

**IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
-APPELLATE JURISDICTION-**

CIVIL APPEAL NO. 107 OF 2008

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

-And-

In the Petition of **KALOUTIE MATHAN** of
Meten-Meer-Zorg, West Coast Demerara, for a
Declaration of Title in respect of the following
property:-

Lot lettered 9 (nine) of Area 'E' part of Plantation
Meten-Meer-Zorg, situate on the West Coast of
Demerara, in the County of Demerara, Republic
of Guyana, the said lot lettered 9 (nine) being
shown on a plan by Lennox Mc Greggor, Sworn
Land Surveyor, dated the 21st day of August, 2005
and recorded at the Guyana Lands and Surveys
Commission on the 3rd day of September, 2005, as
Plan No. 37898.



-and-

PAUL KUJAL also known as **PAUL KUJAL
SEERANIE.**

Appellant/Opposer

BEFORE:

The Hon. Mr. Justice B.S. Roy - Justice of Appeal

The Hon. M' de Justice Y. Cummings-Edwards - Justice of Appeal

The Hon. Mr. Justice Rishi Persaud - Additional Judge

Mr. Bernard De Santos SC for the Appellant/Opposer.

Ms. Camilla Edwards for the Respondent/Petitioner.

April 25th, 2014,

May 08th, 2014.

JUDGMENT OF THE COURT DELIVERED BY ROY JA.

[1] It is a notorious fact that since colonial times, the expatriate owners
of sugar estates in British Guiana, stretching from Skeldon in the east to

Leonora on the west and even further afield, would permit their employees to occupy certain portions of the estate lands as building land for their residence under a licence or a tenancy. In time, the estate owners would sell the absolute title to these various parcels of land to their employees. In the event of the death of that employee, title to the land is usually sold to the legal personal representative(s) of the deceased for the benefit of the deceased's heirs and successors-in-title. Since the mid 70's the lands of all of those sugar estates came into the hands of a public corporation - The Guyana Sugar Corporation Ltd. (Guysuco) and the colonial practice of the estate owners providing house lots for their employees on similar or near similar terms and conditions continues up to the present time.

[2] Prince Kujal was one such employee of the Sugar Corporation. Some time before 1975, he was employed by Guysuco at Plantation Meten-Meer-Zorg on the West Coast of Demerara and was permitted by the Corporation, as the paper title holder, to occupy Lot 9, Area 'E', part of Plantation Meten-Meer-Zorg, the subject matter of this appeal ("the disputed land"). For present purposes it is immaterial whether he occupied the land under a licence or tenancy. What is however clear from the evidence before the Land Court (and not the subject of any dispute between the parties) is that Prince Kujal, ("the father-in-law") was put into possession of the disputed land by Guysuco. He built a house thereon and lived there with his family until he died in July 1985, intestate. He is survived by his seven children including the Appellant who is the administrator and legal personal representative of his estate.

[3] According to Kaloutie Mathan ("the Petitioner"), around 1975 when she was just 14 years old, she was "married" to Mathan Kujal, the eldest son of her father-in-law and after the celebration of their marriage they both shared residence with her father-in-law at his dwelling house on the disputed land. Her husband Mathan Kujal died in October 1996 and she maintained that after his death she continued to reside on the subject premises until she left sometime in 2002 by which time she had acquired possessory rights.

[4] In October 2005, the Petitioner filed for a declaration of title to the disputed land under the Title to Land (Prescription and Limitation) Act Cap. 60:02 on the basis that it was occupied beneficially by her since the 15th day of June, 1992 and that she had been in "open, undisturbed and continuous possession and occupation for a total of upwards of 14 years, *nec vi, nec clam, nec precario*".

