

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. SVGHCV 2011/0203

BETWEEN:

KEYLON GAYMES
KEYON GAYMES

CLAIMANTS

-AND-

CYNTHIA SUTHERLAND HAMILTON

DEFENDANT

Appearances:

Mr. Joma Thomas of Counsel for the Claimants

Mr. Parnel Campbell, QC with Ms. Mandela Campbell of Counsel for the Defendant

2017: January 24, 30

JUDGMENT

[1] **ROBERTS, J. [Ag.]**: In this case the claimants are claiming against the defendant-

- "1. A declaration that an 8 feet right of way exists between the lands of the first claimant and that of the defendant.
2. A declaration that the claimants are entitled to pass and repass on foot and with or without motor or other vehicles of all descriptions and with or without animals at all times and for all purposes for the purpose of obtaining access to and from the first claimant's property from and to the public highway along the right of way.
3. An injunction restraining the defendant whether by herself or her servants, agents or howsoever otherwise from placing or allowing to be placed upon the said right of way or any part thereof anything obstructing, restricting, preventing or otherwise interfering with the reasonable enjoyment of the said right of way by the claimants and the public at all times and for all purposes on foot and with or without vehicles or animals of all

descriptions and from doing any act whereby the claimants or any other member of the public may be hindered from the free and lawful use of the said right of way.

4. An order that the defendant remove all present obstructions or hindrances that she has placed or erected or caused to be placed or erected upon the said right of way.
5. An order that the defendant fill all trenches and other excavations that she has made or caused to be made on the right of way or otherwise cause the right of way to be restored to the condition in which it existed prior to the defendant's interference with the same.
6. An order restraining the defendant from threatening, cursing or otherwise molesting the claimants whenever they pass or repass along the said right of way or otherwise
7. Damages for nuisance
8. Interest at such rate and for such period as the Court deems fit
9. Such further or other relief as the Court deems necessary and appropriate
10. Costs."

[2] On 13th March 2007 the first claimant's father and mother (Andrew Gumbs and Cheryl Gumbs) had filed a claim (No 90 of 2007) against the defendant and her sister (Sylvia Sutherland as attorney for Hyacinth Durant) in practically identical terms as this claim. The first claim was in identical terms as this claim, viz.

1. A declaration that an 8 feet right of way exists between the lands of the first claimant and that of the defendant.

[3] The earlier claim was concluded by a consent order dated 9th December 2009 in the following terms:

"It is hereby ordered by consent as follows:

1. That the first defendant cause a concrete wall to be built along the broken embankment bordering her property on the east with the right of way at least up to the level of the embankment commencing at a distance of 33 feet from the point on the wall at the bottom of her property bordering the concrete road agreed by the parties and up to and adjoining the outer end of the wall on the eastern end of her house.
2. At the areas of the broken embankment where a pipeline is exposed the first Defendant shall cause the wall to be built as though the break had not occurred and so that it shall be not less than twelve (12) inches west of the pipeline.

3. That upon building the wall described in paragraph 1 herein the first defendant with the aid of the first claimant shall cause any space between the wall and the remaining parts of the right of way to be filled in with dirt.
4. that there be no order as to costs"

[4] At the commencement of the trial of this case learned Queen's Counsel for the defendant raised the issue that this matter was an abuse of process in that the "self-same alleged road was the sole contentious issue in High Court claim number 90 of 2007 between the First Claimant's parents and the same defendant. A mechanism was agreed upon by a Consent Order dated 9th December 2009 to resolve the dispute; the claimants have chosen to ignore that mechanism and to re-litigate afresh the issue of the same alleged road".

[5] In response counsel for the claimants pointed out that the consent order did not determine the status of the right of way. "The parties of that Consent Order of Claim No 90 of 2007 agreed to build a wall to remedy the problem of the trench that was created by the defendants and the claimants submit that this was a judgment in personam. It cannot be correct to say that the status of the right of way was determined by way of building a support wall and filling in the trench that was created by the defendant. The declaration for an 8ft right of way sought by the Defendants (sic) in that claim (No 90 of 2007) was not determined for reasons unknown. As such, consent order of claim no 90 of 2007 does not bind the claimants in this instant case". The claimants also submitted that the parties being different, the matter of *res judicata* did not arise.

[6] The defendant replying to the arguments of the claimants' counsel, submitted that "the issue of *res judicata* having been raised in the defence and the counterclaim, the same should be referred to the Learned Judge for a consideration of the possibility of a separate trial of that issue as a preliminary issue". It would appear that the suggestion was not followed up because the issue is still live at the time of the trial of this claim. This is not best practice.

