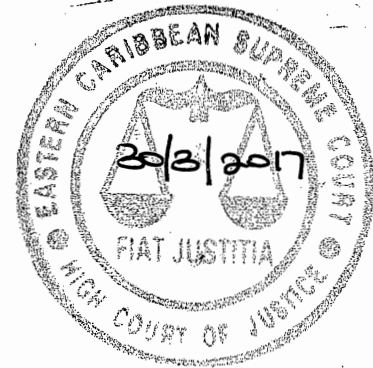


EASTERN CARIBBEAN SUPREME COURT

ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2015/0009



**IN THE MATTER OF AN APPLICATION BY NELLIE FORDE FOR
A DECLARATION OF POSSESSORY TITLE**

APPLICATION FOR DECLARATION OF POSSESSORY TITLE

BETWEEN:

FRANCIS MICHAEL

APPLICANT

AND

ARLENE KIRTON

RESPONDENT

Appearances:

Mr. Bertram Commissiong, Q.C. of Counsel for the Applicant

Mrs. Maferne Mayers-Oliver of Counsel for the Respondent

2017: March, 23, 30

JUDGMENT

- [1] **ROBERTS, J. [Ag.]:** This is an application for possessory title to a parcel of land situate in Kingstown Hill, St Georges, St Vincent. The land is shown on a survey plan No G57/96 dated 24th October 2014. The land is 4,681 square feet and valued at \$117,025.00.
- [2] The applicant stated that he has been in exclusive and undisturbed possession of the land for over twelve years and he sets out the history of the land from 1926 when he says his grandfather purchased it from the Shervingtons. His grandparents built a two level house in which they lived on the land. As a child he spent weekends and holidays with his grandparents at the property. The applicant's "grandfather died when he was about 2 years" and for a few years thereafter the applicants grandmother remained living in the house on the property. The applicant's grandmother returned to the United States when he was still in primary school, leaving the applicant's parents in

absolute care and control of the property. There was no one living in the house on the property and the applicant's parents decided to rent it out to derive an income from the property.

- [3] While the applicant's grandmother was alive his parents would send a portion of the money collected by them from the rental of the property to her in the United States 'but after her death in or about 1969 they used the rent for their own purposes and as they absolutely determined".

The applicant stated in his application that as a teenager and young man he "would go to the property with his father and Mr. Christian Gardiner when they went to clean the property and collect rent from tenants". The applicant stated that in 1995 he came home for good and went into business with his father and assisted him with his day to day dealings in his real estate and farming business. He stated that he "would collect rent from tenants, pay debts and supervise the other workers on the property and other land that his parents owned".

- [4] The applicant's mother predeceased his father in 1972 and he took complete control of his father's business in about 1995 due to his father's failing health; his father died in 1997. The applicant would make regular visits to the property to collect rent and to ensure that the tenants had no complaints and to deal with issues as they arose. Since the applicant's father's death he has continued to collect and use the money from the rental of the property for his sole use and has treated the property as his own.

- [5] In 2000 during the passing of a hurricane a branch from the breadfruit tree on the land damaged the roof of the house on the property. No one was injured but the house was badly damaged and the applicant had to move the tenants out. "As a result the applicant demolished the house but since he could not rebuild he did not put tenants back into occupation but he would instruct his workers to clear and clear the shrub, vines and over grown trees and on occasion garbage dumped on the property. The applicant has also fenced the entire perimeter."

- [6] The applicant's aunts Athalie Augusta Slater and Lestelle Eulalie Slater, to whom the property should have gone when the applicant's grandmother died, in or around 1969 migrated to the USA when he was a child and have never returned. In fact his aunt Lestelle was born in the United States and only lived in St Vincent briefly. The applicant's aunt Athalie predeceased his aunt

Lestelle and she made a will in which she purported to leave all her vacant land in St Vincent and the Grenadines to the applicant's brother Stephenson Michel. However, his right to the property was extinguished by the applicant's parents and then the applicants assertion of rights of ownership dating back to the applicant's grandmother's death in or around 1969. Additionally, "the applicant's brother has lived in the United States and since 1972 has never returned to St Vincent, except for a brief visit to attend their father's funeral in 1997."

