

**IN THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHPT2018/0020

**IN THE MATTER OF AN APPLICATION BY EUSTON PENISTON BY HIS ATTORNEY ON RECORD
ALWYN PENISTON FOR A DECLARATION OF POSSESSORY TITLE TO LAND**

BETWEEN

**EUSTON PENISTON
(BY HIS ATTORNEY ON RECORD ALWYN PENISTON)**

APPLICANT

and

LEROY PENISTON

RESPONDENT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mr. Ronald Marks for the applicant.

Ms. Kensha Theobalds for the respondent.

2022: Feb. 8
Sept. 29
Oct. 4
Nov. 1
Dec. 19
Re-issued - 2023: Jan. 11

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Mr. Alwyn Peniston brings this application for a declaration of possessory title to land on behalf of his late brother Mr. Euston Peniston's estate. He seeks an order declaring Euston

Peniston's Estate as owner of a parcel of land located in Pretoria, Bequia, in the State of Saint Vincent and the Grenadines (the disputed land'). The deceased constructed his house on the disputed land in 1991 and lived there from that time until he passed away on April 15th 2022. His case is that he occupied the disputed land continuously, exclusively and without interruption from anyone since 1989. He contended that he has thereby acquired an interest in and title to the disputed land by adverse possession.

- [2] Leroy Peniston opposed the application. He is Euston and Alwyn Peniston's cousin. He contended that he inherited the disputed land from his mother Adriana Peniston, deceased who owned an interest in it by virtue of Deed Number 122/1964. That Deed vested a larger parcel of land ('the original land') in Adriana Peniston and her siblings Emily Peniston and Henry Peniston as tenants in common. Emily Peniston was Euston and Alwyn Peniston's mother. She is now deceased.
- [3] Mr. Leroy Peniston asserted that Euston Peniston was his tenant who paid him rent in respect of his occupation of the disputed land. He averred that in 2017 he initiated a civil claim in the Magistrate's Court against Euston Peniston to recover possession of the disputed land after he stopped paying the rent. He argued that the issue of ownership of the disputed land was determined by the learned Magistrate and this claim is therefore caught by the doctrine of *res judicata*.
- [4] Mr. Alwyn Peniston acknowledged that the original land was once family land. However, he refuted Leroy Peniston's claim that Euston Peniston paid rent for the disputed land between 2000-2015, before stopping abruptly or that any order as to ownership of the disputed land was made by the Magistrate. He maintained that his mother Emily Peniston went into occupation of the disputed land before Euston Peniston did, and that Euston Peniston continued to do so until his death, without acknowledging anyone else as owner. In those circumstances, he contended that any title that Adriana or Leroy Peniston could claim has thereby been extinguished by Euston Peniston's possession for over 20 years.

ISSUES

[5] The issues are:-

1. Whether the issue of ownership of the disputed land was resolved by the Magistrate's Court and

is therefore caught by the doctrine of *res judicata*?

2. Whether Mr. Euston Peniston is entitled to a declaration of possessory title of the disputed land at Pretoria, Bequia?

LAW AND ANALYSIS

Issue 1 – Was the issue of ownership of the disputed land resolved by the Magistrate’s Court and is therefore caught by the doctrine *res judicata*?

[6] The principle of *res judicata* is described by the learned authors of **Halsbury’s Laws of England** by reference to the essential elements as follows: -

‘Essentials of *res judicata*. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties.....**It is not enough that the matter alleged to have been estopped might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed.**’¹ (Emphasis added)

[7] As to the issue of *res judicata*, Mr. Leroy Peniston testified: -

‘I am of the belief that the Applicant was confused as to which parcel of land he was supposed to challenge, when I filed Recovery of Possession against him in 2017, during the Court case they withdrew their opposition as they realized the land in question was in fact mine.’

Mr. Alwyn Peniston admitted that the claim then was for recovery of possession of the disputed land from Mr. Euston Peniston. He said: -

‘I also agree that in 2017, Mr. Leroy Peniston initiated a claim in the Bequia Magistrate’s Court to recover possession of the land.

[8] Leroy Peniston’s witness Bernadette Frederick stated: -

‘In 2017 Leroy Peniston filed Recovery of Possession and when the matter was heard in

^{14th} Ed. (Reissue) at para. 975.

