REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2013 -03581

BETWEEN

MOHAMOOD ALIGOUR

Claimant

AND

ZAINOOL ALIGOUR

1st Defendant

AHAMAD ALIGOUR

2nd Defendant

SHERIFF ALIGOUR

3rd Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. N. Mohammed instructed by Ms. K. Bocus for the Claimant.

Mr A. Ashraph instructed by Ms. P. Ramroop for the Defendants.

REASONS (0ral)

The issues for my determination on the pleadings are (a) the construction of a clause in a will and (b) trespass. Because the evidence admissible to assist with the construction of a will is limited and because the question of trespass may be dependent on my construction of the will I propose to deal with the issues separately.

(a) the Will

This dispute concerns a disposition made by Will by the father of the Claimant and the Defendants (hereinafter called "the deceased") who died on the 29th of November 2001. The Second and Third Defendants are the executors of the Will of the deceased dated the 28th January 1995. The validity and the contents of the Will are not in dispute.

What is in dispute is the disposition made by the Will with respect of a parcel of land comprising 379.4m² (hereinafter called "the disputed parcel"). The disputed parcel comprises a portion of a parcel of land situate at 117B Cragnish Road, Princess Town.

I am required to determine the intention of the deceased as conveyed by the Will. The deceased made various dispositions in his Will. All of the dispositions of land were made subject to a life interest to the deceased's wife. The Will also directed that there be no sale or division of his estate until after the death of his wife. The deceased's wife survived him.

With respect to the parcel of land situate at 117B Cragnish Road the deceased describes the parcel of land in the Will as:

> "ALL AND SINGULAR that certain piece and parcel of land situate at No. 117B Cragnish Road, Princess Town, in the Ward of Savanna Grande in the Island of Trinidad, COMPRISING TWO LOTS more or less together with two building thereon"

Thereafter with respect to that parcel of land the Will makes the following dispositions:

> "Unto my sons RASHEED ALIGOUR and SHIRAZ ALIGOUR I give, devise and bequeath the lot of land on which the three storey building now stands situate at No. 117B Cragnish Road aforesaid, absolutely.
>
> I also give devise and bequeath unto the said KATHY ALIGOUR, ZINOOL ALIGOUR and his two sons SHAZAD ALIGOUR and REEYAD ALIGOUR the basement and road level floor of the said building (now used

as a grocery) for his own use and benefit (that is of the said building at No. 117B Cragnish Road, Princess Town) aforesaid

I give, devise and bequeath unto my son RASHEED ALIGOUR, his wife HASSINA ALIGOUR and daughter SHERIFF ALIGOUR the top portion (or third Storey) of the said building at No. 117B Cragnish Road, Princess Town, aforesaid together with the eastern garage.

Thereafter the Will states:

"Unto My son MAHAMOOD ALIGOUR I give, devise and bequeath the lot of land or remaining portion of the two lots of land situated at No. 117 Cragnish Road, Princess Town aforesaid (the back portion) together with the building thereon for his own use and benefit."

It is this disposition that is the subject of this exercise the question being whether by this disposition the deceased intended the disputed parcel to go to the Claimant. The Claimant says he did. The Defendants, on the other hand, allege that the disputed parcel forms a part of the front lot and was therefore not devised to the Claimant by the Will.

From a reading of the Will and particularly from his treatment of the land situate at No.117B Cragnish Road (hereinafter called "117B") it is clear that this was a testator who knew what he wanted, was cognizant of the claims of his wife and children and went to great lengths to ensure what he considered to be a fair division of his estate. From the meticulous manner in which the deceased went about ensuring that he provided for his family I am convinced that he would not be pleased with the events that have transpired

since his death. It is also clear from a reading of the Will that the words contained in brackets represented an attempt by the deceased to further describe the property devised to the various beneficiaries. So that for example insofar as he disposes of the top portion of the building he further describes it as the third storey.

Similarly when he refers in the will to the road level floor of the said building he further explains what he is referring to by the use of the words "now used as a grocery" in brackets.

