rectification of
See also land reg Act

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#016

SAINT LUCIA:

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A. D. 1994

SUIT No. 628 of 1992

BETWEEN

**MAURICE DANTES**

Plaintiff

and

**CECILE BIBIANA JOSEPH**

Defendant

Mr. O. Edgar for Plaintiff
Mr. K. Foster for Defendant

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1994: May 16;
June 1.

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## JUDGMENT

**MATTHEW J.**

On December 9, 1992 the Plaintiff commenced this suit by a notice to persons who had any interest in a portion of land described at the Land Registry as Parcel No. 1872C 595 registered in the names of the heirs of Antoine Joseph and Theresa Joseph who were both deceased, Antoine on June 25, 1985 and Theresa on February 13, 1990.

The Defendant, representing the heirs of Antoine Joseph and Theresa

Joseph, entered appearance on December 29, 1992.

On April 5, 1993 the Plaintiff took out a summons in which he applied for an order for rectification of the land register in respect of parcel 595 to replace the names of the heirs of Antoine and Theresa Joseph by the insertion of his own name. Appended to the summons was a copy of the land register, an affidavit made by Theresa Joseph, a copy of the probate of the Will of Albertina Leon with the Plaintiff as the Executor, and an affidavit by Maurice Dantes.

In that affidavit Dantes alleged that Theresa Joseph made an affidavit on the basis of which the Land Adjudicator awarded her the land but he challenged the validity of the affidavit because Theresa Joseph had failed to sign or attest the affidavit before a Justice of the peace, Notary Royal or other Commissioner for Oaths.

He alleged that the failure of the affidavit rendered it invalid and the Adjudicator erred in accepting the affidavit as a valid document upon which Theresa Joseph could lay claim to the land.

Dantes alleged he had been in possession of the property for over thirty years and moreover the land was bequeathed to him by Albertina Leon in her Will which was probated on January 6, 1992.

On June 23, 1993 this Court made an order that the Defendant was to file

and serve an affidavit in answer to the affidavit of Maurice Dantes filed on April 5, 1993 within 28 days.

The Respondent and her Counsel were absent. The order further stated that the order was to be served on the Chambers of Mr.Kenneth Foster within ten days. The matter was further adjourned to September 22, 1993.

There is an affidavit on file by Darren Fessal that on Friday 9th July, 1993 he served on the Chambers of Mr. Kenneth Foster the order of the High Court made on June 23, 1993.

The matter came up on September 22, 1993 but was not heard because Counsel for the Defendant was absent. It was adjourned to December 20, 1993. The matter was again not heard on that day. Mr. M. Foster stated he was not instructed on the matter and Mr. Kenneth Foster ws out of the island. It was adjourned to the next call-over list and the Plaintiff was awarded costs in the sum of $300.00.

On Call-over Day the case was fixed for May 12, 1994. Just before the time for trial the Court received a letter from the Chambers of Mr. M. Foster that Mr. Kenneth Foster was away and would be arriving in St.Lucia on May 13, 1994. Costs were again awarded to the Plaintiff in the sum of $300.00 and the matter was set down for Monday, May 16, 1994.

Up to the time of hearing the Defendant had not complied with the order of the Court made on June 23, 1993. Despite this contempt I allowed the matter to proceed without any pleadings by the Defendant. I had seen Mr. Marcus Foster and Mr. Kenneth Foster appear at different times and I thought the matter should be disposed of, and since Mr. Kenneth Foster would be physically present in the island I re-arranged my cases to fit this one and get it out of the way.

Only the Plaintiff and the Defendant gave evidence at the trial.

Maurice Dantes stated that the place where he lives was given to him by his aunt, Albertina Leon. He said he had her Will probated and he sought to tender it in evidence. Mr. Foster objected to the production of the document on the ground that it was a holograph Will and did not conform to the provisions of Article 788 of the Civil Code.

Mr. Edgar in reply submitted that the Will had been already probated and it had to stand until set aside. He also submitted that according to Article 788 a holograph Will is subject to no particular form.

The document was marked "A" for my later consideration.