Court Euston Peniston Lawyer Ronnie Marks, withdrew the matter, as it was realized that the said land in question was in fact Leroy Peniston.’

Neither party supplied the Court with a transcript of the proceedings before the Magistrate’s Court or a Certificate or other official record of the proceedings and/or the final order in that matter.

[9] Citing **Henderson v Henderson**², **Maurice Dantes v Cecile Bibiana Joseph**³, and **Kathleen Tyrell v Horace John et al**⁴, Mr. Leroy Peniston argued that the doctrine of *res judicata* applies in this case. He submitted that when he commenced proceedings against Mr. Euston Peniston in the Bequia Magistrate’s Court, his lawful attorney on record, Mr. Alwyn Peniston withdrew his defence and allowed Mr. Leroy Peniston’s case for recovery of possession to proceed. He reasoned that Mr. Euston Peniston thereby accepted that he was a tenant on the disputed land.

[10] Mr. Alwyn Peniston submitted that no ‘record of the proceedings was adduced to assist the court in determining the nature of the matter that was before the court, the findings of fact if any and the Order of Court.’ He submitted further that without these details the court would not be in a position to determine if this matter was already subject to adjudication by a court of competent jurisdiction. He contended that the value of the disputed property is well over the Magistrate’s Court statutory limit of \$15,000.00. He reasoned that this proves that the legal issues in the case at bar have not been adjudicated in the Magistrate’s Court since that court does not have jurisdiction to deal with such matters. He argued further that even if the Magistrate’s Court purported to do so, any such adjudication would be in excess of its authority.

[11] It is important to note that the main objective of application of the doctrine of *res judicata* is: -
‘... to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of

²(1843) 3 Hare 100.

³SLUHCV2001/0302.

⁴SVGHCV2004/0097.

the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.⁵

- [12] I make the observation that Mr. Leroy Peniston has not pleaded *res judicata*. He has merely alluded to the earlier proceedings. Mindful of the learning as articulated earlier, I agree with Mr. Alwyn Peniston that the court is precluded from making a finding of *res judicata* in the absence of an official record from the Magistrate's Court as to what happened at the 2017 hearing. In this regard, while I accept the parties' common representations that the suit in the Magistrate's Court in or about 2017 was brought by Mr. Leroy Peniston for recovery of the disputed land from Mr. Euston Peniston, I am unable due to the lack of relevant evidence, to make a finding as to the result of those proceedings. Without any such documentation it is impossible to make a determination as to what transpired there and whether the issue is *res judicata*. I make no such order either way.

Issue 2 – Is Mr. Euston Peniston entitled to a declaration of possessory title of the disputed land at Pretoria, Bequia?

- [13] There is very little divergence between the respective parties' factual contentions in this case. There is common ground between them that the original land was vested in Elizabeth Benn, Adriana Peniston and Henry Peniston in 1964. By then Adriana Peniston had passed away, having died two years before in 1962. She had three children – Bernard, Hollis and Leroy. Hollis is deceased and is survived by his wife and child. Bernard is also dead. Of those siblings, Leroy is the only one alive. Although he was born in Saint Vincent and the Grenadines, he migrated as a youngster with his mother and has lived abroad for most of his life.
- [14] Emily Peniston remained in Bequia with her family. She had 7 children including Euston and Alwyn Peniston. They all lived on the original land for many years and occupied the disputed land cultivating certain crops on it. Emily Peniston passed away in 1990. By then, Euston Peniston had started farming on the disputed land. He built his house on it in 1991. These accounts are set out in Euston Peniston's, Eldridge Friday's, Alwyn Peniston's and Marguerite Peniston's affidavits filed on 21st June 2018 and in their oral testimonies.

⁵Halsbury's Laws of England, (2020) Vol. 12A para. 1568 (LexisNexis).

