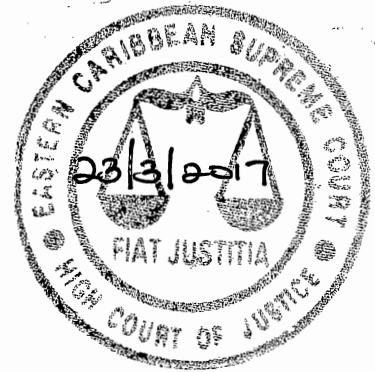


EASTERN CARIBBEAN SUPREME COURT

ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2016/0025



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

APPLICATION FOR DECLARATION OF POSSESSORY TITLE

BETWEEN:

NELLIE FORDE

APPLICANT

AND

BERTILLE DASILVA

RESPONDENT

Appearances:

Mr. Grenville John of Counsel for the Applicant

Mr. Stephen Huggins of Counsel for the Respondent

2017: March 16, 23

JUDGMENT

- [1] **ROBERTS, J. [Ag.]:** This is an application for possessory title to a parcel of land which was described as being bounded on the north by lands belonging to the applicant, on the south by lands of Mr. & Mrs. Brackin, on the east by an existing road and on the west by a 12-foot road. The land was more particularly delineated on Plan Number G60/69 drawn by Ivo Providence, licensed surveyor, dated 30th May 2016 ("the land"). The land measures 9,236 square feet and is valued at \$277,080.00.
- [2] The applicant claims that she was in exclusive and undisturbed possession of the land for twelve years. In her affidavit in support of her application she indicated that she was an 82 years old widow and farmer. She stated that "from the year 1994 I occupied a parcel of land ... the parcel of land was owned by Carib Isle Enterprise Ltd ("the company"). She returned to St Vincent in 1991

when she returned from the USA, she and her daughter Jacqueline Forde purchased a parcel of land from the company. She built a dwelling house on her parcel and lived there ever since. She stated that adjacent to her property was a vacant parcel of land which "had been overgrown with bushes including large cedar and mango trees". From 1994 she began to occupy the parcel of land. She had the large trees cut down, made into lumber and removed and she began to cultivate the land.

- [3] The applicant stated that for from 1994 she took full control and possession of the land and had been in exclusive possession and control of the parcel of land ever since that time. She has cultivated the parcel of land, planting various fruit trees and other agricultural crops such as okras, corn, peas, sorrel, sweet potatoes and cassava, keeping all the proceeds to myself. She stated that she had not paid any rent to anyone in relation to the parcel of land.
- [4] The applicant in her affidavit also deposed that for the past twenty-two years no one had ever made enquiries of her about the land and no one had ever asked her to stop cultivating the land. She stated, "In 2013 I constructed a road on the southern end of the said land to open up access to he said land. Many years ago I fenced the eastern side of the land to prevent animals from coming in and destroying the produce. The applicant related that in April 2016 Casper Da Silva removed the fence she had built many years ago and started to build a fence of concrete blocks.
- [5] The application was also supported by an affidavit of Utan Horne who attested to an incident in April 2016 when Casper Da Silva took down the fence erected by the applicant and replaced with a fence built of concrete blocks. An affidavit of Bobby Speedwell, a retired teacher, swore that he is aware that the applicant "has occupied and has been maintaining, and cultivating various agricultural crops such as sweet potatoes, corn, sorrel, peas and okra undisturbed for a period of over twenty years". He indicated that the land had been previously overgrown with bushes and trees and that he is aware that many years ago, Mrs. Forde had trees cut down and had the land cleared so that she can occupy and cultivate it". However, neither Horne nor Speedwell attended court to be cross examined on their affidavit. Their testimony is therefore untested.

