

**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CIVIL APPEAL NO 11/2010**

**BEFORE: THE HON MR JUSTICE MORRISON JA  
THE HON MISS JUSTICE PHILLIPS JA  
THE HON MRS JUSTICE M<sup>c</sup>INTOSH JA**

**BETWEEN SALEM COOPER APPELLANT**

**A N D CALMAN FOSTER RESPONDENT**

**Mesdames Kedia Dela Haye and Norma Fearon instructed by Frankson & Richmond for the appellant**

**Miss Audrey Clarke, instructed by Judith Clarke and Co for the respondent**

**28 February 2011**

**ORAL JUDGMENT**

**MORRISON JA**

[1] This is an appeal from the decision of the Resident Magistrate for the parish of St. Elizabeth, who, after hearing evidence and hearing the parties in this matter, ordered that there should be judgment for the defendant and that the plaintiff should pay the defendant's costs of the action.

[2] The defendant is the appellant before us and he had brought a claim in the court below claiming that he was the fee simple owner of two acres of land at Burnt Savanna in the parish of St. Elizabeth. He set out the boundaries, and then he claimed that sometime on or about 20 June 2005, the 1<sup>st</sup> defendant that is, the respondent before us, instructed two others to erect a wire fence along a section of the plaintiff's roadway, and the said fence has encroached on the roadway which the plaintiff has used for entrance and egress from his property, and has therefore obstructed the plaintiff's use of the roadway. As a result of that obstruction, his claim was to recover damages of \$250,000.00 for obstruction of roadway, and he also asked for an interim and a permanent injunction restraining and forbidding the defendant from further obstruction of the roadway. So it will be seen from this, that the factual issue which arose for determination in the case was whether there was in fact an obstruction of the roadway. And this is indeed how the learned Resident Magistrate formulated it when he said: "the single issue is whether or not the wire fence is obstructing the roadway".

[3] With the consent of the parties, the matter was referred to a Commissioned Land Surveyor, pursuant to the provisions of section 101 of the Judicature (Resident Magistrate's Court) Act, to which I shall return in a moment. The reference to the surveyor required that the surveyor should be guided by the survey plan annexed to the Certificate of Title at Volume 1414 Folio 109 and two earlier survey plans going back to 1964 and 1960. The one annexed to the certificate of title is dated 2004 and

the title was issued in 2007, that is a title in the name of Mr Stedman Foster, who is a predecessor in title to the actual respondent before us, Mr Calman Foster. The surveyor was also required to make a plan indicating the roadway leading to the appellant's land, any marks of fences or other information which could be of assistance to the court and whenever necessary during the reference. The surveyor was required to make a report to the court.

[4] The matter was in due course referred to Mr K.V. Masters, who is a Commissioned Land Surveyor with a practice in Mandeville. Mr Masters carried out his duty and produced a report dated 11 October 2008. Mr Masters looked at the survey plan which was annexed to the title and he observed that that survey plan showed a 3.66m or 12ft wide reserved road along the northern boundary of the respondent's land and he also made the following observations:

- (1) The existing roadway which is the subject of this dispute is wider than that described in the receipt produced by Mr Salem Cooper who is the appellant.
- (2) There was no evidence on the ground of the roadway being blocked.
- (3) The electric pole, which is within the road reservation, does not obstruct traffic from using the roadway as there is 4.3 m or 13.8ft of usable roadway between the electric pole and the fence across

the roadway, i.e. a fence on the northern boundary of the roadways.

[5] Mr Masters produced a diagram, which is attached to his report, which showed that at the narrowest point, that is, as the roadway entered the appellant's property, it was 4.01m in width, it increased in width to 5.84m on its way to the main road and then at the point where it entered the main road it was 4.86m. At every point, including its narrowest point, the width of that roadway was in fact wider than the road reservation which was shown on the pre-checked plan which was attached to the Certificate of Title registered at Volume 1414 Folio 109.