With respect to 117B he makes a distinction between the three storey house on the land and the land and describes and disposes of the land by way of what he calls lots. A distinction being made between the front lot on which the three storey house stands and the remaining portion of the land which he further describes ("as the back portion").

The question of whether the disputed parcel of land forms a part of the back lot or the remaining portion of the two lots of land is a question of the construction of the Will. From the words used in the Will with respect to the disposition of 117B I am required therefore to ascertain the intention of the deceased.

In this regard the law is clear. The primary evidence of the deceased's intention is to be found in the Will itself. Extrinsic evidence may only be resorted to for the purpose of proving a fact which makes intelligible something in the Will which without the aid of such evidence would not be intelligible. [1]

[1] Halsbury's laws of England vol 102,5th Edition, page 180, para 192.

In this regard with respect to the property a will speaks at the date of death of the testator, a testator's intention must be gleaned from the facts applicable at the date of the making of the will. In these circumstances evidence in this case is only admissible to ascertain what the deceased meant at the time of making the Will by his description of 117B as two lots of land and in particular what he meant by the words 'the remaining portion of the two lots of land situated at 117B Cragnish Road, Princes Town, aforesaid" ("the back portion"). It is this that determines the relevant evidence.

The problem that arises here stems from two facts (i) at the date of the Will No.117B was substantially larger than two traditional lots of land and while this does not create a problem with respect to the identification of the land the problem arises from the disposition of the land by the deceased by reference to lots, and (ii) by the time of the death of the deceased, the deceased had transferred a portion of 117B to the Claimant and the Claimant's daughter.

In this regard evidence is admissible to make intelligible what the deceased meant at the time of making the Will by his description of the land as two lots, a front lot and a back lot and whether the disposition of a piece of 117B during his lifetime makes any difference to this intention.

As can be expected this dispute has divided the family. Two members of the family, a sister Sakina Mohammed, and a brother, Ameer Aligour, gave evidence in support of the Claimant. Evidence on behalf of the Defendants was given by the First and Second Defendants. I will refer here only to the evidence relevant to my determination.

Most of the evidence relevant to ascertaining what the deceased meant by his reference to a front lot and a back lot is not in dispute. At the time of the execution of the Will the deceased was the owner of 117B which was a parcel of land comprising 1,690.2 square metres. This is the land referred to by the deceased as comprising two lots more or less.

The survey plans attached to the certificate of title for 117B reveal that at all material times there was intersecting the land a concrete drain running from the western boundary to the eastern boundary which physically divided the parcel of land into two portions. Both roughly of the same size but with the back portion being slightly larger than the front portion. Indeed to ensure that persons reading the survey knew that both portions belonged to the same parcel of land the surveyors resorted to the insertion on the plans of the device of a surveyor's hook.

At the time the Will was made there were two houses on 117B: a three storey house to the front and located to the north of the drain and a wooden house and located to the south of the drain.

To my mind the only logical inference to draw from the facts presented by the surveyors' plans is that at the time of the Will 117B although one parcel of land, was physically divided by the concrete drain into two plots: a front plot on which was located the three storey house and a back plot on which was located the wooden house. The front plot comprised all of 117B found to the north of the drain and the back plot all of 117B found to the south of the drain. This to my mind is sufficient to answer the question posed in this case. From the survey plans it seems clear that the reference to lots of land by the

deceased in his Will referred to the natural division of 117B as created by the concrete drain.

The question here is whether the other relevant evidence adduced supports or detracts from this logical inference.

In this regard evidence has been adduced in three areas: the occupation of land during the lifetime of the deceased; the disposal by the deceased of a portion of the back plot after he made the Will and conversations which the Defendants claim to have had with the deceased.

With respect to the disposition by the deceased of a portion of the back plot it is not in dispute that in the year 1998 the deceased transferred that portion of the back plot upon which the wooden house stood comprising 653.3 square metres to the Claimant and the Claimant's daughter. The Claimant says and I accept that this was as a result of some matrimonial problems being experienced by his daughter. No change was made to his Will by the deceased as a result of this conveyance. In the year 2000 that portion of land was transferred from the Claimant and his daughter to the Claimant and his wife.

