

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO: CV2007-00042**

**BETWEEN**

**LENNARD NELSON**

**CLAIMANT**

**AND**

**PATRICIA DE FREITAS**

**DEFENDANT**



**DECISION**

**Before the Honourable Madam Justice C. Pemberton**

Appearances:

For the Claimant: Ms. D Prowell

For the Defendant: Mr C. Gift and Ms J. Gift

[1] This matter commenced in 1999. This is significant because we are now in the year 2008. The matter concerns ownership of a parcel of property in Morne Quiton, in the parish of St Andrew, in the Island of Tobago, comprising two roods. This land's owner was Mr Thomas Nelson now deceased.

[2] By his will, Mr Thomas Nelson devised this land to Susana Nelson, Harriet Nelson, Frederick Nelson and his other children. They all held the

land as tenants in common. It is not stated in the pleadings how many other children Mr Thomas Nelson left surviving him.

[3] Mr Thomas Nelson's will was admitted to probate on 26<sup>th</sup> January 1912. Ms Catherine Nelson was appointed sole Executrix. No Deed of Assent was executed vesting the land in the named beneficiaries.

[4] Mr Lennard Nelson is "the natural child" and one of the next-of-kin of Mr Frederick Nelson. Mr Frederick Nelson departed this life on 17<sup>th</sup> July 1980. There is no pleading that Mr Frederick Nelson left a will. I shall return to this later.

[5] Mr Lennard Nelson, in his claim for the parcel of land, outlined certain facts and circumstances in an effort to show that Mrs Patricia de Freitas is not the true owner of the land or the person entitled to possession thereof.

[6] The salient facts are:

- (1) That Mr Frederick Nelson occupied the land for a period in excess of sixty (60) years. He built a house.
- (2) In 1964, after the devastating Hurricane Flora, Mr Frederick Nelson re-constructed the house with Mr Lennard Nelson's financial assistance.
- (3) Mr Lennard Nelson continued in undisturbed possession and occupation of the house after Mr Frederick's death in 1980 until 1998 when he attempted to do certain repairs to the dwelling house.
- (4) He stopped when Mrs de Freitas issued certain threats against him. It was then that he commissioned searches, which contained certain revelations, which are not relevant to this issue.
- (5) Mr Lennard Nelson asserts that Mrs de Freitas is not the true owner of the land.
- (6) In the alternative he sets up a claim in adverse possession.

[7] Mr Lennard Nelson therefore requests this court to declare him the owner of the disputed parcel and grant him an Order for possession and damages for trespass. In the alternative Mr Nelson asks for a declaration of trust in his favour and injunctive relief.

[8] On 14<sup>th</sup> December 2006, I asked the parties to consider two issues:

- (1) Whether the Plaintiff has *locus standi* to bring this action; and
- (2) Can the Claimant clearly define the basis of his claim?

I received no responses.

[9] At the next hearing on 13<sup>th</sup> December 2007, I repeated my request and added two other issues for the parties to consider:

- (3) Whether the cause of action is maintainable?
- (4) Costs.

This time, I gave formal directions for Written Submissions and Authorities. The return date was 20<sup>th</sup> June 2008.

[10] On 20<sup>th</sup> June 2008, I held a video-conference hearing, since travel to Tobago was not allowed. At that hearing Ms Prowell craved my indulgences to be allowed to address me on the issues raised by way of Written Submissions. This she did.

[11] The first starting point in this case is:

Is Mr Nelson in a legal position to maintain **this** claim given his description of himself as a “natural child and one of the next of kin of Frederick Nelson”?

[12] Ms Prowell attempted to deal with this issue in her submissions.

She states inter alia:

(1) Mr Lennard Nelson's Statement of Claim did not disclose the basis on which he claims his beneficial interest in Mr Frederick's land eg. gift, sale or inheritance, intestacy or will.

This alone is fatal to the claim, as *locus standi* to bring the action has not been established.

[13] (2) Can this be cured by amending the Statement of Claim?

Ms Prowell acknowledges that a failure to amend will be fatal unless allowed by "simple amendment" under **CIVIL PROCEDURE RULES (CPR)** an Amendment is allowed in defined and narrow circumstances<sup>1</sup>. None of those appear here. In any event an amendment cannot be granted to make a case where none existed on the original pleadings.

