Case Name:

Luke v. Alexander

Between
Hector Caesar Luke a.k.a. Hector Gregorio Caesar as Personal Representative of Phillip Luke a.k.a. Phillip M.B. Luke, claimant, and
Bernard Alexander, defendant

[2002] E.C.S.C.J. No. 88
Claim No. DOMHCV 2001/0161

Eastern Caribbean Supreme Court (High Court of Justice)
(Commonwealth of Dominica)
Rawlins J.

Heard: October 18, 23, 2002.
Judgment: October 28, 2002.
(23 paras.)

Civil Procedure - Judgment in Default - Claimant granted possession of land - Defendant applies to stay execution of and to set aside the Judgment - whether requirements met - Parts 1 and 13.3 of the Eastern Caribbean Supreme Court Rules 2000 - Limitation of action - adverse possession - possession by oral licence - section 2 of the Real Property Limitation Act, Cap. 54:07.

Appearances:

Francine Baron-Royer and Hazel Johnson, for the claimant.
Lennox Lawrence, for the defendant.

Judgment

¶ 1 **RAWLINS J.**:— This Judgment will first set out the background of this case. It will then consider the legal principles that are applicable and arrive at the findings, which will then culminate in the Order.

The Background

¶ 2 The action herein was instituted by way of a Writ of Summons, generally endorsed, on the 18th day of April 2001. The Statement of Claim was issued on even date. The Claimant thereby sought possession of eight (8) acres of land from the Defendant, damages in the sum of $35,306.24, damages for trespass and injunctive relief restraining the Defendant from entering the land. They were served on the Defendant on the 27th day of April 2001.

¶ 3 The Claimant states, in the Statement of Claim, that he is the Personal Representative of the estate of Phillip Luke, deceased. He states that at the time of his death, Luke was the owner in possession of 247.429 acres of land at Harris Saltoun Estate, Dominica. On the 5th day of December 1991, he obtained probate of the estate of Luke who had died on the 19th day of July 1985. The land at Harris Saltoun Estate is now registered in the name of the Claimant, as the Personal Representative of Luke, in the Register Book of Titles C12 folio 91. It states that the Defendant wrongfully entered and has stayed in possession of approximately eight (8) acres of this land in 1992, and cut down timber to the value of $35,306.24.

¶ 4 A Summons for Judgment in Default of Appearance was issued on behalf of the Claimant on the 21st day of May 2001. The Summons was served on the Defendant on the 19th day of June 2001. The Summons came before Cenac, J. on the 4th day of July 2001. The Order that issued ordered the Defendant to give up possession of the land. He was also ordered to pay the sum of $35,306.34 to the Claimant for damage to the said land and damages to be assessed. It granted injunctive relief against the Defendant restraining him from remaining and/or entering on the said land. An Amended Order dated the 17th day of May 2002 and filed on the 28th day of May 2002 added a penal notice. This Order was served on the Defendant on the 12th day of July 2002. All indications are that the Defendant did not appear by Counsel or in person for the hearings on the 4th day of July 2001 or the 17th day of May 2002.

¶ 5 The Defendant had issued a Summons to set aside the Judgment in Default and for leave to enter appearance on the 20th day of July 2001. This was just about 2 weeks after the issue of the first Order. This was made by virtue of Order 3 rule 3 and Order 19 rule 9 of the Eastern Caribbean Supreme Court Rules, 1970. Mr. Lawrence, as Solicitor for the Defendant, deposed thereto an Affidavit of even date. In Paragraph 6, he deposed that a Draft Defence was served with the Application. He had in fact entered appearance on that said date. The Summons was never heard. However, on the 9th day of August 2001, the Defendant filed a Draft Defence and Counterclaim. It was served on the Claimant on the 17th day of September 2001. It ought properly to have been lodged by the Court Office and, subsequently, a Defence should only have been filed with the consent of the Claimant or with the leave of the Court.

