[2010] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO. 1/2008

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

BETWEEN	CHARLES SWABY	APPELLANT
AND	GERALD LYN	RESPONDENT

Owen Crosbie, instructed by Owen S. Crosbie & Co. for the appellant

Norman Godfrey instructed by Brown, Godfrey & Morgan for the respondent

9 October, 21 November 2008 and 26 March 2010

PANTON, P

[1] On 21 November 2008, we allowed this Resident Magistrate's Court appeal, set aside the judgment and ordered a new trial before another Resident Magistrate. These are our reasons for judgment.

The particulars of claim

[2] The claim before the court was filed by the respondent who sought an award of $250,000.00 as damages for trespass to his land, as well as an injunction to restrain the appellant and his servants or agents from further

trespassing thereon. He claimed in the capacity of proprietor of land registered at Volume 267 Folio 62 of the Register Book of Titles, known as 5 Park Crescent, Mandeville. The claim was against the appellant as proprietor of land registered at Volume 978 Folio 145 of the Register Book of Titles, known as 6 Park Crescent, Mandeville. The respondent asserted that there is a right of way that runs with his land, and that the appellant entered upon the right of way as well as on his land, without lawful authority, and committed several acts of trespass, including the erection of a concrete structure thereon.

[3] In answer to a request for further and better particulars, the respondent said, among other things, the following:

(a) the most recent acts of trespass were committed between 27 and 31 August, 2001; and

(b) the appellant and/or his servants or agents had erected a steel cage and laid concrete blocks on four concrete columns on the respondent's right of way.

The defence

[4] In his written defence, the appellant admits that the parties occupy adjoining lands and states that there are two rights of way between the lands. The appellant asserts that the right of way claimed by the respondent is a right of way for his (the appellant's) land. The appellant

further denies that he, his servants or agents erected a steel cage or laid concrete blocks as alleged by the respondent.

[5] The appellant's written defence further states that the respondent's predecessor in title had brought an action in 1971 against the appellant's father and predecessor in title alleging the said acts of trespass as in the present suit. By bringing the instant suit, the respondent was abusing the process of the court, according to the appellant. In any event, he advanced the view that the Limitation of Actions Act operated to defeat the claim.

The evidence

[6] The respondent gave evidence that the land on which he lives is owned by him, his brother and sister. He has been living there since 1948. The appellant's land, he said, adjoins his, and there is a right of way along his land, touching the appellant's land at the back. This right of way provides access to his land as well as parking for motor vehicles. There are three concrete columns with concrete blocks set between them like a wall, and on top there is reinforced steel with a step projecting out. The step, he said, is directly on his (the respondent's) land, not on the right of way. The structure of which he complains was erected from 1971, during his (the respondent's) parents' lifetime. The structure fell into ruin and in 2001, the appellant started construction again, hence the present

proceedings. According to the respondent, he cannot gain access to his land other than by the right of way, unless he goes through his shop, as the appellant has blocked part of the right of way.

[7] The appellant, in his evidence, confirmed the location of the two parcels of land, and said that the right of way on the respondent's title is shown as divided into two, one on his (the appellant's side) and the other on the respondent's land. He said that the right of way shown bordering the respondent's property is the right of way that leads to his (the appellant's land). He said that his father died in 1978, and he has been in possession of the land since and has done nothing at all to the right of way.

[8] The appellant said that in 2005 he completed the construction of a building that his father had started in the 1960s. This construction is different from any that the respondent is complaining about. He said that he has built no steps on the right of way, leading to the back of his premises. He denied carrying on any construction as recent as 2000 to 2001, and stated that the respondent has given false evidence against him.

The issues

[9] Based on the pleadings, the issues were clear:

(i) Did the appellant trespass on the respondent's property, particularly between 27 and 31 August, 2001?

(ii) Did the appellant or his servants or agents erect a steel cage and lay concrete blocks on four concrete columns on the respondent's right of way?; and

(iii) What is the effect of the suit filed in 1971?

The decision of the Resident Magistrate

[10] The following findings of fact and conclusions were made by the learned Resident Magistrate:

(i) the right of way falls outside the boundaries of the lands owned by the parties;

(ii) the respondent and his co-owners and their predecessor in title have had long, open and established use of the right of way to access their lands, thereby acquiring prescriptive right;

(iii) both the appellant and the respondent are entitled to the benefit of the right of way;

(iv) the appellant's father commenced construction of columns on the right of way leading to the filing of the action in the Supreme Court in 1971;

(v) construction continued over the years, leading to the structure identified by the surveyor to have been built by the appellant on the right of way;

(vi) there is now a building that is different from what is contained in the respondent's pleadings;

(vii) there is only one building, a storeroom, on the right of way as indicated by the surveyor's report, and that building is still undergoing construction;

(viii) the storeroom on the right of way was the structure commenced by the appellant himself in 2001, prompting the respondent to initiate the instant proceedings;

(ix) the appellant, independent of his father, has acted in a manner that obstructed and continues to obstruct the respondent in the use of the right of way;

(x) the interference with the right of way is not trespass properly so-called as the respondent is not in actual possession or entitled to possession of the right of way;

(xi) although there is no such trespass, the interference with the respondent's right over the right of way entitles the respondent to redress in the tort of private nuisance;

(xii) the fact that the respondent filed suit in trespass is not fatal to his claim as it is a matter of form rather than substance;

(xiii) the present action is neither res judicata nor an abuse of the process of the court; and

(xiv) on a balance of probabilities, the appellant "is liable to the respondent for interference with (obstruction of) the right of way in dispute and for trespass on the plaintiff's land through the continuing encroachment of the wall that opens onto the plaintiff's land giving access to the storeroom constructed on the right of way".