The Plaintiff stated that he had been on the land for over thirty years. He said there were two lots, 595 and 596. He said the Defendant was claiming lot 595 but lot 596 was registered in his name. He tendered in evidence his land

certificate which showed he is the registered owner of lot 596 from October 21, 1991.

He said when he did not get his name on lot 595 he went to his lawyer. He said he was in these proceedings asking that lot 595 be put in his name.

When he was cross-examined he said Albertina Leon was his aunt. He said the house he owns on lot 596 was built by Albertina Leon and her husband and that Albertina died on May 25, 1983 in the said house.

He said he remembered when the Land Adjudicators were around. He denied attending a demarcation of lot 595 in the presence of the Defendant and Beatrice Lubin.

He said he was not present at a demarcation conducted by Mr. Legge. He said he never spoke to Legge. He said it was when he went to the Land Registry that he was told Theresa Joseph had claimed the land. He said he appealed against the decision and that was why he was in Court.

He said he was aware that a wooden house belonging to the Defendant's parents was removed from lot 597 and placed on lot 595 but that the Josephs never lived on lot 595.

He said he probated the Will nine years after the death of his aunt because that is the time he was able to do so.

Cecile Bibiana Joseph stated that her parents were owners of lot 595. She tendered Letters of Administration in respect of the estate of her parents as well as the title to lot 595. She said her parents first occupied the land in 1961 and two years later they bought it from Albertina Leon. She said her family lived on lot 595 for a long time.

She said when her mother died, Dantes began to deny her access to lot 595 and began to destroy her goods.

She said she remembers 1986 when Mr. Legge was demarcating lot 595 in the presence of the Plaintiff who raised no objections. She tendered in evidence a demarcation certificate which indicates that H. Legge was the demarcator. The document indicates that the person pointing out the land was Theresa Joseph and the witnesses present were Cecile Joseph, Beatrice Lubin and Maurice Dantes. The claimant was the Heirs of Antoine Joseph and Theresa Joseph.

When she was cross-examined she stated that her parents bought the land but the receipt is now lost or misplaced. She said Mr. Legge was asking questions of Dantes and Dantes told Mr. Legge he knew the land was sold by Albertina Leon to her father. She denied that Dantes had been living on lot 595 for over thirty years.

In his closing address learned Counsel for the Defendant asked me to reject

the Plaintiff's claim in respect of long possession because he sought to claim possession while his aunt was alive.

Counsel submitted that the Land Adjudicator demarcated the land in favour of Defendant's family, that Dantes was present at the time and raised no objections.

Counsel submitted that rectification can only arise as a result of fraud or mistake by virtue of **section 98(1)** of the **Land Registration Act.** Counsel said fraud must be pleaded and that was not done and the Plaintiff has not suggested what the mistake was.

Counsel said the Will was a holograph Will and should be in the writing of the testator.

In his closing address learned Counsel for the Plaintiff observed that the Plaintiff was claiming from a Will which was duly admitted to probate.

Counsel said the Defendant was relying on a claim by purchase but there was no receipt. Counsel repeated the challenge to the affidavit of Theresa Joseph mentioned above.

Counsel submitted that unless the Will was improbated and set aside it remains valid. He cited **Article 1142** of the **Civil Code** in that context.

I cannot take too seriously the Plaintiff's claim based on long possession. It would have to be a possession of the quality described in **Article 2103A** and he did not even allege that. Further, that possession was interfered with when the

Land Adjudicator awarded the land to the Defendant's parents. I believe the Defendant that the Plaintiff has not been living or occupying the land for over 30 years. A further proof of that is that Defendant has a house on the land.

The Plaintiff has sought to claim on the strength of his probate granted on February 25, 1992. Let me make some observations. The document shows that Albertina Leon made a Will on January 24, 1977 leaving 2½ lots of land measuring approximately 40 feet by 100 feet situated at No.15 Lady Mico Street to the Plaintiff less a house spot sold to one Jn.Baptiste Leicester Charles. Nothing in the Will says lot 595 is covered by it or referred to. A Will speaks from the death of the testator and in this case from May 25,1983. It does not necessarily mean because you own property in January 1977 you still own it in May 1983. The testator could easily sell all of the land or some of it after she made the Will. There is no vesting deed putting lot 595 in the ownership of the Plaintiff, nothing to connect him legally with the land.

