[2024] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00041

BETWEEN	**ZENA HOLNESS**	**APPELLANT**
AND	**ADMINISTRATOR GENERAL OF JAMAICA (Administrator of Estate Everton Lynch otherwise known as Everton Anthony Lynch)**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman and Company for the appellant

Miss Melissa White instructed by the Administrator General of Jamaica for the respondent

7 February and 15 March 2024

Land – Adverse possession - Possession by co-tenant of jointly owned property - Factual possession - Intention to possess- Limitation of Actions Act - ss. 3, 14, 30

Evidence - Admission of hearsay statements - Failure to object to admission

F WILLIAMS JA

[1] I have read in draft the judgment of Shelly-Williams JA (Ag) and agree with her reasoning and conclusion. There is nothing that I wish to add.

BROWN JA

[2] I too have read the draft judgment of Shelly-Williams JA (Ag). I agree with her reasoning and conclusion.

SHELLY-WILLIAMS JA (AG)

[3] This is an appeal by the appellant, Zena Holness, from the decision of Carr J ('the learned trial judge') contained in a judgment delivered on 1 April 2022 in which the learned trial judge granted the declarations sought by the respondent, the Administrator General of Jamaica, administrator of Estate Everton Lynch otherwise known as Everton Anthony Lynch, regarding an interest in property located at 2B Rivoli Avenue in the parish of Saint Catherine. The details of the order appealed are as follows:

> "1. All legal rights and ownership of the Defendant Zena May Holness, of ALL THAT parcel of land located at 2B Rivoli Avenue, Spanish Town in the Parish of Saint Catherine registered at Volume 1232 Folio 804 in the Register Book of Titles is extinguished.
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> 2. Everton Lynch otherwise called Everton Anthony Lynch, the deceased, is the legal and beneficial owner of ALL THAT parcel of land located at 2B Rivoli Avenue, Spanish Town in the Parish of Saint Catherine registered at Volume 1232 Folio 804 in the Register Book of Titles absolutely.
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> 3. ALL THAT parcel of land located at 2B Rivoli Avenue, Spanish Town in the Parish of Saint Catherine registered at Volume 1232 Folio 804 in the Register Book of Titles is to be transferred to the Claimant [The Administrator General of Jamaica] for the estate of Everton Lynch otherwise called Everton Anthony Lynch.
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> 4. The Registrar of the Supreme Court is empowered to sign all documents and/or Transfer Instrument(s) (if any) on behalf of the Defendant in order to facilitate the transfer of ALL THAT parcel of land located at 2B Rivoli Avenue, Spanish Town in the Parish of Saint Catherine registered at Volume 1232 Folio 804 in the Register Book of Titles to the Claimant, should the Defendant Zena May Holness, fail and/or refuse to sign the documents within fourteen (14) days of the date of this Order.
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> 5. Costs to the Claimant to be agreed or taxed."

[4] On 12 April 2022, the appellant filed an application seeking a stay of execution of the judgment pending the determination of the appeal. This application was heard and refused by Brown JA on 19 July 2022.

Background to the appeal

[5] Everton Lynch, otherwise called Everton Anthony Lynch ('the deceased'), died intestate on 8 June 2019. The deceased was survived by a minor child, and as such, the Administrator-General of Jamaica ('the respondent') pursuant to her powers to act where a minor is involved under section 53B and 53F of the Administrator-General's Act, was appointed Administrator of the deceased's estate by virtue of the Instrument of Administration dated 21 November 2019.

[6] The deceased died in possession of property located at 2B Rivoli Avenue, Spanish Town, in the parish of Saint Catherine, registered at Volume 1232 Folio 804 in the Register Book of Titles ('the property'). The appeal before this court concerns this property and as such it is necessary to set out the circumstances surrounding its acquisition.

[7] It is the appellant's evidence that around 1982 she met the deceased at a bar where she worked in Spanish Town in the parish of Saint Catherine. Shortly thereafter, they began an intimate relationship and eventually lived together at his previous home in Ensom City in Spanish Town, with her two children. They moved on more than one occasion thereafter and during this time they had their first child together, Everton Anthony Lynch (otherwise called Kemar).

