

IN THE COURT OF APPEAL

ANTIGUA

Civil Appeal No. 3 of 1972

Between: DAISY EDWARDS
(Executrix of the Estate of Martha Thomas Deceased)
Plaintiff/Appellant

and

THEODORE ATHILL Defendant/Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Glasgow (Ag.)

S.T. Christian for Plaintiff/ Appellant
Louis H. Lockhart for Defendant/Respondent

1972, November 10

JUDGMENT

CECIL LEWIS, C.J. (Ag.)

The plaintiff/appellant instituted a suit in the High Court against the respondent in which he claimed possession of a piece or parcel of land at Liberta Village and a two-storied dwelling house situated thereon and also a declaration that she was entitled to the said land and premises. She sued in her capacity as executrix of the estate of Martha Thomas deceased. In her statement of claim she alleged that Martha Thomas (who is hereinafter referred to as "the testatrix") purchased this land on the 19th January, 1923 and was in undisturbed possession thereof up to the date of her death on the 28th January, 1969. The said Martha Thomas left a will in which she appointed the plaintiff/appellant her executrix. Probate of the will was granted to the plaintiff/appellant on the 10th July, 1969. The said house and land were devised to the plaintiff/appellant absolutely. On the same date of Martha Thomas' death the respondent wrongfully went into possession of and refused to leave the premises.

The defence is that the defendant/respondent is personally in possession of the premises, that on the date of the /death

death of the respondent's father, Joseph Athill, on the 14th July, 1964, he, Joseph Athill, was in possession of the said premises and had been in possession thereof since the 16th September, 1919, that his son the respondent, obtained Letters of Administration of the estate of his father and included in the estate of his father which he administered was the said property; that as administrator the respondent conveyed the said property to himself and that the Deed of Conveyance is now registered. In paragraph 5 of the defence, it is also stated that upon the death of the said Joseph Athill in 1964, he, the defendant/respondent went into possession of the said premises. In her reply the plaintiff/appellant joined issue with the respondent on his defence and said as to paragraphs 2, 4 and 5 of the defence that she repeated paragraph 3 of her statement of claim, asked the court to say that the indenture by which the respondent conveyed the land to himself is null and void and has sought a declaration to this effect.

Now the evidence discloses there was a purchase of this land in 1923. This evidence was given by Matilda Thomas, the sister of Martha Thomas the testatrix. Her evidence is that her sister Martha who was younger than she was, went away to the U.S.A. and that she owned no property at the time. The property in dispute was in Liberta and was originally owned by an old lady called Mrs. Cable; that Sonny Athill, the respondent's father, bought it; that her sister purchased it from him in 1923 while she was in America, and that when it was purchased she, the witness, Matilda Thomas, lived with her mother on the premises; and that her sister sent the money to purchase the property.

Before action was brought, there was some correspondence between the solicitors for the parties about this property and in a letter, Exhibit 2, written by the then solicitor for the respondent to the solicitor for the plaintiff/appellant it was stated that the respondent had instructed the solicitor to inform the appellant that the respondent had been appointed by the court to administer his father's estate "which estate

includes the house and land at Liberta which you now occupy." This letter was written to Martha Thomas and in it she was requested to vacate the premises not later than the 31st August, 1968. The reply to that letter by the appellant's solicitor was to the effect that Martha Thomas claimed that she owned the property since 1923 and that she has a receipt dated 18th January, 1923 to prove she had purchased it from one Joseph Nathaniel Attley who was presumed to be the father of the respondent. This indeed, has not been denied. The letter stated also that on the receipt are the signatures of three witnesses, two of whom are dead, and that Miss Thomas has been residing on the property since 1923 without disturbance; that the solicitor for Miss Martha Thomas has documents to show that the house was hers beyond doubt, and that she was therefore disputing the respondent's claim to the property.

I now return to the evidence of Matilda Thomas. She said that the property was for sale in 1923, and that one Charles Graham, the agent for Athill, (the respondent's father) was selling it for Athill as the latter was away in Cuba at the time. One Reverend Francis applied to buy the land, then Joseph Francis, Neither apparently was successful, and the land was sold to her sister Matilda. The witness' mother and son went to secure the property in 1923. They lived on the property from that year while her sister was still away. I therefore hold that if this were so, then that possession by the witness' mother and her son would constitute possession on behalf of the executrix. She next said the property was repaired by one James Stephens her mother's agent, and that her sister came to Antigua in 1928 after the hurricane and lived in the property until the death of their mother in 1943. Now it is to be observed (and counsel for the appellant has so maintained from the beginning) that his claim is not a claim based on long possession at all, but it is a claim based on purchase, and it is conceded by counsel for the respondent that that claim has not been

traversed. There has been no specific or implied denial in the defence that there has been a purchase by Matilda Thomas.

