JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 26/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	EPHRAIM STEWART	DEFENDANT/ APPELLANT
AND	CLIFTON LINDO EUPHEMA LINDO	PLAINTIFFS/ RESPONDENTS

Anthony Fearon for appellant

Donald Smith for respondents

October 23 and December 9, 1991

WRIGHT, J.A.

This is an appeal from the judgment of His Hon. Mr. R.A. Stewart, Resident Magistrate for the parish of St. Elizabeth in favour of the respondents which was delivered on February 4, 1987. The appeal is distinguished by the singular disregard for the appeal process set out in the Judicature (Resident Magistrate's) Act as a result of which it has taken over four years for the appeal to come before this court. But more of this anon.

The facts of the case are by no means complicated. Mrs. Beryl Parchment was the registered owner of 10 acres 3 Roods and 11 Perches of land registered at Volume 1039 Folio 464 which she cut up into five pastures each of which was fenced around. In 1962 the respondents purchased one of those pastures and went into and remained in unmolested occupation until March 20, 1984 the date of the trespass complained of in this action. On that day the appellant brought in commissioned Land Surveyor Mr. D.L. Rowe to survey lands which he had bought from Mrs. Parchment in 1975. Those

lands were comprised in the remaining four pastures. The problem stemmed from the fact that although the respondents had bought and had been in occupation of 2½ acres in addition to ¼ acre purchased by Doris Buchanan the vendor had purported to sell to the appellant 9½ acres. On survey the four pastures yielded 7 3/4 acres but the appellant insisted that the respondents were occupying a portion of the lands which he had bought. He accordingly brushed aside the objection of the respondents to the surveyor crossing their line and establish the extent of the lands he claimed. In the process the surveyor chopped down a hardwood tree "brazaetta" and three sour sop trees and planted monuments on the respondents' land. It is significant to note that the respondents only heard of the survey because although they are adjoining owners in relation to the lands being surveyed no notice of the survey was served on them. Their evidence to that effect is borne out by the note on the surveyor's diagram.

The respondents' action for trespass claimed $600 damages and an injunction to restrain the appellant, his servants or agents from repeating or continuing the trespass to the respondents' land. The defence sorted was "Denial of trespass as alleged or at all" and in addition the appellant counter-claimed for trespass alleging that the respondents had pulled down fence posts and wire and had, pulled up surveyors pegs. The respondents pleaded a denial. In his defence the appellant testified that when he purchased the land:

> "'Nurse took me around the land showed me title and handed me title. Fence marked my boundaries. I went in possession of land....I worked land and raised animals on it, I worked up to Lindo's line. Took surveyor to survey off my 9½ acres... I showed surveyor my boundaries. Showed him boundary line between me and Lindo.'
>
> Ques: After you showed boundary to surveyor where did he survey?
>
> Ans: He surveyed along my line.
>
> Ques: Did the surveyor survey a part of Mr. Lindo's land?
>
> Ans: Yes. Didn't hear the question you asked."

This was a part of his evidence-in-chief and he insisted that the surveyor surveyed 9½ acres for him.

Having regard to the fact that there were roughly 10½ acres comprised in the title it is clear that the appellant could only obtain 9½ acres by encroaching on the respondents' land. He denied the cutting down of any trees on the respondents' land and insisted that the surveyor did not cross the line.

The trial began on November 10, 1986 and after an adjournment to December 3, 1986 when the evidence and addresses were completed there was an adjournment to January 7, 1987 for judgment. However, it was on February 4, 1987 that oral judgment was delivered:

> "Judgment for the plaintiff on claim for $600. Injunction granted as prayed. Formal order to be prepared. Costs to be agreed or taxed. Judgment for plaintiff on counter claim. No order as to costs."

Notice of Appeal is dated February 4, 1987 and appears to have been filed in the Resident Magistrates' Court office, Black River on February 9, 1987 and on February 11, a copy was sent by registered mail to the attorney-at-law for the respondents. That same document contains notice of the deposit for due prosecution of the appeal and of security for costs. Thereafter an unexplained hiatus set in.

The court was advised that despite counsel's efforts the reasons for judgment were not forthcoming from the Resident Magistrate. There are two curious documents in the record of appeal. The first is an undated notice as follows:

> "Take notice that his Honour R.A. Stewart, Esquire, Resident Magistrate, exercising jurisdiction in St. Elizabeth has filed his Reasons for Judgment in the above case.
>
> sgd. L. Shelley
> Ag. Deputy Clerk of Courts
> Saint Elizabeth."

The next document is also undated. It is somewhat of a hybrid being partly a finding of facts and partly reasons for judgment.

