JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO. 10/98

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

BETWEEN CLARENCE POWELL DEFENDANT/ APPELLANT

AND AMY CAINE PLAINTIFF/ RESPONDENT

January 18, 19 and March 8, 1999

**Christopher Malcolm** for the appellant
No appearance on behalf of the respondent

PANTON, J.A. (Ag.)

This is an appeal by Clarence Powell (the defendant) from the judgment of His Honour Mr. Noel B. Irving, Resident Magistrate for the parish of St. Elizabeth in which he non-suited both parties in a claim for cattle trespass and counterclaim for trespass.

The particulars of the plaintiff's claim read thus:

> "The plaintiff's claim against the defendant is for five hundred and thirty dollars ($530.00) damages for cattle trespass for that the defendant's mule on or about the 17th day of May, 1994, trespassed on the plaintiff's land at Steven Run in the parish of St. Elizabeth and did damage thereon as per particulars below.
>
> Particulars of damage
>
> 1. 3 acres more or less of guinea grass valued at $500.00

2. Valuator's fee 30.00
$530.00

And the plaintiff claims costs and attorney's costs."

The particulars of the counterclaim read:

> "The defendant's counterclaim is for the sum of six hundred dollars ($600.00) for damages for trespass for that on or about the 17th day of May, 1984, the plaintiff broke and entered the defendant's close situated at Stephen's Run in the parish of St. Elizabeth removed the defendant's mule lawfully tethered thereon and thereby did deprive the defendant of the use of the said mule for five (5) days and other wrongs did to the great damage of the defendant.
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> The defendant counterclaims costs and fifty dollars ($50.00) attorney's costs to date of filing."

The trial lasted seven (7) days between and including June 11, 1992, and April 18, 1997. Judgment was delivered on July 24, 1997.

According to the notes of the trial recorded by the learned Resident Magistrate, the defence to the claim was a "denial of trespass as alleged. We say the land which the plaintiff claims as his (sic) own is our land." The defence to the counterclaim was "(Plaintiff) denies trespassing on any land belonging to the defendant."

From the stated defences it is clear that issue was joined between the parties as to title. The learned Resident Magistrate was apparently of this view even before the commencement of the trial, as the matter was referred to a surveyor on September 23, 1985. The instructions in respect of this reference called for the following:

> (1) the parties were to point out to the surveyor the whole of the land and the boundaries claimed by each as well as the point or points of trespass alleged to have been committed by each.
>
> (2) the surveyor was required to make a plan indicating:

(i) the boundaries pointed out by the parties;

(ii) the points of trespass as alleged by the parties;

(iii) the boundaries between the land of the plaintiff and the land of any other adjoining owner as indicated by the plaintiff; and,

(iv) the marks of fences or other information which would be of assistance to the Court in determining the respective claims of the parties.

The surveyor's report dated September 28, 1988, (that is, three years after the reference) was submitted to the Clerk of the Courts for the parish on October 5, 1988.

**The reasons for judgment**

The relevant portions of the learned Resident Magistrate's reasons for judgment read thus:

> "There is (sic) in my opinion two fundamental flaws in the actions brought before me. The evidence discloses that Amy Caine placed her husband in charge and I interpret that to mean possession for Mr. Caine said he worked the land and used the grass to mulch. His testimony is that he saw a mule destroying the grass. He impounded the mule. He informed Powell; he valued; he paid the valuation fee. But he did not sue. I can find no basis on the evidence for the action brought by Mrs. Caine for it is not trespass to land - an interference which would go to any claim to the interest of an owner. It is cattle trespass. The person who should have sued is not Mrs. Caine but the person in possession. The action as to cattle trespass must therefore fail.
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> In relation to the counterclaim a similar principle arises. The defendant's mule was not taken by Mrs. Caine. There is nothing said in evidence which vicariously links her. The mule was taken by Mr. Caine. But he did not sued (sic). I find no

> basis for this and it is my opinion that the counterclaim must also fail.
>
> This action possesses the ingredients for an interesting inquiry in relation to who owns what and whose title relates to what. I am of the view the court would have fallen into error if, having regards (sic) to its own defined jurisdiction and to the nature of the actions brought and the parties thereto, it had ventured into this dispute in relation to title. I am further of the view that the merit of these action (sic) can best be served if both parties are non-suited. No order is made as to cost (sic)."

