

**IN THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS
THE HIGH COURT OF JUSTICE
(NEVIS CIRCUIT)**

CLAIM NO NEVHCV2021/0120

BETWEEN:

ORVILLE ALCENDOR

Applicant/Caveatee

And

LOVINA DAVIS

Respondent/Caveator

Before: **His Lordship Justice Patrick Thompson Jr**

Appearances: Ms. Kurlyn Merchant for the Applicant/Caveatee
Mr. Brian Barnes for the Respondent/Caveator

**2022: May 23rd
June 2nd & 21st
September 30th**

JUDGMENT

1. The Applicant is the nephew of the Respondent as the Applicant's late mother and the Respondent were sisters. Notwithstanding their familial ties, they dispute who owns all that lot, piece or parcel of land situated at Barnes Ghaut in the Parish of St. Thomas in the Island of Nevis containing by admeasurement 1.1858 acres of land ("the land") as delimited in the survey plan prepared by Simeon Hill and dated August 18th, 2021.

Factual Background:

2. By a vesting deed on May 17th, 2018 the Applicant vested in himself the land. If that were all then there would have been no need for this Court's intervention but

by an application filed on August 31st, 2021 the Applicant applied for First Certificate of Title in respect of the land.

3. In support of his application for First Certificate of Title he relied on his own affidavit dated August 11th, 2021 to which were exhibited the vesting deeds, a tax receipt for the land and his mother's death certificate. His application was also supported by affidavits from Earl Freeman and Patricia Flemming.
4. By a caveat filed on September 24th, 2021 the Respondent objected to the Applicant's application for First Certificate of Title. In their caveat the Respondent contended that the Applicant had misrepresented the true position in relation to the land when he averred that he had been in open and uninterrupted possession of the land for a period of 30 years. The Respondent contended that the land formed part of the Estate of the late Virginia (the Applicant's great grandmother) and Evelyn Davis (the Applicant's grandmother) and was in the possession of their heirs and not that of the Applicant.
5. What happened next can easily be summarized as follows. The Applicant applied to remove the caveat filed by the Respondent and supported his position by his affidavit. The Respondent filed an affidavit to maintain the caveat. The Applicant filed further affidavits both from himself and other witnesses in support of his application for First Certificate of Title. Unsurprisingly, the Respondent filed further affidavits from herself and other witnesses in opposition to this position.
6. On June 2nd and 21st, 2022, a hearing was convened before this Court to determine whether the Applicant is entitled to a First Certificate of Title in respect of the land. Implicit in the answer to that question required this court to consider whether the caveat should be sustained.
7. It is important to note that this Court benefitted greatly from a visit to the land for the purpose of taking evidence from the parties 'on the ground' as to the state of the land. A locus visit helped to focus the minds of the parties and their attorneys and this Court on how the relevant legal principles applied to the land in question.
8. This Court draws significant comfort from the observations of the late Mr. Justice Megarry in Tito v Waddell [1975] 1 W.L.R. 1303 on the questions a judge ought to consider in deciding whether to conduct a view of the locus in a civil context. All the same, if Justice Megarry found it necessary to his understanding of the evidence in a mining claim about Ocean Island in the Pacific to travel there in the 1970's then there can be no dispute about this court's decision to drive to Barnes Ghaut to view the land.

Legal Background:

9. The relevant legal principles are not in dispute.
10. The application for First Certificate of Title is brought under The Title by Registration Act ("the Act"). Section 12 (1) (d) of the Act provides that

"Land not registered under this Act may be so registered if the land has been in the sole and undisturbed possession of the Applicant alone in his or her own right or as executor, administrator or trustee or partly in the sole and undisturbed possession of any person through whom he or she claims, continuously for a period of thirty years next before the presentation of the request under this Act"

11. The relevant legal principles on possession have been summarized by Lord Browne-Wilkinson citing with approval the reasoning of the late Mr. Justice Slade (as he then was) in **Powell v MacFarlane (1977) 38 P&CR 452** and cited with approval in JA Pye (Oxford) Ltd and others v Graham and another [2002] UKHL 30. These principles have been cited with approval by jurists throughout the Commonwealth Caribbean and do not require any extensive discussion. These principles are set out below

"(1) In the absence of evidence to the contrary, the owner of the land with the paper title is deemed to be in possession of the land as being the person with a prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (animus possidendi).....Factual possession signifies an appropriate degree of physical control. It must be single and exclusive possession.....The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances....."

