

2011

No. 616-P

Demerara

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

In the matter of all that piece or parcel of land known and described as **Tract A being a portion of lot 28 Plantation Aurora situate on the left bank of the Essequibo River in the county of Essequibo** in the Republic of Guyana, in the Pomona/ Good Hope Neighbourhood, comprising an area of 7.6677 acres as shown on a plan by Colin J.H. Bowen, Sworn Land Surveyor dated 19<sup>th</sup> October, 2010 and recorded in the Guyana Lands and Surveys Commission on the 25<sup>th</sup> day of October, 2010 as Plan No. 48671.

-and-

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

-and-

In the matter of the Rules of the High Court (Declaration of Title).

-and-

In the matter of a **Petition by Massabally** of 28 Aurora, Essequibo Coast for prescriptive title to the hereinbefore described property.

**Summons to Strike out Opposition**

Before: Nicola Pierre, Commissioner of Title

Appearances: Mr. R. Satram for the Petitioner  
Mr. R. N. Poonai S.C. for the Opposer

Hearing date: July 24, 2019.

Decision of Nicola Pierre, Commissioner of Title

**The Proceedings:**

1. Omeshwar Misir filed action 2010-HC-DEM-CIV-S-91 against Massabally claiming possession of lands including Tract A part of lot 28 Plantation Aurora, on the Essequibo Coast. Massabally now deceased whose estate is represented by Bibi Zarida Ali ('the petitioner') filed a defence to that action and also filed the petition herein dated 27 June 2011 in which he claimed to have acquired possessory title to Tract A. On 15 July 2011 Omeshwar Misir ('the opposer') filed an opposition.
2. Both the petition and the High Court possession actions are ongoing. In the High Court Action the opposer obtained an injunction preventing the petitioner from being on Tract A and the petitioner's appeal of that interlocutory order was prosecuted all the way to the Caribbean Court of Justice which on 23 August 2016 ordered that the High Court action be stayed until the determination of this petition.
3. This hearing of the petition is also interrupted by interlocutory proceedings, namely a summons filed by the petitioner on 20 August 2014 asking that the Opposition be struck out on the ground that the opposer has "shown no right in law or otherwise that allows him to oppose the petition".

**Conclusion:**

4. This decision disposes of that Summons to strike out the Opposition. I dismiss that Summons for the reasons set out below.

**The law**

5. The right to oppose a petition for a declaration of title to immovable property acquired by prescription is a right held by a legal owner, by a creditor (*Trustees, Diocese of Guiana v. Mc Clean* (1939) LRBG 182, 193), by a person with possessory title, and any of their heirs and assigns.

### **The Submissions**

6. Counsel for the petitioner submits that the opposer has no right to oppose because –
  - (a) The “application to oppose a petition is a preliminary application” and before he is allowed to oppose, the opposer must prove “beyond reasonable doubt” possession of, or legal title to, the land claimed.
  - (b) A Full Court of the High Court of Guyana and the Caribbean Court of Justice have both “found as a fact that the petitioner was in possession for 11 years subsequent to the opposer obtaining title” so the opposer is not in possession.
  - (c) The Caribbean Court of Justice intended that the opposition be struck out and the petition proceed unopposed.
  - (d) The opposers transport numbered 305 of 1999 and other documents do not establish the opposer as owner Tract A of Plot 28 Aurora.
7. Counsel for the opposer submits that the petitioner himself in his petition and plan has named the opposer as legal owner of the land claimed and cannot now deny that while continuing to rely on that petition and plan. He points to:
  - Plan 48671 filed by the petitioner which defines Tract A and at memorandum 5 alleges “Tract A is held by Harry Sahoye vide transport No. 4970 of 1938.”
  - Transport 305 of 1999 which is title to Plantation Aurora conveyed by the estate of Harry Sahoy to the opposer, Omeshwar Misir.

- The petition at paragraphs 27 and 35 which name Omeshwar Misir as “the transported owner of the land in question” .

### **My Analysis**

8. I do not agree with counsel’s submission that a Full Court and the Caribbean Court of Justice have both “found as a fact that the petitioner was in possession for 11 years subsequent to the opposer obtaining title” and because of that finding the opposer has no right to oppose on the basis of possession, with the result that the opposition should be dismissed and the petition proceed unopposed.
9. To extinguish the title of the legal owner and bar his right to bring an action to recover land, a petitioner must not only prove occupation, but also sole possession for the statutory period, with the required intent, and without consent or agreement. If the CCJ has determined that the period and nature of the petitioner’s occupation was sufficient to bar the opposer bringing an action to recover possession or opposing the petition, then it has determined the material issue in a petition for a declaration of title and there is no need for me to hear the petition.
10. I have a copy of the decision of the CCJ that states [17] ‘It is expected that the Land Court application will be dealt with as expeditiously as possible’ and orders that [18] (iv) the proceedings in High Court Action No. 91/S-10 are stayed until the determination of Land Court proceedings No. 616-P of 2011”. Because of that express direction and stay I find it unlikely that the CCJ required or intended the petition be heard unopposed.
11. I hold that Counsel’s submission that an ‘application to oppose a petition is a preliminary application at which an opposer must prove beyond reasonable doubt legal title or possession of the land claimed’ has no merit, for several reasons.

