JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 70/93

BEFORE: **THE HON. MR. JUSTICE CAREY, J.A.**
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

BETWEEN	**CHARLES GARDENER**	
AND	**INEZ WALKER**	**APPELLANTS**
AND	**EDWARD LEWIS**	**RESPONDENT**

Mrs. Jacqueline Samuels-Brown for appellants

Miss Dawn Satterswaite for respondent

March 27 and June 6, 1995

PATTERSON, J.A.:

By an originating summons dated the 14th April, 1993, the respondent, Edward Lewis, sought a declaration that he is entitled to an interest to the extent of 3 1/2 acres in certain land comprised in certificate of title registered at Volume 1206 Folio 63 of the Register Book of Titles, in the names of the appellants, Charles Gardener and Inez Walker, both of Belmont District, Bluefields in the

parish of Westmoreland as joint tenants in fee simple. He further sought consequential orders to effect a transfer of the said 3 1/2 acres from the names of the appellants to his.

The originating summons was supported by evidence which clearly showed the respondent's entitlement to the interest claimed. The respondent deposed that his mother, Alice Gardener, owned 8 acres of land, more or less, at Bluefields, part of Belmont in the parish of Westmoreland. She acquired the said land by way of a gift from her father sometime in 1922, and ever since lived on the land undisturbed, exercising all customary rights of an owner in possession up to the time of her death in 1975. The respondent was born on the said land and he lived there until 1960 when he migrated to England. Since then he had paid regular visits to Jamaica, staying there on such visits.

The respondent's mother, by her last will dated 8th November, 1973, devised 3 1/2 acres of her land at Belmont to the respondent, 3 1/2 acres to her other son, Clement Noble, and 1 acre to Charles Pinnock, her nephew, who is also known as Charles Gardener. The boundaries of each parcel of land are described in the will, the devise to the respondent being "three and a half (3 1/2) acres of the said land with house thereon and leading from the main road to the south and bordering by land belonging to Albert Lawson to the west." The devise to Charles Pinnock is described as "one (1) acre of the said land on top of lands belonging to Rhoden and Lascelles Forrester" and that a "six foot (6) roadway be left leading from the main road against Cecil Roxburgh's land leading up to Charles Pinnock's

land." The devise to Clement Noble is described as being "three and a half (3 1/2) acres of my land at Belmont touching on the main road and to the south, by land belonging to Cecil Roxburgh on the east."

The will of Alice Gardener was proved and registered in the Supreme Court on the 17th November, 1987, when administration of the estate was granted to Isaac Samuels of Belmont and Harold Henry of Cave, the executors named in the said will. Harold Henry deposed that at the time of the deceased's death, the appellant Charles Pinnock was living with the deceased on that part of the land which the deceased devised to him.

It was not clear whether the executors took any steps to sub-divide the land in accordance with the terms of the will. What was clear was that on the 21st October, 1986, the respondent obtained a provisional Order of Approval to bring the property under the Registration of Titles Act ("The Act"). The property was described as follows:

> "ALL THAT parcel of land part of BELMONT in the parish of WESTMORELAND containing by estimation Eight Acres more or less and butting Northerly on land belonging to Albert Lawson Southerly on land belonging to Ida Rhoden Easterly on land belonging to Samuel Isaac, Jonathan Hewitt, Benjamin Lewis and Hubert Whitelocke and Westerly on land belonging to Cecil Roxburgh and on the Main Road leading from Black River to Savanna-la-mar."

He did not advertise the provisional Order of Approval, and no further step appears to have been taken to perfect the registration. It must be noticed that his

application seems to have included all the land mentioned and described in the will. The respondent returned to Jamaica sometime in 1993, and it was only then that he discovered that the appellants had obtained a registered title to all the land under the will, including what had been devised to him. The title is by description, to which no plan is annexed.

The appellants appeared to the originating summons and deposed in answer that in or about October 1986, they applied for and became the registered proprietors of all that parcel of land part of Belmont in the parish of Westmoreland registered at Volume 1206 Folio 63 of the Register Book of Titles. They further deposed:

> "3. That we have been advised by our Attorneys-at-law and verily believe that the issuing of the Certificate of Title in our respective names makes us the legal and equitable owners of the land aforementioned absolutely."

It is on those grounds that they prayed that the summons be dismissed and the reliefs sought be denied.