- [7] The applicant summed up his claim in these words, "Over the years the applicant's parents considered the property their own and atoned to no one and since their death the applicant has treated the property as his own and has likewise atoned to no one".
- [8] The affidavit in support of the application was almost word for word what was in the application. He did state that he was an engineer by profession and confirmed that he did not demolish the structure on the land as he stated incorrectly in the application. The application was supported by two other affidavits: that of Christian Gardiner and Robert A. Sandy. Mr. Christian stated that he was born on the 11th September 1932 and he began working with the Michaels as one of their labourers/domestic workers when he was about 20 or 21 years old. They owned land which they farmed or rented out and he would "go with Mr. Michel to help with maintenance and/or collect rent; the property was one of those parcels of land. He recalled that the property had a wooden house and a breadfruit tree on it. Mr. Michael often gave me instructions to clear /cut overhanging limbs, trim the yard and on occasions to do minor maintenance to the wooden house on the property".
- [9] "Mr. Michael's son, the applicant, affectionately returned to St Vincent around 1995 and began assisting his father in his business dealings. When Mr. Michael died in July 1997, I was working under the instructions issued by Ali. In all my years of going to the property to work the wooden house on the property was rented. I can recall it was rented to a Joseph family for a long time and after that to Olive Charles and George Johnson. As far as I am aware the property has always been owned by the Michael family and for all of my adult life I have worked with first Mr. Michael and then the applicant to ensure that the property and the house that used to be on it were fit for the tenants to live in. "In all the time that I have worked with Mr. Michael and the applicant I have not seen anyone or heard of anyone challenging their right to rent the house on the property or to

collect the rent for the tenants, or to send me or the other workers onto the property to do repairs or clean the yard."

- [10] The other affidavit in support of the application was by Robert Shandy. The relevant part of his affidavit is as follows –

"In the 1980's after I retired as a bailiff I became a rent collector for the Michaels and other persons. I used to collect rent on the said property at Kingstown Hill from a Mrs. Joseph, the mother of "Doggie 'nose' Joseph" the well-known journalist who lived in the said premises at Kingstown Hill (Long Wall) with her family. I continued to collect rent from Mrs. Joseph for the said property until about the year 2000 when the foundation of the house that was made from limestone began to crumble and the Joseph family vacated the property. As far as I am aware no one ever lived there after the Josephs left. The said property at Bottom Town was comprised of two dwelling houses the rooms of which were rented to several tenants from whom I collected rent; it was a 'rooming house'. I stopped collecting rent for this property in or about 2000."

THE OPPOSITION

- [11] Arlene Kirton filed an entry of appearance opposing the application pursuant to section 7 of the Possessory Titles Act on 1st July 2016. In her affidavit in support of her application Arlene Kirton stated that she and her siblings always considered the property to be theirs based on their mother's interest in the property and that the applicant was aware of their interest. She lived on the property with her grandmother from the time she was a baby until she migrated to the United States of America in 1961. She swore that the applicant had never been in undisturbed possession of the property. He never lived there nor was he ever in care and control of the land.

- [12] The respondent related that her grandfather bought the property for her grandmother's two eldest children and made her grandmother trustee for them. She refuted the applicant's statement that his grandfather died when he was 2 years old; rather she stated that the applicant's grandfather died before the applicant was born. She stated that her grandmother never abandoned the property but had the applicant's mother "handle the rental of the said property and deposit the proceeds in a separate savings account at St Vincent Co-operative Bank. The applicant's mother

died in 1992 and not in 1972 as he stated in his affidavit. Her aunt Lestelle retained the services of Arleigh Douglas, a bill collector, "sometime before 1992 to handle the affairs of the property".

