[2010]JMCA App 9

JAMAICA

IN THE COURT OF APPEAL
APPLICATION NO. 175/2009

BEFORE: THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag)

BETWEEN	MERLENE THOMAS	APPLICANT
AND	MICHAEL SPENCER	1ST RESPONDENT
AND	TREVOR SPENCER	2ND RESPONDENT
AND	HOPE SPENCER	3RD RESPONDENT
AND	DAVE SPENCER	4TH RESPONDENT
AND	OWEN SPENCER	5TH RESPONDENT
AND	LUDLOW SPENCER	6TH RESPONDENT
AND	MILDA SPENCER	7TH RESPONDENT
AND	WILLIAM SPENCER	8TH RESPONDENT
AND	THELMA SPENCER GRANT	9TH RESPONDENT
AND	NELSIE STONE	10TH RESPONDENT

Dorrell Wilcott instructed by Dorrell Wilcott & Co. for the applicant

Terrence Ballantyne instructed by Bonner & Associates for the respondents

2 and 11 June 2010

BROOKS, J.A. (Ag)

[1] Miss Merlene Thomas was unsuccessful in her claim filed against the respondents in the Supreme Court of Judicature. Anderson J handed down judgment against her on 11 June 2007. Not satisfied with the decision, Miss Thomas has filed an application for leave to appeal out of

time. The application was originally filed in 2009 but was re-listed after the written reasons for the decision became available on 31 March 2010. Miss Thomas also seeks leave to adduce fresh evidence as part of her appeal.

[2] The subject matter of the dispute is a parcel of registered land situated at Foga Road, May Pen, in the parish of Clarendon (the land). The land is comprised in the certificate of title registered at Volume 1029 Folio 552 of the Register Book of Titles.

Miss Thomas' case

[3] In the affidavits filed in support of the applications, Miss Thomas alleges that her father Mr Alexander Thomas purchased the land from Mr R. O. Terrier in or about January 1946. She says that shortly thereafter, her father subdivided the land and "gave" two parcels therefrom to one of his daughters Eunice Peart (nee Thomas) and Ms Peart's then paramour; Mr Clifford Spencer. Although that relationship ended and Ms Peart emigrated from the island, Mr Spencer dealt with the two parcels as if they were his own. Mr Thomas dealt with the remainder of the land as he wished. On his death, in 1963, Miss Thomas assumed ownership and has dealt with her father's portion of the land as she pleased, exercising sole dominion over it.

[4] It seems that it eventually came to her notice that the land was comprised in a registered title and that certain transactions had taken

place in respect of the title which jeopardized her status as the title-holder. An examination of the certificate of title reveals that in 1966 Mr Terrier transferred the fee simple in the land to Messrs Clifford Spencer and Alexander Thomas as joint tenants. Mr Clifford Spencer, having survived Mr Thomas, died in or about 1977. Mr Thomas' death was noted on the title on 25 January 1996 but the date of death was said to have been 29 October 1959. Also on 25 January 1996, one of Mr Clifford Spencer's sons, Michael, one of the ten respondents herein, was registered on the certificate of title as the administrator of Mr Clifford Spencer's estate. Also on that date, an instrument of transfer was registered, whereby, Michael, as administrator, transferred the fee simple in the land to his mother, his brothers and sisters and himself as tenants-in-common in equal shares. They are the respondents herein.

[5] Miss Thomas asserts that all those transactions in respect of the registered title are fraudulent. That prompted her, along with Ms Eunice Peart and Mr Leonard Thomas, to file and prosecute the claim against the respondents, who are all the named registered proprietors.

[6] The critical aspects of her complaint are firstly, that the registration of Clifford Spencer on the certificate of title as joint tenant with her father, as registered proprietors for the land, was secured by fraud. Secondly, that a fraudulent death certificate was used to register her father's death

on the certificate of title, leaving Mr Clifford Spencer as the sole proprietor of the fee simple in the land.

The previous action

[7] Although the evidence is based on the heading of an affidavit which has been placed before us, it seems that eight of the ten registered proprietors had sued Miss Thomas and a Derrick Thomas in or about 1996. This was to prevent Miss Thomas and Derrick from interfering with certain crops on the land. The heading on the affidavit also asserts that the land is registered at Volume 1029 Folio 552 of the Register Book of Titles. The result of that claim has not been communicated to us. It will be again mentioned, hereafter.

The trial in the present claim

[8] At the conclusion of the trial of Miss Thomas' claim, Anderson J found that the claimants had failed to prove their allegations of fraud and he gave judgment for the defendants (the respondents herein). Although there were three claimants before Anderson J, only Miss Thomas has made the instant applications.