As to the first point, there is clear evidence by her sister that there was a purchase. In cross-examination, Matilda Thomas' evidence discloses that the money for the purchase of the house was paid in two instalments. She did not remember the date, but she got a full receipt and plan for the house and posted the receipt and plan to her sister. She also said that a long time did not elapse between the two payments, and that Grayman Athill's agent posted the money to him. She further added that her sister stayed to repair the house and did not return to America. She, the witness lived in the house till 1928 when her sister came to Antigua and then her mother and sister remained in the house. Now on that evidence the trial judge could have found that there was a purchase. He did not specifically find a purchase by Matilda Thomas although he said that he accepted her sister's evidence and had been able to hold that the document dated 19th January, 1923 (i.e. the receipt) was admissible in evidence he would have held that Martha Thomas was the owner of the property as she had been in possession thereof.

In his findings he was against the respondent on nearly every material fact. He found that Joseph Athill, the defendant's father owned the property in question, that Martha Thomas was in possession of the property from 1928 until 1969 when she died; that she occupied the property and carried out repairs to it, that in 1923 Martha Thomas and Joseph Athill were not in Antigua, that the property was up for sale, and Martha Thomas was interested in purchasing it and the property was never conveyed to Martha Thomas. Then he continued, "if I had held the document dated 19th January, 1923 admissible, Martha Thomas, having entered into possession of the property, I would have held her to be owner. The plaintiff, having based the claim to ownership of the property on the document of 1923 and having ruled it inadmissible, I cannot hold that Martha Thomas was the owner of the property."

I think that is where the trial judge went wrong because there was other evidence on which he could have found that Martha Thomas had purchased the property and it was not necessary to rely exclusively on the receipt. In addition to this, one has to take into account the behaviour of the respondent and of the respondent's father. The latter had been in Cuba, but when he returned from Cuba he did not go and exercise acts of ownership over the property. On his return he went, first of all, to live with his niece Elisa Matthew who says that she knew when Joseph Athill left Antigua for Cuba in October, 1920, that he returned in August of the year 1946, and the first place at which he stayed was her home which was his father's and mother's place, that he stayed a few months with her to see if she had room, then he left and said he was going to see if the good lady, Martha Thomas would rent him downstairs of the house. He stayed at Martha Thomas' place for nine days then he went to Mamy Davidson's house in Liberta, and after that he lived in several places. He finally got a place of his own in Liberta with his other son who was illegitimate. However, he went back to live in Martha Thomas' house and also lived with her, i.e. his niece, for a few years, then he went to St. Lucia, returned to Antigua, and lived at Newfield and from Newfield he went to the Fienness Institute where he died.

Here is a man who is said to own property, and yet he goes "knocking from pillar to post" to find somewhere to live. He goes to his niece first, then to his son, then to Martha Thomas to rent a room from her. Is this conduct consistent with a man who owns property? To my mind it is not. If he owned the property what could Martha Thomas be doing in it, and why could he not turn her out if the property belonged to him? It is quite clear that Athill was conscious of the fact that he had sold the property. He obviously did not tell his son anything about this, or if he did, the son pretended he did not. The whole point is that such conduct is explicable

only on the basis that John Athill knew that he had parted with the ownership of the property and in those circumstances, when the judge found that Martha Thomas had been in undisturbed possession of the property from 1928 till 1969 I am of the opinion that that fact coupled with the fact that she repaired it, he ought also to have found that her possession was explicable only on the hypothesis that she had purchased the property. Her purchase could not be proved by the receipt because for technical reasons, that document could not be admitted in evidence, and that was the only ground on which the trial judge dismissed the plaintiff's claim. He however ignored entirely the fact that there was oral evidence of purchase and did not give effect to it, nor did he give effect to the conduct of the respondent's father which showed unequivocally that he did not regard the property as being his. There is no question here of anybody being in long possession. The respondent has not tried to explain how his father came to be in possession of the land except to say that Matilda Thomas was his father's common law wife but even if that were true and it is by no means established it is not an argument which has any validity in law because if a person is the common law wife of a man who owns property, she cannot prescribe against him while living in the house with him, and the judge, in finding that Matilda Thomas was in possession clearly rejected that view, as he was bound to do. I am of the opinion therefore, there was evidence to support the claim that in 1923, Matilda Thomas was in possession of the premises through her agent, and in 1928 by herself and that she had the property repaired by one Stephen in her absence. Her possession was referable to the purchase of the property mentioned by her sister which was effected by her sister from Graham, Joseph Athill's agent and she became the owner thereof. Accordingly when the respondent purported to transfer the property to himself after he got letters of administration of his father's estate that document of transfer was null and void, and I so declare.

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The appeal will accordingly be allowed, and the Court orders that possession of the premises be delivered up to the appellant, within one month from the date hereof. There will also be a declaration that the appellant is the beneficial owner of the property in question and that the respondent is trustee thereof for the plaintiff/appellant. The costs of the action should be paid by the respondent.

P. Cecil Lewis
JUSTICE OF APPEAL

ST. BERNARD, J.A.

I agree.

E.L. St. Bernard
JUSTICE OF APPEAL

GLASGOW, J.A. (Ag.)

I agree.

E.F. Glasgow
JUSTICE OF APPEAL (Ag.)