[8] While, living at at 56 March Pen Road they were told by their then landlord of the property being on sale. The appellant stated that at this time she was earning "good money" as she was no longer working at the bar but was travelling to and from the Cayman Islands buying goods to sell in Jamaica, as such, she and the deceased decided to buy the property. However, because of her type of work, she would not be in receipt of pay stubs to secure a loan as such the deceased, being employed to the Department of Correctional Services and being a member of the Correctional Service Cooperative

Credit Union, applied to the credit union instead for the loan. The appellant asserted that an agreement was arrived at between herself and the deceased that he would secure the loan to purchase the property and she would furnish the house on it, refurbish it, provide for the children, and cover all the utility bills.

[9] In 1985, with the loan from the credit union, the deceased purchased the property, in the names of the deceased and the appellant as joint tenants. The title was, however, not received until 1991. After this purchase, in 1985, the appellant stated that both she and the deceased lived in the property together with their children. The appellant indicated that over the years, she furnished the house and undertook repairs using her earnings from buying and selling goods as agreed between the deceased and her. She painted the property, replaced the doors, installed burglar bars, fixed the ceiling, and carried out plumbing work. She also paid to have the perimeter fence built.

[10] In 1994, she travelled to the United States for employment and had their second child, Lamar Jonathan Lynch. Around 2002, she acquired her apartment in the United States. She stated that during this time she and the deceased maintained an intimate relationship, and this continued even up to the point of his death. She also stated that they would both travel back and forth to see each other. She asserted that up to 2006, on one of her trips to Jamaica, she paid the water bill and property tax for the property.

[11] The evidence of the respondent's witnesses asserted otherwise. In particular, Ms Donna Carr, declared common law spouse of the deceased by formal order dated 26 October 2020, stated that in October 2004 she moved into the property with the deceased and the two children of their union, Terry-Ann and Toniann, where they lived until the deceased's death on 8 June 2019. She also denied the appellant ever lived at the property or exercised any rights of ownership over it during the 15 years the deceased lived at the property with her and the children. She asserted that the deceased occupied the property from 2004 to the time of his death, absolutely, and exercised all rights of ownership to the exclusion of the appellant for that period. It was further stated that the deceased's occupation was open, undisturbed, exclusive, and intentional during the 15 years.

[12] In light of the foregoing, the respondent brought an action for several orders, including a declaration that the legal rights and ownership of the appellant to the said property were extinguished and the deceased's estate is the absolute owner of the said property.

[13] At the trial of the matter, the learned trial judge found in favour of the respondent and made the orders set out in para. [1] above.

The appeal

[14] On 6 April 2022, the appellant filed grounds of appeals as follows:

> "a. The Learned Trial Judge erred in law in failing to appreciate that the evidence of Ms. Donna Carr, as captured in paragraph 13 of her written judgment, could not have established that the Defendant and the deceased, Mr Everton Lynch, purchased any property in 1991 as joint tenants, as such evidence was inadmissible hearsay.
>
> b. The Learned Trial Judge erred in law in failing to appreciate that the evidence of Ms. Donna Carr, as captured in paragraph 13 of her written judgment, in which Ms. Carr stated that, as far as she was aware, he, Mr Lynch, made all the mortgage payments from his salary, was inadmissible hearsay and could not be used by the Trial Judge to establish a fact in issue.
>
> It is submitted that such evidence amounts to an implied assertion, which is caught by the Hearsay Rule. See **R v Kearley (1992) H.L.E 2 A.C. 228.**
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> c. The Learned Trial Judge erred in law in failing to appreciate that the evidence of Ms. Shelly-Ann Wade, which is captured at paragraph 17 of her judgment, that Miss Wade resided at the property for approximately 3 months in 2010 and then for a year in 2018 and 2019, and that, during her stay there, she observed that Mr Lynch treated the property as his own, amounts to opinion evidence and could not be relied on by the Trial Judge to establish a fact in issue.

d. The Learned Trial Judge erred in law when she stated at paragraph 25 of her judgment, that Ms. Donna Carr's evidence supports the conclusion that Mr. Everton Lynch handled all the financial affairs in relation to the property.

