

Subj: LAND - Registered title - whether obtained by fraud - Declaration in favour of plaintiff - Order that certificate of title be cancelled by Registrar of Titles

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E. 167 OF 1989

*Cases referred to
see p 14 (end)
✓ comp*

BETWEEN SYBIL REID PLAINTIFF
(EXECUTRIX OF ESTATE
OLIVE CARTER DECEASED)
A N D EZEKIEL CARTER DEFENDANT

Ola-Mae Edwards for the plaintiff.
Leon Palmer for the defendant.

Heard: April 26, 27, 28, 29, 30, 1993
May 17, 18, 1993 & July 30, 1993

*Carneyan
Remedies*

Judgment

RECKORD, J.

By Writ of Summons dated 25th of May, 1989, the plaintiff sought from the court the following:-

1. A declaration that the plaintiff is trustee of approximately one acre of land situate at Lances Bay behind the school in the parish of Hanover and holds the said land for the benefit of the plaintiff and Violet Hazel who are entitled in fee simple absolute to the said land under the will of Olive Carter, deceased.
2. A decalaration that the defendant has acquired duplicate certificate of title registered at volume 1187 folio 422 in the Register Book of Titles for the said land by fraud and the said certificate is void.

Plaintiff's Case

The plaintiff and the defendant are brother and sister. Their father and mother were Joseph and Olive Carter both deceased and formerly of Lances Bay, Hanover. There are five children of the marriage, the defendant and the plaintiff being fourth and fifth respectively.

The plaintiff, a registered nurse, now live in Ontario, Canada. She testified

that her mother died on the 29th of February, 1980 and as the executrix of her mother's will she obtained probate in the R.M. court in Hanover, which was rendered in evidence.

Under the will her mother had left the land, the subject matter of this suit, to the plaintiff and her sister Violet Hazel. She said that before her father's death in 1938, this land was owned by both her father and mother. A house was on the land and this was where the family lived. Her other brother Harold Carter who is handicapped, now lives on the land. The original house made of board and thatch consisted of two rooms and a hall. Her father was a cultivator fisherman and baker - He could not read nor write - His friends Mr. Hillman and Aubrey Gardener assisted him in this regard. Her mother could read and write.

In 1954, the house was blown down by hurricane. It was rebuilt. The plaintiff left for England in 1955, to study nursing leaving her mother, Harold and the defendant living in the house. She returned home in 1970 and found the house badly in need of repairs. Defendant had got married by then and was living elsewhere. She spoke to defendant about the condition of the house but he said he had no money to fix same. The taxes had not been paid so she paid what was due and ever since has paid same. Her mother had been paying the taxes before by selling fruits and food-stuff from the land but complained that the defendant was now reaping same. Her mother was then 70 years old but was still active.

On her returned to Canada the plaintiff sent money and clothing to her mother on a regular basis. She hired helpers to assist her mother. One was Fiona Haughton who was still at the house looking after her brother Harold. In 1972 she came back to Jamaica. The house needed repairs - She bought materials in Lucie and defendant, who is a carpenter, did the repairs. She told defendant that she would build a new house for her mother if it needed repairs again. She would supply workmen and materials and asked him to supervise same. He refused but suggested instead that she sent him the money and he would build the house. She never agreed to this.

In 1978 - 79 she again returned to Jamaica and discussed the building of a new house with Mr. Vincent Clarke. When she returned to Canada she sent money to Mr. Clarke to start the foundation - A contract had been drawn up with Mr.

Clarke and Mr. Smith. Her mother died in 1980 and she came to the funeral and paid the costs of the funeral. She saw the defendant there. After the funeral service she announced that their mother's will would be read in the house. Defendant, on hearing this, pushed her away saying "Mom can't make will as it is not hers to make." He then drove away.

By this the foundation of the new house was laid and the sides were up. Because of her mother's death construction had ceased for a while and later started again when she sent money to Mr. Clarke. The house took about five years to complete. She had spent over C\$100,000.00 on the construction.

