

JAMAICAIN THE COURT OF APPEALRESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 28 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding).
 The Hon. Mr. Justice Fox, J.A.
 The Hon. Mr. Justice Edun, J.A.

B E T W E E N STEPHEN THOMPSON - PLAINTIFF/APPELLANT
 A N D TIMOTHY ADDISON - DEFENDANT/RESPONDENT
 A N D WILTSHIRE HANSON - DEFENDANT/RESPONDENT

H.G. Edwards, Q.C., for Stephen Thompson.
 V.B. Grant, Q.C., for Timothy Addison.
 Wiltshire Hanson appearing in person.

October 26, 27, 1972
February 28, 1973

EDUN, J.A.:

Thompson claimed against Hanson a declaration that the land in dispute was his, damages for trespass and conversion, and an injunction restraining Hanson from entering or in any way molesting him in his enjoyment of the land in dispute.

Hanson in his defence denied the claim and stated that he bought the land from Addison and secured a certificate of title for it, registered at Volume 467 Folio 48. Thompson then joined Addison as a defendant and alleged that he bought the land from Addison and was put in possession of it by Addison.

Addison in his defence stated that he never sold any land to Thompson and denied that he ever put Thompson in possession of it. With respect to Hanson, Thompson further alleged that Hanson obtained the registered title by fraud and his title was impeachable. Of course, Hanson replied that he was not guilty of any fraud nor that he had any dealings with Addison concerning the land. The actions were consolidated and heard together.

Thompson's evidence was to the effect that in early 1957 he bought the land in dispute from Addison for £12 which he paid to Addison in the presence of witnesses and he obtained a receipt but which was lost. Addison showed him the boundaries and put him in possession. Surveyor Gooden surveyed the land and prepared a diagram which was tendered in evidence as Ex. 1. He exercised various acts of ownership and possession on the land. In 1958 Addison and himself went to the Parish Council in order to secure water on the premises. He also secured from the Collectorate the right to have his name put on the tax roll. He said he did get water from the Parish Council and paid taxes for the land. Three times he asked Addison to give him title to the land but was refused.

Thompson said he first met Hanson in 1964 and later Hanson told him that he bought the land from Addison. Hanson tried to stop his tenants (one of whom was Daisy Roman) from walking there. Thompson left the Island for a short while and on his return found his fence down and when he invited the police, Hanson maintained to them that he bought the land and had papers for it.

Desmay White, a Land Valuation Officer, gave evidence on behalf of Thompson and produced a declaration of transfer form (Ex.5) dated June 27, 1960 for the land in dispute, executed by Addison in favour of Thompson, sale price being £12. Upon that document, it was evident that Addison made his mark and that James Ebanks was witness to the mark. Mr. White also tendered another declaration of transfer form (Ex.7) dated June 14, 1960 which showed that Addison transferred the said land to Hanson, - sale price was stated as £300. Addison in his evidence on oath has admitted this sale to Hanson.

James Ebanks, a senior Revenue Field Officer, when shown Ex.5 swore that he witnessed Addison put his mark on that document and that it was read over to him. Under cross-examination he was asked whether he can remember Ex.5 being read over to Addison, and he said that "generally" means that it has always been done and does not mean read over sometimes. He was willing to state that the document was read over to Addison because such documents were usually read over and explained when witnessed.

Daisy Roman stated on oath that Thompson owned the premises where she lived and that a road led into her premises. In 1964, when Thompson

was away she saw Addison show Hanson the line for the roadway and heard him tell Addison to take back the land and give Thompson back his money. Hanson broke down the fence, took away materials that were there and put across the road a zinc which Thompson removed. When asked about the date of the conversation, she said she did not remember if it was early or late 1964. She said that Hanson had chopped her, that she was Thompson's agent and that her husband was arrested for threatening Hanson with a gun.