   It is submitted that this assertion amounts to an implied assertion, which is caught by the Hearsay Rule.

e. The Learned Trial Judge erred in law in stating that Ms. Donna Carr's evidence supports a finding that Everton Lynch conducted himself as if he was the sole owner of the property and did so to the exclusion of the Defendant."

[15] The respondent filed a counter-notice of appeal on 20 April 2022, the grounds of which are couched in the following terms:

"1. The learned Judge was entitled to make the Orders granted in accordance with Sections 3, 14 and 30 of the Limitation of Actions Act which operate to make the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant.

2. The learned Judge was entitled to make the Orders in light of the evidence before her establishing that the deceased, Everton Lynch, had a sufficient degree of physical custody and control over the property subject to the claim. That the learned Judge was also entitled to make the Orders as the Defendant/Appellant failed to provide any evidence to the Court to challenge this assertion.

3. The learned Judge was entitled to make the Orders in light of the evidence before her establishing that the deceased, Everton Lynch, had an intention to exercise such custody and control over the property for his benefit to the exclusion of the Appellant as a co-owner. That the learned Judge was also entitled to make the Orders as the Defendant/Appellant failed to provide sufficient evidence to the Court to rebut this assertion.

4. The learned Judge was correct in finding that the deceased made all the mortgage payments and paid the necessary property taxes regarding the subject property based on the evidence provided by the Claimant/Respondent and based on the fact that no evidence to the contrary was presented by the Defendant/Appellant.

5. The learned Judge was correct in rejecting the evidence of the Defendant/Appellant that she paid all the utility bills and property taxes for the subject property prior to the death of the deceased as the evidence put forward by Defendant/Appellant was insufficient to merit such a conclusion.

6. That the learned Judge correctly exercised her discretion and jurisdiction in granting the Orders and was entitled to do so based on the evidence before her."

Submissions for the appellant

[16] In essence, the appellant submitted that the decision of the learned trial judge ought to be overturned as she permitted inadmissible hearsay statements to be led. The hearsay statement to which the appellant refers relates to the ownership and the manner in which the property was purchased. It was argued that the learned trial judge erred in attaching significance to Ms Carr's evidence on how the mortgage payments were made as it amounted to an implied assertion that it was the intention of the deceased to occupy and use the premises as his own which was inadmissible. Further, it was argued that the evidence relied on by the learned trial judge to arrive at the conclusion that the deceased handled all the financial affairs of the property was an implied assertion. Counsel made reference to the case of **R v Kearley** (1992) 2 AC 228 ('**Kearley**').

Submissions for the respondent

[17] Miss White, for the respondent, submitted that Ms Carr's evidence highlighted the source of her knowledge, that being, the title for the property as well as the deceased's payslips showing deductions for the mortgage payments, all of which were tendered into

evidence. She argued that there is no evidence that the learned trial judge relied on the statements deemed hearsay and not the documentary evidence before the court.

[18] Further, Miss White contended that in the event the impugned evidence was found to amount to hearsay, since no objection was taken to the hearsay evidence at the time of the trial, and it was admitted in the proceedings, no objection may be taken to it on appeal. She submitted that the evidence having been admitted, it ought to be given its full probative value. Counsel relied on the cases of **Bank of Nova Scotia Limited v Sovereign Resources UK Limited & Dean Williams** [2021] JMCA Civ 27 and **Guyana Bank for Trade and Industry v Alleyne** [2011] CCJ 5 (AJ).

[19] Therefore, it wasMiss White's submission that grounds (a.) and (b.) are not substantiated and the learned trial judge was correct in her findings.

[20] Regarding ground (c.), counsel argued that Ms Wade's conclusion regarding how the deceased treated the property was her own discernment having observed him while residing at the property. Accordingly, she submitted the learned trial judge could rely on the evidence and determine how much weight, if any, should be given to it.

