

NM 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C306 OF 1991

BETWEEN

SEYMOUR CAMPBELL &  
HAZEL CAMPBELL

PLAINTIFFS

A N D

GEORGE DUNKLEY

DEFENDANT

Mr. Raphael Codlin appears for Plaintiffs

Mr. Leon Palmer appears for Defendant

Heard: 22nd, 28th February, 1996; 21st, 27th, 28th March, 1996; 10th April,  
15th, 16th May, 1996 and 20th June, 1997

McCALLA, J (Ag.)

By a Writ of Summons dated the 13th of June, 1991 the Plaintiffs claimed as follows:

“Recovery of their and situated at Palmer’s Cross in the parish of Clarendon and rescission of an agreement for sale on the ground of fraud and Misrepresentation which said agreement was entered into by the Plaintiffs and the Defendant on or about August 1983.”

The Plaintiffs who are husband and wife are the registered proprietors of land situated at Palmer’s Cross in the parish of Clarendon. They are alleging that in 1983 the defendant approached the second Plaintiff and expressed a desire to purchase a portion of the land and next he took the 2nd Plaintiff to his Attorney-at-Law Mr. Diggs-White in pursuit of

that objective. The Plaintiffs are maintaining that the 1st Plaintiff's signature on the agreement for sale was forged.

The Plaintiffs seek a declaration for rescission of the contract of sale on the ground of fraud and misrepresentation and have pleaded that:-

- (a) The First Plaintiff's signature was forged on the agreement for sale by the Defendant.
- (b) The first Plaintiff at no time authorized anyone to sign his name on the agreement for sale.
- (c) on the agreement for sale it does not specify how much land is to be sold and the terms of the agreement are therefore not well defined.
- (d) the attorney-at-Law for the defendant when approached about the signature said the 2nd Plaintiff had said that her husband the first Plaintiff was in Frankfield and that she had to take the documents for her husband to sign in Frankfield this being a blatant untruth as the 2nd Plaintiff had maintained from the beginning that her husband the first Plaintiff was in England and she had to take the agreement to England for his signature .

The Plaintiffs claim rescission of the agreement entered into in August 1983 , recovery of possession, costs and attorneys costs.

The defendant in his defence filed admits that he took the Second Plaintiff to his attorney-at-Law but denies that the agreement for sale was placed in a sealed envelope and denies also the allegations of fraud and misrepresentation.

In paragraph 4 of the Defence and Counter-claim he further pleads that the Plaintiffs are not entitled to the reliefs claimed or any relief as:

- (a) The Plaintiffs are estopped by laches from rescinding the said agreement.
- (b) The defendant has paid the greater portion of the purchase price, with possession of the purchased lot and has expended money with respect thereto.
- (c) It is now impossible for the defendant to be restored to his original position by reason of changes in the value of land and money.

The defendant alleges that at all material times he has been ready willing and able to complete the said Agreement. He counterclaims for specific performance and further or alternatively, damages for breach of contract.

The Second Plaintiff Mrs. Campbell gave evidence that in 1983 she was living in England but came to Jamaica to attend her father's funeral and was approached by the defendant with an offer to purchase a portion of her land at Palmer's Cross. He took her to the office of his attorney-at-Law, Mr. Diggs-White and thereafter they went with him to a bar which is located across the road. Instructions were taken by Mr. Diggs- White pursuant to an agreement for sale of the land and on return to the Attorney's office she signed a blank piece of paper on which the instructions were to be transferred as the Secretary was

not in attendance. At that time her husband was in England. On her way to the Airport, the defendant took her to Mr. Diggs- White's office from where he collected and handed to her a sealed brown envelope for transmission to her husband in London and execution of his signature. On her arrival in London it was discovered that Mr. Campbell's signature already appeared on the agreement for sale.

Under cross examination she denied visiting the land with the defendant and pointing out the boundaries to him. The sale price of \$14,000.00 was provisional only as any agreement entered into was conditional on her husband's approval. she attended Mr. Diggs-White's office on a Monday but denied that she was accompanied by a gentleman whom she introduced as her husband. She refuted a suggestion that at no time did she tell Mr. Dunkley that she had to get her husband's approval. She denied that she had put the defendant in possession of the property as also the suggestion that she had changed her mind about selling it as the sale price being paid was too low. She also rejected a suggestion that she was given a copy of the agreement for sale having signed same.

The First Plaintiff Mr. Seymour Campbell gave evidence that he never visited Jamaica in 1983 or had ever signed the agreement for sale; that he does not wish to sell his land nor had he given his wife permission to sell. He gave specimens he said of his handwriting to his Solicitors in London and also attended the office of Raphael Codlin and Company in Jamaica where he also gave further specimens of his handwriting.

