

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV2021/00196

IN THE MATTER OF THE POSSESSORY TITLES ACT

AND

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

BETWEEN:

LEO WALCOTT

First Respondent

AND

ELSA TESSA WALCOTT

Second Respondent

AND

FRANKLYN TELESFORD

Applicant

Appearances:

Mr. Ruggles Ferguson for the Applicant

Mr. Zuriel Francique for the First Respondent

2022: November,
2023: January 20, (Delivered)

JUDGMENT

[1] **CHARLES-CLARKE, J:** This is an application to set aside an order of the court granting a declaration of possessory title to the first respondent, Leo Walcott on 25th March 2022. It arises from competing claims by Leo Walcott and the applicant Franklyn Telesford, to a lot of land measuring 1 acre and 3 poles situate at La Digue, St Andrew.

Contextual Background

- [2] On 19th May 2021 Leo Walcott filed an application under the Possessory Title Act¹ (the Act) for a declaration of possessory title to the said lands. Following an objection by the second Respondent Elsa Tessa Walcott, Leo Walcott filed an amended application with leave of the court to exclude 6,829 square feet from the original area claimed which is occupied by Elsa Walcott, his sister. For the purposes of this application the dispute as to ownership really lies between Leo Walcott and Franklyn Telesford. Both parties have agreed to exclude the 6,829 square feet originally occupied by the mother of the first and second respondents, now occupied by the second respondent, Elsa Walcott.
- [3] On 8th July 2021 Franklyn Telesford entered an appearance opposing the application by Leo Walcott for possessory title, but did not file a written claim and statement of facts as required by Section 9 of the Act.
- [4] On 31st July 2021 the lawyer for Franklyn Telesford filed a discontinuance.
- (1) An entry of appearance was made by another lawyer on 22nd March 2022 on behalf of Franklyn Telesford. However, no written claim, statement of facts or affidavit was filed.
- (2) On 25th March 2022 after an *ex parte* hearing the court made the order granting a declaration of possessory title to Leo Walcott. Franklyn Telesford now seeks to set aside the declaration of possessory title.

¹ No. 22 of 2016.

Issues

- [5] The sole issue is whether this Court should set aside the declaration of possessory title granted to Leo Walcott.

The Applicant's Case

- [6] The application to set aside the order is brought under Section 21 of the Act. The applicant relies on Section 21(2) and (3) (a) and (c) and asserts that:

- (i) the grant of possessory title to the first respondent was obtained without a trial and his application was filed within 60 days of the judgment being published in the official gazette;
- (ii) his failure to file a written claim having filed an entry of appearance was through inadvertence and misunderstanding of the process on his part; and
- (iii) that he has a real prospect of succeeding in opposing the claim for declaration of possessory title.

- [7] Franklyn Telesford also asserts that there has been material non-disclosure by Leo Walcott in that he failed to make frank and full disclosure of material facts and failed to make proper inquiries about additional facts.

- [8] Further, he submits that the undisclosed facts were material and that there is a high probability that if the Respondent had made full disclosure then the court may have refused the application even if it was unchallenged.

- [9] Both parties in their affidavits adduce evidence of the history of ownership of the land.
- [10] In his affidavit in support of the application Franklyn Telesford deposes that the original owners of the land were Joseph and Agnes Telesford, his great grandparents, who had six children, one of whom was Flossie Carrington nee Telesford who was the last child to occupy the land until she migrated to the UK where she died in 1965. Two of Flossie Carrington's siblings, Ireton and Belmore Telesford predeceased her. Her remaining siblings Fitton, Darwin and Newton Telesford migrated to the USA where they lived until their death. Ireton Guy Telesford was the father of Aubert Telesford, who was the applicant's father. The applicant exhibited a birth certificate which names Aubert Telesford as his father. The applicant therefore claims that Flossie Carrington nee Telesford, the last occupant of the land, was his grand aunt.
- [11] Franklyn Telesford avers that he is 66 years old and states that he occupied the land from 1974 and has been in open, exclusive and undisturbed possession, close to 50 years. He has been cultivating the land by planting and selling cocoa. He has laid water pipes, paid the electricity bills and land tax in the name of Flossie Carrington. He exhibited some documents, namely a cocoa book, land tax receipt and water bills.
- [12] He further states that he entered into several dealings with the land as owner, which include transactions with financial institutions as well as sale of parts of the land to third parties as follows:
- (i) 1988 - Mortgage with the National Commercial bank secured by 1 acre and 3 poles of land at La