Smith, J. granted the declaration sought by the respondent and made consequential orders in the following terms:

> "(a) That the Plaintiff is entitled to an interest in the lands to the extent of 3 1/2 acres thereof;
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> (b) That the Defendants apply for and obtain sub-division approval in relation to the said lands facilitating the transfer to the Plaintiff of that part of the said land comprising 3 1/2 acres to which the Plaintiff

"beneficially entitled and if they fail so to do, the Plaintiff is empowered to so apply;

(c) That the Defendants on receipt of the aforesaid sub-division approval shall execute the Instrument of Transfer and take such steps as are necessary to register the Instrument of Transfer in relation to the aforesaid 3 1/2 acres part of the said lands in favour of the Plaintiff or, if the Defendants fail so to do, the Registrar of the Supreme Court is empowered to execute the Instrument of Transfer;

By consent

(d) That the costs of the aforesaid sub-division and Transfer are to be borne equally by the Defendants and the Plaintiff;

(e) That the costs of the Application are to be paid by the Defendants;

(f) Leave to appeal refused."

Before us, the appellants relied on two grounds of appeal. The first dealt with a question of jurisdiction. The appellants contended that the court below had no jurisdiction to hear the claim, since the proceeding was commenced by an originating summons. Mrs. Samuels-Brown argued that the claim is not covered by the rules set out in Title 43 of the Judicature (Civil Procedure Code) Law. It is for those reasons, so she argued, that the court had no jurisdiction to hear the claim commenced by originating summons.

In my view, the appellants' contention as to the jurisdiction of the court to hear the cause was misconceived. The Supreme Court is a superior court of record and a judge of the court has wide powers to grant declarations. See section

239 of the Judicature (Civil Procedure Code) Law. It could be that the appellants really intended to question the procedure adopted by the respondent in commencing the proceeding by an originating summons and not by writ of summons, but it seems that issue was not raised before the learned judge below. An unconditional appearance had been entered and an affidavit filed refuting the respondent's claim. There was, furthermore, no dispute as to the facts and the principal question at issue was one of pure law. In the circumstances, it was my view that proceeding by originating summons was ideally suited for the declaration sought and the determination of the point of law raised. "In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to procure fairness and clarification" (per Lord Templeman in ***Eldemire v. Eldemire*** P.C. Appeal Nos. 30/89 and 13/90 - delivered 23/7/90 - unreported). I found no merit in this ground.

The other ground of appeal on which the appellants placed great reliance reads as follows:

> "2. The Learned trial Judge erred in law in that:
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> a. he had no jurisdiction under the Registration of Titles Act or otherwise to make any order for the sub-division of the land and/or the transfer of any portion of the land in the circumstances of the instant case;
>
> b. the Registered Title of the Defendant/Appellant operated as a complete bar to the Plaintiff's/Respondent's rival claim in the absence of special statutory exceptions which were never relied on nor proved by the Plaintiff/Respondent;

> "c. that the affidavit evidence of the Respondent which must have been accepted by the learned trial Judge in respect of the Testator's ownership of the said land was hearsay and/or could not properly establish such ownership."

Mrs. Samuels-Brown submitted that the registered title in the name of the appellants issued in accordance with the provisions of the Act was indefeasible. She referred to section 68, section 70 and section 161 of the said Act in support of her contention, and submitted that the respondent had failed to bring himself within any of the exceptions set out in section 70 or section 161. She argued that, in particular, no misdescription had been alleged or proved.

The first consideration was whether the evidence disclosed that the respondent had an interest in the land he claimed: The uncontroverted evidence was that the deceased was the proprietor in undisturbed possession of all the land disposed of in her will from 1922 up to the time of her death on 1st June, 1975. Her long possession would have extinguished the interest of any claimant. The devisees under her will, which was proved and registered, are the respondent, the male appellant and the deceased's other son. Their interest vested in the executors named in the will, from the date of death of the testator, and in accordance with the Wills Act (s. 23), since the real estate was devised without any words of limitation, the words of the devise are to be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appears by the will. The devise

to the respondent was properly described in the will, and in my view, the evidence disclosed beyond doubt that the respondent acquired by devise a beneficial interest in approximately 3 1/2 acres of land at Belmont on the 1st June, 1975, the date his mother died.