[7] Having read the court file of the claim 90 of 2007 and the cases submitted by counsel on both sides, I have come to the conclusion that the claimant's present claim is not an abuse of process. Considering that the consent order did not for whatever reason deal with the first and most important claim of both cases, the claimants are entitled to bring a claim against the defendant to

have the claim of the existence or not of an 8-foot right of way resolved by the court. The parties of the first claim seem to have preferred to deal with the wall rather than the existence of the right of way.

[8] With respect to the present claim, the claimants state that they are the fee simple owner and occupier of a part of the remaining one and three quarter ($1\frac{3}{4}$) acres of land more or less situate at Campden Park in the Parish of Saint Andrews in St Vincent and the Grenadines and commonly called "Lowmans" and being in extent one house spot admeasuring six thousand one hundred and thirty one square feet (6,131 sq. ft.) and butted and bounded on one side by lands of Andrew Gumbs on another side by lands of Carson Gumbs on another side by lands of Althea Collins and on the other side by the remaining lands of the Donor or howsoever otherwise the same may be butted bounded known distinguished or described TOGETHER with all buildings and erections thereon and with all ways waters watercourses rights lights liberties privileges and all other easements and appurtenances thereto belonging or usually held used occupied and enjoyed therewith or reputed to belong or be appurtenant thereto .

[9] At paragraph 4 of the statement of claim, it is set out that "the first claimant's deed describes a road as being in existence on the western boundary to her land and the said claimant and her predecessors in title have enjoyed openly and as of right free passage on foot and with or without vehicles of all descriptions (including for at least the past 60 years motor vehicles) and with or without animals at all times and for all purposes over and along the said road which measures about eight (8) feet in width for the purpose of gaining access to and from the first claimant's property to and from the public highway from time immemorial or alternatively for the past 60 years or more prior to the commencement of this action".

[10] The claimant asserted that the road is clearly demarcated and is principally used by the claimant and their family as a means of access to their land. They state that prior to the defendant no one disputed the 8 ft right of way and the right of way "existed long before the defendant's mother purchased lands in the area".

- [11] The claimants assert that "of and by virtue of plan A 329 lands in the area were surveyed and the 8ft right of way is clearly demarcated upon the said land. They contend that they have "an established right together with their family and the general public to make use of the right of way as aforesaid and this right is given statutory effect under the provisions of the Prescription Act Cap 246 of the laws of St Vincent..."
- [12] The claimants state that the defendant regularly challenged the claimants' "use, maintenance and upkeep of the side right away" (sic). They state that from about the year 2002 the defendant has obstructed and otherwise impeded claimants, their family from using the right of way "as was the norm and the present condition of the right of way is causing a continuing nuisance to the claimants, their family and the public". They state that "motor vehicles previously travelled up the right of way to the claimants' home. The road is now impassable to vehicular traffic and dangerous to pedestrians."
- [13] In her defence the defendant denied the existence of an 8-foot right of way. Her testimony was that "all references to all paragraphs of the statement of claim which purport to claim the existence of an 8-foot road are irrelevant and misguided. I therefore deny all assertions and or/allegations and/or averments in the /statement of Claim which purport to support the existence of the alleged 8-foot road pleaded in the claim."
- [14] The defendant pointed out that the description of the first defendant's land in her title deed did not refer to any road, let alone an "eight feet road". She stated, "The pleadings based on the alleged existence of a road which is alleged to form one of the boundaries of the first claimant's land as described in the possessory title deed number 3321 of 2009 are therefore wholly unfounded and unsupported by the first claimant own pleaded document of title". The defendant stated that her mother conveyed a portion of her land to her and her daughter in 1988 by Deed Number 1872 of 1988 and the only road which bounded her land was the main Castle/Grant road below her land. She stated that, "As far as I am aware, there were no surveys done on any lands in the area".
- [15] In dealing with the survey plan A329, the defendant gave the following crucial testimony in her witness statement

"8. The following year 1989, my mother had a survey done to subdivide the remaining lands. On this plan, a private road was put in over my land to access mine and the adjoining lot from the Esther Joseph/Allan Wood's end. As it turned out, the road was never built or used."

The defendant acknowledged the existence of survey plan A329 but she denied "the purport thereof in so far as the said survey plan purports to identify an "8 ft right of way".

[16] The defendant contended that the first claimant is "neither entitled nor permitted to vary the Schedule to her Possessory Title so as to insert therein the existence of a road which is not mentioned in the document itself.

