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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 9/2001

**BEFORE: THE HON. MR. JUSTICE FORTE, P.
 THE HON. MR. JUSTICE HARRISON, J.A.
 THE HON. MR. JUSTICE SMITH, J.A.**

BETWEEN: MERLENE THOMAS PLAINTIFF/APPELLANT

AND MICHAEL SPENCER DEFENDANT/RESPONDENT

Chukwuemeka Cameron for appellant instructed by Dorrell Wilcott

Dr Bernard Marshall for respondent

March 18, 19 and December 19, 2003

HARRISON, J.A:

This is an appeal from the judgment of His Honour Mr. H. P. Wells, Resident Magistrate for the parish of Clarendon on December 21, 2000 giving judgment for the defendant with costs to be agreed or taxed.

We heard the arguments of counsel and we set aside the judgment of the court below, non-suited the appellant and ordered costs of \$15,000.00 to the respondent to be agreed or taxed. As promised these are our reasons in writing.

The appellant, on September 1, 1999, filed in the Resident Magistrate's Court for the parish of Clarendon, plaint No. 1315 of 1999 claiming against the respondent Michael Spencer a right to land consisting of 11 acres and 21 perches at Foga Road, May Pen in the parish of Clarendon, which land the respondent

claimed to be his, having obtained Title registered at Volume 1029 Folio 552 of the Register Book of Titles.

The facts relevant to this are that the appellant 85 years old in the year 2000, currently occupies the said land which originally consisted of 13 acres and 21 perches and was formerly owned by the appellant's father Alexander Thomas. The latter had bought the land in 1946 from one R.O. Terrier. In addition to the appellant and others, a witness to this purchase was one Jeremiah Samuels. Alexander Thomas gave two (2) acres of the land to both Clifford Spencer, the father of the respondent and Eunice Thomas Peart, the sister of the appellant. Clifford was then living with Eunice. The appellant has been living on the land "for over fifty years" since the 1950's up to the year 2000. She said "Alexander Thomas gave the land to me". She paid the taxes on the said land from 1960 to 2000 and received tax receipts therefor.

Up to 1959 Alexander Thomas was living in Chapelton with his wife, the mother of the appellant. Alexander Thomas died February 20, 1963. The said wife died on August 6, 1963.

The plaint note alleged fraud against the respondent. In an unusually detailed particulars of fraud, the appellant alleged acts of fraud by the respondent, namely:

"A) Falsely declaring that Alexander Thomas died on the 29th October, 1959 by producing to The Registrar of Titles a forged Death Certificate Registration for Alexander Thomas.

B) Falsely declaring that he was the co-owner of the said 13 acres 21.7 perches of land with Alexander Thomas.

C) Falsely declaring that Clifford Spencer was the co-owner of all that land comprised in Volume 1029 Folio 552 when he well knew that the land was not owned by Clifford Spencer.

D) Falsely deponing to a Transmission Application claiming an interest in all the land when he knew that Clifford Spencer only owned 2 acres of the land.

E) Signing a Transfer falsely representing that as Administrator of Clifford Spencer's Estate he was entitled to transfer the entire parcels of land to the defendant and seven (7) others".

The defence of the respondent before the learned Resident Magistrate was tersely stated namely:

"No fraud on part of plaintiff (sic) invalidating his title under the Act".

The learned Resident Magistrate heard the examination-in-chief and the cross-examination of the appellant Merlene Thomas and at the close of the appellant's case he heard and upheld a submission of no case to answer by counsel for the respondent. The learned trial judge in his reasons, inter alia, said:

"In the view of the Court, the paucity and impotence of the evidence was palpable. Ms Thomas told the court absolutely nothing that the defendant had done which was an act of "deliberate or conscious dishonesty". Indeed, only two basic references were ever made to the defendant in Ms. Thomas' evidence, namely that he was one of the children of Clifford Spencer, and secondly, that she had only just "heard that Michael and his (siblings) are claiming the full 13 acres". The very high burden of proof alluded to in ***Bater, Hornal and Dellows*** for civil matters

concerning allegations of fraud was manifestly unattained in the view of the court and as such the no-case submissions upheld."

