

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

Suit No: 379 of 2009

BETWEEN

MARVA LINDAWESE BEST

PLAINTIFF

AND

ERCILLE PAULINE KINCH

DEFENDANT

Before The Honourable Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court

2012: November 08, 09, 15 and 27

Appearances:

Mr. John Collymore holding for Mr. Norman O. Thomas, Q.C., Attorney-at-Law for the Plaintiff

Mr. Edmund G. Hinkson, Q.C., Attorney-at-Law for the Defendant

DECISION

BACKGROUND

Introduction

- [1] In 1932, Octavia Lamont Daniel died intestate in childbed at the age of 40, leaving behind her young husband, Livingstone, aged 27 or thereabouts, and 3 children – Husford, Hadley and the Defendant, Ercille Kinch. Of these, only the Defendant now survives.
- [2] On Octavia’s death, Livingstone quickly remarried to Rose, the mother of the Plaintiff, and their union also produced 3 children – Arlene, Warrington and the Plaintiff, Marva Best. Livingstone died some years later in 1982 and his second wife died in 1998.
- [3] Octavia and Livingstone had made their home on a plot of land situate at Briar Hall in the parish of Christ Church in this Island containing by admeasurement 1,762.7 square metres or thereabouts (hereinafter sometimes called “the land”). It is believed that Octavia had inherited the land from her maternal grandfather, William Layne, who had

not only been a seaman but one of the many Barbadians who had immigrated to Panama to work on the construction of the Panama Canal. He is thought to have used his earnings from Panama to purchase the land in question.

- [4] The Defendant has obtained a Registrar's conveyance with respect to this land and the Defendant, who has built a house thereon, now applies, inter alia, to set aside that conveyance as having been fraudulently obtained.

History of the Matter

- [5] After Octavia's death, Livingstone remained in occupation of the land and brought his second wife, Rose, to live with him. Rose continued to reside there after Livingstone passed in 1982. In fact, it is accepted that she stayed there until her own death in 1998.

- [6] By that time, the Defendant had long ceased to reside on the property. Sometime in 1952 she had moved to Scarborough in the parish of Christ Church, after she had been asked by her father to leave the family home.

- [7] The Plaintiff had also, by then, moved out of the home in which she was born. She had left upon her marriage to Lionel Best sometime in 1974. Hasford Layne, the Defendant's brother, had by 1998 already passed away. He died in May 1995. While Hasford's brother Hadley survived him, there is no evidence that he remained in the family home or in occupation of any part of the land. The only child of Livingstone Daniel that appears to have remained in occupation of the land in March 1998 when Rose Daniel passed away was Warrington Daniel, the Plaintiff's brother.

The Foreclosure Proceedings

- [8] After the death of her father, but before the death of her step-mother, the Defendant had the land surveyed and a plan prepared by a certified land surveyor. The prepared plan proposed the subdivision of the land into four lots and on the 9th of October, 1991, she applied to the Chief Town Planner for permission to effect the sub-division. Permission was granted on the 15th of April, 1992.

- [9] On the 19th of February, 1997, while her step-mother (then 89 years of age) was still residing in the family home on the land, the Defendant instituted foreclosure proceedings in the High Court of Barbados under **Order 31 of the Rules of the Supreme Court** in fictional suit No. 260 of 1997 entitled ***Roseanne Skeete v Ercille Pauline Kinch***. Her aim in instituting this action was to perfect title to the land which had been occupied by Livingstone Daniel.

- [10] In her supplementary affidavit dated the 12th of February, 1999 filed on the 15th of February, 1999 in her foreclosure proceedings, the Defendant deposed that she had the strongest right to ownership of the land. She stated in that affidavit that her mother, who had been entitled to the land, had died intestate. It was also her assertion that her brother, Husford Layne, who had been residing on the land had also died intestate without leaving issue or spouse and that she was his "sole surviving sibling". No mention was made of Hadley.