Digue as described in the schedule to the mortgage deed ("FT11");

- (ii) Statutory Declaration by Neville Persue in favour of Franklyn Telesford declaring him to be in possession of a lot of land at La Digue approximately 1 acre, dated 23rd February 1989 registered in the Deeds and Land Registry of Grenada as Liber 414 p. 810 No. 606 ("FT12");
- (iii) Deed of indenture for sale of 4,844 square feet of land at Holy Innocent, (also known as La Digue), St. Andrew by Franklyn Telesford as vendor to Neville Persue and Shirley Noel as purchasers dated 2nd April 1998 with attached plan of survey drawn on 9th March 1998 of 4,844 square feet of land ("FT13");
- (iv) Mortgage Deed made 3rd August 1999 between Neville Persue and Shirley Noel and the Grenville Co-operative Credit Union secured by the land at Holy Innocent, St. Andrew ("FT14");
- (v) Deed of indenture executed 20th October 2009 between the administratrix and beneficiaries of Neville Persue as vendors to Carl Campbell for a parcel of land, measuring 4,844 square feet situate at Holy Innocent, St. Andrew ("FT15");
- (vi) Deed of indenture between Carl Campbell and the National Insurance Board for a mortgage loan secured by the property described as 4,844 square feet of land at Holy Innocent, St. Andrew ("FT16").

The Respondent's Case

- [13] Leo Walcott in his affidavit in reply outlines the history of ownership of the land and claims that Flossie Carrington was his grand aunt and that she came into possession of the land on or before 1950 but had no title deed to the land. He deposes that he is the grand-nephew of Flossie Carrington.
- [14] Leo Walcott deposed that Ireton Guy Telesford the brother of Flossie Carrington was his grandfather. He claims that Ireton Guy Telesford had several children including Aubert Telesford who was the father of the applicant, and Dio Acton Telesford who was his father. He therefore claims that he and the applicant are cousins. He exhibits a birth certificate which does not bear his father's name as his parents were not married. He deposes that Dio Acton acknowledged him as his son and that he was commonly known as Leo *Telesford*, a name he claims he carried throughout his primary school. He exhibited a letter dated 1st July 2016 ("LW1"), from his former school principal, Mr. Fitzroy Walcott, which refers to the respondent as Leo *Telesford* and indicates that the respondent was registered at the Holy Innocents Anglican School from the year 1959 where the records show he was placed there under the guardianship of one Flossie Carrington ("LW1").
- [15] He further deposed that his father was the legal administrator of the estate of Flossie Carrington and he exhibited a grant of Letters of Administration to Dio Acton Telesford on 9th September 1988 ("LW3"). He asserts that Dio Acton died in 1980.
- [16] He also relied on the statutory declaration of Tricy May and Edwin Meriegh executed on 9th May 1989 declaring Flossie Carrington owner of the land situated at La Digue ("LW2").
- [17] Leo Walcott deposed that during the time Flossie Carrington was in possession of the land she allowed his mother to live on

the land. His mother constructed a wooden structure on part of the land which was later expanded by adding more rooms and later she constructed a concrete structure around it. He claims that he lived on the land with his mother and after her death he continued in exclusive and undisturbed possession occupying an area which extended beyond the area occupied by his mother.

- [18] He denies knowledge of the documents referred to by the applicant exhibited as “FT11” to “FT16”, referred to in paragraph 15 above. He disputes that the applicant planted cocoa on the land and states in his affidavit that the cocoa book exhibited by the applicant relates to sales done during the period 2021 to 2022. He further states that the pipes referred to by the applicant were laid in 2021 and the applicant began constructing a wooden house in May 2021 adjacent to his house on the said land, after he filed his application for possessory title.

