JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO: 19/2000

CORAM: THE HON MR. JUSTICE FORTE, PRESIDENT
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH, J.A.

BETWEEN: ROSETTA DYSON — DEFENDANT/APPELLANT

AND VINCENT NELSON
CONSETTA NELSON — PLAINTIFFS/RESPONDENTS

Debayo A. Adedipe for appellant

Maurice Manning instructed by Nunes, Scholefield DeLeon & Company for respondents

December 10, 2002 and March 13, 2003

HARRISON, J.A:

This is an appeal from the judgment of the Resident Magistrate for the parish of Portland on April 3, 1995, ordering, that the house and area of land occupied by the defendant/appellant Rosetta Dyson be sold and the net proceeds deriving from such sale be given to the said appellant. It was further ordered that the appellant account to the plaintiffs/respondents for all sums collected for rental of the said house and land and that the appellant give vacant possession to the said respondents.

The facts are that the first respondent Vincent Nelson, the brother of the appellant Rosetta Dyson, and husband of the second respondent Consetta Nelson, sent money to their father Levi Nelson who purchased land, lot 80 at Commodore in the parish of Portland in about 1964 to 1965, for the said first respondent. The respondents were then residing in England. The first respondent's house was built on the said land in 1968. Both respondents came to Jamaica in 1968 and returned to England. The second respondent returned to Jamaica in 1974. Ronald Dyson, an Englishman and then a friend of the appellant, came to Jamaica in 1968 and commenced building a house on the said land. No permission to do so was given to him by the respondents. The first respondent came to Jamaica in October 1974. The house being built by Ronald Dyson on the said land had by then consisted of two rooms and the roof. Ronald Dyson admitted to the first respondent that he knew that he had no permission to build. He agreed to pay to the said first respondent $600.00 for the house spot, when he Dyson returned to England. Ronald Dyson returned to England, he never paid for the said land. He married the appellant and they both came to Jamaica in 1975. When asked for the $600.00 payment Ronald Dyson neglected to pay the first respondent. After a disagreement with the appellant, Ronald Dyson returned to England. He subsequently died in England. Levi Nelson had bought the said land, lot 80, in his own name on behalf of the respondents. Ronald Dyson, had agreed with the first respondent that he the first respondent would sell his Ronald Dyson "land and building" thereby paying for the land and

paying the balance to the appellant and to him Ronald Dyson. See letter dated August 3 1976, exhibit 3.

Levi Nelson signed an agreement for transfer form, dated January 12 1970, exhibit 8, transferring the said land into the name of the first respondent as owner. Levi Nelson by doing so facilitated the entry of the name of the first respondent on the tax roll as the owner of the said land. Letter dated March 11 1976, from the Commissioner of Valuation to Vincent Nelson and copied both to Levi Nelson and the Collector of Taxes, Port Antonio confirms this. Levi Nelson had agreed to meet with the first respondent at the Tax Office, but failed to appear. He went missing and his body was found a few days later. He had been killed. This was in 1975.

The said lot 80 did not form a part of Levi Nelson's estate. The Administrator General confirmed this by letter dated November 26 1990, exhibit 5. A registered title to the said land was issued in the names of the respondents, and registered at Volume 1253 Folio 983 in the Register Book of Titles. It was tendered as exhibit 1.

Levi Nelson had declared both orally and in writing that the said lot of land was not his, but belonged to the first respondent.

Counsel for the appellant argued inter alia, the following grounds:

> **"1.** The Learned Resident Magistrate erred in law in failing to make any findings at all in relation to crucial aspects of the evidence in the case, particularly, evidence of the constructing of the house on the land in 1974, by Ronny Dyson on behalf of the appellant, the agreement with Vincent Nelson to pay

> $600.00 for the land, the continuation of the construction by the appellant and the effect of the said agreement.
>
> **2.** The learned Resident Magistrate erred in failing to find that the appellant had an equitable interest in or an equitable right to remain in possession of the land, because of the said agreement with Vincent Nelson on behalf of Ronny Dyson and the appellant making the house a matrimonial asset, and construction possession and habitation of the said house next door to the respondents' without the latter's objection.
>
> **3.** The Learned Resident Magistrate erred in entering judgment for the respondents, because the effect of the said agreement and the conduct of the respondents in allowing construction to continue, conferred an equitable interest on the appellant and Ronny Dyson jointly, the latter's authority to Vincent Nelson to sell was ineffectual having been given without the knowledge of the appellant and the agreement was not validly terminated for non-payment because the land being under the operation of the Registration of Titles Act, the respondent were at no time ready and able to give title having taken no steps to comply with the Local Improvements Act."

