

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 103 of 2003

BETWEEN:

MATHILDA ANTOINE

Claimant

v

CLAUDE THEOBALDS
KEN THOMAS

Defendants

Appearances: Ms. Nicole Sylvester for the Claimant
Mr. Joseph Delves for the First Defendant

2006: November 27
2007: January 26
June 25

JUDGMENT

- [1] **THOM, J:** This is claim for damages for trespass and a counterclaim for a declaration that the First Defendant is the legal owner of the property.
- [2] The Claimant Matilda Antoine who instituted this claim on the 13th day of March 2003 died on the 28th day of March 2004.
- [3] By order of Court dated the 13th day of April 2005 the Claimant's daughter Nopsie Rubenstein a personal representative of the Estate of the Claimant was appointed to represent the Estate of the Claimant for the purpose of continuing these proceedings.
- [4] The Claimant in her statement of claim alleges that in 1974 she entered into possession of a parcel of land at Layou and since then she has been in sole continuous, uninterrupted,

- peaceable and exclusive possession of the said land. She took ill between 1998 and 1999 and when she recovered she found her land was fenced. She removed the fence and commenced construction of a building on the land. In 2001 the First Defendant sought and obtained an injunction restraining her from constructing on the land. The claim was dismissed in 2002. In January 2003 she recommenced construction of the building and cultivating the land. The First Defendant destroyed crops which she had planted.
- [5] The Claimant sought inter alia an injunction to prevent the Defendants from entering the said land and special damages for the crops destroyed.
- [6] The First Defendant in his defence alleges that he was the owner of the land. He claims title to the land through his mother Florence Theobalds (deceased) who he alleges purchased the land from Gwendolyn Deare.
- [7] In his counterclaim the First Defendant alleged that the Claimant was trespassing on the land and sought inter alia a declaration that he was the legal owner of the land and an injunction to prevent the Claimant her servants and agents from entering or remaining on the land, and an order that the Claimant demolish and remove the structure from the land.
- [8] The Second Defendant did not file an acknowledgement of service or a defence.
- [9] Nopsie Rubenstein and Glenda Chewitt testified on behalf of the Claimant. The First Defendant testified on his own behalf and called two witnesses being Alma Jones and Leon Young.
- [10] The evidence of the witness Nopsie Rubenstein is that the Claimant owned several pieces of land in the Layou area. She entered into possession of the said land in 1974 and cultivated same. She exercised sole continuous, uninterrupted peaceable and exclusive possession of the said land and regarded it as her own. She fell ill between 1998 and 1999. When she recovered from her illness and visited the said land she observed the land was fenced. She removed the fence and commenced construction on the land. She paid taxes for the land. Four tax receipts were exhibited dated 2001, 2004, 2005, 2006. In

February 2001, the First Defendant brought an action against the Claimant in relation to the said land. The action was dismissed in 2002. The said land was purchased by Herbert Thompson and on two occasions the said Florence Theobalds paid part of the purchase price on behalf of Herbert Thompson being on the 29th July, 1965 and on 3rd January, 1970. All other payments were made by the Claimant. A receipt from Gwendolyn Deare in relation to the said land was exhibited. The Claimant recommenced cultivating the land and in January 2003 the First Defendant destroyed crops planted by the Claimant.

[11] Under cross examination the witness testified that the land belonged to the Claimant. The Claimant bought the land from Gwendolyn Deare. The receipts showed that the Claimant paid for the land. She agreed however that the Claimant's name was not on the receipts evidencing payment to Gwendolyn Deare for the land. The witness testified further that she was present when the Claimant made payments for the land. She herself made two payments being May 17, 1966 and July 29, 1968. She emigrated to Canada 1972 but has visited St. Vincent and the Grenadines thirteen times since 1972. She further testified that the Claimant took possession of the land in 1965 and gave someone the land to work. The Claimant took sole possession in 1974. She agreed that the full purchase price for the land was paid in 1970. The Claimant cultivated various crops on the land such as corn, sweet cassava, sweet potatoes, pine, ochros, plantains and bananas. The witness denied that the Claimant gave the First Defendant the receipt for the land exhibited with the Defendant's witness statement and alleged that he stole the receipt from the Claimant. The witness also denied that it was in 1999 the Claimant took possession of the land.