Discussion and Analysis

- [19] Both Franklyn Telesford and Leo Walcott claim to derive their interest in the land from their grand aunt Flossie Carrington nee Telesford. They also claim exclusive and undisturbed possession of the land for more than twelve years.
- [20] It is not for the court at this stage to determine who has a legal or beneficial interest in the land, or who can claim by way of adverse possession. As already stated, the sole issue for this Court to decide is whether the order granting a declaration of possessory title to Leo Walcott should be set aside.
- [21] The declaration of possessory title was granted to Leo Walcott after an *ex parte* hearing on 25th March 2022 upon this Court being satisfied at the time of the application that Leo Walcott had

met the requirements of the Act. This was in accordance with Section 12 of the Act which provides:

- “(1) *An applicant may obtain judgment without trial, where in respect of the application for declaration of possessory title –*
 - (a) *no person enters an appearance within the prescribed time; or*
 - (b) *no person files a written claim within the prescribed time.*
- (2) *Where a person who has entered an appearance pursuant to Section 9 fails to file a written claim within the prescribed time, the court may proceed ex parte and the court may make an order to give a decision as it sees fit.”*

[22] At the *ex parte* hearing Leo Walcott deposed that he is 69 years old. He averred that he grew up living on the land with his grand aunt Flossie Carrington until she migrated to England and then he continued to live on the land with his mother who resided there in a wooden house at the invitation of Flossie Carrington until her death in 1965. His mother occupied an area of 6,820 sq. ft. In 1971 he entered into full, free and undisturbed possession of the remaining lands which is the subject of the application. He stated that he cultivated the land, paid bills, and assisted his mother in renovating the wooden structure into a concrete structure. He exhibited a plan of survey drawn by licensed surveyor Goodwin Alexis on 20th November 2020. There were two supporting affidavits deposing that the respondent lived on the land with his mother from the time he was a little boy to the present. At the *ex parte* hearing the court felt that the other requirements under Sections 4, 5, 6, 7 and 8 of the Act had been satisfied and granted the order for declaration of possessory title.

[23] Section 21 of the Act allows the court to vary or set aside a grant of declaration of possessory title under certain conditions. It provides:

- “(1) Where a declaration of possessory title is voidable by virtue of Section 31, a person may apply for the declaration to be set aside by an order of the court.*
- (2) A person who seeks to claim in opposition to an application for declaration of possessory title may, not later than sixty days after the order of the court has been published in the Gazette pursuant to Section 23, apply for the judgment to be set aside or varied, where-*
- trial;*
- (a) the judgment was obtained without*
 - (b) the person entered an appearance but failed to file a written claim within the prescribed time and judgment was obtained in ex parte proceedings.*
- (3) Upon an application pursuant to subsection (2), the court may set aside, or vary the judgment obtained without trial, if it considers it appropriate by any reason, including –*
- (a) a person otherwise claims in opposition to the application and gives a good explanation for failure to enter an appearance, or to file a written claim, within the prescribed time;*
 - (b) a person claims to have legal title to the land that the person acquired less than twelve years before the date of the application for declaration of possessory title;*
 - (c) a person has a real prospect of successfully opposing the application for declaration of possessory title, on a fact other than the fact referred in paragraph (b).”*

[24] Section 19 of the Act allows the court to apply the Civil Procedure Rules 2000 (CPR 2000) in all possessory title proceedings.

[25] Under CPR 13.3 an application can be made to set aside a default judgment where no defence has been filed. In **Marina**

Village Ltd v St Kitts Urban Development Corporation Ltd²

the Eastern Caribbean Supreme Court of Appeal restated the requirements for setting aside a default judgment under CPR 13.3 for failure to file an acknowledgement of service or a defence which can be distilled as follows: Firstly, the applicant who seeks to engage the discretion of the court to set aside a default judgment 'must give a good explanation for failing to file an acknowledgement of service or defence'. Secondly, the applicant 'must have a real prospect of successfully defending the claim'. Thirdly, 'the court can set aside the default judgment if there are exceptional circumstances for doing so'.

- [26] The failure of an applicant objecting to a grant of possessory title to file a written claim and statement of facts is analogous to failure of a defendant to file a defence under CPR 13.3. Accordingly, the rules for setting aside default judgments or an order of the court under CPR 13.3 are applicable in this case.
- [27] The court has jurisdiction to set aside a grant of possessory title under Section 21 of the Act. The applicant must satisfy the court that: (i) the application was made within sixty days after the order of the court has been published in the official gazette; (ii) the order was granted without a trial; (iii) the applicant entered an appearance but failed to file a written claim and the order was obtained *ex parte*; (iv) the applicant must within the prescribed time provide a good explanation for failure to enter an appearance or file a written claim; and (v) demonstrate that he or she has a real prospect of succeeding.
- [27] It is accepted that the application was made without a trial. The order was made on 25th March 2022 and was gazetted on 22nd

² SKBHCV2015/0012.

