1978?
1981

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN ON THE 19TH FEBRUARY 1981
BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD C.B.E., Q.C.

Cause No. 571 of 1978

In the matter of the land in the West Bay North East Registration section Block No. 8E Parcel No. 45

and

In the matter of an application for rectification of the register

and

In the matter of an application under section 140 (i) of the Registered Land Law (Revised)

BETWEEN	HENRY LEE EBANKS	APPLICANT
AND	MRS. MYRTIS POWERY	RESPONDENT

Mr. Harding for applicant
Mr. Dougherty for respondent

JUDGMENT

This is an application by way of originating summons for an order for the rectification of the Land Register under section 140 (1) of the Registered Land Law 1971 on the ground of mistake.

Initially, fraud was also alleged but that allegation was withdrawn before the hearing.

Section 140 (1) provides:

> "Subject to any provisions of the Land Adjudication Law, 1971 and to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake,".

This application relates to a first registration in favour of the respondent.

The land in dispute may be described as West Bay North East Registration Section No. 84 Parcel No. 45. It is situated at Barkers. Its boundaries may be described as follows (the alternative names referring to changed owners over the relevant period):

Bounded -

On the North : by a public road (from West Bay to the sea)

On the South : by the lands of Arthur (Joe) Ebanks

On the East : by the lands of Andrew (Uriah) Powery

On the West : by the lands of Arthur (Edison) Ebanks.

In reaching my conclusions on the facts of this case I have preferred the evidence of the respondent to that of the applicant or his supporting witness, Janice Ebanks. The respondent was open and frank and did not hesitate to admit lack of knowledge where she did not know or could not remember. She was a convincing witness and struck me as reliable. On the other hand, I had little confidence in the applicant's evidence where it conflicted with that of the respondent. He appeared ready to say anything which would bolster his case or mend the crevices in it. For example, he insisted that Item 5 in the inventory to the letters of administration, Ex. HJ 3, describing land alleged to have formed part of the estate of his grandfather, Amon Ebanks, was the same lot of land as that described as item 1 in the so called vesting assent, Ex. HL 4 (the two documents constituting the only link between his grandfather's estate and his claim to the land by documentary title). It is quite plain on the face of the documents that they are not the same pieces of land. The land in the inventory is described as bounded on the north by lands of Andrew Powery on the South by "Main Road leading from West Bay to Sea" whereas the land in the purported vesting assent is described as bounded on the north by a public road .... and on the south by lands of Arthur Ebanks ..... It

is obvious, therefore, that the land described in the inventory is to the north of the public road and the land described in the purported vesting assent is to the south of that public road. Item 5 in the inventory is the only lot of land described as at Conch Point; and the applicant had earlier in his evidence conceded that it was another lot owned by his grandfather lying to the north of the land in dispute.

Further, the applicant was prepared to say that the respondent never worked the land in dispute although he, himself, was regularly away from the Islands, at sea, for 9 or 10 months in each year. For the same reason, it is difficult to see how he could lay claim to the land in dispute on the grounds of "long possession" on the basis put forward by him.

The applicant was also prepared to hold out that he was unaccustomed to the "survey procedures" as he called them (meaning the procedures for making claims under the Land Adjudication Law 1971) although he had made several other claims, two of which were successful in his own right.

His evidence as to where he learned that no claim forms were available conflicts with his affidavit on that point - although this is a minor matter.

His claim that for some time there were no claim forms for the relevant adjudication area after that area had been declared an adjudication area, incredible though it may appear, will have to be accepted as there is no evidence to the contrary.

As to the appellant's supporting witness, his sister Janice Ebanks, she was less convincing than the respondent. She was prepared to give a blanket concurrence to the contents of the affidavit of the applicant (without specifying which one). She was prepared to say in evidence that the land in dispute was given to her (and the applicant's) mother before Amon Ebanks died. If that is so, then , it could never have formed part of Amon Ebanks' estate. This witness

then went on to say that the administrator of Aron's estate gave it to her mother. If that is so then it would have formed part of her mother's estate when she died and could only have been disposed of by her mother's personal representative - an altogether different line of claim from that put forward. In either event, both those assertions conflict with paragraph 4 of her affidavit. Further, the latter assertion cannot be true as her mother, Elmy, died in 1931 and the administrator, Henry Luke, did not take out letters of administration until 1966.