**Article 780** of the **Civil Code** states the three forms in which a Will can be made in St.Lucia as being:-

a) notarial;
b) holograph;
c) according to English form.

**Article 788** states:

> "A holograph will must be written and signed by the testator, it requires neither notaries nor witnesses and is subject to no particular form. Such a will may be made by a deaf mute."

The document in this case purports to be made by Albertina Leon but two "**XX**" are indicated as her mark. Learned Counsel for the Defendant submits that the Will was not written and signed by the testator. Learned Counsel for the Plaintiff answers this by saying the Article says "*a holograph Will is subject to no particular form*".

Surely, that cannot be the way to interpret **Article 788**. What the Article means is once the holograph will is written and signed by the testator it requires neither notaries nor witnesses and is subject to no other particular form.

So I would hold that the document is not in fact a holograph Will.

But I would also agree that the probate would have to stand until it was improbated in accordance with **Article 1142** of the **Civil Code** and **Articles 173 et seq.** of the **Code of Civil Procedure**. According to **Article 177** of the **Code of Civil Procedure** this can be begun at any stage of the suit until the closing of the evidence and even afterwards before judgment, upon proof that the falsity was not ascertained until after evidence was closed.

Counsel for the Defendant did not seek to suspend proceedings in the suit until improbation was adjudicated upon. Rather, he kept making reference to a repealed provision of the **Code of Civil Procedure, Article 136,** which I felt and indicated was not relevant to the point.

I did not find it necessary to direct that improbation proceedings should take place in view of what I am about to say below.

The Defendant has a provisional title for the land since February 13, 1987. The effect of such registration is stated at **Section 24** of the **Land Registration Act**. The Plaintiff is asking for rectification of the register. I will say here what I said at **pages 6-7** of an earlier decision in **Suit No.287 of 1992** between **Phillip Bernadine v Stanislaus Modeste** decided on September 23, 1993:

> *"The undisputed fact is that under the Land Registration and Titling Project the Adjudicating Officer granted the land to Elizabeth Macauldy. She made a successful claim presumably under the Land Adjudication Act. Plaintiff did not make a claim at the relevant time or at all. Defendant obtained absolute title on June 24, 1991.*
>
> *There is no evidence that the Plaintiff appealed to the Court against the decision of the Adjudication Officer within the specified time limit.*
>
> *I refer to **Skelton and Others v Skelton (1986) 37 W.I.R. 177**. It seems to me that the Plaintiff can only proceed now before the Court by virtue of **Section 98** of the **Land Registration Act**. Section 98(1) reads as follows*:
>
> 'Subject to the provisions of sub-section (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake'.
>
> ***Skelton's** case gives an idea of the kind of mistake that is contemplated.*
>
> The headnote reads:
>
> 'The appeal procedure provided by section 140 of the Registered Land Ordinance was appropriate if the final decision of the Adjudication Officer was incorrectly recorded in the Land Register, but it was not appropriate where a challenge is made to findings of fact reached by the Adjudication Officer even though these were in effect embodied in an entry in the Land Register. The correct procedure for an appeal in the latter circumstances was an appeal in accordance with the procedure under section 23 of the Land Adjudication Ordinance.'
>
> *No evidence or issue of fraud arises in this case."*

The situation is the same here. The Defendant's parents obtained a demarcation of the land. The Plaintiff did not appeal under the Land Adjudication Act. The procedure under Section 98 of the Land Registration Act which is the same provision as Section 140 of the Registered Land Ordinance of Tortola is not applicable. There is no evidence of fraud or mistake.

The application for rectification of the register is refused. Because of the manner in which this case was conducted by the defence including the loss of the Court's time caused by the frequent adjournments due to the fault of the defence and their refusal to comply with my order of June 23, 1993, I make no award of costs to the Defendant.

A.N.J. MATTHEW
Puisne Judge.