¶ 6 This case first came before me on Friday the 18th day of October 2002. This was on the hearing of an Application on behalf of the Defendant for the stay of execution of an Order of the Court and for leave to enter a Defence out of time. The Application that was filed on the 7th day of August 2002 requested the Court to hear and determine a similar Application that the Defendant had filed on the 20th day of July 2001. The stated grounds for the Application were, inter alia, that the Application of the 20th day of July 2001 had not been heard and the Defendant has a good and substantial defence. I Ordered the Parties to file and serve Written Submissions on the issue whether the proposed Defence is viable, so as to afford a real prospect of successfully defending the claim, by the 23rd day of October 2002. On this latter date, decision was reserved.

Should the Application by the Defendant be Granted?

¶ 7 Whether the Application of the Defendant succeeds, so that the Judgment in Default be stayed and set aside and the Defendant be permitted to file his Defence depends, primarily, upon whether he has a real prospect of successfully defending the Claim on the basis of the proposed Defence. The hurdles that he has to surmount are set out in Part 13.3(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (hereinafter referred to as "CPR 2000"). It sets 3 conditions, which are

conjunctive, that are to be satisfied if the Court is to be moved to exercise its discretion to set aside a Judgment entered in Default. The first condition is that the Application by the Defendant should be made as soon as reasonably practicable after he finds out that judgment has been entered. In other words, there should be no unreasonable delay. Second, he should proffer a good explanation for the failure to file acknowledgement or Defence. Third, he must have a real prospect of defending the claim.

¶ 8 The Defendant submits that he has satisfied the first requirements because he first made application to set aside the judgment within about 2 weeks. Solicitors for the Claimant submit that the Defendant had defaulted on the first requirement. This was because notwithstanding that the Defendant had filed the first Summons early, no date had been inserted in the Summons. Additionally, the Defendant did not actively pursue the case for over one year.

¶ 9 On the second requirement, in his Affidavit in support of the Application that was filed herein on the 20th day of July 2002, Solicitor for the Defendant stated that he was retained for the Defendant in June 2001. He had requested the Defendant to obtain certain specific information with respect to the crop damage and his cultivation on the land, since these were necessary for the filing of a Defence. The deponent stated that he left the jurisdiction on or about the 26th day of June 2001. He was informed that the Summons to Enter Judgment and the Order of 4th July 2001 consequent thereon were served on the Defendant after his return to the island on the 8th day of July 2001. He stated that the filing of an Appearance was due to administrative oversight while the delay in the filing of the Defence was due to his absence from the jurisdiction.

¶ 10 In his Affidavit in support of the Application that was filed on his behalf on the 7th day of August 2002, the Defendant deposed that when he received the initiating Summons, he had retained another Solicitor, who later handed the case over to the present Solicitor. He deposed that the first application that was issued on his behalf had not been determined. On the other hand, Counsel for the Claimant submits that the Defendant had defaulted on the second requirement. In this regard they noted that Counsel for the Defendant was retained after the time that was limited for entering appearance and the filing of a Defence had expired. They are of the view that, in the circumstances, he could have, inter alia, requested the consent of the Claimant to the late filing of the documents.

¶ 11 With respect to the question whether there was a real prospect of successfully defending the claim, the Defendant said that he had been in occupation of the land for some 15 years. This made the claim by the Claimant statute barred by virtue of section 2 of the Real Property Limitation Act, Cap. 54:07 of the Revised Laws of Dominica, 1990. However, Counsel for the Claimant submits that the Defendant had also defaulted on this third requirement because the Defendant had encroached upon the disputed land in 1992.

Additionally, even on the facts as set out in the Draft Defence and Counterclaim, the Defendant cannot bring his case within section 2 of the Real Property Limitation Act.