[12] The witness Glenda Chewitt testified that she lived with the Claimant for most of her (Glenda Chewitt) life. She worked the land with the Claimant. No one ever went unto the land while they were working it. When the Claimant got ill someone fenced the land and the claimant broke it down. Since she knew herself the claimant was farming the land. She helped the claimant to plant peas, corn, cassava, ochro and sweet potato on the land.

[13] Under cross examination the witness Glenda Chewitt testified that the Claimant bought the land. She alone paid for the land. She was present when the First Defendant stole the

receipt from the Claimant. The Claimant worked the land for many years. The Claimant worked the land since she (the witness) was a little girl. The witness further testified that she did not know when she was born but stated she was between 70 – 80 years old.

[14] The First Defendant in his evidence stated that he is the son of Florence Theobalds and he resides in the United Kingdom and also in Layou. In 1970 Florence Theobalds purchased a parcel of land from Gwendolyn Deare for the sum of \$304.18. A receipt showing that Florence Theobalds made payment to Gwendolyn Deare for a parcel of land at Layou on January 3, 1970 and on December 22, 1970 was admitted into evidence. Florence Theobalds died in 1984. After Florence Theobalds died he put one Jackson Douglas to look after the said land. Jackson Douglas planted coconut trees and a mango tree. These trees are still on the land. In 1999 he surveyed the property. He was granted Letters of Administration in the Estate of Florence Theobalds. Between December 2000 and early January 2001 the Claimant commenced construction of a concrete foundation on the land. He obtained an injunction restraining the Claimant from constructing on the land. In 2003 the Claimant recommenced construction on the land. He migrated to the United Kingdom in 1956 but he returned to St. Vincent and the Grenadines on several occasions. During his visits he saw no sign of the land being occupied by the Claimant or anyone else. Up to 1998 the Claimant acknowledged that the land belonged to Florence Theobalds and the Claimant encouraged him to build a house on the land. The Claimant gave him the receipt for the land. Florence Theobalds paid taxes for the land. Since he received the Deed of Assent for the land in 1999 he has paid taxes for the land in his own name.

[15] Under cross-examination the witness testified that Florence Theobalds and the Claimant had a very close relationship. When Florence Theobalds died he sent money to the Claimant had a very close relationship. When Florence Theobalds died he sent money to the Claimant and she arranged the funeral. The witness testified that he was not aware that the land was purchased for Herbert Thompson. Herbert Thompson was Florence Theobalds' adopted son. He died some time ago. The witness further testified that he did not know the exact date the Claimant commenced construction on the land.

- [16] The witness Leon Young testified that he is the son of the Claimant. He resides in the United Kingdom. During his visit to St. Vincent and the Grenadines in 1991 the Claimant encouraged him to build a house on the said land. In answer to his query about the ownership of the land, the Claimant agreed the land belonged to Florence Theobalds who was at that time deceased. The Claimant showed him a receipt for the land with Florence Theobalds name.
- [17] Under cross examination the witness agreed that he does not have a good relationship with the witness for the Claimant Nopsie Rubenstein. When he visited in 1991 the Claimant was old and weak and had problems with her foot. He brought medication for her. He did not see any peas, corn or cassava planted on the land. The land was covered in bushes. The witness was shown the receipt exhibited by Nopsie Rubenstein and he stated that he had never seen that receipt. The Claimant never mentioned Herbert Thompson to him. Under re-examination the witness was shown the receipt exhibited by the First Defendant and he testified that it was not the receipt shown to him by the Claimant.
- [18] The witness Alma Jones testified that she emigrated to St. Vincent and the Grenadines in 1967. The Claimant and Florence Theobalds were sisters and they had a very close relationship. Florence Theobalds bought the said land from Gwendolyn Deare. She was present when Florence Theobalds told the Claimant that she was purchasing the land for Herbert Thompson. The witness further testified that the Claimant told her that she would give the receipt to the First Defendant. She enquired of the Claimant about the dispute over the land and the Claimant told her she gave the First Defendant the receipt and the witness Nopsie Rubenstein wanted the land. Neither the Claimant nor Glenda Chewitt cultivated the land.
- [19] Under cross-examination the witness confirmed that Florence Theobalds did not say she was making payment for Herbert Thompson but that she was buying a piece of land for Herbert Thompson. The witness agreed that she did not have a good relationship with Nopsie Rubenstein because of the dispute over the land. The witness testified that herself and Nopsie Rubenstein has a good relationship and Nopsie Rubenstein broke off the

relationship. Under re-examination the witness stated that the relationship broke down because Nopsie Rubenstein wanted her to support the Claimant's claim of the land and she (Alma Jones) did not agree because the land belonged to Florence Theobalds.

