

"8. And in the exercise of our power of sale under the said mortgage No.264088, we direct the certificate of title to be issued in the name Gibraltar Trust Company Limited, a Provident Society registered under the Industrial and Provident Societies Act and having its registered office at 20 Hope Road, Kingston 10 in the parish of Saint Andrew."

The Referee of Titles, the 2nd defendant, to whom the said application was submitted, by memorandum dated 28.4.90, stated, inter alia,

"Registrar of Titles

Application No.92885
Pt. Palmeto Cottage, St. Elizabeth (sic)

"Papers returned herewith

1. Section 88 of the Act clearly prescribes the manner in which the proprietor of land already under the Act may transfer the same namely in one of the forms set out in the Fourth Schedule.

The Direction Clause of the application should therefore be deleted to enable title to be issued in the name of the applicant after which a transfer to the nominee can be effected in the prescribed manner.

.....
.....

Referee of Titles".

Correspondence followed in which the plaintiff company/applicant protested the requisition by the 2nd defendant for the deletion of the direction clause in the application, relying on sections 28, 37, 54 and 174 of the Registration of Titles Act to support the said application and the retention of the direction clause.

The 2nd defendant maintained his stance, and by memorandum dated 25th May, 1990 to the Registrar of Titles, said, of the plaintiff's company's application, inter alia,

"The application is misconceived. The applicants are mortgagees purporting to sell under power of sale contained in a registered mortgage. The procedure to be followed is laid down by section 106 of the Act which makes the production of a Transfer obligatory.

....."

The plaintiff company applied to the Registrar of Titles under section 156 of the Registrar of Titles Act requiring the 2nd defendant to

set out his grounds for his direction.

By memorandum dated 18th January, 1991 to the 1st defendant, the 2nd defendant wrote as his said ground,

"The application by the applicants as mortgagees to transfer the land to a purchaser for value is governed by a subject to the provisions of section 106 of the Act ..."

As a consequence of the above the plaintiff applied for the issue of the said originating summons under the procedure set out in the said section 156.

Mr. Goffe for the plaintiff submitted that by section 28(iii) a person having the power of "disposing of the fee simple" may apply to bring land under the Registration of Titles Act, and para 7 of the First Schedule thereto empowers such applicant to nominate the name of the person in which the title is to be issued. The proviso to the said section restricts a mortgagee from making such an application, except when exercising his power of sale and "unless the certificate ... shall be directed to issue in the purchaser's name."

He argued farther that section 174 of the said Act permitted an applicant re-registering land by plan to direct title to be issued in the name of another, that section 54 permitted any person who is entitled to sell land to apply to have such land registered by plan, that such latter application shall be treated and dealt with as an original application to register land and that the plaintiff was such a person. Continuing, he stated that the duties of the Referee of Titles under section 31 did not empower him to direct the application to produce a transfer, no added revenue is required and therefore the act seeks to permit a transfer in these circumstances without the mechanics of a transfer form. He countered that section 28 refers to a mortgagee, as proprietor, selling his mortgaged interest and not as a person under section 28, exercising his power of sale, which power is the ordinary situation as recited in section 106.

Mr. Johnson for the defendants argued that section 54 deals with the applicant's obligation to file the necessary documents, as if it were a first application, to give effect to the requirements of section 29, namely "every application shall be accompanied by deeds and documents and other evidence ..."

of his title," that section 28 contemplates an original application to bring land under the Act and when read along with paragraph 7 of the First Schedule, does not apply to a transfer of land already under the Act.

However, he continued, if the Court finds that section 28 applies to a mortgagee of land under the Act, the relevant section is section 88, which deals with the transfer of such land and requires an instrument of transfer to be drawn up, and this is required under section 28 where the mortgagee on re-registration must name a nominee. He said further, the word "may", in section 88, is mandatory, as also in section 106, which deals with the power of sale of the mortgagee, and it makes the instrument of transfer a necessary document to pass the legal estate. He cited the Torrens System in New South Wales by John Baalman. He concluded that section 174 contemplates the use of an instrument of transfer being produced to pass the interest on re-registration, and in the case of a mortgagee who is exercising his power of sale, until he produces such a document the legal estate does not pass.