Where there is any conflict between the evidence, oral or affidavit, of the respondent and that the applicant or his supporting witness I accept the respondent's version. On that basis the material facts can be outlined.

Amon Ebanks was originally the reputed owner of the land in dispute. No documentary evidence has been put forward to establish his title, but it is not disputed that he was the owner. Presumably he had title to it by "settlement" thereon - long and undisturbed possession. He also owned several other lots of land in the West Bay district.

Amon died on 27 November 1924 leaving a wife, Amelia, and 10 children, those relevant to this case being Elmy, Carrie and Annie.

Elmy was the mother of the applicant and three other children.

Carrie was the mother of the respondent.

Annie de facto (but not legally) adopted the respondent, her niece, from early infancy. The respondent was brought up by Annie and lived with her until she died.

Amon left a will, Ex. HL1, clause 4 of which provides:

> "I leave my whole property real and personal to be equally divided between my ten children Viz:- Annie, Elvin, Julian, Louisa, Beecher, Elmy, Arvis, Carrie, Luke and Byron, to be shared after the death of my wife Amelia.".

Probate was granted on 1 March 1926 in favour of Abram Ebanks, one of the Executors of the will. Probate was limited to the administration of the personal estate of Amon.

The daughter, Elmy, died on 26 December 1931 leaving four children, including the applicant. It is not on record that she left a will or that letters of administration were taken out in relation to her estate.

It is not on record when the daughter, Carrie, died, but that date is not material.

The daughter, Annie, died in 1954.

Amon's wife, Amelia, also died in 1954.

The executor, Abram Ebanks, also died but it is not on record when.

The respondent claimed the land, under the Land Adjudication Law, her claim form being dated 14 February 1973. The demarcator appears to have become seized of the matter on 26th June 1973. The respondent's claim was based on open and peaceful possession for over 12 years. She stated on her claim form:

> "Worked land for forty years - first worked by Aunt Annie Ebanks then by self. I personally have worked it for about 18 years. Planted corn, potatoes and peas.
>
> No one else ever worked or claimed land.".

From her evidence it emerged that after she fell ill in the mid 1960's the actual work on the land was done by her brother-in-law, Andrew Powery, on her behalf. It is clear from her evidence that Andrew Powery was at all times her agent for the purpose of possessing and using the land and was remunerated for his services. That would satisfy section 16 (1) (a) (i) read with section 16 (2) (a) of the Land Adjudication Law.

There were no other claimant's to the land in dispute and her claim was accepted. The Records Officer signed the form on 3 August 1973. It was then later registered in her name with a provisional title. On 7th March 1974 she applied for the provisional title to be made absolute and absolute title was accorded to her.

The applicant admits that he made no formal claim to the land in dispute. The West Bay North East Registration Section

(wherein lies the disputed land) was declared an adjudication area on 3rd October 1972. The applicant stated that on 5th December 1972 he asked for a claim form to make a claim to land in that area. His evidence is conflicting as to where that request was made. At all events, he said that he was told that there were no claim forms available then but that when the time came for the land to be surveyed the Records Officer would contact the applicant's wife. The applicant said that he then left with the Records Officer what he called a deed of assent, Ex. HL 4, which will feature later in the judgment, and received a receipt for it. The purported deed of assent refers to three lots of land, including the land in dispute. It is dated 12th February 1971 and would, therefore, by itself not constitute good documentary title for the purpose of section 16 (1) (a) (ii) read with section 16 (2) (b) of the Land Adjudication Law as it was not at the relevant time (and still is not) more than 12 years old. The applicant then left the Islands in the middle of February 1973 - two months after the initial enquiry about claim forms. One can interject here that, as the respondent signed her claim form on 14th February 1973, claim forms were available around that time. The applicant said that his wife also made enquiries about the land in his absence and was told that there were still no claim forms. The applicant said that he did nor return to the Islands until early 1974. He went to the Land Registry and was told that the land had been registered in the name of the respondent with absolute title. So his visit to the Land Registry must have been some time after 7th March 1974. He took steps to have a caution placed on the land register and after some exchange of correspondence, including correspondence from his attorney, a caution was entered on 1st May 1974. Some form of proceedings were commenced in this court to have the Register rectified on 18th June 1974. At the hearing on 16th June 1976 there was an adjournment for the purpose of regularising the proceedings. Those proceedings appear to have been abandoned and the present proceedings were commenced on 9th October 1978. The applicant's prolonged absences abroad have delayed the hearing date.