After she had obtained probate of her mother's will the plaintiff instructed her lawyer to get a registered title for the land but discovered that the defendant had obtained title in his name. A certified copy of the title was admitted in evidence as also a copy of a deed of gift. The name Joseph Carter was signed at the bottom of the deed and witnessed by two persons whom she knew. The plaintiff had been paying the taxes in her mother's name up to the time of her death but after she obtained probate she started paying the taxes in her own name. She had grown up as a child in the house and was very close to her mother yet she never heard of any deed of gift from her father to her brother Ezekiel.

When the construction started the defendant never objected to it or showed any document concerning the land. Under her mother's will the defendant had gotten a five acre piece of land situate at Two Rivers.

She valued the land with the house on it as \$450,000.00. The defendant had made no contribution towards the construction.

When her father died she was 6 years of age while her brother Ezekiel was 10 years old and sister Francis was 16 - 17 years old.

Under cross-examination the plaintiff said she never saw Francis reading for her father - She did not recall her father going to Church with the family. She looked at the signature Joseph Carter on the deed of gift Ex. 6 and Ezekiel's Birth Certificate Ex. 3 and saw no likeness in the signatures. She recognised the receipt for the purchase of the land Ex. 7. Her mother's name did not appear on it.

She was never informed by her Attorney Mr. Ford that her mother's will was

Invalid - She admitted writing to the defendant suggesting that the land be shared between the five of them.

The plaintiff did not remember date when she entered contract to build house a photocopy of the contract was shown to her which she claimed was dated 1979 - She had written on the date sometime afterwards. She had lodged a caveat against the title which defendant had - She was claiming land by virtue of her mother's will, not by virtue of estate of her father. When she was shown a document she admitted she was claiming land by virtue of being one of the lawful children of Joseph Carter, not by virtue of her mother's will. It was suggested to her that it was defendant who built her mother's vault and purchased the casket which she denied. Her cousin Vincent McDoon was living with the family when she left for England.

Shown her mother's Marriage Certificate Ex. 11 she said the signatures "Joseph Carter" and Olive Mackintosh" were not signed by them - Her mother's maiden name was spelt 'McIntosh.' It was some five years after her mother died that she discovered that defendant was claiming the land on which the house was built.

Mr. Delroy Campbell, the acting Collector of Taxes testified - He produced records relating to the land at Lances Bay owned by Olive Carter - taxes paid up from 1963 up to 1983 in her name - He got notice from Land Valuation that the land was transferred to Ezekiel Carter with effect from the 1st April 1984 - Then he got another notice dated 7th April 1986 from the Land Valuation Department saying that the land was transferred to Sybil Reid et al from 1st April 1984. His records showed that for 1980 to 1992, two payments were made for the same property, apparently from two different sources - (photocopies of the records admitted in evidence by consent.)

A number of receipts for taxes on the same land up to year 1993 - 94 in name of Ezekiel Carter were admitted in evidence as being issued from his office. He also identified receipts up to 1992 - 93 in name of Sybil Reid.

Francis Cunningham, now 75 years old and daughter of Mr. & Mrs. Joseph Carter testified for the plaintiff. When her father died she was 19 years old. She went to school at first in Lances Bay and at 13 years old was sent to school in Lucea. She boarded in Lucea. She said her father died in her lap. He could not read or write, she did all that for him. When she boarded Mr. Hillman and

Mr. Aubrey Gardener did reading and writing for him. When her father was at the point of death Mr. Gardener had asked him if he going to make a will. He said no, all his children were lawful - they must try to live loving.

Mrs. Cunningham said her father would make an X to complete letters she wrote for him.

Under cross-examination she said she used to keep his books and give receipts her mother could not read nor write - although her father loved all his children he had a particular liking for Ezekiel. After her mother's funeral there was fuss between Sybil and Ezekiel after the will was read - Although she spoke with Ezekiel about the land, he never told her that his father had left that piece of land for him.

Clifford Smith of Hibernia, Manchester, told the court that Sybil Reid and her husband employed him to build a house at Lances Bay in Hanover for a price of \$7000.00. He started the building in 1979 - He was assisted by Mr. Vincent Clarke. Payments came from Mrs. Reid through Mr. Clarke. While building the house Mrs. Carter died. He built the vault and the head stone and was paid for this by Mrs. Reid.

