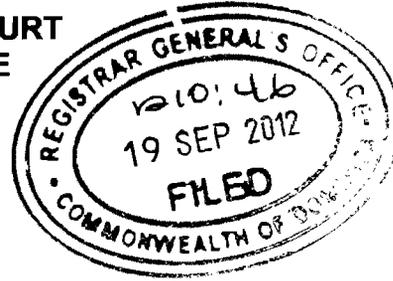


IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
DOMINICA
Claim No. DOMHCV/2010 /0161



BETWEEN:-

NATHANIEL HODGE

Claimant

-and-

CLARA JOHN

Defendant

Before:

The Hon Justice Birnie Stephenson

Appearances:

Mr McDonald Christopher for the Claimant

Ms. Roseanne Charles for the Defendant

JUDGMENT

[2012: March 7th, 8th
September 19th]

[1] **Stephenson J:** Nathaniel Hodge (the claimant) seeks declarations from this Court that he and his immediate predecessor Una Magloire were in sole and uninterrupted possession of a piece and parcel of land measuring 23,924 square feet located at Trafalgar in the parish of St George, in the Commonwealth of Dominica. This land is bounded on the North East by land of the heirs of Una Magloire separated by a road; on the South East by Wotten Waven Estate separated by the Roseau River, on the South West and West by the land of the Heirs of Una Magloire and that together and through her, he has adversely possessed as the true owner of the land and that he should be registered as owner thereof.

[2] It is the Claimant's case that he has been in sole and exclusive possession of the parcel of land since 1993. He relies partly on his sole undisturbed possession; and partly on the undisturbed possession of his predecessor in title, his grandmother Una Magloire,

to say that he has been in occupation of the land for a period of 30 years and more prior to his applying for the issue of First Certificate of Title on 1st April, 2010.

[3] Clara John (the Defendant) is the great aunt of the Claimant. She is the daughter of Rosaline Magloire (deceased) who she contends was the owner of the land and that she and her siblings are the rightful heirs and persons entitled to the parcel of land in question. She is also the sister of the Claimant's grandmother Una Magloire.

[4] It is the Defendant's contention that the land which is the subject matter of this claim is part of a larger portion of land which forms and is regarded as "family land" by the descendants of Rosaline Magloire who was the owner of the piece of land, and through the years the parcel of land which is being claimed by the Claimant has been occupied by different members of the family who are the descendants of Rosaline Magloire and who are the persons entitled to the said land.

[5] The Defendant further contends that there are other surviving heirs of Rosaline Magloire who have prior interest to that of the Claimant in the said parcel of land. Mrs John, the Defendant, also contends that the Claimant did not occupy the land solely as he claims neither did he occupy the square footage of land that he claims.

[6] The Defendant contends that the Claimant's grandmother, Una Magloire always treated the land like it was communally owned by her family who are the descendants of Rosaline Magloire and never sought to dispossess her other siblings of their interest in the land and that at all material times the Claimant occupied that land as a licensee. Further, when the members of the family realised that the Claimant was seeking to have the parcel of land registered in his name immediate steps were taken to refute his claims.

[7] By way of counterclaim, the Defendant is seeking orders from this Court *inter alia* for a declaration:

- a. that the parcel of land subject of this litigation forms part of the estate of Rosaline Magloire;

- b. that the Claimant is not entitled to the said parcel of land as he claims;
- c. that she has a beneficial entitlement to an interest in the said land,
- d. for a declaration that the funds set aside by the Government of Dominica for the acquisition of 7700 square feet of land at Trafalgar which was statutorily acquired by the state in or about 2009 forms part of the estate of Rosaline Magloire and that said funds should be distributed in accordance with the Intestates Act .
- e. The Defendant is also asking for an order that the Claimant should vacate the land and refrain from occupying any other land at Trafalgar forming part of the estate of Rose Magloire.

The Issues:

[8] I am of the view that the primary issue to be decided in the case at bar is whether the Claimant's application to be registered as owner of the parcel of land on the basis that he and his grandmother before him have been in continuous possession of the parcel in excess of thirty years can be sustained. Should this court find that he can, then attention will have to be paid to the Claimant's other prayers, however should this issue be decided against the Claimant, I am of the considered view that the substratum of his claim fails and then attention would have to be paid to the other prayers of the Defendant.

