

**THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE



CLAIM NO. SVGHPT2012/0041

**IN THE MATTER OF AN APPLICATION FOR DECLARATION OF POSSESSORY TITLE
TO LAND BY WILFRED MILLER**

AND

**IN THE MATTER OF A CLAIM BY GREGORY MILLER, MARGARITA ROBINSON AND
JICIMAW BROWNE IN OPPOSITION TO THE SAID APPLICATION**

BETWEEN:

[1] WILFRED MILLER Applicant

and

[1] GREGORY MILLER
[2] MARGARITA ROBINSON
[3] JICIMAW BROWNE Respondents

Appearances:

Mr. B.E. Commissiong Q.C. and Mr. P.R. Campbell Q.C., Mr. Carlyle Dougan Q.C. and Mr. Andrew Cummings Q.C., Amicus Curiae.

Mr. C.B. Williams for the Applicant/Respondents.

Mr. S. Sergeant and Ms. S. John for the Respondents/Applicant.

AND

CLAIM NO. SVGHPT2012/0025

BETWEEN:

[1] ALDONIO MATTHEWS Applicant

and

[1] YOLANDA FAYE SAYERS Respondent

Appearances:

Ms. Mandella Campbell for the Applicant/Respondent.
Mr. Andreas Coombs for the Respondent/Applicant.

2013: February 7
April 8

JUDGMENT

- [1] **THOM, J:** Wilfred Miller on the 18th day of June 2012 made an application pursuant to Section 7 of the Possessory Title Act Chapter 328 (the Act) for a Declaration of Possessory Title of a parcel of land situate at Belair.
- [2] The application was published in "The Vincentian" and "Searchlight" newspapers on the 29th June 2012 and the 3rd August 2012.
- [3] On August 8, 2012 the Respondents filed an Entry of Appearance.
- [4] Section 9(1) of the Act provides in effect that where a person files an entry of appearance, a written claim shall be filed within twenty-one days from the date of the entry of appearance.
- [5] The Respondents did not file a claim within the twenty-one day period pursuant to Section 9(1) of the Act.
- [6] On November 6, 2012 the Respondents applied pursuant to Part 26.8 of CPR 2000 for an order in the following terms:
- (1) The Applicants/Respondents be allowed to file a claim outside of the twenty-one day period.
 - (2) That the Fixed Date Claim submitted with this application stand as the Claim in this matter.
 - (3) There be no order as to costs.

[7] A similar application was made in relation to Claim No. 25 of 2012 *Aldonio Matthews v Yolande Faye Sayers*. The Respondents in both cases opposed the application. The Court therefore decided to hear both applications together.

[8] This matter being a matter of general public importance the Court invited Learned Queen's Counsel to appear *amicus curiae*. Learned Queen's Counsel submitted a joint written submission. At the hearing oral submissions were made by Learned Queen's Counsel Mr. P.R. Campbell. The Court also heard oral submissions from Mr. Jaundy Martin and Ms. Mira Commissiong.

ISSUE

[9] The issue which arises is whether the Court has a discretion to extend the period of time stipulated in Section 9(1) of the Act.

SUBMISSIONS

[10] I will outline first those submissions which support the view that the Court has a discretion to extend the time and then I will deal with those submissions with the opposite view.

[11] Learned Queen's Counsel submitted that the Act is procedural in its juridical nature. The only non-procedural provisions are to be found in Section 26(2) which provides a criminal penalty for the offence of swearing an affidavit falsely and Sections 29 – 33 which contains the administrative provisions. The Act being procedural in nature the time requirement in Section 9(1) must be interpreted to be directory and not mandatory. The framers of the Act did not intend a person who filed a claim after the twenty-one days period to be excluded from the proceedings.

[12] Learned Queen's Counsel further submitted that the language of Section 9(1) is different from that of Section 24 which can be construed as being mandatory. Section 24 contains the words "no later than three months after." If the framers had intended Section 9(1) to be mandatory, similar words would have been used.

Learned Queen's Counsel referred the Court to the case of *Robert Bowman v Blyth* (1856) 119 E.R. 1158 where the Court found that where the legislature specifically makes a provision stipulating that something must be done at a specified time only, that provision is mandatory and must be followed.