[21] In relation to grounds (d.) and (e.), Miss White submitted that the learned trial judge relied on the evidence of the respondent's witnesses who either resided at or resided close to the property, who gave first-hand knowledge of the actions they saw that led them to believe the deceased handled all financial affairs. Counsel also submitted that evidence was also provided by the witnesses to satisfy the court that the deceased had a sufficient degree of physical custody and control over the property and an intention to exercise such custody and control for his benefit to the exclusion of the appellant as is required by **Wills v Wills** [2003] UKPC 84. Evidence considered by the court included:

a) The deceased had physical custody and control of the property from 2004 to his death in 2019.

b) The appellant did not sleep at the property during this time but made arrangements to sleep elsewhere when visiting Jamaica.

c) The appellant did not collect rent from the deceased or Ms Carr.

d) The deceased invited Ms Carr to live with him at the property from 2004 until his death in 2019.

e) The deceased made all mortgage payments.

f) The appellant was unaware that Ms Carr resided at the property with the deceased until 2006 and further, when made aware, took no steps to remove Ms Carr from the property.

g) The appellant was unable to provide evidence of any act of ownership from 2004 to the date of the death of the deceased - only her payment of property tax after the death of the deceased.

[22] On the point of setting aside the decision of the learned trial judge, Miss White submitted that the appellant has not satisfied the criteria in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 for the learned trial judge's decision to be set aside. She argued that the learned trial judge was not under a misunderstanding of the law and facts, and her decision was arrived at judicially and with good reason.

Facts not in issue

[23] There are some facts in this case that are not in issue, which are:

(a) The deceased and the appellant had purchased the property on 14 January 1991. The title for the property was attached to the affidavits of Keera Batten, a case worker employed to the Administrator-General's Department, sworn on 30 June 2020, as well as the affidavit of the appellant sworn on 17 November 2020.

(b) The deceased had resided at the property with Ms Donna Carr and two children until the time of his death in 2019.

(c) The appellant visited the property on at least one occasion whilst Ms Carr resided with the deceased and the police was summoned.

(d) The first attempt of the appellant to remove Ms Carr from the property was after the death of the deceased.

(e) Ms Carr was declared to be the spouse of the deceased after his death.

Discussion

[24] There are two issues that arise from the grounds of appeal filed in this matter, namely:

A. Whether the deceased had dispossessed his co-tenant, the appellant, and as such acquired the entire property by means of adverse possession (Grounds d and e); and

B. Did the learned trial judge utilise hearsay evidence or opinion-based evidence in her judgment, and if so, did it render her judgment unsound? (Grounds a, b, c)

Adverse possession

[25] The appellant and the deceased had acquired the property in 1991 as joint tenants. This fact was confirmed by copies of the title issued by the Registrar of Titles, which were attached to two affidavits filed before the learned trial judge. Section 68 of the Registration of Titles Act establishes the approach to be adopted once registered title is acquired. It states:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of

> any informality or irregularity in the application of same,…and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any 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 seised or possessed of such estate or interest or has such power."

[26] The indefeasibility of a registered title is subject to the Limitation of Actions Act. Sections 3 and 30 of the Limitation of Actions Act establish the legal principle of adverse possession that extinguishes the legal interest of registered proprietors. Section 3 of the Limitation of Actions Act provides:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Section 30, then, reads:

> "At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[27] Section 14 of the Limitation of Actions Act also addresses the issue of possession as it relates to joint tenants or tenants in common. It states that:

> "When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares,

> of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

[28] The term adverse possession was explained in the case of **Ramnarace v Lutchman** [2001] 1 WLR 1651, where Lord Millett stated at para. 10 that:

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner…."

[29] The case of **JA Pye (Oxford) Ltd v Graham and Another** [2002] 3 ALL ER 865 highlighted the elements that must be satisfied in a claim for adverse possession. These were stated at para. 40 to be:

a. "factual possession" ie a sufficient degree of physical custody and control; and

b. "intention to possess" ie an intention to exercise such custody and control on one's own behalf and for one's own benefit.