- [11] In her affidavit, the Defendant also admitted that her half-brother, Warrington Daniel, was occupying a portion of the land. She alleged, however, that he acknowledged her title to the land and had been paying her rent from 1994 onwards.
- [12] Notices of the Defendant's application were placed in the Nation newspaper and the Official Gazette. A notice of her application was also reportedly placed on the land itself by an officer from the Court Process Office. These notices invited any person having any claim, lien or charge against the land which was the subject matter of the proceedings to submit their claim to the Registrar of the Supreme Court by a specified date.
- [13] No adverse claim was submitted and, thus, on conclusion of the foreclosure proceedings, the Registrar of the Court conveyed the land to the Defendant by way of a Conveyance dated the 15th of November, 1999. This Conveyance was recorded in the Land Registry on the 15th of February, 2001 as Deed No. 1085 of 2001. The Defendant thus obtained sole ownership of that entire land through the foreclosure proceedings instituted on her behalf pursuant to the *Judicial Sale of Land Act, Cap 227 of the Laws of Barbados*.
- [14] Although the Defendant obtained title to the land through foreclosure proceedings, her step-mother continued to reside on the property. It does not appear from the evidence that the Defendant had ever requested rent from her for doing so.
- [15] The evidence of both the Defendant and the Plaintiff make it clear that Warrington Daniel, the Defendant's half-brother, had also been occupying a portion of the property as unlike her other brothers and sisters, whether half or whole, Warrington Daniel had never left the family home.
- [16] Indeed the evidence shows that even when the said Warrington Daniel finally emigrated to the United States, he still maintained his ties to the land as he left his daughter, Wilma Daniel, residing there and she continued to occupy the land. The Defendant states in these proceedings that Warrington did, however, acknowledge her title to the land by paying rent for its use from 1999 onwards, despite the fact that she claimed during the foreclosure proceedings that he had paid her rent from some 5 years earlier in 1994. It is clear to the Court that the Defendant did not provide full disclosure to the Registrar during the course of the foreclosure proceedings. She had also, quite deliberately, failed to reveal that at the time of the proceedings the existence of her brother, Hadley.

Notice to Quit

- [17] In any event, matters between the Plaintiff and the Defendant came to a head on April 26, 2008 when the Defendant served a notice to quit on the Plaintiff who occupied and continues to occupy lot 3, which is a small portion of the land and is only approximately 366 square metres in admeasurement. It appears that prior to serving this notice, the Defendant had been receiving rent from the Plaintiff. The Plaintiff has admitted to paying the same.
- [18] A Notice to Quit was also served by the Defendant on Wilma Daniel, the daughter of Warrington Daniel. On service of this notice, it appears that Wilma delivered possession to the Defendant.

[19] The Plaintiff, however, refused to do so and sought legal advice instead, which has led to the institution of this claim.

THE ACTION BEFORE THE COURT

[20] By Writ of Summons filed on February 27, 2009 the Plaintiff instituted an action against the Defendant in which she sought to obtain the following relief:

- (i) A Declaration that the Conveyance dated the 15th day of November, 1999 from the Registrar of the Supreme Court is void;
- (ii) An order that the said Conveyance be delivered up to the Court for cancellation;
- (iii) All necessary and consequential directions;
- (iv) Such further or other relief as the Court may deem just; and
- (v) Costs.

[21] In her Statement of Claim filed contemporaneously with the Writ, the Plaintiff alleged that the Defendant had wrongfully commenced the foreclosure proceedings as she had no exclusive claim, right or title to it as against the Plaintiff and knew or ought to have known that the Plaintiff was as equally entitled to the land as she. She also contended that the Defendant had “*knowingly and falsely misrepresented to the Registrar of the Supreme Court*” that she had inherited the land from her maternal grandmother.

[22] The Plaintiff contended that their father had become entitled to the land by curtesy. She alleged also, in the alternative, that he had obtained possessory title to the land as a result of occupying the land for about 30 years and that, as he had died intestate, the land passed to Rose, his wife, and his children pursuant to the *Succession Act, Cap 249 of the Laws of Barbados*. She accordingly alleged that the Defendant had no exclusive right to the land to which she had obtained title and the conveyance by which she received title to it should therefore be set aside.

[23] In her Defence filed March 20, 2009 the Defendant denied the allegations placed against her by the Plaintiff. She also denied that her father was ever entitled to the land, whether by curtesy or by adverse possession. Likewise, she alleged that his second wife, Rose Daniel, had also not gained possessory title to the land and thus contended that the children of the union between her father and Rose Daniel did not have any right to the land.

ISSUES

[24] The primary issue for this Court to determine is whether the Plaintiff, Marva Lindawese Best, had any rights to the land at the center of this dispute which should have been taken into account by the Registrar of the Supreme Court before the Registrar granted the Conveyance dated the 15th of November, 1999 to the Defendant.