April 2022. The application was filed on 17th June 2022. Therefore the court finds that the application to set aside was made within the prescribed time.

- [28] In considering the second requirement for setting aside the order for the grant of declaration of possessory title, an examination of the record reveals that the applicant entered an appearance on two occasions but failed to file a written claim on each occasion. The court notes that the first entry of appearance was filed by Franco Chambers on behalf of Leo Walcott on 8th July 2021. A discontinuance of entry of appearance was filed on 30th July 2021. The court record shows that on 28th January 2022 on the first hearing of the matter the applicant appeared before the court with lawyer Mr. Henry Paryag who sought to address the court. The court informed Mr. Paryag that he had not satisfied the requirements of the Act to make representations on behalf of Franklyn Telesford as no entry of appearance had been filed on his behalf and Mr. Paryag was not on record. The court requested that Mr. Paryag comply with the requirements of the Act. On 23rd March 2022 an entry of appearance was filed by Mr. Henry Paryag on behalf of the applicant. This was filed two days before the hearing of the application for possessory title. However, no written claim, statement of facts or affidavit was filed on behalf of the applicant/respondent. No satisfactory explanation was given for failing to comply with the requirements of the Act and no application was made for an adjournment. The Court proceeded to hear the application and granted the declaration for possessory title based on the uncontested facts before it.
- [29] Franklyn Telesford stated in his affidavit at paras. 23 and 24 that there was a misunderstanding on his part of the process and he did not understand after the appearance was filed he needed to do anything else. The court accepts the explanation given by the applicant and views the applicant's appearance at every hearing

of this matter as an indication of his interest in the matter. Therefore, the court will not hold his lawyer's failure to take action in accordance with the Act against the applicant.

[30] In considering whether the applicant has '*a real prospect of successfully opposing the application for declaration of possessory title as required under Section 21(3) (c)*' the court accepts that Franklyn Telesford and Leo Walcott are claiming possessory title of the same parcel of land at La Digue, St. Andrew measuring 1 acre 3 poles. They both exhibit plans of survey which identifies a parcel of land measuring 1 acre 0 roods and 3 poles located at La Digue, St. Andrew. Although the court notes that the boundaries on the respective plans are different both parties agree that it is the same plot of land which is the subject matter of the application.

[31] Both parties are claiming to be grandnephews of Flossie Carrington nee Telesford who died intestate and without issue. Further, they are both claiming to have been in free, continuous, exclusive and undisturbed possession for over twelve years, that is, by adverse possession.

[32] Section 2 of the Act defines adverse possession:

"adverse possession" means factual possession of an exclusive and undisturbed nature of a piece or parcel of land in Grenada for a continuous period not less than twelve years immediately preceding the claim, accompanied by the requisite intention to possess the said land as landowners thereof."

[33] It is settled law that possessory title involves factual possession and an intention to possess³. In **Charles v Gittens and Hutchinson**⁴ Sir Vincent Floissac CJ described factual possession as a:

³ Michael T. Arthur v Elroy Arthur, SVG Civil Appeal No. 17 of 2010.

⁴ SVGHCVAP1991/0006.

“...continuous, uninterrupted, peaceable, public and unequivocal possession of the land as owner thereof and to the exclusion of the proprietor for at least 12 years whether the adverse possession or prescriptive possession was as a result of dispossession or discontinuous possession by the proprietor.”

- [34] This Court will not embark on an analysis of the evidence to determine who was in factual possession or had an intention to possess. Suffice it to say that both parties are claiming that they were. This Court is of the view that Leo Telesford has raised a valid opposition to the grant of declaration which has a real prospect, not a fanciful prospect, of successfully opposing the application to the grant of possessory title⁵.
- [35] The third ground upon which the applicant seeks to set aside the grant of possessory title is that there has been material non-disclosure by Leo Walcott.
- [36] Franklyn Telesford asserts that the Leo Walcott has not provided the court with the full or correct history of ownership of the land and his relationship to the original owner of the land, nor has he informed the court of the existence of several deeds recorded at the Deeds and Land Registry of Grenada relating to the said land in which the applicant was a named party.
- [37] Leo Walcott in his affidavit in reply described his relationship with Flossie Carrington whom he claims to be the original owner of the land and who was his father's aunt and therefore, his grand aunt and guardian until she migrated to England when he was 10 years old. He further asserts that he had no knowledge of the deeds exhibited by the applicant and that searches conducted at the Registry did not reveal these transactions with the land.

