

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

IN THE HIGH COURT OF JUSTICE

SVGHPT2013/0039

BETWEEN

DANAH POMPEY

APPLICANT

and

**ELISHEBA AYANNA HENRY NÉE JOSPEH
(The Attorney on record for James Joseph)**

RESPONDENT

Appearances:

Mr. Richard Williams for the applicant.

Mr. Jaundy Martin for the respondent.

2015: Oct. 21
2016: Nov. 1
Apr. 12

JUDGMENT

BACKGROUND

[1] **Henry, J.:** The parties in this case are at opposite ends of a conflict surrounding ownership of land situated at Villa on mainland Saint Vincent and the Grenadines. In 2013¹, Danah Pompey applied for a declaration of possessory title of the said lands. Elisheba Ayana Henry née Joseph filed an entry of

¹ By application filed on 24th July.

appearance to oppose the grant to Mr. Pompey. When the matter came on before the judge for hearing, Mrs. Henry's was not present. An order was made granting Mr. Pompey the declaration of possessory title.

[2] Mrs. Henry has applied for the declaration of possessory title to be set aside. She contended that her failure to participate at the hearing was done by mistake, error or inadvertence; that Mr. Pompey's application was supported by false and inadequate evidence and obtained on the basis of material mistake in the application; that his affidavit did not comply with the Possessory Titles Act² ('the Act'); and that Mr. Pompey did not fully comply with the Act.

[3] Mr. Pompey resisted the application and argued that Mrs. Henry's application to set aside the declaration is without merit and should be dismissed. I have concluded that it is just to set aside the order.

ISSUES

[4] The sole issue is whether to set aside the declaration of possessory title granted to Mr. Pompey?

ANALYSIS

Issue – Should the declaration of possessory title granted to Mr. Pompey be set aside?

[5] The Act prescribes the legislative regime governing the grant of a declaration of possessory title. A successful applicant must establish that he has enjoyed adverse possession of the subject property. Adverse possession is defined in the Act as 'factual possession of an exclusive and undisturbed nature for a continuous period of twelve years or more accompanied by the requisite intention to possess the land as owner.'

[6] The term was explained by Sir Vincent Floissac C.J. in **Charles v Gittens and Hutchinson** where he described it as a:

'... continuous, uninterrupted, peaceable, public and unequivocal possession of the land as owner thereof and to the exclusion of the proprietor for at

² Cap. 328 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

least 12 years whether the adverse possession or prescriptive possession was as a result of dispossession or discontinuous possession by the proprietor.’³

- [7] Factual possession is now synonymous with ‘... an appropriate degree of physical control.’⁴ As articulated by Slade J.:

‘The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...’.⁴

- [8] One of the grounds on which Mrs. Henry seeks an order setting aside the declaration of possessory title is that it was not grounded in evidence which established adverse possession. In this regard, both parties adduced evidence as to the factual background on which the declaration was granted.

- [9] The record reflects that the court granted the declaration of possessory title on the basis of the application, affidavits in support and exhibits. The endorsement on the file summarizing the proceedings that day states:

‘Justice Combie Martyr Ag (ch)

App: Maferne Mayers-Oliver for applicant. Applicant present.

30/4/14

Case Notes

Ms. Mira Commissiong had entered an appearance for Ayanna Henry née Joseph Attorney on record for James Joseph. The opposant intends to withdraw the appearance in the claim to be filed for the opposant/Respondent. Application will proceed on this basis. Application filed on 24/3/2013.

Order

Declaration for application for possessory title is granted to the applicant Danah Pompey.’

³ SVGHC VAP1991/0006.

⁴ Powell v McFarlane et al (1977) 38 P & CR 452 at pg. 470 – 471.

[10] The court takes judicial notice that applications for declaration of possessory title which are unopposed are usually granted on the basis of affidavit testimony, without taking viva voce testimony of the applicant or the witnesses, unless the court wishes to elicit further information from an affiant. In the absence of a notation on the case file that oral testimony was adduced or indication by Mr. Pompey, I infer that the order which was entered records what transpired. It reflects that the learned judge made an order having read the application and affidavits in support. I turn therefore to examine Mr. Pompey's application for a declaration of possessory title and the evidence supplied in the supporting affidavits.

