

2/L

J A M A I C A

SUPREME COURT LIBRARY  
KINGSTON  
JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 69/77

BEFORE: The Hon. Mr. Justice Henry J.A.  
The Hon. Mr. Justice Kerr, J.A.  
The Hon. Mr. Justice Melville J.A.

BETWEEN                      ETHELINE BOURKE                      PLAINTIFF/RESPONDENT  
   (Administratrix Est.  
   Ruth Christiana Bourke, deceased)

A N D                      ARTHUR ROBERTS                      DEFENDANT/APPELLANT

Mr. Dennis Daley for Defendant/Appellant

Mr. Horace Edwards Q.C. for Plaintiff/Respondent

March 9, 1978 and February 1, 1980

HENRY J.A.

This is an appeal from a judgment by Mrs. E.J. Collymore Woodstock, Resident Magistrate for St. Andrew given in favour of the Plaintiff/Respondent. By that judgment the learned Resident Magistrate made an order for possession by November 15, 1975 of premises known as 1 or 1½ Bryce Hill Road, on payment by the Plaintiff of \$100 to the Defendant and costs to be agreed or taxed. In addition, an injunction was granted restraining the Defendant/Appellant and his servants or agents from entering the premises after the date of possession.

The land which is the subject matter of the action was formerly owned by one Samuel Mais who died on January 25, 1973. On September 6, 1956 one Ruth Bourke signed an agreement (Ex.2) in the following terms:

"I Ruth Bourke of August Town in the parish of Saint Andrew do hereby agree to give Samuel Mais of the said August Town five shillings per week until death. I also agree to give him a good burial and to take possession of his room."

134

/..3

that Miss Bourke had failed to comply with the agreement in Ex. 2. for two years prior to Mais' death and also to provide a good funeral for him, the learned Resident Magistrate made her order for possession subject to the payment of "a reasonable sum \$100" for Mais' funeral expenses.

Counsel for the Defendant/Appellant complains against this judgment on two main grounds:-

- (a) That the findings (in particular in relation to the nature of the agreement) are unsupported by the evidence.
- (b) That no adverse possession arises on the facts.

Counsel for the Plaintiff/Respondent supports the judgment on the basis that it does substantial justice between the parties. He submits that there are two equities - one based on the agreement Ex. 2 and the other on the building of the house by Ruth Bourke, that there is abundant evidence that the Defendant/Appellant had notice of both and that any legal estate vested in him by the conveyance Ex. 3 was therefore subject to the prior equitable interest of Miss Bourke and that it is for the court to say in what way the equity can be satisfied. This, he submits, the learned Resident Magistrate did in her judgment. He cites in support of his submissions Inwards v. Baker 1965 1 All E.R. 446 and Wakeham v. McKenzie (1968) 2 All E.R. 783. Inwards v. Baker is authority for the proposition that where an occupier of land is induced or encouraged by the owner to spend money on that land in the expectation that he will acquire an interest in it, equity will not allow that expectation to be defeated. That principle was recognized

/..4.

136

Then in cross-examination having had Ex. 2 read to her she said:-

"I know of an agreement between Mr. Mais and Ruth Bourke about the house I am now claiming I also know of agreement about room - and it is one agreement they make from the beginning"

and a little later:-

"I say the agreement was that she care Mais until she dies and then he gave her spot to build her house and when he dies she to give him a good funeral and take over his house"

It is by no means clear whether this evidence as to the agreement was her interpretation of Ex. 2 or mere hearsay and certainly she did not state that she was present when any oral agreement was made. The only other witness who purported to give evidence of the terms of an oral agreement was Imogene Buchanan. She said:-

"Mr. Mais will out the land to Miss Bourke and Miss Bourke gave Mr. Mais 5/- every week."

Then in cross-examination she said:-

"I not present when land will out. Mr. Mais come and tell me after he did it."