[5] Paul Kujal, a son and the administrator of the estate of Prince Kujal, deceased, opposed her Petition for prescriptive title principally on the ground that at all material times, she was never in occupation of the disputed land for the requisite period as she had left the premises soon after her husband, Mathan Kujal died in October 1996, and went to live with someone else somewhere else. The learned Commissioner of Title appears to have been deeply impressed by the fact that "although her literacy level is very low she appeared to be an honest person" and curiously enough found that "the Petitioner and her husband were in joint possession from the 6th July 1985 (the day her father-in-law died) until his (husband's) death on the 6th October 1996, that she continued possession up to the 7th July 1997 for the full twelve year period which was free from any interruption, sole and undisturbed". On the basis of these rather strange and extravagant findings, the learned Commissioner of Title granted her a declaration of title of the disputed land.

[6] At the hearing of the appeal, eminent Senior Counsel for the Appellant contends that the learned Commissioner of Title erred, in not applying the relevant legal principles to the facts as found by him, misconstrued the issues in the case; that the decision is clearly against the weight of the evidence and that the Petitioner did not fulfill the requirements of the Title to Land (Prescription and Limitation) Act Cap. 60:02 and rules made thereunder in that there was substantial non-disclosure in the Petition itself.

[7] In the first place, it must be recognized that in accordance with Rules of the High Court (Declaration of Title) Cap. 3:02, there is a mandatory requirement for the Petitioner to make full disclosure in the Petition of all material facts. The importance of strict compliance with

this statutory requirement was stressed by Langley J in *Incorporated Trustees of the Diocese of Guiana -v- Mclean* (1939) LRBG 182. Non-compliance will be viewed by the Court as “deliberate and fraudulent suppression of evidence and as a mediated and intentional contrivance to keep all interested parties and the Court in ignorance of the real facts of the case”. (See *Adams -v- London* (1964) LRBG 193 and *Patch -v- Ward* (1867) L.R. 3 Ch App. 203 at 212.

[8] The Petition as presented in the Land Court was in clear violation of this statutory requirement in that the Petitioner failed, *inter alia*, to disclose that:

- The dwelling house on the disputed land in which she lived from 1975 until she left in 2002 was owned by her father-in-law, Prince Kujal who died in July 1985.
- At all material times and especially from 1975 until 2001, the paper title holder of the disputed land was Guysuco.
- Prince Kujal is survived by his seven children, each of whom, including Mathan Kujal, the late husband of the Petitioner, was entitled on intestacy to a fractional share of his estate.
- The dwelling house on the subject premises formed part of the estate of the deceased, Prince Kujal.
- She came on to the premises in 1975 under a family arrangement in which she was permitted by her father-in-law to share his dwelling house.
- Her father-in-law never had title to the disputed land.
- Paul Kujal, her brother-in-law, obtained a grant of Letters of Administration of the estate of Prince Kujal since 1998.
- She left the disputed land in 2002, some 3 years before she instituted proceedings in the Land Court.
- Some three or four years before the presentation of her Petition in 2005, she was aware that Paul Kujal, the legal personal representative of the estate of Prince Kujal had obtained Transport for the disputed land.

- She filed the Petition for title because her husband's name was not included in the list of beneficiaries of the estate of Prince Kujal, deceased, in the application for a grant of Letters of Administration.

[9] These disclosures were essential and material to the just determination of the case and in these circumstances the learned Commissioner would have been clearly justified in dismissing her Petition on the sole ground of non-disclosure of material facts. In *Lackhram Bisnauth et anor -v- Ramanand Shivpersaud et anor* [2009] CCJ8 (A), the Caribbean Court of Justice, in considering the nature and importance of full disclosure in a petition for prescriptive title noted the following: "It lacked specificity on important and material details such as Lakhram's relationship with the true owners or the circumstances of his occupation of the lands.... As it stood...., the Petition ought to have been dismissed either at the Court of first instance or by the Court of Appeal". For my part, I would have been inclined to deal with the matter at this level in the summary manner suggested by the CCJ. However, it appears to me that this appeal raises, *inter alia*, an issue of some importance and it has to do with whether, in general terms, a beneficiary in possession can maintain possession adverse to his or her co-beneficiaries.

