**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN EQUITY**

**CLAIM NO. 2014HCV01425**

**IN THE MATTER of an Application by ESTHER SCOTT, GLADSTONE SCOTT, DENNIS SCOTT AND LOIS SCOTT ROBINSON as children of the late MITCHELL SYLVESTER SCOTT, deceased under sections 3,4,14 and 30 of the Limitation of Actions Act (1881).**

**And**

**IN THE MATTER OF ALL THAT PARCEL OF LAND part of STONE HOLE AND PART OF CUMBERLAND PEN now known as WATERFORD in the parish of SAINT CATHERINE being the Lot Numbered FIVE HUNDRED AND SEVENTY EIGHT on the Plan of Waterford aforesaid deposited in the Office of Titles on the 15th of October, 1976 of the shape and dimensions and butting as appears by the said plan and being part of the land comprised in Certificate of Title registered at Volume 1053 Folio 152 of the Register Book OF Titles now registered at Volume 1134 Folio 978 of the Register Book of Titles.**

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| **BETWEEN** | **ESTHER SCOTT** | **1ST CLAIMANT** |
| | **GLADSTONE SCOTT** | **2ND CLAIMANT** |
| | **DENNIS SCOTT** | **3RD CLAIMANT** |
| | **PAULETTE PHILLIPS (under power of attorney of LOIS SCOTT ROBINSON)** | **4TH CLAIMANT** |
| **AND** | **ALLISON ELIZABETH SCOTT** | **DEFENDANT** |

**Limitation of Actions – Joint Tenancy- One Joint Owner in possession – Surviving Joint owner living overseas when property purchased and never in possession – Whether title of surviving joint owner 'automatically" extinguished after 12 years – Whether children of joint owner in possession have a cause of action – Whether trial ought to be in chambers or in open court.**

**Tamara Powell-Francis for Claimant**

**Dennis Forsythe for Defendant**

**Heard: 18th February, 2016, 19th February, 2016**

**Coram: Batts, J.**

[1] On the 19th February 2016 I dismissed this claim. I promised then to put my reasons in writing at a later date. This written judgment is the fulfilment of that promise.

[2] By Fixed Date Claim filed on the 24th March 2014 the four Claimants seek Declarations as well as Injunctive Relief and Orders against the Defendant Allison Elizabeth Scott. The remedies sought all relate to property registered at Volume 1134 Folio 978 of the Register Book of Titles and being Lot 578 Genovese Way Waterford P.O. in the parish of St. Catherine. It will hereinafter be referred to as the said property. All the remedies claimed flow from, or would follow inexorably from, the grant of the Declaration claimed at Para 1 of the Fixed Date Claim Form, that is :

> **"1. A Declaration that Mitchell Sylvester Scott, deceased, being in sole possession of [the said property] during his lifetime to the exclusion of Allison Elizabeth Scott the joint tenant registered on the duplicate Certificate of Title for the said property, acquired an absolute title against the said Allison Elizabeth Scott prior to his death by virtue of sections 3,4, and 14 of the Limitation of Actions Act."**

[3] The Claim was supported by affidavits from each of the four Claimants. The Defendant filed a Defence on the 27th June 2014 but filed no affidavit. The Defence reads like a summarised legal submission, and is itself perhaps best summarised in Paras. (iii) and (iv):

> **"(iii) Upon the death of Mitchell Sylvester Scott, it is the other registered joint tenant Allison Elizabeth Scott who moves into the position of sole ownership. The joint tenant in possession cannot make his possession so absolute as to deny this other joint tenant his right and he made no such claim while he was alive.**
>
> **(iv) Therefore the children [of] Mitchell Sylvester Scott, the Claimant herein, have no *locus standi* in this matter, as there is no legal or beneficial interest in the property at 578 Genovese Way passing to them upon the death of their father. "**

A detailed Reply to Defence was filed which more or less regurgitated the facts contained in the affidavits already filed. Para. (6) of the Reply 7:

> "**6. At the time of the property's acquisition both Hilma and Mitchell Scott were over fifty years. The Defendant, as the eldest child, was used during the transaction to facilitate the processing of the mortgage loan to both parents and was therefore named on title. As seen the Defendant is last named on title."**

[4] On the first morning of the hearing, I enquired of both counsel why was the matter listed for a hearing in Chambers. Neither counsel could give a satisfactory reason for the Order made at Case Management on the 27th April 2015 for a trial in Chambers.