[30] McDonald-Bishop JA, in the case of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, addressed the issue as to whether one joint owner can dispossess another. Having reviewed the Privy Council case of **Wills v Wills**, McDonald-Bishop JA stated at para. [34] of her decision that;

> "... a co-tenant in possession of jointly owned property can, in law, dispossess another co-tenant who had not been in possession for the requisite limitation period of 12 years."

[31] The first issue that had been considered by the learned trial judge was whether the deceased had exclusive possession/control of the property. The evidence presented was gleaned from affidavit evidence on which the affiants were cross examined, as well

as from documents attached to the various affidavits. The oral evidence presented in this case as it relates to the question of whether the deceased exercised exclusive possession/control over the property came from:

a. Ms Carr, who stated that she and the deceased had resided in the property between the years 2004 and 2019;

b. Mr Festus Bryan, who averred that he was the neighbour of the deceased and had seen the deceased and Ms Carr residing at the property from 2004 to 2019. His evidence was that he had never seen the appellant residing in nor exercising any rights of ownership over the property;

c. The evidence of Ms Shelly-Ann Wade that she resided at the property for three months in 2010 and for one year from 2018 to 2019. She averred that during that period, the deceased's possession and occupation of the property was "open, undisturbed, exclusive and intentional during this time";

d. The evidence of Mr Peter Lynch, the brother of the deceased and witness for the appellant. He averred that Ms Carr started to reside at the property in either December 2004 or January 2005. Mr Peter Lynch averred that he had been tasked with overseeing the property when the deceased and the children travelled overseas to visit the appellant, but the last time he had done so was in 2003.

[32] Documentary evidence was also admitted in support of the position that adverse possession had been established. The evidence of Ms Carr was that the deceased had paid the mortgage for the property. She attached copies of the salary slips of the deceased in support of this position.

[33] It was also Ms Carr's evidence that, as far as she was aware, the deceased was the person who paid the bills relating to the property. No documentary evidence was

provided to support this position. However, in cross examination, Ms Carr, on being asked how the taxes for the property were paid, maintained that it was the deceased who paid them and indicated that she had seen tax receipts in the deceased's name and none in that of the appellant. She was also able to give the sum that was paid for taxes as being "$2,000 and something dollars". Ms Carr also gave evidence of the deceased paying the electricity bill, which she stated was also in his name. She denied seeing moneys being sent from abroad to pay for light and taxes for the property.

[34] The appellant sought to refute the position that the deceased had been in exclusive possession of the property. The appellant gave evidence that the deceased and herself had been in a relationship. The appellant averred that there had been an arrangement between herself and the deceased wherein he would pay the mortgage for the property whilst she would pay the bills. The appellant produced a receipt in support of this position, however, that receipt showing the payment of property taxes was dated 17 November 2020, after the death of the deceased. The appellant did not produce any documentation showing the payment of taxes prior to 2020.

[35] The appellant also gave evidence that on two occasions, she had visited the property, that is, in 2006 and 2008. The appellant gave evidence that on her visit in 2006, the police were called by Ms Carr, and she did not stay at the property. The appellant's evidence was that, on the second occasion, Ms Carr and the deceased were at the property. The appellant averred that she called the police. On that occasion, the deceased told her she could stay in the front room, but she did not stay. In contrast, Ms Carr gave evidence that the appellant went to the property on one occasion. On that occasion, the deceased and Ms Carr were at the property, and it is the deceased who called the police, after which the appellant left.

[36] The evidence presented by the appellant was that she had visited the property on two occasions and failed to be accommodated there. Her second visit in 2008, if her account is to be believed, amounted to clear evidence that the deceased was, in fact, treating the property as being solely his own. The evidence of the appellant pointed to

the deceased dictating to the appellant where she could be accommodated on her visit to the property. This was under circumstances where the deceased resided at the property with his family and was merely allowing the appellant to stay in a front room.

