

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 10 OF 2009**



BETWEEN:

SYLVIA McKREE

Applicant

V

CHRISTOBEL BURGIN

Respondent

Appearances:

Mr. Stephen Williams for Applicant
Mr. Joseph Delves for Respondent

2009: July 15th
August 25th

JUDGMENT

BACKGROUND

- [1] **JOSEPH, Monica J.:** On 17th February 2009, applicant Sylvia McKree filed an application seeking declaration of possessory title in relation to a parcel of land, 18,732 sq ft., situate at Hamilton, Bequia (the parcel of land). That application was made in accordance with section 3 of the Possessory Titles Act 2004 (No. 38 of 2004) (the Act). The application was supported by affidavits of Clinton McKree and Marilyn Roache, filed in accordance with section 5 of the Act.
- [2] There was publication of the application in the newspapers as required by section 7 of the Act. The application was opposed by respondent Christobel Burgin who filed an entry of appearance on 25th March 2009, and an affidavit on 19th May 2009. On 19th May 2009, her son Esvert Burgin filed an affidavit supporting her entry of appearance.

- [3] The parcel of land is described: on the North East partly by 16 foot road and a dry gutter on the South East partly by lands of Gregg and lands of A. Sargeant and B. Sargeant on plan G10/37 on the South West by lands on Plan Gr10/17 on the North West by remaining lands on Plan Gr. 1018 and shown on the plan drawn by Keith Francis licensed surveyor ...approved and lodged at the Surveys Department bearing registration number Gr.12/54."
- [4] Family Tree: John Burgin and Sybil Burgin were brother and sister. Sybil had three children: Joseph, Charles (deceased) and Augustina. Joseph had three children, two of them being Christobel and Magdalene. Augustina had three children, Sylvia McKree, Elsie and Matthew. Elsie had Earl and other children. Austina Peniston grandmother of Earl.

WRITTEN SUBMISSIONS: 23rd July 2009 and 27th July 2009.

CASE FOR THE APPLICANT

Sylvia McKree - Affidavit

- [5] She has been in continuous and exclusive possession of the parcel of land in survey plan GR12/54 drawn by Keith Francis for upward of fifty years to present time. The parcel of land was property of John Burgin who died in Trinidad many years ago.

Sylvia McKree - Evidence at trial

- [6] After John Burgin's death her mother Augustina took possession of the parcel of land. She lived with her parents cultivating the land and after they died she continued to cultivate the land. Joseph who died in 2003 or 2004 was not in control of the parcel of land she is claiming.
- [7] Elsie (Augustina's daughter) did not seek Joseph's permission before she put a board house on part of the land. It was Augustina who sent Elsie to put the house on the land. As people were getting old, she (Sylvia) went to uncle, Joe and, in Chistobel's presence invited him to 'get the land fixed the right way'. He did not have money and said they should get together and share the land so that everybody could get a share.

- [8] She remembers Earl (Elsie's son) and Marilyn claiming the whole land including the Roman Catholic churchland and she had told them that the Church land did not belong to them. She supported Earl and Marilyn's application for possessory title for over four acres of land and swore that they own the land:

Marilyn Roache - Affidavit evidence -

- [9] She deposed that Sylvia has been in continuous and exclusive possession of the parcel of land for upwards of fifty years to the present time.

Marilyn Roache - Evidence at trial –

- [10] Marilyn 's evidence was that she is the same person who made a possessory title application to the Court in 2007 for the four acres of land, which was opposed by Christobel and the roman catholic church. She was in possession of the four acres from 1973. She testified that during the time she was in possession of that land, and at the time she made application for possessory title, Sylvia McKree was in possession of a part of the parcel of land.

CASE FOR RESPONDENT

Christobel Burgin - Affidavit evidence

- [11] The land previously measured by Earl and Marilyn Roache to be 198,273 sq ft. Court ordered just over 20,670 sq ft. to Roaches and the balance of the land which has not yet been surveyed, belongs to them (Christobel and Magdalene, two children of Joseph Burgin).
- [12] She never saw the applicant on the parcel of land during her father Joseph's lifetime. Some time after Joseph died in 2003 the applicant began clearing it, cutting trees and started to plant peas and cassava. She swore an affidavit in the application made by Earl and Marilyn Roach (suit No. 45/2007) and relies on it.