Mr. Manning for the respondents filed a respondents' notice seeking a variation of the judgment of the Learned Resident Magistrate in terms:

> "**(a)** That the Learned Resident Magistrate's order that the house and land occupied by the defendant be sold and the net proceeds of sale be paid to the appellant after payment of costs of sale, valuation, surveyor's report and for use and occupation over the years, be discharged.
>
> **(b)** That the appellant accounts to the respondents for all sums collected for rental income for the property for the period April 15, 1995, to the date of vacant possession.

> **(c)** This Honourable Court orders that the appellant gives vacant possession forthwith."

He argued that the order for sale is unreasonable and unworkable, the appellant, on the evidence, had no legal nor equitable interest in the respondents' property and that the appellant having remained in possession should account for the income received since the order for possession was made.

An action for the recovery of possession of land by the holder of a title under the Registration of Titles Act is virtually indefensible by a defendant in occupation, simpliciter, due to the indefeasibility of such title (sections 68 and 69 of the Registration of Titles Act). However, a defendant against whom possession is sought may defeat such a claim if he can show that he acquired "... any rights over such lands ..." (section 70), or any other legal or equitable interest known to law.

An equitable interest in land could arise if parties enter into an agreement that the registered owner will sell to the purchaser a portion of the land for a stated price. Such an agreement in order to be enforceable must be in writing as required by the Statute of Frauds 1677. An oral agreement coupled with past performance may also be enforceable in equity, if the evidence unmistakably points to such an agreement and the party seeking to enforce it acts with promptitude.

Where however a party expends money on the property of another, without the latter's request, prima facie, the former has no claim on such other's property (***Ramsden v Dyson*** (1865) L.R. 1 H.L. 129).

If the party expending the money, is under a mistaken belief that he has an interest in the said property and the owner of the property knows of the mistaken belief and either encourages the expenditure or refrains from informing the person expending the money of his mistake, with a view to benefiting from the mistaken belief, a claim by way of proprietary estoppel may arise, in favour of he who expends the money: (***Inwards et al v Baker*** [1965] 2 Q.B. 29).

In the instant case, the appellant's defence to the claim by the respondents for recovery of possession was that she was given the area of land by her deceased father Levi Nelson who pointed out the house spot to her late husband Ronald Dyson.

The defence stated to the Learned Resident Magistrate, inter alia reads:

> "During the lifetime of Levi Nelson the defendant was given a house spot on the said land and spot pointed out by Levi Nelson to the husband of the defendant, Mr. Ronald Dyson. The defendant commenced construction on the property during the lifetime of Levi Nelson. No objection was ever raised ...
>
> ... The defendant claims to have been lawfully placed on the land and consequently has a right to remain there, or at the very least has acquired an equity, arising out of the acquiescence of either or both Levi Nelson and the plaintiff."

The appellant was therefore clearly not relying on the oral agreement between Ronald Dyson and Vincent Nelson, nor could she have done so. She

was not a party to that oral contract, nor was Ronald Dyson purporting to act as the appellant's agent. The letter dated August 3 1976, exhibit 3, written by Ronald Dyson to Vincent Nelson, reads:

> "This is to authorize you to effect sale of my land and building at Commodore for ... not less than Four Thousand Five Hundred Dollars$4,500).
>
> Out of the proceeds you are to pay yourself One Thousand Dollars ($1,000) for the price of the land and Fifteen Hundred Dollars ($1,500) to my wife and the residue to me." (Emphasis added)

The tenor of this letter, exhibit 3, unmistakably shows that Ronald Dyson far from acting as the appellant's agent, regarded the land and building as his, and from the proceeds of sale sought to retain for himself the greater share, "... the residue ..." of Two Thousand Dollars ($2,000).

In any event Ronald Dyson, at no time paid any money nor sought to perform the oral contract. No enforceable contract existed between the respondent and Ronald Dyson. Consequently, no equitable interest arose in the said land in favour of the appellant.

Counsel for the appellant, Mr. Adedipe, argued before this Court that the conduct of the respondents was such as to cause the appellant not to doubt that she had the right to complete the building her husband had started. Accordingly, the appellant was entitled to recover the value of the house but obliged to pay an amount as ground rent.

The appellant can only establish her contention, in the face of the existence of the unimpeachable registered title in favour of the respondents, if

she can show that based on a mistake as to her ownership of the said land she expended money in building the house, and the respondents, knowing of her mistake, acquiesced in or encouraged her expenditure, with a view to claim the benefit for themselves. She may, alternatively, succeed if she can satisfy the Court that her father Levi Nelson, was the owner of the land and gave it to her by way of gift.

It is clear that Levi Nelson, the appellant's father, was never the beneficial owner of the land although the title was initially in his name. He had bought it for the first respondent, Vincent Nelson.

A declaration by a deceased person against his proprietary interest is strong admissible evidence of that fact, as an exception to the hearsay rule. The author of **Phipson on Evidence**, 11th edition, at paragraph 907, on page 387, stated;

> "Declarations made by deceased persons in disparagement of their title of land are admissible if made while the declarant was in actual possession of the property, and as to matters either within his personal knowledge or on which he had formed an opinion ..."