- [6] An Affidavit was filed on behalf of Cornelius de Bique in support of the application. He stated that "I am aware that there is a parcel of land that is adjacent to her property that she has occupied and has been maintaining, and cultivating various agricultural crops such as sweet potatoes, pumpkin, bananas, corn, peas and okra unhindered for a period of over twenty years". He stated that "[s]ince Mrs Forde occupied the said land" she has remained in continuous and exclusive possession of the said parcel of land up to the present time. "Since I have known Mrs Forde occupied the said parcel of land she has treated the land as owner. She has cleared and maintained the said parcel of land and has been farming the lands planting a variety of agricultural crops." He stated that he did not know Mrs. Forde to pay rent to anyone for the use and occupation of the land and she kept the proceeds of the said parcel of land for herself.
- [7] Harold M. Burgin swore to an affidavit in support of the application. He gave evidence that he had been employed by the applicant for over 20 years - from 1994 to 2014. During the period of his employment with Mrs. Forde, he worked for over six months clearing a parcel of land that was adjacent to her property. This parcel of land was covered in bushes and had a number of trees. He had the trees cut down and removed. Some of the large logs were used to make timber while the remainder was burnt to make coal. From time to time he would get help to do this work from "friends and guys from my village." Once the land was cleared, he cultivated it, planting various agricultural crops including sweet potatoes, banana, corn pumpkin, sorrel, peas and okra. "Over the years" as gardener he maintained and farmed the land. "On a regular basis" he ensured the land was clean and well kept. "From time to time" he would reap crops and give them to the applicant. He stated that, "During the period of 20 years while I was employed by Mrs. Forde, no one ever came to stop me from clearing or working the land". He related that a fence was built at the bottom of the land to keep out animals, He also stated, "Whenever Mrs. Forde went to America she left me in charge of her property".
- [8] Liston Sutherland gave evidence in support of the application. He stated that he lived with the applicant from 1992 to 1995. He left St Vincent in 1995 and returned in 1998. He worked with Burgin to cut down trees on the parcel of land. He mentioned that one Eworth Delves had assisted by cutting down trees with his chain saw. From 1998 to present he visited the applicant and continued to assist her from time to time to keep up the land.

[9] Samuel Thomas gave supporting evidence along the lines of the other witnesses for the applicant that she occupied and has been maintaining, and cultivating various agricultural crops including sweet potatoes, corn, peas and okra unhindered for a period of over 20 years. Around 1994 Mrs Forde had the trees cut down and had the land cleared so that she could occupy and cultivate it. He was not aware of any other person occupying the parcel of land. "During the period 2002/2003, when Mrs. Forde travelled abroad for medicals she would leave the keys to the house with me and I had the responsibility to pay the gardener for his services which included cultivating the said land.

[10] The application was challenged by Bertille Da Silva who filed an entry of appearance on 16th August 2016. He also filed a claim opposing the application of possessory title in respect of the land on 5th September 2016. In that claim Bertille Da Silva is asking the court for the following –

- "1. That the Applicant Nellie Forde is not entitled to the land which she claims herein.
2. A declaration that Bertille Da Silva is the true owner of the parcel of land described in the Applicant's claim for a possessory title.
3. That the Registrar be authorized to execute a title deed for the land described herein in favour of Bertille DA Silva of Indian Bay.
4. Bertille Da Silva bought the lands from Carib Isles Enterprises Limited in or about the year 1972.
5. Since 1992 Bertille DA Silva has been in possession of the lands and has not ceded title, ownership or possession of the land whether in fact or by law or anyone.

[11] In his affidavit in support of the claim Bertille Da Silva stated that his brother Caspar Da Silva was his agent and so acted with specific reference to the land. He stated that Mrs. Forde was not the owner of the land. She had no title deed and had not established any legal claim to the land nor had she occupied the land in any manner sufficiently or at all to ground the application for title by

adverse possession, whether by physical possession or having had the requisite intention to possess the land. He stated that the applicant was not in occupation for the requisite period of twelve years and certainly not the twenty-two years which she alleges.

- [12] The respondent stated that he was a friend of Graham Wagenseil who was the principal shareholder of the company. He swore as follows –

"10. I bought two parcels of land from Carib Isles Enterprises Ltd. One parcel was bought for my sister Emily and her husband Keith Brereton. They subsequently transferred ownership to their son Brian Brereton and he eventually sold the said parcel of land to Mr. and Mrs. Brackin in 2007.

12. The second parcel of land was bought on my own behalf. This is the said parcel which the Applicant Nellie Forde now claims.

13. My lawyer and best friend at the time was Mr. Orthneil Sylvester and he was retained to prepare the deed in respect of this land. He apparently never registered the deed. I had never been aware that the deed was not registered as I had always left my business matter in his hands".

- [13] He went on to relate that in 1992 letters were written by the company to him and his brother relating to the lands and the company. A suit was instituted in the High Court against him. He exhibited the pleadings in that case and stated that, "Each claim was stoutly defended and the matter eventually came to rest in my favour as the matter was discontinued by the Claimant's company".

- [14] Bertille DA Silva stated that since buying the land he never gave anyone permission to enter the land except his brother and his servants and agents and his son Cordel Da Silva. He offered the parcel of land to his son in or about 1993, his son drew up plans for the construction of his home but he abandoned the plans about a year later and returned to Canada. He denied that anyone had been farming the land "for any substantial time". He also related that "on an occasion in 2008" the applicant approached him and told him that she heard he owned the land. He confirmed this to her. She asked him if when he was going to sell it he could give her first preference and stated he told her. "OK."

