

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2015-01289

BETWEEN

**SAMPSON PHILLIP
BY HIS LAWFUL ATTORNEY THERESA PHILLIP** **Claimant**

AND

MARGARET FLETCHER **First Defendant**

AND

**EVERY OTHER PERSON IN OCCUPATION OF
NO.1 OROPUCHE ROAD IN THE WARD OF SIPARIA** **Second Defendant**

Before The Honourable Madam Justice Margaret Y Mohammed

Dated the 17th January 2017

APPEARANCES

Mr. Darrel Allahar instructed by Mr. Kern Saney Attorneys at Law for the Claimant.
Ms. Asha Watkins-Montserin and Ms. Jacqueline Chang holds for Mr. Keith Scotland Attorneys at Law for the Defendants.

RULING ON APPLICATION FOR LEAVE TO APPEAL

1. On the 18th October 2016 (“the instant application”) the Defendant applied for permission to appeal the order made by this Court on the 11th October 2016 (“the said order”) whereby judgment was granted to the Claimant against the Defendant for vacant possession of the property situated at No 1 Oropuche Road, Siparia (“the property”) and for the Defendant to pay the Claimant’s costs in the sum of \$14,000.00. A stay of execution of 42 days was also granted. By amended notice of application filed on the 6th December 2016 (“the

amended notice of application”) the Defendant also sought an order for a stay of execution of the said order pending the hearing and determination of the appeal. The Defendant sought costs of the instant application.

2. The affidavit of Margaret Fletcher which was filed in support of the instant application almost verbatim repeated the grounds which were:

- “a. The Learned Judge erred in granting the relief sought at paragraph 1 of the Fixed Date Claim filed on 22nd April 2015, by the Respondent/Claimant.
- b. The Learned Judge erred in finding that in 2011, the Applicant’s ex-husband Curt Fletcher was still in occupation/possession of the subject property as evidenced by the Magistrate Court Protection Order made by consent on 22nd November 2011.
- c. The Learned Judge erred in finding that the Applicant/Respondent admitted by virtue of letter dated 2nd March 2011, that ex-husband Curt Fletcher was still in occupation/possession of the subject property in 2011.
- d. The Learned Judge erred in finding that the Applicant/Defendant admitted by virtue of her affidavit filed in matrimonial proceedings case reference no. SM224 of 2008 that her ex-husband Curt Fletcher was in possession/occupation of the subject property in 2011, and as such has not crossed the hurdle of undisturbed possession and control of the subject property for the period she has claimed.
- e. The Learned Judge erred in finding that based on the Applicant/Respondent’s affidavit evidence she did not discharge her duty that she has been in continuous undisturbed possession for the period that she has claimed.
- f. The Learned Judge erred in that she proceeded to give her judgment when the Applicant’s/Defendant’s Attorney at Law had not yet completed her oral submissions in reply to the Respondent’s/Claimant’s oral submissions.

- g. The Learned Judge erred in failing to hear the remainder of the Applicant's/Defendant's oral submissions in reply which said reply was pertinent and necessary particularly with respect to the aforementioned factual issues raised by the Respondent/Claimant and which the Learned Judge considered when she determined the matter and gave judgment against the Applicant/Defendant.
- h. The Learned Judge erred in law and was plainly wrong in the exercise of her discretion in determining the matter on the merits at the pleadings stage thus depriving the Appellant/Defendant of the opportunity to lead relevant and probative evidence in her behalf which exercise of discretion has resulted in a substantial miscarriage of justice. And/or the Learned Judge erred in law when arriving at the conclusion and/or exercising a discretion in determining that this was a matter that ought properly to be determined summarily.
- i. The Learned Judge erred in dealing with the matter summarily without having proper regard to the several disputed facts which touched and concerned the issues raised by the Applicant/Defendant and which ought properly to be dealt with at a trial of the matter.
- j. The Learned Judge erred in dealing with the matter summarily when there were issues of law to be determined namely whether (a) letter dated March 2011 (exhibited CF 5 to the affidavit of Curt Fletcher); (b) affidavit filed by the Applicant/Defendant in case reference No. SM-224 of 2008 and (c) Magistrate Court Protection Order made by consent on 22nd November 2011, were tantamount to an admission by the Applicant/Defendant that she was not in undisturbed possession and/or occupation of the subject property in 2011.
- k. The Learned Judge erred in law in granting the order for possession as she failed to consider the Applicant's/Defendant's interest in the building standing upon the subject property which she was awarded by the Learned Judge in matrimonial

proceedings case reference No. SM-224 of 2008 and which she deposed to making financial and other contributions towards since 1986 to date.

