

2019

No. 122-P

Demerara

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
CIVIL JURISDICTION
(DECLARATION OF TITLE)

In the matter of the Title to Land (Prescription and Limitation) Act, Chapter 60:02

In the matter of an application for a declaration of title to :-
Lot numbered 13 (thirteen) between Thomas and Pike Street, Kitty Railway Lands, being a part of Kitty and Alexanderville District, in the city of Georgetown, County of Demerara, Republic of Guyana, as shown on plan by Keith A. Chapman, Sworn Land Surveyor, dated the 8th day of May 2019 and deposited in the Guyana Lands and Surveys Commission on the 17th day of May 2019 as Plan No. 72210.

-and-

In the matter of a Petition for prescriptive title by **AILEEN NIEUENKIRK**.

Before: Nicola Pierre, Commissioner of Title

Appearances: Mr. K.A. Juman Yassin S.C. for the petitioner
Mr. P. Henry for the Opposer

Trial dates: September 23, October 2, 2020.

Decision of Nicola Pierre, Commissioner of Title

The Proceedings:

1. Aileen Nieuenkirk claims possessory title to Lot 13 Kitty Railway Lands, Kitty, Georgetown, containing 0.096 acres as shown on Plan No. 72210 [Ex A]. She says that the legal owner Randolph Miggins made an oral gift of the land to her in 1986 and that she has had adverse possession of it since. Agnes Dalrymple, executrix of the estate of the legal owner Randolph Miggins, opposes on the ground that Aileen Nieuenkirk was a licensee of Randolph Miggins and therefore not in adverse possession.

Conclusion:

2. I hold that Aileen Nieuenkirk has acquired possessory title to Lot 13 Kitty Railway Lands.

The Law:

3. Possessory title to land is acquired by the claimant's sole open possession of it for more than 12 years without the consent or agreement of the person(s) legally entitled to it. Possessory title to land crystallizes in the possessor on the expiration of 12 years adverse possession of it.

The Issues:

4. Issues that arose include whether the petitioner had sole and adverse possession of the property, whether possession taken pursuant to a gift can found prescription, and whether a devise of property interrupts possession.

The Evidence and my Analysis:

5. Lot 13 Kitty Railway Lands (the property) is owned by Randolph Miggins by transport 1377 of 1968 [Ex J]. Randolph Miggins also owned Lot 4 George Street, Georgetown, at which property he lived as is evidenced by his stated address in his will and Probate [Ex K1-4].
6. Randolph Miggins died testate 26 September, 2003. Agnes Dalrymple was appointed his executrix on 15 October, 2003 [Ex K3 Probate 911/2003]. In his will dated 14 October 1999 Randolph Miggins devised lot 13 to his three children in equal shares.
7. The petitioner lives on lot 13. She and Randolph Miggins had an intimate relationship. She says he gave her lot 13 in or around 1986. At that time it was low lying swamp with a dilapidated house. She says she accepted the gift of the property from him and that in 1986 she took possession of the property and started filling the land with sand. In 1990 she started building a new house on the land and in May 1998 she moved into the house she built.

8. In proof of her claims that she built the house and filled the land petitioner tendered receipt dated 1 June 1997 showing her payment for 20 loads of sand supplied “over a period of time” [E 2]; receipts for building materials and paint issued in the years 1997, 1998, 1999 through 2004 [Ex E 1-28]; Ministry of Public Works certificate dated 26 June 1999 issued to Aileen Nieuenkirk approving the electrical installation at lot 13 and a Guyana Electricity Corporation consumer deposit receipt dated 8 July 1999 [Ex D1-3]. She also tendered the building plan approved by the M&CC Engineer’s Department in 1995 for a building to be ‘erected for Randolph Miggins lot 13 Railway Line’.
9. The petitioner also tendered bank statements addressed to her son Wayne at the property in 2005 [Ex G], receipts issued her when she paid rates for the property 2007 through 2020 [F1-10].
10. It is clear that the petitioner and her son Wayne live at the property, what is disputed is whether she had sole possession of it, whether her status in occupation was as owner or mere licensee, and whether she held undisturbed possession for the statutory period.
11. The opposer contends that the petitioner was Randolph Miggin’s licensee, and relies on statements made by the petitioner in her statement of claim in action 520-W of 2004 in which she seeks to acquire the property by prescription, and the fact that lot 13 was the subject of a devise in Miggins’ 1999 will.
12. There is nothing on record to support the contention that the petitioner has admitted to being a licensee. In the statement of claim [M 1-8] the petitioner says that ‘The late Randolph Percival Miggins and the Plaintiff agreed that the Plaintiff would build and use the said land for her own use and benefit and that the property and land would become that of the Plaintiff’. Those words do not establish a license, or a belief in the petitioner that she is licensee. They establish that the petitioner intended to use the land for ‘her own use and benefit’ not for the owners use or benefit, and that the petitioner’s intention was that the property ‘would become that of’ or belong to her.

