JAMAICA

Reported
27-06-74

IN THE COURT OF APPEAL

CAYMAN ISLANDS APPEAL 9/72

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

BETWEEN: THOMAS WILLIAM FARRINGTON - Appellant

AND : HENRY ELI BUSH - Respondent

H.G. Edwards, Q.C. for the appellant

John Stafford and Arthur Hunter for the respondent

27th June, 1974

GRAHAM-PERKINS, J.A.:

This is an appeal from a judgment of the Grand Court in favour of the respondent in a suit in which he, as the duly appointed Attorney of Sydney Emerson Crowe, sought, inter alia :

(1) damages for trespass by the appellant upon his land at Head of Barcus, in this island, on various occasions between 1956-1970;

(2) a declaration that he is the fee simple owner of the said land;

(3) cancellation and delivery up of a certain document of conveyance recorded at Volume XVI Folio 36 in the Record Office; and

(4) cancellation of the registration of the said land.

Sydney Emerson Crowe is the eldest son of Gustus Crowe. The latter died in 1925, having predeceased his father Julius Crowe who died, intestate, on November 26, 1926. Sydney Crowe therefore became the heir-at-law of Julius Crowe. Part of the estate of Julius Crowe was a parcel of land at Head of Barcus, butting on the north by Pond, on the south by the sea, on the east by lands of the estate of Ishmael Ebanks and on the west by lands formerly belonging to Abram Ebanks but now owned by the appellant.

The respondent claimed that he had been in possession of this parcel of land since 1925. He admitted, however, that his possession had been challenged since 1958-1959 by the appellant who claimed to be the owner of

the land by virtue of a conveyance to him dated March 24, 1952, and recorded on September 7, 1956.

The respondent testified that prior to his death in Cuba in 1926, Julius Crowe had returned to Grand Cayman in 1925, when he took him (the respondent) to the land and showed him its boundaries whereupon he entered into possession. He said that in 1927 he cleared the land and planted two coconut trees which were still growing thereon. He alleged, further, that over the years he had cleaned the land from time to time. There was a shed there in 1927 but it fell down in the nineteen twenties. He stated, too, that Sydney Crowe had lived for most of his life in Cuba and he had been his manager of this land. In 1958 Sydney duly appointed him his Attorney.

He alleged that having been off the Island for some time he returned and received from his wife certain information, as a result of which he saw the appellant with whom he had a discussion concerning the land. The appellant told him that he had bought 39 fathoms of this land from Elvera Ebanks, a daughter of Julius Crowe. The appellant, however, did not show him any document of title to this land. He said that he then fenced the land and that the appellant removed the fence. Thereafter he instituted certain proceedings against the appellant as the attorney of William Crowe, younger brother of Sydney Crowe. Those proceedings were determined in 1957 in favour of the appellant on the technical ground that the respondent could not seek to recover this land on William's behalf as it had devolved upon Sydney. In 1958, Sydney appointed him his attorney in respect of the land, and for ten years prior to the trial of this suit he had been on the land twice a week, and living on it.

In 1959, the appellant took steps to register the conveyance of March 24, 1952, given to him by Elvera Ebanks but he alleged at the time of the registration that the land had been conveyed to him by the heirs of Julius Crowe. It was conceded at the trial that this conveyance was invalid. The present proceedings were commenced in October, 1970. The appellant, at the trial, sought to resist the respondent's claims on the ground that he had acquired a title to the land by adverse possession.

Adverse possession of land is, and always has been, a complex concept. It involves the co-existence of two essential elements, namely, the assumption of actual physical possession by, and the presence of a particular mental element directed towards the true owner in, the adverse possessor. It is, in our view, a mistake to think that mere entry upon, and user of, the land of another can, without more, be equated with an assumption of possession. It must be possession of such a nature as to amount to an ouster of the original owner of the land. See, e.g. William Bros. v. Raftery (1958) 1 Q.B. 159. To support a finding of adverse possession there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner. Where alleged acts of possession are intrinsically equivocal they will almost always be found to be mere acts of trespass. In this context, an equivocal act means an act of such a nature as to provide an equal balance between an intention to exclude a true owner from possession and an intention merely to derive some enjoyment or benefit from the land wholly consistent with such use as the true owner might wish to make of it. See Ticbild Ltd. v. Chamberlain (1969) 2 P. & C. Report 633.

In order to determine the precise nature of an alleged act of possession, the geography and nature of the land are to be regarded as critical considerations. Equally important, from the point of view of the true owner, is the nature of the user of which his land is shown to be capable and his intention in relation thereto.

In this case, the appellant sought to assert a possessory title by user over a continuous period of twelve years prior to October 19, 1970, the date on which the statement of claim herein was filed. The onus of establishing that the respondent no longer had any right or title to the land was clearly on the appellant. For this purpose he called in aid certain acts which he asked the Grand Court to interpret as concluding the issue in his favour. Having examined those alleged possessory acts and the evidence relating thereto, that Court expressed itself as being not

satisfied, on a balance of probability, that a title by adverse possession had been established. The acts relied on by the appellant were:

(i) monthly visits to the land;

(ii) getting the land cleared;

(iii) registration of the land in 1959 under the invalid conveyance of March 24, 1952;

(iv) putting up a notice on the land warning persons not to trespass thereon; and

(v) putting down markers on the boundary in 1968.

With regard to (iii) of the above, we are constrained to observe that the appellant's claim to a possessory title is perhaps a little less than fanciful when looked at on the background of an alleged purchase of the land by him in 1952. He insisted on the validity of this transaction up to April 1971 when he filed and served a notice of a number of special defences, all of which were subsequently withdrawn. The fact that the special defence relating to registration was withdrawn is really nothing to the point. What is clear is that from 1952 to April 1971 the appellant was maintaining that there was vested in him a perfectly good title to the fee simple by virtue of the conveyance to him in 1952. How then could he claim to have acquired a title by adverse possession? These irrevocably inconsistent positions could not possibly have escaped the notice of the learned judge of the Grand Court. He would have noted the absence in the appellant of that mental element so essential to the concept of adverse possession. On the hypothesis that the appellant was found to be in possession the trial judge would have recognised that such possession, far from being adverse, to anyone, would have been enjoyed by the appellant in his own right qua owner. Indeed all the other acts on which the appellant relied would equally have been done qua owner and not with the intention of excluding the possession of the respondent.

In the final analysis, however, the critical question remains: Did the appellant effectively dispossess the respondent of the land? The learned trial judge held, in effect, that there was no such dispossession. We are of the clear view that there was an abundance of evidence on which he could so hold. He held, too, and this follows necessarily from his

finding just noted, that the evidence on which the appellant relied was incapable, in the particular circumstances of this case, of demonstrating possession in the appellant. We are quite unable to say that he was not right in so concluding.

For the foregoing reasons we would dismiss the appeal with costs to the respondent, to be agreed or taxed.