- [13] In suit 45/2007 applicant Earl (Elsie's son) and Marilyn Roache lived on lot No. 1 shown on plan GR 10/17 and not also on lot No. 2. The Burgin land which they were claiming was in possession and control of her father Joseph Burgin.
- [14] When Elsie desired to build a house on the land, she sought and obtained Joseph Burgin's permission and she built a wooden house on part of the land, which was later changed to concrete by Earl. Earl did not have possession of the rest of the land.
- [15] When the land was surveyed at the instance of Earl and Marilyn Roach the land identified as the Roach measured 20,670 sq. ft and is bounded on the north by the "remaining lands of the heirs of John Burgin".
- [16] In 2001 Roach swore that they had 28 years uninterrupted possession of three lots of land at Hamilton, acknowledging they were bounded on the north by John Burgin, (Joseph Burgin's father).
- [17] No one had paper title of the parcel of land. After John Burgin's death his nephew Joseph Burgin took possession of the land.

Christobel Burgin - Evidence at trial:

- [18] In cross examination, she said she is fifty five years, she and Sylvia are cousins with a common grandmother, Sybil Burgin. She is not claiming four acres of land. The Court gave Marilyn 20670 sq ft and the balance belongs to her, but stated she is unaware that the balance is 170,000 sq ft. Sylvia is not in possession of the parcel of land. She admitted that she was familiar with how the old generation used to handle land, distributing the land without legal representatives.

Esvert Burgin - Affidavit evidence:

- [19] The parcel of Land is part of a larger parcel of land owned by his grandfather Joseph Burgin and before that by his uncle John Burgin. Some time after Joseph's death in August 2003 Sylvia McKree began cultivating cassava and peas on the land. In 2005 Sylvia cleared some parts of the land in preparation for its survey.

- [20] Christobel and Magdalene instructed solicitors to write to Sylvia warning her not to trespass. After reaping the crops she had sown Sylvia did not return to the land and nothing further happened until 2007. The parcel of Land is in the family for over fifty years. His great great uncle John Burgin then Joseph Burgin and presently his aunt Magdalene and mother Christobel are in possession of the parcel of land.

Esvert Burgin - Evidence at trial:

- [21] The family is not certain as to the amount of land that Joseph Burgin was in possession of. Lawyer had asked them to give estimation of the parcel of land and they had estimated one acre more or less but no survey had been done. He does not know if other family members are in possession of the land. His mother who was ill did not physically occupy the parcel of land after Joseph's death neither did Magdalene. Neither did he and his siblings. Christobel occupied the land before Joseph's death.

SUBMISSIONS

- [22] Mr. Williams submitted that, in deciding this matter, the Court must address one central issue and that is whether the applicant was in possession of the parcel of the land for upwards of twelve years, and whether she had the animus possedendi for that period of time.
- [23] Counsel's submission was that the respondents are not clear as to the amount of land they were in possession of and, by extension, exactly what they are entitled to.
- [24] Mr. Delves submitted that in suit No. 45/2007 Marilyn Roach filed an application claiming 198,273 sq ft of land. The parcel of land now claimed by Sylvia McKree is part of that land claimed by Marilyn Roache in 2007, which fact was admitted in evidence in this case by Marilyn and Sylvia.
- [25] In Suit **45/2007** Sylvia McKree deposed that her mother occupied the land: when her mother advanced in age, Earl and Marilyn Roach took possession of the said land in or

about the year 1973, and they remained in continuous and exclusive possession to the present time."

- [26] Mr. Delves submitted that Sylvia McKree in one suit stated that the land was occupied by one person (the Roaches). The Court having ruled she was now applying for possessory title claiming that part of the land that she said in this suit belonged to another person, belongs to her.