[20] The witness John Joseph testified that he knew the Claimant. She lived across the road from him in Texier Road. He knew her since he was a boy. He was born in 1946. He also knew the First Defendant from a boy. Florence Theobalds tried to get someone to work the land she did not get anyone. The land was uncultivated, opened not fenced. After Florence Theobalds died the First Defendant hired him to cut the bushes on the land. He did so. Mr. Douglas who was the caretaker of the land fenced the land with barbed wire. Mr. Douglas planted two mango trees on the land. He subsequently saw peas on the land but he did not know who planted it. He never saw the Claimant on the land. He saw Arthur Chewitt building a house on the land. In 2000 at the time when the house was being built he saw the barbed wire fence cut. He never saw anyone cultivating the land.

[21] Under Cross examination the witness testified that in the 1990's he was on good terms with the Claimant. He denied that the Claimant ordered or made a deposit on blocks from him. He reiterated that the First Defendant hired him after Florence Theobalds died to clear the land which was covered with bushes. After he had cleared the land Austin Douglas fenced it with barbed wire.

[22] Pursuant to Part 32.9 of CPR 2000 the parties agreed and the Court directed that expert evidence be given by one expert witness. This witness being Mr. Arthur Robertson a licensed land surveyor.

[23] Mr. Robertson in his report stated that the land described in the Claimants statement of claim and the witness statement of the First Defendant were one and the same land. The boundary marks are according to the plan P3/40 i.e. the survey plan exhibited by the First Defendant. The witness was shown the tax receipts exhibited by the Claimant and the First Defendant. The witness testified that he was not familiar with the Registration system at the Tax Department. He testified further that the receipts do not indicate which property they relate to.

[24] The issues to be determined are

- (1) Whether the Claimant was in peaceable continuous exclusive and uninterrupted possession of the land for a period of at least twelve years prior to the institution of these proceedings.
- (2) Whether the First Defendant's interest in the property has been extinguished and his right of recovery has been statute barred.

[25] Learned Counsel for the Claimant urged the Court to find that the evidence led on behalf of the Claimant was reliable. Learned Counsel referred the Court to several legal authorities on the law relating to limitation of action and adverse possession including the cases of **J.A. Pye (Oxford) Ltd and Arother v Graham** [2002] 3 AER p. 865; **Powell v McFarlane** [1977] 38 p & cp 452; **Buckinghamshire County Council v Moran** [1990] ch. 623 and **Gifford Laville v Lennard Hill** [2002] High Court of Dominica No. 2001/0278.

[26] Learned Counsel for the First Defendant submitted that the Claimant did not plead that she had title to the land but rather possession of the land which was sufficient to ground her claim for trespass. Learned Counsel submitted that while CPR 2000 does not require the Claimant to plead the limitation Act, Part 10.5 of CPR 2000 requires a defendant to set out all facts. Therefore when ownership of the land was raised by the First Defendant in his defence and counterclaim, the Claimant was required to set out those facts in her reply and defence to counterclaim. Secondly the Claimant did not prove that she was in adverse possession of the land for a period of at least twelve (12) years within the meaning of the Limitation Act. Learned Counsel referred the Court to several of the cases referred to by Learned Counsel for the Claimant and the case of **Cobhan v Joseph Frett** [2000] UKPC (BVI).

[27] I do not agree with the submission of Learned Counsel for the First Defendant that the Claimant in her pleadings did not assert ownership of the land. Having examined the statement of claim I am of the opinion that the Claimant claimed ownership of the land by

virtue of adverse possession. In my opinion CPR 2000 does not require the Claimant to specifically refer to the Limitation Act. The facts outlined by the Claimant in her statement of claim are sufficient.

[28] Was the Claimant in adverse possession of the property for a period of at least twelve (12) years?

[29] The relevant provisions are sections 17, and schedule 1 of the Limitation Act Cap. 90. Section 17 of the Limitation Act reads as follows:

1. No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
2.
3.
4.
5. Part 1 of the schedule contains provisions for determining the date of accrual of rights of action to recover land in the cases therein mentioned.”