[9] The primary issue could also be stated this way "whether the Claimant's alleged use and occupation of the parcel of land in question is tantamount to adverse possession so as to confer on him a possessory title and bar the Defendant's right to recover the said parcel of land."

[10] This is essentially a question of fact to be ascertained from the evidence adduced at the trial and a consideration of the circumstances which was disclosed by the evidence.

The Law

[11] The Claimant seeks to acquire registered title under Section 12 (1)(d) of the **Title By Registration Act**¹. Section 12 (1) (a) –(e) of the act states:

“Land not registered under this Act may be so registered-

(a)If the applicant can show a good documentary title thereto in himself and his predecessors in ownership for at least thirty years next before the date of the presentation of the request under the act;

(b)if, notwithstanding that such documentary title thereto cannot be shown, the Court is satisfied from the deeds or other documents accompanying the requests, that the applicant has the right to claim the land as owner and that he himself has been in undisturbed possession of the same continuously during the period of twelve years next before the date of the presentation of the request under this Act;

(c)if the applicant has, by descent or by will or deed acquired a title to the land from a person who would have been entitled himself to have the land registered in accordance with paragraph (b)

(d)if the land has been in the sole and undisturbed possession of the applicant alone in his own right or as executor, administrator or trustee, or partly in the sole and undisturbed possession of the applicant in any such right and partly in the sole and undisturbed possession of any other person through whom he claims, continuously for a period of thirty years next before the date of the presentation of the request under this Act;” (emphasis mine)

...

[12] Section 2 of the Real Property Limitation Act² says

¹ Chapter 56:50 of the laws of the Commonwealth of Dominica

² Chapter 54:07 of the Laws of Dominica

"After the commencement of this Act, no person shall make an entry or distress, or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to some person through him he claims, or if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same."

[13] In order to acquire prescriptive title to land under the provisions of the Real property Act a person asserting the same must establish that he and his predecessors were in the sole and uninterrupted possession for a period of thirty years.

[14] Counsel for the Claimant has submitted that the Defendant is barred from maintaining her claim twelve years after the Claimant's predecessor went into occupation of the parcel of land pursuant to the provisions of section 2 of the Real Property Limitation Act.

[15] It is a well established principle of law that a person claiming adverse possession must show that he was in factual possession; that he had the requisite intention to possess and his possession must be adverse to the owner.³

The Claimant's entry upon the land:

[16] The Claimant in his witness statement which forms part of his evidence in chief says that he was born in 1975 and that he was raised by his grandmother who lived close to the spot where he lives. Further that his grandmother was the only person who occupied the

³ Re: Pye –v- Graham (2000) 3 WLR 242 @252 E-F

land that he is laying claim to; that *she claimed "ownership of the land absolutely"*; That for his entire life no one but Una Magloire occupied the portion of land; that the Claimant or any other person never visited the land as owner or otherwise.

[17] The Claimant said further *"that after his grandmother died he had to take care of himself; and by the time he was 14 years old, my cousin Radam Peter who was also in the house went abroad with a white woman. I continued possession of the land undisturbed by any one"*⁵.

[18] Under cross examination the Claimant contradicted himself when he said that his grandmother died when he was 9 years old and after she died he went to live with his mother. The Claimant also told the Court that his mother left Dominica in 1988 whilst he was still a child. I therefore find as a matter of fact based on the Claimant's evidence that he did live with his grandmother but after his grandmother's death he went to live with his mother at the age of nine.

[19] The Claimant in his evidence in chief sought to tell this court that he lived on his own from when he was a child which I find difficult to believe. In fact I find that in this regard the witness was not a witness of truth and if I were to accept his evidence, it would mean that he lived with his grandmother who died when he was nine years old and after her death he lived alone with his cousin in the house where his grandmother and cousin lived, while his mother lived in Dominica in the same area and that he lived on his own from 1989

⁴ See Paragraph 5 of the Claimant's Witness Statement filed on the 1 March 2012

⁵ See Paragraphs 1 & 2 of Claimant's Witness Statement op cit.

when and until his cousin who also lived in the house left the state, that is some five years later.