The rationale of this rule is that whatever statement a man makes against his pecuniary or proprietary interest is probably true. There was overwhelming evidence that the deceased Levi Nelson consistently maintained, and also in the presence of the appellant that the said land, lot 80 at Commodore, was not his, but belonged to his son Vincent Nelson, the first respondent.

The respondents' witness Icilda Nelson, in examination-in-chief, at page 2 of the record said:

> "When Rose came from England we were all sitting in my father's house and Rose stopped by, my father told Rose that Ronny Dyson wanted to build her a house at Black Rock but is (sic) could not be built there. He told Rose that Ronny Dyson asked Vincent for a piece of Vincent's land at Commodore ..."

The second respondent, Consetta Nelson, at page 5 said:

> "Levi Nelson told me when Vincent comes home he will change the land over into Vincent's name."

A letter dated July 6 1971, from the deceased Levi Nelson to the first respondent, exhibit 7 inter alia reads:

> "My dear son you send and tell me that you not going to pay no more money on the land if I don't take out my name out of it so that live (sic) to all I know that the land is yours and I try my best to go up and down to get it out and I get all the papers and sent them to you to get them sign by a J. P. But when the paper came back to me I take it back to the office and them tell me that the paper did not sign the right way ... so I can't do more so what you want to say it left to you all I no (sic) I don't want your land so that is that."

This is evidence led before the Learned Resident Magistrate, indicating that the deceased Levi Nelson was rejecting ownership of the said land in himself and declaring that the first respondent was the owner. Exhibit 8, the agreement for transfer dated January 12 1970, signed by Levi Nelson in respect of "property at Commodore Portland", as transferor, is further evidence of the deceased's Levi Nelson's declaration against interest.

There was no basis on which the appellant could maintain that she thought that this land was deceased Levi Nelson's land, entitling her as his daughter to build thereon. Levi Nelson consistently asserted to the contrary. Neither was there any credible evidence before the Learned Resident Magistrate that Levi Nelson gave her the land on lot 80 to build her house. The appellant's evidence at page 23, where she said:

> "My father gave me a portion of land. My father owned it. Not true my ex-husband Mr. Dyson said he would build on the land and compensate Vincent."

and at page 19:

> "Up to the death of my father in my mind I thought Levi Nelson was the owner of the land."

is without any credible basis and contrary to the documentary evidence in the case.

We agree with the rather terse "reasons for judgment" of the Learned Resident Magistrate, at page 33. He said:

> "The Court finds that on the acts of plaintiff, the defendant did not get an equitable right by acquiescence. The defendant acted on the belief that the land belonged to Levi Nelson. The evidence is that at no time did he, Levi Nelson tell the defendant that the land belongs to him. The actions of Levi Nelson cannot be because of the ..."

There is no evidential proof, whether oral or documentary, accepted by the Learned Resident Magistrate to satisfy the requirements of any gift made to the appellant by the deceased Levi Nelson.

We have given full consideration to the fact that the appellant did expend sums of money in building the house upon the land in question. The appellant herself, at page 19, said:

> "When I visited lot 80 in 1975 the frame of my house was put up, the skeleton of the frame made of block were up. One room zinc was laid on the roof. This room was battened up with my furniture. The house had ... the house had no floor or doors or windows ... no electrical outlay, the walls were not rendered."

The first respondent stated, on the contrary, that when the appellant came from England the roof was on the house as also door and windows, the latter of which she changed. However, he stated, she continued the construction after 1991, when she received the notice from the Administrator General, that the said land did not form a part of the deceased Levi Nelson's estate.

The expenditure of the appellant, was not therefore done in circumstances of a mistake on her part, with an expectation knowingly induced or encouraged by the respondents, that she would have a right to remain on the land, to give rise to an equity in the appellant's favour, as in the case of ***Inwards v Baker,*** (supra).

As unfortunate as it may seem, in the circumstances of this case, no question therefore arises as to the manner in which any equity in favour of the appellant may be satisfied.

The appellant voluntarily chose to expend money building a house on land which was neither hers nor hers to build on. The house therefore adheres to the land and there is no legal obligation on the respondent owners to repay the

appellant. Her expenditure, based on her unfounded and misguided claim through her father, was in the nature of a gift.

In all the circumstances, the appeal is dismissed. On the basis of the respondents' notice, the order of the Learned Resident Magistrate for the sale of the house and the proceeds of sale to be given to the appellant is rescinded. It is ordered that paragraph 1 of the said judgment that the appellant deliver up possession to the respondents, is affirmed. The injunction granted is also affirmed. Costs to the respondents are fixed in the sum of $15,000.

FORTE, P.

I agree.

SMITH, J.A.

I agree.