

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A NO. 2431 OF 1994

BETWEEN

ORVILLE BOBCOMBE

Plaintiff

AND

**RUBEN HILLS
BERESFORD HILLS
RUDOLPH HILLS
ANGELA AWONG and
THEODORA WILSON LA TROY**

Defendants

Before the Honourable Mr. Justice P. Moosai

Appearances:

Mr. C. Wilson for the Plaintiff

Mr. A. Ashraph for the Defendants

JUDGMENT

By Writ of Summons filed on August 5, 1999 the Plaintiff claimed against the Defendants, inter alia,:

1. A declaration that the Plaintiff is the owner in fee simple in possession and/or the Registered Proprietor of All that piece of land situate in the Ward of Savana Grande, in Trinidad, comprising 9a 3r 33p be the same more or less delineated and coloured pink in the diagram attached to and described in the Crown Grant in Volume 41 Folio 363, also described in Certificate of Title in Volume 3033 Folio 25 and now described in Certificate of Title in Volume 3500 Folio 21 and bounded on the North by lands of Joseph Duntin, on the South by lands of the heirs of A.Mc Nish, on the East by lands of the heirs of Lewis Movele and on the West by lands of the heirs of Polyden Floyd and intersected

by a Road Reserved and a branch of the said Road also reserved each 40 links wide. (hereinafter referred to as “the said parcel of land”).

2. An order that Certificate of title registered in Volume 3500 Folio 21 issued in the names of the Defendants by virtue of the order of the High Court dated the 23rd day of October 1991 (in Action No. 604 of 1991) be set aside.
3. An order that the Registrar General do cancel the said Certificate of title issued pursuant to the said order and/or register the Plaintiff as the registered proprietor of the said parcel of land.
4. An injunction restraining the Defendants or any of them and/or their servants and/or agents from entering upon the said parcel of land and/or remaining thereon or in anyway interfering with the Plaintiff’s ownership, occupation and/or possession thereof.

Pursuant to Royal Grant for Crown lands No. 89 dated May 10, 1898 registered in Volume 41 folio 363 the late Joseph Loney became seised of an estate in fee simple of the said parcel of land.

By virtue of Probate of the will of the said Joseph Loney granted by the Supreme Court (No. 258 of 1909) registered in Volume 462 Folio 463, his son, the late Isaiah Loney, became registered as the proprietor of an estate in fee simple of the said parcel of land.

By Memorandum of Assent No. 7 dated August 6, 1983 Margaret Ann Adriana Bobcombe (the mother of the Plaintiff and the daughter of the said Isaiah Loney) as legal personal representative of the said Isaiah Loney transferred the said parcel of land to herself, James Loney and Christiana Loney as tenants-in-common.

On February 4, 1986 a new Certificate of Title was issued in Volume 3033 Folio 205 in consequence whereof the said Royal Grant for Crown Lands No. 89 dated May 10, 1898 registered in Volume 31 Folio 363 was cancelled.

By Memorandum of Transfer No. 27 dated April 21, 1986 the said Margaret Ann Adriana Babcombe (“Margaret Babcombe”) transferred the said parcel of land to herself and the Plaintiff as joint tenants.

By two Memoranda of Transfer both dated November 27, 1989 registered in Volume 3392 Folio 343 and in Volume 3393 Folio 21 respectively, the said Christiana Loney and Margaret Bobcombe transferred all their estate and interest in the said parcel of land to the Plaintiff

By reason of the matters hereinabove referred to, the Plaintiff became the registered proprietor of an estate in fee simple of the said parcel of land.

On May 14, 1991 the Defendants filed an application pursuant to s.49 of the Real Property Ordinance (“R.P.O.”) for an Order vesting the said parcel of land in them and for an Order that the Registrar General do issue a new Certificate of Title in respect of the said parcel of land endorsing the Defendants as the registered proprietors of same.