During the building he never saw the defendant Ezekiel Carter come to the premises. He was seeing him for the first time in court.

Vincent McDoon, a cousin of the plaintiff and defendant, informed the court that he lived with the Carter family in Lances Bay from he was a child until he 25 years old. He said the defendant treated his mother badly - threatened her often when she complained about his behaviour - he would pick fruits and cut down trees on the land. He had never heard defendant make any claim to the land - With the permission of his grand-mother Mrs. Carter, he built a pig pen on the land - The defendant tore it down which resulted in his taking action against the defendant in court.

Before his grand-mother died he saw a house being built on the land. He never saw the defendant on the building site.

His aunt Sybil Reid was responsible for the building of the house. He was present at the funeral and afterwards saw the plaintiff and defendant in a dispute concerning the land. He had heard the defendant asking his mother for papers to the land.

Joel Robertson, 75 years old fisherman of Lances Bay testified that he knew Joseph Carter who was his god-father. He lived next door to the Carters. He knew that Mr. Carter could not read and write. He had seen someone sign Mr. Carter's name on a paper from the Post Office and he made an X. He was shown the deed of gift (Ex. 6). He knew John Bowen well. He could neither read nor write. He is now dead. He had seen defendant reaping fruits from the property. He and his mother always had fuss over this. Mr. Hillman used to read newspapers for Mr. Carter.

Fiona Haughton told the court she was employed by the plaintiff to look after her brother Harold in Lances Bay. She started in 1975 looking after Mrs. Olive Carter and after her death she lived at the house with Harold. She was there when the house was being built - Same persons who built the vault built the house. Since the completion of the house she saw the defendant come there and measured the house - He was claiming that the land was his.

This was the case for the plaintiff.

Defendant's Case

Ezekiel Carter, the defendant testified on his own behalf. He was 10 years old when his father died in 1938. As a child he was closest to his father who carried him on his donkey wherever he going. He assisted his father in whatever he doing. His father showed him the boundaries of all his lands.

Before he died his father called him and in presence of his mother, his father said "Man Zeek, this piece of paper belongs to this land and it is yours. Don't let nobody rule you with it if I die and your mother will keep it with the rest of paper for you until you come of age." His father had the paper in his hand as he spoke and handed it to his mother who put it in her tin case which she kept in her bedroom. He identified the paper in court as exhibit 6. It read thus:-

Deed of Gift

Lances Bay,
Manover
Jan. 6, 1938

To Whom It May Concern

That I Joseph Carter give and bequeath to my son Ezekiel Carter infant 1 acre of land belonging to me said Joseph Carter on property owed by me the said Joseph

Carter of Lances Bay property easterly on the main road from Lucca to Green Island.

the sea northerly on land belonging to the United Presbyterian Church
and the School and southerly on the land belonging to Church
property.

Sign Joseph Carter

Witness John Bowen

Witness Robert Allen.

The defendant explaining the condition of the deed said ink had been thrown on it causing some of the words to be obscured - hence the blank spaces.

After the death of his father, with assistance of his mother, he took over all what his father was engaged in. The original house was blown down in the 1951 hurricane and he built a three bedroom house for the family.

His mother died in 1980. He had a good relationship with her. She permitted Vincent McDoon to build a pig pen on the land and he broke it down and told McDoon to leave the premises as his father had given it to him. McDoon took court action against him and he had to pay for the damage to the material that made the pen.

After the court case he asked his mother for the papers for the land and she said she was going to destroy the deed of gift. He searched the tin case for the title and receipt. He found the receipt and was comparing it with the deed of gift which he had on the table and his mother threw ink on the deed of gift leaving it in the condition it now appears.

He made an application for title to the Titles Office taking the receipt and the deed of gift. He paid the taxes for the land in his mother's name until he got title in 1984 when he started paying taxes in his own name. His father never made a will and no one took out Letters of Administration in his father's estate.