“Subject to section 20,

While paragraphs 1,2 and 8 (1) and (2) of Schedule 1 read as follows:

- “1. Where the person brings an action to recover land or some person through whom he claim, has been in possession of the land, and has while entitled to the land been dispossessed or has discontinued his possession, the right of action shall be treated as having accrued on the date of dispossession or discontinuance.

2. Where any person brings an action to recover any land of a deceased person (whether under a will or on intestacy) and the deceased person
 - (a) was on his death in possession of the land or in the case of a rent charge created by will of taking effect upon his death, in possession of the land charged and
 - (b) was the last person entitled to the land to be in possession of it, the right of action shall be treated as having accrued on the date of his death.

8. (1) No right of action to recover land shall be treated as accruing unless the land is in possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession") and where the preceding provisions of this schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

- (2) Where a right of action to recover land ceases to be in adverse possession, the right shall be treated as accruing unless and until the land is again taken into adverse possession."

[30] The effect of the above mentioned provisions is that the right of action to recover land is barred whenever twelve (12) years have elapsed from the time when a right of action accrued. The right of action is accrued only when the land is in adverse possession of a person other than the true owner. Time begins to run at the time when adverse possession is taken of the land.

[31] In **Halsbury Laws of England** Vol. 28 paragraph 768 the learned authors explained adverse possession as follows:

"Meaning and effect of "adverse possession" No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. Such possession is called adverse possession. What constitutes such possession is a question of fact and degree; there is no general principle that to establish possession of an area of land, the Claimant must show that he made physical use of the whole of it. On the other hand a claim to prescriptive rights to easements may be so extensive as to amount practically to a

claim to the whole beneficial user of the servient tenement, in which case it can only succeed as a claim to adverse possession.”

[32] The principles to be applied by the Court in determining whether a person was in adverse possession were outlined in the case of **Powell v McFarlane**. These principles were approved by the House of Lords in **JA Pye (Oxford) Ltd. And Arother v Graham and Arother**.

[33] In the case of **JA Pye** the Court at p. 866 stated

“The legal possession required is

- (i) a sufficient degree of physical custody and control (factual possession) and
- (ii) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (intention to possess).

As regards factual possession, everything depended on the circumstances, but broadly, such possession was constituted where the alleged possessor had been dealing with the land as an occupying owner might have been expected to deal with it, and nobody else had done so. The necessary intent was one to possess, not to own and an intention to exclude the proper owner only so far as was reasonably possible.”

[34] Applying the above principle to this case the question is did the Claimant dispossess the true owner of the said land and if so when did she go into possession. The onus of proving that the owner has been dispossessed is on the party who alleges it. In this case it is the Claimant.

[35] In her pleadings the Claimant pleaded that she went into possession of the land in 1974 and continued since then in exclusive, peaceable and uninterrupted possession, except for interruptions by the First Defendant in 2001 and 2003.

[36] The Claimant died before filing a witness statement in this matter. The evidence adduced to prove the claim is the evidence of Nopsie Rubenstein and Glenda Chewitt.

[37] I did not find the Claimant's witness Nopsie Rubenstein to be a reliable witness. In her witness statement she stated that the Claimant went into possession of the land in 1974. During cross-examination she said the Claimant went into possession in 1965 and gave someone else the land to work. In her witness statement she stated that the land was originally purchased by Herbert Thompson. Under cross-examination she stated the land was the Claimant's land the Claimant bought it from Gwendolyn Deare. Further in her witness statement the witness stated that Florence Theobalds made two payments for the land and all other payments were made by the Claimant. However under cross-examination the witness stated she made two payments and the Claimant made payments in her presence. The witness reiterated in re-examination that she made payments and the Claimant made payments. The receipts show that the total purchase price for the land was \$1,104.18. Payment for the land was made in five (5) installments being:

\$369.50 on 29th July 1965

\$324.40 on 17th May

\$106.00 on 12th July

\$200.00 on 3rd January 1970

\$104.00 on 22nd December 1970

Florence Theobalds name appears on both receipts. Neither the Claimant's name nor the witness Nopsie Rubenstein's name appear on either receipt. Since there were only five payments and Florence Theobalds name appears against three of those payments it was not possible for the witness to make two payments and the Claimant to make some payments.

