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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 83/99

**BEFORE: THE HON MR. JUSTICE DOWNER, J.A.
 THE HON MR. JUSTICE BINGHAM, J.A.
 THE HON MR. JUSTICE PANTON, J.A.**

BETWEEN:	VANDA GRANT	PLAINTIFF/APPELLANT
AND	ERROL TAPPER	DEFENDANT/RESPONDENT
AND	ASHLEY GRANT	THIRD PARTY/RESPONDENT

Leon Green for the Plaintiff/Appellant.

H. Haughton Gayle for the Defendant/Respondent

Leroy Equiano for the Third Party/Respondent

November 20, 21, 22, 23, 24, 2000 and January 31, 2002

BINGHAM, J.A:

Over a period of several days this Court heard submissions from counsel in respect of this appeal. At the end of the submissions we came to the conclusion that the appeal ought to be allowed and the judgment of the learned trial judge below set aside and that judgment be entered for the plaintiff/appellant. We further ordered that our decision as to the reliefs sought in the Statement of Claim were to be incorporated into our reasons for

judgment. Our reasons for judgment promised at the conclusion of the hearing of the appeal now follows.

To have a full understanding of the issues raised in this appeal and which the Court had to grapple with, it is first necessary to examine the factual background leading up to the litigation below.

The parcel of land which gave rise to this dispute was first brought under the Registration of Titles Law Chapter 353 of the Laws of Jamaica for registration, and a Registered Title for "all that parcel of land part of Cave River, Barracks, in the parish of Clarendon, containing two acres one rood sixteen perches and two tenths" was issued to one Reginald Davis on 28th December, 1948. The Title was registered at Volume 523, Folio 75 of the Register Book of Titles. The lands described therein had boundaries delineated and marked out by a plan of survey done on the said lands on 7th June 1945.

These lands were subsequently transferred by Reginald Davis by an Instrument of Transfer to the Colonial Secretary for Jamaica for a consideration of One Hundred and Fifteen Pounds (£115.00.)

On 14th March 1949, the Colonial Secretary in whom all Crown lands were then vested in Colonial Jamaica, made a Crown grant of these lands to Albert Stanley Clarke, the predecessor in title of the appellant. This was done in recognition of Mr. Clarke's war service. Although no formal written document of transfer was executed, Mr. Clarke entered into possession of the said lands.

It is contended by the appellant that these lands remained in the undisturbed possession of Albert Clarke until 1988, when he sold the entire portion to the appellant for a consideration price of Seventy-Five Thousand Dollars (\$75,000.00). Consequent on this sale, Mr. Clarke went with the appellant to the Commissioner of Lands at North Street in Kingston. This officer had taken over the role and function in respect of Crown lands, previously vested in the Colonial Secretary. The Commissioner of Lands had the said lands transferred to the appellant acting on the instructions of Mr. Clarke as the equitable owner. The old Certificate of Title registered at Volume 523 Folio 75 was subsequently cancelled on 30th May 1988, and a new Certificate of Title recorded at Volume 1212 Folio 251 was issued to the appellant, Vanda Grant.

It is the contention of the third party Ashley Grant in his defence that sometime in 1959, his father, Uzziah Grant, acquired a portion of the lands obtained by Albert Clarke being one-half acre by way of purchase. At the hearing below a document purporting to be a Deed of Indenture dated 14th October 1959, and executed by Albert Stanley Clarke evidencing the sale was admitted in evidence as exhibit 8. This document was relied on by the learned trial judge in finding for the respondents.

The first-named respondent Errol Tapper, in his defence pleaded, raised the following:

- 1.** That the appellant knew that Uzziah Grant had acquired a portion of the said lands from Albert Clarke before she purchased the said land.

2. That Uziah Grant, Ashley Grant and the defendant, Errol Tapper, to the knowledge of the appellant were in sole continuous and undisturbed possession of the said land during the period 1959 - 1983, and 1983 - 1995. The defendant had thereby acquired a title by adverse possession.
3. That the appellant with the concurrence of Albert Clarke had fraudulently caused the Commissioner of Lands to transfer the entire parcel of land comprised in the Certificate of Title at Volume 1212 Folio 251 to the appellant.

The learned trial judge in her written judgment made no finding in respect of the issue of fraud or adverse possession. She founded her judgment on the basis that the land now occupied by the defendant Errol Tapper, was purchased by him from the third party, Ashley Grant, the successor in title of Uziah Grant. There is no evidence that Uziah Grant when he died in 1983, left a will or died intestate. In either case there is no evidence that any representation by way of Probate or Letters of Administration was even taken out in respect of his estate. This calls into question the authority of Ashley Grant to make title to the defendant Tapper, by way of a sale of the said land to him.

