JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO: 17/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	ASTLEY RODGERS THELMA NATION	APPELLANTS
AND	SHIRLEY GORDON	RESPONDENT

Debayo Adedipe for appellants

Amery Huntley & Dr. Diana Harrison for respondent

9th, 12th, 19th, 27th June 2006 & 13th July, 2007

HARRISON, P.

This is an appeal from the judgment of the Resident Magistrate for the parish of St. Elizabeth on 22nd October 2003 entering judgment for the respondent in the sum of $100,000.00 for trespass and granting an injunction against the appellants with costs to be agreed or taxed.

A counterclaim filed by the appellants claiming an easement of way over the respondent's land at common law by means of a lost modern grant or pursuant to the Prescription Act was dismissed with costs to the respondent to be agreed or taxed.

We heard the arguments and dismissed the appeal giving an oral judgment. These are our expanded reasons in writing.

The facts relevant to this appeal are that the respondent is the fee simple owner of lot 11 at Ridge Pen in the parish of St. Elizabeth consisting of fifty (50) acres registered at Volume 1046 Folio 593 of the Register Book of Titles. The appellant Astley Rodgers is the occupier of an adjoining lot 2, registered at volume 1204 Folio 625, on which the second appellant also resides. The appellant Rodgers is the husband of Elyn Nation who is the child of Evelyn Nation, the widow of the late Sandford Nation. Thelma Nation is also the daughter of Evelyn and Sandford Nation.

Formerly, in the 1940s Sandford Nation was the owner of lot 2 where he lived with his wife Evelyn and daughter the said Thelma Nation. Wilfred Nation, his brother, was the owner of lot 11 adjacent to the West of lot 2. He, Wilfred, lived in Mandeville in the parish of Manchester. He farmed on lot 11 and kept cows there. A respondent witness Samuel Gunter, 74 year old, said he knew both brothers well and worked for both on their respective pieces of land. His father also worked for both brothers. Both lots have an entrance to the east onto the Tamarind Tree parochial road, with the entire eastern boundary of lot 2 running along the said road. Samuel Gunter testified before the learned Resident Magistrate that Sandford looked after Wilfred's land (lot 11) when he Wilfred who lived in Mandeville, was not there and he Sandford "walked anywhere on Wilfred's land." He also said that both Wilfred and Sandford "used

the main gateway from the east." Samuel Gunter further said that the area that he now sees the first appellant going through – he had seen no road there, only cattle grazed there. Wellesley Gunter also confirmed that Sandford took care of Wilfred's land (lot 11). He also worked for the Nations. However, the learned Resident Magistrate found this latter witness' evidence as not credible, in relation to the fact that:

> "... the Kildare road from Mountainside ... was the main entrance (to the west) to the Sandford Nation's property or that it was used by many people."

Witnesses Astley Brooks and Cleveland Blake who both worked on lot 11 (Gilpin land) from 1975 to 1980 stated that for that period the said land was completely enclosed by wire fencing leaving only the entrance to the east. There was no road from the Kildare road to the west – no one walked nor did any motor vehicles enter from that road. The first appellant never passed through the land lot 11, then.

Wilfred sold lot 11 to one Gilpin in 1970 – Gilpin enclosed the land then. He died in 1977. Gilpin's land was sold to the respondent Shirley Gordon in 1980. The respondent never saw Evelyn walk through his land. The western border towards the Kildare road was inaccessible. It was steep and rocky with a deep depression at the bottom of the hill. Wilfred had bought from Advera James an area 12 feet wide between her land and Wilfred Green's to the west of lot 11. This was bought in order to create an entrance to lot 11 from the Kildare road to the west. According to both Gunters, Wilfred started to cut the road but

did not complete it. This road become overgrown with bush and was not used. The respondent, starting in 1985, spent a substantial sum of money to clear and build the road from the Kildare road to the western boundary of lot 11 – his land. The respondent was still living in Canada.

In 1992 the respondent first saw the first appellant drive through his property. He did not stop him, because they were friends.