[20] The Claimant denied that after his mother left Dominica he went to live with his father in Trafalgar or with his father's relatives in Laudat. Under cross examination the Claimant again contradicted himself. He told the Court that "after his grandmother's death he went to live with his mother." He also told the Court that "he did not remember seeing his mother live in his grandmother's house". Clearly, even though the Claimant claims that he returned to his grandmother's house before his mother left, I find as a matter of fact that he would have left the house and any occupation he seeks to rely on by himself and grandmother would have been interrupted and not continuous as is required by law.

[21] The Defendant contends that the Claimant is her great nephew and her sister Una Magloire died in or about 1984 and when she died that she left several children including the Claimant's mother surviving her.

[22] The land in question was land owned by her and Una Magloire's mother, Rosaline Magloire, who died intestate in 1951 and as such the land subject of this case is part of her mother's estate. In her evidence she said that the land *"forms part of a larger portion of land which is regarded as 'family land' by the descendants of Rosaline Magloire and this land has been occupied by different members of the family at different periods of time. The property had never been formally distributed and no one member has ever had exclusive possession of the said land."*⁶

⁶ See paragraph 5 of the Defendant's Witness Statement filed on the 28th February 2011

[23] The Defendant does not deny that the Claimant has been living on the land and farming there. She, however contends that the Claimant was at all times in occupation of the land as a licensee and that he was allowed to occupy the house on the property and cultivate the land by her and other family members who recognised him as needing someplace “to stay and to earn a living”⁷.

[24] The Defendant said in her evidence that the Claimant lived most of his life with his father in Trafalgar and that the parcel of land which he is now claiming was previously occupied by the Claimant’s cousins (her other grand nephews) namely Clem Hodge, Edward Magloire, Michael “Radam” Peter and Bentley Rolle. Further that they were all allowed to cultivate crops on the family land and that the Claimant who was experiencing problems with his paternal family at Trafalgar was granted a licence to occupy the house on the property and farm the land.

Submissions by Parties:

[25] Learned Counsel, Mr McDonald Christopher for the Claimant submits that the crucial question to be determined is whether it can be established by documentary evidence or otherwise that the Defendant and her mother Rosaline Magloire, deceased did not abandon the defined portion of land now in the possession of the Claimant.

[26] I respectfully disagree with Learned Counsel in this regard. I am of the considered view that the first issue to be resolved is whether the Claimant and his predecessor in title had sole and uninterrupted possession of the land in question.

⁷ See Paragraph 7 of the Witness Statement of Clara John filed on the 28th February 2010

[27] Lord Browne Wilkinson in JA PYe (Oxford) Ltd en anor –v- Graham et anor⁸ said:

“The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner”

[28] Now what evidence is there that the court can find in support of the Claimant’s contention that Una Magloire went into possession of the parcel of land with the intent to exclude the world at large including the owner?

[29] Learned Counsel for the Claimant submitted that the root of the Claimant’s title goes back to his maternal grandmother Una Magloire who was in possession prior to and at the time of her death in 1984. There is no evidence presented to this Court by the Claimant as to how his grandmother went into occupation of the land as clearly he was not alive when that happened and he presented no credible evidence to this court in that regard. I find that the Defendant Clara John who is the sister of Una Magloire is more in a position to accurately say how the Claimant’s grandmother came to be occupying the land.

[30] When subjected to close scrutiny the Claimant’s testimony contained contradictions and inconsistencies and prevarications as to when he went into occupation of the land. I find as a matter of fact that his evidence was unconvincing and I am not persuaded that he went into possession of the property as he claimed he did.

[31] I preferred the testimony of Defendant Clara John to that of the Claimant and found the Defendant to be a credible witness.