- [13] Learned Queen's Counsel further submitted that the Act requires full disclosure and transparency in the process of the grant of a declaration of possessory title. This is evidenced in the provisions of Sections 7, 8, 26 and 27. Sections 7 and 8 provide for full disclosure to be made by the applicant as it relates to the ownership and possession of the land, while sections 26 and 27 provide for a declaration of title to be nullified where it was obtained by falsification of material information. No time limit is provided for an application for a declaration of nullity. Transparency would only be achieved if the Court has a discretion to enlarge the time in Section 9(1). Learned Queen's Counsel also referred the Court to Section 15 of the Act and submitted that it provided further evidence of the requirement of transparency in the Act since it gives locus standi to the whole world to provide information in relation to the application and there is no time limit for the filing of such an affidavit provided that it is filed prior to the hearing of the application. In view of the provisions of Section 15, if Section 9(1) is interpreted to be mandatory, this would result in absurd consequences. To illustrate the absurdity that could result Learned Queen's Counsel gave the following example:

"John Citizen enters an appearance in time in opposition to a published notice of application, but John Citizen does not file a claim in support of his opposition within the twenty-one days prescribed by Section 9(1) and he is deemed by the Court to be out of time he loses forever the right to be heard. The Application comes before the court for hearing in due course several months later. One day before the hearing of the application Mary Citizen the wife of John Citizen files an affidavit pursuant to Section 15 setting out information which contains the substance of the objection which John Citizen had intended to file as his Section 9(1) claim. The Court would be bound to entertain Mary Citizen's Section 15 affidavit having previously locked the door in John Citizen's face for presumed non-compliance with Section 9(1)."

- [14] Learned Queen's Counsel emphasized that an extension of time only gives the potential objector the right to be heard. There is no injustice to the applicant.
- [15] Mr. Cecil B. Williams submitted that the provision in Section 9(1) is not a mandatory provision but a directory provision. Mr. Williams referred the Court to Sections 12(2) and 19 of the Act and submitted that Parliament intended CPR 2000 to apply to the Act and under CPR 2000 the Court has a discretion to extend the period of time pursuant to Parts 26 and 27.
- [16] Mr. Williams further submitted that the Act is procedural in nature and if the Court adopted the view that the provision in Section 9(1) is mandatory then the Court would not be giving effect to the true intent of Parliament which is to allow persons who object to an application for possessory title to be heard.
- [17] The submissions of Learned Queen's Counsel and Mr. Williams were adopted by Ms. Commissiong and Ms. Campbell. Ms. Campbell further submitted that Section 19 applies to all proceedings under the Act. The Court must balance the need for applications to be dealt with expeditiously and the need to do justice and protect against land stealing.
- [18] Ms. Campbell also submitted that a person who has filed an affidavit pursuant to Section 15 would not necessarily become a party to the proceedings. Such a person would not be able to get a declaration of title pursuant to Section 13.
- [19] Opposing submissions were made by Mr. Sergeant, Mr. Coombs and Mr. Martin.
- [20] Mr. Sergeant submitted that Section 9(1) is imperative and obligatory. The section uses the word "shall" as is done in Sections 7 and 8 which puts an obligation on the applicant to do certain acts within a specified period of time.

- [21] Mr. Sergeant further submitted that the conventional approach is to ask the question whether the provision is mandatory or directory. When Section 9(1) is read with Section 12(1)(b), Section 9(1) must be interpreted to be mandatory since Section 12(1)(b) provides a consequence for non-compliance being that the applicant may get judgment in default or may proceed *ex parte*.
- [22] Mr. Sergeant also submitted that if the Court adopted the modern approach as outlined in *R v Immigration Appeal Tribunal ex parte Jeyanthan; Ravichandran v Secretary of State for the Home Department* [1999] 3 AER 231, the result would be the same. The Applicant has not satisfied the three-stage test set out in the modern approach. There was no substantial compliance, but non-compliance since the claim was not filed. The non-compliance cannot be varied or waived because Section 12(1)(b) has already provided a consequence for failure to comply with Section 9(1). This case is distinguishable from the case of *ex parte Jeyanthan* and *ex parte Ravichandran* in that Rule 38 of the U.K. Immigration Appeal Tribunal Rules expressly provided for waiver where there was non-compliance. There is no provision for waiver in the Act.
- [23] Mr. Sergeant also submitted that Section 19 of the Act does not provide for a general application of CPR 2000. Rather, Section 19 provides for CPR 2000 to apply in relation to applications under Sections 16, 17 and 18 of the Act. These applications are to be made pursuant to Parts 23, 24, 64 and 65 of CPR 2000. CPR 2000 Part 26 is not applicable as it relates to applications for relief from sanctions for failure to comply with the rules of CPR 2000, any case management order or practice directions. If CPR 2000 is applicable then it would open the floodgates for applications to be made for injunctions, to strike out, summary judgment and other similar applications. This was not intended by Parliament. Further, there are other remedies open to a person who believes he is entitled to the property such as an action for recovery of possession, file an affidavit pursuant to Section 15 of the Act, or make an application for the possessory title to be declared void due to fraud or mistake.