[5] Having considered the matter, the fact that issues of fact were joined on the pleadings and , that the matter was not matrimonial and did not involve a minor, I decided that the trial would be held in Open Court. It appears to me that, save in an exceptional circumstance or where Parliament has otherwise so determined, trials involving issues as to entitlement to land ought to be held in open court. In

this way, neighbours or persons in the community at large can be aware of the evidence lead and the issues joined and decided by a court. I therefore adjourned into open court and continued the trial. It was by agreement determined that affidavits, with exhibits attached, would stand as the evidence in chief of each witness called.

[6] The 2nd, 3rd and 4th Claimants were the only witnesses called. Defendant's counsel did however cross-examined each one to good effect. I will not in the course of this judgment repeat verbatim the evidence of each witness. That evidence was in any event often repetitive. I will instead state my findings of fact on the evidence based as it is on the Claimants' evidence. There was no evidence from the Defendant.

[7] My findings of fact are as follows:-

a) The 1st, 2nd and 3rd Claimants are siblings of the Defendant, who is the eldest of 9 children born to Mitchell Sylvester Scott and Hilma Bernice Scott.

b) Mitchell Sylvester Scott and Hilma Bernice Scott are both deceased. Hilma predeceased Mitchell.

c) The 4th Claimant is the granddaughter of Mitchell and Hilma Scott. The 4th Claimant sues under "power of attorney" of her mother Lois Scott Robinson, one of the 9 children born to Mitchell and Hilma.

d) In or about the year 1976 Mitchell Sylvester Scott (hereinafter referred to as Mitchell) purchased the said property. It was acquired by virtue of his employment as a port worker and with the assistance of a mortgage from the Jamaica Mortgage Bank.

e) The said property was purchased jointly in the names of Mitchell, Hilma Bernice Scot (hereinafter referred to as Hilma) and the Defendant. The price for the said property was then $2,970.00.

f) At the time of purchase the Defendant was living in Canada and worked as a waitress. She had

been living in Canada since in or about the year 1972.

g) The Defendant has never lived at the said property. She has only visited the said property on two occasions. The first occasion was on a visit to Jamaica in 2012 to see to the placement of Mitchell in a nursing home. The second occasion was in 2013 to attend Mitchell's' funeral service.

h) The Claimants who gave evidence were not aware of the facts or circumstances of the purchase of the said property. They are all unaware of the reason the Defendant's name was placed on the title. Their evidence on affidavit in that regard was effectively discredited during cross-examination where each admitted that their father did not say anything about the purchase of the said property to them.

Gladstone the 2nd Claimant said for example,

> "**My father work at the wharf. He never told us about who own property**."

Dennis the 3rd Claimant said,

> "**Q. how her Allison name get on the title.**
>
> **A. I don't know**."

and,

Paulette the 4th Claimant said:

> **"Q: how old were you in 1976**
>
> **A: a small child**
>
> **Q: 40 years ago, in your affidavit you recited facts which is hearsay you hear.**
>
> **A: I live with my grandparents from Alexander Street, live with them all these years.**

**Up till now I still live at the premises."**

i) Paulette and her mother made improvements to the premises over the years and while Mitchell was still alive. The 2 bedroom house originally purchased is now a 4 bedroom house and is valued at approximately $4,380,000.00.

j) Mitchell told Paulette on numerous occasions that the house is for the family and it must not be sold.

k) Paulette continued to live at the said property and cared for Mitchell after the death of Hilma in 2001.