On October 23, 1991 Mr. Justice Lucky ordered that the said parcel of land be vested in the Defendants and further ordered that the Registrar General do issue a new Certificate of Title in the names of the Defendants. Pursuant to the said Order a new Certificate of Title in the Defendants’ names in Volume 3500 Folio 21 was issued on November 21, 1991.

On November 22, 1991 the Plaintiff filed a caveat pursuant to s. 125 of the R.P.O forbidding the registration of any person as transferee or proprietor of and of any instrument affecting his estate and interest in the said parcel of land.

The Plaintiff is contending that the Defendants obtained the Certificate of Title fraudulently. In the alternative the Plaintiff is claiming under a Certificate of Title prior in date of registration to the Defendant’s Certificate of Title pursuant to s.143 (d) of the R.P.O. The Defendants are contending that they have acquired title by possession.

It is indisputable that the provisions of the R.P.O. are designed to secure indefeasibility of title to all registered proprietors except in certain cases specified therein. The Privy Council has said that “the sections making registered certificates conclusive evidence of title are too clear to be got over”: **Assets Co. v. Mere Roihi** [1905] A.C.176 at 202. “The cardinal principle of the Statute is that the register is everything”: **Waimiha Sawmilling Co. v. Waione Timber Co.** [1926] A.C. 101 at 106.

The basic provision designed to confer indefeasibility of title is s.45 of the R.P.O. which is in the following terms.

“45. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Ordinance might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Ordinance shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this Ordinance, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value.”

There is an exception to the paramountcy or priority of the title of a registered proprietor in the case of fraud. The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, is also an express exception from the prohibition against actions of ejectment or for the recovery of registered land against the registered proprietor thereof. S.143 of the R.P.O. sets this out in the following manner:

“143b. No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof

under the provisions of this Ordinance, except in any of the following cases –

- (b) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud, or as against a person deriving, otherwise than as a transferee bona fide for value, from or through a person so registered through fraud."

In **Assets Co. Ltd. v. Mere Roihi** (supra) Lord Lindley at page 210 in delivering the judgment of the Board, said that the sections of the then New Zealand Acts to which his Lordship referred:

“..... appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very difficult, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon. In dealing with Colonial titles depending on the system of registration which

they have adopted, it is most important that the foregoing principles should be borne in mind, for if they are lost sight of that system will be rendered unworkable.”

In Stuart v Kingston (1923) 32 C.L.R. 309 at 359 Starle J. stated:

“The equitable doctrine of notice, actual and constructive, is founded upon the view that the taking of an estate after notice of a prior right is a species of fraud (Le Neve v. Le Neve). Under the Act, taking property with actual or constructive notice of some trust is not of itself sufficient reason for imputing fraud. The imputation of fraud, therefore, based upon the application of the doctrines of the Court of Chancery as to notice cannot any longer be sustained in the case of titles registered under the Act. The difficulty lies as Mr. Hogg points out (Registration of Title to Land throughout the Empire at p. 142), ‘in the demarcation of the line between knowledge or notice that is not to be treated as fraud, and notice that under particular circumstances must be treated as fraud’. Cases must necessarily arise in which opinions will differ as to whether the conduct proved is or is not fraudulent. No definition of fraud can be attempted, so various are its forms and methods. But we may say this: that fraud will no longer be imputed to a proprietor registered under the Act unless some consciously dishonest act can be brought home to him. The imputation of fraud based upon the refinements of the doctrine of notice has gone. But the title of a person who acquires it by dishonesty, by fraud (s.69) by acting fraudulently (s187), or by being a ‘party to fraud’ (s.187), in the plain ordinary and popular meaning of those words, is not protected by reason of registration under the Act. And to titles so acquired the equitable obligations imposed by the law of trusts are as applicable as formerly.”

In Waimiha Sawmilling Company’s case (supra) Lord Buckmaster stated at pp. 106 and 107:

“New fraud clearly implies some act of dishonesty If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.”