To further compound the matter there was no allegation in the defences of both the defendant and the third party, Ashley Grant, as to the document, exhibit 8. The existence of this document surfaced for the first time during the hearing below.

Learned counsel for the appellant sought to challenge the judgment of the learned trial judge on 7 grounds of complaint. The respondents were, however, called on to respond only to grounds 1, 2 and 5.

Grounds 1 and 2 relate to the complaint in respect of the document, (exhibit 8). They read:

"1 The learned judge wrongfully admitted into evidence a document purporting to be a Deed of Indenture as proof that the land in the subject action had been sold or conveyed to one Uziah Grant in 1959, when no proper foundation was laid for its admission.

2. The learned trial judge erred on the facts by relying on the said purported Indenture as evidence capable of supporting a finding that:

- (i)** The land the subject of the action had been sold and its title conveyed to the predecessor in title of the defendant and,
- (ii)** that the plaintiff must have known of such sale and conveyance."

Learned counsel for the appellant submitted that the requisite proof necessary for the admission into evidence of the document exhibit 8 was lacking.

He relied on the following:

- 1.** There was no proof of execution or handwriting.
- 2.** That even if the document (exhibit 8) was admissible the only witness in the case who could have laid the foundation of facts required for its admissibility into evidence was the third party Ashley Grant, the son of Uziah Grant, through whom the defendant claimed his title and from whom he is said to have purchased the land. Ashley Grant was at all material times present in Court but chose not to give any evidence.
- 3.** The document (exhibit 8) is not registered nor recorded and does not fall within any of the known statutory exceptions allowing for admission into evidence without proof.

Counsel contended in the alternative that even if the document (exhibit 8) had been properly admitted into evidence it lacks authenticity, is self-defeating and has no evidential value except to undermine the cases of both the defendant and the third party. Counsel's reasons for so contending were:

"1 That the document, (exhibit 8) is not properly executed as it requires two signatures (that of the Vendor and that of the Purchaser) and only one appears thereon viz: that purporting to be the signature of Stanley Clarke (the Vendor)

2. There was no proper chain of custody established from the alleged maker, Ashley Grant, to the defendant's attorney-at-law from whose custody the document was alleged to have been retrieved for its production in Court at the hearing below. Whereas, the defendant testified at the hearing of accompanying the third party, Ashley Grant, to Brown's Town to Lawyer Tucker's office in 1988, where he took a look at it (referring to the document) yet neither of them made any reference to the document which forms the very essence of the defence, in their pleadings which were settled in 1995.

3. An examination of the document (exhibit 8) revealed several glaring discrepancies viz:

(a) Although it purports to have been executed on 14th October, 1959, on page 1 bears an impress stamp dated 14th June 1958. The inference here being that it was stamped before it was prepared and executed."

There is much force in the above submissions. Nevertheless the outcome of the appeal did not rest on a determination of the admissibility of the document (exhibit 8). The said lands were brought under the Registration of Titles Act from as far back as 1948, before it was later transferred to the Colonial

Secretary. A plan of survey had been done from 1945. That pre-checked diagram describes Uzziah Grant as one of the adjoining owners or persons in possession of lands butting and bordering the portion of land now the subject of this claim.

The appellant has also submitted that the document (exhibit 8) did not support the case of the defendant and the third party as:

(1) It evidenced the sale of one-half acre more or less whereas the respondent Errol Tapper claimed less than one-quarter of an acre. This is although Tapper purported to have acquired the entire portion of land included in the Deed of Indenture being one-half acre more or less.

The defendant/respondent Tapper sought to extricate himself from this discrepancy by testifying in Court at the trial of contracting to purchase an half acre of land from the third party Ashley Grant. None of the documents purporting to have been executed by Ashley Grant as evidencing this sale, mentioned the size of the lands or the boundaries of the land being acquired (vide exhibit 6 a-c). The diagram of survey done at the insistence of Errol Tapper on 7th November 1986, does not indicate on the pre-checked plan (exhibit at page 19 of the record), the presence of the appellant, Vanda Grant, as one of the persons interested in, or present at the survey that was done. In the result she cannot as a matter of law be bound by the survey.