The present applications

[9] In order to succeed in her present applications Miss Thomas has to clear two hurdles. She must demonstrate, firstly, that the evidence which she wishes to have adduced, satisfies the criteria to be received as fresh evidence and secondly, that her appeal has a real likelihood of success.

The Fresh Evidence

[10] Section 28 of the Judicature (Appellate Jurisdiction) Act authorizes this court, in determining an appeal, to order the production of documents and the examination of witnesses which production or examination is necessary for the determination of the appeal. In addition, rule 2.15(2)(h) of the Court of Appeal Rules 2002 permits this court to "make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal". These provisions would seem to allow fresh evidence to be adduced.

[11] The fresh evidence may either be conclusive of the appeal or may cause the court to order a retrial of the matter. The bases for allowing the reception of fresh evidence were set out in ***Ladd v Marshall*** [1954] 3 All ER 745. In that case Lord Denning, at page 748 A-B, outlined them in the following passage:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:** third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible." (Emphasis supplied)

These principles, laid down in ***Ladd v Marshall,*** have been approved by this court in **George Beckford v Gloria Cumper** (1987) 24 JLR 470. In the

latter case, Carberry JA, comprehensively examined and applied the principles on which ***Ladd v Marshall*** was based. One of those principles was the interest of the state that litigation should come to an end. Since the advent of the era of the Civil Procedure Rules, the principles set out in ***Ladd v Marshall*** have been considered as still being relevant. In ***Hertfordshire Investments Ltd. v Bubb*** [2000] 1 WLR 2318, the English Court of Appeal emphasised that strong grounds were required to allow fresh evidence in the face of a final judgment.

[12] Similar, though not identical criteria, to those laid down in ***Ladd v Marshall*** were stated in **R v Parks** [1961] 3 All ER 633. These were approved by this court in **Shawn Allen v R** SCCA No. 7/2001 (delivered 22 March 2002). Panton JA (as he then was), at page 2 of the judgment, cited the following quotation from ***R v Parks***:

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly, and this goes without saying, it must be evidence relevant to the issues.** Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial". (Emphasis supplied)

[13] **R v Parks** was also considered, with approval, by their Lordships in **Kenneth Clarke v R** PCA No. 93/2002 (delivered 22 January 2004). The

latter case was an appeal to the Privy Council from a decision of this court. After noting the difference in this context, between civil and criminal cases, in terms of the standard of proof, their Lordships addressed the matter of fresh evidence which is in written form. At paragraph 56 they quoted from **R v Sales** [2000] 2 Cr App R 431 to address the point:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court. It was a course which we followed in this appeal, in relation to the evidence of the appellant himself and the three witnesses called in support of his appeal to whom we have referred." (Page 438 B-C)

Although the quotation does not mention the issue of relevance, it was addressing one aspect of the requirements for receiving fresh evidence.

[14] The criteria set out in ***Ladd v Marshall,*** **R v Parks** and **R v Sales** all apply in this court. Miss Thomas' application must be viewed against the background of these criteria.

[15] Miss Thomas has deposed that the fresh evidence which she seeks to adduce only became available after the trial was concluded. This evidence comprises firstly, a copy of a death certificate which she says is

the true record of her father's death in 1963 and secondly, an affidavit sworn to by a Mr Jeremiah Samuels. These two items shall be examined individually.

[16] The certificate, used to note Mr Alexander Thomas' death on the certificate of title, alleged that he died in 1959. A copy of that certificate, as well as one of the certificate which Miss Thomas asserts is genuine, have both been exhibited to an affidavit in support of Miss Thomas' applications before this court. Also exhibited, is a letter from the Registrar General confirming the validity of the 1963 entry and denouncing as, "not authentic", the document alleging a death in 1959.

[17] Taken by itself, this certificate purporting to be "fresh evidence" faces a number of difficulties. Firstly, although the letter from the Registrar General is dated November 8, 2007, the information about the correct death certificate was clearly discoverable before Miss Thomas filed her claim in 2003. The fact that the date of death was false, was, as far as her case was concerned, an important factor. She knew her father's date of death and could have, in advance of the trial, secured an official copy of his death certificate. The certificate cannot, therefore, meet the standard to be considered "fresh evidence". It does not meet the first criterion set out in ***Ladd v Marshall*** or **R v Parks.**

[18] Secondly, although the date of death was made an issue in the claim, it really plays a very minor part in the real dispute between the parties. Certainly, the accuracy of the date of death is not the gravamen of Miss Thomas' claim. That date is not an issue, because, regardless of the date of Mr Alexander Thomas' death, there is no dispute that he predeceased Mr. Clifford Spencer. The clear result, again regardless of the date of Mr Alexander Thomas' death, is that, by virtue of the joint tenancy, if there be one, Mr Clifford Spencer would become, on Mr Thomas' death, the sole registered proprietor of the land. The matter of the correct date of death, as recorded on the title, may be remedied without recourse to an order of this court.