[8] The Claimants' counsel in her closing submission asserted that the Defendant was not entitled to the said property. Although registered on the title as a joint owner it is said that her title has been extinguished. The normal *jus accrescendi* rule is not applicable, it was submitted, by virtue of the operation of the Limitation of Actions Act. Mitchell's possession and the Defendant's absence and inactivity combined to defeat the Defendant's title. Counsel relied on the authorities of ***Paradise Beach and Transportation Co. Ltd. v Cyril Pryce-Robinson [1968] AC 1072; Wills v Wills PC Appeal No. 50 of 2002; Freckleton v Freckleton HCV 01694 of 2005*** unreported judgment of Sykes J dated 25 July 2000; sections 3,4,14 and 30 of the Limitation of Actions Act were also prayed in aid. Claimants' counsel very helpfully provided written submissions which were supported by oral arguments.

[9] At the end of her submissions I did not however feel the need to call on the Defendant's counsel to respond. The case must on the evidence fail. In the first place there had been and is no claim by Mitchell (or Hilma) to sole ownership or title to the said property. The claim before me is not brought by the estate of Mitchell. There is not even any indication that legal personal representatives have been appointed. All Claimants admit that they were, to the extent that they enjoyed possession, licensees with the permission of Mitchell. No Claimant sought in their own right to claim adversely by possession, to the interest of

Mitchell. Twelve years have not yet run since Mitchell left the premises to go into a nursing home, or since he died, hence there can be no possessory claim personal to any of the Claimants. There being no claim by Mitchell or his estate this claim therefore fails.

[10] In this regard, it is important to note that in the ***Paradise Beach*** case (referred to above) the testator died in 1913. The fact found was that two of his children continued farming the land in their own right from 1913 until 1962 and thereafter it was farmed by their successors in title. The contest was between the successors in title who remained in possession and those who did not. It was decided that those registered on the title but who had not been in possession were dispossessed by those who continued to farm and occupy the land to their exclusion. In the case at bar this is decidedly not the situation. In ***Wills v Wills*** (above) after the husband died his second wife who remained in possession was unable to make a personal claim to a possessory title against the other joint owner. This is because her occupation, until her husband's death, had been as his licensee. The possessory title which was obtained adversely to the interest of the other joint owner (the first wife), belonged to the estate of the husband; See per Lord Walker,

> "**33. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed with costs here and below and that there should be a declaration that the <u>appellant in the capacity of her late husband's personal representative</u>, is solely and exclusively entitled to the two properties identified in the originating summons.:" [emphasis mine].**

[11] ***Freckleton v Freckleton*** (above) is the third decision relied on by the Claimants. That was a case which concerned the former matrimonial home and a plot of land. The husband quit possession and departed the island for a considerable time. It was found as a fact that the wife possessed in her own right and with an intent to exclude all others including the other joint owner. She did additions to the property, paid all taxes and even took steps to evict squatters from the plot of

land. The claim was brought by the wife. The case is therefore clearly distinguishable.

[12] The estate of Mitchell has made no claim, nor is there evidence that Mitchell in his lifetime instituted any such claim. The *jus accrescendi* therefore applies and the Defendant succeeds to the title as the sole surviving joint owner.

[13] There is a further reason for the failure of this action. The Claimants rely on the absence of the Defendant from the premises as the basis for saying that her title has been extinguished. I therefore, in the course of submissions, put a hypothetical case. This was whether if a father purchased property in 1962 jointly in his name and that of his 6 year old daughter; and that daughter left Jamaica to study in Switzerland, got married and returned only in 2016 (over 40 years after leaving Jamaica) to bury her now deceased father; does it mean her joint title to the property would be extinguished? Counsel consistently with her legal submission did not resile, and affirmed that as a matter of law, the child, would have lost her right to title as joint owner.