Learned counsel for the defendant/respondent in responding rested his submissions on the finding of the learned trial judge that on the evidence the appellant knew that the portion of land described in the Deed of Indenture had

been sold to Uzziah Grant by Albert Clarke, her predecessor in title, that she failed to point out this fact to the Commissioner of Lands when the said parcel of land registered at Volume 523, Folio (now Volume 1212 Folio 251 (exhibits 1 and 2) was transferred to her. He further submitted that her failure to make such a disclosure would have brought the respondents within the exceptions to the doctrine of the indefeasibility of the title conferred on a holder of a Certificate of Title under the Registration of Titles Act.

This being the case, in so far as Section 70 in part enacts that such a holder would take free from such encumbrances not noted in the folium of the Register Book constituted by his Certificate of Title "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." Counsel relied in support on ***Charles Gardener et al v Edward Lewis*** Privy Council Appeal No. 25/97 delivered on 22nd June 1998 reported at (1998) 53 WIR 236.

In my view this submission is totally without any legal foundation for the following reason.

Even if a portion of these lands contained in the Certificate of Title being the lands the subject of the Crown Grant to Albert Stanley Clarke, had been sold to Uzziah Grant, no attempt was made by Mr. Clarke as the vendor to bring this fact to the notice of the Commissioner of Lands. Having not done so there is no basis for inferring that in the circumstances he would have told the appellant in

her capacity as purchaser of the disposition of a portion of the said land. In this regard, the learned trial judge in her written judgment in dealing with the situation with which the appellant was confronted said:

"Mrs Grant has agreed that it was after she got her registered title in 1988, she found out that the piece of land Mr. Tapper is claiming is included on the title. She testified - "I knew the land was mine after I got the title. I could not claim the land when he was on till I got the title."

It is therefore against this background that one now has to examine the legal position of someone who acquires land, the subject of a Registered Certificate of Title from a previous registered owner, (the appellant's position), and in respect of which there are no encumbrances, trusts, or other interests endorsed on the Title to these lands. Taken at its highest the only interest that Uzziah Grant could have acquired, given the finding of the learned trial judge was an equitable interest to a one-half acre of land. There was no finding of adverse possession or fraud made by the learned trial judge. No respondents' notice was lodged in this Court against such a finding. We did not trouble ourselves therefore, with any consideration of these two defences raised on the pleadings.

The only basis therefore, upon which the judgment of the learned trial judge can be supported would be, where the appellant, in acquiring the land in question by way of a registered transfer of title from the Commissioner of Lands, was "as the purchaser for valuable consideration," under a statutory duty to disclose to the Commissioner of Lands the existence of any equitable interests

created in favour of someone else having prior dealings with the previous equitable owner of the said lands. If no such duty existed, then the legal position is clear that the appellant would, by virtue of obtaining a Registered Certificate of Title by way of transfer from the previous registered holder (the Commissioner of Lands), have acquired all the said lands mentioned and referred to in the Certificate of Title free from all encumbrances and other interests as may have been in existence but not noted on the said Title.

At this stage one now needs to examine the relevant sections of the Registration of Titles Act (the "Act") in ascertaining the manner in which, if at all, it affects the position at law of the appellant as the holder of a Certificate of Title by way of a transfer from a registered owner.

A Torrens System of land registration in this country is provided for by this Act. Under section 28 a person claiming to be the owner of the fee simple either at law or in equity can apply to have land brought under the operation of the Act. This was the course adopted by Reginald Davis, the predecessor in title of the Commissioner of Lands from whom the appellant obtained a registered transfer of title to the said lands. This officer was the successor to the Colonial Secretary the functionary of the Crown in Colonial Jamaica (vide exhibit 1) and in whom all Crown lands were vested.

While there was a disposition of the said lands to Albert Clarke by way of Crown grant in 1948, in recognition of war service, there was no formal transfer of title effected to him. It is to sections 68, 70 and 71 of the Act that one now

has to turn to look therefore, to discover the clear position of the registered owner of land because of registration. The relevant sections provide as follows:

"68. No Certificate of Title registered and granted under the Act shall be impeached or defeasible by reason or on account of an informality or irregularity in the application for the same or in the proceedings previous to the registration of the Certificate and every Certificate of Title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars set forth and the entry thereof in the Register Book and shall be subject to the Statute of Limitations be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power."

The above section speaks to the indefeasibility of the registered title as "it is in fact the registration and not its antecedents which vests and divests title."

Per dictum of Lord Wilberforce in *Fraser v Walker* [1967] 2 WLR 411 at 415.

