived in Georgetown for the past three to four years. He sees him in Georgetown. A young lady now lives on the land.

Submissions

- [40] Mr. John submitted that Mr. Bailey and his witnesses were credible witnesses. Their evidence showed that Mr. Bailey has been in uninterrupted possession of the land for a period of 40 years. There is no evidence of any interruption of his occupation. No legal proceedings were instituted against him in relation to occupation of the land. No lease agreement was tendered into evidence showing that he was a lessee of anyone. The evidence of Mr. Bailey and his witnesses should be preferred over the evidence of Mr. Richards. Mr. Richards had no knowledge of the circumstances of Mr. Bailey's occupation of the land. He produced no evidence on which the Court could find that Mr. Bailey occupied the land as a tenant. Mr. Richards could not produce the receipts copies of which were filed with his affidavit. Generally, the matters stated in his affidavit were information he received from Ms. Duncan and others.
- [41] Mr. Fraser in response referred to the legal principles on adverse possession as outlined in cases such **JA Pye** and submitted that Mr. Bailey having occupied the land as a tenant, he did not have the necessary intent to possess the land in his own right. He submitted that Mr. Bailey in his oral testimony admitted he entered into possession of the land with the permission of Malachi Toney. The fact that no one objected to his continued occupation can be interpreted to mean that they never acknowledged that Mr. Bailey had entered possession of the land with intent to possess it. No evidence was adduced that he later intended to possess the land as owner. Even if he did so, he has not done so for twelve years. While his permission would have expired with the death of Mr. Malachi Toney, there is no evidence of the date when Mr. Toney died. The Court therefore cannot be satisfied that Mr. Bailey was in undisturbed exclusive possession of the land for twelve years.

Findings of Facts

- [42] I find Mr. Bailey and his witnesses to be credible witness. There was no conflict in their evidence. There was no hesitation in answering questions put to them. Their evidence in relation to their knowledge of the occupation of the land was very specific. When Mr. Richards in his oral testimony stated that Mr. Bailey was no longer living on the land at Chester Cottage, but he was now living at Georgetown with his girlfriend and has done so for the past three to four years, Mr. Bailey who is now seventy-six (76) years old, he was born on 3rd August 1946, on being questioned further by the Court readily agreed that he has a girlfriend who lives in Georgetown and he spends time there with her. Further, his friend's granddaughter now occupies the house with him. I believe he spends time in Georgetown with his girlfriend and his friend granddaughter lives in the house, but I do not agree that this means that Mr. Bailey has voluntarily abandoned the property and the home he built where he lived since 1983. I believe his testimony, he spends time between Chester Cottage and Georgetown.
- [43] Mr. Bailey in his affidavit evidence does not explain in detail the circumstances relating to his occupation of the land. He states in paragraph 3:
- "I was born in Park Hill in this State. I began living in the village of Chester Cottage in 1983 after the volcano erupted and destroyed our family home. In 1983 I began occupying the subject land after learning that the purported owner of the land; Malachi Toney, was residing in the United Kingdom. My former employee gave me lumber and I bought galvanize and constructed a wooden dwelling house on the subject land. I have remained in occupation of the subject land since then."
- [44] In answer to questions from the Court, in a very forthright manner Mr. Bailey testified very clearly that it was while Mr. Malachi Toney was visiting St. Vincent in 1983 that Mr. Malachi Toney gave him permission to occupy the land. On a later visit Mr. Malachi Toney promised to sell him the parcel of land. He subsequently told him not to pay for the land. No one approached him about the land until after he made his application for possessory title. I believe his testimony that he was given permission to occupy a very small portion of land 2063 sq.ft. This was shortly after the eruption of the volcano in 1979 and several persons were displaced.
- [45] Mr. Richards' affidavit was very vague. He gives no date from which yearly rent was collected from Mr. Bailey by Ms. Goddard. No receipts were adduced in evidence. In his oral testimony he stated Ms. Goddard died in 2001. He saw Mr. Samuel collect rent from Mr. Bailey but he does not state when this occurred. While two photocopies of receipts were attached to his affidavit bearing the year 2010 and 2012, what is astonishing is that Mr. Richards stated in his oral testimony that he did not know whose signature is on the photocopy receipts. He could not produce the receipts. While he stated Benajamin Toney collected rent between 2013-2018 no receipts were adduced in evidence. Mr. Richards' evidence was mainly information that he had received from his friend Ms. Duncan. Mr. Richards was not familiar with the circumstances relating to Mr. Bailey's occupation of the land. In his affidavit Mr. Richards makes no mention of Malachi Toney.
- [46] I am not satisfied that there is cogent evidence which shows that Mr. Bailey was a yearly tenant. I am satisfied that he was originally granted permission by Malachi Toney to occupy the

land and he continued to occupy the land exclusively for a continuous period from 1983. While the date of Mr. Malachi Toney passing was not given in evidence, I accept Mr. Bailey's testimony that while Malachi Toney had promised to sell him the small piece of land, he subsequently gave him the land. Mr. Bailey planted fruit trees on the land, he lived in his house without interruption from 1983. It is his home. He organized for the supply of electricity and water to the land. He did the sort of things which homeowners usually do.

- [47] I am satisfied that he has met the requirements of the Act for a grant of declaration of possessory title to the land.

Order

- [48] I therefore order and declare that

- (1) Sigbert Maldorf Bailey is the true owner of all the piece or parcel of land situated at Chester Cottage in the Parish of Charlotte in the State of Saint Vincent and the Grenadines comprising of Two Thousand Six Hundred and Three (2603) sq. ft. with appurtenances thereon valued at \$21,000.00 more particularly described and delineated in survey plan C29/33 approved and lodged at the Land and Surveys Department on the 8th September 2020 by Chief Surveyor, Keith Francis bounded as follows:

On the north by Lot 62 on Plan CC38 on or towards the North East by lands in the possession of Anil Sam on Plan C18/62 on or towards the South East by land in possession of Denville McDonald shown as Lot 30 on Plan CC38 on the south by a Road and on the west by land in possession of Veronica Martin shown as Lot 32 on Plan CC38 and shown on the survey plan drawn by Kendon Lavia Licensed Land Surveyor filed with this application and approved and lodged at the Surveys Department bearing Registration Number C29/33.

- (2) Mr. Bailey will bear the costs associated with his application.

Gertel Thom

High Court Judge (Ag.)

By The Court

Registrar