[10] In the Court below the case seemed to have turned almost exclusively on the question as to whether or not the Petitioner resided on the disputed land for the requisite number of years. In my respectful view, however, the primary and simple issue in this case is not whether the Petitioner in seeking a declaration of title by adverse possession to the disputed land has established a sufficient degree of physical custody and control for the requisite period and the intention to exercise such custody and control on her own behalf and for her own benefit but essentially whether she is a person in whose favour time can run in accordance with Section 10 of the Title to Land (Prescription and Limitation) Act Cap. 60:02 which provides (shorn of such immaterial parts for the case at hand) that no right to recover land shall be deemed to accrue unless the land is in possession of *some person in whose favour the period of limitation can run.* (emphasis supplied.) In other words, it

would be a thoroughly wasted exercise for any Petitioner to attempt to satisfy the Court that he or she has been in uninterrupted possession of land for the requisite period of years together with the necessary intent unless firstly it can be established that he or she is a person in whose favour the requisite limitation period can run.

[11] The question whether the Petitioner is an excluded person under the provisions of Section 10 of the Act could perhaps only be answered by the ascertainment of her status on the disputed land from and after 1975 until she vacated same in 2002. For the sake of convenience, I propose to examine her claim to prescriptive possession *vis-a-vis* her status as aforesaid (a) from 1975 to July 1985; (b) from August 1985 to October 1996; and (c) from November 1996 to October 2005.

[12] In her evidence before the Land Court the Petitioner said that in 1975, when she was then only 14 years old, she 'married' Mathan Kujal, the eldest son of Prince Kujal and thereafter went to live at the home of her father-in-law, Prince Kujal, deceased. It is not in dispute that the said dwelling house was built on the disputed land by her father-in-law and at the time of his death, he was its sole owner and on his passing, it formed part of his estate. It is not in question also that the disputed land was owned by the Sugar Corporation and the deceased himself, throughout his lifetime was only a licensee (or a tenant) and his possession of the subject premises must therefore be treated as being on behalf of the paper title holder. (See *Harper -v- Charlesworth*, (1825) A B & C 574 and *Powell -v- McFarlane* (1977) 38 P&CR 452. Moreover it is to be noted that possession in law is single and exclusive but occupation can be shared with others (as appears to be the position in the present case) or had on behalf of others. (See *Hill (Patents) Ltd -v- University College Board of Governors* (1956) 1QB 90. In so far as the disputed land is concerned, the estate of the deceased could only have been entitled to the benefit of any unexpired residue of the term of years granted by any demise or perhaps the right to exercise the option to purchase the disputed land and nothing else.

[13] Based on the evidence that was presented in the court below, it cannot be seriously challenged that from 1975 until 1985 the Petitioner's shared occupation of her father-in-law's dwelling house was with his express consent and permission. For all these years she never paid rent for her accommodation and the relevant facts and circumstances show that there was never an intention to create legal relations. As **George JA** noted in *Romany -v- Romany* (1972) 21 WIR 491, at 494 "Recent authority makes it clear that in family situations ... when one member helps another in a period of difficulty over accommodation there is usually no intention to create legal relationships, so that there can be no tenancy at will but merely a licence".

[14] From all appearances what was intended here was for the Petitioner to have a personal privilege of residing with her father-in-law in his house as a member of his extended family kinship. For all these years she was the 'object of his charity' and, to my mind, it was clearly intended that her occupation was permissive and permissive occupation of course can never be converted into adverse possession. It is inconceivable in the circumstances outlined above that the Petitioner could have been entertaining the thought that she was acquiring some right in and over the deceased's house much less of formulating an intention to own and possess and to claim a statutory title of the entire property when ownership of the disputed land never resided with him. The fact of the matter is that she lived in the deceased's house because he permitted her to do so, and not because of any claim of hers.