[24] Mr. Coombs adopted the submissions of Mr. Sergeant and further submitted that where time limits are set by Parliament they must be strictly adhered to. If Parliament intended the Court to have a discretion to enlarge the time then Parliament would have made express provisions to that effect.

[25] Mr. Martin also adopted the submissions of Mr. Sergeant and further submitted that the purpose of the legislation is to make the equitable interest of the applicant a legal interest. Section 9 having set out a limitation period for objection, the Limitation Act and CPR 2000 do not apply.

FINDINGS

[26] The Possessory Title Act is a unique legislation. It provides the legal framework for a person who was in adverse possession of another's land for a period of twelve years to apply to the Court for a declaration that he/she is the legal owner of the land. Prior to the enactment of the Act persons simply made a statutory declaration relating to their possession and registered same under the Registration of Documents Act.

[27] It is agreed by all of the parties that the Act is procedural in its juridical nature.

[28] The Act sets out an elaborate procedure with an emphasis on transparency to be followed by an application for possessory title. An integral part of the process is that the applicant is required to make full disclosure not only of the circumstances of his possession of the land which he claims, but the applicant is also required to state whether or not there are other persons claiming to be owner of the land. The applicant is also required to identify the person in whose name the land had been registered immediately before the commencement of the alleged adverse possession – Form 1 of the First Schedule.

- [29] An applicant is also required to advertise his/her application in two publications of two newspapers in circulation in Saint Vincent and the Grenadines – See Section 7.
- [30] By Section 8, an applicant is required to serve notice of his/her application on all adjoining owners of the land. The court may not grant a declaration of possessory title unless an applicant has complied with the requirement of publication pursuant to Section 7 and service of the adjoining owners and six weeks have expired since the service on the adjoining land owners.
- [31] The Act also permits a person who claims to have an interest in the land or part of the land to file an entry of appearance within one month from the last publication of the notice. Where an entry of appearance is filed then pursuant to Section 9(1) the person is required to file a written claim within twenty-one days from the date of the appearance.
- [32] The emphasis on transparency is also illustrated in the provisions of Section 15 of the Act which reads as follows:
- “(1) A person who has information in relation to the nature of possession of the piece or parcel of land by the applicant, may file an affidavit with the Registrar whether or not he has an interest in the said piece or parcel of land or whether or not he intends to file an opposing claim with the Registrar.
 - (2) An affidavit filed pursuant to subsection (1) shall -
 - (a) attest the truth of the facts set out therein;
 - (b) be filed with the Registrar; and
 - (c) be served on all parties to the proceedings.
 - (3) At the hearing of the application the court may require the attendance of the person who filed an affidavit pursuant to this section.
 - (4) The court may make an order or give a decision as it sees fit if the person who is required to attend court pursuant to this section fails to do so.”

[33] The effect of section 15 is that any person who has information in relation to the possession and ownership of the land the subject of the application may file an affidavit with the Registrar and at the hearing of the application the court may require the attendance of the person. The section does not stipulate a time period within which the affidavit must be filed.

[34] As stated earlier, the sole issue for determination is whether the Court has a discretion to extend the period of time in Section 9(1) for the filing of a claim in opposition to an application for possessory title. Section 9(1) reads as follows:

“A person who enters an appearance pursuant to Section 7 shall, within twenty-one days from the date of the appearance, file in the Registry a written claim setting out the name of the person who has title to the piece or parcel of land and a statement of the facts on which the claim is founded.”

[35] The traditional approach of dealing with non-compliance of a procedural requirement is for the Court to consider whether the provision is mandatory or directory. However, the modern approach is for the Court not simply to consider whether the provision is mandatory or directory. The modern approach is outlined in the speech of Lord Woolf MR in *ex parte Jeyanthan and Ravichandran* as follows:

“I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and if so, has there been substantial compliance in the case in issue though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived and if so, has it, or can it, and should it be waived in this particular case? (The discretionary question). I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question).

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on those questions is that they should avoid the unjust and unintended

consequences which can flow from an approach solely dependent on dividing requirements into mandatory one which oust jurisdiction, or discretionary which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conformed where it does not otherwise exist by consent or waiver."