[17] In their amended Reply to Defence, the claimants admitted that no mention is made of the road in the description of the boundaries of the first claimant's land but they contend that "it simply demonstrate (sic) that the possessory title number 3321 of 2009 was in artfully (sic) done" and they reiterated that "the survey plan marked A329 clearly points to an 8 ft road".

EVIDENCE AND ANALYSIS

SITE VISIT

[18] The court made a visit to the site and found the site to be as shown in the photograph at p 256 of the trial bundle. It was interesting that an electricity pole was at the side of the existing pathway and in line with the wall that was built by the defendant pursuant to the consent order of 90 of 2007. I find it very unlikely that the pole would have been planted in the middle of the road, if a 8-foot road existed at that time.

[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 the defendant's witnesses reliable and forthright. On the other hand, it was clear that the claimants were not as knowledgeable of the history of the land.

[20] The first claimant in her witness statement stated that she recalled "that when I used to visit my grandmother that I would walk up to her home on an unpaved pathway. I am certain that the

pathway started at the foot of the hill, over lands now occupied by the defendant and up to my grandmother's home. The pathway is the right of way depicted in the several survey plans." This testimony flies in the face of her testimony in cross examination that the access to her parents' house was over the Joseph's property. I do not accept her testimony that the pathway she described to her mother's house was 8 feet or motorable. I accept the evidence that it was a footpath of some 1 ½ feet which over years widened to 3 to 4 feet. The first claimant also testified in cross examination referring to the right of way, "I have no idea where it ends. I know it goes beyond my property".

[21] I did not find credible the witnesses explanation for the lack of mention of the 8 foot right of way in the description of her land on her title. She said in her witness statement

"I know that the schedule of my deed of gift does not speak about an 8 ft right of way. I also know that at the time of *my* application for possessory title and its certificate does not indicate an 8 ft right of way. I can only explain that as an error or oversight for not including in my application possessory title as the land was surveyed in 2006" (sic).

The evidence of the second claimant was not any more helpful. It was interesting that he testified that, "I make this statement in connection with my suit against the defendant for denying myself and family a right of way over her land."

[22] The court accepts the evidence of Sylvia Sutherland that neither in the root title of the first claimant's land (Deed No 84 of 1962) nor in any title derived from it mentions any road or right of way as a boundary between the land of Luenda Gumbs and Gertrude Sutherland. I do not accept the explanation of "in artful" drafting of the description of the land or an error or oversight as to why the right of way is not mentioned in the title of the first defendant. I find that the right of way was not mentioned because it did not exist.

[23] I also accept as truthful the evidence of Sylvia Sutherland for the defendant when she testified as follows -

"11. My mother conveyed a portion of land to my sister, the defendant in 1988 by deed number 1872 of 1988. My sister's boundaries are with Miss Esther Joseph/Ann Woods and Gumbs. There is no mention of a road.

12. Subsequent to this, my mother decided to distribute the balance of the land to some of my siblings. As a result, a survey was commissioned. On the survey plan A329 done in 1989, a private road was asked to be put in on the lands of /Gertrude and Cynthia Sutherland to serve the defendant's lot and that of the adjoining lot which belonged to my other sister Hyacinth Durant.
13. However, it was subsequently decided not to construct that road, and it was never opened or used by any one. It is therefore incorrect for anyone to say that the right of way as described on Plan A329 was ever a public right of way or ever used by the Claimants or anyone else, as alleged. It is different, separate and distinct from the foot path used by the Gumbs over the land of Esther Joseph/Anna Woods, which they continue to use to access their homes,
14. As I understand the situation it appears that the claimant have either misunderstood or have been pretending to misunderstand the 8 foot right of way on the Sutherland survey plan A329".

[24] The evidence of Arthur Medford for the defendant also impressed me as being reliable and truthful. Mr. Medford said in his witness statement

- "2. I knew Miss Luenda Gumbs, now deceased, who lived on the hill above the lands of Mrs.. Gertrude Sutherland, also deceased. There was a bank at the top of Mrs. Sutherland land which looked like a natural boundary between both lands.
3. There was no road to Mrs. Gumbs land and she and her children got to their home by a foot path above the bank through the lands of Mrs. Esther Joseph. Mrs. Esther Joseph's land is immediately next to Mrs. Sutherland's land, and is below Miss Gumb's land on the slope.
4. I can state categorically that there was no motorable road between the lands of Mrs. Joseph and Mrs. Sutherland, nor between that of Miss Gumbs and Mrs. Sutherland. As stated, there was just a footpath that Miss Joseph allowed the Gumbs to access their

home. That footpath was a narrow track which could only be used by persons in single file. That footpath started from the public road and uphill through Mrs. Joseph's land along the boundary with Mrs. Sutherland's land, which is a bank, then up to Miss Gumbs' land where it bounded with Mrs. Sutherland's land. If that footpath was a motorable road it would have to be motorable from the public road and over Mrs. Joseph's land, but there is no space between Mrs. Joseph's property and Mrs. Sutherland's property to accommodate a motorable road.