- [15] The subject of payment of rent was introduced into the case in Mr. Leroy Peniston's affidavit filed on 18th April 2019. He stated simply that he rented Euston Peniston the disputed land years ago and that he had been paying rent, but eventually stopped. His witness and cousin Bernadette Frederick averred that she conducts all of his business in Saint Vincent and the Grenadines. She said that Leroy Peniston rented Euston Peniston the disputed land from January 2000 at a monthly rent of \$10.00 which the latter paid until 1st May 2015. She produced 6 receipts⁶. They relate to the periods 1st January to January 2000, May 1st to 31st, July 1st to 31st, June 1st to 31st and August 1st to 31st. The first three contain a signature, purportedly of Euston Peniston. The others are not signed.
- [16] Ms. Frederick testified that she ended up with the receipts and retained them because she was the one conducting his business so he needed her to keep the receipts. I tendered 6 receipts. She explained that she used to go to Euston Peniston's house and clean the room that Alwyn put him in, take him to the doctor and cut his nails.
- [17] Mr. Euston Peniston did not file any further affidavits denying the assertions that he paid rent to Leroy Peniston. On the other hand, his then lawful attorney on record Alwyn Peniston, now appointed as representative for Euston Peniston's estate sought to introduce doubt as to Mr. Euston Peniston's ability to read the receipts and as to whether he signed the receipts. In his further affidavit filed on 18th April 2019, Mr. Alwyn Peniston accepted that Euston Peniston is able to write his name. he asserted that he cannot read.
- [18] He recounted a conversation in which Euston Peniston told him that on one occasion in July 2017 Leroy Peniston took him to the back of a shop and held his hand to sign a document and that he did not know what he was signing. He also testified that as far as he is aware, Euston Peniston never paid anyone rent for the disputed land. On re-examination he averred for the very first time that he can 'say accurately that Euston Peniston never paid rent for the land ... because my brother told me that he had never paid any rent for no land. I do not know if he paid money to Bernadette Frederick.' Not only are these conversations hearsay evidence, significantly, Mr. Alwyn

⁶ Pgs. 153 – 154 of the trial bundle.

Peniston introduced this later statement without giving notice to Leroy Peniston pursuant to CPR 29.13 requiring him to admit this as factual.

[19] Moreover, it is noteworthy that Mr. Euston Peniston's sole affidavit was executed by him in the presence of a Justice of the Peace and contained no certificate in the jurat that he is unable to read. Even more remarkable is the fact that the jurat signified that the affidavit was read to him because of his illness and that he appeared perfectly to understand the contents. Taken together, these circumstances demonstrate that Mr. Euston Peniston was alive to the need to include a certificate of his incapacity to read by reason of illness. I infer that he would have been just as aware of the need to include a similar certificate if he was illiterate. The absence of such a certificate belies Mr. Alwyn Peniston's statement to the contrary. I do not believe him and I reject that account for all of these reasons. In contrast, Ms. Frederick struck me as a credible witness and I believe her and accept her account.

[20] Euston Peniston made no further averments after his initial affidavit that was filed on 2nd June 2018 even though he passed away only in 2022. I find this curious especially in light of Mr. Alwyn Peniston's refutations. The rent receipts signed by Euston Peniston evidenced an acknowledgment by him that Leroy Peniston is the owner of the disputed land. His handwriting speaks stridently from the grave. I accept that he signed the receipts in circumstances where he had adequate opportunity to deny doing so but did not. I find that Euston Peniston signed the rent receipts neither by mistake, duress or by deception but fully appreciating what he was signing. In fact, no such denial is not pleaded.

[21] The disputed land comprises 2,802 square feet and is delineated in survey plan Gr17/97 drawn and prepared by authorized land surveyor Kendon Lavia and approved and lodged at the Lands and Survey Department on 8th February 2018. The boundaries are set out in the Application as follows: -

'On the north partly by an access road and partly by lands of Marguerita Peniston as seen on survey plan GR15/62, on the south by lands of the heirs of Zita Friday, on the east by

lands of the heirs of Annette Peniston as seen on survey plan Gr9/12 and on the west by lands of the heirs of Norma Gordon being lot 2 on survey plan Gr16.133’.

[22] As to the legal requirements for a grant of a declaration of possessory title, **the Possessory Titles Act** (**‘the Act’**)⁷ outlines the procedure and elements to be established. It stipulates among other things that an applicant must file an application in the prescribed form⁸ and include all of the details specified in **the Act**⁹. Among the particulars to be included on the form is the name(s) of the persons(s) who is/are registered as owner(s) of the subject land immediately before adverse possession commenced. By completing and submitting the form, the applicant avers that he ‘has not knowingly withheld any fact concerning the said land which ought to be disclosed in this application, and has truly and honestly, to the best of his knowledge and belief, represented the truth concerning the title of the land’.

[23] Mr. Euston Peniston certified that he had truly and honestly represented the truth in his application.

