

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 101/69

Quilam Portin 5 P

*Oral agreement for sale of
lands - findings by C of A -
Disagreement with Mag's
findings -*

BEFORE: The Hon. Mr. Justice Eccleston J.A. (Presiding)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

*WBF
30.4.71*

NAOMI FORSYTHE - PLAINTIFF/APPELLANT

v.

ANITA THOMAS - DEFENDANT/RESPONDENT

Horace Edwards Q.C. for Appellant

Geoffrey Ramsay for Respondent

January 13, 15, 1971

FOX, J.A.

In 1940, Eliphas Thomas purchased three acres of land, identified as lot 17 in the Sunning Hill Land Settlement, St. Thomas. At that time Eliphas was living with Adella Delpratt as man and wife. The plaintiff said that Eliphas asked her husband, Robert Forsythe, to join in the purchase because he, Eliphas, could not pay for all the land. This offer was made in a conversation at which Eliphas, Adella, Robert and the plaintiff were present. Robert said that he would like to look at the land. As a result, he and the plaintiff were shown the lot by Eliphas. Robert accepted the offer. Under an oral agreement the land was divided equally between Robert and Eliphas. Partition was effected by a gully and a wire fence. Robert was to pay £31.10/- to Eliphas. The plaintiff said that then and there she saw Robert pay money to Eliphas. Robert and Eliphas occupied their respective portions of land without any disagreement between them for over twenty years. Eliphas was a tailor. His tailor's shop and dwelling house were on the land. In 1942 Adella left him, thereby ending an association between them of over fourteen years. In 1948 he married the defendant. On 5th December, 1960 he made a will in which he named Lorenzo Edwards and the defendant as Executors. "The house together with one acre and a half more or less (land)" was given by the will to the defendant for her life with remainder to the lawful children of Eliphas' son, Alfred

Thomas. The defendant was present when the will was written, and she heard Eliphas tell the writer that the land was one and a half acres. Eliphas died on 27th December 1960. His will was proved in the Resident Magistrate's Court Saint Thomas on 29th August 1961. Robert cultivated his portion of land. He also sold small plots to various purchasers from time to time. Three of such purchasers who were still in occupation of the land they acquired, corroborated the plaintiff in this particular. The plaintiff was also corroborated by Adella Delpratt as to the circumstances under which Robert became owner of the land. Robert died intestate on 24th April 1961. Letters of Administration in his estate were granted to the plaintiff on 19th May 1964. At the time of Robert's death the $1\frac{1}{2}$ acres which he owned originally had been reduced to about $\frac{3}{4}$ acre by the sales made before his death. Trouble over the land arose between the plaintiff and the defendant after the death of Robert. The defendant claimed that Robert's occupation of the land had been as agent for Eliphas. She ousted the plaintiff from possession of the $\frac{3}{4}$ acre. The plaintiff sued to recover possession in the Resident Magistrate's Court, St. Thomas. The Magistrate gave judgment for the defendant. In his reasons for judgment he found that Eliphas appointed Robert "to act as his agent in cultivating and letting the land" and that "all the activities of Robert Forsythe on the said land was done in connection with his duties as an agent of Eliphas Thomas."

There was no evidence that Robert had cultivated any part of the land for the benefit of Eliphas. There was evidence in the plaintiff's case that Robert had sold part of the land he occupied. A witness called by the defence, Zepheniah Kelly said that he rented land from Robert at first. In the hurricane of 1951 his home was blown down. After the hurricane he asked Robert to sell him the land. Robert said "he could not rent lease or sell as he has given up possession after the death of Eliphas to Anita Thomas." Since Eliphas died in 1960, it is difficult to understand how this reply could have been made by Robert to a request to sell land which, as it appears in the printed record of the examination in chief was made shortly after the hurricane in 1951. The witness was forced in cross-examination to admit that if Robert and Eliphas had an arrangement about the purchase of land he would not know. There were unmistakable indications that he was a witness of convenience. There is really only one source which was capable

of giving rise to this particular finding of the magistrate that Robert was in occupation of his portion of land as agent for Eliphas. This is in the evidence of the defendant. She said,

- (a) that Eliphas had so informed her, and
- (b) that after the death of Eliphas, Robert told her to go on the land because it "belonged to my husband".

(a) is of course hearsay and inadmissible. (b) amounts to a declaration by Robert against his proprietary interest in the land and was admissible in evidence after his death. The magistrate did not indicate the material on which his finding was based. It could have been on the strength of evidence which was admissible as well as evidence which was inadmissible. This is an unsatisfactory situation. Not only has the magistrate failed to identify the reasons why he resolved the particular question of fact in the way he did, but also it is clear that the finding could have been made, in whole or in part, on inadmissible evidence. Even if it had been made on the admissible evidence, substantial objections to its validity remain. In the first place, the testimony of the defendant as to what Robert had said to her was plainly self serving in nature. The magistrate was bound to take this into account in assessing its value. Secondly, and more important, the alleged declaration by Robert flies in the face of overwhelming evidence to the contrary. It was not disputed that Robert was in peaceful possession of the land for over twenty years. During this period he performed acts of enjoyment which are incompatible with mere agency and for which the only reasonable presumption is ownership. In our view it is unmistakeable that in rejecting the evidence of the plaintiff and Adella Delpratt, the magistrate did not make proper use of the advantage which he had in seeing and hearing the witnesses. In this situation the critical questions of fact which arise for decision are at large for the decision of this court in accordance with the third proposition stated by Lord Thankerton in Watt v. Thomas [1947] A.C. 484 at 488. When the full effect of the circumstance that in his will Eliphas made a disposition of $1\frac{1}{2}$ acres of land, and that the defendant was present when the will was written, is appreciated, the conclusion is overwhelming that Eliphas and Robert had agreed to divide the three acres of land between them as the plaintiff and Adella Delpratt said, and that Robert was in possession of his portion

as owner. The plaintiff, as administratrix of his estate was entitled to recover possession from the defendant and the magistrate should have so ordered.

The appeal is allowed with costs fixed at \$30. Judgment in the court below is set aside and judgment entered for the plaintiff with costs to be taxed. Order for possession forthwith of the land as described in the further and better particulars dated 21st March 1968 and filed that same month in the court.

[Handwritten signature]