

11/11/01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E 416 OF 2000

IN THE MATTER OF ALL THAT PARCEL OF LAND part
of Smithfield in the Parish of Westmoreland registered at
Volume 1097 Folio 937 of the Register Book of Titles.

IN THE MATTER OF ALL THAT PARCEL OF LAND part
of Smithfield in the Parish of Westmoreland registered at
Volume 1228 Folio 234 of the Register Book of Titles.

AND

IN THE MATTER of an interest in the estate of ROBERT
VALENTINE also known as ROBERT VALENTINE late of
Glenbrook in the Parish of Westmoreland.

BETWEEN	MELMOUTH VALENTINE	APPLICANT
AND	JOSEPHINE CARMETTA HARRIS	1 ST RESPONDENT
AND	CHARLES EVERALD BRUMLEY	2 ND RESPONDENT
AND	THE REGISTRAR OF TITLES	3 RD RESPONDENT

Mr. Leonard Green instructed by Chen, Green & Company for the Plaintiff
Third defendant served but is not appearing nor represented.

Heard : October 9, 11 2001

HARRISON J.

The matter before me is a Notice filed as an interlocutory proceeding in a pending matter. The applicant has filed an Originating Summons in which he seeks certain declarations and orders. He asserts that a title issued in the names of the First and Second Defendants at Volume 1228 Folio 234 in respect of property situate at Smithfield, Westmoreland, was wrongly issued "and must have been obtained" by those defendants making

fraudulent representations to the Third Defendant since a registered title had already been issued to his deceased father and registered at Volume 1097 Folio 937. (emphasis supplied)

The document filed and upon which this application is made is intituled "NOTICE TO PRODUCE". It is addressed to the third defendant, The Registrar of Titles, and to the Registrar of the Supreme Court. It recites as follows:

“TAKE NOTICE, that you are hereby required to produce and show to the Court on the trial of this matter all books, papers, letters, copies of letters and other writings and documents in your custody, possession, power, containing any entry, memorandum or minute relevant to the application made on behalf of the Applicant pursuant to the application for the title registered at Volume 1228 Folio 234.”

Counsel for the applicant was asked to state the basis upon which he was making this application. He informed me that it was made pursuant to the provisions of the Registration of Titles Act (referred hereto as “The Act”) but he did not rely upon any particular section.

Now, section 40 of the Act makes provision for the Court to order production of deeds, instruments or evidence of title after an application is made to register land. It is my considered view however, that this section is not relevant bearing in mind what the Notice to Produce seeks to achieve. The section reads as follows:

“40. After an application has been made to have any land brought under the operation of this Act, a Judge may require all persons having in their possession, custody or control, any deeds, instruments or evidence of title, relating to or affecting the land the subject of such application, to produce the same at a time, and place appointed by such Judge to the Registrar or to a Referee for his inspection upon such terms and subject to such conditions, and for such charge or

fee, as the Judge making the order may think just and shall fix. All orders to be made by a Judge under this section may be made in Chambers on summons at the instance of the person applying to have the land brought under this Act”.

It is quite evident however, that section 42 of the Act is the closest provision that could be prayed in aid. That section empowers a judge to order inspection of the deeds, instruments or documents in the custody or possession of the Registrar of Titles, evidencing the title of a person upon registering a certificate of title. The section specifically provides that:

“...the Registrar shall retain in his custody and possession all deeds, instruments and documents, evidencing the title of the person registered, and...

No person shall be entitled to inspection of any such deeds, instruments or documents, except upon the written order of the persons who originally deposited the same, or of some person claiming through or under him, or upon the order of a Judge.”

The Notice that is lodged, speaks about production of the relevant documents “to show to the Court at the trial”.(emphasis supplied) It does not expressly seek an order for an inspection of the documents by the applicant so, how would this assist the plaintiff if he himself does not inspect them? It seems to me that the only logical conclusion to be drawn from the application is that the Notice is being used as a means to assist the applicant in the production and inspection of documents in order to discover whether or not there was evidence to support the allegation of fraud.

The gist of the originating summons in the matter is that there is fraudulent conduct on the part of the respondents. However, it is my understanding of the law , that once fraud is alleged the normal rule is that the action ought to be commenced by writ of summons. See *Robert Honiball v Alele* 30 JLR 373 [Privy Council] In view of the fact that the

substantive summons is not presently before me, I will make no further comment on the procedure adopted to commence these proceedings.