⁵ ED & F Man Liquid Products Ltd V Patel and Another [2003] ALL ER (D) 75.

[38] Learned Counsel for the applicant Mr. Ruggles Ferguson refers to the case of **Adari v Adari**⁶ where the Eastern Caribbean Supreme Court of Appeal applied the principles relating to non-disclosure on a grant of an *ex parte* judgment laid down in **Brinks Mat Ltd v Elcombe et al.** This Court accepts these principles. Of significance are the following: (i) there must be “a full and fair disclosure of all material facts” by the applicant; (ii) the need for the applicant to make proper enquiries before making the application and disclose material facts he would have known and any additional facts he would have known if he had made such enquiries; (iii) the extent of the enquiries will depend on the nature of the case; the degree of legitimate urgency and the time available for making enquiries; (iv) whether the non-disclosure was innocent and was not known to the applicant or that its relevance was not perceived; (v) the importance of the material not disclosed to the issues which were to be decided by the judge; and (vii) the probable effect of the order on the defendant.

[39] Learned counsel for the respondent, Mr. Zuriel Francique on behalf of the Respondent submits that the applicant has not met the standard requirements of fraud as required by Sections 30 and 31 of the Possessory Titles Act and relied on the case of **Derry v Peek**⁷. He asserts that Franklyn Telesford has failed to prove that Leo Walcott “knowingly made or assisted in making any material false statements or representation, or intended to deceive, suppress or refuse to disclose, or assisted in the suppression or non-disclosure of any material document or information. Nor did the Leo Walcott knowingly make any statement without belief in its truth or made it recklessly or carelessly whether it be true or false.”

⁶ Eddy Gay Addari v Enzo Addari, BVI Appeal No.2 of 2005.

⁷ [1989] 14 A.C. 337.

- [40] *Prima facie* it appears from the exhibits attached to Franklyn Telesford's affidavit there were several deeds recorded at the Deeds and Lands Registry of Grenada at the time the application was made by Leo Walcott which were not mentioned in his affidavit in support of his application for possessory title. The court considers these to be material to the grant of possessory title.
- [41] However, the court will not pronounce on whether this omission was deliberate, inadvertent or innocent. The court does not believe that these matters can be resolved at this stage as this would entail an enquiry into the truthfulness and credibility of the affiants and authenticity of the documentary evidence.
- [42] Moreover having found that the application satisfies Sections 21(2) and 21(3) (a) and (c), there is no need at this stage to determine the issue of material non-disclosure or whether Leo Walcott '*knowingly made false statements, or with intent to deceive suppressed or refused to disclose any material document or information*' as required by Sections 30; or '*whether there was a material mistake*' under Section 31 of the Act. However, the court notes in passing that Sections 4(c) and (d) of the Act require the applicant to a declaration of possessory title '*to provide information about any other person capable of claiming ownership of the land immediately before the period of adverse possession began to run based on the records located at the Registry*'.
- [43] Leo Walcott deposed in his affidavit in support of the application for declaration of possessory title that he conducted a search at the Registry which revealed no title deed in the name of his grand aunt Flossie Carrington. The extent of the search which he conducted will be an issue to be determined.

[44] Based on the above I have found that the applicant Franklyn Telesford has satisfied the requirements under Sections 21(2) and 21(3) (a) and (c) of the Act. Where there are competing claims for the same parcel of land it is the court's duty to ensure that ownership is granted to the rightful owner who may have a legal or beneficial interest or who is claiming adverse possession. These competing claims will best be resolved at a trial. It is therefore in the interest of justice to grant the application to set aside the order.

[45] Accordingly, it is hereby ordered:

1. The order for declaration of possessory title granted to Leo Walcott on 25th March 2022 in respect of the parcel of land measuring 1 acre 3 poles at La Digue, St Andrew as delineated by the survey plan of Godwin Alexis dated 14th March 2022 be set aside.
2. The matter shall proceed to trial on a date to be fixed by the Registrar of the Supreme Court.
3. There shall be no order as to Costs.

Victoria Charles-Clarke
High Court Judge

By the Court

Registrar