[19] The certificate, therefore, also does not meet the second criterion set out in ***Ladd v Marshall*** or in **R v Parks.** It is unlikely to have an important influence on the result of the case.

[20] It should, perhaps, be noted that, in the reasons for judgment, a typographical error was made in recording the date of Mr Alexander Thomas' death, as it appears on the registered title for the land. The date is set out in the judgment as being 29 October 1995. The date of death, as noted on the title was, in fact, 29 October 1959. The error does not affect the matter because, as previously pointed out, the actual date of

death does not, in the circumstances, affect the result of Mr Clifford Spencer being the surviving joint tenant.

[21] The next bit of alleged "fresh evidence" is an affidavit sworn to by Mr Jeremiah Samuels. Although the reference to it in one of the affidavits filed in support of the present applications is not entirely clear, Mr Wilcott, on behalf of Miss Thomas, has informed us that it is in fact the affidavit to which reference is made. The affidavit of Mr Samuels is included in the papers before this court. How it came to be included is not immediately clear. What is clear is that his affidavit was filed in the previous court action in which Miss Thomas was one of two defendants. This was in Suit No. C.L. 1996/S 077 **Trevor Spencer and others v Derrick Thomas and Merline** (sic) **Thomas**. Mr Samuels' affidavit was filed in July 1996. The action, in which it was filed, as mentioned above, involved the land, the subject of this application.

[22] A cursory examination of the affidavit reveals that it was filed on Miss Thomas' behalf. This affidavit cannot properly be said to have been unobtainable, with reasonable diligence, for use at the trial. It cannot, therefore, satisfy the first criterion set out by Lord Denning in ***Ladd v Marshall*** or ***R v Parks.***

[23] Mr Samuels' affidavit also hints at other problems. In it, he deposes that he is "of the age of 86 years and upwards". The affidavit was filed

almost 14 years ago. Mr Wilcott has informed us that, not surprisingly, Mr Samuels has since died. Mr Samuels is, therefore, not available to give *viva voce* evidence. His evidence would, as a result, be in written form. Based on its contents, the affidavit could be described, using the terminology of ***R v Sales,*** cited above, as being "plainly capable of belief". It must however pass the test of relevance. It is our view that it does not pass that test.

[24] Mr Samuels, in his affidavit, speaks to his knowledge of the land, Mr Thomas, Mr Clifford Spencer, the purchase of the land by Mr Thomas from a Mr Terrier, certain transactions with the land and, importantly, the occupation of the land from 1946 to 1996. Mr Samuels, does not, however, purport to address, explain or deny the fact that Mr Alexander Thomas and Mr Clifford Spencer were the named transferees, as joint tenants, in an instrument of transfer, of the fee simple for the land.

[25] That instrument of transfer was said to have been exhibited to the affidavit filed in support of the applications before us but it was not in fact exhibited. We allowed Mr Wilcott to submit it subsequent to the close of the submissions. By the instrument of transfer, Mr Rupert Oliver Terrier transferred all his estate and interest in the land (then comprised in certificate of title registered at Volume 600 Folio 9) to Mr Clifford Spencer and Mr Alexander Thomas. The transfer is dated 28 June 1966, which, as

has been demonstrated, is after Mr Thomas' death. The document is signed only by the transferor. Neither Mr Thomas nor Mr Clifford Spencer purports to sign it as transferees. It need not have been signed by them.

[26] The aberration in respect of the date, by itself, does not assist Miss Thomas. It is our view that further evidence is required to demonstrate that the instrument of transfer did not accord with Mr Thomas' instructions to Mr Terrier. Neither Mr Samuels nor Miss Thomas addresses this fact and Mr Wilcott has quite candidly informed us, again not surprisingly, that Miss Thomas, at 96 years old, is now unable to give any evidence concerning that or any other matter concerning the land.

[27] Mr Samuels' affidavit cannot, therefore, assist Miss Thomas in meeting the criticism that the learned trial judge made, that she had failed to prove fraud in the securing of that transfer. The affidavit does not satisfy the second criterion set out by Lord Denning in ***Ladd v Marshall*** or ***R v Parks.***

[28] The application to adduce fresh evidence must, for the reasons stated above, fail.