¶ 12 I indicated to the Parties that, in my view, the contestable issue was whether the Defendant has a viable Defence so as to have a real prospect of successfully defending the claim. This was because I took the view that the delay by the Claimant in filing the Application was not unreasonable. Second, although the explanation that was given with respect to the second requirement is not totally convincing, it is my view that Part 13.3(1) of CPR 2000 must be interpreted in the context of the overriding objective of CPR 2000 contained in Part 1 of CPR 2000. This enjoins the Court to deal with cases justly. Part 1.2(b) requires the Court to seek to give effect to the overriding objective when

it interprets any rule. The result, I think, is that where there is a viable defence, if delay is not unreasonably inordinate, or the explanation for failure to file is not totally inadequate or unfounded, the Court should set aside judgment in default and permit a Defendant to acknowledge service of a Claim or to file and serve a Defence out of time. I therefore ordered the Parties to file written submissions on the issue whether the Draft Defence and Counterclaim affords the Defendant a real prospect of successfully defending the Claim by Wednesday the 23rd day of July 2002. The matter was adjourned for further hearing on that date.

A Real Prospect of Successfully Defending the Claim?

¶ 13 We have seen that the main thrust of the issue under this head is whether, on the proposed Defence, the Defendant has set up a viable Defence that the Claim is statute barred by virtue of section 2 of the Real Property Limitation Act. This section provides:

> "After the commencement of this Act, no person shall make an entry or distress 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 the entry or distress, or to bring the action or suit has first accrued to some person through whom he claims; or if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same."

¶ 14 This provision is not notable for elegance or clarity. It is, however, the foundation for the notion of "adverse possession", which the English Court of Appeal referred to in Hughes v. Griffin [1969] 1 All E.R. 460, page 463 D, as being "of very ancient lineage". There are similar provisions in the jurisdictions of the Commonwealth Caribbean. They have their progeny in English provisions that are contained, for example, in sections 4(3), 5(3) and 10 of the Limitation Act, 1939 (U.K.). Careful research might show that, proportionately, the provisions are now more regularly the subjects of litigation in Commonwealth Caribbean countries with our history of migration, than in England. The legal principles on these provisions are well settled and may be found, for example, in cases such as Powell v. McFarlane and Another (1977) 38 P & C.R. 452, at pages 470-472; Edwards v. Brathwaite (1978) 32 W.I.R. 85, at pages 89-90 (High Court of Barbados); and in the Judgments of the Court of Appeal of the Eastern Caribbean in Pollard v. Dick, 2 OECS Reports, 242-243 and Roslyn Burton v. Bertillia Christopher (Dominica, 16 March 2001).

¶ 15 What are the basic principles which they state for the purposes of this case? The Court will, prima facie, ascribe possession to the paper owner of land or a person who can establish title through the paper owner. The court can only ascribe possession to a person who does not have paper title if that person has factual possession and animus possidendi, the requisite intention to possess the land. Factual or physical possession means a single and conclusive possession, or exclusive physical control of the land. The acts that constitute a sufficient degree of exclusive physical control will depend upon the circumstances, particularly the nature of the land and the manner in which land of that nature is commonly used and enjoyed. The animus possidendi, has been described as the intention to possess the land to the exclusion of all other persons, including the owner with the paper title, so far is reasonable and so far as the process of law will allow. It is against these principles that the Draft Defence and Counterclaim must now be considered, in order to determine whether the Defendant has a real prospect of successfully defending the Claim herein.

The Circumstances revealed in the Defence

¶ 16 I have had some difficulty determining whether the land to which the Defendant refers in his Defence is the same land for which the Judgment in Default was entered on the 4th day of July 2001. In fact, in their Submissions that were filed on the 10th day of October 2002, Solicitors for the Claimant pointed out that the land to which the Defence and Counterclaim speaks is not the disputed land for which Judgment was entered by that Order. As far as they are aware, the Defence speaks to another portion of land that was owned by one Alexander John Baptiste, a.k.a. Camille Clifton, the uncle of the Defendant, which adjoins the disputed land.