[25] If the Plaintiff does have an interest, the Court then has to consider whether the relief the Plaintiff seeks, that is the setting aside of the Registrar’s conveyance, is barred by the operation of the *Limitation of Actions Act, Cap 231 of the Laws of Barbados*.

SUBMISSIONS TO THE COURT

- [26] **For the Plaintiff:** Counsel for the Plaintiff, Mr. Collymore, contends that if it were true that the land were owned by the maternal grandfather of the Defendant as she had alleged, this land would have passed to the Defendant's mother on her grandfather's death and then, upon the death of the Defendant's mother, it would have passed to her father by virtue of curtesy. It is his contention that the Defendant's father and all of his living children would have obtained a life interest in the land by virtue of the principle of curtesy.
- [27] Mr. Collymore further argues that the Defendant's father would have remained a tenant by curtesy until the enactment in 1975 of the *Succession Act*, which abolished curtesy and thereby converted his life estate by curtesy to a fee simple absolute. As a result of this conversion, on the death of the father intestate, the land should be distributed to all his children in accordance with *section 49* of the *Succession Act*.
- [28] It is the alternative argument of Counsel for the Plaintiff that if on the death of her father, the land reverted to the heir-at-law of the Defendant's mother, this person would be Husford Athelson Layne who died intestate without leaving any issue or spouse within the meaning of the *Succession Act*. He did, however, leave his sister, the Defendant, and his step-brothers and sisters, Arlene, Warrington and the Plaintiff, who would each be entitled to one quarter interest in the said land under the *Succession Act*.
- [29] **For the Defendant:** Counsel for the Defendant, Mr. Edmund Hinkson, denies that Livingstone Daniel was entitled to the land. He submits that while the parties' father may have obtained a life interest to part of the land on the death of his first wife by virtue of curtesy, which was then part of the common law of Barbados, this interest was extinguished upon his death and his children could not therefore claim any interest in the land through him. The children of his second wife did not therefore have any interest in the land.
- [30] Mr. Hinkson also submitted that the Defendant was not guilty of fraud in commencing foreclosure proceedings and obtaining the Conveyance dated the 15th day of November, 1999 from the Registrar of the Supreme Court as she was, at the time of instituting her claim, the only person alive with the best claim to the land.
- [31] Counsel for the Defendant also pointed out that the Court order for the sale of the land to the Defendant had occurred over ten years ago and since then innocent third parties had acquired estates in individual parcels the land. The interests of justice therefore demanded that the Conveyance not be rescinded and the Plaintiff's claim dismissed with costs in favor of the Defendant.

THE LAW

- [32] A determination of the primary issue in this matter, whether the Plaintiff has any claim, rests largely on the issue of curtesy. Curtesy, which is formally known as an estate by the curtesy of England (or Scotland), but is also called tenancy by curtesy has been concisely defined and described by **Black's Law Dictionary (9th edition, 2009)** and **Mozley &**

Whiteley's Law Dictionary (10th edition, 1988), while the nature of the estate by curtesy has been somewhat more extensively discussed in **Halsbury's Laws of England, Vol 87: Real Property and Registration (5th edition, 2012)** and a number of treatises on the law of real property, including **The Law Relating to Real Property in a Nutshell (5th edition) by Marston Garsia (London: Sweet & Maxwell, 1988)**, **A Treatise on the Law of Real Property by Edward Douglas Armour (Toronto: Canada Law Book Company, 1916)** and **Cheshire & Burn's Modern Law of Real Property (15th edition) by E. H. Burn (London: Butterworths, 1994)**.