Superintendent Carl Major of the Jamaica Constabulary Force examined the specimen writings as also the questioned writing on the purported agreement for sale and found that both were not written by one and the same person.

The Defendant gave evidence that having spoken to Mrs. Campbell in July of 1983 concerning the purchase of land, arrangements were made and he and his brother along with both Plaintiffs and Mr. Diggs-White went and viewed the property. A shop which was located on the premises could not be inspected as the shopkeeper was absent but a message was sent to her and an appointment made for viewing of the shop on the 1st of August. The parties returned to the premises, the shop was viewed, negotiations continued and a price of \$14,000.00 was agreed upon. An appointment was made and kept for the parties to meet at Mr. Diggs-White's office on the 6th of August. All were present and Mr. Dunkley now testifies:

"We fixed up our agreement at Mr. Diggs- White's office and we signed.

Four of us signed."

He paid by cheque a deposit of ten thousand dollars (\$10,000.00) and was put in possession. He has carried out certain improvements on the property including renovation of an old shop and built a four bedroom house. He commenced building his house about a year after he was put in possession. He has not received title. He denied giving

Mrs. Campbell any sealed envelope to take to her husband. Preparation of the document took place at Mr. Diggs-White's office on the 6th of August. The First Plaintiff he says resembles the person to whom he was introduced as the husband of the Second Plaintiff.

Mr. Dunkley repudiated the suggestion that Mrs. Campbell never introduced any gentleman to him as her husband. On the 6th August 1983 a secretary had prepared and handed the agreement for sale to Mrs. Campbell, who along with Mr. Campbell, the defendant took to the Airport. He denies any visit to a bar.

Mr. Diggs-White testifying for the defence, supported Mr. Dunkley as to the attendance of all the parties at his office in July, the viewing of the property and subsequent visit when Mrs. Doreen Campbell the shopkeeper was present. He spoke to an agreement on sale price and of the introduction of Mr. Dunkley as a prospective purchaser. Mr. Dunkley had agreed to go to the bank on the 3rd of August to obtain a cheque and report to his office on the 6th of August for the agreement to be drawn. On that date, the parties attended at his office, gave instructions and the agreement was duly drawn signed and copies taken by each. A cheque was paid to the Campbells leaving a balance of four thousand five hundred dollars (\$4,500.00) payable on delivery of title. A document was signed putting Mr. Dunkley on the tax roll. They subsequently had a drink at a bar on the Campbell's premises before both Plaintiffs departed the Island.

Mr. Seymour Campbell was recalled by the Defence. He deposed that in 1983 he was in possession of a valid passport. Cross examination was deferred to enable him to produce it. On resuming his evidence he stated that his Jamaican Passport had expired in 1975 and by a British Passport issued to him in 1985, he travelled to Jamaica in 1986. Between 1975 and 1985 he was without a valid passport.

Mr. Neville James a physical planning technologist with experience in property valuation gave evidence that he carried out a valuation on the land. This he appraised at 2.2. Million Dollars. He valued a commercial building thereon for four hundred and ninety-six thousand dollars (\$496,000.00) and a partially completed dwelling house for one million four hundred and ninety thousand four hundred dollars. (\$1,490,400.00)

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Mrs. Doreen Campbell gave evidence that she is married to a cousin of the First Plaintiff to whom she was introduced by her husband in 1981. It was at Mr. Campbell's invitation that she went to occupy the shop located on the premises. She saw him in 1983 and is not mistaken in her assertion that the First Plaintiff was present in 1983 as she is married to his cousin. She supported the evidence of Mr. Dunkley and Mr. Diggs-White that Mr. and Mrs. Campbell visited the premises in August, viewed same together with defendant and had discussions. She was introduced to Mr. Dunkley as the prospective owner and about four months after the visit she began paying rent to him.

For the Defence it was urged that Exhibit 1 is a valid agreement for sale, that the first Plaintiff is untruthful when he says he was not in Jamaica in 1983 and had not signed Exhibit 1; that the evidence of Mr. Diggs-White and Doreen Campbell ought to be accepted. Moreover First Plaintiff had initially averred that in 1983 he was the holder of a valid passport, but later had testified to the contrary.

Counsel for Defendant submitted further that the Second Plaintiff ought not to be believed when she says that she received a sealed envelope to take to her husband for his signature to be affixed and Exhibit 7 does not request return of any agreement but seeks to obtain title.

Defence Counsel urged the Court to find that having entered into the agreement, the Plaintiffs thereafter wished to change their minds as the sale price was too low. Their claim is not genuine as they have waited over eight (8) years before commencing litigation and there is no evidence that Mr. Campbell had reported to the police that his signature was forged. There being no fraud or forgery the Court should find that the action is

statute-barred. No timely request for rescission was made, the defendant had been put in possession, has been paying land taxes since 1984 and has carried out improvements to the property. Only after a lapse of eight years had the Plaintiffs sought to recover possession and therefore an order for specific performance of the agreement should be granted.