The Order

[11] In the end, the learned Resident Magistrate made the following orders:

"(i) The defendant is restrained by himself, his servants and/or agents from obstructing or otherwise interfering in any way whatsoever with the right of way that runs along the northern boundary of the plaintiff's land registered at Volume 276 Folio 62 of the Register Book of Titles as shown on site plan prepared by R.L. Wilson, Commissioned Surveyor, dated 28th September, 2006.

(ii) The defendant is restrained by himself, his servants, and/or agents from entering, remaining on, or otherwise interfering with the plaintiff's use, occupation and enjoyment of his said land as aforesaid.

(iii) The defendant, at his own expense, do pull down, demolish and remove the obstruction to the right of way and the encroachment on the plaintiff's land as identified and shown in the report of R. L. Wilson, Commissioned Surveyor, within THIRTY (30) days of the date hereof so that the boundaries between the parties' property and the right of way in question do accord with the boundaries as contained in their respective certificates of title.

(iv) If the defendant shall fail to comply with paragraph (iv) (sic) above within the time specified, then the plaintiff is at liberty to carry out such acts as are necessary to give effect to the said order at cost to the defendant. The cost to be recovered from the defendant as a civil debt, if not satisfied by him.

(v) Costs to the plaintiff, inclusive of surveyor's costs, to be agreed or taxed."

[12] In arriving at her decision, the learned Resident Magistrate clearly relied heavily on the report of the surveyor. The record of appeal

indicates that she made the reference to the surveyor at the end of the addresses by both counsel on 7 April 2006. Mr Owen Crosbie, representing the appellant then as well as now, voiced objection to the reference saying that there was no power for such a referral and that he would not be consenting. Whereupon the Resident Magistrate stated that there was no need for the consent of the parties. She noted at page 43 of the record the basis for the referral. It reads thus:

> "Matter cannot be determined without reference to a surveyor and a visit to the locus in quo only would not assist Court in coming to a determination without help of surveyor to identify parties' lands, boundaries and right of way."

[13] An application was made for a stay of the order of referral but this was denied by the Resident Magistrate. The date for the surveyor to report was fixed as 7 July 2006. The report was however not acknowledged in court until 3 April 2007, when Mr Norman Godfrey for the respondent stated that he had received a copy and had no questions for the surveyor. The Resident Magistrate was informed that Mr Crosbie had been advised of the availability of the report but had refused to accept it.

[14] The learned Resident Magistrate delivered her reasons for judgment on 18 September 2007, and on the following day, the appellant filed the following grounds of appeal:

"1. Mistrial – being unlawful and grounded in vital and fatal inadmissible evidence touching and concerning for example the Surveyor's, R. L. Wilson Report on which the court wrongfully heavily relied, the Report not being the Report requested and ordered in Order for Reference to Surveyor of 7th April, 2006 but a Report entirely dehors and based upon a private agreement between the Surveyor and the Plaintiff behind the back of and without the involvement of the Defendant; misleading and mis-statement of facts and other wrongs.

2. The judgment is against the weight of the evidence which favours the Defendant by any standard of proof is unreasonable and unlawful."

[15] Mr Crosbie submitted, in writing as well as orally, that the judgment was flawed in that it relied on an inadmissible surveyor's report. He pointed to what he regarded as procedural breaches which made the report inadmissible; for example, he said that the report should have been submitted by 7 July 2006, but was not filed until 3 November 2006. The order of reference, he claimed, expired on 7 July, 2006. In any event, he said that the report was never admitted in evidence; hence, there was really no evidence of it and its contents ought not to have been acted on.

[16] Mr Godfrey, on the other hand submitted that the only issue to be determined, and which ought to be determined in favour of the

respondent, was whether the learned Resident Magistrate was correct when she referred the matter to the surveyor – at a time when both parties had not only closed their cases, but had also addressed. He was of the view that section 101 of the Judicature (Resident Magistrate's) Act ("the Act") did not deprive the Resident Magistrate of that authority, and that she could make the reference at any time before judgment. The direct payment by the respondent to the surveyor was in order in the circumstances, Mr Godfrey said. He pointed out that the surveyor had conducted the survey before submitting the bill of costs, and no prejudice had been occasioned by the payment being made after the survey.