[11] In his application, Mr. Pompey outlined that he is in possession of a lot of land bounded on the north east by the residence of Ray Defreitas, on the South East by a road leading to the windward highway, on the south west by the residence of Desiree Richards and on the north west by lands of Judy Sutherland shown on plan G55/99 drawn by Keith Francis and approved and lodged at the survey department. He rehearsed that the land comprised 9,919 sq. ft. with an estimated value of \$248,000.00. A report and valuation to this effect by Franklyn Evans were filed⁵ in support.

[12] Mr. Pompey claimed further that there were no claims affecting the land and that no other persons were claiming to be owner. He alleged that he or his predecessor in title has been in exclusive and undisturbed possession of the land for 15 years. He averred that the possession came about in several ways:

1. His father Daniel Pompey was in possession for 30 years but never held a title deed to it.
2. His father died in 1995.
3. He (Danah Pompey) returned to Saint Vincent and the Grenadines in 1998 and took possession of the land from then up to the present time.
4. From the time he took possession he has been regarded by everyone as the only person in charge of the land and is entitled to possessory title.

[13] Mr. Pompey claimed that the land never had a proper title immediately before possession began to run in his favour. He also stated that he has not knowingly withheld any fact concerning the land

⁵ On 24th July, 2013.

which ought to be disclosed to the court and that he has represented the truth concerning title to the land to the best of his knowledge and belief.

[14] Mr. Pompey and his two witnesses – Alice Mandeville and Myrtle Byron provided affidavit testimony in support of the application. Ms. Mandeville and Ms. Byron deposed that they have been living next to the subject property. Ms. Mandeville indicated that she has lived there for approximately 50 years. Ms. Byron simply stated that she lives there at present. Ms. Mandeville deposed that Mr. Daniel Pompey was always in charge of the lands. Ms. Byron claimed that she knew that Mr. Daniel Pompey owned the lands.

[15] They recalled that Daniel Pompey used to work the lands and reap the crops. Ms. Mandeville said that he would bring some of the crops for her. Both ladies said that Mr. Daniel Pompey died in 1995 and Danah Pompey returned to the State in 1998. They alleged that Danah Pompey 'has been in possession of the said land for over 15 years. Ms. Mandeville added that since she has lived there, she has never seen anyone else on the subject property.

[16] For his part, Danah Pompey deposed that as a child growing up he would go to the lands, plant and reap crops. He claimed that his father worked the lands until 1995 when he died. He averred that he returned to the State in 1998 and took possession of the lands and has remained in possession since then. He claimed that he has always been in exclusive and undisturbed possession of the subject property. No other factual assertions were made in support of the application.

[17] Mrs. Henry attacked this evidence on three grounds:

1. the supporting affidavits contain no evidence to support the claim for adverse possession;
2. Mrs. Mandeville's testimony was false; and
3. Danah Pompey's evidence of 15 years' occupation and possession was false.

These assertions are dealt with sequentially.

- [18] Mrs. Henry grounded her application in sections 8, 12, 26, 27 and 28 of the Act. Section 12 empowers the court to set aside a judgment which was obtained without a trial on any conditions it considers appropriate. Section 26 renders void any order obtained by fraud where any person fraudulently, knowingly or with intent to deceive makes, assists joins in or is privy to the making of any false statement or representation.
- [19] The provisions of the Civil Procedure Rules 2000 ('the CPR') apply to proceedings under the Act.⁶ Accordingly, the court's powers to set aside a default judgment under CPR 12 are deemed to have been activated and are therefore considered. Although theoretically the judgment objected to, is not strictly a 'default judgment' entered in, the effect is similar and the principles applicable to setting aside a default judgment are therefore applied.
- [20] Mrs. Henry filed her Notice of Application to set aside in 2014⁷. It was supported by affidavit sworn and filed by her at the same time. She deposed that the subject property is registered in the name of her grandfather's wife - Alexandrina Phillips Joseph deceased. She averred that Mrs. Joseph died intestate on 28th May 1991. Mrs. Henry deposed that her grandfather James Joseph is the person entitled to apply for Letters of Administration to his late wife's estate. She deposed that he has executed a power of attorney authorizing her to act on his behalf.
- [21] Mrs. Henry attested that her grandfather indicated that he wants her to have the subject property and has assigned to her all of his entitlement, estate, right, title, claim, interest and demand in it. She indicated that in 2013 she discovered that Mr. Pompey had applied for the declaration of possessory title and she retained legal practitioner Mira Commissiong to defend the application. Pursuant to those instructions, an entry of appearance was filed.
- [22] Mrs. Henry deposed that she travelled to Saint Vincent in January 2014 as a result of information she received and she visited the land and observed that dasheen bushes were planted there. As a result she caused her lawyer to write to Mr. Pompey to inform him not to trespass. Mrs. Henry stated that