In defence, Addison said that he sold the land in dispute to Hanson and duly transferred it to him. He had given Thompson permission to walk across the land but he had no dealings with him nor did he go with Thompson to the Parish Council or Collector of Taxes. He said he had known Ebanks a long time but that he and Thompson preached together and that they were telling lies on him. Hanson in his defence, said that in December 1963 when he returned to Jamaica from England, he spoke to Addison and eventually arranged to purchase the land in dispute. Documents were drawn up on January 13, 1964 and title was transferred by registration in his name on January 19, 1964 at Volume 467 Folio 48. He saw no fences and he proceeded to erect a building on it. Then Thompson told him not to drive on the road and broke down a fence which he, Hanson, had erected. He said he had no conversation with Daisy Roman, and he did not plot with Addison to get a registered title in his name or to deprive Thompson of any rights to any property.

The learned Resident Magistrate entered judgment for Hanson and entered a non-suit in Thompson's claim against Addison. He rejected the evidence of Daisy Roman and stated that the evidence of James Ebanks did nothing to strengthen the plaintiff's case.

Learned attorney for Thompson submitted that in non-suiting his claim against Addison, the Learned Resident Magistrate did not properly or at all weigh, the documentary evidence which contained satisfactory proof of a sale in 1957 by Addison to Thompson of the land in dispute. He urged that when such evidence was contrasted with mere ipse dixit of Addison, the learned Resident Magistrate erred in not entering judgment for Thompson. He claimed that the Learned Resident Magistrate's appreciation of the evidence as against Thompson was so faulty that he failed to weigh and appreciate the case against Hanson. In particular, he referred to two land

valuation Roll documents, Exs. 9 and 10; Ex.9, dated June 1, 1957 showed that Thompson owned 4 poles of land in the area and Ex.10 also dated June 1, 1957 showed that the lands owned by Addison was lessened from 34 poles to 30 poles.

On the other hand, learned attorney for Addison, submitted that the learned Resident Magistrate had the advantage of seeing and hearing the witnesses and in non-suiting the plaintiff, he must have considered -

- (a) that Thompson could not produce the receipt for £12 given to him by Addison;
- (b) Victor Brown who was present at the sale of the land was not called to give supporting evidence of the sale;
- (c) Thompson told a lie by saying that Hanson was in Jamaica on November 30, 1965 when Hemmings made his survey (diagram Ex.4), whereas Hanson's passport (Ex.13) established that he Hanson was in England then.
- (d) Gooden who surveyed the land in 1957 at the instance of Addison could not recognise Addison out of court and he could not say who paid him £12 for the survey. It could well be that Thompson impersonated Addison at that survey.
- (e) James Ebanks who was a witness to Addison's mark made no written note on the document that it was read over to the person making his mark and Ebanks in his evidence was rather vague as to whether or not the document was in fact read over and explained to Addison before he made his mark.
- (f) There was abundant evidence to support the Resident Magistrate's findings that there was no complicity with Hanson and Addison, and that Daisy Roman's evidence was correctly assessed and rejected.

In those circumstances, learned attorney claimed that Thompson's appeal against both Hanson and Addison should be dismissed.

The case against Hanson

It was agreed by attorneys concerned at the trial that the only evidence purporting to implicate Hanson in any dishonest dealing with Addison was given by the witness Daisy Roman. I have no reason to disagree, but the questions which must be resolved are -

- 1, whether this Court can interfere with certain findings of facts of the learned Resident Magistrate, and if so
- 2, whether Roman's evidence is any proof of fraud.

In Gross v. Lewis Hillman Ltd. (1959) 3 A.E.R. p.1476, A was induced to enter into contract by the vendor's misrepresentation. The benefit of the contract was given by A to B and there was completion by conveyance to B. The question arose whether B was entitled to rescind. Cross, L.J., (as he then was) in considering the findings of fact made by the trial judge said, at p.1481:-

"The judge, who heard Mr. James, the Marshoms, Mr. Ruston and Mr. Youngs in the box, said that he preferred the evidence of Mr. James to that of the Marshoms wherever they were in conflict. He believed Mr. James when he said that he did not know that the company had no capital assets, and that he assumed that Mr. Youngs had made enquiries as to its financial position and as to the financial position of those who were to run it before he gave the reference. He does not say in terms that he considered Mr. James to be in all respects a witness of truth but it is the natural inference from his judgment that he did so regard him.