OCCUPATION POSSESSION

- [27] Sylvia McKree's application for possessory title relates to a parcel of land which is part of the land shown on that survey plan claimed by Marilyn Roach in 2007 in suit 45/2007
- [28] In suit 45/2007 Sylvia McKree deposed that her mother occupied the land: Earl and Marilyn Roach took possession of the said land in or about the year 1973, and they remained in continuous and exclusive possession to the present time" (21st August 2007).
- [29] Here Sylvia McKree was admitting that the parcel of land she is now claiming was land that, in 2007, she swore belonged to Earl and Maralyn Roach. I think that admission is fatal to her application.
- [30] In establishing exclusive possession of the parcel of land, the applicant has given evidence in addition to two other persons, her husband, Clinton McKree and Maralyn Roach. Clinton McKree, testified that he was giving evidence in support of his wife "whatever she says". I therefore cannot look for much help from him. I consider the evidence of the other two persons, Sylvia and Marilyn.
- [31] Applicant Sylvia McKree admitted that, part of the land that she now claims to have been in exclusive possession of, she swore in 2007 the Roaches were in possession of the land. Marilyn Roach made a similar admission. She said that when she applied for the four acres, Sylvia McKree was cultivating piece of the parcel of land. Marilyn Roach testified that during the time she was in possession of that land, and at the time she made

application for possessory title, Sylvia McKree was in possession of a part of the parcel of land.

[32] In cross examination Marilyn stated "I was saying that I was in possession of the four acres from 1973 until case in 2007. Still maintain that. Ms. McKree was working a part of the four acres of land. In reexamination she stated: I had applied for whole four acres. Ms McKree was working piece of said land. Am fifty five. MsMcKree was working land as long as I know her. I get to know her nephew (her husband Earl Roach) in 1969 approximately forty years ago."

[33] In cross examination, Marilyn Roach stated what was her intention at the time she made application for possessory title, but that does not assist Sylvia's application She said:

"When I made application for the land it was with intention to share the land for the family. Family include Sylvia McKree, her brothers. When we were surveying the land it was to share among the family comprise of Sylvia McKree, her brothers Matthew Simmons, St.Clair Simmons. During survey Esvert Burgin came and said that the land belong to them which I never knew. There could be other members of the family as it is large family. I would say its family land."

[34] Sylvia McKree, Clinton McKree and Maralyn Roach have demonstrated that they say what is expedient at the time I do not think they are credible witnesses and I am therefore unable to accept their evidence of possession of the parcel of land by Sylvia McKree. In those circumstances, I make a finding that Sylvia McKree was not in possession of the parcel of land for the requisite period of twelve years.

[35] The respondents are unsure of the extent of the land of which they claim possession. According to Esvert Burgin, when they sought legal advice, the Attorney asked them to give an estimation of the parcel of land. They gave an estimation of one acre more or less, but no survey had been done. Esvert Burgin's evidence was that he does not know if other family members were in possession of the land.

[36] For adverse possession the applicant is to establish actual possession with the intention to possess. "Adverse possession" is defined in section 2 of the Act "as factual possession of an exclusive and undisturbed nature of a piece or parcel of land in Saint Vincent and the

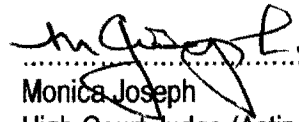
Grenadines for a continuous period of 12 years or more accompanied by the requisite intention to possess the said land as owner thereof."

[37] **Halsbury's Laws of England 4th ed. Vol. 28 paragraphs 977-981**, para 977 reads:

"What constitutes adverse possession is a question of fact and degree and depends on all the circumstances of each case, in particular the nature of the land and the manner in which land of that nature is continually used;However, for the claimant's possession of the land to be adverse, so as to start time running against the owner, the factual possession should be sufficiently exclusive and the claimant should have intended to take possession. Where the occupier's possession of the land is by permission of the owner, that possession cannot be adverse..."

ORDER

- [38] (1) The applicant has not been in adverse possession of the parcel of land for twelve years.
- (2) The applicant is to pay costs of \$14,000.00 to the respondent.


.....
Monica Joseph
High Court Judge (Acting)
1st August 2009.