[14] (3) **RELATED MATTER**

There is presently before the court in a related matter between the same parties an action filed by Mr Nelson for Probate in Solemn Form of the Last Will and Testament of Mr Frederick Nelson. By that Will Mr Frederick Nelson devised his interest in lands to Mr Lennard Nelson.

[15] How that helps Mr Nelson in this action does not appear readily apparent to me. How can I take judicial notice of the un-probated will in this related action? Even if I do, where does this carry the action at bar? I think the answer to this is nowhere.

[16] The presence of the related matter (there may be argument against whether the matters are indeed related), and the evidence of the un-probated Will do not assist Mr Lennard Nelson in his quest to establish *locus standi* in these present proceedings.

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<sup>1</sup> **Part 20.1 (3)** The Court may not give permission to change a Statement of case after the first Case Management Conference **unless** the party wishing to change a Statement of Case can satisfy the court that the change is necessary because of some change in circumstances which became known after that Case Management Conference.

[17] Lastly, *locus standi* must be established at the time of bringing the action. This action was brought since 1999 when admittedly Mr Lennard Nelson had no *locus standi*.

[18] In the premises and regrettably Mr Lennard Nelson claim fails. The matter shall continue to trial on the counter claim filed by Mrs de Freitas.

[19] **THE PLEADINGS**

**ADVERSE POSSESSION/POSSESSORY TITLE**

The terms adverse possession and possessory title are often used interchangeably. At common law in Trinidad and Tobago there is no such title as a “possessory title”. This is a phrase which unfortunately found its way into the marginal notes of the **REAL PROPERTY ACT Chap. 56:02**. It is noteworthy that the body of the Act – Section 18 in particular does not contain those words. The correct words “title claimed by possession” are used. This is to be read with the purpose and intent of the **REAL PROPERTY LIMITATION ACT Chap. 56:03**, the conjoint effect of Sections 3 and 22 is to bar the title holder’s right to bring an action *inter alia* for recovery of possession or rents and to extinguish the paper title owner’s title after a sixteen (16) year period of inactivity has elapsed. It does not, nor is it intended to vest a title in the person in possession. That title is therefore “illusory”<sup>2</sup>.

[20] Paragraph 12 of the Statement of Claim reads

Adversely (adverse possession claim) the Plaintiff  
by virtue of the said exclusive and continuous and  
undisturbed occupation ... claims a right to  
continue in undisturbed possession of the .... lands.

[21] To ground any such right the following must be established:

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<sup>2</sup>

- (a) The entry onto the land must be unlawful or without permission of the true owner/paper title owner;
- (b) The possession must be for a period of sixteen (16) years;
- (c) There must be an intention to dispossession.

None of these is pleaded. I do not see that there is any merit in this pleading and it would be difficult to persuade me otherwise.

[22] **COSTS**

This is indeed a heart wrenching matter for both parties. The history of this file shows that I raised the issue of *locus standi* at the inception of my hearings in 2005. The issue was not addressed until 31<sup>st</sup> July 2008. I really feel for Mr Lennard Nelson to have received such a decision after all of this time. However, I must take cognizance of the fact that Mrs de Freitas has been brought to court on a claim that stood no chance of success. I am constrained therefore to make an Order for costs against Mr Lennard Nelson though a reduced one.

The Order therefore reads as follows:

1. That the Plaintiff's Statement of Claim filed on 9<sup>th</sup> September 1999 be and is hereby dismissed.
2. That the Plaintiff pays the Defendant's costs prescribed in the sum of Seven Thousand, Seven Hundred Dollars (\$7,700.00) reduced by 40%, being the sum of Four Thousand, Nine Hundred and Twenty Dollars (\$4,920.00).
3. That the matter proceed in the Defendant's Amended counter claim as amended filed on 19<sup>th</sup> December 2006.
4. That the Claimant do file and serve his defence to counter claim on or before 30<sup>th</sup> January 2009.

5. Case Management Conference to be held on 1<sup>st</sup> May 2009 at 10:00 a.m. in POS#19 and T'BGO#4.

Dated this 11<sup>th</sup> day of December 2008.

/s/ CHARMAINE PEMBERTON  
HIGH COURT JUDGE