Court's Analysis & Findings:

12. This Court's task is to apply these principles as found by this Court after considering the evidence adduced at the hearing of this matter.
13. For reasons that will become apparent shortly, this Court does not propose to laboriously set out the evidence adduced at trial since there are a number of facts that are not disputed by the parties. These are set out below as follows.
- (i) A portion of the land in question was first 'worked' by Virginia Davis.
 - (ii) Virginia Davis was the mother of Evelyn Davis.
 - (iii) Evelyn Davis was the mother of Vivian Alcendor (the Applicant's mother) and Lovina Davis

- (iv) No one can say the exact size of the land 'worked' by Virginia Davis
- (v) Virginia Davis died in 1961.
- (vi) Evelyn Davis died in 1980.
- (vii) Vivian Alcendor was a farmer. She resided in the US Virgin Islands and Nevis for a period of time but would work the land on her return. It was not immediately clear when she ceased traveling to the USVI.
- (viii) Vivian Alcendor died in 2010
- (ix) The Applicant worked the land from after his mother died in 2010 until the present date.
- (x) The Applicant fenced the land but there was no evidence as to when he did so.
- (xi) The Applicant paid the taxes on the land from at least 2018 to the present date.

14. The dispute between the Applicant and the Respondent can be summarized as follows. The Applicant's case is that while the land was originally worked by his great grandmother (Virginia Davis), she left a Will. The Applicant was only able to find two pages of what he says was Virginia Davis' Will and exhibited those pages to his affidavit. The Applicant says that document shows that his great grandmother gave his mother 'everything that is in her house' and the house and that other land worth about \$560.00 were given to his mother and Rose Collins equally.

15. The Applicant says further that he and his mother exclusively worked the land since it was understood that the land was owned by his mother. In further support of his position he relied on the fact that in the 1990's his mother purchased lands on the southern and eastern side of the land from a Mr. Thompson and a Mr. Smith respectively. No title was obtained from these vendors but the Applicant exhibited a survey plan dated January 25th, 1993 showing lands on the south eastern boundary of the lands allegedly bought from Mr. Thompson in the name of 'Vivian Alsende'. In his view, this was proof that his mother owned the land since the survey plan suggested that she owned the land abutting on the south eastern boundary of the land that she bought from Mr. Thompson.

16. Therefore, the Applicant's ultimate position was that the land was not family land. His mother believed that the land was hers since she believed it had been willed to her by her grandmother. He and his mother and not his other relatives worked the land until his mother's untimely demise in 2010. After 2010 he continued to work the land until the present day having planted and reaped from the produce on the land.

17. The Respondent's position is that the land was family land and was worked by the descendants of Virginia Davis in common for a number of years. She believed that half of the land was owned by her late mother (Evelyn otherwise called Avis) since it had been left to her by Virginia Davis and the other half was owned by the other heirs and descendants of Virginia Davis.