After his mother's funeral the plaintiff produced a will saying her mother had willed the house and land to her sister and herself. He told her that his mother could not do that as his father had given that land to him.

Before his mother died she had started building a house on the said land in about 1978 and the plaintiff had told him that it was her mother's house. "I had no objection with mother building house on the land." He had assisted by giving his mother money. The plaintiff never told him that she was building the house.

for herself.

After his mother's death he told Sybil not to go further with the house as it was his mother's house and it belonged to her estate. It was then that Sybil told him it was her house. He told her if she finished it, she would lose it as it belonged to mother's estate. After that he saw men working on the house and he told them to stop but they continued.

The defendant said his mother could not read nor write but his father could. He had never seen anyone reading or writing for his father. He knew John Bowen and Robert Allen they were ~~friends~~ of his father. Although born with a crippled hand, Allen, could use the other hand to write. He admitted he did not see them sign the deed of gift.

Before his mother died there was controversy that his father had given him the best piece of land and the plaintiff had written to him saying he alone could not get that land. He never got title to the land by fraud. He never gave Sybil permission to build on the land and never sat back and saw her building on the land and said nothing. He said they had big quarrel.

Under cross-examination, defendant said he never got back the original deed of gift from the Titles Office. He made application for Title in May 1984 and got title same year. Before his mother died he used to pay the taxes in her name. Since coming to court in this case he found out that Sybil was also paying the taxes. He was accustomed to see his father write - He knew his handwriting. All of the writings on the deed of gift were his father's handwriting except the signature of the two witnesses.

From he was a child the Presbyterian Church had been beside the land. The name of the Church was changed to United Church of Jamaica and of Grand Cayman, "just the other day." Before that it was called Presbyterian Church. It was not called United Presbyterian Church when father was alive. When his father gave deed of gift to his mother he did not know what was written on it. The first time he knew it's content was when his mother gave it to him after the court case he had with McDoon.

In making application for title he listed the receipt Ex. 7 as one of documents he relying upon. When shown a copy of the application form admitted that the receipt was not listed. Nevertheless he said he had shown them the receipt and

had left it at the Titles Office.

From the day his father gave the deed of gift to his mother he regarded the land as his - this was about 6 months before his father's death. All his sisters knew his father had given him the land - his mother had told them - he also had told them. Joel Robertson, Fiona Haughton and Francis Cunningham and Clifford Smith were all lying on him. He denied that Aubrey Gardener and Mr. Hallman assisted his father in reading and writing. Francis' also never wrote letters for his father and never read to him. The incident when ink was thrown on the deed of gift was in 1977. He had sent away McDoon from the house from he about 5 - 6 years old. He denied McDoon was living there until he about 23 years old. When his mother died the house was about 3/4 finished. He did not know where his mother got money to build house - He would help from time to time supplying cement, sand and lumber.

The defendant told the court that when he applied for the title the house and land was valued between \$150,000.00 to \$200,000.00. However he had told the Registrar of Titles it valued no more than \$1,500.00. "I did this because it is not suitable to push up land value because the Government will intervene and tax you too heavy - so you have to hide them." His mother never discussed the building of the house with him. It was only after his mother died that Sybil was claiming the land - He agreed in his application to the Registrar of Titles he had stated that no one else was making any claim to the land. In answer to the court the defendant said that although he was a contractor and builder his mother had never asked him to assist in any way or to supervise the building of the house.

This was the end of the case for the defendant.

Submissions

Miss Edwards in her address referred the court to section 178 of the Registration of Titles Act, which makes void any title obtained by fraud -

also SCCa No. 28/76 Enid Timoli-Uylett v. George Timoli. She submitted that - the deed of gift which formed the basis for defendant obtaining title was false. Joseph Carter could not read and write - She referred to also exhibit 3 - photocopy of birth certificate of defendant - and Exhibit 11, photocopy of marriage certificate of Joseph Carter and Olive Carter, - All written by one and same person. This she submitted supported the plaintiff's case that her father could not read nor write.

