

2020-HC-ESS-P-4
IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
CIVIL JURISDICTION
DECLARATION OF TITLE

All the rights, title and interests in and to the lands described as:

FIRST: Block lettered G part of the southern portion of Plantation Hamburg known as Tiger Island, situate in the Essequibo River, in the county of Essequibo, in the Republic of Guyana the said Block lettered G containing an area of 75.889 (seventy five decimal eight eight nine) acres being shown on a plan by R. Looknauth, Sworn Land Surveyor, dated 10th the day of October, 2019, and recorded in the Guyana Lands and Surveys Commission on the 10th day of October, 2019 as plan No. 73321.

-and-

SECONDLY: Block lettered F part of the southern portion of Plantation Hamburg known as Tiger Island, situate in the Essequibo River, in the county of Essequibo, in the Republic of Guyana the said Block lettered F containing an area of 48.580 (forty-eight decimal five eight zero) acres being shown on a plan by R. Looknauth, Sworn Land Surveyor, dated 10th the day of October, 2019, and recorded in the Guyana Lands and Surveys Commission on the 10th day of October, 2019 as plan No. 73321.

-and -

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

-and-

In the matter of the Rules of the High Court , Chapter 3:02, (Declaration of Title).

-and-

In the matter of a petition by **MOHAMED RAMZANALLI KHAN** also known as ALI KHAN of lot 69 Aurora Village, for a declaration of title to the hereinbefore described lands.

Before: Ms. Nicola Pierre, Commissioner of Title

Appearances: Mr. C. V. Satram and Mr. R. Motilall for the petitioner
Mr. R. Forde S.C. and Mr. R Jackson for the opposer

Trial dates: October 13, November 29, 2021; January 17, 2021

Decision of Nicola Pierre, Commissioner of Title

The Proceedings:

1. Mohamed Ramzanalli Khan (the petitioner) is a purchaser in possession of Blocks G and F, Hamburg, Essequibo, (the property) who claims to have acquired possessory title to it.
2. Fazal Salim opposed in his capacity as the duly constituted attorney of the vendor Sayad Mohammad Mukhtar Ahmad Hamied (hereinafter called Sayad). He claims that the petitioner is not a purchaser in possession for the statutory period entitled to prescribe because firstly, he has not paid the purchase price in full, and secondly, he has not been in adverse possession for the statutory period because the vendor had no possessory interest to sell him at 2019 when the agreement was executed.

The Law:

3. Possessory title to land is acquired by sole, open, and undisturbed possession of it for more than 12 years, without fraud, and without consent or agreement expressly made or given for that purpose, adverse to the interest of the person(s) legally entitled to it.¹

¹ Title to Land (Prescription and Limitation) Act, Cap. 60:02, s. 3

4. No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession").²
5. 'Where a purchaser who has paid the full purchase price enters into possession pursuant to an agreement for sale, he enters into possession as of right and time begins to run in his favour on his entry. Where however he enters into possession under an agreement for sale, but has not paid the full purchase price, the question of whether that purchaser's possession is as of right, is in our view, a matter of construction of the agreement for sale having regard to the circumstances of each case.' - *Kowsal Narine v Deonarine Natram*.³
6. Possession is never adverse if it can be referred to lawful title: *Toolsie Persaud v Andrew James Investment Limited*.⁴

The Issues:

7. The issues to be determined are whether (a) the petitioner was a purchaser in possession who had paid the entire purchase price; (b) whether the vendor his predecessor in occupation had a period of adverse possession that he could tack onto.

² Ibid, s. 10

³ [2018] CCJ 11 (AJ)

⁴ [2008] CCJ 5 (AJ) [61], *Thomas v Thomas* (1855) 2 K & J 79 at 83, *Corea v Appuhamy* [1912] AC 230 at 236

The Evidence and my Analysis:

(a) whether the petitioner was a purchaser in possession who had paid the entire purchase price

8. The petitioner has proved that he has paid the purchase price of the property in full.
9. By written agreement executed and notarized on 20 October 2019 [Ex B] the vendor Sayad himself agreed to sell to the petitioner 'All the vendor's right, title and interest in and to the property described as Blocks lettered G and F parts of Plantation Hamburg' for \$7,000,000.
10. At the clause labelled 'Purchase Price' in the agreement exhibit B, Sayad acknowledged receipt of the purchase price in full. His duly constituted attorney [powers of attorney Ex G and H] Fazal Salim by receipt dated 14th October, 2019 [Ex K1] acknowledged receipt of '\$7,000,000. being monies paid under an agreement of sale and purchase made on the 14th day of October, 2019, for a parcel of land known as Block lettered G and F parts of the southern portion of Plantation Hamburg'.
11. The petitioner testified that the vendor had on 18 May, 2018 verbally agreed to sell him the property and that pursuant to that agreement he had paid a deposit of \$500,000 in cash and thereafter multiple payments by cheque to Fazal Salim. He tendered encashed cheques amounting to \$6,200,000 [Ex J 1-15, Ex L] evidencing payments made by him to Fazal Salim in the period 25 June 2018 through 18 October 2019.
12. The opposer denied the petitioners allegations at paragraphs 10 and 11 of the petition where he said he had purchased the vendors interest in the property, paid the purchase price in full and taken possession of the property. In cross- examination when asked whether

he accepts that the petitioner and Sayad had signed an agreement, he said 'no me ain't know nothing about that', but he admitted to being present with Sayad and the petitioner at the time and place shown in the photographs marked M 1-3 which the petitioner says shows the signing of the agreement of sale [Ex B]. Fazal Salim gave no other explanation why they were all there together. When asked whether he had collected monies from the petitioner, he said 'me ain't know nothing about that' and he also denied giving the petitioner a receipt for \$7,000,000.

13. Fazal Salim was not an honest witness. The cheques tendered J 1-15 were all endorsed by Fazal Salim. I believe that he accepted those cheque payments from the petitioner, that he endorsed the cheques, and presented them for payment to Republic Bank. I also believe that Fazal Salim signed the receipt Ex K 1 acknowledging payment of \$7,000,000 by the petitioner. The signature on that receipt, is the same as the signature endorsed on the cheques J 1-15, and the same as the signature on his identity card numbered 156021203 [Ex K 2].
14. The petitioner has proved that he has paid \$7,000,000 for the property to Sayad. He has presented documentary evidence of Fazal Salim encashing his cheques totalling \$6,200,000, and a written acknowledgment from Sayad that he received payment of \$7,000,000, as the full purchase price for the property.
15. I find that the petitioner is a purchaser in possession who has paid the whole of the purchase price and I hold that his occupation since 20 October 2019 is adverse to the interest of the legal owner.

(b) whether Sayad had a period of adverse possession that he could tack onto.

16. The Caribbean Court of Justice has ruled that ‘to succeed in a claim to land by adverse possession, a claimant needs to show that for the requisite period he (*and any necessary predecessor*) had (i) a sufficient degree of physical custody and control of the claimed land in the light of the land’s circumstances (“factual possession”), and (ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land (“intention to possess”).’⁵
17. The requisite period is 12 years. The petitioner from October 2019 was in adverse possession in his own behalf. Prior to that from 2018 he occupied under a verbal agreement to purchase the land, and from 2017 as a tenant of Sayad. He says that he tacks his period of adverse possession onto Sayad’s period of adverse possession, or has bought Sayad’s acquired possessory rights to the property. Successive occupiers can combine the time of their occupation with that of previous occupiers so that they can meet the statutory time period once there is privity between them. That ‘privity may be created by any conveyance, agreement, or understanding, that has for its object the transfer of possession of the land and is accompanied by a transfer in fact.’⁶

⁵ *Toolsie Persaud v Andrew James Investments Limited* [2008] CCJ 5 (AJ)

⁶ *Walters v. Rogers* , 222 Miss. 182, 75 So.2d 461 (1954).

18. The opposer says Sayad had no possessory title to sell, or period of adverse possession to be tacked on to because Sayad is lawfully entitled to the property as a beneficiary of the legal owner Abdul Hamied, and further, occupied it with the consent of Iqbal Hamied who is the executor of the estate of Abdul Hamied.
19. It is uncontested that the legal owner of Plantation Hamburg of which the property is part is S. M. Abdul Hamied by transport 635/1969. He died in 1976, and by will [Ex W1-2] gave portions of Hamburg to his three sons Sayad, Ansari, and Iqbal, who was appointed executor [Ex V -Probate 693/1977].
20. Fazal Salim says that Sayad occupied the property in his capacity as a beneficiary under that will and with the consent of the executor Iqbal, and that his possession was therefore consensual and lawful.
21. Mohamed Sonnah, Fazal Salim's brother and allegedly the executor of Iqbal's estate, said that Sayad is entitled to the property, but that he never took possession of the land. In contradiction, he also said that the three beneficiaries, the late Ansari and Iqbal, and the living Sayad, all rented their individual portions of the land to various people.
22. Fazal Salim said that Ansari and Iqbal got transports for their portions of land at Hamburg. He said that it was Iqbal who used to control Sayad's land, but then in contradiction said that Sayad never paid rent to anyone, that no one ever tried to take away the property from Sayad, that Sayad lived off the rental income he got for the property. In cross examination he agreed that Sayad was entitled to the property and that everybody regarded him as owner of the property, and he admitted that he is Sayad's attorney by POA 147 of 2017 [Ex

G]. By that power of attorney Fazal Salim is authorized by Sayad Hameid to 'collect all rent....for the appearer's 125 acres of lands situated at Hamburg,.... Take control of the said lands and to take legal action for any arrears of rent....apply to the High Court by way of declaration of title in the name of the appearer to have transport for the said lands.'

23. By that power of attorney 147 of 2017 [Ex G] which they both signed, both Sayad and Fazal Salim evidenced an intention, whether maintainable or not in law, to secure title in Sayad to the property by an application by way of prescription. The agreement of sale executed by Sayad and the petitioner, also points to this intended course of action. Sayad sells 'property: all the vendors rights, title and interest..' and requires at 'Transport: steps to be taken by the purchaser to obtain transport of the property subject matter of this agreement.' There is no clause that Sayad convey the property to the petitioner.
24. It seems therefore that the intention of the parties was that the petitioner do exactly what it is he seeks to do in this application, that is, apply for a declaration of title to the property on the basis that he bought Sayad's possessory title to it. It is clear that it was Sayad who had represented to the petitioner that he acquired possessory title to it.
25. I do not accept the evidence of Mohamed Sonnah and Fazal Salim that Sayad was never in possession of the property. They both admit that he rented the property to various farmers and lived off the rental income earned. Fazal Salim admits that everyone considers Sayad the owner, has signed and accepted his appointment as attorney to apply by way of prescription on behalf of Sayad, and has accepted payments from the petitioner on behalf of Sayad.

26. Sayad was in possession, but was his possession adverse so as to lead to prescription? Possession is never adverse if it can be referred to lawful title. 'The lawful title-holder in possession can have no right of action to recover possession from himself so as to start the running of any limitation period, and, indeed, already having title, has no need to be able to obtain it by adverse possession'.⁷
27. A beneficiary has a right to bring an action to enforce a devise to him, and that right should be exercised before the expiration of 12 years from when the right to receive the property accrued to him.⁸ The beneficiary can have no right of action to recover possession from himself so as to start the time running of any limitation period. His possession is referable or due to a lawful right.
28. The petitioner was sold the property by Sayad. It is clear that the arrangement was that he apply for legal title by way of prescription. Sayad swore an affidavit in support of the petition that he was devised the property, but that the property was not included in the estate's statement of assets and liabilities and was therefore never vested in him, and that he has occupied and remained in possession through himself and agents and tenants for the past 48 years.
29. Sayad is a beneficiary in possession. There are circumstances when a beneficiary in possession can claim to be in adverse possession, for example where he is entitled to an

⁷ Toolsie Persaud [2008] CCJ 5 (AJ) [61], Thomas v Thomas (1855) 2 K & J 79 at 83, Corea v Appuhamy [1912] AC 230 at 236

⁸ Title to Land (Limitation and Prescription Act) s 16

undivided share and ousts his co-beneficiaries in order to possess the whole, or where he is entitled to a specific portion, and ousts the beneficiary of another portion and takes and holds possession of it.

30. The evidence here however is that Sayad was entitled to Blocks G and F (the property), and took possession of Blocks G and F. His brothers Ansari and Iqbal were entitled to and took possession, and transport, of other blocks of land at Hamburg. In these circumstances Sayad was in possession of lands he is lawfully entitled to. He was not in adverse possession even though legal title was not vested in him. He had an enforceable legal right to possession and ownership, and his possession is referable to that right.
31. There is also the fact that Fazal Salim now opposes, ostensibly on behalf of Sayad, using a power of attorney given him by Sayad on 28 August 2019 [Ex H], notarized by the same Notary as the Agreement of sale dated 20 October 2019. Fazal Salim contradicts everything said by Sayad in his affidavit in support of opposition and everything apparent on the documentary evidence. He also repudiates Sayad's claims of possessory title. Sayad now aged 82 [birth certificate Ex Q1] has not personally attended to testify. Fazal Salim's evidence is that Sayad lives in a small wooden house in his yard on the Essequibo Coast, and is cared for by Fazal, his wife Leona, and Mohamed Sonnah. The petitioner is not in a position to produce him as a witness. Fazal as the duly constituted attorney stands in the place of Sayad, and speaks with Sayad's voice.
32. In law, Sayad had no possessory title to convey. He has in writing promised to convey all his rights, title and interest in the property to the petitioner. His interest is a lawful right to the

property not possessory. Therefore he had no period of adverse possession that the petitioner can tack onto.

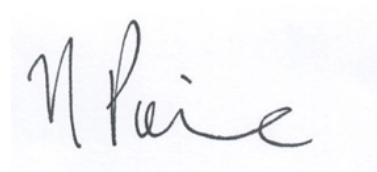
33. In fact, through Fazal Salim, Sayad repudiates his earlier affidavit and contract and says now that he had no possessory rights to pass on. I am unable to ascribe possessory rights to someone who does not intend to possess, or says that they did not intend to possess. I therefore cannot find that Sayad had acquired any possessory interest in the property or accumulated any time in adverse possession that may be tacked on to by the petitioner.

34. I hold that the petitioner has not had adverse possession of the property for the statutory period.

Conclusion:

35. I dismiss the petition.

36. Each party to bear their own costs.

A handwritten signature in black ink, appearing to read "N Pierre", is written over a light blue rectangular background.

Nicola Pierre, L.L.M.
Commissioner of Title.
14 March, 2022.