[15] As noted earlier, Prince Kujal died in July 1985, intestate, leaving his seven adult children as co-beneficiaries of his estate including the Petitioner's husband who passed away in October 1996. According to the Petitioner, she continued to reside on the disputed land until around 2002 and the question therefore must be what was the nature of her shared occupation of the disputed property in the second period i.e. in and from 1985 until her husband passed away in 1996? There is nothing on the record to even remotely suggest that during the period under review, which lasted some 11 years, that the legal personal representative of the estate of the deceased or any of the seven adult beneficiaries of his

estate, including the Petitioner's husband, objected to her remaining on the disputed property as a member of their family and it is to their credit as a family unit that they all maintained the status quo long after their father had passed on. In my respectful view, the only rational conclusion that can properly be drawn from all of the surrounding circumstances is that consequent on the death of the Petitioner's father-in-law in 1985, the legal personal representative and all of the beneficiaries of his estate, without exception, including the Petitioner's husband, by necessary implication, consented in allowing her to continue to share in the occupation of the disputed property. (See "*Adverse Possession*" by Stephen Jourdan, at P 587 et seq.) In the period under review, like the first, nothing has arisen thus far for consideration in the nature of adverse possession by anyone as permissive occupation can never amount to prescriptive possession.

[16] During the lifetime of her husband, the Petitioner obviously could claim nothing from the estate of the deceased. In the circumstances outlined above, she could not possibly have asserted a right of her own. Any right which she might have independently of her husband could not arise until after his death and any right which she might have as a wife must depend on the right of her husband. (See *Hughes -v- Griffin* [1969] 1 ALL ER 460. In her husband's lifetime, all she enjoyed was undoubtedly a personal privilege of occupation initially granted to her by her father-in-law and upon his death, impliedly, by his heirs and successors-in-title. However, on the death of the Petitioner's husband in October 1996, other considerations applied.

[17] Perhaps the event which must take and retain a prominent place in this sorry episode and which has the most compelling significance is the death of the Petitioner's husband in October 1996. During his lifetime, she could not have asserted a right of her own in respect of the estate of her father-in-law as she had none. However, upon the death of her husband his estate was entitled to a one-seventh transmissible share of the estate of Prince Kujal, deceased, notwithstanding the fact that his estate up to that time remained unadministered. (See Section 35 of the *Deceased Persons Estates Administration Act*. Cap. 12:01). All things

being equal and under an intestacy, the Petitioner and her children became the potential beneficiaries of a fractional and transmissible share of the estate of Prince Kujal deceased. (See *Commissioner of Stamp Duties (Queensland) -v- Livingston* (1965) A.C. 694. That much Senior Counsel for the Appellant has conceded but unfortunately that concession did not alter the earlier submission made by Counsel for the Petitioner that from and after her husband's death, she continued to enjoy the benefit of prescriptive rights in and over the disputed land. In other words, Counsel for the Petitioner maintains that the permissive possession of a potential beneficiary of the estate of a deceased can be adverse.

[18] Such a view, I think, is somewhat startling and is certainly not well founded. The evidential basis for that contention appears to have been buried deep in the record as Exhibit "E" and can be found at PP 114-122. In October 2002, the Appellant instituted proceedings against Anand Mathan (the Petitioner's son) for, *inter alia*, possession of the disputed land. On her application, she was made an added defendant in those proceedings and at paragraph 13 of her affidavit of defence she said that she was "entitled to possession along with the other beneficiaries to the said property and entitled to claim part ownership". This was a claim that was made some 3 years before proceedings were filed by her for prescriptive title but more significantly, the Petitioner, in her affidavit in reply to the affidavit in opposition, deposed at paragraph 29 "that alternatively as a son of the deceased Prince Kujal my husband stood entitled to a share or part of the estate of the said deceased and by virtue of being deceased my husband's children stood entitled to a share or part of the estate of the said deceased". The Petitioner herself then, under her own hand, acknowledged the collateral title of the beneficiaries of the estate of her father-in-law years before she petitioned the land court. These two crucial bits of evidence were before the learned Commissioner but, regrettably, he made nothing of it with the result that throughout his review of all of the evidence he saw the tapestry from the wrong side.