The mistake alleged to justify rectification has three legs,

namely:-

(1) Failure of the Cadastral Survey officials to send the applicant a claim form. It is admitted that the applicant is partly to blame for this. It is admitted that he knew the law. Perhaps it is appropriate to say here that section 8 of the Land Adjudication Law places the onus on the claimant to make his claim in the manner provided within the prescribed time.

(2) The applicant can produce a reasonable case and has documentary title to the land in dispute. This will be analysed presently.

(3) The respondent claimed and became possessed of the wrong piece of land. This can be discounted immediately. The respondent's evidence was quite clear on this point and I accept it. She knew the land she was claiming. She had lived on it all her life and based her claim on open and peaceful possession of it. There can be no room for mistake there.

Learned counsel for the applicant frankly concedes that on this originating summons he is asking this court to re-open the adjudication proceedings under the Land Adjudication Law. Assuming this to be possible, what basis for a claim to the land in dispute exists?

One can dismiss at once the claim based on open and peaceful possession. In the applicant's own affidavit he asserts that he only took possession of the land in February 1971.

I do not believe that he ever took possession of it openly although he may have been responsible for furtively planting some of the mango and coconut trees after title had been granted to the respondent. However, even if he had gone on to the land in February 1971 this would never have satisfied the requirements of 12 years or more open and peaceful possession under section 16 (1) (a) (i) either at the relevant time or even today. Further, being away at sea most of the year he would have to establish how he remained in open and peaceful possession during these long periods of absence. However,

in my view, the land has since 1954 been in the continuous possession of the respondent and remains in her possession.

As to documentary title the applicant relies on clause 4 of Amon's will, set out earlier, and the purported vesting assent, Ex. HL 4, which reads as follows:

> "WHEREAS Amon Ebanks, late of West Bay, Grand Cayman, died intestate on the 27th day of November One Thousand Nine Hundred and Twenty Four, and WHEREAS Probate of the said Amon Ebanks both real and personal were granted to Abram Ebanks, Executor, and which probate now remains on record, and WHEREAS the Executor after taking probate, intermeddled in the estate and effects of the said deceased and afterwards died, in the year 1964, leaving a portion of the estate unadministered, and that on the 20th day of December 1966, Letters of Administration of the said estate and effects so left unadministered, were granted by the Grand Court to Henry Luke Ebanks, Administrator lawful surviving son, he having been first sworn well and faithfully to administer the same by paying the just debts of the testator, and distributing the residue of the said estate according to law, and to exhibit a true and perfect Inventory of the said estate so left unadministered thereof whenever required by law so to do, and WHEREAS Elmy A. Ebanks late of West Bay, Grand Cayman (hereinafter called "THE BENEFICIARY"), was a lawful daughter of the late Amon Ebanks entitled to the one eighth portion of all the real and personal estate possessed by the late Amon Ebanks at the time of his death, and WHEREAS the remaining undivided portion of the said estate aforesaid mentioned, now passes to the four lawful children of the late Elmy A. Ebanks, viz James W. Ebanks, Jennis A. Ebanks, William D. Ebanks, and Henry L. Ebanks, share and share alike, a portion of their share of the said estate being as follows:
>
> (1. A description of the land in dispute;
>
> 2 & 3. A description of two other parcels)".

The general devize in Amon's will is not a root of title. The applicant attempts to rely on the inventory filed with the application for letters of administration of Amon's estate. That inventory was filed some 42 years after Amon's death. Amon had no documentary title to the land. In the meantime Annie and then the respondent were in turn in undisturbed possession of the land until the time of the adjudication and thereafter. Furthermore, the inventory could never constitute a root of title or be accepted as sufficient identification of land belonging to the estate. More important still, the inventory does not include the land in dispute. As mentioned earlier, the applicant stated that item 5 of the inventory related to the land in dispute. What authority he had to make such an

assertion was not disclosed. However, the documents speak for themselves. The boundaries of the land described in item 5 of the inventory differ from the boundaries describing the land in dispute in the purported vesting assent. Item 5 relates to land to the north of the public road (land which apparently Amon did own). The land in dispute is to the south of that public road.