13. The opposer says that the petitioner shared the property with Randolph Miggins and was never in sole occupation. There is no evidence to support the opposers claim that Randolph Miggins lived at the property. In his will dated 1999 and in the Probate dated 2003, his address is stated at lot 4 George Street [Ex K 1-4]. The opposer in cross examination said that Randolph Miggins and his legal wife who died in 1999 both lived at lot 4 George Street. The petitioner says that Randolph Miggins used to visit her at the property but never lived there and that his visits and their physical intimacy stopped in 1999 when he had a stroke. I find that Randolph Miggins resided at lot 4 George Street not at the property.
14. The opposer also relies on the devise of lot 13 in Randolph Miggins' 1999 will as establishing that he had never gifted the property to the petitioner. The petitioner disagreed that it forms part of his estate because she says -'he gave it to me.' The petitioner suggests that his will was not entirely voluntary. In cross examination in answer to the question 'He had his faculties all the time when he died?' the petitioner said that after he got sick in 1999 Randolph Miggins 'started to talk out of terms' and that she believed that he 'didn't do that will on his own.' When asked whether she had challenged his will she said 'that is why the matter before the court.'
15. I believe the Petitioner when she says that she accepted a gift of the property from her paramour, took sole possession of it, built her house on it, and occupied it for herself, on her own behalf, for her sole use and benefit. I also accept the submissions of counsel for the opposer that an oral gift is not valid to transfer a legal interest in property in Guyana.
16. No transfer of immovable property can take effect unless perfected by transport : *Surejpaul v. Ramdeya & Sarju* (1942) L.R.B.G. 315, section 12 Deeds Registry Act, Cap. 5:01, although, according to the Court of Appeal in *Lambert v. Caldeira* (1970) 18 W.I.R. 15, an interest in land may in some cases be acquired by way of a trust. In *Lambert* a validly executed deed of gift coupled with delivery of possession of a property and the documents of title to the donee, was held to create a trust of the legal estate in the property in favour of the donee.
17. The petitioner has not presented a deed and no instrument creating an interest in any immovable property in Guyana shall be valid or pleadable unless the instrument is signed

and executed in the presence of two witnesses, and duly proved and filed as of record in the registry – Section 17(1) Deeds Registry Act, Chapter 5:01. A document notarially executed shall be held to be a valid deed: s. 14 of the Civil Law of Guyana Act, Cap. 6:01.

18. The petitioner has not offered any document at all evidencing a gift to her of the property. She says that Randolph Miggins gifted it to her orally, and that she took possession of it and treated it as her own. That oral gift is invalid and unenforceable in Guyanese law. What then was her position as occupier? Was she occupying with consent or agreement, or was her occupation adverse to the interest of the legal owner ?
19. The Privy Council in a case emanating from the Bombay High Court has held that when a person takes possession of land under an invalid gift, time runs in their favour from the date of entry: *N. Varada Pillai v. Jeevarathnammal*, Privy Council, 1920 BOMLR 444; vol 38 MLJ 313.
20. Time can only run in favour of a person in possession adverse to the interest of the legal owner. The Privy Council in *Pillai* held that a donee holds possession in their own right adverse to the interest of the legal owner/donor. In that case the document purporting to transfer the property to the claimants predecessor Duraisani was invalid, but it showed that Duraisani was not holding as a licensee of the owner, but as intended owner herself, in her own behalf. The gift changes the nature and character of the possession of the Donee. The Court said –

‘It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the *nature and character of the possession* thenceforth held by Duraisani. In other words although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt.’

21. The reasoning that if a gift of property is invalid then a donee possessor holds the land for themselves and therefore adversely to the donor was applied in India in *Jagdeo Singh v*

Deputy Commissioner (AIR 1926 Oudh 431), *Secretary of State v. Mahant Harcharan Das* (AIR 1926 Oudh 98) and *Sri Padma Kumari Patto Mahavei v Nanda Padhan* (AIR 1944 Pat 219). The decision of the Privy Council although not binding is persuasive. That reasoning was also applied by the Honourable Commissioner Madam Priscilla Chandra Hanif in 2019 in a Petition by *Leelawatie Ramrattan*, 923-P/2014 and in 2015 by me in Land Registry Application by *Dindiall Persaud and Naresh Persaud* No. 42/2015 Essequibo, and Application by *Chitraka Boodram* No. 51/2015 Essequibo, both of which decisions were affirmed by a Full Court.

22. I find that the petitioner from the time she was gifted the property by Randolph Miggins held and possessed the property for herself, in her own right and adverse to his legal interest.
23. The opposer claims that the acts of occupation were those of Randolph Miggins not the Petitioner, that Randolph Miggins built the building on the property and planted trees there. I believe the petitioner when she says that after she took possession of lot 13 she had the land filled and built up and with her own funds built a two story dwelling on it. I visited the property and saw the substantial building. The petitioner has produced receipts evidencing the purchase of the building materials, and the installation of utilities in her name.
24. The petitioner's witness Roy Corlette was very believable. He said he helped the petitioner fill the land in the 1980's and rebuild the fence around the property and that in 1990 the petitioner broke down the old wooden building and started building a new house which he helped paint. In cross examination he freely admitted that he had used the existing fence materials to build the fence and that Randolph Miggins had brought suckers and mango trees for the yard.
25. I do not accept the contention that the approved building plan being in the name of Randolph Miggins means that he built that building. There is no evidence of him having spent any money on the construction of the dwelling on the property. There is clear evidence that the petitioner paid to construct her home on the property. I accept the evidence of the petitioner that Randolph Miggins applied for building approval on her behalf. It is unlikely

that the M&CC would issue building permission to the petitioner in her own name when Randolph Miggins' name appears on the transport.

