

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 4/73

BEFORE: THE HON. MR. JUSTICE HENRY J.A. - Presiding  
THE HON. MR. JUSTICE KEIR J.A.  
THE HON. MR. JUSTICE ROBERTSON J.A.

BETWEEN: ARCHIBALD NEWLAND - PLAINTIFFS/RESPONDENTS  
JULIAN NEWLAND

AND: JOSEPH WALKER - DEFENDANTS/APPELLANTS  
VIRGINIA BROWN

Mr. Berthan Macaulay, Q.C., & Mrs. Macaulay  
for Defendants/Respondents

Mr. Norman Hill and Miss Francis for  
Plaintiffs/Respondents

April 5 & 6 and May 5, 1978

HENRY J.A.

This is an appeal from a judgment of Marsh J., adjudging that the Defendants by fraud obtained the issue of a registered title for premises 62 Molyne's Road in St. Andrew and ordering consequentially that the Defendants deliver the title to the Registrar of Titles for cancellation, account to "the owners of the land as eventually determined" for rent received during the existence of the title and pay the costs of the action. There is also a Respondents' notice seeking a variation of the judgment to include the following:-

- " (i) A declaration that William Newland late of 19 Seaward Pen Road in the parish of St. Andrew was at the time of his death on or about the 12th day of March, 1947, the sole owner of an estate in fee simple absolute in possession of the parcel of land situate and known as 62 Molyne's Road in the parish of St. Andrew and now registered at Volume 1053 Folio 715 of the Register Book of Titles.
- (ii) A declaration that the said William Newland deceased died intestate as to the parcel of land situate and known as 62 Molyne's Road as aforesaid which land formed part of his residuary estate.
- (iii) A declaration that the first named Plaintiff Archibald Newland and Thomas Newland deceased of Christobel, Canal Zone, Panama, as the only lawful children of the said William Newland deceased and

as the only persons entitled to the residuary estate of the said William Newland deceased are entitled to an estate in fee simple absolute in possession as tenants in Common in equal shares of the said parcel of land".

A number of grounds of appeal were filed but in the event only two were argued. The first is that assuming all the findings of fact by the learned trial judge to be correct (other than the finding of fraud) his conclusion in law cannot be supported. The second is that the finding of fraud is not supported by the evidence. Insofar as the first ground is concerned criticism is directed at two findings of the learned trial judge, namely, the finding that "William Newland acquired an interest in that one acre from 1930" and the finding that "the Plaintiffs are now beneficially entitled to an interest in William Newland's estate". Criticism of the first finding is based on the assumption that this finding indicates that in 1930 William Newland had acquired the fee simple. We do not think that this is so. The learned trial judge's finding was that "on a balance of probabilities, the Plaintiffs' evidence in this regard is to be accepted that William Newland acquired an interest in that one acre from 1930". Neither in the pleadings nor in the evidence nor in the presentation of the case was it suggested that William Newland had acquired the fee simple in 1930. The Plaintiffs' case was that William Newland was in possession of the land from 1930 until the time of his death, they adduced evidence in support of this and in our view the finding of the learned trial judge indicates no more than an acceptance of that evidence. Criticism of the second finding is in our view equally unjustified. William Newland had in his will named his sons Archibald Newland and Thomas Newland as principal beneficiaries. That will contained no residuary clause. Thomas Newland survived his father but died intestate in 1963, leaving his lawful child Julian Newland. It is clear that the Plaintiffs Archibald Newland and Julian Newland would therefore have an interest in the estate of William Newland and the learned trial judge correctly so found. The land which is the subject of the action however, although mentioned in the will of William Newland was not disposed of by that will. Nevertheless, the Plaintiffs' claim as disclosed by the pleadings is based

on a devise of the land to Archibald Newland and Thomas Newland not on their interest under a partial intestacy. It is presumably for this reason that the learned trial judge stated that "on the pleadings the extent of that interest (in William Newland's estate) does not call for decision in this action". For the same reason it would not be proper for this court to vary the judgment to make the last declaration sought on the Respondent's notice.

Insofar as the question of fraud is concerned the evidence discloses the following facts not in dispute. In 1942 Jane Adams, the owner of premises 60½ Molyne Road applied to the Registrar of Titles to have the premises entered in the Register Book of Titles. In her application she stated that 62 Molyne Road was owned by William Newland and occupied by Ernest Dawkins. In support of her application she exhibited a survey diagram indicating William Newland as the owner of 62 Molyne Road. In 1967 Joseph Walker applied to have premises 62 Molyne Road entered in the Register Book of Titles. In that application he stated that he was 66 years old, that the land had from his childhood days been in the possession of his aunt Jane Adams and after her death had been in his possession. In support of his application he submitted a certificate from the Collector of Taxes indicating that the name of the owner appearing on the tax roll was William Newland. It is true that payment of taxes is not proof of ownership, but the certificate must be considered in conjunction with Mrs. Adams' declaration. Mr. Walker's evidence is that in 1942 Jane Adams was a registered pauper, she was his aunt and he looked after her affairs including the application to the Registrar of Titles in respect of 60½ Molyne Road. Indeed he submitted a declaration in support of that application. It is reasonable to conclude that he was aware of the contents of that application. He was aware that Noel Phillips collected rent from tenants on 62 Molyne Road before the death of Jane Adams and that after her death other unnamed persons collected rent. Noel Phillips was William Newland's executor. None of these persons were collecting either on behalf of Jane Adams or on behalf of Joseph Walker. He himself collected none. Nevertheless, in his application he stated that he and Jane Adams had been in peaceful and undisturbed possession of the land.

172

It seems clear that in his application he made statements which he knew to be false and that he made them deliberately for the purpose of obtaining a registered title to the land and thereby depriving the Plaintiffs of an unregistered right or interest. It is true that it cannot be determined on ~~the~~ evidence whether the Plaintiffs had a fee simple interest in the land but there is evidence that they were in possession of it and Joseph Walker in his application failed to disclose this. In our view the learned trial judge was fully justified in his finding of fraud by Joseph Walker. The finding that "Joseph Walker must be regarded as having been the agent of the co-owner in title Virginia Brown who is accordingly tainted with his fraud" is not supportable but the effect of Section 161 of the Registration of Titles Law would be to preclude Virginia Brown from acquiring a registered title as joint tenant with Joseph Walker. For these reasons the appeal of the defendants fails.

In so far as the Respondents' notice is concerned we have already indicated that the third declaration sought cannot be granted. The first declaration sought is that William Newland was at the time of his death the owner in fee simple of the land. In the absence of any evidence of purchase by William Newland that declaration can be made only on the basis of adverse possession or of long possession. In order to establish adverse possession however it is necessary for the Plaintiffs to adduce evidence of the state of the title at the time that the period of adverse possession commenced. Otherwise it is impossible to say that the claims of all the persons entitled to the land when the adverse possession commenced have been barred. There is no such evidence. Long possession would only prove sufficient after 40 years (vide Section 2 of the Vendors and Purchasers Act) and there is no evidence that William Newland was in possession for 40 years prior to his death in 1947. For these reasons the first declaration sought can also not be granted. We do not consider it competent for this court to consider whether long possession in William Newland and his successors has been established so as to confer on the Plaintiffs a right to the fee simple because this has neither been pleaded in the action nor sought in the Respondents' notice.

173

In the circumstances the appeal will be dismissed with costs to the Respondents to be agreed or taxed. The Respondents must pay to the Appellants such costs (if any) as were occasioned by the Respondents' notice, also to be agreed or taxed.