NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL
MOTION NO. 4/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN	LUCILDA MURRAY	
AND	HOWARD MURRAY	APPLICANTS
AND	KARL A. W. SHERVINGTON	RESPONDENT

Raphael Codlin for the applicants

Nancy Anderson and Michelle Brown
for the respondent, instructed by Crafton S. Miller & Company

February 15 and March 26, 1999

PANTON, J.A. (Ag.):

On February 2, 1999, Walker, J. dismissed a summons that had been taken out by the applicants in which they sought leave "to file and deliver a defence" to the respondent's action. In dismissing the summons, he refused leave to appeal. Before us, the applicants now seek that which was denied them in the court below.

In order to fully appreciate what was before the learned judge, we requested, and received, a copy of the statement of claim which, surprisingly, had not been included in the record. It discloses that the respondent is seeking an injunction against the applicants whom he alleges "are and were ... trespassers" on premises at 61 Main Street, May Pen, owned by him. The nature of the trespass is the erection of a shack which is "partially in the right of way and partially on the plaintiff's land comprised in certificate of title at Volume 965 Folio 37."

The summons was supported by two affidavits filed by the applicants. In his affidavit, the second-named applicant made the following statements:

> (1) "the building which the plaintiff is seeking to have me demolish is partially erected on a road which is owned by my mother and which she has been using for well over twenty years" (para. 10);
>
> (2) "the rest of the building is erected on land owned by my mother" (para. 11); and
>
> (3) "I have plans, diagrams and other documents to show clearly that the road belongs to my mother" (para. 13).

The first-named applicant, in paragraph 4 of his affidavit, states, "I have documents to show that the land is mine."

From the statement of claim and the affidavits, it is clear that both sides are asserting ownership. In the case of the respondent, the claim is buttressed by a registered title. So far as the applicants are concerned, they have been content to refer to plans, diagrams and "documents".

No formal note was made of the learned judge's reasons for judgment. However, from the affidavits filed in respect of the Notice of Motion before us, it appears that the learned judge said that the registered title in favour of the respondent was indefeasible unless fraud is alleged and proven; there being no such allegation, he concluded that the defence being put forward by the applicants had no chance of success.

Mr. Codlin, on behalf of the applicants, has challenged the reasoning of the learned judge and has submitted that there was ample material in the affidavits which raised triable issues.

The Registration of Titles Act is relevant in the determination of this matter. Section 68 reads in part:

> "... 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 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."]Emphasis added]

Section 70 of the said Act reads in part:

> "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:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land..." [Emphasis added]

The effect of these provisions is that a registered title is indefeasible, but for the qualifications set out in the Act. In *Miguel Thomas and Merlene Lewis (Executors Estate Ethline Dayes) v. William and Kathleen Johnson,* S.C.C.A. 85/94 delivered on June 19, 1995, Carey, J.A. said this:

> "The doctrine of the indefeasibility of title which is enshrined in the Torrens system of registration is a fundamental principle. It describes the immunity from attack by diverse claims to land or the interest in respect of which the proprietor is registered."

A thorough examination of the affidavits presented to the learned trial judge does not reveal any indication of there being a serious challenge to

the validity of the respondent's title. Indeed, there does not appear to be any issue whatsoever to be tried. As a result, I am of the view that the learned judge was correct when he dismissed the summons on the basis of the strength of the respondent's registered title, and the absence of the appearance of a case for the defence.

In the circumstances, I would dismiss the motion for leave to appeal, with costs to the respondent to be agreed or taxed.

DOWNER, J.A.:

I agree.

HARRISON, J.A.:

I also agree.