The reasoning of the learned Resident Magistrate makes it clear that subsequent to the reference to the surveyor he had a change of mind so far as the relevance of title was concerned.

**The grounds of appeal are:**

1. The verdict of the learned Magistrate cannot be supported by the evidence

2. The Judge failed to take into consideration the findings of the surveyor and to give sufficient weight to those findings particularly paragraph 3 of the surveyor's report where he stated that "Section 1 is unregistered and the owner or occupier is stated as Artell Powell in Volume 1060 Folio 883." Artell Powell is the predecessor in title of the defendant.

3. The Judge fell into error when he found that Mr. Caine was in possession of the land. The evidence disclosed that he was in charge, and the inference is that he was agent to his wife Amy Caine who was responsible for whatever acts her husband did in relation to the land.

4. The Judge was wrong to have refused to venture into the dispute in relation to title, when he clearly had jurisdiction so to do, and having referred the matter to a surveyor with terms of reference as stated he had actually embarked on an enquiry into title and should have pursued it to the end, thereby coming to a finding in favour of the defendant."

In determining this appeal, the Court has to consider whether the learned Resident Magistrate was correct in finding that the plaintiff had no locus standi, and that the merits of the case required that the parties be non-suited.

**The right to sue in an action for cattle trespass**

It is indisputable that a trespass is actionable only at the suit of him who is in possession of the land, using the word possession in its strict sense as including a person entitled to immediate and exclusive possession.

The mere use of land, without the exclusive possession of it, is not a sufficient title to found an action of trespass for the disturbance of that use. Furthermore, the occupation of land by an employee or agent in that capacity vests the possession in the employer or principal; the employee or agent cannot sue in trespass, but the employer or principal can. See **Halsbury's Laws of England, 4th edition, Vol. 45, paragraph 1397.**

The evidence before the Court indicated that Mrs. Caine was claiming ownership of the land in question. She had bought it from her father. She was put in possession. Her husband worked for her. She put it this way:

> "I handed it over to my husband - my husband did my business. I did farming to the land - that is my husband."

It seems therefore that Mr. Caine was an agent or servant of Mrs. Caine in relation to the use of the land. There was no question of Mrs. Caine having divested herself of possession. Mrs. Caine was merely acting through her husband. Indeed Mr. Caine testified that Mrs. Caine had purchased the land and had put him in charge of it. The learned Resident Magistrate was therefore in error in holding that "the person who should have sued is not Mrs. Caine but the person in possession."

**The power of non-suit**

Section 181 of the Judicature (Resident Magistrates) Act provides:

> "The Magistrate shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court."

The case **Madgelin Griffiths v Diamond Mineral Water Co. Ltd.** (1964) 8 J.L.R. 567 is of note. The facts as set out in the judgment of Lewis, J.A. indicate that the appellant had sued the respondents to recover damages suffered by her while she was a passenger in a motor car which collided with a motor truck. The appellant and another passenger gave evidence blaming the driver of the truck for the accident. Both drivers also gave evidence. The learned Resident Magistrate who tried the case seemed astonished that both drivers and the owners of the vehicles had been sued and said that **in the light of the conflicting evidence of the drivers** he was unable to make up his mind which vehicle was to be blamed. In those circumstances, he non-suited the appellant.

The Court of Appeal held that the judgment of the learned Resident Magistrate was clearly wrong. "A judge must give a decision on the issues in a case."

In **Perkins v McGhan** (1925) S.C.J.B.II p.5, S.C.J. (1917-1932), page 200, the Resident Magistrate having heard evidence from the plaintiff, his witnesses, the defendant and his witness, non-suited the plaintiff. In his reasons for judgment, he indicated that he was unable to make up his mind either way, so he thought it appropriate to non-suit the plaintiff to give him an opportunity to have the case reheard.

