

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE**

**GRENADA**

**CLAIM NO: GDAHCV 2018/0489**

**BETWEEN:**

**In The Matter of The Possessory Titles Act**

**and**

**In The Matter of an Application for a Declaration of Possessory Title of Land**

**and**

**Reginald Penny**

**Applicant**

**and**

**Estelle Charmaine Penny**

**Respondent**

**Appearances:**

Alban John with Verne Ashby for the applicant  
Cyrstal Braveboy – Chetram for the respondent

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2020: January 30  
March 5

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**JUDGMENT**

[1] **ACTIE J:** This is an application filed by Reginal Penny seeking a declaration for possessory title pursuant to the **Possessory Title Act 20 of 2016**. Having read the application and evidence before the court, the application is refused with costs.

[2] Reginald Penny, sixty-five (65) years old, deposed in his affidavit filed on February 13, 2019 as follows:

- (i) He has been in exclusive and undisturbed possession of a parcel of land measuring 15,268 square feet.
- (ii) He commenced the building of a concrete dwelling house and has been residing on the said parcel since birth.
- (iii) He is not aware of no other owner except his father "Martin Penny" who died on or about the 23<sup>rd</sup> August 1996.
- (iv) He continued to occupy the land to the exclusion of all others without accounting or paying rent to anyone.
- (v) To the best of his knowledge and belief, no one has ever come unto the land or attempted to interrupt possession of the said land.
- (vi) To the best of his knowledge there is no mortgage and/or other claims in relation to the land.

[3] The application was supported by affidavits from two witnesses namely, Christopher Franco and Phillip Munro.

[4] On the 17<sup>th</sup> May 2019, Estelle Charmaine Penny who is the sister of the applicant, Reginald Penny and Executrix of the estate of their father Urier Marvin Penny also called Marvin Penny acting through her lawful attorney Kevin Penny entered an appearance opposing the applicant's application for possessory title.

[5] On 26<sup>th</sup> November 2019, Estelle through her attorney filed an affidavit and deposed as follows:

- (i) Her father Thomas Urier Marvin Penny migrated to Toronto, Canada and made a Will on 16<sup>th</sup> January 1995 naming Estelle as trustee and executrix of his estates.

- (ii) Her siblings, including the applicant, was given a copy of the Will and all agreed that the applicant would continue to occupy the house spot on which he presently resides and to care for the property in the trustee's absence.
- (iii) She sent money to the applicant to start rebuilding the family house on the parcel.
- (iv) The siblings were in constant communication up until 2018 when she last visited Grenada.

[6] Counsel for Reginald Penny contends that Estelle Penny's affidavit filed on the 26<sup>th</sup> November 2019 does not constitute a written claim opposing the application for declaration of possessory title as it fails to comply with the requirement of Section 15 of the Act.

[7] Counsel for Estelle Penny, in response, states that she has a right to be heard and that the applicant is not entitled to the grant of a declaration of possessory title

### **Law and Analysis**

[8] **The Possessory Titles Act**<sup>1</sup> (The Act) as the name implies was enacted to facilitate the obtaining of possessory title to land by persons who are in factual, exclusive and undisturbed possession of a piece or parcel of land accompanied by the requisite intention to possess the piece or parcel of land as owner for a period of not less than twelve years immediately preceding a claim.

[9] **The Act** provides the legislative framework and process for seeking a declaration for possessory title.

Section 4 (c) and (d) of the Act requires an application to include inter-alia :-

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<sup>1</sup> Act 22 of 2016

- (a) a description of the land, giving its extent, boundaries and estimated value.
- (b) the facts upon which the applicant relies to establish adverse possession.
- (c) whether to the applicant's knowledge, any other person claims or is capable of claiming to be the owner of the land for which the declaration is being sought and
- (d) the name, if any, of any person entitled to ownership of the land immediately before the period of the adverse possession began to run.

[10] **Section 9(1) of the Act** provides that a person may enter an appearance in response to a notice not later than 2 months after the date of the last publication of the notice in the newspapers.