[37] The evidence as to the occasion(s) that the appellant visited the property had been considered by the learned trial judge, and she stated at para. [24] of her decision that;

> "The uncontroverted evidence is that Everton Lynch was in factual possession of the property from 2004 until his death in 2019. The defendant herself has admitted that she resided in the United States, and she only visited the property on two occasions. On those two occasions, due to confrontations with Ms. Carr and Everton Lynch, the police were called and it resulted in her leaving the property. In cross-examination she was asked if she stayed at the property after 2004 and her answer was, '*no I could not stay there as Ms. Carr was living there.*' It is therefore the finding of this court that Everton Lynch was in factual possession of the property from 2004 until his death in 2019. He exercised physical custody and control of the property during that period to the exclusion of Ms. Holness." (Italics as in the original)

[38] The learned trial judge was tasked with the decision as to whom she believed as to what transpired on the occasion(s) the appellant visited the property. The learned trial judge found at para. [26] of her judgment that:

> "It was clearly his intention to start afresh with his new family in this home at 2B Rivoli Avenue. That he did so to the exclusion of Ms. Holness is patently obvious, since, as she indicated in her evidence she was unaware of Ms. Carr's presence until she visited the premises in 2006. Despite her concerns and the interference of the police, when Ms. Holness returned in 2008, Ms. Carr was still living there. Everton Lynch made no effort to change the living arrangements despite her objections."

[39] The finding of adverse possession was reinforced by the fact that the appellant made no attempt to remove Ms Carr from the property during the period of 2004 to 2019.

It was only after the death of the deceased that the appellant served Ms Carr with a notice to quit the property.

[40] The learned trial judge addressed the issues of factual possession and an intention to possess in her decision, considering all the evidence that had been presented to her. There was no evidence presented by the appellant that refuted the overwhelming evidence presented by the respondent. The learned trial judge was justified in arriving at her decision that the deceased conducted himself as if he was the sole owner of the property to the exclusion of the appellant and did so with the clear intention to possess the property as the sole owner.

Hearsay

[41] Mr Wildman alleged that the learned trial judge relied on hearsay evidence in arriving at her decision. The hearsay evidence that was alleged to have been admitted was:

a. that Ms Carr gave evidence of the fact that the deceased, her common law husband, informed her he purchased the property as joint tenants with the appellant

b. that Ms Carr gave evidence that she believed the deceased made all the mortgage payments from his salary

c. that Ms Carr gave evidence that the deceased made all the mortgage payments and paid the property taxes which the learned trial judge relied on to arrive at the conclusion that the deceased handled all the financial affairs in relation to the property.

[42] In support of this position, Mr Wildman cited the case of **Kearly**. The appellant in the case of **Kearly** had been charged with possession of a controlled substance with intent to supply. There had been several telephone calls made, in the absence of the appellant in relation to the drugs. The House of Lords was asked to decide whether these telephone calls were admissible against the appellant. Lord Bridge of Harwich at page 243 of the judgment stated that:

> "When the only relevance of the words spoken lies in their implied assertion that the defendant is a supplier of drugs, must this equally be excluded as hearsay? This, I believe, is the central question on which this appeal turns. Is a distinction to be drawn for the purposes of the hearsay rule between express and implied assertions? If the words coupled with any associated action of a person not called as a witness are relevant solely as impliedly asserting a relevant fact, may evidence of those words and associated actions be given notwithstanding that an express assertion by that person of the same fact would only have been admissible if he had been called as a witness? Unless we can answer that question in the affirmative, I think we are bound to answer the certified question in the negative."

[43] Counsel Miss White submitted that the statements alluded to by Mr Wildman did not amount to hearsay. However, in the event that they could be classified as such, she urged the court to adopt the English common law position referred to by Hayton J in **Guyana Bank for Trade and Industry v Desiree Alleyne** at para. [59] of his judgment. This reads:

> "A failure to make a sufficient objection to evidence which is incompetent waives .... any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it may have probative value."

At para. [60], Hayton J concluded:

> "Thus, unless clearly prohibited by some exceptional statute, counsel in civil cases are free to choose to consent (or not object) to the admission of evidence that would be inadmissible if objection were taken and, if they so choose, the evidence must be given its full probative value and no objection to its admission may be taken on appeal."

[44] Counsel for the appellant had objected to the admission of hearsay evidence at the time of trial and as such, unlike the case of **Guyana Bank for Trade and Industry v Desiree Alleyne**, this court would have to examine whether hearsay evidence had been admitted, and whether it impacted the decision of the learned trial judge.