[19] It is not in dispute then that the Petitioner, on the death of her husband, is, in her own right, the holder of a transmissible fractional

share of the estate of the deceased Prince Kujal, notwithstanding the fact that the deceased's estate remained unadministered from 1985 until 1998 and Transport of the disputed land was obtained in 2001. At this juncture the salient question must therefore be whether the Petitioner in these circumstances can avail herself of the provisions of the Title to Land (Prescription and Limitation) Act against her co-beneficiaries.

[20] In *re Leigh's Will Trust* (1970) Ch 277 at 282D Buckley J (as he then was) noted that a person absolutely entitled to a share of an unadministered estate "does have an interest of a kind in the assets comprised in it" and relying on the earlier case of *Commissioner of Stamp Duties (Queensland) -v- Livingston* (1967) A.C. 694, His Honour defined that interest to be an entitlement "to a chose in action viz - a right to require the deceased's estate to be duly administered whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration". In other words, from and after the death of her husband, the Petitioner was entitled in law to require the Appellant and/or the five other beneficiaries to administer the estate of Prince Kujal deceased and to distribute it according to law. The right to a chose in action, it must be noted, and the right to a claim for prescriptive title operate in two separate and distinct fields and should not be confused one with the other. The overriding principle here is that the possession of a potential beneficiary of the estate of a deceased person (which is the substance of the Petitioner's case) could never be adverse. (See *Earnshaw -v- Hartley* (1999) 3WLR 709 and *Moses -v- Lovegrove* (1952) 2QB 533 per Evershed MR at 539.

[21] In *Earnshaw -v- Hartley* (supra) - a case involving a beneficiary of an estate in possession for a considerable number of years, Buxton LJ at page 715 made the following observation: "Using language in a non-technical sense I would be surprised to find that where four persons have equal interests of some sort in a property, one of those four persons can deprive the others of their interests by being permitted by them to occupy the property for a substantial period of time. Not only would that appear inequitable, but also the occupier would in a general sense be occupying against his own interest, the same interest as was held by his

fellow beneficiaries. I am glad to find that the law does not compel or permit of such an outcome....” At the same time it must be recognized that in accordance with S.16 (1) of the Title to Land (Prescription and Limitation) Act, where one of several beneficiaries is in exclusive possession of property belonging to an ancestor in whose name it is registered, any action after twelve years by a beneficiary who is out of possession for that period is barred, unless (by ss 18-20) the beneficiary in possession acknowledges in writing the title of the other in whom the right of action accrued. In the present suit, the Petitioner, although a potential beneficiary, was never in possession but in occupation in a permissive way. There is really nothing in this case which can form the basis for the proposition that immediately after the death of the Petitioner’s husband, that all of his siblings abandoned or relinquished their inheritance to the estate of Prince Kujal, deceased.

[22] Contrary to what has been advanced by Counsel for the Petitioner, the entire ownership of whatever property comprised in the estate of Prince Kujal, deceased, which remained unadministered between 1985 and 1998 is in the deceased’s legal personal representative(s) for the purposes of administration. (See *Commissioner of Stamp Duties (Queensland) -v- Livingston* (1965) AC 694). In that regard, section 35 of the *Deceased Person’s Estates Administration Act*, Cap: 12:01 specifically provides that “the estates of all persons dying..... intestate shall vest in the personal representative or representatives of the deceased and shall be administered and distributed according to law under a grant of letters of administration....” So that when Transport of the disputed land was obtained and taken by the Appellant in 2001, it was taken for the benefit of the persons rightfully entitled by inheritance including the Petitioner and her children. The title of the Appellant was not independent as it was common to all the heirs of Prince Kujal, deceased and throughout the period between 2001 and 2005 (when the Petition was filed) there was a unity of title and unity of possession. The Appellant was, therefore, under a statutory duty to hold whatever property comprised in the estate of the deceased in trust for the benefit of all beneficiaries and in accordance with S.15 (1) of the (Prescription and Limitation) Act, time does not run in favour of a trustee, which includes

in its definition, the personal representative of a deceased person's estate. (See *Bazil -v- Wharton*, (1992) 47 WIR 238).