In considering these facts of relevance is that this is not a factor which could have any bearing on the intention of the deceased at the time of making the Will. I am satisfied that the mere fact of a subsequent conveyance to the Claimant of a portion of the back plot can make no difference to the intention of the deceased as expressed by the Will made some three years earlier. Its relevance is merely with respect to arriving at the intention of

the deceased at the time. On the case as presented by the evidence of the Defendants this fact is intrinsically tied to conversations which they claim to have had with the deceased.

The Defendants rely on conversations which they allege they each had with the deceased after this conveyance to the effect that the portion already conveyed to the Claimant represented the portion of 117B left to the Claimant in the deceased's Will. Before examining the evidence of the Defendants with respect to the alleged conversations with the deceased however I propose to deal with the evidence with respect to the occupation of the land during the lifetime of the deceased.

The Claimant's evidence of occupation is in accordance with the facts as pleaded in his statement of case that sometime in 1978 he and his immediate family moved onto the land; lived on the back plot (he refers to it as the back lot) in the wooden house and enclosed the entire back plot with a chain link iron fence. He resided there until he migrated to Canada in 1988 but continued in possession by maintaining the lot. The Defendants specifically admit these facts in their defence. In this regard it must be noted that the excuse of a poor pleading even if available to the Defendants at this stage does not explain the fact that in his evidence the First Defendant denies that there ever existed any fence between the houses before the year 2003.

I do not accept the evidence of the First Defendant when he seeks to resile from the facts as admitted true by him in his defence and in particular his admission of the existence of the fence along the drain between the two plots of land. Of further note in this regard is the fact that at no time was it ever put to the Claimant in cross-examination that he did not erect a fence enclosing all of the land to the south of the drain. Nor do I accept the

First Defendant's evidence first given in cross-examination that he was always in the occupation of the land to the south of the drain.

I find the First Defendant not to be a truthful witness. Under cross-examination he prevaricated and refused to answer questions directly or truthfully until cornered as shown for example by the manner in which he answered questions with respect to a comparison of the size of the two plots; the Power of Attorney obtained by him from the Second and Third Defendants and his damage to the concrete wall built by the Claimant.

On the evidence before me I am satisfied that the occupation of the land during the lifetime of the deceased accords with the inference to be drawn from the survey plans that the land was physically divided into two portions a front plot upon which the three storey house was located and a back plot running from the drain to the southern boundary upon which the wooden house was located.

The question is whether the evidence adduced by the Defendants as to their conversations with the deceased makes any difference to my conclusions. Each Defendant relies on different conversations with the deceased. None of these conversations are corroborated by any other evidence and none of which are relied on by the Defendants in their defence as allegations of fact upon which they rely to dispute the Claimant's claim.

According to the First Defendant he had two conversations with the deceased. Both of them after the Will was made. According to this Defendant the first conversation occurred in the presence of the Second Defendant. The Second Defendant however

although present at the trail and during the various stages of hearing leading to the trial gives no evidence to corroborate this conversation.

The First Defendant provides no details of when, where and in what circumstances this conversation took place. I do not accept this evidence. It would seem to me that this conversation, if it did occur, was of sufficient significance to require it to be pleaded and corroborated by the Second Defendant in whose presence it supposedly took place.

For similar reasons I do not accept the evidence of the second conversation. It also is in my opinion inherently incredible. The First Defendant suggests that the deceased from the third floor of the building on the front lot located an iron picket on the boundary of the lands conveyed to the Claimant and her father. Further according to the First Defendant "they", presumably himself and the Claimant's daughter, were told to walk down to the area where the picket was located and from where the Defendant stood in the house not only did the deceased point out the iron picket but he held a conversation with the Claimant's daughter. I find that hard to believe. I do not accept the First Defendant's evidence as to these conversations.