[45] Firstly, Ms Carr swore to an affidavit, filed on 28 July 2020, in which she stated that she was informed by the deceased that he purchased the property as joint tenants with the appellant. It was further noted that under cross examination, Ms Carr indicated that she had gotten information concerning the title from the Administrator General's Department and went on to state that the title, which she had seen, indicated that the title holders were the deceased and the appellant.

[46] Ms Carr was the third witness to give evidence at the trial. At the time of giving her evidence the title for the property had not yet been admitted into evidence. Her evidence, concerning who had purchased the property, based on what she had been told, would as such amount to hearsay. In addition, the evidence of the respondent as to what she had seen on the title, prior to it being admitted into evidence would also amount to hearsay as she would be giving evidence of the contents of a document not in evidence. This evidence by Ms Carr would not fall under any of the exceptions to the hearsay rule. Despite being hearsay, its admission could not be said to be prejudicial as the title was later admitted into evidence and the ownership of the property was placed before the learned trial judge.

[47] The second bit of hearsay evidence that was alluded to by Mr Wildman concerned the mortgage payments in respect of the property. Ms Carr in her affidavit, filed on 28 July 2020, averred at para. 9 that "…I am aware that Everton Lynch made all mortgage

payments and I recall seeing payments coming out of his salary to the Correctional Services Credit Union, and it showed on his pay slips… I know this, as Everton Lynch informed me that he had finished paying for the mortgage on the house….". In cross – examination, Ms Carr was questioned as to her knowledge of the payment of the mortgage, and she gave evidence that she did not see anything about the mortgage until after the deceased's death. However, she produced the salary slips of the deceased in support of her position that he paid the mortgage.

[48] Ms Carr's evidence as to whether the deceased made mortgage payments could not be classified as hearsay as she gave evidence of mortgage payments being recorded as deductions on the deceased's salary slips.. She could give that evidence since she produced the salary slips as evidence in support of this position. The only section of Ms Carr's evidence as to the mortgage payment made by the deceased that is objectionable was Ms Carr's statement that "Everton Lynch informed me that he had finished paying for the mortgage on the house". This would amount to hearsay, and it does not fall under any of the exceptions to the hearsay rule.

[49] In the absence of the evidence of Ms Carr indicating that the deceased made all the mortgage payments, the learned trial judge still had adequate evidence from which she could arrive at the same conclusion. The only evidence presented to the learned trial judge concerning the payment of the mortgage for the property came from Ms Carr who produced the deceased's salary slips. It is noted that the appellant did not refute the position that the deceased made the mortgage payments, but merely made the assertion that she and the deceased had an arrangement for him to "secure the loan" while she "furnish the house and fix it up…". The learned trial judge had cogent evidence from which she could draw the conclusion that it was the deceased who made all the mortgage payments.

[50] The final portion of evidence Mr Wildman submitted amounted to hearsay was Ms Carr's evidence which led to the conclusion of the learned trial judge that the deceased

handled all the financial affairs related to the property. This conclusion was seen at para. [25] of the learned trial judge's judgment, where she said:

> "[25] The claimant's evidence in support of the intention to possess rests with Ms. Carr. It was her evidence that Everton Lynch handled all the financial affairs in relation to the property. He made all the mortgage payments and he paid the property taxes. The evidence was supported by the provision of two pay slips which were admitted in evidence as Exhibit 4 (a) and (b)…."

[51] This court has already dealt with the mortgage payments and has found that the learned trial judge was correct in finding the deceased made the mortgage payments. It was also noted that Ms Carr, at para. 12 of her affidavit filed on 7 June 2021 stated, "[t]hat Everton, as far as I know, paid the property taxes for his house at 2B Rivoli Avenue; but he used to pay it in periods meaning several years at one time….". As was previously stated under cross-examination, Ms Carr, when asked how the taxes were paid, maintained that it was the deceased who paid them and indicated that she saw tax receipts in the deceased's name and none in the name of the appellant. Ms Carr was able to give the sum paid for taxes as being "$2,000 and something dollars". She also gave evidence of the deceased paying the electricity bill, which was in his name, and, denied seeing moneys being sent from abroad to pay these bills.