- [13] The respondent denied that the applicant ever made regular visits to the property or collected rent for the property as he stated in his application. In the year 2000 there was no tenant in the property as the applicant claimed. She related that "on a visit with my aunt Lestelle to the property in 1992, we found a crack in one of the supporting beams, deeming the property unsafe for occupation, and a decision was made to give notice to the tenant. Attorney Douglas Williams wrote the notice to vacate on our behalf. Permission was given to erect a temporary dwelling on a portion of other land to the bottom".
- [14] The respondent related that after the applicant's mother died Mr Arliegh Douglas paid taxes on the property for a short period until the tenant moved out. After she paid the taxes, paying sometimes two years in advance. When property was taken off the tax roll, she worked with the Valuation Department to get the property back on the roll. She had to show proof of ownership to have the property put back on the tax roll and it was put back in the name of Athalie her mother and Lestelle Slater.
- [15] The respondent also refuted the testimony of the applicant that he demolished the house on the property and that he had the right to do so. She indicated that a hurricane demolished the house and that the remains become grossly overgrown with vines. The applicant never sent anyone to clear the vines. She indicated that the vines were actually cleaned a year later by Kingstown residence in preparation for their annual Christmas lighting.
- [16] When it was discovered that a wire fence had been erected around the property on the applicant's instructions, he was immediately called and asked about the fence. His explanation, the respondent related, was that he thought he had informed them of his decision. He acknowledged that he had fenced the land but said he did it because he had been told that the Government was planning to take the property. He was informed that the siblings were filing for possessory title. The respondent said she was therefore shocked when she saw the notice to apply for possessory

title in the newspaper. The applicant informed that "he did it because he heard through the grapevine that one of the neighbours was trying to own the property".

[17] The respondent refuted the statement by the applicant that her aunt Lestelle left St Vincent and never returned. She indicated that her aunt had come back to St Vincent several times to visit her mother, Athalie. In addition, she had returned in 1992 to bury her sister, the applicant's mother. She stated that the applicant's parents could never have considered the property to be their own as she was agent for the property and at one time she had suggested to her aunt to sell because of various problems, such as a retaining wall at the bottom of the property and storm water issues. Hence the reason Arliegh Douglas was retained as agent because the task had become too much for the applicant's mother.

[18] The applicant asked her siblings and her on several occasions what they were planning to do with the property. She concludes that the applicant would not have asked us these questions if he considered the property to be his own. The applicant at one time told us, he had a buyer for the property, but we told him we were not interested in selling. The respondent stated that the applicant "has no right to claim ownership of the said property. He has withheld critical and crucial information and his claim to the court for possessory title is "bogus and unwarranted".

[19] Yemi Khensu also gave evidence in opposition to the application. He is the brother to the applicant and has a JD degree in law. He stated.

"I declare that I am the nephew of Athalie Deare and Lestelle Slater, the legal owners of the property in question given to them by their father Clarence Slater, my grandfather. Both Athalie and Lestelle Slater are now deceased. Athalie left no will, but had five children who are currently abroad. Lestelle Slater had no children but left a will leaving her interest in the property to her heirs which includes me. Both the applicant and his parents always acted as agents of the family who were living abroad and always had a fiduciary duty to protect all interest of the said property".

[20] Mr. Khensu addressed what he claimed to be several untrue assertions of the applicant. He refuted the claim that "There are no other persons claiming to be owner of the land". This he said

was untrue as the heirs of Athalie Deare and Lestelle Slater claim ownership of his property. The applicant's grandfather died in the 1920's long before the applicant was born. The applicant's mother was just an infant at the time. When the house became vacant the applicant's aunts Athalie Deare and Lestelle Slater instructed the applicant's mother to act as agent and rent the property. The applicant's grandmother died in December 1975. The applicant's parents continued to act as agents for Athalie Deare and Lestelle Slater. The rent collected was not used for their own purposes. The rent was always deposited in a bank account. Upon the death of the applicant's mother in June 1992. Applicant's father turned over the bank account to the applicant's aunt, Lestelle Slater. Soon after, the management of the property was turned over to Arlie Douglas who managed the property for some time. Applicant's mother died in June 1992 not 1972 as stated. The statements regarding his departure from St Vincent are untrue. He migrated to the USA in 1970 and returned to St Vincent many times. After his mother's death in 1992, he visited St Vincent three or four times a year until his father's death in 1997. After 1997 he visited St Vincent on a yearly basis until May of 2001.