According to the Third Defendant he had a conversation with the deceased four days before he died, this time, conveniently, in the presence of the Third Defendant's now deceased wife. At that time he says the deceased told him two things: one that he had already given the Claimant his piece of land and had told the Claimant so. And two that the land where the poultry sheds were located should be given to the First Defendant's son. No evidence is given as to the deceased's state of health mental or otherwise at this time. Again this is not a fact relied on by the Defendants in their defence in support of

their position as to the intention of the deceased. Neither was the Claimant cross-examined on the fact that he was told by the deceased that he had already been given the parcel of land. More importantly however it is extremely strange that at no time during this conversation did the deceased mention that he had left a Will by which he had appointed this Defendant was a executor. It would seem to me that it is more likely that this evidence was fabricated to justify the positions taken by the executors in giving to the First Defendant extremely wide powers by way of a power of attorney with respect to the disputed parcel of land. I do not accept the evidence of this Defendant as to the alleged conversation with the deceased.

At the end of the day therefore I am left with only two pieces of evidence which assist me in making intelligible the dispositions of the deceased with respect to 117B. Both pieces of evidence in my view support the construction arrived at by the Claimant with respect to the dispositions under the Will made by the deceased with respect to 117B. These are: the physical layout of the land into two roughly equal portions divided by a concrete drain and the mode of occupation of the land during the lifetime of the deceased.

Accordingly I find that by referring to117B as two lots of land more or less and devising each lot to different persons the deceased was in fact referring to the physical division of the land into two plots. The front lot being that plot of land bounded to the south by the drain and upon which the three storey building stood and the back lot being that plot of land bounded to the north by the drain and upon which the wooden house stood.

In the circumstances I am of the opinion that the disputed lot of land comprises a portion of the land referred to by the deceased in his Will as the lot of land or remaining portion

of the two lots of land situated at No. 117 Cragnish Road, Princess Town and devised to the Claimant.

Trespass

It is not in dispute that the First Defendant entered onto the disputed portion and committed damage under the authority of the executors given to him by a power of attorney. Trespass is a wrongful entry onto lands in the possession of another. As indicated earlier I accept the evidence that at the time of the entry onto the land the Claimant was in the possession of the land. Further no grant of probate had yet been issued to the executors. The Defendants therefore had no right to the possession of the disputed parcel of land. In the circumstances the only conclusion open to me is that the Defendants are guilty of trespass.

The question is what are the damages due to the Claimant in this regard. The Claimant seeks damages for:

(i) the construction of a brick wall;

(ii) construction materials for the wall generally, and

(iii) in particular construction materials purchased on the 10th August 2012 to repair the wall; labour for repairing the wall on the 26th August 2013 and construction materials for repairing the wall in 2013

(iv) As well as the Claimant seeks the cost of four flights to Trinidad

It cannot be disputed that these are all special damages and that the Claimant is therefore required to specifically prove these damages. There is no evidence of the cost of flights to Trinidad at the time and in the circumstances no damages are awarded for this claim.

With respect to the construction and repair cost the Claimant merely says I have suffered loss and damage; recites the particulars of special damages contained in his amended statement of case and states; "true copies of receipts dated 3rd August 2011, 10th August 2011, 15th August 2011, 10th August 2012, 26th August 2013 and 4th September 2013 are annexed. No hearsay notice is filed with respect to the contents of these receipts and no attempt is made by the Claimant by way of his evidence to link any of the receipts produced to payments made by him to any person.

In these circumstances I agree with the submissions made by Attorney for the Defendants when he says that the Claimant's special damages have not been proven.

Accordingly the Claimant is only entitled to nominal damages for the trespass. Given the nature and frequency of the trespass I assessed these nominal damages at $15,000.00.

In the circumstances the Claimant is entitled to the declaration and injunction sought and an order that the Second and Third Defendants prepare and execute a deed of assent in favour of the Claimant conveying to him the disputed portion of land namely a portion of the parcel of land known and assessed as No. 117B Cragnish Road, Princess Town, more particularly described in Certificate of Title Volume 3689 Folio 381which portion comprises 379.4 m² bounded on the north by lands of Ishmael Aligour and more partly by a concrete drain and the south by the lands of the Claimant and his wife.

The Claimant is also entitled to damages in the sum of $15,000.00.

Dated this 22nd day of October, 2014.

Judith Jones
Judge