⁶ Section 19 of the Act.

⁷ On May 9th.

she was therefore surprised when she learnt that an order was made granting Danah Pompey the declaration of possessory title. She subsequently travelled to Saint Vincent and retained new counsel to represent her to lodge the instant application.

[23] Mrs. Henry submitted that Danah Pompey did not establish that he was in adverse possession of the subject land as required by the Act. She contended that he brought the application in his own name and therefore could not rely on any acts of ownership carried out by his father. She argued that Danah Pompey did not allege in his application that his father's occupation of the land was adverse, but rather relied on his alleged occupation for 15 years. She submitted that even his witnesses' testimony runs contrary to his claim that he had occupied the property continuously and undisturbed for the past 15 years. She argued that 'his witness' indicated that Danah Pompey did not plant crops on the land until recently, but would clean it once in a while.

[24] Mrs. Henry contended that Danah Pompey did not provide the details stipulated by section 5 of the Act which requiring him to attest to the truth of facts outlined in the application, set out the description of the land including its extent, boundaries and estimated value. She submitted that he did not outline the facts on which he relied to establish adverse possession but included only a bald statement that he has been in possession since returning to Saint Vincent and the Grenadines. She added that he failed to include facts as to how the alleged possession was taken or what actions he performed to demonstrate that he enjoyed undisturbed and exclusive possession. She submitted that he also failed to include the name of the paper title owner and the other interested parties.

[25] In response to these assertions, Mr. Pompey filed a further affidavit on 4th July, 2014. He neither admitted nor denied the factual allegations made by Mrs. Henry that his affidavit and those of his witnesses did not include the requisite information required by the law. He submitted however that this objection is purely a technical one. He countered that his affidavit mirrored paragraph 5 of his application and in any event the court may proceed with an application even if it is not supported by affidavits of two witnesses. He argued that section 20 of the Act provides that no affidavit shall be rendered invalid by reason of any informality or technical irregularity in it or any mistake not affecting the substantial justice of the proceedings.

[26] Mr. Pompey maintained that he supplied evidence certifying his adverse possession of the subject property. He argued that Ms. Byron's account attested to his father's ownership. He contended that Ms. Mandeville endorsed that testimony. He cited the case of **Grace Munroe Okoya v Douglas Browne et al**⁸ where legal possession was described as a 'sufficient degree of physical custody (factual possession); and an intention to exercise such custody or control on one's behalf or for one's own benefit (intention to possess)'.

[27] He argued that regarding factual possession, everything depends on the circumstances, but broadly possession was constituted where the alleged possessor had been dealing with the land as an occupying owner might be expected to deal with it and nobody else has done so. He asserted that the necessary intent was 'one to possess and not to own and an intention to exclude the paper title owner so far as possible.'

[28] Mrs. Henry's submission that the supporting affidavits contain no evidence to support the claim for adverse possession invites this court to review the evidence on which the declaration was granted and determine whether a *prima facie* case was made out. Section 12 (2) of the Act provides:

'The Court may set aside or vary a judgment obtained without trial on **any condition it considers appropriate.**' (bold mine)

This provision does not preclude the Court from examining the evidence on which the declaration was granted. I therefore do so.