- [15] The respondent's claim was also supported by the affidavit of Caspar DA Silva who confirmed that he acted as agent for his brother with respect to the land. His brother entrusted him with looking after the land from time to time. He sent his workers go to the land from time to time to cut he bushes whenever they grew high. He also gave evidence of the action against his brother Bertille Da Silva "in which title to the land was in dispute". He mentioned plans for a house being drawn but shelved by his nephew. He testified that "In 2010 a survey plan was done by Keith Francis. At the time there was no cultivation of any sort on the land and no one was in occupation of the land other than his brother.
- [16] Tamara Owen-Brackin testified that she and her husband purchased a parcel of land from Brian Brereton and started building about September 2007. She stated that the land bordered their land. She swore that about 4 years ago she noticed that some pumpkin was growing on the land. Here testimony was that, "The activity surrounding the disputed land, the road and crops were done within the last four years".
- [17] Margaret Ferrari had been living on a property that is very close to the land. She stated that she passed the land several times every day going to and from her home. She swore that the land was uncultivated and covered with thick brush and weeds when she moved into her home in 1992 and remained so until recently. She said that "approximately two to three years ago I noticed that some flowers were planted at the eastern side of the lands adjacent to the road. About six months after the flowers appeared, I observed that some corn and ground provisions and possible other plant matter had been planted on the land. Prior to that, there was nothing on the land except brush and weeds and I had never observed any people on the land or any clearing or cultivation of the land". She also denied that there was ever a fence on the eastern side of the land until in the last few months a wall was constructed on all sides of the land.
- [18] Hazel Ryan gave evidence that she had been working for Mrs. Brackin as a domestic worker for the past 13 years. She stated that the land was in bush all the time and Mrs. Forde said she was afraid of rats and animals and she started trimming the boundary on the side next to her land. Mrs. Forde started planting peas and pumpkin on the land two or three years ago. She built a road below the land about two years ago.

EVIDENCE AND ANALYSIS

[19] 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 both the applicant's neighbours to be forthright and reliable witnesses. Counsel for the applicant suggested to them that they were upset with the applicant because she extended her road. They both denied being upset with the applicant for any reason. The evidence did not disclose any reason why both neighbours would conspire to give evidence against her. I find baseless the suggestion by counsel for the applicant that "the neighbours had a problem with Ms. Forde. Equally so counsel's suggestion that Mrs. Brackin had issues with Ms Forde and longed for the opportunity to give evidence against her. I find the witnesses Tamara Owen-Brackin and Margaret Ferrari to be witnesses of truth. The evidence of the Da Silva's was supported in many respects by the affidavit of Wagenseil in case No 292 of 1992. The evidence of the applicant was not accepted where it conflicted with the evidence of her neighbours.

[20] The key aspect of the applicant's case was that she was in adverse possession of the land from 1994 or thereabouts. She brought a number of witnesses to support that assertion but she could not bring any hard corroborative evidence to prove that she was on the land for at least twelve years. The applicant did not seriously challenge the strong evidence of her neighbours. In respect of Ms. Ferrari evidence, the applicant pointed out that the witness was a diplomat posted overseas between 2001 and 2007. The witness said that she was home regularly and frequently - 3 to 4 times a year. I accept this evidence and find that the witness would have been in a position to see any development on the land, especially as radical as from being uncultivated and covered in thick brush to a cultivated parcel. On the other hand, I believe the applicant's neighbours that she started occupying the land and cultivating it no more than four years ago. I find as a fact that the applicant started planting crops on the land no more than 4 years ago.

[21] I note that the witnesses of the applicant were very vague in their time and contradicted each other. For instance, one witness says he is in charge in the absence of the applicant and another claimed to be the person in charge,, paying the wages of the person who should have been in charge. There was inconsistency as to which witness commenced the clearing of the land in 1994. Both Burgin and Liston Sutherland claimed to have started the work. Liston Sutherland claimed that Ms

Forde authorized him to clean up the land because she was afraid of bush and snakes and she needed to see what was around her. Nellie Ford herself said that both Harry Burgin and Liston Sutherland worked the land

[22] Bertille Da Silva's claim opposing the Forde application is based on his assertion that he owns the land, having purchased it from the company. He exhibited the filings in the court action 1992/No 219 - the company vs Bertille Da Silva, Keith Brereton and Casper Da Silva. In that action the company sought a declaration that Bertille and Keith had no interest in any land of the company and an injunction to stop the defendants from trespassing on the company's land and the company sought damages for trespass of Bertille and Casper Da Silva.

[23] The defence to the action was essentially, "Save that First Defendant knows that Gerry Palmer and William Carter managed the affairs of the Plaintiff Company and that the First Defendant purchased the land during that period and occupied it immediately and remained in possession thereof up to present time paragraph 5 of the Statement of Claim is not admitted".