What then, is the affidavit evidence in support of the application? The applicant swore to an affidavit on the 28th June 2001 which states inter alia:

1. "That I live and have my true place of abode at No. 233 Phase Three Llandilo Housing Scheme in the Parish of Westmoreland and my postal address is care of Savanna la Mar Post Office.
2. That I deponed to an affidavit dated the 28th day of September 2000 in the matter filed herein and attended court on the 9th day of November, 2000 when the matter was adjourned without a date.
3. That on that occasion the Third Defendant did not attend nor were they (sic) represented by any Attorney at Law.
4. That I assert that the title issued in the names of the First and Second Defendants at Volume 1228 Folio 234 was wrongly issued and must have been obtained by those defendants making fraudulent representations to the Third Defendant since a registered title had already been issued to my deceased father and registered at Volume 1097 Folio 937.
5. That in the light of my application that the defendants were engaged in fraudulent conduct so as to obtain the title registered at Volume 1228 Folio 234 issued in their names, it is my respectful application that this Honourable Court will be moved by my application that the Third Defendant be ordered to produce all and any document relevant to the application of the First and Second Defendant to obtain the said registered title."

The affidavit of the 28th September 2000 to which the applicant refers to in the affidavit (supra) highlights the following facts:

1. Paragraph 2 states inter alia That ROBERT VALENTINE , also known as ROBERT VALINTINE, deceased, late of Glenbrook in the Parish of Westmoreland was his natural

father and the sole owner during his lifetime of ALL THAT PARCEL OF LAND contained in Title registered at Volume 1097 Folio 937 situate at Smithfield in the Parish of Westmoreland.

2. Para.3 speaks of a person by the name of ALBERT LEONARD VALENTINE who is unknown to him. He knows however of a brother of his deceased's father who he says is Leonard Sanders.

3. Para. 4 speaks about his father having sole custody and control of the premises and that he was not told of anyone having an interest in the property besides himself.

4. Paras. 5 and 6 refers to a PETER HARRIS who was married to the first respondent and that he had occupied the premises as a tenant during his father's lifetime. Peter Harris it is said was taken to Court for recovery of possession.

5. Para. 7 states that the deponent was residing in England at the time suit was brought against Harris and that he was told by his father that he had intended to give him the property.

6. Paras. 8 and 9 speak of contact being made with his Attorneys at Law and that it was discovered that the first and second respondents had applied for and obtained a registered title for the property. This title was registered at Vol. 1228 Vol. 234 of the Register Book of Titles.

7. Para. 10 refers to the services of Commissioned Land Surveyors being retained and that a report on the property was submitted which confirmed that title was issued on the 13th August 1990 to the respondents.

8. Para. 11 speaks of further contact being made with his Attorneys and certain letters being sent off on his behalf. The paragraph ends " I am informed and do verily believe that the 3rd respondent has not replied to MESSRS ERSKINE, GREEN & COMPANY or

to my present Attorneys regarding the Title that the 1st and 2nd respondents had acquired by fraud.

9. Para. 12 makes reference to the applicant obtaining Probate of his father's will on the 21st day of May 1999. He also states "... I was left with that parcel of land that was referred to as ¼ acre of land situated at the said Smithfield in the Parish of Westmoreland which is one and the same as the land registered at Volume 1097 Folio 937 of the Register Book of Titles and referred to paragraph 2 of this Affidavit, which copy registered title was never given to my deceased father by his brother ARCHIBALD LEONARD SANDERS who to the best of my knowledge and belief kept and retained that Title in his possession...."

10. Para 13 speaks of the respective orders sought.

Are there sufficient allegations of fraud in the affidavits that could cause a Court to grant an order for production and inspection of documents? The affidavits in support contain such terms as **"title was wrongly issued and must have been obtained by those defendants making fraudulent representations"** and **"in the light of my application that the defendants were engaged in fraudulent conduct"**. To my mind, these assertions cannot be relied upon to support a case of fraud on the part of the respondents in obtaining the alleged title. The authorities are very clear that in a case founded on fraud, the fraud alleged in the pleadings, and the fraud set out in the particulars must be the fraud of the other party to the action.

In the case of Son Wheatle and Ors. v Evelyn Donalds *Supreme Court Civil Appeal No. 108/92, 5/93, 6/93* delivered on the 30th September 1996, Patterson J.A stated that the application for inspection in that case was properly described as "a trip on a fishing expedition with the hope of catching a defence". I adopt those words and say that they are quite apt in the instant matter before me. The Court of Appeal was of the view in that case that there was no foundation whatsoever to say that by an inspection, they would discover fraud, and an order for inspection would give rise to a mere speculation. The

court held that the power under section 42 (supra) to order inspection should not be exercised unless good cause is shown to lift the veil of confidentiality reposed in the Registrar of Titles, and that by so doing, it would not be assisting a mere fishing or speculative case. Patterson J.A also stated:

“It must be clearly established that in the circumstances it is fair and reasonable and expedient for the purpose of obtaining full information or evidence. Where the ground for applying is based on an allegation of fraud, the nature of the fraud must be specifically stated in the pleading; a general allegation of fraud is not sufficient. For example, where the fraud alleged was perpetrated by the filing of a false document, the pleading should state, the nature of the fraud, identifying the document and naming the maker thereof in order to identify him as a party to the action. The purpose of the inspection in such a case would be to obtain the particulars of the fraud contained in the document in order that they may be particularised in the pleadings”.

In the circumstances, and in light of the authorities, I have no choice but to dismiss the Notice to Produce.