There is, therefore, no basis whatsoever, grounded on documentary title, for the purported vesting assent so far as it relates to the land in dispute. It has been conjured out of the air without any root of title to support it. It was less than 12 years old at the relevant time and so, even without the defects adverted to, it could not have been treated as good documentary title in the adjudication to justify the award of the land in dispute to anyone.

If these defects were not enough, on the face of purported vesting assent there is a transfer of three lots of land to the four children of Elmy, including the applicant, to hold as tenants in common. If it had any validity at all the applicant could have only a one fourth undivided share in the land. That is no basis for the claim to be registered as the sole absolute owner. The applicant states that by a subsequent verbal agreement with his brothers and sister it was agreed that he would take the land in dispute as described in the purported vesting assent as his share of the total, relinquishing his share in the remainder. Such a verbal agreement is of no effect in transferring any legal estate estate in any land.

One final defect should be pointed out. Under Amon's will his land was to be shared among his 10 children after the death of his wife, Amelia. Amelia died in 1956. His daughter, Elmy, the mother of the applicant, died in 1931. If under the will Elmy had any entitlement to any part of Amon's land, a matter I need not go into, it would have devolved on her estate as she predeceased

Amelia. Only Elmy's personal representative could have distributed land vested in her estate. There is nothing to suggest that she had a personal representative. The administrator of Amon's estate, Henry Luke, could only vest land belonging to Amon in Amon's children or their respective estates if they predeceased Amelia. He had no power under the will to pass on land to any of Amon's grandchildren, such as the applicant.

What Henry Luke, as Amon's administrator, purports to do in the purported vesting assent is to recognise that an eigth portion of Amon's real estate (a portion which is not specified or identified) vests in the estate of Elmy and then pass on her interest or legal estate in that land to her four children. In other words he purports to assume the authority of Elmy's personal representative to pass on parts of her estate to her four children. He had no authority to do so.

From what has been said so far it is clear that the purported vesting assent was of no effect in so far as it purported to pass on any interest or legal estate in the land in dispute to the four children of Elmy. The subsequent verbal agreement was of no effect either. There is no documentary title vesting any interest or legal estate in the land in dispute in the applicant which could have been properly acted upon in the adjudication process under the Land Adjudication Law.

There could, therefore, have been no mistake, so far as title is concerned, that adversely affected the applicant's interest.

The failure of the Cadastral Survey officers to send the applicant a claim form is not a mistake which this court can recognise for the purpose of rectification under section 140 (1) of the Registered Land Law. It was an omission on the part of the applicant himself that resulted in no claim being made by him. It was his fault and he cannot re-open the adjudication on the ground of his own default.

This brings me to the question of whether I can entertain this application at all on the grounds put forward. The purpose is to

re-open the adjudication on the grounds of alleged mistake. There is no mistake or fraud subsequent to the adjudication of this land in favour of the respondent.

Although section 140 (1) permits rectification of a first registration I am of the opinion that this does not permit the re-opening of the adjudication process itself. There must be some fraud or mistake subsequent to the adjudication to permit these provisions to be invoked. For example, the adjudication may have been incorrectly reflected in the final adjudication record submitted for entry in the Land Register by reason of mistake or fraud; the result of an appeal may have been incorrectly reflected in the final adjudication record; the officials in the Land Registry may have made incorrect entries from the final adjudication record or other source because of some fraud or mistake.

The only way to have challenged the adjudication record before it became final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20 and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court and thereafter to the Court of Appeal. Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities and then seek to re-open the adjudication years after the event by summons under section 140 (1). If it were otherwise there would be no finality about the adjudication process. No land owner would know where he stood. The certainty sought by the Registered Land Law would be undermined.

Further it is not open to this court on an application under section 140 (1) of the Registered Land Law to refer the matter to the Special Land Dispute Tribunal set up under the Land Title Settlement Law 1979. References to the Special Tribunal are confined to appeals which come before this court under section 23 of the Land Adjudication Law.

For the foregoing reasons this application is dismissed with cost..

SIR JOSEPH SUMMERFIELD