The application for an extension of time to file an appeal

[29] Rule 1.11 of the Court of Appeal Rules 2002 (CAR) stipulates the time period in which notices of appeal must be filed in this court. Where the applicant, as in the instant case, fails to file the notice in time then the

application to extend the time to comply with the rule, would be subject to the principle stipulated in rule 1.8 (9) of the CAR. The latter rule stipulates that in an application for permission to appeal the applicant should satisfy the court that the proposed appeal has a real chance of success. The actual terms of the rule are as follows:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[30] The grounds on which the applicant seeks to appeal the judgment, if granted leave, are founded on the claim that fresh evidence has become available. In her re-listed notice of application for court orders, the applicant states:

> "The grounds on which the Applicant is seeking the orders are as follows:
>
> 1. That after the close of the case as argued fresh evidence which was not available during the trial has come to light
>
> 2. **That a grave injustice will be done to the Applicant if this new evidence is not allowed to be presented to the court**
>
> 3. That the Applicant is ninety-six (96) years of age
>
> 4. That this Application is urgent
>
> 5. **That further reasons for same are contained in the accompanying Affidavit supporting this Notice of Application to extend time in which to file the Notice of Appeal.**" (Emphasis supplied)

[31] What appears to be the accompanying affidavit is one sworn to by Mr Dorrell N Wilcott on 15 May 2009. In it, the deponent, among other things, recites the manner in which the fresh evidence came to hand. In paragraphs 20-23 he states:

> "20. That after the trial a relative of Miss Thomas told her certain information and produced a **statement** made by one Jeremiah Samuels. The contents therein caused further investigations to be carried out.
>
> 21. That after certain enquiries were made, the Registrar General gave us the true copy of [sic] death certificate of Alexander Thomas and declared that the certificate of death presented to the Court by the Defendants was fraudulent....
>
> 22. That this information was not known to either the attorney in conduct of the matter or the Applicant at the time of trial.
>
> 23. **That we are of the view that should the true and accurate death certificate along with the affidavit of Josiah** [sic] **Samuels have been available at the trial the outcome would have been different.**" (Emphasis supplied)

[32] Mr Wilcott has informed us that the name "Josiah" was included in error. The name ought to have been "Jeremiah". He also informed us that the reference to there being available, "a statement", was an erroneous reference to the affidavit, made by Mr Jeremiah Samuels.

[33] The entire appeal is therefore proposed to be hinged on the purported fresh evidence. As has been demonstrated, the evidence not

only does not qualify as "fresh evidence", but has other difficulties. These difficulties undermine any likelihood of these items of evidence, producing a credible challenge to the validity of the essence of Mr Clifford Spencer's entitlement to being the surviving joint tenant on the certificate of title.

[34] Mr Wilcott also proffered Miss Thomas' failed memory, as an explanation for the failure to produce Mr Jeremiah Samuels' affidavit at the trial. That explanation may address the first criterion of admissibility of the affidavit as fresh evidence but it does not address the second. Miss Thomas' memory having, at her age, failed, demonstrates that she will be of no assistance to a court, were a re-trial to be ordered on the basis of this "fresh evidence". No mention has been made of the mental abilities of Ms Eunice Peart or Mr Leonard Thomas, the other claimants.

[35] Finally, Mr Wilcott relies very heavily on the fact that the certificate used to note Mr Thomas' death on the title was "not authentic". From that assertion by the Registrar General, we understand Mr Wilcott to be saying, that the registration of Mr Thomas and Mr Spencer on the certificate of title for the land, is also fraudulent. We find that logic to be flawed. Allegations of fraud should not be loosely made. They require "clear and sufficient evidence" to support them. All that Miss Thomas has, to support her allegations, is a death certificate, which is not critical to the issue of title, and an instrument of transfer registered after the death of her

father. The latter is, by itself, not conclusive of fraud. More is required. For example, evidence could, perhaps, have been produced to demonstrate that Mr Terrier acted improperly, indeed fraudulently, when he transferred the property into the names of both men, as joint tenants or at all. Nothing, impugning the circumstances of the execution of the instrument of transfer, has been produced.

[36] In ***Kenneth Clarke v R,*** their Lordships, at paragraph 55, quoted Megarry J in ***John v Rees*** [1970] Ch 345 as saying:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

It is for Miss Thomas to satisfy this court, as it was her duty to satisfy the court below, albeit on a balance of probabilities, that fraud had been committed. This evidence, which she hopes to have adduced, does not meet the standard required.

[37] The proposed appeal, therefore, has no reasonable prospect of success. It would be futile to grant an extension of time in which to file an appeal or leave to adduce fresh evidence. The applications must be and are, refused.