[38] I also found the other witness for the Claimant Glenda Chewitt to be unreliable. In her witness statement she stated that since she knew herself the Claimant was working the land planting peas, corn, cassava, ochros and sweet potatoes. Under cross-examination she testified that she did not know when she was born she estimated her age to be 70 – 80 years. The Claimant worked the land from when she (the witness) was a little girl. The Claimant's case is that she has been in possession of the land for approximately 30 years having gone into possession in 1974. Taking the lower limit of the witness's age of 70

years or the even lower age of 67 years since her sister the witness Alma Jones testified that the witness (Glenda Chewitt) was born in 1943, Glenda Chewitt's testimony is to the effect that the Claimant has been in possession of the land in excess of fifty (50) years. Further this witness testified that the Claimant bought the land, the Claimant alone paid for the land. This evidence is in contradiction to the receipt exhibited on behalf of the Claimant. Also it was quite apparent from the witness's demeanor that the witness was experiencing some mental retardation.

[39] Having reviewed the evidence I find that the parcel of land that is referred to in the statement of claim and the parcel of land referred to in the Defence and the witness statement of the First Defendant and shown on Plan 3/40 is the same parcel of land. I accept the testimony of the expert witness Mr. Robertson. The Claimant and Florence Theobalds were sisters and they had a very close relationship. When Florence Theobalds died the Claimant arranged her burial, the funds being provided by the First Defendant. This was not disputed by either side. I also find that the land was purchased by Florence Theobalds she paid for the land in several installments.

[40] I do not agree with the submission of Learned Counsel for the Claimant that the defence witness Alma Jones testified both in her witness statement and in her oral testimony that the land was bought by Herbert Thompson. Alma Jones in her witness statement stated at paragraphs 4 and 5 as follows:

- "4. My aunt Florence Theobalds bought the parcel of land which is the subject of this dispute from a lady whom I knew as Gwenny Deare. Florence and my mother were sisters.
5. My said aunt told my mother in my presence that she was buying the said piece of land for her nephew Herbert Thompson."

In answer to Learned Counsel for the Claimant under cross-examination the witness stated that Florence Theobalds did not say that she was making payment for Herbert Thompson. The witness stated that Florence Theobalds said I am going to buy a piece of land for Herbert. I am of the opinion that the evidence of Alma Jones is to the effect that Florence

Theobalds when purchasing the land expressed an intention to give same to Herbert Thompson.

[41] I also do not agree with the submission of Learned Counsel for the Claimant that the Claimant's offer in 1985 to sell the land to the First Defendant's brother Kerwin Theobalds shows that the Claimant held herself out to be the owner of the land. I have carefully examined the evidence in this case and I find that no such evidence was led.

[42] The witness Nopsie Rubenstein exhibited four (4) tax receipts showing payment of property tax on a parcel of land at Layou No 5/70/125 L for the years 2001, 2004, 2005, 2006. The First Defendant exhibited seven (7) receipts showing the payments by Florence Theobalds for rates in Layou for the years 1990 and 1993 and five (5) payments by the First Defendant for property tax in Layou No. 5/70/1/154 L two receipts for the year 2001 and receipt for the years 2002, 2004 and 2005. While the expert witness Mr. Robertson opined that the land described in the pleadings of the parties is the same land he was unable to give any opinion as to whether any of the receipts exhibited related to the land in question.

[43] The onus was on the Claimant to prove on a balance of probabilities that she was in undisturbed possession of the land for a period of twelve years. As stated earlier I found the witnesses for the Claimant to be unreliable. I find that the evidence does not show that the Claimant was in possession of the land from 1974. The evidence shows that the Claimant between 1999 and 2000 destroyed the barbed wire fence constructed by the First Defendant and commenced construction of a building on the land. The Claimant's possession was interrupted when the First Defendant obtained an injunction restraining the Claimant from entering the land. The Claimant reentered the land in 2002 and planted some crops which were destroyed by the First Defendant in January 2003.

[44] The claim is hereby dismissed.

[45] Judgment is entered for the First Defendant on his counterclaim. It is hereby ordered that:

- (a) A declaration is hereby granted that the First Defendant Claude Theobalds is the legal owner of the said land described in Plan P3/40 and described in Deed of Assent number 1387 of 2001.
- (b) Nopsie Rubenstein the Personal Representative of the Estate of Matilda Antoine do forthwith demolish and remove the concrete structure placed on the said land. All expenses to be borne by the Estate of Matilda Antoine.
- (c) Costs in the sum of \$14,350 shall be paid to the First Defendant by the Estate of Matilda Antoine.

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Gertel Thom
HIGH COURT JUDGE