[17] Section 97(1) of the Act provides for the lodging of a plaint in the Resident Magistrate's Court where there is a dispute between the occupiers of adjoining lands respecting the boundary line between the lands. Section 97(2) authorizes the Resident Magistrate,

> "... if he thinks (it) desirable and without the consent of the parties to refer the matter to a surveyor or surveyors to make such survey or surveys and lay down such boundary line as the evidence and the law shall justify and in his final judgment shall lay down and determine the boundary in settlement of such dispute."

[18] The instant case does not involve a dispute as to the boundary line, so section 97 does not apply. However, section 101 provides that:

> "In any suit under sections 97, 98 and 99, or in any other suit where it may be desirable for the purpose

> of determining the matter in issue, the Magistrate ... may make an order that the matter in controversy shall be referred to a commissioned surveyor ... and the person or persons so appointed shall, under the control and direction of the Court, make a survey of the lands in question, so far as the same may be necessary to ascertain and settle the boundary line between the said lands, or the right of way or other easement in dispute, or such other matter at issue as aforesaid ... and shall make a report thereof to the Court, and shall file the report in Court; and the Court shall, on a day to be appointed for that purpose, take the said report into consideration; and it shall be competent for either of the parties to take exceptions to the said report, and the Court shall hear argument upon such exceptions, and shall allow or disallow such exceptions, or confirm the report, as the justice of the case may appear to require ..."

[19] Section 103 provides that no reference (to a surveyor) shall be made until the plaintiff has deposited in court a sum of money, to be fixed by and to be subjected to the order of the court. This provision was apparently not complied with and so formed the basis of complaint by Mr Crosbie. He submitted that section 103 is aimed at protecting "the independence of professional witnesses and the integrity of judicial proceedings through manifest appearance of impartiality."

[20] It is clear that the section was not followed as the reference was made before the deposit of a sum of money in court, which sum ought to have been fixed by the Resident Magistrate. Further, no money was ever deposited in court in respect of the survey. Instead, the cost of the survey

was paid by the respondent directly to the surveyor on 3 November 2006, the date on which the report was filed with the court. This situation prompted Mr Crosbie to describe the report as "a private treaty between the Plaintiff/Respondent and the Surveyor."

[21] We are unhappy with the manner in which the reference was made to the surveyor. Section 101 allows the Resident Magistrate, without the consent of the parties, to refer a matter to a commissioned surveyor. However, the circumstances for such a reference and the steps to be followed are specifically stated. Section 102 makes specific provision for the scale of fees. Section 103 dictates that the court is to fix the sum to be paid and that it is to be deposited by the plaintiff in court before the reference is made. After the sum has been deposited, the Resident Magistrate will then make the formal reference. Upon the completion of the report, the surveyor is to file it in court and the court will then fix a date for consideration of the report. On that date, either party may take exception to the report. The taking of exception is usually in the form of argument or submissions.

[22] The instant situation does not involve a boundary dispute. The problem is with the use of a right of way. It is clear that at the end of the evidence given by the parties, the learned Resident Magistrate required

further information or assistance to arrive at her decision. She stated that at page 43 of the record. Her statement bears repetition -

> "Matter cannot be determined without reference to a surveyor and a visit to the locus in quo only would not assist Court in coming to a determination without help of surveyor to identify parties' lands, boundaries and right of way."

An application had been made for her to visit the locus in quo but she rejected it. That rejection was not in keeping with her statement. Seeing that she needed assistance from a surveyor, and this was not a boundary line dispute, she ought to have taken the opportunity to visit the locus in quo. It seems to us that in order to get a proper comprehension of the facts, seeing that she felt the need for further assistance, she ought to have visited the locus in quo. The object of a view or visit to the locus in quo should be for the purpose of enabling the court to understand the questions being raised, to follow the evidence and to apply the evidence – ***R v Warwar*** (1969) 11 JLR 370 at 383 F. Such a visit is "something which enables a better understanding of the evidence given by the witnesses in court" – ***R v Williams***(1971) 12 JLR 541 at 544 C. It was therefore not in keeping with a fair trial for the learned Resident Magistrate to have given the impression that she preferred to hear from a surveyor, while not choosing to visit the locus in quo, in a situation where the matter was not a boundary dispute.

[23] We noted that the reference was done after closing speeches had been made. The announcement seemed to have taken Mr Crosbie by surprise, and there followed some unnecessary heat between him and the Bench. We can understand the reaction, seeing that the record of appeal does not show that there had been any earlier indication of the intention to seek the services of a surveyor. In our view, it would have been more appropriate for an earlier indication to have been given by the learned Resident Magistrate and, further, for the closing speeches to have been delayed until after the surveyor had reported. If any exception was to be taken to the report, the arguments thereon could have taken place then – given the fact that one does not know whether further evidence would have been put forward following the report. See ***Whitelocke v Campbell*** (1970) 12 JLR 67.

[24] In view of the flawed procedure that was adopted in respect of the reference to a surveyor, and the Resident Magistrate's stated reliance on the report in coming to her decision, we felt that the judgment ought not to be allowed to stand, and that there should be a new trial before another Resident Magistrate.

[25] Before parting with the matter, we wish to say that the learned Resident Magistrate was quite correct in rejecting the submission that res

judicata applied. This is so as there was no evidence before her to substantiate such a plea.