It is not uncommon in Jamaica for a person who owns land but is unable to cultivate it and has no other means of livelihood to obtain financial support from some other person with the understanding that on the death of the owner the land will pass to that other person. If however, this is the sort of arrangement to which Miss Buchanan referred when she said "Mr. Mais will out the land" it is clear that the learned Resident Magistrate did not accept her evidence in this regard since she found that there was an outright immediate gift to Miss Bourke of the land in return for which Miss Bourke agreed to pay

a regular weekly amount to Mr. Mais while allowing him to remain in occupation of the room thereon. It may be that the learned Resident Magistrate was led to this conclusion because Ex. 2 is an undertaking by Miss Bourke rather than an agreement between the two parties. It seems to us, however, that Ex. 2 is equally consistent with an agreement for Miss Bourke to pay a weekly amount as rental or in return for the right to build on the land. In the absence of any clear evidence as to the nature of the oral contract between Miss Bourke and Mr. Mais it is impossible for a court to attempt to uphold any equitable right to enforce it. We agree, however, that an equity arises as a result of the expenditure by Miss Bourke of money for the purpose of erecting the house on Mr. Mais' land and maintaining it thereafter. It is clear on the evidence that the Defendant had notice of this equity when the conveyance Ex. 3<sup>was</sup> executed. In our view that equity can be best satisfied by the payment to the Plaintiff of such amount as may be assessed having regard to the amount spent by Miss Bourke, the present value of the house and the rent received by her. Evidence would have to be led for this purpose. In so far as adverse possession is concerned this clearly does not arise on the evidence. We therefore allow the appeal, set aside the judgment and order for possession and direct that judgment be entered for the Plaintiff for such amount as may be assessed by the Resident Magistrate in the light of such evidence.

In the circumstances there will be no order as to the costs of the appeal.

The room referred to in the agreement was built on the land and was occupied by Mr. Mais up to the time of his death. Some time in 1956 Miss Bourke employed one Robert Fyffe to build a three apartment house on the land at a spot pointed out by Mr. Mais, and she collected rent from tenants of this house up to 1970 or 1971. She also continued to make the agreed weekly payments to Mr. Mais up to that time. Miss Bourke died on July 10, 1972. On March 14, 1972, Mr. Mais executed Ex. 3 - a conveyance to the Defendant of the land including that which is the subject of this action. There is a dispute as to the reason for Miss Bourke ceasing to make the agreed weekly payments to Mr. Mais. The Plaintiff alleges that upon a tenant vacating the house built by Miss Bourke, Mr. Mais with the assistance of the Defendant took the opportunity of gaining possession of it in 1971, and thereafter prevented Miss Bourke from entering or renting the house. This she alleges was in breach of his agreement with Miss Bourke who thereafter made no further payments to him. The Defendant on the other hand alleges that Miss Bourke because of age and illness was unable to carry out her agreement to make weekly payments to Mr. Mais and he therefore repossessed the house in 1970. He further alleges that he assumed responsibility for the weekly payments to Mr. Mais and took care of him thereafter - hence the conveyance Ex. 3.

The learned trial judge came to the conclusion that the land had been given to Ruth Bourke by Mr. Mais and in return she entered into the agreement Ex. 2. She further found that fulfillment of the agreement Ex. 2 was not a condition precedent to the gift of the land and that Ruth Bourke "would have acquired by adverse possession rights to the land...prior to the purported conveyance Ex 3" Having also found

by the Privy Council in Plimmer v. Wellington Corporation (1884) 9 A.C.

699 which expressly approved the statement of it by Lord Kingsdown in

Ramsden v. Dyson L.R. 1 H.C. 129 as follows:-

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

It has also been followed in a number of other cases and most recently

in Jones v. Jones (1977) 1 W.L.R. 438.

Wakeham v. McKenzie is cited in support of the proposition that payment of money may amount to a sufficient act of part performance to call that equitable doctrine into play and in the instant case that the conduct of Miss Bourke in erecting a house on Mr. Mais' land pointed irresistibly to the conclusion that there was some contract with him for the secured occupation of that house by her.

No doubt acts of part performance may be prayed in aid for the purpose of confirming the existence of of an alleged oral agreement. This matter was considered in Steadman v. Steadman (1976) A.C. 536 by the House of Lords at some length. The difficulty in this case is to ascertain the terms of the alleged oral agreement, both parties to it being now dead. The plaintiff said:-

"In 1956 Samuel Mais came to Ruth Bourke's house and made arrangements with her to care him until he dies in a return for the land at 1 Bryce Hill Road and she was to build her house on said land - and Miss Bourke to pay 5/- per week."