[29] The acts of ownership which Mr. Pompey relied on to establish factual possession consist of working the land, planting and reaping crops as a child. His averment and that of his witnesses that he took possession of the land in 1998 and has been in undisturbed and exclusive possession since then are matters of opinion on points of law which fall within the court's exclusive remit.

[30] His affidavits are devoid of the required substratum of facts contemplated by section 5 of the Act which mandates that an applicant provide affidavit testimony detailing facts which establishes his adverse possession; and attest to the truth of the facts outlined in his application such as:

⁸ SVGHCV2003/0503.

1. the description of the land, its extent, boundaries and estimated value; and
2. the name of any other person claiming to be owner or registered as owner.

[31] I am mindful that a declaration of possessory title confers ownership to the successful applicant and has the effect of destroying any interest held in it by a paper title owner. Land is the singular most important and valuable possession owned by the average person. Accordingly, rights, interests and title to land should be disturbed by a court only if there is compelling reason to do so. In exercising its powers under the Act the Court is required to act judiciously and seek to do justice between the parties and interested persons.

[32] In view of the very scant factual content on which Mr. Pompey relied to establish adverse possession, in my opinion, he did not provide the basic data stipulated by the Act. The person who is most closely related to the deceased owner has now approached the court for relief. He has done so through his duly appointed agent, Elisheba Henry. The justice of the case demands that he be given an opportunity to defend his alleged interest in the property. This can only be achieved if the declaration of possessory title is set aside.

[33] In similar vein, CPR 13.3 allows a defendant to apply to set aside a judgment which was entered due to the defendant's failure to file a defence. Mrs. Henry was not required to file a 'defence' proper, but she had a duty to file her claim within 21 days of her entry of appearance. She did not do so. Her claim would have served the same purpose as a defence. The principles and procedure outlined in CPR 13.3 would therefore be applicable to this case.

[34] CPR 13.3 mandates that an application be made as soon as practicable after finding out that judgment had been entered, provide a good explanation for failing to file the defence and supply evidence demonstrating that the applicant has a real prospect of successfully defending the claim. There is no evidence that the order was served on Mrs. Henry. She applied within 3 days of learning that the order had been granted. She therefore complied with the requirement as to timing.

- [35] Although Mrs. Henry entered an appearance in September 2013, she filed no claim. She has not explained why no claim was filed. She did depose though that she had her lawyer write to Mr. Pompey to demand that he not trespass on the property. Maybe she thought that this would have been enough. It did not deter Mr. Pompey from pursuing his application. Mrs. Henry has not explained why she was not available to attend court on the hearing date. She has been silent as to why nothing further was done. She has therefore not satisfied the requirement to provide a good explanation. Her application cannot be granted pursuant to CPR 13.3 (1), but that is not the end of the matter. CPR 13.3 (3) provides that the court may set aside a default judgment in exceptional circumstances. CPR 39.5 also creates another avenue for setting aside a judgment.
- [36] CPR 39.5 (1) enables a party who was absent at a trial at which judgment was given to apply to set it aside. He must file his application within 14 days of service of the judgment on him and provide affidavit testimony (a) articulating a good reason for his failure to attend; and (b) demonstrating that if he had attended it is likely that some other judgment would have been made.
- [37] The endorsement on the court's file reflected that Mrs. Maferne Mayers-Oliver was the legal practitioner representing Mr. Pompey. No appearance was entered for Mrs. Henry. From the record, some representation was made to the court that Mrs. Henry intended to withdraw her claim. Mrs. Maferne Mayers-Oliver provided affidavit testimony and was cross-examined. She testified that when the matter was called that day, she and Ms. Commissiong proceeded to the judge's chambers. She indicated that Ms. Commissiong's intentions that morning were quite unequivocal. Mrs. Mayers-Oliver was unable to say what transpired. This statement is not supported by the court record. Neither the court order nor the endorsement on the court file makes reference to Ms. Commissiong's presence in court.
- [38] This court is therefore somewhat handicapped. Mrs. Henry claimed that her absence was due to mistake, error or inadvertence. She provided no evidence in support of any of those allegations. The reason for her absence might have been legitimate or not. In the circumstances, I am forced to draw a favourable inference. I infer that her absence was justifiable. In the premises, I am constrained to

find that the interest of justice dictates that the declaration of possessory title granted to Danah Pompey be set aside.