A Court of Appeal is not entitled to disturb findings of fact made by the trial judge which depend to any appreciable extent on the view that he took as to the truthfulness or untruthfulness of a witness whom he has seen and heard and the Court of Appeal has not, unless it is completely satisfied that the judge was wrong. It is not enough that it has doubts - even grave doubts - as to the correctness of the judge's findings. It must be convinced that he was wrong

..... I have stated as fairly as I can the points which are urged against the judge's finding that Mr. James was not guilty of fraud and the considerations - apart from the impression which Mr. James himself made as a witness - which may be said to tell the other way. Can I say that I am convinced that the judge was wrong? I am certainly very far from satisfied that he was right. Indeed, considering only the material before us, I would say that he was probably wrong. But it is a very strong thing for an appellate court to hold guilty of fraud a man whom the judge of first instance, who saw and heard him, held to be honest, and I do not myself feel that degree of conviction that the judge was wrong which would justify me in making that step."

Those observations in my view, provide very relevant considerations of certain bits of evidence assessed by the learned Resident Magistrate in the instant case. To a very great extent, the truthfulness or untruthfulness of the evidence of Daisy Roman depended largely upon the Magistrate seeing and hearing her. She said that she heard Hanson tell Addison to take back the

land and give Thompson back his money. Hanson denied having any such conversation. Roman also admitted facts which would to a great extent establish her partiality towards Thompson, thus:-

- (a) she was Thompson's agent at the time,
- (b) she said that Hanson had chopped her and she got stitches, and
- (c) that her husband was arrested for threatening Hanson with a gun.

On the other hand, Hanson was able to show that he began negotiations for the sale of the disputed land with Addison in 1963 and on January 13, 1964 documents effecting transfer of the land were executed. Roman was most vague in her answers about the date of the conversation. She could not remember if it was early or late 1964. The learned Resident Magistrate stated his reasons for rejecting her evidence, thus: "I came to the conclusion that her evidence as to overhearing a plot between Addison and Hanson was a complete fabrication and this was the main evidence of fraud which the plaintiff was submitting for the Court's consideration"

I see no justification for disturbing his decision which was fully warranted by the evidence and which depended upon his advantage of seeing and hearing the witnesses - at least, on this aspect of the case.

It may well be argued that the learned Resident Magistrate had so erred and misdirected himself on other aspects of the case, that it may be in the interest of justice to order a new trial. So, I now consider that even if the learned Resident Magistrate has accepted Daisy Roman's evidence, the full purport of it does not in my view establish fraud in Hanson's dealings (if any) with Addison. In order to enable any court to rescind Hanson's conveyance actual fraud must be proved. As far back as 1848 in Wilde and another v. Gibson 1 H.L. Cases, 605, at p.632-633, Lord Campbell had this to say:

".....If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice,

a conveyance which had been executed could be set aside."

Section 70 of the Registration of Titles Law, (Jamaica) (1889),

Ch. 340 provides, thus:-

"Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Let us assume that what Daisy Roman said was true; Hanson is alleged to have known that Thompson had some interest in the disputed land and he was in effect telling Addison to give Thompson back his money and sell him (Hanson) the land. What were the rights and the position in law of Thompson, if Addison had in fact sold the land to him in 1957. In equity, Thompson had a good title except against a bona fide purchaser for value without notice. But be that as it may, in the instant case it cannot be disputed from Thompson's own evidence when he had Gooden's diagram of the survey, that he, Thompson, had known or must be taken to have known that title to the land in dispute was registered at Volume 467 Folio 48; it is so stated in diagram Ex. 1, which he said was given to him by Addison, since 1957.

Thompson claimed that Addison made a declaration of transfer of the land to him by Ex.5 for purposes of valuation. Whether that document was sworn to or it amounts to a "public document" under the Land Valuation Law, No. 73 of 1956, it was not a conveyance of the land and so far as Thompson was concerned, it was a mere memorandum or note in writing evidencing an agreement for sale of the land by Addison in favour of Thompson and for the value stated therein. No doubt, Thompson had a registerable interest and Section 133 of the Registration of Titles Law Ch. 340 offered him the right to lodge a caveat forbidding the registration of any person as transferee of that land. In evidence at the trial, he said he asked Addison three times to give him title to the land. Addison apparently ignored his claim and he, Thompson did nothing.