26. I find that the petitioner had sole possession of the property in her own behalf and was the source of the funds for the building constructed on it.
27. The fact that Randolph Miggins applied for the building approval in 1995, and that he did not prevent the petitioner building the dwelling, installing utilities, and occupying the dwelling, is difficult to reconcile with his 1999 will devising the property to his children. Why would he consciously support her possession and investment and then seek to dispose of it otherwise? And if the devise was his deliberate and conscious act as claimed by the opposer, then what effect did it have on the petitioners possession? Did the petitioner hold adverse possession undisturbed for the statutory period?
28. Randolph Miggins died in September, 2003. On 10 October, 2003 the petitioner wrote his son requesting the return to her of household items she had provided the deceased at his lot 4 George Street residence for his comfort. On 19 July, 2004 the opposer wrote the petitioner demanding she give up possession of the lot 13 property. The petitioner responded by filing action 520-W of 2004 seeking a declaration she had acquired it by virtue of 12 years adverse possession. When that action came up for hearing in 2019 it was stayed to allow a determination of this petition filed in March, 2019, which seeks comparable reliefs. Her first claim of possessory title was therefore made in August 2004.
29. A possessor is only entitled ask for a declaration of title after her possessory title has crystallized. That is when the cause of action arises. Possessory title crystallizes when she has held adverse possession of a property for 12 years. The petitioner must therefore establish that she had adverse possession of the property from at least August 1992 which is 12 years prior to August 2004 when she filed the writ.
30. The Petitioner says she went into possession in 1986. Her witness Roy Corlette says in the 1980's he assisted in filling the land and rebuilding the fence. The building plan was

approved in February 1995. The petitioner has produced receipts evidencing extensive filling and construction in 1997 and onwards. Roy Corlette says that the petitioner demolished the old wooden building on the property in 1990. The petitioner says she broke down the old house in the 1980's began to build a new house on the property in 1990.

31. The opposer has not contested the claims of the petitioner and her witness that the fence was rebuilt in the late 1980's, there was land filling in the late 1980's or that the old house was demolished in 1990. The opposer's counsel in fact put it to Roy Corlette that when he rebuilt the fence he used the materials from the pre-existing fence. There was not much evidence from the opposer regarding the years and dates at which work was undertaken at the property. The opposers case rested largely on the issue of the petitioners status in occupation, whether she had sole occupation, whether she was a licensee.
32. I did not find the evidence of Agnes Dalrymple compelling. In cross examination she admitted that she had only once met the petitioner and that was in the 1990's. She said that Randolph Miggins had introduced the petitioner as 'his friend'. She also admitted that she is unable to say what 'promises or gifts he made' to the petitioner. Throughout cross examination she said 'I will not be able to answer that question' or 'I can't say'. Her testimony was also inconsistent. She says that she was not in a position to say whether the petitioner and Randolph Miggins were intimate, yet she insists that Randolph Miggins lived at lot 13 together with the petitioner. At the same time she also says that Randolph Miggins lived at lot 4 George Street and when pressed to admit that he and his legal wife lived separately there, she upstairs and he downstairs, she prevaricated saying that 'the bedrooms were on the upper floor' and then 'I can't say whether he lived in the upper flat or lower flat' .
33. I accept the evidence of the petitioner and her witnesses that by 1990 she had taken possession of the property, did some land filling, rebuilt the fence, and demolished the old wooden building.

34. I find that the petitioner was in sole adverse possession of the property from at least 1990 and that she has held sole adverse possession of the property to date. I hold that by 2002 she had acquired possessory title to the property.
35. I hold that the devise by Randolph Miggins in his 1999 will did not interrupt her possession. Firstly, a devise in a will takes effect on the death of a testator not before, and Randolph Miggins died in 2003, after the petitioners' possessory title had crystallized. In 2003 Randolph Miggins no longer had a devisable interest in lot 13. The devise was therefore ineffectual.
36. Secondly, a clause in a will does not stop time running. An interruption of possession must be physical or judicial - *Bisnauth v. Shewpersaud* [2009] CCJ 8 at [40], *Markfield Investments Ltd v. Evans* [2001] 1 WLR 1321.

Conclusion:

37. I dismiss the opposition.
38. I make a declaration of title in favour of Aileen Neiuenkirk to Lot numbered 13 (thirteen) Kitty Railway Lands, Kitty, in the city of Georgetown, in the County of Demerara, in the Republic of Guyana, lot 13 containing 0.096 acres being shown on plan by Keith A. Chapman, Sworn Land Surveyor, dated the 8th day of May 2019 and recorded in the Guyana Lands and Surveys Commission on the 17th day of May 2019 as Plan No. 72210.



Nicola Pierre,
Commissioner of Title.
4 January, 2020.