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IN THE COURT OF APPEAL

CAYMAN ISLAND CIVIL APPEAL NO. 6/73

BEFORE: The Honourable Mr. Justice Edun - Presiding
The Honourable Mr. Justice Graham-Perkins, J.A.
The Honourable Mr. Justice Swaby, J.A.

BETWEEN: HEPSY DIXON - Plaintiff/Appellant

AND : EFFIE FREDERICK - Defendant/Respondent

H.G. Edwards, Q.C. for Plaintiff/Appellant
John Harding for Defendant/Respondent

28th June, 1974

EDUN, J.A.:

In this appeal, the plaintiff/appellant claimed from the defendant/respondent, damages for trespass. It is not disputed that Rachael Terry was the owner of the land in dispute but she sold the same land first to Isaac Frederick by conveyance dated 27th January, 1950. On the death of Isaac Frederick, the land became the property of the defendant/respondent Effie Frederick. Rachael Terry later sold the same land to her niece, Hepsy Dixon, the appellant, on 20th October, 1965.

The first conveyance was not recorded until 16th March, 1965, whereas the second conveyance was recorded on the same date as the deed, that is, on 20th October, 1965. The learned judge of the Grand Court gave judgment for the respondent and, in his reasons for judgment, he held that the plaintiff was a bona fide purchaser for valuable consideration. He said: "In my opinion any second sale must be by means of a deed duly acknowledged or proved and recorded (See Section 2 of Cap. 334) and such must be done before the date when the defective first deed has been perfected by recording..... the second sale is Exhibit A. It was recorded after Exhibit B was recorded. I find in favour of Exhibit B."

Learned attorney for the appellant relied upon the provisions of the Record of Deeds, Wills and Letters Patent, Law, Cap. 334 and submitted that Exhibit B, the first conveyance was not duly proved and recorded as required by that law and therefore did not validly convey any legal estate to the respondent. He submitted also that the evidence did not support the finding that Exhibit B, was duly executed.

In our view, the relevant provisions of the law in Cap.334 are sections 2, 6 and 7. It is undoubtedly true that by Section 2 deeds are to be recorded within three months after execution in order to be valid to pass the freehold without livery, etc., and that no deed made after 1681 without such acknowledgment or proof and recording shall be sufficient to pass away any freehold. So too, by section 6 deeds are to be recorded within ninety days after the date of such deeds, otherwise to stand void and of no effect against all other purchasers bona fide for valuable consideration of the said lands, who shall duly prove and record their deeds within the time prescribed by the law from the dates of their respective deeds.

In our view, however, section 7 the saving clause has decisive bearing upon the facts in this case. That section provides that if any vendee of any lands shall hereafter omit to prove and record within the time, and pursuant to the form prescribed by this law, but shall at any time afterwards do the same, no second sale being made by the first vendor, the same (that is, the first sale) shall nevertheless be good to the said vendee, and a perpetual bar against the first vendor, anything in this law, or any other, to the contrary notwithstanding.

In other words, up to the time when the first conveyance, Exhibit B, was duly proved and recorded, that is, on 16th March,1965, there was no second sale by Exhibit A.. Though there was an omission to prove and record the first conveyance, Exhibit B, within ninety days after the date of such deed, so long as there was no second sale before 16th March, 1965, the first sale was nevertheless good to the said

vendee and a perpetual bar against the first vendor.

In Harris v. Johnson and Others (1971) 17 W.I.R. 84, it was held that as there was no second sale by the vendor between the date of the deed and the recording of it, the first sale was good despite the fact that proof of the recording of the deed did not take place until about eight years after the date of the deed. In the instant case, the principle remains the same because at the time when the vendee of the first sale proved and recorded the deed of that sale, there was no second sale.

In our view, the clear meaning of the sections relevant to the issue in this case (in particular the saving clause section 7) is to prevent a vendor selling the same land twice but if it happened that a second sale was made, the vendee of the first sale was unprotected if he did not perfect his deed before the second sale took place. That is a chance he will have to take if he omitted to prove and record his deed in accordance with provisions of sections 2 and 6 of Cap. 334. So that immediately after 16th March, 1965, there being no second sale of the same land by Rachael Terry, the first sale to Isaac Frederick would appear to be valid and effective against the said Rachael Terry. The fact that Isaac Frederick decided to keep the land rather than sell it, is irrelevant and immaterial.

We hold that the learned judge of the Grand Court arrived at a correct conclusion on this issue in the instant case.

The second submission is that the evidence did not support the finding that Exhibit B, was duly executed. In the instant case, the learned judge of the Grand Court stated in his reasons for judgment that he compared the questioned signatures of the witnesses to the deed, Exhibit B, with genuine signatures made by them in open court and he found that Exhibit B was genuine, that is, it was signed by Rachael Terry, sealed and delivered in the presence of Thomas Berry and Adler Bodden. Those two witnesses, however, gave evidence on oath for the appellant

saying that the signatures which appeared as theirs on the dead, Exhibit B, were not theirs and so it was urged on behalf of the appellant that it was not true that Rachael Terry had made her mark as vendor, on the deed.

We are of the view that the comparison of handwritings by the learned judge of the Grand Court unassisted by expert evidence was a dangerous course which should not have been undertaken by him: See R. v. Tilley (1961) 3 AER 406 and R. v. O'Sullivan (1969) 2 AER 237. We have considered all the facts and circumstances of the instant case. We find no evidence, apart from the comparison of handwritings, which would support the conclusion of the learned judge of the Grand Court as to the due execution of the deed, Exhibit B. In our view, the questions still remain unresolved as to whether Thomas Berry and Adler Bodden had in fact witnessed the mark of Rachael Terry on the deed, Exhibit B, and whether that deed was duly signed, sealed and delivered as is recited at the end thereof. In those circumstances, we hold that the second submission of learned attorney for the appellant is well founded.

For the reasons given, we allow the appeal. The judgment of the judge of the Grand Court is set aside with costs of appeal to be taxed or agreed upon, in favour of the plaintiff/appellant. We remit the matter for a re-hearing before another judge of the Grand Court to enable the parties to adduce some cogent evidence, expert or otherwise, with a view to resolving the issue of the validity or non-validity of the execution of the deed, Exhibit B.. Costs of the trial to abide the result of the re-hearing.