He did not supply the name of the registered owners as he was mandated to do and he provided not application either in his application or affidavit as to why he had not done so. On this score, it is significant that Alwyn Peniston’s further affidavit was filed on the same day that Leroy Peniston filed his solitary affidavit, in accordance with case management directions issued on January 14th 2019.

[24] In that further affidavit, Mr. Alwyn Peniston recounted the history of legal ownership of the disputed land without prompting or other assertions by Leroy Peniston. In fact, his account was much more substantial than Leroy Peniston and was mirrored in materials respects in the contents of a further affidavit filed on Euston Peniston’s behalf by Mrs. Marguerite Peniston on the same day. They both averred in written and oral testimony that they were aware of these circumstances all along. A reasonable inference is that those particular facts were deliberately omitted from their earlier affidavits. Mr. Euston Peniston had by then stopped pursuing this case in his own right but from

⁷Cap. 328 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

⁸ Form 1.

⁹Sections 4 and 7.

then has been represented by Mr. Alwyn Peniston. The absence of an explanation as to why this specific detail was omitted from the Form is of concern.

[25] Equally telling is that in his application for possessory title Mr. Euston Peniston omitted all references to the Deed No. 122/1964. The insertion of the names of any registered owners is a requirement of the **Act**¹⁰. Mr. Euston Peniston also did not reveal in his initial filings that Leroy Peniston had actually initiated proceedings against him in the Magistrate's Court concerning ownership of the disputed land although this was later acknowledged by Alwyn Peniston. Moreover, in the application Mr. Euston Peniston claimed that he had not knowingly withheld any fact concerning the disputed land which ought to be disclosed and has truly and honestly to the best of his knowledge and information represented the truth concerning the title to the land. His testimony is thereby discredited and has tainted the other material evidence of his witnesses.

[26] Mr. Euston Peniston satisfied the other procedural requirements for grant of a declaration of possessory title including publishing notice of his application in two newspapers circulating in the State and to neighbouring landowners; supplying a valuation of the disputed land and a copy of the relevant approved survey plan. I find however, that by reason of the inconsistencies and inaccuracies in his factual allegations, the omissions from Form 1 and the other defects in his case, that he has failed to establish adverse possession of the disputed land. His application for a declaration of possessory title is dismissed.

Miscellaneous

[27] Learned Counsel for Mr. Euston Peniston's Estate Mr. Ronald Marks, made some astute observations regarding Mr. Leroy Peniston's decision to convey the disputed land to himself by Deed of Assent even though one of his brothers left a widow and child who are entitled to a share in the same. I make the observation that in light of Mr. Leroy Peniston's testimony under cross-examination, that conveyance requires further scrutiny by the court. In the circumstances, I hereby refer those matters for consideration by the Registrar of the High Court for inquiry and appropriate action. The clerk is directed to bring this judgment to her attention and make available to her the audio of the entire proceedings to facilitate review and necessary action.

¹⁰ Sections 4 and 7 and Form 1.

Costs

[28] Having prevailed in this claim, Mr. Leroy Peniston is entitled to his costs. The applicable procedural rules¹¹ stipulate an award of prescribed costs at the same rate as a claim valued at \$50,000.00. That amounts to \$7,500.00.

DISPOSITION

[29] Accordingly, it is ordered:-

1. Euston Peniston's application for a declaration of possessory title of land situated at Pretoria, Bequia and shown in survey plan Gr17/97 drawn by Kendon Lavia authorized land surveyor and approved and lodged at the Lands and Survey Department on 8th February 2018, is dismissed.
2. The Registrar of the High Court is directed to review the audio recording of this trial and conduct an inquiry as to the persons who are deemed by law to be the lawful beneficiaries of the Estate of Adriana Peniston as it relates to her title, right and interest in the disputed land. The Registrar shall take all appropriate action to ensure that Deed of Assent No. 2/2014 from Leroy Peniston, Administrator of the Estate of Adriana Peniston to Leroy Peniston complies with all applicable legislative provisions for devolution of real property on intestacy, or other appropriate action.
3. Alwyn Peniston, court appointed representative of Euston Peniston's estate shall on or before January 31st 2023 pay to Leroy Peniston prescribed costs of \$7,500.00.

[30] I am grateful to counsel for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

¹¹ Civil Procedure Rules 2000, rule 65.5(2)(b).

Registrar