In 1998 the respondent, in his newly build house now living on lot 11 told the first appellant that he was closing off the roadway. Cows were being driven across. The first appellant pleaded with the respondent not to close the roadway, offered to pay compensation for its use and sought the respondent's permission to use the roadway. The first appellant suggested that "...when the (respondent's) son took over ... he would change it."

In 1999 the respondent erected a fence and had witness Rantie Lloyd install two gates across the roadway in June 1999. The first respondent hit off the gates in August 2000.

The respondent filed the present suit in September 2000.

The first appellant stated that he was in charge of the land, lot 2, having been authorized by the second appellant Thelma Nation from 1983. He relied on a power of attorney, exhibit 9, dated June 2001. This Court notes however that Evelyn Nation, the widow of Sandford, was living on and in possession of the said land up to 1990, when she died. She was, and her name remains as the registered owner of the land, lot 2.

A lost modern grant will be presumed by a court to have been made, if it is proved that the easement was enjoyed for twenty (20) years, but the document effecting the grant has been lost (Cheshire & Burns, Modern Law of Real Property, 14th Edition (1988). User must be as of right. Permission or allowance is evidence of the absence of a right. Such evidence is fatal to a claim (see ***Burrows v Laing*** [1901] 2 Ch. 502 and ***Healey v Hawkins*** [1968] 1 WLR 1967.) In the instant case, Wilfred, the owner of lot 11, granted permission to Sandford, his brother, the owner of lot 2, "to walk anywhere" on lot 11. This was permissive user and created no right or easement of way over lot 11. This claim based on lost modern grant fails.

Under the Prescription Act, a person claiming an easement of way, must show, user as of right for 20 years, that is, continuous user without interruption for 20 years immediately preceding the filing of action. Section 2 of the Prescription Act reads:

> "When any profit or benefit, or any way or easement, or any watercourse, or the use of any water, a claim to which may be lawfully made at the common law, by custom, prescription or grant, shall have been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen, or of any person, or of any body corporate, by any person claiming right thereto, without interruption for the full period of twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

We find that the fee simple owner of lot 2, Sandford Nation had the care of lot 11, his brother Wilfred's land "when Wilfred was not there". Sandford's access to lot 11 was therefore by permission. No right of way could therefore arise during Wilfred's ownership of lot 11. There was no user, as of right.

Wilfred sold to Gilpin in 1970. Gilpin sold to the respondent in 1980. If time began to run from 1970, which on the evidence it did not, twenty (20) years user would not be satisfied because Gilpin enclosed the entire land from 1970 until he died in 1977.

The respondent erected gates on his land in 1999 – having permitted the first appellant to drive through his land from 1992.

Even if time had begun to run, which we find did not, section 2 of the Prescription Act, would not have availed the appellant, because there was no "20 years continuous user without interruption" immediately preceding commencement of these proceedings. Suit was filed herein in September 2000. However, between June 1999 when the gates were put up by the respondent and August 2000 when the first appellant hit them off, a period of one year and two months intervened. There was no attempt at or actual use of any right of way by the first appellant, during this period, on the evidence before the learned Resident Magistrate. This is further clear evidence that there was no "20 years continuous user without interruption" to satisfy the provisions of the Act as contended for by the appellants.

On both limbs therefore, the grounds fail.

The learned Resident Magistrate was correct to find that no easement exists over the respondent's land at Ridge Pen in the parish of St. Elizabeth, lot 11, in favour of the appellants. Nor does any easement exist in favor of anyone in possession of the land, lot 2 registered in the name of Evelyn Nation.

The appeal is dismissed. The judgment of the learned Resident Magistrate is affirmed. Costs of this appeal of $15,000.00 to be paid by the appellants to the respondent.

COOKE, J.A.

I have read in draft the judgment of Harrison, P. I agree with the reasons and conclusions therein and have nothing further to add.

HARRIS, J.A.

I too agree with the reasons and conclusions of Harrison, P., and have nothing to add.

HARRISON, P.

ORDER

Appeal dismissed. Judgment of the learned Resident Magistrate affirmed. Costs of $15,000.00 to be paid by the appellants to the respondent.