Counsel for the Plaintiffs has submitted that having regard to the Pleadings it is inconceivable that the Second Plaintiff was in Jamaica and had attended at Mr. Diggs-White's office at the time the agreement for sale was prepared; that it was never suggested to Mrs. Campbell that Mr. Campbell was present when the agreement for sale was prepared or signed. Moreover the statute of limitation was never pleaded hence the defence is precluded from relying on same.

He submitted further that the provisions of the Exchange Control Act rendered the contract unenforceable by the defendant as the Plaintiffs resided outside of the jurisdiction. The agreement is uncertain as only a portion of the land was being sold nor has any application been made to the relevant Parish Council for subdivision approval, hence specific performance cannot be granted. He cited and relied on the case of Watkis vs. Roblin 1964 JLR P. 444.

In order to pronounce on the validity of the signed agreement the circumstances surrounding its execution must be carefully examined. In this regard the Court has to consider the evidence as to whether Mr. Campbell was in Jamaica in 1983 and whether he signed the purported agreement. The court must also determine the circumstances in

which his signature appears to be affixed to Exhibit 1. He first claimed that in 1983 he possessed a valid passport but subsequently testified to the contrary.

I find it difficult to believe that Mr. Campbell was genuinely in error as to his possession in 1983 of a valid passport

I accept the evidence of Mrs. Doreen Campbell that she saw Mr. Campbell in Jamaica in 1981 and again in 1983. I accept her evidence that she is not mistaken as he it was who invited her to accept a tenancy at his shop but as to Mr. Campbell's attendance on the premises in 1983 as she testified, I make no finding adverse to him as this was not put to him with specific reference to her.

The next question to be determined is whether the Plaintiffs executed the agreement for sale at the office of Mr. Diggs-White. If, as the Plaintiffs contend, a sealed brown envelope was opened by Mr. Campbell in the presence of his wife and it contained an agreement for sale it is hardly conceivable that Mrs. Campbell had in fact signed a blank piece of paper in the attorney's office.

If, as the Defendant and Mr. Diggs-White have testified, the document was executed there by both Plaintiffs, Mr. Diggs-White would certainly not have addressed Exhibit 7 to Mrs. Campbell only. I am fortified in this view by the pleadings at paragraph 1 of the Defence to wit:

"... the 2nd Plaintiff representing that she was acting on behalf of the first Plaintiff and herself agreed to sell ...."

And paragraph 2 to wit:

“.... that the agreement was prepared in accordance with instructions jointly given to Mr. Diggs-White by the Second Plaintiff and the Defendant.”

This supports the view that the First Plaintiff was not present. For these reasons I reject the testimony of Mr. Diggs-White as also that of the defendant as untruthful.

In light of my finding that the agreement for sale was not executed by the parties as it purports to have been, it follows that it does not constitute “a note or memorandum in writing” on which a decree of specific performance could be granted. Therefore the Defendant’s counter-claim must fail and in the circumstances an order for rescission of the contract must be made and the deposit be refunded to the defendant. I find support for this view in the decision in **Johnson vs. Terrier & Terrier** reported at **[ 1974] 12 J.L.R. at P. 1663** which was not cited at the trial. There, the husband a dealer in real estate allowed the appellant to inspect a parcel of land jointly owned by T and his wife. An agreement was concluded for the sale of this land to him. A receipt was signed by T. and he caused his secretary to issue and sign a receipt for a deposit in pursuance of an agreement. T’s wife had sent the title which the appellant was allowed to inspect. In an appeal against the refusal of a decree of specific performance by the Resident Magistrate, the Court of Appeal affirmed that there was no memorandum signed by the wife or on her behalf nor did any estoppel by Agency operate against her.

The Court gave consideration to the issue of compensation on the basis of an equity arising in the defendant's altered position by virtue of his expenditure of money to erect buildings.

The evidence is that four months after being put in possession he began improvements to the shop and later he commenced a structure. His conduct, having regard to my findings above does not make him one who comes to a Court of Equity with clean hands and his delay does not avail him.

In light of the conduct of all the parties, I was minded to make no order as to costs, however I find that although Mr. Campbell was not present at the office of Mr. Diggs-White he subsequently became aware of the purported agreement for sale and was aware that a deposit had been made to the vendors. Since there was no payment into Court, an order is hereby made for the return of the deposit of \$10,000.00 to the Defendant with interest thereon at rate of 10% per annum from 1st January, 1984 to today and an award to the Defendant of half the costs that would have been agreed or taxed on the successful prosecution of his counterclaim.

The Defendant must deliver up possession of the premises within six (6) months of the date of the refund of the deposit.