[24] The case was discontinued at the instance of the company. The order of discontinuance is interesting. It was made after the judge read a summons dated September 1996 and an affidavit in support filed on 4th September, 1996. The summons and affidavit in support that seemed to have triggered the discontinuance were not exhibited. The Court therefore requested the court file and found that the summons was taken out by the plaintiff company. Supporting the summons was the affidavit of Graham Wagenseil of Brookfield, Connecticut 06804, USA.

[25] I will recite the affidavit in full because it is so crucial to the claim of Bertille Da Silva.

- "1. *I am the managing director and one of the principal shareholders of the plaintiff company. The facts of this case are within my peculiar knowledge.*
2. *This action was begun by generally indorsed writ of summons which was issued on the 8th day of May 1992. An appearance was duly entered on the 14th May, 1992 for the first and third named defendants. On the 22nd May, 1992 the statement of claim was served on the first and third defendants. These defendants delivered and filed their defence on the 1st June 1992. The summons for directions was heard and an order made thereon which was entered on the 24th February, 1992.*

3. Office copies of the statement of claim and the defence are exhibited herewith marked "A" and "B" respectively.
4. The action was brought because the first defendant who had said that he was the owner of land that belonged to the Plaintiff company refused on demand to show any evidence of title to the said land. The first and second defendants who are in laws are supposed to have bought the said land from the Plaintiff company when it was being managed by the late "Gerry" Palmer who died in or about the year 1990. One William G Carter was secretary of the company at that time. The Third defendant is the brother of the first defendant; he was sued because he entered upon the land in what I thought was an unlawful act.
5. Even though I am the principal shareholder and managing director of the company I was not at the time of the said purchase in 1990 resident in St Vincent and the Grenadines. I am a citizen of the United States and have my permanent residence there. I live in St. Vincent and the Grenadines for about three months in the year. At one time I did not come to St Vincent and the Grenadines for several years. It was during this period of prolonged absence in the United States of American (sic) where I also carry on business that the said sale was made to the first and Second Defendants. I was never aware of this sale and the company's records never showed a sale to them. The facts pleaded in paragraphs 4 to 11 of the statement of claim in this action are true and correct and I would like to incorporate them as part of this affidavit. A copy of the said statement of claim is exhibited herewith marked "C".
6. Sometime in the month of February I found the carbon copy of the letter marked "D" exhibited herewith in an old discarded box in the basement of my hotel at Ratho Mill. The letter shows a likelihood there may indeed have been a purchase of land by the first and second defendants. In the premises I respectfully request leave of this Honourable Court on behalf of the Plaintiff Company to discontinue this action."

[25] The Wagenseil affidavit supports the assertion of the Da Silva Brothers that, "Each claim was stoutly defended and the matter eventually came to rest in my favour as the matter was discontinued by the claimant's company"; and again, "they later abandoned the claim to the land. This was a clear indication that they were admitting that I bought the land. I retained possession of the land". Though the applicant strenuously denied that Bertille Da Silva "purchased two parcels of land or any land from Carib Isles Enterprises Ltd", she was not in a position to support her position by any evidence. On the other hand, Bertille Da Silva in his 3rd affidavit deposed that he dealt with "one Carter was the person whom I dealt with." Wagenseil swore that "One William G. Carter was secretary of the company at the time". Their statement that they had cleaned the land appears to be supported by the claim for trespass by the company against them and Wagenseil's affidavit..

[26] I therefore find as fact that Bertille Da Silva did purchase the land from the company and that the company conceded that fact through their managing director and principal shareholder. I have to agree with counsel for the Bertille Da Silva that the evidence is clear that Bertille Da Silva is the owner of the land. I find as fact that he did purchase the land from the company.

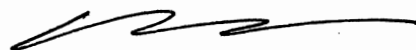
CONCLUSION

[27] Under the circumstances, I conclude that the application by Nellie Forde to be declared the owner of the parcel of land in described in her application fails. On the claim opposing the application for possessory title, I conclude that Bertille Da Silva is entitled to the declaration he sought that he is the owner of the land. I also conclude that he did purchase the land from the company. Considering that the respondent had his title problem solved, I propose no order as to cost. I do not think that the applicant should pay for the respondent's benefit which went beyond her claim for the land.

ORDER

[29] I therefore order as follows:

1. The application by Nellie Forde for possessory title is refused.
2. On the claim opposing the application,
 - (1) It is declared that Bertille Da Silva is the owner of the land described in the applicant's claim for a possessory title.
 - (2) The Registrar is authorized to register a deed of title to Bertille Da Silva, the respondent when one is presented after payment of stamp duty, other taxes, and filing fees.
3. No order as to costs.



Sir Clare K. Roberts, QC

High Court Judge (Ag)