The deed of gift which is dated 1938, describes the Church as "United Presbyterian" - It was some 40 years later that the name of the Presbyterian Church was changed to the United Church of Jamaica and Grand Cayman. She described this as prophetic. The defendant himself had admitted that the church was not called United Presbyterian in 1938. The evidence of Francis Cunningham and Joel Robertson disclosed that John Bowen could not read or write. His signature on Exhibit 6 would therefore be a forgery. The evidence of Sybil and Francis was that John Bowen and Robert Allen were not close friends of Mr. Carter. It was unlikely therefore that they be asked to witness the Deed of Gift. Miss Edwards submitted that on a balance of probabilities the Deed of Gift was a false document and the particulars set out in the statement of claim would have been established. On his own admission the representations made by the defendant to the Registrar of Titles were false and would disentitle him from obtaining Title.

In his defence filed the defendant stated at paragraph 5 that he had produced the deed of gift when construction of the house began. Yet in his evidence he said he never showed it to the plaintiff.

Regarding the relationship between the defendant and his mother Miss Edwards submitted that the evidence of the plaintiff and Clifford Smith did not support the defendant's claim that house was being built by the mother. On the demeanour of the defendant Miss Edwards referred to him as shifty - making up case as he went along. Based on her payment of taxes and undisturbed possession of the land for over 40 years, Mrs. Olive Carter was justified in holding and believing the land was hers to will to whomsoever she wished.

Miss Edwards asked the court to find as highly improbable that Joseph Carter over whelmed with love for his son as a generous gesture, gave away to his 19 year old son the property on which the matrimonial house was situate oblivious of the welfare of his wife and other children.

She referred the court to section 158 of the Registration of Titles Act which forms basis for the court to order the defendant to deliver up Title and for the Registrar of Title to cancel same.

On her claim for damages as no evidence had been given in this regard she could make no submission.

Mr. Palmer on the defendant's behalf, submitted that before the court could come to a decision in this action, the root of title must be established. Mr. & Mrs. Carter were married in 1915, the land was purchased in 1919, the receipt exhibited showed the name of Joseph Carter, and Olive Carter's name not mentioned. There was evidence that no Letters of Administration were granted in the estate of Joseph Carter. Under what authority did Olive Carter make a will and bequeath this land to the plaintiff.

Mr. Palmer submitted that the plaintiff knew that the will was invalid hence when she applied for caveat it was on the basis as a beneficiary of the estate of her father, not by virtue of her mother's will.

The plaintiff had brought no documentary evidence showing that her father was a marksman.

A deed of gift was like a will. To prove that it is fraudulent is no less a degree of certainty sufficient to set aside a will. There was abundant evidence that the deed of gift was in existence. McDoon admitted he often heard the defendant quarrelling with his mother that he wanted the land papers his father gave her to put down for him. The defendant started exercising rights to the land when he broke down pig pen put up by McDoon. The application for the title had been published in the Gleaner. There was no objection and title issued. Because of the closeness of defendant to his father it is possible that he made gift to his son.

See Mollibella Mullings v. Theresa Jobs - Vol. 8 JLR 501.

It was Mr. Palmer's submission that the word "United" in the deed of gift was not detrimental. The name of the church had been undergoing changes from time to time. The plaintiff admitted that after she obtained probate she had written to the defendant suggesting the land should be shared between the five children. This Mr. Palmer suggested was because the plaintiff knew that the will was not valid.

The fact that the plaintiff was producing a will at the funeral would be not necessarily serve as a notice that she had an interest in the land. The plaintiff had no genuine claim in the mind of the defendant - His was the only claim, all others were spurious.

As to the value of the land Mr. Palmer submitted that this by itself could not set aside the registration. All the Registrar could do is to have the property revalued and order an upstamping of the documents.

On the totality of the evidence Mr. Palmer asked the court to accept the deed of gift and deny the plaintiff's prayer for a declaration as not sufficient evidence brought by the plaintiff to suggest that the deed was a forgery.