¶ 17 Indeed, Paragraphs 6, 8 and 9 of the Draft Defence and Counterclaim states that the uncle of the Defendant placed the Defendant in possession of 6.312 acres of land at Harris Saltoun Estate in or about 1987. The Defendant entered into possession when his uncle advised him that the property was an inter vivos gift, which he intended to confirm in his Will. He (the Defendant) cultivated various agricultural crops and constructed a wooden house and kitchen on the land. Paragraph 7 states that in 1988, the land was registered in the Register Book of Titles L1 Folio 29. It does not state in whose name it was registered.

¶ 18 Paragraph 10 of the Draft Defence and Counterclaim states that in September 1991, Fanny Benjamin, a stepdaughter of the uncle of the Defendant, sought to remove the Defendant from the land. In the circumstances, the cultivation of the Defendant was assessed and valued at $72,000.00. Paragraph 11 is quite interesting. It states:

> "In consequence of the failure of both Alexander John Baptiste a.k.a. Camille Clifton and of Fanny Benjamin to compensate the Defendant for his cultivation and interest in the said property the Defendant continued in undisturbed possession of the said property, cultivated the same and remained in possession thereof and was in such possession at the date of the filing of the suit herein."

¶ 19 Paragraph 12 of the Draft Defence and Counterclaim states that in May to July 2001, the Claimant, his servants or agents trespassed upon the land, damaged the Defendant's crops and commenced the construction of a road across the land. It continues in the Paragraphs following to state that the Defendant suffered loss and damage as a result of this entry, and counterclaimed, inter alia, for the sum of $124,080.00.

¶ 20 If, as it appears, the Defence and Counterclaim is not speaking to the land that is the subject of the Order of the 4th day of July 2001, it cannot constitute any Defence whatever to the claim in this case. If it is intended to speak to the disputed land, it does not provide the basis on which the Defendant may have any chance of successfully defending the claim, by virtue of adverse possession, for 3 reasons. First, he would have entered into and continued in possession as a licensee. As Counsel for the Claimant submit, on the authority of Edwards v. Brathwaite and Hughes v. Griffin and Another, supra, no cause of action could have accrued to the Defendant. This is because his possession of the land is permissive and cannot constitute adverse possession. Second, the Draft Defence and Counterclaim discloses that the licence was terminated when Fanny Benjamin tried to remove the Defendant from the land in 1991. It does not indicate that he protested against the entry on the basis that he was entitled to exclusive possession. Rather, it states that he has stayed in possession because neither Fanny Benjamin nor his uncle have paid him the estimated value of the crops lost. The Draft Defence and Counterclaim discloses, at best, that the Defendant was in undisturbed possession for about 10 years from 1991 to 2001. The claim is not thereby statute barred.

The Claimant, who is claiming under the title of the deceased owner of the land, is not therefore precluded from instituting a claim for possession.

Result and Order

¶ 21 Premised on the foregoing, the Defendant fails on his applications herein to stay the execution of and to set aside the Order of the Court dated the 4th day of July 2001, as amended by the Order of the 17th day of May 2002, and cannot be granted leave to file Defence and Counterclaim out of time. I note, however, that the sum of $35,080.24 in the Claim was not itemized, save for the indication in Paragraph 5 of the Statement of Claim that the Defendant had cut down timber to that value on the land. In my view, the value of any timber so cut should be the subject of assessment under Paragraph 3 of the Order of the 4th day of July 2001. I shall vary that Order accordingly.

¶ 22 The Order of this Court is therefore as follows:

i. The Summons filed herein on the 20th day of July 2001 and the Notice of Application filed on the 16th day of May 2002 are both dismissed.

ii. The Order dated the 4th day of July 2001 that was entered and filed herein on the 10th day of July 2001 is varied by deleting Paragraph 2 thereof, and renumbering Paragraphs 3 and 4 as Paragraphs 2 and 3, respectively.

iii. The Defendant shall pay the costs of the Claimant for and incidental to the Claim herein in the sum of $1,500.00.

¶ 23 It will be remiss of me not to commend the industry and research of Counsel in this matter and, in particular, Counsel for the Claimant.

RAWLINS J.

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