[52] The evidence of Ms Carr was that she was aware of the deceased paying the bills for the property and could give details as to how and under what circumstances they were paid. Ms Carr, unfortunately, was allowed to again give hearsay evidence concerning the sum paid for taxes. This would again amount to Ms Carr giving evidence as to the contents of documents not presented to the Court. This, however, did not detract from the evidence that she personally was aware that the deceased paid the electricity bills and the taxes for the property. This is evidence that the learned trial judge could take into consideration in arriving at her conclusion.

[53] The learned trial judge considered whether the appellant paid all the utility bills and taxes for the property at para. [27] and concluded:

> "Ms. Holness in an effort to refute the case for the claimant, averred that she paid all the utility bills for the property and that she paid taxes as well. She exhibited two receipts from the Tax Administration of Jamaica. Both receipts were dated in the year 2020 and covered the tax period 2017-2020. She also exhibited two notices to quit which were also dated in 2020. She did not provide any documentary proof of utility payments. I did not accept her evidence that she continued to pay the bills for the house following her discovery of the presence of Ms. Carr on her first visit to the property in 2006. The manner in which she was unceremoniously removed from the property on those two occasions mentioned, as well as the fact that she indicated she could not stay at the property due to the presence of Ms. Carr, suggests that she would not pay any sums to support another woman living in her household."

[54] The learned trial judge, based on this evidence, was at liberty to conclude that "Everton Lynch handled all the financial affairs in relation to the property". Her conclusion did not emanate from any implied assertions by a third party not called as a witness as put by Mr Wildman, but instead from Ms Carr's own personal knowledge of some important facts.

Opinion Evidence

[55] Mr Wildman objected to what he referred to as the opinion evidence given by Ms Shelly-Ann Wade. Ms Wade had averred in her affidavit at paras. 6, 8, 11 and 12 that:

> "6. I remember [this] because I visited with Auntie Donna and Everton to help take care of the baby on some weekends after Toniann [was] born…. I also stayed with them for a few about two months in the summer of 2005. I noticed that Everton treated the house as his house and he and my Auntie Donna took care of the house together.
>
> …

8. That I went back to live with my Auntie Donna for about 1 year between 2018 to 2019; and I was there when Everton died.

11. That I never saw the Defendant living at, or visiting the property located at 2B Rivoli Avenue, Spanish Town, St. Catherine during the time Everton Lynch and my Auntie Donna lived at the property with their children: neither did I see the Defendant or anyone other than Everton Lynch exercise any rights of ownership over the said property during 2004 when I first stayed at the house, and June 2019 when Everton Lynch died.

12. That Everton Lynch lived at the property with Ms. Donna Carr from 2004 to the time of his death; and he occupied the said property and exercised all rights of ownership to 2B Rivoli Avenue for all the time he lived there. That as far as I am aware and saw, Everton Lynch's occupation and possession of the said property was open, undisturbed, exclusive and intentional during this time."

[56] It is accepted that Ms Wade gave evidence beyond her personal knowledge when she asserted that the deceased exercised exclusive rights of ownership to the property for the 15 years he lived there. Ms Wade's evidence, however, on the deceased's occupation and possession of the property during the period she resided there ie:

(a) in 2004 (when Toniann was born),

(b) two months in the summer of 2005, and

(c) the one-year period between 2018 and 2019

could be considered, as this evidence was garnered from her personal observation. She was merely giving evidence of what she perceived at the time she lived there. The learned trial judge, in her discretion, could have placed whatever weight she wanted on Ms Wade's reported observations. Having reviewed the contested evidence highlighted by Mr Wildman, I find the contention to be without merit.

Conclusion

[57] After all the facts of the case are considered within the context of the legal principles applicable to adverse possession, the learned trial judge was correct in concluding that the appellant's interest in the property had been extinguished. Therefore, I find no reason to disturb the findings of the learned trial judge.

[58] Accordingly, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.
2. Costs to the respondent to be agreed or taxed.