[11] **Section 9(2) of the Act** requires a person who enters an appearance, shall not later than twenty one (21) days after the date of entry of the appearance, file in the Registry a written claim setting out the name of the person who has the title to piece of parcel of land and a statement of facts on which the claim is founded. The notice may be filed by the person who intends to oppose or an authorised agent (**Section 9 (3)**).

[12] Reginald' Penny's application for possessory title was filed on 13<sup>th</sup> February 2019. On the 17<sup>th</sup> May 2019, Estelle Penny entered an appearance in accordance with Section 9 (1) but did not file a claim in keeping with Section 9 (2) of the Act. However, Estelle Penny filed an affidavit pursuant to Section 15 of the Act.

- [13] **Section 15 of the Act** provides for a person who has information in relation to the possession of the piece or parcel of land subject to the application for declaration of possessory title may file affidavit whether or not he or she intends to file an opposing claim
- [14] Counsel for the applicant contends that the respondent having failed to file a claim in accordance with Section 9 of the Act but instead filed an affidavit pursuant to Section 15 after the matter was listed triggers the provision of Section 12 of the Act.
- [15] **Section 12 of the Act** provides for default judgment or ex parte proceedings and reads as follows:
- (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 or give a decision as it sees fit.
- [16] The question that falls for consideration is whether judgment should be entered in accordance with Section 12 of the Act in light of the respondent's failure to file a claim within the time stipulated in Section 9 of the Act.
- [17] Counsel for Estelle Penny submits that the import of Section 15 of the Act is clear as it permits a person, including a complete stranger to the proceedings, to provide to the court with information in relation to the land that is subject to an

application for a declaration of possessory title. Counsel contends that the court ought to consider such information and /or to hear the affiant in person before determining the application.

[18] I am in total agreement with counsel for the respondent. **The Possessory Titles Act** must be interpreted for the purpose for which it was enacted. The Act is grounded on natural justice. The object of the Act is not to curtail or deprive a rightful owner of a piece or parcel of land on the failure to file a claim within the timeline prescribed. Neither does the Act permits for the automatic granting of a declaration of possessory title by default on the failure of an interested party entering an appearance. The applicant is required to give full disclosure of all the relevant facts and to convince the court that he/she is entitled to a declaration of possessory title.

[19] In **Wilfred Miller v Gregory Millier etal**<sup>2</sup> Thom J (as she then was) in relation to Section 15 of the Possessory Act states:

“The Act sets out an elaborate procedure with an emphasis on transparency to be followed by an application for possessory title. An integral part of the process is that the applicant is required to make full disclosure not only of the circumstances of his possession of the land which he claims, but the applicant is also required to state whether or not there are other persons claiming to be owner ...

[20] At paragraph 33, Thom J states that the emphasis on transparency is also illustrated in the provisions of Section 15 of the Act.

“ [33] The effect of section 15 is that any person who has information in relation to the possession and ownership of the land the subject of the application may file an affidavit with the registrar and at that hearing of the application the court may require the attendance of the person. **The section does not stipulate a time period within which the affidavit must be filed.** (my emphasis).

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<sup>2</sup> SVGHPT2012/0041 para 28.

- [21] Counsel for Reginald Penny emphasised on the fact that Estelle Penny's notice failed to comply with the requirements of Section 9. The court is of the view that that **Section 9 of the Act** is not to be construed in isolation. The mere filing of an application and the failure of an interested party to file a claim will not automatically result in the granting of a declaration by default. The applicant has to first satisfy all the relevant requirements to prove his/her case on a balance of probability.
- [22] It is a well-established principle that a person seeking adverse possession must prove his/her possession *Nec vi, Nec clam, Nec precario*, that is, 'not by force, nor stealth, nor the licence of the owner'. The applicant must satisfy the court that he /she meets the basic requirements before a declaration of title can be granted.
- [23] It means that even if the requirements of Section 9 are not met, the Court is still required to look at the applicant's case and all the supporting evidence to ascertain whether a case for possessory title has been made out. In that regard, the discretionary power given in section 12 of the Act should not be interpreted to mean that the court ought to be oblivious to relevant evidence only because such evidence was made known outside of the time period stipulated by the Act.
- [24] **The Act** permits anyone, including persons who do not have any interest in the land, to file with the Registrar any information in relation to the application for possession land at any time before and even after the grant. (**see section 30(1)**).
- [25] The court accepts the evidence that the applicant, Reginald Penny is the brother of the informant, Estelle Charmaine Penny. Estelle Penny who is resident in Canada, is the sole executrix of the estate of Thomas Urier Marvin Penny who was the registered owner of the piece of land which the applicant, Reginald Penny is seeking to obtain a declaration of possessory title as sole owner to the exclusion of all of his other siblings.

