

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 50/88

BEFORE: The Hon. Mr. Justice Campbell, J.A.  
The Hon. Mr. Justice Wright, J.A.  
The Hon. Mr. Justice Gordon, J.A. (Ag.)

BETWEEN

KATHLEEN MORRISON  
ANDREW MORRISON  
JOY MORRISON

APPELLANTS

AND

HERMA LEMOND

RESPONDENT

Miss Nancy Anderson for Appellants

Arthur Kitchen for Respondent

22nd February, 1989

CAMPBELL, J.A.

The claim by the respondent in the action in the Supreme Court is principally for a Declaration that she is the fee simple owner and the person entitled to possession of land situate at Moneague in the parish of Saint Ann. Following from the declaration being sought, the respondent seeks relief by way of injunction and damages for trespass.

On the basis of her claim, the respondent sought an interlocutory injunction against the appellants.

The respondent in two affidavits in support of her Summons for interlocutory injunction deposed that she is a beneficiary of the land in issue under the will of one Eric Hemming who died on or about January 30, 1984 and that she had assumed and taken sole possession of the aforesaid land from and

since that date. She conceded that the appellants are owners and/or occupiers of adjoining land but her claim is that they had encroached on her land by taking possession of about one half ( $\frac{1}{2}$ ) acre thereof.

Photocopy of an admittedly unprobated will purportedly executed by Eric Hemming on 23rd April, 1983 was exhibited by the respondent to her affidavit in support of her claim to the land on the basis of which she sought the injunction. In that will there exists a devise to her of the remainder of the Testator's land after the expiry of a life interest given to the Testator's wife. The respondent however deponed that the Testator's wife died on 24th September, 1984. The first appellant on behalf of herself and the other appellants by her defence and counterclaim which is repeated in her affidavit in opposition to the grant of the interlocutory injunction, asserts an equitable fee simple ownership of the area of land on which admittedly they are in possession. She claims through a memorandum of sale dated 3rd June, 1980 executed by Eric Hemming to her husband which, with a subsequent document purporting to be assignment to her by her husband, she has exhibited to her affidavit.

On these facts gleaned from the affidavits and on the assumption that the will is valid, the respondent would at best be an inchoate equitable owner with the executors named in the will of Eric Hemming being the legal owners. Only after probate has been granted of the will would her inchoate estate and/or interest in the land become certain and even then it would, until an assent is given by the executors, remain an equitable estate or interest. To the contrary the 1st appellant claims an equitable interest which is definite and presently existing in some part of the land in issue by virtue of the memorandum of sale dated 3rd June, 1980 which is confirmed in the will of Eric Hemming by the latter granting to his wife the benefit of the outstanding loan on mortgage owing by the 1st appellant's husband who is the purchaser/mortgagor under the aforesaid memorandum of sale dated 3rd June, 1980.

Thus, the learned Master was faced with a situation in which the respondent who did not have an equitable estate which was certain, much less a legal estate, was seeking an interlocutory injunction against a defendant who was asserting a prima facie equitable ownership in a part of the land in issue.

In such circumstances no interlocutory injunction could properly be ordered against the 1st appellant because there was no existing estate or interest, legal or equitable, vested in the respondent in support and protection of which the ~~interlocutory~~ order was being issued.

For these reasons the learned Master erred on the threshold principle on which an interlocutory order of injunction is granted. The appeal is accordingly allowed and the interlocutory order of injunction is set aside with costs in this court and the court below in favour of the appellants to be taxed if not agreed.