- [33] The sources listed above, to which the Court has had regard, all establish that an estate by the curtesy referred to the common law right of a widower to a life estate in the land that was owned by his deceased wife during their marriage and at the time of her death once she died intestate and he had children that were born alive from her who were capable of inheriting the lands of their mother. The wife must also be solely entitled to the land and must have seisin (or actual possession) of it at the time of her death: **Marston Garsia supra** at p. 101 and **Edward Douglas Armour supra** at p. 101.
- [34] The Husband acquires a vested interest in the estate of his wife as soon as a child capable of inheriting the estate is born and on his wife's death he holds the estate of the heir: **Halsbury's Laws of England supra** at para 152.
- [35] The rights and powers of a tenant by curtesy are generally the same as those of any tenant for life (*Ibid*) and like other tenancies for the life of a tenant, tenancy in curtesy determines on the death of the tenant i.e. the widower claiming by curtesy.
- [36] Tenancy by curtesy was abolished in the United Kingdom for all women dying after 31 December, 1925 by the enactment of the *Law of Property Act, 1925* and the *Administration of Estates Act, 1925*: **Cheshire & Burns supra** at p. 250.
- [37] In Barbados, tenancy by curtesy was also abolished. This occurred in 1975 by the enactment of the *Succession Act* and specifically *section 4(b)* thereof. This section provides that:
- “With regard to the real and personal estate of a person dying intestate there shall be abolished –
- (b) tenancy by curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate whether arising under the general law or by custom or otherwise;”
- [38] The High Court of Barbados has previously had cause to consider tenancy by curtesy as it operates in Barbados in *Yearwood v Griffith et al* (unreported) High Court of Barbados, Suit No. 802 of 1980, Decision of December 3, 1998. In *Yearwood*, the plaintiff instituted a claim by which he sought possession of land to which he had obtained title by a Registrar's conveyance. The land was being occupied by the First, Second and Third Defendants who claimed that they were tenants at will of the Fourth Defendant who was entitled to the land and who was, at their request, added to the action as a party. The Fourth Defendant argued that he was entitled to the land by virtue of an estate in curtesy as

the land had been owned and occupied by his wife who had predeceased him and with whom he had children.

[39] Counsel for the Plaintiff submitted to the Court that tenancies by the curtesy of England have never been a part of the laws of Barbados. However, Roachford J. firmly ruled that there was “no merit whatsoever in this contention [by the Plaintiff]”, accepting instead the submissions of counsel for the Defendant that tenancy by curtesy constituted part of the common law obtained from England and, by extension, Barbados.

[40] He noted, however, that:

The *Succession Act, Chapter 249 of the Laws of Barbados* has abolished tenancies by the curtesy in respect of deaths occurring on and after the 13th November, 1975. Etheline Lottina Griffith died prior to the 13th November, 1975. At the time of her death, she was entitled solely to an estate in possession in this parcel of land and there had been issue of her marriage to the fourth defendant, such issue was born alive and capable of inheriting as her heir. Her widower, the fourth defendant therefore became a tenant by the curtesy and entitled to an estate for the residue of his own life in the said parcel of land, certainly up to the moment of the execution of the registrar's conveyance on the 6th June, 1979. The interest of the plaintiff in this parcel of land was therefore subject to the right of curtesy of the fourth defendant up to the 6th June, 1979.

[41] Roachford J then considered what effect, if any, the execution of the Registrar's conveyance had on the legal rights of the Plaintiff and the Fourth Defendant to the land. It noted that the Plaintiff had admitted in his evidence that he had or ought to have had knowledge of the Fourth Defendant's right of curtesy in respect of the estate of his mother, as he was aware that the Fourth Defendant was the widower of his mother and that his mother died intestate and in possession of the land and had given all of this information to his attorneys when he sought legal advice.

[42] Roachford J therefore found that the Plaintiff had therefore made a false representation to the Registrar and had done so knowingly and was therefore guilty of fraud. He did not set aside the Registrar's conveyance but held that the Plaintiff held the legal estate in the land as a trustee, the beneficial interests being a life interest in the Fourth Defendant and the fee simple in remainder in himself and dismissed his claim.

[43] Implicit in the decision of Roachford J is that the effect of the *Succession Act* and its abolition of tenancy by curtesy were not to transform the tenancy by curtesy already being enjoyed into a fee simple estate. The Defendant has provided no authority to support his submission to that effect.

[44] In light of all the authorities cited above, the Court finds that a right to land by virtue of the tenancy of curtesy only gives a widower claiming the same a life interest in the property in question and any right obtained therefore determines on the death of the widower. The Court also finds that persons holding a tenancy by curtesy before 1975 did

not as a result of the passage of the Succession Act thereafter hold estates in fee simple. There is no basis for this argument.

- [45] What this essentially means is that if Livingstone held the land by curtesy as the Plaintiff has alleged and the Court accepts he did, he held the estate only as a life tenant and on his death in 1982 the property therefore reverted to his wife's heirs. His wife had been survived by the Defendant and her two brothers, Husford Layne and Hadley Daniel.
- [46] Therefore, it is clear that on Livingston's death he was not in possession of any estate or interest obtained by the common law doctrine of curtesy that he could leave to his wife, Rose or his daughter, the Plaintiff.