The appellant, in her particulars of claim, after alleging fraud had sought a declaration that she was the sole owner of the said 11 acres 21.7 perches of land comprised in certificate of title registered at Volume 1029 Folio 552 in the name of the respondent, an order for cancellation of the said title and a re-issue in the appellant's name, damages, an injunction and costs against the respondent.

The grounds of appeal were as follows:

- "1. That the Learned Resident Magistrate erred in holding that the plaintiff/appellant has not proved her case.
2. That the Learned Resident Magistrate refused to admit the affidavit of Jeremiah Samuels who witnessed the purchase by Alexander Thomas from R.O. Terrier on January 1, 1946 of 13 acres 21.7 perches given by Jeremiah Samuels on July 10, 1996 and that the plaintiff has lived on that property since January 1946.
3. That the proper notice was given by the Evidence (Amendment Act 1995); that the Learned Resident Magistrate having listened to the evidence of Jeremiah Samuels' illness agreed to visit his home, but without more changed his mind having concluded that the affidavit was hearsay.
4. The Resident Magistrate failed to record my submission on the Limitation Act and then denied the validity of the tax receipts and the death certificate, certified by the Registrar General of Alexander Thomas' death on February 23, 1963 age 80. The Resident Magistrate insisted that the proper person must attend the court.

5. The Learned Resident Magistrate refused to accept the production of a forged death certificate which the defendant must have known to have been forged and tendered by the defendant applicable to the death of Alexander Thomas on October 25, 1959 was fraudulent.

6. That the Learned Resident Magistrate refused to contemplate the effect of a transfer from R.O. Terrier to Alexander Thomas and Clifford Spencer many years after the death of Alexander Thomas."

Mr. Cameron for the appellant conceding that the allegation of fraud had not been proved, advanced no firm arguments in support of grounds 1-5. In support of ground 6 he argued that the appellant led sufficient evidence to prove that she was the sole owner and entitled to the said land. Her father died in 1963 and she proved her right to a possessory title.

Dr Marshall submitted that no evidence of fraud having been led, the learned Resident Magistrate was correct in entering judgment for the respondent.

On the invitation of this Court to counsel to argue the issue of non-suit, Dr Marshall stated that non-suit did not apply. Mr. Cameron submitted that the appellant should have been non-suited.

When fraud is alleged as having been committed under the Registration of Titles Act, it means, actual fraud, that is, dishonesty of some sort (***Assets Co. v Mere Roihi*** [1905] A.C. 176). Fraud alleged must be clearly pleaded and strictly proved. If proved, it is sufficient to vitiate the otherwise indefeasible title under the Registration of Titles Act.

As a general rule, in the Resident Magistrates' Court, if a plaintiff has not proved his case as alleged, the Resident Magistrate has a discretion to non-suit such a plaintiff. In ***Stewart v Brown*** (1917) Clark's Report 22, the appellant brought an action for damages for injury to his mule due to the negligence of the respondent driver. The Resident Magistrate non-suited the appellant for the reason that "the witnesses had contradicted each other". The Full Court of Appeal, in reversing the order of non-suit, per Beard, J. at page 24, said:

"In cases where the Judge after hearing the plaintiff's evidence, is of opinion that on the case as submitted assuming the plaintiff's version of facts be true, the plaintiff has not disclosed a legal cause of action, and that therefore there is nothing to answer, the Judge was always entitled, and I conceive still entitled, to non-suit the plaintiff ..."

Non-suit by a Resident Magistrate is also permissible under section 181 of the Judicature (Resident Magistrates) Act. It reads:

"181. The Magistrate shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court".
(Emphasis added)

See also ***Clark v Arthurs Engineering Ltd.*** [1959] 2 All E.R. 503.

In the instant case, the appellant tendered in evidence as Exhibit 1, a certified copy of the death certificate of her father Alexander Thomas, who died on February 20, 1963. The cause of his death as certified by the doctor was "senility". The certificate confirms the evidence of the appellant that at the time of his death Alexander Thomas:

(a) was 80 years old,

(b) lived at Chapelton,

(c) was married

and

(d) his death was reported by Kenneth Thomas
her nephew.