⁸ [2003] 1 A C 419 @para 36

Unlike the Claimant, the Defendant was present when the Claimant's grandmother went into possession of land in the area. She could also tell this court clearly where her sister lived and she was also able to tell this Court with clarity about the land in question, about the family members including the Claimant's mother and her acquisition of a piece of the said land forming part of the estate of Rosaline Magloire. She was also able to tell this Court about her sister Una Magloire's marriage, and where she lived and her movements. On the whole this witness impressed me as a witness of truth and I accept her testimony as a reliable account of the use of the land in question and of the ownership thereof.

[32] I therefore find as a matter of fact that Una Magloire's occupation of the land and the house on the said land as claimed by the Claimant was with the blessings of her siblings and as a member of the family living on family land. Therefore, in the circumstances, one cannot infer any "*animus possidendi*". It is clear from the evidence that she did not enter the land as a trespasser.

[33] I am of the considered view that the Claimant therefore cannot there rely on his grandmother's occupation to establish adverse possession. His grandmother never entered upon the property as a trespasser or squatter.

[34] I wish to note that learned Counsel for the Claimant sought to take issue with the fact that the Defendant did not know the acreage and extent of the property I find that this is of no moment to the matter in issue.

[35] There is no doubt in my mind that the Claimant occupied a portion of the land, that he lived on the said portion and that he

planted a garden. There is also no doubt in my mind that the Claimant chased persons from time to time out of what he considered to be his garden; however, are these actions adequate to establish adverse possession of the parcel of land? It is established law that what amounts to possession depends on the characteristics of the land, and I acknowledge that the Claimant's activities on the parcel of land were within the normal user of the land.

[36] It is an uncontested fact that the Claimant lived off of the land, that he planted a garden and his activities were in keeping with what his family thought was proper use of the land in that he was allowed on the land in recognition of the fact that he needed a place to live and to earn a living.

[37] Therefore in these circumstances the fact that Claimant chased persons off the land cannot be construed as his claiming ownership but protecting his produce from which he earned a living which is reasonable in the circumstances.

[38] I however accept the evidence of the Defendant that the Claimant was allowed on the land, to live on the land and to use the land as part of or as a member of the family. The Defendant recognised that the Claimant was a descendant of Rosaline Magloire and because he was a member of the family he was allowed unto same.

[39] It is the Defendant's contention that on the evidence presented to the Court, the Claimant's possession of the land was in effect by licence and therefore he cannot claim to have adversely possessed the parcel of land subject of this case. Learned Counsel for the Defendant Miss Rosanne Charles contended that the claimant

did not have the “*animus possedendi*” and in support of her contention she relied on the explanation of *animus possidendi* by Slade J in **Powell –v- MacFarlane and another**⁹

“ ... the intention in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the process of the law will allow”.

[40] In support of her submission Miss Charles further referred to the case of **Edwards –v- Braithwaite**¹⁰ where the conclusion of the Court as stated in the head note was that where the Claimant went into occupation under a family arrangement and that this arrangement continued after this mother’s death during the lifetime of his father; in the absence of any evidence of interference with his occupation by the heir after his father’s death of any indication of an intention to create a relationship of landlord and tenant at the time, it could be inferred that the Claimant was nothing other than a licensee at any time and as such incapable of deriving a title by prescription. The Court in this matter applied **Heslop –v- Burns**¹¹.

[41] Learned Counsel for the Defendant further cited the statement of Denning LJ in **Facchini –v- Bryson**¹² which statement was approved in **Heslop –v- Burns**¹³

“In all cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement an act of friendship or generosity or the like to negative any intention to create a tenancy”

Conclusion

⁹ (1978) 38 P & R 452

¹⁰ (1978) 32 WIR 85

¹¹ [1974]1 WLR 1241

¹² (1952) 1 TLR 1386 at 1389

¹³ supra

[42] Applying the law as to the facts as I have found them, the Claimant, in this matter has not established on the balance of probabilities as he is required to do, that his possession of the parcel of land that he is seeking to obtain title to was adverse to the owners of the persons legally entitled to the said land. He has failed to show that there was any *animus possidendi* on the part of his grandmother whose possession he sought to rely on in his claim.

