

The plaintiff further sought:

"..... an order in the nature of an injunction ordering the defendant to forthwith remove the said fence and to restrain the defendant from interfering with the plaintiff's use of the said Church premises, whether by himself, his servant and/or agent or lawful visitors."

The evidence before the Resident Magistrate was that in or about 1974 the plaintiff entered into possession of the premises by agreement with the mother of the defendant/appellant, who was then a member of the Church. Subsequent to that date the defendant, on the death of his mother, he being the executor of his father's estate continued with the arrangement that existed and the Church continued in possession of the land. The plaintiff's evidence disclosed that the "land was given to the Church by Roland Drysdale but the Church has a policy that a token must be passed" or paid for it. The sum of thirty-six dollars was paid as the token for the land and a structure was placed on it by the Church in 1976. In pursuance of the agreement the land was surveyed on the instructions of the respondent. The parties who were served with notices by the surveyor Mr. Derrick Dixon were the defendant/appellant, his son Liva and the City Engineer of the Kingston and Saint Andrew Corporation. The defendant and his son Liva were present at the survey which was done on the 4th of February. Neither made any objection to the survey and in due course a diagram delineating the Church land was issued. It was tendered in evidence.

The pastor of the Church said that the Church continued in uninterrupted possession from 1976 up to April 1985 when the then Minister of Religion Mr. Roy Folkes went to worship and found a fence across the gate so that he could not enter the Church. He spoke to the defendant Drysdale and asked why the fence was erected and Drysdale said "it was done because animals were coming through the gate." Because this fence was erected across the gate of the premises, this action was brought by the plaintiff in trespass against the defendant.

The evidence revolved around the question of the purchase of the property. It was not in dispute that the plaintiff was in possession; what was disputed was the question of the purchase of the property. The plaintiff's case was that the sum of thirty-six dollars had been paid for the property. The defendant said no sum was paid for the property. Agreement had been reached with him for the purchase and he had placed the Church in possession. The sale price, he said, that had been agreed on was Fifteen Hundred Dollars (\$1,500.00); one thousand dollars for the property and five hundred dollars for fence but no money had been passed. There had only been a promissory note given to him and nothing more. One Mrs. Cain, now deceased, had negotiated the agreement on behalf of the Church. She had been given the Surveyor's diagram by the defendant but the defendant did not admit that he had given her a receipt for money the plaintiff averred had been paid. The defendant said he was illiterate and could not sign his name. At the request of the Resident Magistrate the defendant signed his name on a piece of paper. The alleged receipt was however never admitted in evidence.

The learned Resident Magistrate found the following facts:

- "1. Church on land before 1976 when R. Edwards was pastor and he died in 1974. Land was surveyed in 1976. Defendant allowed Mrs. Cain to keep diagram.
2. Mrs. Cain bought land on behalf of Church for \$36. Defendant promised to get her on Tax Roll. Defendant issued receipt to Mrs. Cain. Defendant can sign his name.
3. Defendant put up fence.
4. Mrs. Cain did not agree with defendant to buy land for \$1,500. Mrs. Cain did not tell L. Roach she was buying land for \$1,500. Roach became Church member in 1980 and disqualified in 1981."

Mr. Davis arguing for the appellant submitted that there was no proof that the plaintiff was a person who was competent to bring an action in this Court or in any Court. The plaintiff then on record was the Jamaica Conference of the Church of God Seventh Day. He further argued that the judgment was based on title; that the learned Resident Magistrate's finding was as to title in that he found that there had been a sale of the land for the amount which the plaintiff said was thirty-six dollars; that the plaintiff was in possession and title being the basis of the plaintiff's claim he argued that an action in trespass could not be maintained because title had not been established by the plaintiff.

It is accepted law that an action for trespass is based on possession and only one who is in possession can prosecute such an action against anyone. For the defendant to succeed against the plaintiff, he must show a superior title to that which the plaintiff had. The defendant's evidence is that he was the executor of his father's estate but there was no evidence adduced by him, no probate or other documentary evidence, to support his claim. Without more his admission that the plaintiff was in possession should be the end of his case. In the Court below Mr. Samuda for the defendant at the end of the plaintiff's case admitted, "at least the Church was in possession of the property" and he further said he was "minded to adopt a certain course if certain undertakings (were) given by the other side." In his final submission after the conclusion of the defendant's case Mr. Samuda said the "plaintiff has not proved ownership of the land. No evidence on which the Court can find trespass based on ownership. There is evidence to support trespass on possession."

(emphasis supplied) The uncontroverted facts in this case show that the plaintiff was in lawful possession as a purchaser. On the plaintiff's version the purchase price had been paid. At best the defendants claim amounted to a dis-satisfaction that the agreed purchase price had not been paid. He could not resort to the self-help route to extract the sum

he was demanding. In any event the learned Resident Magistrate rejected his evidence as to the sale price and in our view that left the defendant without any arguable defence.

Miss Gordon for the respondent sought leave of the Court to amend the particulars of claim to have the Church of God Seventh Day Limited substituted as plaintiff instead of Jamaica Conference of the Church of God. She provided us with evidence of incorporation by statute and as the proposed amendment could not conceivably prejudice the appellant leave to amend and to substitute the new plaintiff was granted.

We find, despite the valiant attempt made by counsel for the appellant, that the evidence and the law are not with the appellant. The appeal is therefore dismissed with costs to the respondent fixed at \$200.00.