Brown, J., in delivering the judgment in which DeFreitas, C.J. (Ag.), and Orpen, J. concurred said:

> "The section, in my opinion, does not justify a Resident Magistrate in abdicating his functions and

> taking refuge in this power to non-suit whenever a conflict of evidence occurs in a case which he is trying .... If this power... is to be exercised when no just cause for it exists and merely because there is a conflict then such an exercise will be a denial of justice and a desertion of duty by the Resident Magistrate.
>
> If the plaintiff has not proved his case, the defendant is entitled to judgment and not a non-suit. If the plaintiff has proved his case and it has not been displaced by the defendant; the plaintiff should have judgment. I can conceive of cases occurring in which there is a conflict in the oral testimony upon which the issue depends, that it is apparent that perjury is being committed by the witnesses upon one side or the other, or that the witnesses upon one side or the other are mistaken in their evidence - in such cases if a Resident Magistrate, guided by the rules as to the burden of proof and applying this general knowledge to the evidence, is unable to satisfy himself as to the credence to be given to the evidence of the witnesses, then this section ... affords him a means of escape from a dilemma."

We are of the view that this statement by Brown, J., is a correct statement of the law. In the instant case, it was the responsibility and duty of the learned Resident Magistrate to identify the issues and to make a decision based on the facts found by him.

The facts were fairly simple. Both attorneys-at-law in their closing addresses identified the issues after making reference to the simplicity of the matter.

Here was a situation in which the plaintiff was claiming damages against the defendant for cattle trespass on her three-acre plot. The defendant denied the alleged trespass and counterclaimed for trespass on the ground that the plaintiff had entered land that was not hers and had removed the defendant's mule, depriving him of its use for five days.

The evidence presented indicated that both parties were claiming ownership of the land on which the mule was tethered.

The plaintiff had testified that she had bought the three-acre plot from her late father. She had also said that she had bought "a second piece" of land from him. She denied receiving documents which had cancelled the earlier documents that she had received from her father in respect of the first purchase.

The defendant is saying that he owns two acres which he bought in 1974 from Artel Powell. He produced an indenture which indicates a conveyance to him by Powell on March 4, 1974. He also produced a surveyor's plan showing that a survey done on May 27, 1968, recognized the existence of land owned by Artel Powell.

The plaintiff's land is registered; the defendant's is not.

The surveyor's report indicates that there are indeed two parcels of land which total three acres and 2 perches. The larger portion measures 2 acres and 11.4 perches and is unregistered. The smaller parcel is registered. According to the surveyor's report, the mule was tethered on the unregistered parcel of land.

The evidence presented to the learned Resident Magistrate was clearly sufficient for a determination of the issues to have been made. There was evidence indicating the area of land on which the mule was tethered. In addition, the fact that there were two parcels of land, one registered and the other unregistered, adjoining each other, with the surveyor's plan indicating that the unregistered portion was once owned by Artell Powell, gave credence to the story put forward by the defendant.

There was evidence on which the learned Resident Magistrate could have properly found that:

(a) the unregistered parcel of land was in the defendant's possession

(b) the plaintiff had no lawful claim to it; and

(c) the defendant's mule had been lawfully tethered thereon

Mr. Christopher Malcolm, submitted on behalf of the appellant that the learned Resident Magistrate abdicated his responsibility in this case. We agree with that submission. This abdication meant that the learned Resident Magistrate failed to use the advantage that a trial judge has of seeing and hearing the witnesses. That being so, this Court is now obliged in the circumstances of this case to make a determination in keeping with the evidence. We are mindful of the fact that this cause of action arose nearly fifteen years ago.

In view of the clear evidence as to the respective titles of the parties, and as to the plaintiff being the proper person to sue and be sued, the appeal is allowed. The judgment of the Court below is set aside. Judgment is entered for the defendant/appellant on the claim and counterclaim, with damages on the counterclaim assessed at three hundred dollars ($300.00). Costs in the Court below to be the defendant's and to be taxed if not agreed. Costs of this appeal to the defendant/appellant fixed at one thousand dollars ($1,000.00).