A person in Hanson's position, wanting to buy the land, may have known of the assertion by Thompson of a right in the land but yet not guilty of fraud or of dishonesty. Section 138 of Ch. 340 provides:-

"Any person desiring information as to whether a proprietor is able to deal with the land comprised in his certificate free from obstruction caused by any caveat, instrument lodged for registration, order, injunction, or other cause known to the Registrar, but not appearing upon the certificate, may sign an application for search certificate; and on payment of the fee in that behalf provided, the Registrar shall cause the necessary searches and enquiries to be made for the purpose of affording the information required and issue his certificate of search.

Section 139 provides:

"Such search certificate shall refer to the dealing or encumbrance last noted on the certificate of title for the purpose of showing the state of the register at the time of issuing the search certificate, but not of informing the person applying for the search certificate as to what is upon the certificate of title; and such person shall be entitled to inspect the certificate of title, and shall be deemed to know all of which an inspection of the certificate of title would have informed him."

There is no disclosed evidence that Hanson secured a search certificate but as soon as he concluded his bargain to purchase the land from Addison, he went to Solicitor March who secured a diagram and later his registered title. He said he first knew the land in December 1963, he saw a gateway and a cart road. He saw "people's foot-tracks across the land" and in 1964 he saw Daisy Roman passing through. As far as documents 5, 6, 7, 8, 9 and 10 were concerned, they were kept in the department of the Commissioner of Valuations and any entries or alterations therein have not been proved to be effected by Hanson or inserted through any false representations by him. Knowledge, therefore, of the existence of the unregistered interest of Thompson in the land in dispute shall not of itself be imputed as fraud.

It may well be argued also that if the evidence of Daisy Roman were true that Hanson unlawfully interfered with a contract between Addison and Thompson by persuading Addison to break his contract with Thompson, and

as such he committed a tort. But I fail to see what evidence there is which can establish that Hanson has brought about a breach of contract between Addison and Thompson. Long before Hanson knew of any contractual relationship between Thompson and Addison, Thompson, has said that Addison refused to give him title to the land in dispute. To say that Hanson has committed a tort by his simply saying to Addison (if true) "take back the land and give back Stephen his money," is rather far-fetched.

As already mentioned, however, the learned Resident Magistrate has rejected the evidence of Daisy Roman and in my view he was justified in doing so. In those circumstances I am at a loss to find what evidence there is of fraud in Hanson as to warrant an impeachment of his title; or of any tortious conduct in Hanson as to entitle Thompson to any damages against him; or to order a new trial.

The case against Addison

Here, however, giving the fullest recognition to the advantage of the learned Resident Magistrate seeing the witnesses and being able to form an appreciation of their personality and demeanour, I am convinced that his appreciation of the case for Thompson as against Addison was faulty and to the degree which would entitle and compel this court to interfere.

For instance -

1. James Ebanks swore that he witnessed Addison put his mark on Ex.5, thus declaring that Addison had transferred the land to Thompson for the price of £12. The learned Resident Magistrate, however, said, this:-

"The evidence of Ebanks did nothing to strengthen the plaintiff's case as he qualified all the statements which may have been detrimental to Addison by using the words 'generally' or 'usually', both in his evidence-in-chief and under cross-examination."

Addison could not sign his name and apparently the learned Resident Magistrate wanted to be satisfied that if Ebanks witnessed his mark, why was he not positive that the document was read over to Addison. The witness stated, "I am only prepared to say Ex.5 was read over. I have not lost my memory yet. "Generally" does not mean read over sometimes. ...It is usually read over and explained to the witness."

It may well be that the witness's command of the English language was poor, but Ebanks' signature on the document as witnessing Addison's mark was undisputed. If that was so, Thompson's evidence concerning the sale of the land to him by Addison in 1957 for £12, although he was unable to produce the original receipt, was supported by that note or memorandum in writing by Addison.