12. Firstly, prescriptive title proceedings are civil proceedings and the standard of proof of ownership or possession is on a balance of probabilities.
13. Secondly, applications to strike out an opposition are analogous to applications to strike out a defence or for summary judgment, and considering whether an opposer has established a right to oppose is analogous to considering whether a defendant has established reasonable grounds for defending a claim. The opposer is defending his legal or possessory title against the petitioners claim that their long sole adverse possession has extinguished it. The legal principles applied in considering applications to strike out a defence or for summary judgment are therefore helpful when applied to applications to strike out an opposition.
14. One applicable principle is that a ‘party resisting an application to strike-out is not under a general burden of proof in an evidential sense’. It is ‘misleading to speak of there being a ‘burden’ on a party to show that he has a real prospect of succeeding . . . the question for the court is whether it considers that the claimant has no real prospect of succeeding on the claim or issue’. The party that raises that question, that challenges the right to defend or oppose, is the party that has a threshold to cross. They must point out the weakness in the defence and persuade the court that the defence is unreasonable : *Green v. Hancocks (A Firm)* [2001] PNLR 10 at [21] per Ferris J. -

I think it would be wrong to suppose that a party resisting a claim for summary judgment or a strike-out is under a general burden of proof in the evidential sense. First it hardly seems likely that the rules intend that an applicant for an order under Rule 3.4 or Rule 24.2 shall, in every case, and without drawing attention to any actual or supposed weakness in the opposite party’s case, be entitled to put that party to proof that he has a real prospect of succeeding. There must, I think, be a threshold which the party making the challenge must cross before any kind of burden passes to the opposite party. . . Secondly, under Rule 3.4(2) the court may strike out “if it appears to the court that ...

the statement of case discloses no reasonable grounds” and under Rule 24.2 the court may give summary judgment if it considers that there is “no real prospect” of success. If the court is not satisfied about the requisite matter than that matter cannot be said to “appear” to the court for the purposes of Rule 3.4, nor can the court “consider” it to exist for the purposes of Rule 24.2. These considerations suggest that it is for the party which urges the court to find that the matter does “appear” or to “consider” it to exist to persuade the court of this. Thirdly, I think it is somewhat misleading to speak of there being a “burden” on a party to show that he has a real prospect of succeeding. Under Rule 24.2 the question for the court is whether it considers that the claimant has “no real prospect of succeeding on the claim or issue”, a similar question being raised in the case of a challenge to a defendant. Under Rule 3.4 the court has to consider whether it appears that the statement of case “discloses no reasonable grounds for bringing or defending the claim”. All these are comparatively simple concepts expressed in simple language.

15. Another principle is if an application to strike out involves a prolonged and serious argument the court should dismiss the application unless it feels the pleading is unsound and that striking it out will avoid a trial or a burdensome trial: *Williams and Humbert v W & H Trade Marks Ltd* [1986] AC 368. The court must not conduct a mini trial: *Swain v Hillman* [2001] 1 All ER 91.
16. I therefore disagree with Mr. Satram’s submission, made at the hearing of the summons, that a person wishing to oppose must make a preliminary application to establish a right to oppose, during which they must present proof of ownership and submit to cross examination by the petitioner’s counsel. That process would amount to a mini trial.
17. Another principle of substance is that to defeat an application to strike out their defence a defendant need only show that they have a real prospect of success, that their claim is not fanciful, devoid of substance, or hopeless: *ED&F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [5], [10], [53]. Therefore, to establish a right to

oppose an opposer need only show that their claim to have possessory or legal title is not fanciful and devoid of substance.

18. I now consider whether the petitioner has pointed out such weaknesses in the opposition and the opposer's transport so as to persuade me to strike out the opposition on the ground that the opposers allegation that he has legal title to Tract A is fanciful and devoid of substance.
19. The right to oppose a petition for a declaration of title to immovable property by way of prescription is a right held by 'a legal owner, by a creditor,' (*Trustees, Diocese of Guiana v. Mc Clean (1939) LRBG 182, 193*) or by a person with possessory title, and any of their heirs and assigns.
20. An opposition must set out the basis of the opposition and refer to any legal title upon which the opposer relies and if the opposer does not have possessory title or is not the legal owner, it ought to explain how the opposer derives title from the legal owner.
21. The Court does not 'embark on a mini trial' but looks at the contents of the petition, the opposition and the Registrar's Report in forming an opinion whether the opposer's claim they are the legal owner, or a person with possessory title, has substance, is not fanciful.
22. Counsel for the petitioner submitted that the opposers transport numbered 305 of 1999 and other documents do not establish the opposer as owner Tract A of Plot 28 Aurora. The opposer's counsel pointed to the petitioner's admissions in his petition and plan that the opposer is owner.
23. The petitioner's counsel says that subsequent to those admissions he discovered that portions of Aurora had been sold off and that those conveyances have not been annotated on transport 305 of 1999. He questions whether Tract A has been sold off,

and insists that the opposer must not participate in the trial unless he proves he owns Tract A.

24. One of the things the Court relies on in determining whether a person has a right to oppose is the report submitted by the Registrar of Deeds, the custodian of titles. The Registrar of Deeds on 9 March 2012 submitted a report that “the property claimed in petition numbered 616-P of 2011 is being held under Transport 305 dated the 1<sup>st</sup> December, 1999 by Omeshwar Misir”.
25. Because of the submissions on behalf of the petitioner and because the report on file was seven years out of date I requested a Registrar’s report on the current ownership of the property and was provided one dated 6 August 2019 that states “The property is being held by Omeshwar Misir under transport dated 1<sup>st</sup> December 1999, and numbered 305”.
26. The documents available to me, which include the petition and the plan on which the petitioner relies, are consistent with the opposer’s allegation that he has legal title to Tract A. On the face of the record the opposer’s claim that he is the legal owner of Tract A is not fanciful, not a sham. The opposer has a right to oppose.

**Order:**

27. I dismiss the summons to strike out the opposition.

A handwritten signature in blue ink, appearing to read "Nicola Pierre".

Nicola Pierre, Commissioner of Title.  
27 August, 2019.