- 18.** It was the Respondent's case that she and her late sister Vivian Alcendor would work the land in conjunction with other family members and that they would sell the produce from the land. After Vivian died in 2010 other family members would pick the fruits from the trees on the land.
- 19.** Therefore, the Respondent's position was that her nephew had no greater claim to the land than any of the other heirs of Virginia Davis. In her view the land was always family land and thus could not have been in the exclusive possession of the Applicant or his mother.
- 20.** This Court's task is to apply the relevant law to the factual dispute summarized above. This has not been any easy task but this Court found that the locus visit together with the evidence of the Respondent's witness, Ms. Eileen Liburd to be extremely useful.
- 21.** Ms. Liburd was aged 87 and as a result the Court decamped to Barnes Ghaut for the purpose of taking her evidence as she was not able to physically come to the Court. This Court notes in passing that attempts to take Ms. Liburd's evidence via Zoom were unsuccessful, not because of any default on her part or on the part of internet providers but because Zoom was not the most effective or efficient method of receiving her evidence.
- 22.** Her viva voce evidence was striking and clear and did not suggest any partiality or fabrication. She knew all of the parties (no surprise in view of her age) and confirmed the following
- (i) That the Applicant's mother had worked the land with her grandmother, Virginia Davis.
 - (ii) That after Virginia died, Vivian (the Applicant's mother) and Evelyn Davis ("Avis") worked the land together.
 - (iii) That Vivian was the one who mostly worked the land
 - (iv) That the Applicant had another job but that he would come in the land since his mother had passed away.
 - (v) That Avis and Vivian were the last persons to work the land.
- 23.** This Court had no hesitation in accepting her evidence as set out above. The acceptance of that evidence is significant for the following reasons. Firstly, this evidence confirms that up until Evelyn Davis died in 1980 the land was worked by the heirs of Virginia Davis in common as opposed to being exclusively owned by the Applicant and/or his mother. The Applicant's contention that he and/or his mother had been in possession of the land for his entire life is not made out.

24. That is not the end of the matter though. The law only requires the Applicant to establish possession for 30 years from the date of the application for First Certificate of Title. What therefore was the position with the land on August 31st, 1991? The answer to this question is less clear.
25. Ms. Liburd's evidence is that the Applicant would come on to the land after his mother had passed away in 2010 since he was working somewhere else. The Applicant accepted that he had other jobs but it was his evidence that he would come to the land after work to assist his mother in taking away the produce from the land and assisting her to farm the land. The Respondent's evidence was that she and other family members would continue to pick fruits on the land from 1980 when her mother died and 1983 when her father died and that the family continued to do so.
26. The locus visit was particularly instructive. The Applicant pointed to fruit trees that had been planted by him and his mother. Those trees did not appear to have been planted 30 or more years ago. This Court is not a horticulturalist but the fruit trees appeared small for trees that were 30 or more years old. Moreover, 1.158 acres is a significant portion of land to be cultivated and maintained by the Applicant.
27. The law is clear. The Applicant must demonstrate that he was in exclusive physical control of the entire 1.158 acres to the exclusion of all others. It would have been extremely useful to know when the Applicant fenced the land since that is the clearest sign of exclusive control of the land. Fencing of the land is not the sole determinant but is a significant factor in deciding the issue of exclusive control.
28. The late Mr. Justice Slade in Powell v McFarlane (1977) 38 P&C R 454 highlighted the significance of fencing when demonstrating exclusive physical control over a portion of land he pointed out that:

"There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention of the doer to appropriate the land concerned....The enclosure of land by a newly constructed fence is [one]"

See also George Wimpey and Co Ltd v Sohn [1967] Ch. 487

29. The Applicant's reliance on the 1993 survey plan does not provide the support prayed for by the Applicant. The surveyor could only reasonably rely on what was told to him by his client. There is no evidence that he did any due diligence to confirm what had been told to him by his client or the owners of any adjoining lands. Moreover, there is no evidence from the Applicant confirming that the 1993 survey plan was accurate because its contents were confirmed by contemporaneous or subsequent survey plans. No other survey plans showing that lands belonging to 'Vivian Alsende' were adduced in evidence.