This Court is of the view that section 106 of the Registration of Titles Act empowers a mortgagee of land in whom the power of sale has arisen due to the default of the mortgagor, to sell the land and pass the legal estate to the purchaser.

By section 54(1) of the said Act, any person,

"entitled to sell land, which shall have been registered otherwise than by plat or diagram, may apply to have such land registered by plat or diagram."

This latter section contemplates that the owner of land or a mortgagee in whom the power of sale has arisen, because he is "entitled to sell land" under the provisions of section 106, may make an application to have such land registered by plan. Until the mortgagee obtains such a power he has no legal right to seek to change the form of registration of land, to one registered by plan.

Section 54(2) provides inter alia, that,

"An application under this section shall in all respects be treated and dealt with as if it were an original application to register land ..." (emphasis added). This subsection equates

its own procedure to that contained in section 28 of the Act which deals specifically with land being brought under the said Act for first time. It does not seem that this sub-section is restricted to the requisite "deeds and documents or other evidence and by an affidavit" as recited in section 29 of the Act. This is one of the contentions of counsel for the defendants. The phrase "in all respects," seems to have been deliberately widely based. Being so interpreted, it is all embracing to include all the provisions under the title "Procedure in bringing land under the operation of this Act", which includes section 28.

Section 28 reads,

"Any of the following persons may, by an application addressed to the Registrar, in the form in the First Schedule, apply to have land brought under the operation of this Act, that is to say -

- (i)
- (ii)
- (iii) persons who have power of appointing or disposing of the fee simple"

A mortgagee in whom the power of sale has arisen, is a person with "... the power of ... disposing of the fee simple ..."

Significantly, the first proviso to section 28, precludes the mortgagee from making an application under the section, except where he wishes to exercise his power of sale and the certificate of title is to be issued in the name of the purchaser. The plaintiff in the instant case qualifies as such a mortgagee.

The said proviso, reads, inter alia,

"provided always that a (mortgagee) shall not be entitled to make such an application unless for the purpose of the exercise of his power of sale, and unless the certificate of title shall be directed to issue in the purchaser's name ..."

Section 174 deals with a revenue provision, i.e. the payment of stamp duty. However, the section is of some assistance.

The statute must be read as a whole. The said section provides,

"(1) On every application to bring land under the operation of this Act or to re-register land with a plan wherein or in respect of which the applicant shall direct the certificate of title to issue in the name of any other person there shall be chargeable and paid the following stamp duty -

(a) where the direction operates or is intended to operate as a transfer upon the sale of the land for valuable consideration"

The recital shows that the "direction" is that referred to in section 28," to bring land under the operation of this Act," and section 54," to re-register land with a plan". It therefore refers specifically to the "direction" of, for example, under section 28(vii) the owner of the fee tail, and under section 28(ix), the tenant for life, and the "direction" of the mortgagee in accordance with the first proviso to section 28.

Section 54 does not in its wording explicitly permit the applicant thereunder to give directions. Therefore, the fact that section 174 refers to an applicant to re-register land with a plan (Section 54) "wherein or in respect of which the applicant shall direct the certificate of title to issue in the name of another person", is further proof that section 54 has to read in conjunction with section 28.

The statute has to be interpreted as a whole.

For this direction to be seen to operate as a transfer, means that the direction is elevated to be construed as a transfer obviating the requirement of such a formal document of transfer whenever the mortgagee is exercising his powers of sale and in the same transaction making an application under section 54.

It is true that the mortgagee is required, under section 88 when he wishes to sell his mortgage interest, and under section 106, when he exercises his powers of sale, to sign a transfer document. However, these are transactions simpliciter, and not a purported transfer in combination with an application to re-register land. The draughtsman must be taken to have had section 106 in mind when formulating section 174. Section 106 which requires the mortgagee on

sale, to sign a transfer form do not conflict with the procedure contemplated by section 28, 54 and 174, read together. The latter are enabling statutory provisions formulated to reduce the procedural steps without violating the sanctity of the transfer as the effective document to pass the legal estate in the ordinary case.

The application comprising the direction in clause 7 under section 28, is deemed to be a transfer.

For these reasons the order sought are hereby made, in terms of the originating summons.

In accordance with the provisions of section 156 of the Registration of Titles Act there shall be no order as to costs.