[43] Further, I am satisfied after giving due consideration to and from the analysis of the evidence presented and the law submitted. I find that

- I. His grandmother when she did occupy land in the vicinity of the parcel of land subject to this litigation she did so as a member of the family and not as a squatter or trespasser or with intent to adversely possess her siblings.
- II. The claimant entered on the parcel of land as a licensee because he was a member of the family
- III. That he was allowed to occupy the parcel as a descendant of the original owner

[44] For those reasons which I have stated the Claimant does not acquire possessory title to the identified piece and parcel of land by virtue of the Title by Registration Act or The Real Property Limitation Act¹⁴.

[45] I accept the evidence of the Defendant Clara John that the land was owned by her deceased mother and that her mother died intestate leaving seven children surviving her. I accordingly find that

¹⁴ Supra

the piece and parcel of land subject of this litigation forms part of the estate of Rosaline Magloire deceased.

[46] The circumstances therefore, the Claimant is not entitled to the compensation for the land acquired by the State; which compensation falls into the estate of Rosaline Magloire.

[47] The Defendant has in her counterclaim asked for a number of declarations including that she is beneficially entitled to an interest in the said land at Trafalgar forming part of the estate of Rosaline Magloire.

[48] In her evidence the Defendant stated that her mother died intestate leaving seven children surviving her. Under the provisions of the Intestate Estate Act¹⁵ the surviving issues of the deceased inherit equally. Therefore upon her death the seven surviving children of Rosaline Magloire are entitled to inherit equally in her estate. The Defendant being one of those seven children is therefore entitled to a one seventh share of her mother's estate. Her sister Una Magloire likewise would have been entitled to one seventh interest in the estate.

[49] From the evidence presented and accepted in this Court in the claim at bar the Claimant is the grandchild of Una Magloire and his mother would be entitled to a share in her mother's share and in turn the Claimant would be entitled from his mother, and not from his grandmother or great grandmother directly.

[50] It is trite law that in order to deal with property which is part of an estate, letters of administration or probate ought to be applied for

¹⁵ Chapter 9:03 of the Laws of Dominica

and obtained which would empower the persons obtaining the grant to duly administer the estate. This would include establishing what comprises the estate, gathering it in and to distribute same among those persons who are by law entitled to benefit from same. Therefore the estate of Rosaline Magloire would have to be administered according to the law.

[51] The Defendant has asked this Court to order that the Claimant vacate the piece and parcel of land that he occupies and to prohibit him from occupying any other land at Trafalgar forming part of the estate of Roseline Magloire. I am reluctant to grant the order for these reasons. It has been established that the Claimant is a descendant of Rosaline Magloire. He is not a stranger to the family. He has grown up in and around the said land which he has been occupying as a member of the family for some time now. That the estate is quite extensive and the part which the Claimant is seeking to obtain title to is but a part. I would therefore encourage the parties to accommodate each other and to enter into some kind of arrangement where the Claimant is either given a piece of the land or is given an opportunity to purchase or lease the said land.

[52] In the circumstances having found, that:

- 1) The Claimant is not entitled to the said 23,294 Square feet of land as claimed;
- 2) That the said piece and parcel of land forms part of the estate of Rosaline Magloire.
- 3) That based on the Defendants evidence and the provisions of the Intestate Estate Act the Defendant is entitled to a one seventh share of the said estate.
- 4) That the Defendant is entitled to and ought to take immediate steps apply for and to administer her mother's estate.
- 5) That the parties attend mediation in an effort to consider the suggestions in paragraph 51 of the Judgment herein.

6) Costs to the Defendant to be prescribed costs if not agreed.

[53.] It is noted that after the completion of this matter Mr McDonald "Don" Christopher passed suddenly and tragically and I would like to place on record my condolences to his family and that I am of the considered view that his peculiar brand of advocacy and his persistence in advocating his Client's case at all costs will be missed by the Court, his learned colleagues and indeed the people of the Commonwealth of Dominica. I would also like to record my thanks to Ms. Roseanne Charles for her submissions and assistance rendered in this matter, and an apology for the delay in rendering this judgment.



Birnie Stephenson

Birnie Stephenson
High Court Judge