The appellant attempted to prove that she:

"paid the taxes for the place in Foga for over forty
(40) years. I last paid the taxes April 2000. When I
pay the tax I got a receipt".

The learned Resident Magistrate upheld an objection by counsel for the respondent to the admission of the tax receipt as an exhibit, on the basis that it was not a public document nor did it satisfy the statutory requirements of notice required under the Evidence Act. In so ruling the learned Resident Magistrate was in error.

The appellant, the daughter of Alexander Thomas occupied the said land since his death in 1963. She claimed a right to the land. In seeking to establish her possessory right, she sought to prove the payment of taxes in support of that right. The tax receipt, not being her document could properly be classified as hearsay in respect of the truth of its contents, and thereby ordinarily inadmissible. However, the appellant if merely seeking to prove the fact that while in possession she paid taxes and got a receipt, as distinct from the truth of its contents, is seeking to use the document as original evidence, making it

clearly admissible for that purpose: (*Subramaniam v Public Prosecutions* [1956] 1 W.L.R. 965 at 969).

Relying on a possessory title and living on the said land from 1946 possession would reside in the appellant from 1963 onwards and she could thereby seek to establish her right to the land by this means extinguishing the right of any other alleged owner. In any event she was the daughter of Alexander Thomas, the owner of the land purchased from R.O. Terrier.

Furthermore, exhibited before this Court as fresh evidence was a certified copy of a "death certificate" also of Alexander Thomas. The appellant complained that the learned Resident Magistrate "refused to accept that the production of a forged death certificate ... known to be forged and tendered by the defendant ... was fraudulent". This certificate disclosed that Alexander Thomas:

- (a) died in May Pen
- (b) lived at Foga Road at death
- (c) was single
- (d) was aged 61 years at death and
- (e) died on October 29, 1959.

These are all material recitals of fact, so contradictory of the evidence contained in the certificate, exhibit 1, that no court should fail to pay particular attention to its details. But most curiously, the cause of death was recorded as:

"malignant Tumor to tissue causing carnisconia (sic)".
(Emphasis added)

It was signed by "Dr R. Mendez R.C.S. L.R.C.P".

The very wording of the cause of death ought to have raised a suspicion in one's mind and should have alerted the Resident Magistrate, that the latter certificate may have been less than authentic. It was on the basis of such a certificate that, presumably, a registered title for the entire 13 acres of land was issued to the respondent at Volume 1029 Folio 552 of the Register Book of Titles.

In addition, the Learned Resident Magistrate refused to admit the affidavit evidence of an ailing witness Jeremiah Samuels. The latter witness was alleged to have been a witness to the sale of the 13 acres 21.7 perches of land by R.O. Terrier to Alexander Thomas. The requisite notice under the Evidence Act to admit the affidavit had been served.

There was sufficient material available, if it had been put forward and accepted, to substantiate the claim of fraud in the respondent. The learned Resident Magistrate should have non-suited the appellant under the provisions of section 181 of the Judicature (Resident Magistrates) Act. Had the learned Resident Magistrate examined the statement of defence of the respondent, namely,

"... no fraud invalidating the title (of the respondent)
under the Act"

along with the death certificate signed by "Dr Mendez", he no doubt may have concluded that satisfactory proof had not been given to him entitling either the

plaintiff or the defendant to the judgment of the Court; least of all, the respondent - thereby attracting the operation of the said section 181 of the Act.

The appellant should remain in possession of the said land.

I am not aware however that a Resident Magistrate has the power to order the Registrar of Titles to cancel a registered title, having found that fraud was proved.

In view of the advanced age of the appellant, now 88 years of age, the matter should be dealt with expeditiously. If the appellant chooses to persist with the action in the Resident Magistrate's Court, it should be heard by a different Resident Magistrate.

Accordingly, for the above reasons we allowed the appeal and made the order stated.