2. Thompson produced diagram Ex. 1 which was drawn up as the result of a survey carried out at the instance of Addison. Thompson claimed he received that diagram from Addison apparently as evidence of an acknowledgment by Addison of sale of the land and the boundaries of it. In the survey made by Hemmings in 1965, the pegs laid down in 1957 delineating the boundaries of the land in dispute are discernible in the later diagram, Ex.4.

Addison's only answer to such cogent evidence was a mere denial of the sale to Thompson.

3. Thompson said he paid Gooden, the surveyor, £7 as half of £14 for fees and paid £12 for the land itself.

The learned Resident Magistrate said:

"I found it impossible to accept that Addison paid a surveyor £7 to cut off a bit of land which he had already sold for £12 and received payment in full. The Surveyor Trevor Gooden did not assist the plaintiff's case at all as he never produced any duplicate receipt for the £14 which he alleged was paid to him by Addison."

Gooden claimed that he did the survey for Addison and was paid £12 as fees and £2 for travelling expenses. He gave Addison a receipt but which he said he could not produce because he had not looked up his receipt books. It is abundantly clear from Hemmings' survey that the earlier survey was in fact done. The reason for the 1957 survey has not been explained by Addison. Thus a clear inference of the probability of the sale arises in favour of Thompson of the 4 poles of land. The comparison of cost of £12 with half of the cost of £7 is rather an unrealistic reason for disbelieving the evidence of surveyor Gooden, or Thompson.

From an examination of all the evidence in the case I can hardly imagine a more satisfactory case for Thompson in which most violent probabilities are raised in his favour and which remain unanswered by Addison to the very end of the evidence led by all parties concerned.

The decision of the learned Resident Magistrate in non-suiting Thompson was obviously wrong.

For the reasons given, I would dismiss the appeal as against Hanson, with costs of appeal to him of \$20 to be paid by Thompson. Allow the appeal against Addison, set aside the non-suit with costs at the trial to Thompson to be taxed or agreed upon. Enter judgment for Thompson in the case against Addison but remit the matter to the same Magistrate to assess the damages to be awarded for a breach of contract of the sale of the land to Thompson. Costs of appeal \$50 in favour of Thompson.

LUCKHOO J.A.

I agree.

FOX, J.A.:

Even if the learned Resident Magistrate was wrong in his assessment of the credibility of Daisy Roman, for the reasons so clearly and fully stated by Edun J.A.. I agree that the evidence of that witness is incapable of establishing the actual fraud necessary to initiate a transfer of registered land. Consequently, on this aspect of the case the finding in favour of Hanson should not be disturbed. However, fraud was not the only question before the magistrate. An equally critical issue for his determination was whether Thompson had been put in possession in 1957 of the land in dispute as a consequence of its sale in that year to him by Addison. In relation to this issue sufficient evidence was adduced to enable a decision one way or the other. The credibility of that evidence should have been assessed. The situation was the usual one requiring the magistrate to arrive at conclusions of fact on a balance of the probabilities in the testimony. There was no question of satisfactory proof not having been given "entitling either the plaintiff or the defendant to the judgment of the court." (s.181 Cap. 179). To have applied the provisions of that section so as to effect a non-suit of the plaintiff's claim against Addison therefore amounted to a failure to adjudicate an important issue of fact.

I also agree with Edun J.A., that the evidence establishes a sale by Addison in 1957 of the land in dispute to Thompson. Thompson's evidence of this transaction is overwhelmingly corroborated by the documents tendered during the trial. In particular, it should be noticed that the registered title to the land states that it contains "by survey one rood eight perches and four tenths of a perch". This is an area of 1464.1 square yards. The documents tendered show that the sales made by Addison of this land were:

(a)	To Reid et ux,	4161.4 square feet;	or 462.3 square yards
(b)	To Thompson,	799 square feet;	or 88.7 square yards
(c)	To Hanson,	30 perches;	or <u>907.5</u> square yards
		Total	<u>1458.5</u> square yards

This is only 5.6 square yards less than the area on the registered title, and cannot lessen to any significant extent the confirmatory effect of the calculations.