- [39] Having addressed Mrs. Henry's contention that the requisite factual and legal foundation was not made out to support the grant of declaration of possessory title, it is not necessary to explore the other grounds on which the application is brought since resolution of the previous grounds has provided a sound basis to set aside the order. However, for the sake of completeness, I will comment on each of the other grounds.

Fraud allegation

- [40] Mrs. Henry attacked Ms. Mandeville's testimony and charged that it was false. She contended that it was false and fraudulent because:

1. In June 2003 her grandfather received an offer to purchase the land from Dr. Miriam Sheridan who lives directly opposite the subject property;
2. She obtained aerial photographs of the property in 2007 which show that there was no occupation of any sort on it any that time;
3. Photographs taken by Mr. Franklyn Browne in 2012 shows that there was no occupation present or past and it was in bush;
4. ... of comments in the survey report which noted that Mr. Pompey's father took care of the family land for a number of years and now that the father is deceased his mother gave the property to him; and
5. Ms. Mandeville made a false statement that neither Danah Pompey nor his father was in possession of the land.

- [41] The court is not permitted to take into account the matters listed as 1 through 4 unless the authors of the referenced records testified regarding the circumstances under which they were prepared.⁹ I therefore hold that they do not constitute a satisfactory basis on which to set aside the impugned decision. In relation to the alleged false statements by Ms. Mandeville, Mrs. Henry deposed that she met Ms. Mandeville when she visited the subject property on August 21st, 2013. She testified that Ms.

⁹ Evidence Act, Cap ... of the Revised Laws of Saint Vincent and the Grenadines, 2009.

Mandeville confessed that she had signed a false document. She said that she later taped a conversation with Ms. Mandeville in which she confirmed that there was no occupation of the land by anyone.

[42] Mrs. Henry produced the recording and Ms. Mandeville's was captured on it, but it was clear that she made no such confession. I find therefore that Ms. Mandeville did not make a false statement as alleged. There is therefore no basis on which to hold that the declaration of possessory title was obtained based on a fraudulent statement. Likewise, Mrs. Henry claimed that the declaration was obtained by a material mistake. She did not indicate what that mistake was. I make no finding that such mistake existed.

[43] Finally, Mrs. Henry contended that Danah Pompey did not publish notification in a conspicuous place on the subject parcel of land pursuant to section 8(b) of the Act. The Act provides that no certificate or other proceeding shall be invalidated by any informality or technical irregularity or mistake not affecting the substantial justice of the proceeding. Danah Pompey filed newspaper publications in support of his application. In the normal scheme of things, publication in the newspapers would be expected to generate significant coverage throughout the State. A singular error of not publishing all public notices under the Act, would not by itself constitute significant non-compliance sufficient to invalidate the proceedings in the circumstances of this case. I make no such finding.

[44] For all of the foregoing reasons, I am satisfied that it is just to set aside the declaration granted to Mr. Danah Pompey. It is accordingly ordered that the declaration of possessory title to Danah Pompey in respect of the parcel of land at Villa reflected in Survey plan G55/99 surveyed by Keith Francis licensed land surveyor and approved and lodged at that Lands and Survey Department on 5th July 2013 is set aside.

ORDER

[45] It is ordered:

1. The declaration of possessory title to Danah Pompey in respect of the parcel of land at Villa reflected in Survey plan G55/99 surveyed by Keith Francis licensed land surveyor and approved and lodged at that Lands and Survey Department on 5th July 2013 is set aside.
2. Danah Pompey shall pay to Elisheba Henry costs to be assessed pursuant to CPR 65.11.

[46] I wish to express thanks to counsel for their written submissions and express regret to the parties for the unavoidable delay in rendering this decision.

.....
Esco L. Henry
HIGH COURT JUDGE