[21] Noel Kirton supported the testimony of the other witnesses for the respondent, his wife. He refuted the claim of the applicant that no other persons claimed to be owner of the land. Yet a few years ago, he was a family gathering including my wife and her sisters at my home in Brooklyn, New York and wanted to know what they were planning to do with the property at Kingstown Hill. He stated that they were sitting on a lot of money and that the property was worth quite a bit. He posed the same question at another gathering at Yvonne Quammie's home. "Those questions in themselves acknowledged the true ownership of the land and that he was not the owner. He supported the evidence of the respondent as to the circumstances under which the tenants vacated the premises, the payment of taxes in respect of the land.

[22] Yvonne Quammie stated that her mother Athalie Deare and aunt Lestelle Slater are the rightful owners of the land applied for by the applicant. She stated that the applicant was present in June 1992 after the mother's death when his father Arnold Michael, handed over the bank book that was used for the proceeds of the rental of the property. She supported the respondent's evidence in particular with respect to her payment of taxes for the land and the management of the property.

THE LAW

[23] The Possessory Title Act provides the following definition of "adverse possession" –

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

[24] In the case of **Powell v McFarlane**¹ where Slade J pronounced –

"Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land 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 been expected to deal with it and no one else has done so."

[25] On the question of "the requisite intention to possess the said land as owner thereof", the *animus possidendi*, Slade, J, had this to say –

"The *animus possidendi*, which is also necessary to constitute possession ... what is really meant in my judgment is that the *animus possidendi* involves the intention in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of law will allow."

EVIDENCE AND ANALYSIS

[26] I had the opportunity of observing the demeanor of the witnesses when they gave their oral testimony and formed definite impressions about the witnesses in this case. I found the evidence of the respondent's witnesses reliable and forthright but the applicant's witnesses seemed not be

¹ (1977] 38 P & CR452], [1977, LS Gaz R 417

knowledgeable of the history of the land. I find that the applicant's affidavit in support of his application was riddled with errors. His testimony did not stand up to testing on cross examination. He admitted that his grandfather died before he was born and not when he was two years old as he stated in his affidavit. He knew his parents were left in charge of the property. It was his grandmother's property and he did not think it was his mother's property. He had no reason to think it was his mother's property. His mother lived at Villa not on the property. His mother opened an account for the rent and did not use the rent for her own use as he stated. His mother died in 1992 not 1972 as in his affidavit. He has been "frequently living in St Vincent. He fenced the perimeter of the property in 2014 and he still cleans the boundary line. He stated on cross examination, "I am in charge of the property from 2000 to 2017. I am seriously in charge of the property. I am in America sometimes. I spend 4 months, three months, two months every year". He admitted that "the most I did was to clean. It was not mine to build on it". At the end of his cross examination he stated, "I am uncertain about my claim for possessory title".

- [27] On the other hand, I accept that he unchallenged testimony of the respondent and her witnesses that the applicant enquired of them as to what they planned to do with the property and if they were willing to sell it. I find that this was clear acknowledgement on the part of the applicant that he was not the owner and that the respondent and her siblings were the rightful owners. There is evidence that the respondent paid the land tax while I find that the applicant did not.

CONCLUSION

- [28] The applicant has failed to fulfill the requirements of the Possessory Titles Act. In particular, he did not have the necessary factual possession and the required *animus possidendi*. The evidence is overwhelming that he was not in physical control of the property and he did not have the intention in his own name and on his own behalf, to exclude the world at large, including the owner. I find that the applicant came woefully short of proving his claim on a balance of probability. Therefore, the application of the applicant for a declaration of possessory title to the land described in his application fails.

ORDER

[29] I therefore order as follows -

1. The application for possessory title is dismissed.
2. Prescribed costs based on a value of \$50,000.00 amounting to \$7,500.00 to be paid by the applicant to the respondent.



Sir Clare K. Roberts, QC
High Court Judge (Ag)