Francis Torrens Title in Australasia, Vol. 1 at pp. 602 and 603 summarises the position in the following manner:

“With regard, then, to the general exception from indefeasibility in cases of fraud, the position, it seems, may be summed up as follows:-

1. No definition is given, either by statute or by judicial decision, of what constitutes fraud, nor, it seems, is any such definition possible.
2. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
3. Fraud must involve an element of dishonesty or moral turpitude.
4. Notice of the existence of any trust, or unregistered instrument, does not of itself constitute fraud, but may be an element in the establishment of the existence of fraud.
5. Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.
6. The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.
7. The fraud to which the section refer is that of the registered proprietor or his agent.
8. Gross negligence without mala fides will not be regarded as fraud in New Zealand, or, it seems, in Australia.”

In the instant case I am of the view that the Plaintiff has established fraud against the Defendants. On May 14, 1991 the Defendants applied for a vesting order on the basis of their possession. The Originating Summons stated inter alia:

“....on the part of the Applicants for an order vesting in them ALL THAT piece or parcel of land situate in the Ward of Savana Grande in the Island of Trinidad, comprising 9acres 3 roods and 35 perches be the same more or less and delineated and coloured pink on the Diagram attached to and described in the Crown Grant in Volune 41 Folio 363.....”

The Defendants are brothers and sisters. They set out that in their Affidavits in support of the Application:

1. Their great-grandfather the late Joseph Loney was the owner of the said parcel of land.
2. Probate of his Will was granted to his son Isaiah Loney.
3. The said Isaiah Loney was their grandfather.
4. Their grandmother, Alice Loney, was the daughter of Joseph Loney.
5. Their mother, Octavia Pierre, was the daughter of Alice Loney
6. They were born on the said parcel of land and occupied same with their mother, Octavia Pierre, until her death in 1974 and by themselves thereafter.
7. They have been in exclusive and undisturbed possession of the said parcel of land together with their mother since the death of her mother, Alice Loney, around 1952 cultivating same in short-term crops and teak trees.
8. Isaiah Loney to whom the estate of Joseph Loney was granted was in possession of a portion of the said parcel of land until his death on February 27, 1934.
9. Margaret Bobcombe obtained a Grant of Administration of Estate of Isaiah Loney on November 13, 1981.

10. The taxes with respect to the said parcel of land were paid on the name of Isaiah Loney as contributed to between the Defendants.
11. There are no documents or evidence of title affecting the said parcel of land except Crown Grant (the said Crown Grant in Volume 41 Folio 363) and the facts mentioned in the application.
12. The Defendants are not aware of any mortgage or encumbrance affecting the said parcel of land or that any person has any estate or interest therein as mentioned in the application

A copy of that Crown Grant of Vol. 41 folio 363 was tendered into evidence by consent of both Attorneys. That Crown Grant had a clear endorsement across the front of same:

“CANCELLED CERTIFICATE OF TITLE ISSUED IN VOLUME 3033
FOLIO 25

Registrar General

86-02-04”

There is support for that endorsement by the endorsement at the back of that Crown Grant in the following manner:

“order of the Registrar General dated 16th December, 1985 directing that a New Certificate of title do issue pursuant to section 136 of the Real Property Ordinance. Volume 3033 Folio 21.

Registrar General

86.-02-04”

Needless to say although the Defendants referred to the Crown Grant in their affidavits in support of the application for a vesting order, the Defendants did not exhibit a copy of the said Crown Grant This would have shown quite conclusively that the Crown Grant was cancelled and a new Certificate of Title issued in Vol. 3033 Folio 205 on 4th February 1986. I therefore hold that the Defendants had actual notice of the fact of cancellation of the Crown Grant and of the issue of a new Certificate of Title to the

Plaintiff. The Defendants' application for a vesting order being made in 1991, and the date of the endorsement being 4th February, 1986, I hold that the Defendants failed to disclose the fact of cancellation of the said Crown Grant and the existence of the New Certificate of Title in Volume 3033 Folio 25 in respect of the identical parcel of land. I am of the view that that by itself is sufficient to establish fraud by the Defendants. But there is more!