[36] I agree with the submissions of all counsel that the modern approach should be adopted.

[37] As stated by Lord Woolf, depending on the particular circumstances of the case all of the questions may not arise.

THE SUBSTANTIAL COMPLIANCE QUESTION

[38] In my opinion the substantial compliance question does not arise in this case because the requirement in this case is a time requirement. A party is either within time or out of time.

THE DISCRETIONARY QUESTION AND THE CONSEQUENCES QUESTION

[39] Having regard to the particular circumstances of this case, I find it convenient to deal with the discretionary and consequences questions together.

[40] The non-compliance being the failure to file the claim within the specified time can be waived by the grant of an extension of time. Whether an extension of time is granted would depend on factors such as the effect of the waiver on the proceedings, the prejudice, if any, to the other party and whether it is in the interest of justice to do so.

[41] The effect of an extension of time is that it may cause a delay of the proceedings. The Court could minimize any prejudice which may be suffered by an applicant as a result of the delay by the length of period of extension that is granted. Having regard to the nature and purpose of the Act, it would be in the interest of justice that all parties who claim to have an interest in the land be heard. The Act permits the Court to hear not only the Applicant and persons who oppose the application,

the Court may also hear an adjoining owner and even "John and Mary Citizen" who file an affidavit pursuant to Section 15 of the Act where no time limit is specified for the filing of an affidavit.

[42] I do not agree with the submission of Mr. Sergeant that non-compliance within Section 9(1) cannot be waived because Section 12(1)(b) sets out the consequences for non-compliance with Section 9(1). Section 12(1)(b) cannot be read in isolation. It must be read in the context of the entire section. Section 12 reads as follows:

12. Default judgment or ex parte proceedings –

- (1) An applicant may obtain judgment without trial where a person fails to –
 - (a) enter an appearance; or
 - (b) file a written claim within the time allowed for so doing.
- (2) The Court may set aside or vary a judgment obtained without trial on any conditions it considers appropriate.
- (3) Where a person who has entered an appearance, pursuant to section 7 fails to file a written claim within the time allowed for so doing, the applicant may proceed ex parte and the Court may make an order or give a decision as it sees fit."

Section 12 does not simply provide for a default judgment to be entered. Subsection 2 gives the court a discretion to not only vary the judgment entered in default for non-compliance with Section 9(1) but it also gives the Court a discretion to set aside the judgment. This in my opinion shows the clear intention of Parliament that the Court should have a discretion to extend the time in cases of non-compliance with Section 9(1). This is in keeping with the overall purpose of the Act that the grant of possessory title to a person was to be under the supervision of the Court and not merely by a person making a statutory declaration and registering same.

[43] I agree with the submission of Learned Queen's Counsel that the different language used in Section 9(1) and Section 24 is also a clear indication that Parliament intended the Court to have a discretion to extend the time in Section 9(1).

[44] I also agree with the submission of Learned Queen's Counsel that if the Court was to adopt the view that the Court does not have a discretion to extend the time in Section 9(1) it would result in the absurd situation where a person who has an interest in the land would not be able to make his claim to the land if he fails to file his claim within twenty-one days after he enters appearance, but a person who has no interest in any part of the land such as an adjoining owner or "John and Mary Citizen" could be heard pursuant to Section 15. In my opinion, having regard to the emphasis on transparency in the Act, Parliament could not have intended such an absurdity.

[45] During the submissions there was much discussion on the effect of Section 19 of the Act which reads as follows:

"Procedure for making applications under this Act.

The Eastern Caribbean Supreme Court Civil Procedure Rules 2000, except where expressly excluded, shall apply to all proceedings made under this Act."

[46] Mr. Sergeant's argument that Section 19 is only applicable to applications made pursuant to Sections 16, 17 and 18 of the Act is based on the wording of the heading of the section. The section clearly provides for CPR 2000 to be applicable to all proceedings under the Act. While the section also provides for CPR 2000 to be expressly excluded, there are no provisions which expressly exclude the application of CPR 2000.

CONCLUSION

[47] In conclusion, I find that the Court has a discretion to extend the period of time for filing a claim pursuant to Section 9(1) of the Act. The application is to be made in accordance with the procedure for making an application as outlined in CPR 2000.

[48] It is ordered that:

- (1) The application for an extension of time will be heard on April 24, 2013.
- (2) No order as to costs.

[49] I wish to express my gratitude to Learned Queen's Counsel who readily agreed to appear amicus curiae. I also wish to commend the junior members of the Bar.


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Geffel Thom
HIGH COURT JUDGE