The beneficial interest of the respondent in the land in question could have come to an end in any one of three ways. Firstly, the executors could have exercised their power to sell the land to pay the debts of the testator. Secondly, the executors could have vested the estate or interest in the land in the respondent who could then dispose of it by sale or otherwise. Thirdly, the land being unregistered land, adverse possession could extinguish the interest of the respondent. There was absolutely no evidence, either direct or by inference, which showed that the interest of the respondent had been extinguished or that the appellants acquired title to that portion of land by adverse possession; twelve years had not elapsed between the vesting of the estate in the executors of the deceased and the acquisition of the registered title by the appellants. Nevertheless, the appellants contended that "the issuing of the certificate of title in our respective names makes us the legal and equitable owners of the land aforementioned absolutely."

It was my opinion that the provisions of section 68 of the Act did not advance the appellants' contention. The respondent's claim was not based on "any informality or irregularity in the application to bring the land under the provisions of the Act." Indeed, the respondent did not seek an order for inspection of the

documents which supported the appellants' application, as he could have done under the provisions of section 42 of the Act. Nor did the respondent base his claim on fraud. He was not claiming an interest in the entirety of the registered land. His claim extended "to an interest in the lands to the extent of 3 1/2 acres of (sic) thereof', which he said was not and could not have been defeated in favour of the registered proprietor. In this regard, section 70 of the Act fell to be examined. The relevant part reads as follows:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."
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> [Emphasis supplied]

As I understood the respondent's claim, he did not attack the indefeasibility of the certificate of title of the registered proprietors, the appellants. Both counsel

accepted that, the certificate of title is conclusive evidence and that it confers an unimpeachable and indefeasible title on the registered owner. But there are exceptions in certain specified cases, and it is within the exception, emphasised in section 70 above, that the respondent's claim falls. What the respondent claimed was that the appellants became the registered proprietors of approximately 8 acres of land described and identified by metes and bounds, but that a portion of that registered land - to the extent of 3 1/2 acres - in which he has a beneficial interest, had been included. He is not alleging fraud, but implicit in his claim is that its inclusion in the certificate of title of the appellants must have resulted from wrong description of the parcel to which the appellants were entitled or its boundaries. This contention is fully supported by the evidence of the respondent and the executor, with reference to the will of the deceased which described the boundaries and extent of the devise to the respondent separate and apart from the rest of the land. The land in its entirety of which the deceased died possessed is now contained in the certificate of title registered at Volume 1206 Folio 63 of the Register Book of Titles, and it is plain that the registration, which includes the land devised to the respondent, must have come about by a wrongful description of the property to be registered. For emphasis, the contents of the Certificate is as follows:

> "CHARLES GARDENER and INEZ WALKER both of Belmont District, Bluefield Post Office in the parish of Westmoreland, Fisherman and Housewife respectively are now the proprietors of an estate as joint tenants in fee simple subject to the incumbrances notified hereunder in ALL

> "THAT parcel of land part of BELMONT in the parish of WESTMORELAND containing by estimation Eight Acres more or less and butting Northerly on lands belonging to Albert Lawson Southerly on land belonging to Ida Rhoden Easterly on land belonging to Samuel Isaac, Jonathan Hewitt, Benjamin Lewis and Hubert Whitelocke respectively and Westerly on land belonging to Cecil Roxburgh and on the main road leading from Black River to Savanna-la-Mar."

There was never any allegation that the interest of the respondent in the 3 1/2 acres devised to him had been extinguished. The appellants did not allege that they were purchasers for valuable consideration of the respondent's interest, or that they derived such an interest from or through such a purchaser. If that were so, I would have expected that they would have adduced evidence to prove that which peculiarly would have been within their knowledge.

The learned judge must have been satisfied that by error, the appellants' description of the land to be registered included the respondent's interest. The appellants gave no evidence whatever - they relied wholly on the principle of indefeasibility of their title. They did not challenge the affidavit filed by the respondent as to misdescription.

It is the appellants who supplied the description of the land to the Registrar of Titles for the purposes of the registration, and accordingly, it is they who brought about the wrong description of the parcels or boundaries to be included in their certificate of title. The consequential orders made by the learned judge in the

circumstances, will have the effect of correcting the wrong by excluding from the certificate of title the land in which the respondent has established his interest.

I found the arguments of counsel quite interesting, but without merit in the circumstances of this cause. I saw no reason to interfere with the judgment of the learned judge, and accordingly, for the reasons I have stated, I agreed that the appeal should be dismissed, and the order of the court below affirmed, with costs to the respondent to be taxed if not agreed.

GORDON, J.A.:

I agree.

CAREY, J.A.:

I entirely agree. Fraud or misdescription of land or its boundaries is capable of defeating a registered title. Here the respondent alleged misdescription. The appellants did not challenge that fact. I think that is enough to dispose of the matter.