30. This Court is not persuaded that the Applicant has been in possession of the entire parcel of land. That is not to say that the Applicant has not been in possession of **a part (my emphasis)** of the land so as to entitle him to a First Certificate of Title for that part of the land (once it can be identified). This Court finds that the Respondent's evidence at the locus was telling. The Respondent indicated distinct portions of the land that were farmed by her parents and also where her mother and the Applicant's mother used to farm on the land.
31. This evidence is a tacit acceptance that the Applicant and his mother were at the very least in possession of a part of the land. This evidence lends support to the Applicant's position. Moreover, it is not immediately clear when the land that had until 1980 been considered (at least by Ms. Liburd) as family land became the exclusive property of the Applicant and/or his mother.
32. This Court also notes with some surprise the paucity of evidence as to the state of the land from 1991 to the present date. Both the Applicant and Respondent were very clear and detailed in their evidence on steps taken by their respective forbearers on the land. The nature and details of any steps taken from say 1991 onwards in relation to the land remain murky.
33. On the Applicant's side his affidavit indicates that he and/or his mother worked the land together until her untimely demise in 2010. There is no evidence as to when the land was first fenced or when he and/or his mother first fenced the land. It was put to the Respondent in cross examination that the land was fenced before the Applicant's mother died but no specific date was put to the Respondent. It was the Respondent's evidence that the fence was only recently erected. Neither side indicated when the fence was erected. This is significant since the erection of a fence is the clearest sign that the Applicant and/or his mother were exercising dominion over the land to the exclusion of everyone, including family members.
34. It is clear that irrespective of their competing claims to ownership of the land up until 1983 or so the land was worked by the heirs of Virginia Davis. If the Applicant is seeking to assert possession of the land to the exclusion of his relatives it would have been useful to determine when he excluded or at the very least restricted their access to the property. The onus is on the Applicant to demonstrate on a balance of probabilities that he was in exclusive possession of all of the land for the requisite period. He has failed to do so.
35. On the other hand, the Respondent's evidence is singularly lacking in respect of any evidence as to any actions taken by 'the family' on the land from 1991 to date. There is no reasonable explanation for why the Respondent has been unable to clearly articulate when the Applicant first fenced the land or any interactions by other family members with the land beside vague references to picking of fruits and leisure access.

Court's Findings:

36. This Court has carefully considered the matter and has arrived at the following findings. Up until around 1983 the land was farmed by the heirs of Virginia Davis. By 1991 the land (over an acre) lay largely fallow except for the portion worked by the Applicant and his mother. The Applicant and his mother were in possession of a portion of the land for the requisite period but not all of the land.

37. As a matter of law, acts of possession done on tracts of land for which possessory title is sought may be evidence of possession of the whole. The obiter dictum comments of Lord Blackburn in Lord Advocate v Lord Blantyre (1879) 4 App Cas 770 at page 791 are instructive on this issue.

"No one such act is conclusive and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who are interested in disputing ownership would be aware of it. All that tends to prove possession as owners of parts of the tract tend to prove ownership of the whole tract; provided that there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it and what kind of possession proved was"

38. Ultimately, this is a question of fact to be determined in each case. The evidence does not lead to a reasonable inference that since the Applicant was in possession of a part of the land, he was in possession of the whole of the land. Without seeking to put too fine of a gloss on the point the Privy Council decision in West Bank Estates Ltd v SC Arthur (1966) 11 WIR 220 cites with approval the decisions in Clark v Elphinstone (1880) 6 App Cas 164 and Glyn v Howell [1909] 1 Ch 666.

39. Those decisions all confirm that in order for acts of possession in portions of a larger area to amount to possession of the entire area, the larger area must be clearly defined and demarcated. It is common ground that the boundaries of the land first worked by Virginia Davis and her heirs were not defined. Therefore, the Applicant cannot assert title to the whole of the land by his acts of possession as found by this court on a part of the land.

40. In this Court's view, the Applicant would thus be entitled to a 1st Certificate of Title in respect of such portion of the land that he and his mother 'worked' to the exclusion of the other family members. Determining the exact nature of this portion should be resolved in the following way:

- (i) The Applicant and Respondent are ordered to jointly instruct a single land surveyor for the purpose of determining the portion of land 'worked' by the Applicant and his mother.

- (ii) The parties are at liberty to approach the Court for further directions if they are unable to agree on the exact portion of land worked by the Applicant and his mother.

41. In this Court's view, a Court is empowered as a part of powers to make such orders as the justice of the case demands. The orders made above are consistent with this Court's overriding duty to do justice both to the parties and the nature of the dispute.

42. In view of the Court's ruling above, each party should bear their own costs since they have both enjoyed success in this matter. As a result, this Court makes no order as to costs.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR