

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA

(CIVIL JURISDICTION)

COURT FILE NO.: **6 SOC 2017**

BETWEEN:

NADIRA PERSAUD, represented herein by her duly
constituted attorney, Ken Bhola, agreeably with
Power of Attorney duly executed and registered at the
Deeds Registry, New Amsterdam, Berbice, on the
14th day of January, 2016 and numbered 87 of 2016
(Berbice).

Claimant

-and-

ANDREW SINGH

Defendant

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Arudranauth Goosai for the Claimant

Messrs. Ian Anamayah and Adrian Anamayah for the Defendant

Delivered November 3rd 2017

DECISION

The Claimant claims to be in possession and occupation of property described as one undivided sixth part or share of and in seven undivided ninth part or share of and in the western half of lot numbered 1, part of the eastern half of Brighton or Lot No. 37, Corentyne, Berbice.

The Claimant further claims that the Defendant trespassed on the said property in April 2016 and continues to trespass on the property.

The Defendant refutes the claims and contends that the property that he occupies is owned by his mother, Maureen Bhola Ishack, which he occupies with her permission.

Counsel for the Defendant has submitted that based on the evidence at trial the property that the Claimant is claiming is not the same property that the Defendant currently occupies.

ISSUE I

Is the Claimant claiming possession of property that the Defendant currently occupies?

FACTS

Ken Bhola, the brother and duly constituted Attorney of the Claimant testified that the Claimant bought “*one undivided sixth part or share of and in seven undivided ninth part or share of and in the western half of lot numbered 1, part of the eastern half of Brighton or Lot No. 37, Corentyne*” from Clement Bhola, who owned the said property by Transport No. 1027 of 1972 (County of Berbice) (**Exhibit C1 - C2**).

This purchase was the subject of a written agreement of sale and purchase dated February 21st, 1986 and that agreement was registered in the Deeds Registry at New Amsterdam, Berbice on the said February 21st, 1986 as Miscellaneous Deed No. 301 of 1986 (**Exhibit B**).

The Defendant submits that the land the Claimant bought as per **Exhibit B**, assuming they accept that she bought it, which they don't, is not the same land that the Defendant currently occupies since the land that the Claimant bought is said to be defined on a plan made by Sworn Land Surveyor, F. U. Tronchin, dated August 12th 1902 (**Exhibit G**), the said plan also being referred to in Transport No. 1027 of 1972 and that plan only defines Lot 1, Brighton **south** of the public road and the Defendant currently occupies Lot 1, Brighton **north** of the public road.

In addition to **Exhibit G**, the following plans were tendered as exhibits in this trial.

Plan No. 65684 prepared by Sworn Land Surveyor R. T. John at the request of the Claimant and dated January 5th 2017 (**Exhibit F**).

The road plan for Brighton prepared under the instructions of the Chief Works and Hydraulics Officer of Guyana by Sworn Land Surveyor Edwards and dated January 25th 1969 (**Exhibit J**).

Plan No. 66812 prepared by Sworn Land Surveyor S. M. James at the request of the Defendant for his mother, Maureen Bhola Ishak and dated May 25th 2017 (**Exhibit T**).

ANALYSIS

Based on a close examination of all of these plans, it is the Court's finding that the true north direction indication on the Tronchin plan (**Exhibit G**) is incorrect and is in fact displaced by 180 degrees. This is easily ascertained by comparing the

placements of the lots, roads and dams on the Tronchin plan (**Exhibit G**) with other three plans (**Exhibits F, J and T**).

This finding is supported by the fact that both parties used a house on the land as an object of reference to the land in dispute, that house being occupied by the Claimant, the Defendant and the Defendant's mother (who is the Claimant's sister), at various times with the Claimant's parents.

It is clear that the property that the Claimant claims possession of and the property that the Defendant is occupying is the same property, to wit, a portion of Lot 1, Brighton, **north** of the public road.

CONCLUSION

The Claimant is claiming possession of the same property that the Defendant currently occupies.

ISSUE II

Was the Claimant in possession or entitled to possession of the property which she claims the Defendant has trespassed upon?

FACTS

As stated before the Claimant claims to have bought "***one undivided sixth part or share of and in seven undivided ninth part or share of and in the western half of lot numbered 1, part of the eastern half of Brighton or Lot No. 37, Corentyne***" from Clement Bholá, who owned the said property by Transport No. 1027 of 1972 (County of Berbice) by a written agreement of sale and purchase dated February

21st, 1986 which agreement was registered in the Deeds Registry at New Amsterdam, Berbice on the said February 21st, 1986 as Miscellaneous Deed No. 301 of 1986 (**Exhibit B**).

Transport 1027 of 1972 (County of Berbice) contained another undivided share of the western half Lot 1, part of the eastern half of Brighton which Ken Bhola purchased from Clement Bhola on the same date, February 21st, 1986 evidenced by an agreement in writing which was registered in the Deeds Registry at New Amsterdam on the said February 21st, 1986 also as Miscellaneous Deed No. 301 of 1986 (**Exhibit D**).

The Defendant has asked the Court to view as suspicious the fact that **Exhibit B** and **Exhibit D** were both registered as Miscellaneous Deed No. 301 of 1986.

Ken Bhola testified that the Claimant lived in the house on the property up to January 1996 when she emigrated to Canada.

He testified that at the time that she emigrated the Defendant, who was born in 1986, was living at that house because his father had passed away in 1989 and his mother, Maureen, had emigrated to the United States of America in 1992.

He testified that the Claimant fenced the property in the 1990's and that the telephone service to the house is in the Claimant's name.

The Defendant testified that he emigrated to the United States of America in 2001 and was deported back to Guyana in 2010.

He testified of various improvements to the house between 2014 and 2016 which his mother, Maureen, financed and he managed.

He testified that the rates and taxes for the property was paid by the Claimant; that the electrical power supply to the house is in the Claimant's name and that the telephone service to the house is in his name now but was previously in the Claimant's name.

Maureen Ishack, the Defendant's mother testified that Walter Bhola was her, the Claimant's and Ken's father.

She testified that she is the owner of the property because her father, Walter Bhola, gifted it to her, orally, in 1986 when she was 19 years old, after which she allowed her parents to live there.

She testified that her parents did not contribute to the maintenance of the house after 1986.

She testified that she had gotten married in 1985 but moved back home with her parents shortly after when she got pregnant. Ken had testified that she lived with her husband at Phillipi until he died in 1989.

LAW

The fundamental principle of the law of trespass is that trespass is an injury to possession and not to ownership or title.

Possession has to be construed as being with the title holder unless rebutted by cogent evidence.

Where property is owned in undivided shares, each co-owner is entitled to possession of the whole property.

ANALYSIS

Firstly, with respect to the Miscellaneous Deeds, **Exhibits B and D**, it is clear that the two agreements were tendered at the Deeds Registry **on the same day** as a method of memorialising the transactions. The persons tendering them would not have had control over the number/s assigned to the Deeds and an error in marking by the Registry would not suffice to suggest that the Deeds or a Deed is fraudulent. In any event such a cause of action would only be available to Clement Bhola.

Further the Defendant cannot raise a defence of *jus tertii* to defeat the claim of the Claimant if it is established that the Claimant was in possession or entitled to possession at the time the trespass is alleged to have occurred.

The evidence from Ken Bhola and the Defendant demonstrates that the Claimant is in constructive possession of the property. the utilities are in her name and she pays the rates and taxes coupled with a written agreement of sale and purchase of undivided shares in the property in her favour.

The Defendant claims a right to possession through his mother, Maureen, who claims ownership of the property.

Maureen claims to have attained title or ownership through an **oral gift** from her father, Walter Bhola, some 31 years ago.

Apart from the fact that this is contrary to the Statute of Frauds, there is no evidence that Walter Bhola owned the property or had any titular interest in and to the property. Walter Bhola could not give that which he did own.

In fact, Walter Bhola was the duly constituted attorney of Clement Bhola, the holder of Transport No. 1027 of 1972 (County of Berbice) (**Exhibit C1 - C2**), and was the person that executed the agreements (**Exhibits B and D**) selling the properties in the said Transport to the Claimant and Ken Bhola in **1986**, the same year that Walter Bhola purportedly **gifted** the same property to the Defendant's mother.

As stated it is clear from the evidence that Walter Bhola did not own the property and therefore could not gift what he did not own, so, whether Walter Bhola told Maureen he was gifting her the property or not is truly immaterial.

CONCLUSION

The Court finds, without a doubt, that the Claimant was in constructive possession and is entitled to possession of the western half of lot numbered 1, part of the eastern half of Brighton or Lot No. 37, Corentyne, Berbice since the year 1986.

The Court further finds that the Defendant trespassed on the said property after his grandfather died and the Claimant asked him to remove in or around January 2016.

Counsel for the Defendant submits that the Defendant's mother would have extinguished any and all title to the property by virtue of the provisions of the Title to Land (Prescription and Limitation) Act; CAP 60:02 of the Laws of Guyana.

There is no evidence to support such a finding, on the contrary, as stated before, the Court finds that the Claimant has been in possession of the property since 1986.

In the circumstances the Court awards possession of property situate at the western half of lot numbered 1, part of the eastern half of Brighton or Lot No. 37, Corentyne, Berbice to the Claimant against the Defendant.

The Court orders the Defendant to deliver up possession of the said property to the Claimant forthwith.

The Court awards damages for trespass to the Claimant against the Defendant in the sum of \$500,000.00.

Costs to the Claimant against the Defendant in the sum of \$150,000.00.

Justice N. A. Singh