[25] Mr. Medford's evidence was supported by the evidence of Yvette Jackson particularly when she stated that "the track provided only walking space, so you had to walk one behind the other. There was definitely never any road on which any vehicle could have travelled. In fact the space between Mrs. Joseph's house and the boundary with Miss Sutherland was not wide enough to allow for vehicles".

[26] The claimants based their claim largely on the fact that survey plan A 329 and subsequent plans showed an 8-foot right of way thereon. It is accepted that survey plan A329 was the first plan that showed an 8 ft "right of way". However, the claimants could not say how the right of way came about. In cross examination about the right of way, the first claimant could not say where the right of way started and where it ended. The evidence of the existing right of way as a footpath was convincing and not challenged by the claimant. On the other hand, the evidence of how the 8-foot right of way came to be drawn on survey plan A329 was not contradicted by the claimants and I accept it.

[27] I have looked at survey plan A329 by Mc Arthur Robertson and the subsequent plans A10/47 and A13/58 by Ivo Providence and A11/128 by Benson Quamina. I have looked at the reports of land surveyors Corliss Murray and Ivo Providence, the report of the Chief Surveyor Adolphus Ollivierre, I have also looked at the objections to the report of the Chief Surveyor by the defendant and the claimants' response to Defendant's objections to Chief Surveyor's report. It is noted that the survey plan A329 indicates that the survey was done "at the instance of Mr. Delbert Sutherland" and there is drawn thereon an "8 ft right of way" starting and ending on the Sutherland land. It is also noted that Ivo Providence in his answer to questions about his survey (p 215 trial bundle)

stated the following:

1. the 8ft right of way shown on Plan A329 is established on private land.
2. I did examine the boundaries outlined on the claimant's predecessor in title per Deed #84/1962 and I did note that the said land is bounded on the western side by lands of Sutherland.
3. My research indicates that there was no registered survey plan prior to Plan A329 delineating a road of a specific width.

[28] In my view the Chief Surveyor's report in the earlier claim (No 90 of 2007) did not take the matter any further on the key question in this claim of whether there is a valid claim by the claimants to an 8-foot right of way on the defendant's land. Given the fact that there was considerable doubt as to the reason and scope of the survey, the many objections to the report and unanswered questions on it, and, importantly, that the Chief Surveyor was not before the court to be cross examined in this case, I did not find the report helpful with respect to the key issue now before the court - the existence of an 8-foot right of way between the Joseph and Gumbs land and the Sutherland land. One of the Chief Surveyor's conclusion did fly off the pages of his report though, namely, that "There is the existence of a right of way but over the lands belonging to the Gumbs family, a portion of which the claimants holds title number 3321/2009."

[29] Having considered all the evidence in this case I find the following facts -

1. The plan A329 was commissioned by the Sutherlands and that part of the instructions to the surveyor was to show an 8 foot right of way to give access to the parcels of land she was subdividing.
2. There was no reference to an 8-foot right of way or delineating a road of a specific width on any registered survey plan before the plan A 329.
3. The right of way shown on the plan A329 access was not acted upon in that it was never established or put into use.
4. The right of way shown on survey plan A329 was on the land of the Sutherlands.

"

5. The wall was built in accordance with the consent order of claim No 90 of 2007. The parties to that claim seemed to have been so satisfied.
6. There was never an 8-foot right of way on the Joseph or Gumbs land; and certainly no public right of way 8-foot in width.
7. There was a footpath of about 1½ feet which over time widened to 3 to 4 feet. This path was on the Joseph and Gumbs land.
8. The access to the Gumbs land was a footpath for pedestrians and not motor vehicles.

CONCLUSION

[30] The claimants have failed to prove that they are entitled to any of the orders for which they prayed. The court has held that there was no right of way established on the defendant's land. In those circumstances the claim against the defendant must fail.

ORDERS

[31] I therefore make the following orders -

- (1) The claim of the claimants is dismissed
- (2) The counterclaim of the defendant being subsumed in the defence, is dismissed
- (3) Prescribed costs on a value of \$50,000.00 amounting to \$7,500.00 to be paid by the Claimants to the defendant.
- (4) No order as to costs on the counterclaim.

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