1. Based on the foregoing the Applicant/Defendant has a reasonable prospect of success.”
3. The additional grounds in the amended notice of application in support of the request for the stay of execution were:
 - “m. For the Applicant to satisfy the order would render the appeal nugatory.
 - n. If the stay of execution is not granted, the Applicant and her family would suffer real prejudice as they would become displaced. The applicant would be required to vacate her home which she presently resides in with her daughter and granddaughter and which she has resided in and considered her home for the last 30 years. Additionally, at present she has no other alternative accommodation where she can relocate to.
 - o. The Respondent will suffer no real prejudice as he is not and has not been in occupation of the property including the structure standing thereupon since 1997, nor through his claim has he asserted any immediate and/or urgent request or need to obtain possession and/or occupation of same.”

Background

4. To place the instant application in context it is necessary that I briefly set out the background to the said order. At the hearing of the substantive matter on the 11th October 2016 the documents which were before the Court were the Fixed Date Claim Form filed on the 22nd April 2015, the affidavit of Teresa Phillip filed on the 22nd April 2015, the affidavit of the Sampson Phillip filed on the 22nd April 2015, the Defence filed on the 25th June 2015, the affidavit of Margaret Fletcher filed on the 5th May 2016 (“the Margaret Fletcher affidavit”), the affidavit of Sampson Phillip filed on the 1st June 2016, the affidavit

Theresa Phillip filed on the 1st June 2016 and the affidavit of Curt Fletcher filed on the 6th June 2016 (“the Curt Fletcher affidavit”).

5. Based on the documents before me at the hearing of the substantive matter I understood the Defendant’s Defence to be one of adverse possession and that in the alternative she asserted an interest in the house based on an order in the divorce proceeding SM 224 of 2008 between the Defendant and her ex-husband Curt Fletcher.
6. According to sections 3 and 22 of the **Real Property of Limitation Act**¹ the paper title owner is prevented from the right to recover lands either by action or entry within 16 years from the time when the right to bring the action or make an entry first accrued. After the expiration of the said limitation period of 16 years if the paper title owner has not brought an action or made an entry for the recovery of the land his right and title to the land shall be extinguished.
7. To succeed with a Defence of adverse possession the onus was on the Defendant to prove that she had the intention to possess the property and exercise control over it to the exclusion of other persons for at least 16 years prior to the institution of the instant action. In **Powell v McFarlane**² Slade J described “exclusive possession” as:

“It consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons”

8. In **J A Pye (Oxford) Ltd and anor, v Graham and anor**³ the Court adopted the sentiments put forward in **Powell** and described “Factual possession” as:

“Factual possession signifies an appropriate degree of physical control. It must be single and conclusive possession, thou there can be a single possession exercised by or on behalf of several persons jointly.”

¹ Chapter 56:03

² (1977)38 P&CR 452

³ (2002) WLR 221

9. At the hearing of the substantive matter since the proceedings were dealt with summarily, the onus was on the Defendant to demonstrate that her Defence of adverse possession had a realistic prospect of success.
10. I was not persuaded that the Defendant's Defence had a realistic prospect of success since there were internal inconsistencies in her evidence for the period of exclusive undisturbed possession and her evidence for the said period was contradicted by the contemporaneous documents which she did not challenge.
11. The inconsistency in the Defendant's evidence on the period of undisturbed exclusive possession were as follows. At paragraph 23 of the Margaret Fletcher affidavit she stated that "*From that time in 1997 to now I have paid no rent to anyone and I am in undisturbed possession of the said land*". However at paragraph 26 she contradicted her earlier evidence and stated that in 2002 her ex-husband, Curt Fletcher left the property and that she and her daughter Maretha continued to reside on it. Later at paragraph 37 she stated that "*Over the past approximately 30 years I have lived at the said property, initially with my ex-husband until 2002...*". Based on the aforesaid contradictions of the Defendant's own evidence her period of undisturbed exclusive possession started in 2002 and not in 1997 which she initially asserted.
12. Further, the contemporaneous documents which were before the Court did not support the Defendant's assertion that she had been in continuous exclusive undisturbed possession since 1997. In the Defendant's affidavit in support of her application for property settlement proceedings filed in the divorce proceedings between the Defendant and Curt Fletcher (SM 224 of 2008)⁴ the Defendant stated at paragraph 12 that her husband, Curt Fletcher left the property in February 2002 and at paragraph 18 she stated that from "*From 2002-2011 I was solely in possession and responsible for the matrimonial home.*" Further, by letter dated 2nd March 2011⁵ captioned "*The Operation of a Barbeque business at LP*

⁴ Exhibit CF 6 of the Curt Fletcher affidavit

⁵ Exhibit CF 5 of the Curt Fletcher affidavit

1 Oropouche Road Siparia” and written by the Defendant’s attorney at law to her ex-husband Curt Fletcher, the attorney at law referring to the Defendant’s instructions stated that *“I am instructed by my client that a decree nisi was granted in her favour since the 29th September 2008. That in or about 2002 you vacated the matrimonial home..”* It was also stated in the said letter that about five weeks prior to March 2011 the Defendant’s ex-husband Curt Fletcher rented out the upstairs portion of the house on the property for the purpose of carrying out a barbeque business. Additionally, exhibited to the Curt Fletcher affidavit was a Consent Final Protection Order issued from the Siparia Magistrate’s Court on the 22nd November 2011 where the Defendant was confined to the downstairs portion of the property⁶ and which the Defendant did not dispute.