[23] It is perhaps fitting to reserve the last word on the subject for Dalton CJ (ag) when he held *In Re Downer* (1919) LRBG 165 that prescription is impossible in the case of undivided interest in immovable property and that it was "inconsistent with the true nature of undivided ownership". His Honour in his judgment posed the question - Can title to an undivided share of or interest in land held in joint ownership be obtained by prescription? and he proffered the following answer: "Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land and to an interest in every square inch of it, proportionate to his share and to everything upon it." And with reference to the whole question of joint ownership and possession, His Honour noted the following: "His possession of the property he claims is joint, not exclusive, it is not uninterrupted, since he admits that another has an interest as well as himself. His claim is not adverse to the true owner of part of the property, rather he admits that ownership." His Honour's pronouncement on the law in this regard is, in my respectful view, an added and authoritative solvent of this appeal.

[24] This is indeed a curious case in which the Petitioner claims prescriptive title to the disputed land when its paper title resided with the Sugar Corporation for almost 9 of the requisite 12 years and not the estate of Prince Kujal deceased. It turns out, from an analysis of the events that transpired from and since 1975 up to the presentation of the petition for a Declaration of Title, that the limitation clock never moved its hands, not even for a single day, in favour of the Petitioner or anyone else. Throughout her sojourn on the disputed land the Petitioner was an object of charity in that she was granted a personal privilege, initially by the deceased in 1975 and upon his death by his personal representative(s), of sharing, rent free, the deceased's dwelling house for a period of some 27 years. The subsequent proceedings filed by the Petitioner for a declaration of title of the subject premises does seem to

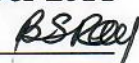
me to be an act of the most extraordinary ingratitude to her late father-in-law and his heirs and successors-in-title.

[25] The Petitioner's application for prescriptive title to the disputed land on these facts could not have involved a more outrageous exercise. It was indeed a hopeless proposition and it was exposed to absurdity at every turn and at every stage of the three distinct portions of history under review. The learned Commissioner of Title fell into serious error as well by not applying the relevant legal principles to the facts of the case. The issues before him were totally misconstrued and in many respects his declaration of title in favour of the Petitioner can be described as being mindless or perverse. If ever there was a case in which the Petitioner on an application for prescriptive title is totally disqualified by the provisions of the Title to Land (Prescription and Limitation) Act (and in particular SS. 10,15 and 16 thereof), then it is this case. Inevitably, the appeal must be allowed and the Declaration of Title of the 29th September 2008 is hereby set aside with costs agreed in the sum of \$75,000. Transport No. 2373 of 2008 issued to the Petitioner is also hereby set aside .

[26] I wish to make one final observation before leaving this matter. The rapacious conduct of the Petitioner in this case lends credence to the growing international unease over unmerited cases of adverse possession. Among other tribunals, the Supreme Court of India has pointed to the need to have a fresh look at the law of adverse possession. Borrowing from the language from the judgment of the High Court (Chancery Division) of England in *J.A. Pye (Oxford) Ltd -v- Graham* (2000) 3WLR 242, the Supreme Court in *Hemaji Waghaji -v- Khengarbhai* AIR 2009 SC 103 described the law of adverse possession as irrational, illogical and wholly disproportionate and extremely harsh for the true owner "and a windfall for a dishonest person who had illegally taken possession of property".



Dated the 9th day of October 2014


B.S. Roy
(Justice of Appeal)