Section 70 then provides:

"70 Notwithstanding the existence in any other persons 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 the 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 in the folium of the Register Book constituted by his certificate of title, but absolutely free from all 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 title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser..." (Emphasis supplied)

Then section 71 reads:

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Emphasis supplied)

As the appellant acquired her title from the previous registered owner free from any encumbrances or endorsements on the said title the indefeasibility of that title could only be challenged on the ground that there was some circumstance falling within any of the exceptions provided for in sections 68, 70 and 71 of the said Act, viz adverse possession, fraud, a holder of a prior registered title or in certain circumstances on the grounds that the land had been included on the title because of "a wrong description of parcels or boundaries" (section 70). This last underlined exception is here excluded as the appellant was a purchaser for valuable consideration of the lands comprised in the

Certificate of Title registered at Volume 523, Folio 75, (now Volume 1212, Folio 251.)

The position of the appellant as a purchaser for valuable consideration and someone who by the same token acquired her Certificate of Title by virtue of a transfer from a prior holder of a registered title in respect of the same parcel of land results in two important considerations viz:

1. Under Section 70, the exceptions provided for therein cannot affect the appellant's title. This is so in the light of the special position of the appellant as a purchaser for valuable consideration.
2. The Crown was the registered owner of the said lands from 1949 to 1988 by way of a registered transfer from Reginald Davis to the Colonial Secretary and later when the Commissioner of Lands (the then functionary) transferred the land to the appellant. The Statute of Limitations would not have assisted Uzziah Grant or persons claiming, through or under him, title by way of adverse possession. To succeed in such a claim against the Crown would have required a period of sixty (60) years continuous and undisturbed possession and the period 1959-'83 and to 1995, falls far short of this requirement. (Section 38 of the Limitation of Actions Act).

Moreover the failure of Albert Stanley Clarke to disclose the interest of Uzziah Grant to the Commissioner of Lands, while opening him up to a possible claim in personam at law or in equity could not affect the appellant in so far as she obtained an indefeasible title; or, by virtue of the provisions of section 71 of the Registration of Titles Act, she was not under any duty "to enquire into or ascertain the circumstances or the consideration for which the proprietor or the

previous proprietor thereof was registered:" ***Fraser v Walker*** (supra) – (the headnote (1) – (3) as their Lordships' Board held.)

It bears repeating that there was no evidence whatsoever that Albert Stanley Clarke in issuing instructions to the Commissioner of Lands to transfer his entire interest in the said lands disclosed the fact that he disposed of one-half acre to Uzziah Grant. That, however, would not affect the nature of the Certificate of Title obtained by the appellant. As the holder of that title, sections 70 and 71 of the Act would have clothed her with immunity in respect of any claims of adverse possession, fraud etc.

The case ***Charles Gardener and Inez Walker v Edward Lewis*** (referred to supra) relied on by learned counsel for the respondent Errol Tapper, (on its facts,) does not support the contention earlier referred to. The Board of the Privy Council was there concerned with the misrepresentation by the appellant Gardener (as a beneficiary of a portion of the land), in applying to have the entire parcel brought under operation in his name and that of his common-law partner, under the Registration of Titles Act. Such conduct on his part would have as the Board held, enabled the beneficiaries under the estate of the deceased owner of the said lands, to claim through the Executors in equity to give effect to their equitable rights and those of the respondents.

In the instant case the appellant acquired her title as a purchaser for valuable consideration, and that title cannot be impeached by any prior equities irrespective as to whether she had notice of them or not at the time she

obtained her registered title. Moreover, notice by itself would not amount to fraud as "the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Section 71 of the said Act.)

The learned trial judge also relied on the decision in ***Gardner et al v Lewis*** (supra) in finding for the respondents. In accepting the submissions advanced by learned counsel for the respondent, Errol Tapper, she was led into error. This judgment therefore, could not be sustained.

In the result to summarize therefore, on the basis of the clear provisions of Section 68, 70 and 71, of the Registration of Titles Act and on the evidence there exists no basis either in law or in fact for impeaching the Certificate of Title obtained by the appellant. The appeal was accordingly allowed and the judgment entered below set aside and judgment was entered for the plaintiff/appellant. The appellant is to have her costs both here and below such costs to be agreed or taxed.

As to the reliefs sought in the prayer to the Statement of Claim the Court will be guided in this direction by any arguments which counsel may wish to address on it.

Downer, J.A.

I agree

Panton, J.A.

I agree