The first Defendant testified in his viva voce evidence that he was claiming his grandmother's share in the said parcel of land. He said his grandmother was Alice Loney, **the sister of Isaiah Loney**. And Alice Loney was one of the nine people to whom the lands were devised by Joseph Loney.

Yet in their application for the vesting order, the Defendants claim in paragraph 5 of their Principal Affidavit that Isaiah Loney was **their grandfather**. And at paragraphs 6 and 7 the Defendants set out that Alice Loney was their grandmother.

When one looks at the will of Joseph Loney which went into evidence by consent, Joseph Loney sets out the names of his nine children viz., Ann Victorian Loney, James Phillip Loney, Obadiah Loney, Belsiana Loney, Isaiah Loney, Rosanna Mitchell, Josephus Loney, Augustina Loney and Charlotte Loney.

It is clear therefore that Isaiah Loney was not the Defendants' grandfather. Nor was Alice Loney one of the nine children of Joseph Loney.

Further at paragraphs 11 to 14 of the said Affidavit, the 1st Defendant deposed as follows:

- “11. The said Isaiah Loney – to whom the estate of Joseph Loney was granted was in possession of a portion of the subject parcel until his death on the 27th February, 1934.
12. That by an application made to the High Court of Justice on 20th October, 1981 in application No: S-116 of 1982, one Margaret Ann Adriana Bobcombe applied for a grant to her of the estate of the said Isaiah Loney (referred to paragraph 5 and 11 hereof) who died on the 27th February, 1934 which said estate was granted to her on the 13th November, 1981.
13. That by her application made on the 20th October, 1981 as aforesaid, the said Margaret Ann Adriana Bobcombe claimed to be the legitimated

daughter of the said Isaiah Loney by virtue of the Legitimation Ordinance Ch. 5 No. 13 of the Laws of Trinidad and Tobago and Tobago notwithstanding that the said Ordinance had already been repealed by Section 20 (1) of the Status of Children Act No. 17 of 1981, which came into force on 24th July, 1981.

14. That a true copy of the said application and the Grant of Administration of the estate of the deceased Isaiah Loney and the grant of administration is now produced and marked “C”.”

The Application by Margaret Bobcombe for the grant of Letters of Administration of the estate of the said Isaiah Loney was an application for the entire parcel of land and not simply for the portion which it was alleged that Isaiah lived on. The Defendants and/or their legal advisers were well aware of the nature of the application of Margaret Bobcombe. Indeed the Grant related to the entire parcel.

Moreover in the Affidavit by Margaret Bobcombe in support of the application for the Grant of Letters of Administration she deposes to the fact that Isaiah Loney was at the date of his death possessed of or entitled to inter alia, the said parcel of land.

When the Defendants swore that they were not aware that any person has any estate or interest therein except as therein mentioned, that was obviously false. The Defendants were under a positive duty to bring those facts specifically to the attention of the Court. What the Defendants sought to do on the fact of the Affidavit was to establish that Isaiah Loney was entitled to only a portion of the said parcel of land and that Margaret Bobcombe was applying for that portion.

In this oral testimony the 1st Defendant said some time in 1990 the Plaintiff served him with a notice to come and survey his land (the 1st Defendant) objected to the surveying of the said parcel of land “as that land is ours” (obviously referring to the Defendants).

In cross-examination, the 1st Defendant was asked whether he told his lawyer about the Plaintiff and he responded by saying that he didn't.

At the end of the 1st Defendant's testimony the Court enquired from the 1st Defendant as follows:

COURT: When you made the application for vesting order for the land, were you aware that the Plaintiff had a Certificate of Title for that land.

A: He was saying so, but we did not know.

In answer to Mr. Wilson, with leave of the Court, the 1st Defendant said that from what the Plaintiff told him, the Plaintiff was saying he had a Certificate of Title, "but we did not know". He was asked by Mr. Wilson whether he told his lawyer that, but the 1st Defendant answered that he didn't have to tell his lawyer that.