[6] In light of this report, the learned Resident Magistrate had to consider what effect should be given to it. He had to consider the provisions of section 101 of the Judicature (Resident Magistrate's Court) Act, which states as follows:

**"101.** In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose of determining the matter in issue, the Magistrate if he thinks it expedient so to do, may make an order that the matter in controversy shall be referred to a commissioned surveyor, or with the consent of both parties, to some other fit person or persons whom he shall nominate; and the person or persons appointed shall, under the control and direction of the Court make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary lines between the said lands, or the right of way or other easement in dispute, or such other matter at issue as aforesaid and shall ascertain and settle the said boundary line or right of way, or other easement or matter as aforesaid, and shall if necessary make a plan or diagram of the said lands, indicating the boundary line, or the right of way, or other easement or matter as aforesaid, and shall

make a report thereof to the Court, and shall file the report in Court; and the Court shall, on a day to be appointed for that purpose, take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear argument upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require

Provided that the Court may refer back the report to the persons who made it, or to any other surveyor or person nominates as aforesaid, for a further report, with such instructions as the Court may think fit to give, and on the making of such further report the Court may proceed as it might have proceeded on the first report"

[7] The proviso to that section empowers the court to refer the report back to the person who made it. In this case it would be back to Mr Masters or to any other surveyor nominated for a further report, with such instructions as the court may give as to what it is that the court would want to be investigated on that further reference.

[8] As a result of the surveyor's report in this case, the learned Resident Magistrate considered some exceptions that were taken on behalf of the respondent and, having considered them, concluded at paragraphs 9 and 10 of his reasons for judgment:

"After hearing the exceptions as stated by Mr. Palmer, I hereby confirm the surveyor's report submitted to the reference made herein.

I find that the Plaintiff has failed to satisfy the Court that the Defendants have obstructed the roadway by the erection of a fence by them as claimed."

[9] The appellant was dis-satisfied with this judgment and filed grounds of appeal which are part of the notice of appeal which was filed on the 26 March 2009. In those

grounds, five in all, the appellant made several complaints which amounted a single complaint, that is, that:

“the learned Resident Magistrate had failed to properly exercise his discretion and wrongfully exercised his discretion in dismissing the appellant’s case, because in error he assumed that the surveyor’s report was conclusive evidence which would entitle the respondent to succeed without a trial of the issues.”

[10] We have heard arguments from Miss Dela Haye , who has valiantly put forward on behalf of the appellant everything that could possibly be said for him, and the point of her contention is that although it is clear that the surveyor’s report which was sent back to the Resident Magistrate did not support the appellant’s case, it was nevertheless the magistrate’s duty, to hear other evidence to be called by the appellant which would presumably elucidate or clarify questions such as when was the wire fence erected and other matters such as that. We are very grateful to Miss DeLa Haye for her spirited argument.

[11] Miss Clarke’s answer was characteristically direct, which is to say that the issue in the case was whether or not there was an obstruction and that the surveyor had answered that question in the negative, and that that should be end to the case. We were very helpfully provided by the Miss Clarke with a copy of the judgment of this court in the case of ***Whitelocke v Campbell*** (1970) 12 JLR 67. In that case the court considered the meaning and scope of section 101 and Smith JA observed (at page 71) that, although the court is required by the section to hear argument upon the

objections to the surveyor's report "there is no provision made for the hearing of evidence...what the court is required to hear is arguments, not evidence".

[12] It seems to me that in this conclusion Smith JA was, not unusually, plainly correct in his interpretation of the section: there is no provision in section 101 for the hearing of evidence as distinct from the arguments on the exceptions taken by one or the other or both of the parties. The statutory language is very specific and once the exceptions having made which they were in this case, the magistrate is obliged to hear argument on them and then to determine the matter which is precisely what the learned magistrate, His Honour Mr Stanley Clarke, did in this case.

[13] In this case, it seems to us that, in the light of the fact that the appellant's claim was premised on a single assertion of fact, which was that the roadway had been obstructed once it emerged that the surveyor's finding was plainly against him on that point, the case was no longer sustainable and the learned Resident Magistrate's decision was in the circumstances the only conclusion that was properly open to him.

[14] It is of interest to note finally, that it is also plain, as I had early indicated, that the roadway as it now exists on the ground is wider, and not inconsiderably so, than the roadway contemplated by the pre-checked plan which is annexed to the certificate of title, so that even if this were a claim for the correction or the re-alignment of the boundaries in any way, it is quite clear that such an exercise would

have produced a result which would have been less advantageous to the respondent than is the present situation which he enjoys.

[15] In all of these circumstances, this appeal must be dismissed with costs to the respondent, which are fixed at \$15,000.00.