[26] The informant, Estelle Charmaine Penny in her affidavit deposed that a copy of their deceased father's will was sent to all the siblings, including the applicant. It was agreed that the applicant, Reginald Penny, would continue to occupy a house spot on the property and would continue to work their deceased father's farmland as he did over time. The informant deposed that money was sent to the applicant's son in 2015 for the rebuilding and renovation of the deceased father's house which had become dilapidated.

[27] The court accepts the incontrovertible evidence that the applicant who is one of several beneficiaries under the un-administered estate of his father has been in continuous possession of the parcel of land. However, the doctrine of "non-adverse possession amongst beneficial co-owners" precludes a claim of adverse possession of an unadministered estate<sup>3</sup>. There is no right of action in favour of a beneficiary while trust land is in possession of a person entitled to a beneficial interest in the said land or parcel of land.

[28] The author Kevin Gray in the text **Elements of Land Law**<sup>4</sup> under the Rubric "Family Relationships" states:

" There is a tendency to find that any possession exercised by one family member against another within the context of a loosely organised family arrangement is not in any real sense "adverse", but is more realistically attributed to some form of licence, whether expressed or implied." <sup>5</sup>

[29] **Section 4 (c) of the Act** requires an application to state whether to the applicant's knowledge, any other person claims or is capable of claiming to be the owner of the land for which the declaration is being sought. The applicant failed to disclose that his siblings had a beneficial interest and could make a claim to the said land neither did he claim as a trustee on behalf of his other siblings. This is a significant concealment of material facts within the applicant's knowledge.

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<sup>3</sup> Earnshaw v Hartley [2000] chancery 155.

<sup>4</sup> Page 257.

<sup>5</sup> Murphy v Murphy IR 183 at 195.

- [30] **The Possessory Titles Act** is not to be used as an instrument of fraud to deprive beneficiaries of their entitlement under an un-administered estate. **Section 30 of the Act** makes it a criminal offence for any fraudulent declaration made by an applicant or any one in support of an application for possessory title. **Section 30 (2) of the Act** makes a person who swears or assist in the making of an affidavit in support of an application for declaration of possessory title, knowing the contents of the affidavit to be false, liable on summary conviction to a fine not exceeding ten thousand dollars or to a term of imprisonment not exceeding two years or both.
- [31] The applicant's failure to give full disclosure is fatal to his application. The claimant interest in the land is no more than that of a beneficiary, trustee or licensee. The claimant has failed to prove his case on a balance of probabilities that he is entitled to a declaratory title of possession. For the foregoing reasons, the application for a declaration for possessory title pursuant to the Possessory Title Act is dismissed with costs.
- [32] Counsel for the respondent seeks costs on the value of \$50,000.00 pursuant to CPR 65.5 (2) (b). The applicant in response suggests costs in the sum of \$2500.
- [33] The court takes into consideration that the respondent filed a notice of opposition and an affidavit but did not file a claim to take the costs within the realm of Part 65.5 (2) (b). Accordingly, an award of costs in the sum of \$2500.00 shall be paid by the applicant to the respondent.

## **ORDER**

- [34] In summary and for the above reasons it is ordered as follows:
- (i) The application for a declaration for possessory title is refused.

- (ii) The Applicant, Reginald Penny shall pay costs to the Respondent Estelle Charmaine Penny in the sum of \$2500.00.

**Agnes Actie  
High Court Judge**

**By The Court**

**Registrar**