In conclusion the 1st Defendant testified that the Plaintiff objected to his (the 1st Defendant's) brother building a house saying he had a deed for that.

Again the 1st Defendant was asked whether he told his lawyer that and responded that he did not have to tell his lawyer that.

It is clear in my mind that the 1st Defendant knew of the Plaintiff's estate or interest. That also ought to have been disclosed in the application for the vesting order.

Additionally the viva voce evidence of the Plaintiff, which I accept, is that at the time of the filing of the Defendant's application he lived at Indian Walk, Moruga Road. The first Defendant did not live too far away. "Just a couple blocks away. About four lots away". The Plaintiff testified that he knew Ben Hills, and Octavia Pierre the Defendants' father and mother. And that Ben Hills was in occupation, that Ben Hills and his family lived there until Ben Hills died around 1950. And that after the death of Ben Hills, but, before the death of Octavia Pierre, Octavia Pierre and her family inclusive of the Defendants moved to Mitchell Block. The Plaintiff testified that his mother Margaret Bobcombe paid the taxes for the said parcel of land from the death of her father Isaiah Loney in 1934 and that he also paid the taxes at times.

It was put to the Plaintiff that during the course of the application in 1991 the 1st Defendant and one Mr. Sambury spoke to him about the application but the Plaintiff denied that, responding that if the 1st Defendant had spoken to him about the application he (the Plaintiff) would have done something about it. Those specific instructions having been put to the Plaintiff, it must be that the Defendants were alleging that some time in 1991, after the application for the vesting order was filed, they put the Plaintiff or notice

that the application was filed. It stands to reason that they would only have done that if they were of the opinion that the Plaintiff had some kind of estate or interest in the said parcel of land. That being the case it was incumbent on the Defendants to disclose that the Plaintiff had some kind of estate or interest in the said parcel of land.

The cumulative effect is that there has been actual fraud by the Defendants. Not only was there an abstaining from enquiring when suspicions have been aroused, there has been a deliberate suppression of the true facts from the Court which granted the vesting order. In addition there was actual knowledge by the Defendants of the Plaintiff's estate or interest in the said parcel of land. The designed object of the application for the vesting order was to cheat the Plaintiff, the registered proprietor of the said parcel of land from his known existing right.

Having regard to my findings, I am of the view that it is not necessary for me to determine the other issue namely, whether a Plaintiff who claims under a Certificate of Title prior in date of registration to a Defendant's Certificate of Title, can bring an action for ejectment or recovery of land.

Accordingly I give judgment for the Plaintiff and I order:

1. A declaration that the Plaintiff is the owner in fee simple in possession and/or the Registered Proprietor of All that piece of land situate in the Ward of Savana Grande, in Trinidad, comprising 9a 3r 33p be the same more or less delineated and coloured pink in the diagram attached to and described in the Crown Grant in Volume 41 Folio 363, also described in Certificate of Title in Volume 3033 Folio 25 and now described in Certificate of Title in Volume 3500 Folio 21 and bounded on the North by lands of Joseph Duntin, on the South by lands of the heirs of A.Mc Nish, on the East by lands of the heirs of Lewis Movele and on the West by lands of the heirs of Polyden Floyd and intersected by a Road Reserved and a branch of the said Road also reserved each 40 links wide. (hereinafter referred to as "the said parcel of land").
2. An order that Certificate of title registered in Volume 3500 Folio 21 issued in the names of the Defendants by virtue of the order of the High Court dated the 23rd day of October 1991 (in Action No. 604 of 1991) be set aside.

3. An order that the Registrar General do cancel the said Certificate of title issued pursuant to the said order and/or register the Plaintiff as the registered proprietor of the said parcel of land.
4. An injunction restraining the Defendants or any of them and/or their servants and/or agents from entering upon the said parcel of land and/or remaining thereon or in anyway interfering with the Plaintiff's ownership, occupation and/or possession thereof.

The Defendants must pay the Plaintiff's costs of the action to be taxed .

Dated this 9th day of November, 1999.

PRAKASH MOOSAI
JUDGE