Findings

Under section 173 of the Registration of Titles Act any title issued under the Act was indefeasible unless fraud is proved. The plaintiff having expressly alleged fraud in this action, must bear the burden of proving same. How has she gone about doing so. She testified that even at the tender age of 6 years when her father died she recall that he could not read or write. In support she called her oldest sister Francis Cunningham now 75 years old who was 19 years old when her father died and 75 years old Mr. Joel Robertson, a neighbour of Mr. Carter, both of whom said in evidence that Mr. Carter could neither read nor write. The plaintiff also exhibited the marriage certificate of Mr. and Mrs. Carter and the birth certificate of the defendant both of which were purported to have been signed by Mr. Joseph Carter. It is noted that all the entries on each of those documents appear to have been written by one person and that the handwriting, 'Joseph Carter' written on these two documents do not appear alike and they bear not even the slightest resemblance to the signature 'Joseph Carter', appearing on the deed of gift.

On the defendant's own admission the name of the Presbyterian Church in Jamaica was changed recently to the United Church of Jamaica and Grand Cayman. When his father died the church adjoining the land in Lances Bay known as the Presbyterian Church - It was never known or referred to as the 'United Presbyterian Church.' No evidence has been given to suggest that as far back as 1938 there was any discussion of any contemplation to change the name of the church to include the word "United." Short of any explanation it is not unreasonable for the court to infer as the plaintiff asks, that this "deed" was written since the change of name - Both Francis Cunningham and Joel Robertson also testify that John Bowen, who is purported to be a witness to the Deed could neither read nor write. Against all this evidence the defendant said the deed was in his father's handwriting -

Both on the preponderance of evidence and on the balance of probabilities I accept the evidence tendered by the plaintiff and find that Mr. Carter could neither read nor write up to the time of his death and therefore the deed of gift tendered by the defendant could not have been written by Joseph Carter and accordingly is a forgery. I further find that in order to obtain title the defendant knowingly submitted this forged document to the Registrar of Titles giving a false valuation of the property in order to evade the property charges and also falsely stating that no one else was making any claim to the land when he full well knew then that the plaintiff was claiming ownership by virtue of her mother's will.

Mrs. Carter was obviously dealing with the land as hers by virtue of undisturbed possession for well over 30 years. Would she, knowing that Joseph Carter had given this one acre piece of land to their son, the defendant, notwithstanding in her will made a devise to him of a three acre piece of land? Save for $\frac{1}{2}$ acre at Lyon Land in Lances Bay, nothing would have been left for the other children - He would have gotten all - This is most unlikely.

There were several other areas of the evidence in which I found the defendant unreliable - He spoke of taking over all his father's business after his death when he only 10 years old. He contradicted himself on many occasions and his whole demeanour in the witness box did not inspire confidence. I cannot help but agreeing with Miss Edwards that he was shifty in the witness box. Of the five children, Francis showed no interest in the lands left by her father. Violet and Sybil the plaintiff had got married and settled abroad. Harold was handicapped and needed care and most likely took no interest. This left the defendant alone. It is against this background that this deed of gift was concocted. McDoon denied that it was shown to the court in the case in Lucea R.M. court, in 1977 - Francis was not aware that her father had given the one acre land to defendant.

The plaintiff who admittedly, was very close to her mother was never told by her mother about it. The defendant who was born in 1928, could have registered the land in his own name from the time he attained 21 years of age in 1949 - Thirty-five years later and only after the death of his mother he applied for title in 1984.

For these and other reasons already stated the declarations sought by the plaintiff are granted as prayed.

The Registrar of Titles is hereby ordered to cancel Certificate of Title registered at Volume 1187 Folio 422 of the Register Book of Titles issued to Ezekiel Carter of Cacoona, Dias Post Office Hanover in respect of land at Lances Bay Hanover, containing by estimation one acre more or less.

The defendant is also ordered to deliver up to the Registrar of Titles the Duplicate Certificate of the said land for cancellation.

There shall be costs to the plaintiff to be taxed if not agreed.

Cases referred to

- ① SCCA 28/76 Erin Timm - Uylett v George Timm
- ② Mollabella Makings v Theresa Jobs 8JLR50!