Section 256 of the Judicature (Resident Magistrates) Act

which sets out the appeal regime in Civil cases states inter alia:

> "On the appellant complying with the foregoing requirements (i.e. the giving of notice of appeal and security for the costs of the appeal) the Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree or order appealed against. Such statement shall be lodged with the Clerk of the Courts who shall give notice thereof to the parties, and allow them to peruse and keep a copy of same.
>
> The appellant shall within twenty-one days after the day on which he received such notice as aforesaid draw up and serve on the respondent and file with the Clerk of the Courts, the grounds of appeal and on his failure to do so his right of appeal shall, subject to the provisions of Section 260, cease and determine."

The significance of the reasons for judgment and the issue of the notice by the Clerk of the Courts is highlighted by the section. Without compliance with the provisions the appellant cannot proceed with his appeal. In the circumstances the undated notice issued by the acting Deputy Clerk of the Courts and the absence of a date mark showing when the statement of the Magistrate was filed can only be seen as an attempt to cover up the lapse in the process. But the fact that the Grounds of Appeal are dated 31st July, 1991 tends to support counsel's contention of his vain attempts to secure the reasons for judgment until July 1991. The need for a regular inspection of the Appeal Register in the office of the Clerk of the Courts is clearly indicated.

By way of contrast it may be appropriate to set out the requirement for "findings of fact" about which there seems to be some confusion. In the first place the requirement for "findings of fact" relates only to criminal cases and was introduced into the Act only in 1973 by section 5 of Law 45 of 1973 whereas the requirement for reasons for judgment was always in the Act. The amendment was to section 291 and provides:

> "Where any person charged before a court with any offence specified by the Minister, by Order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Magistrate shall

> record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

There can, therefore, be no cause for confusing these two requirements.

> "Four Grounds of Appeal were filed namely:
>
> 1. The verdict of the Learned Resident Magistrate is unreasonable and cannot be supported by the evidence.
>
> 2. The Plaintiffs being the recipient of Notice of the Survey are barred from alleging Trespass as a result of the Act of the Surveyor, pursuant to section 26 of the Land Surveyors Act.
>
> 3. There was no evidence given by the Plaintiffs which amounted to act(s) of Trespass on the part of the Defendant.
>
> 4. The Defendant being the Registered Proprietor and the owner of the legal estate of the land which is the subject of the claim, having not inteferred (sic) with the Plaintiffs possession of the part of land occupied by the Plaintiffs, ought not to be found liable in Trespass."

However, only grounds 2 and 3 were argued, Mr. Pearson laid great stress on section 26 of the Land Surveyors Act which reads as follows:

> "Subject to the provisions of section 27 any surveyor may, with his student surveyors, servants and workmen, enter upon any land which it is his duty, or which he has been appointed, to survey and, so far as may be necessary for such survey, upon all other lands immediately abutting upon such land for the purposes of such survey."

Although the appellant maintained that the surveyor did not go on to the respondents' land reliance on this section of necessity endorses the contrary and accords with the finding of the Resident Magistrate. The submissions on this ground were really self defeating because although it is clear from the surveyor's notes on the diagram prepared by him that the respondents were not among the adjoining owners who were served notice Mr. Pearson submitted that if the respondents wished to object they could only do so by signing the appropriate form contemplated by section 29 of the Act. However, he could not say how they who were merely standing by and observed

a trespass to their land would be in possession of such a form. But as Mr. Smith submitted the section is only enabling and speaks of "so far as may be necessary for such survey". The admitted fact is that the respondents bought their land fenced with barbed wire twenty-two years before the date of survey and that the fence was still in place. How then could it be necessary for the surveyor to break and enter upon their close to survey lands which adjoin theirs? Further, how could there be any justification for destroying the respondents' valuable trees? In the twenty-two years of occupation the respondents could well have planted a line of timber or fruit trees close by the line, maybe citrus or coconut etc. Could section 26 be pleaded in justification of damaging those trees to effect such a survey as was carried out that day? The answer must be no. Plainly the section deals with access to carry out the survey and does not justify a trespass.

Under Ground 3 it was submitted that since the surveyor is a professional person not subject to the directions or control of the appellant in the performance of his duties and since the Act protects the surveyor against liability the appellant could not be liable vicariously. I think the Magistrate's acceptance of the respondents' evidence as to what happened there that day has sufficiently answered this submission but for clarity I will repeat that the Magistrate accepted the evidence of the respondents that the appellant ignored the objection of the respondents, went across the boundary and directed the surveyor to proceed across the boundary saying "land over there for him". That is an end of the matter.

In the circumstances we dismissed the appeal with costs to the respondents fixed at $500 and affirmed the judgment of the court below.

DOWNER, J.A.

I agree.

GORDON, J.A.

I agree.