[14] It is with some relief that I am able, on examination of the authorities, to conclude that our law compels no such unjust result. I believe most Jamaicans, having confidently placed their loved ones name on property as joint owner, would be horrified to learn that the interest so granted could be lost because that loved one had gone abroad, as have so many Jamaicans, to seek a better way of life. The point, and I say this with respect, which appears to have escaped counsel is that for one joint owner's interest to be extinguished by the possession of the other joint owner, there has to be demonstrated an intent by the owner in possession to possess exclusively that is to the exclusion of the other. Conversely where the possession by one joint owner is consensual, that is it is part of an understanding, agreement or arrangement between or among joint owners no question of a possessory title by that joint owner against the others can arise without more. The words I wrote, on a previous occasion and in a different capacity remain good law:

"Possession means:

a) A sufficient degree of physical custody and control (factual possession)

b) An intention to exercise such custody and control on his own behalf and for his own benefit (intention to possess).

c) That the taking or continuation of possession is without the actual consent of the legal owner. Note that an initial consent does not necessarily preclude a possessory title as in ***Pye*** where although initially given possession, the possessor was then told to leave and never did. The relevant time ran from the refusal to leave. The legal owner's failure to take action was fatal."

***Wills v Wills* –** another point of view "**JABAR Publications Volume 12 November 5, May 2004.**

[15] In ***Wills v Wills*** (above) although the 1st wife left the premises in 1964 that was not the determining fact which led to her interest being extinguished. It was other evidence, pointing to the possession of her husband (who became her ex-husband) being for his own benefit and to her exclusion, which resulted in his estate obtaining a possessory title. This evidence was –

a) a letter from the first wife in 1983 that,

"From I leave there in '64 I haven't receive[d] any [support] after so much ill treatment] (see Para 5 and 28 of the judgment).

b) The first wife came to Jamaica in 1991 but did not set foot in the house because her husband did not invite her (Paras 8 and 28 of the judgment.)

c) The first wife left the premises removing all her possessions except a wedding ring (Paras 9 and 28 of the Judgment)

d) The husband commenced cohabitation with and eventually married another woman who lived with him from 1976 until his death in 1992. (Paragraphs 8 and 28 of the judgment).

On that evidence it is hardly surprising that the court found that the first wife had either discontinued possession or been dispossessed more than 12 years before the commencement of legal proceedings. Their Lordship's words at paragraph 32 of the judgment of the court must be read against the backdrop of the evidence before them, and the fact that the property there being considered was matrimonial.

[16] The nature of the property and the relations between the joint owners is of cardinal importance when determining whether there is evidence of either a discontinuance of possession or a dispossession with the necessary intent. In the case at bar, it is not matrimonial property that is being considered. The Defendant, the joint owner, was never in possession and had never occupied the premises. The intent of her parents when placing her name on the title, in the absence of credible evidence to the contrary, must be presumed to be to give her a legal interest. Their continued possession could not, without more, be considered as dispossessing the Defendant of a possession she never had. There is no evidence for example that either parent wrote a will or wills treating with the property as if the *jus accrescendi* no longer applied. It may be presumed that they were content that the said premises would pass to their daughter who in the normal course of things they would expect to predecease. There is no evidence that the Defendant's parents had at any time barred her entry to the property or that she had requested entry or treated the property otherwise than as her own. She lived overseas, no doubt satisfied that her parents were comfortably residing at the premises. This is normal and only to be expected of a child who loves and cares for her parents. There is no evidence that parent and child had been estranged indeed the evidence of her coming to resettle her father in a nursing home suggests otherwise. In short, there is no credible evidence that the possession by Mitchell was such as to exclude the Defendant. Mitchell's words to Paulette (Para 7(j) above) are consistent with a hope or expectation that his successor in title would keep the house in the family. They do not by themselves evince an intention to dispossess. Therefore, even

had the claim been framed as one by the estate of Mitchell, on the evidence presented, the result would have been the same.

[17] Let me say however, that in the evidence of Paulette there is the suggestion that acts were done and expenditure incurred based on a promise or representation, by one at least of the joint owners. This may raise the possibility of some form of estoppel and/or the existence of a trust constructive or otherwise. The claim was not framed in that way nor was it said that the Defendant was privy to such understandings. I therefore make no finding in that regard. Suffice it to say that the granddaughter of the deceased, who has been in possession and who cared for her grandparents over all these years, may not be without further recourse.

[18] In the result, on the evidence and on the case as presented before me the Claimants cannot succeed. The Claim is dismissed with costs to the Defendant to be taxed or agreed.

**David Batts**
**Puisne Judge**
**1st March 2016**