ADVERSE POSSESSION

- [47] The law relating to adverse possession in Barbados is governed by the *Limitation of Actions Act, Chapter 231 of the Laws of Barbados*. The *Limitation of Actions Act* provides in *section 24* that no action shall be brought by any person (other than the Crown) to recover land after the expiration of 10 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

- [48] *Section 31* of this Act further provides that:

31. (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run, that is to say, the land is in "adverse possession", and when under this Act any right of action to recover land is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing until adverse possession is taken of the land.

(2) When a right of action to recover land has accrued and after its accrual but before the right is barred the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued, and no fresh right of action may be treated as accruing until the land is again taken into adverse possession.

- [49] From *section 31(2)*, which I have just quoted, in order for a person to claim title to a land by adverse possession that person must have been in adverse possession of the land for a continuous period of at least 10 years from the making of his claim to the land.

- [50] As possession is *prima facie* evidence of *seisin in fee*, it is a transmissible interest in land and the time for which a person is in adverse possession is therefore available to his successor in title provided that this later person, whether purchaser or devisee, immediately follows him into possession and holds the land for the remainder of the period: **Cheshire & Burns Modern Law of Real Property (15th Edition) p 892.**

- [51] Where the person in adverse possession, however, abandons his possession of the land and another person resumes possession but does not do so until after a distinct and

definite interval of time has passed, the second person cannot be a successor in title to the first and their intrusion onto the land will not continue the possession of the first but cause a fresh cause of action to accrue in their favor: *Ibid.*

- [52] The Plaintiff has claimed, and the Court has accepted, that her father became entitled to the land during his lifetime by virtue of the common law doctrine of curtesy. A party who claims to occupy land through the English custom of curtesy will not be simultaneously able to claim title through adverse possession: *Doe dem Milner v. Brightwen* 10 East 582 as cited by George, C. in *Bazil v Wharton* (unreported) Court of Appeal of Guyana, Civil Appeal No. 21 of 1988.
- [53] Accordingly, as the Plaintiff's father was a tenant in curtesy, he could not have been in adverse possession of the land and could not obtain title to it on this basis. Additionally, while the Plaintiff's mother was living on the land with her husband, she was also not thereby in adverse possession of the land as she was living as a member of his household: *Skinner v Collymore* (unreported) High Court of Barbados, Suit No. 513 of 1968, Decision of March 31, 1969 per Williams J. Her adverse possession of the land commenced only when she remained in possession of the land after the death of her husband: *Ibid.*
- [54] It is possible that the Plaintiff's mother may or could have obtained title to the land by adverse possession as she remained on it for over 16 years after the death of the Plaintiff's father. The Court finds as a matter of fact that her possession of the land had been continued by her only son, Warrington Daniel. He may therefore have also been able to obtain title by adverse possession, at least until he started paying the Defendant rent for his occupation of the land.
- [55] Possession has, from the evidence of both parties, to have been abandoned by the Plaintiff. It was certainly not continued by the Plaintiff who by her own evidence re-entered the land some years after the death of her mother and throughout her evidence recognized that the Defendant was the person to whom she should have paid rent and also did pay rent to occupy the land. The Plaintiff cannot therefore claim an interest/share on the land on the basis of any possessory rights or titles that her mother had obtained. She herself has obtained no such right.

CONCLUSION

- [56] In the circumstances, the Court having found that the Plaintiff's father had no interest in the land which he could have deposed by a will or which his children were entitled to claim on intestacy, and also that no adverse possession can be established, the application by the Plaintiff to have the conveyance dated November 15, 1999 from the Registrar of the Supreme Court to the Defendant declared void is dismissed.
- [57] The Court is also asked to give necessary and consequential directions. One of those directions would naturally relate to the Notice to Quit dated April 26, 2008. The Court has no desire, in view of the entire proceedings, to have the Plaintiff rushed off the land, especially given the time of the year in which we find ourselves. At the same time, the Plaintiff has no entitlement to the land and must therefore be prepared to remove herself

within a reasonable time. Accordingly, the Court invited Counsel to seek an agreement as to when the Plaintiff should actually move off the land.

[58] However, as no agreement has been reached between the parties, the Court hereby orders that the Plaintiff, Marva Lindawese Best, be given 6 months from the date of judgment to quit the land she occupies at Briar Hall in the parish of Christ Church.

[59] Costs to be taxed or agreed are awarded to the Plaintiff.

Dated the 27th day of November, 2012

**Jacqueline A. R. Cornelius
Judge of the High Court**