13. In my view the aforesaid contemporaneous documents clearly demonstrated that the Defendant was not in exclusive undisturbed possession of the property from 1997 which she asserted in her Defence.
14. The Defendant also had to demonstrate that her alternative defence that the order in the divorce proceedings SM 224 of 2008 bestowed a proprietary interest on her in the property. In this regard, the Defendant sought to rely on an order of Kokaram J made in the divorce proceedings between the Defendant and Curt Fletcher as a basis for asserting a right in the house on the property. At paragraph 51 of the Margaret Fletcher affidavit the Defendant stated that :

“In the alternative, I am claiming:

- a. A declaration that I am the owner and in possession of the house erected on the said parcel of land pursuant to the Order of Kokaram J and I am entitled to occupy and be in possession of same and remain in possession of same;
- b. An injunction restraining the Claimant, his servants and/or agents from entering upon, interfering, harassing and interrupting or howsoever otherwise with me, those in occupation with me, my servants and/or agents use and /or possession of the said house.”

⁶ Exhibit CF 7 of the Curt Fletcher affidavit

15. I was of the opinion that the court order in the divorce proceedings did not bestow any proprietary interest in the property on the Defendant since it was the result of property settlement proceedings in the divorce proceedings between the Defendant and her ex-husband Curt Fletcher. It only concerned the building on the property and not the rights in the property, the Claimant was not a party to the matrimonial proceedings and therefore his rights in the property were not bound or affected by the Court Order. Therefore I concluded that the Defendant's alternative defence had no realistic prospect of success.
16. Therefore, at the hearing on the 11th October 2016, I was of the opinion the Defendant failed to demonstrate that she was in exclusive undisturbed possession of the property from 1997 to 2002. Further, I concluded that there were acts by Curt Fletcher in early 2011 which disrupted any period of exclusive possession by the Defendant and that the Kokaram J order did not bestow any proprietary interest on the Defendant in the property.

Law and analysis

17. There was common ground that the test which the Court must apply in determining whether permission to appeal is granted was summarized by Weekes JA in **Ocean Development Limited v Mahabir Deonath and anor**⁷ at pages 8 to 10 where she stated that:

“Before the decision can be set aside the Appellant/Defendant must cross the hurdle of getting leave to appeal, this being an instance when, in accordance with Section 38 (2) of the **Supreme Court of the Judicature Act Chap 4:01**, leave is required. Section 38 (2) sets out the circumstances in which leave to appeal is required.

38. (2) No appeal shall lie, except by leave of the Judge making the order or of the Court of Appeal from:

- a. an order made with the consent of the parties;

⁷ Civ App No 12 of 2008

- b. an order as to costs;
- c. *a final order of a Judge of the High Court made in a summary proceedings.*

This case is caught by 38(2)(c) since the local case of **Lalla, Kenneth; Wooding, Henley; Mohammed, Corinre; Walters, Carlyle; Seemungal, Sakal [Members of the Public Service Commission]; Baptiste, Cipriani [The Commissioner of Prisons] v Rajkumar, Dougnath C.A. CIV. 128/1999** outlines that the phrase “summary proceedings” in s. 38[2][c] of the **Supreme Court of the Judicature Act Chap 4:01** should be treated as referring to interlocutory applications which finally dispose of a cause of matter without the formality of a trial.

Once leave is required it will only be granted when an applicant establishes that the intended appeal has a realistic prospect of success: **Sylvester v Faelleseje, A Danish Foundation, St. Vincent and the Grenadines Civil Appeal No. 5 of 2005, 20 February 2006.**

As a starting point, the court needs to know if there is an argument capable of being advanced: **First Caribbean International Bank (Cayman) Limited v Starkey, BVI Civil Appeal No. 23 of 2005, Barrow JA.**

In **Swain v Hillman [2001] 1 All E.R. 91** Lord Woolf discussed the meaning of ‘real prospect of succeeding’ in relation to a summary judgment. The court must consider whether there is a realistic, as opposed to a fanciful, prospect of success. In **Tanfern Ltd. V Cameron-MacDonald (Practice Note) [2000] 1 W.L.R. 1031** Brooke LJ cited **Swain** and stated that the same approach should be adopted in relation to leave to appeal.

Alternatively, leave may be granted when there is some other compelling reason for granting leave. In the case of **Smith v Cosworth Casting Processes Ltd. [1997] 1 W.L.R. 1538** the court of appeal said:

There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one, which the

court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.

So that leave may be granted where the matter may result in the elucidation of an important point of law: **Beedell v West Ferry Printers Ltd. [2001] EWCA Civ 400.**”

18. The onus was on the Defendant to demonstrate from the evidence in support of the instant application that she had a realistic prospect of success on appeal.
19. Counsel for the Defendant argued that the re-entry by Curt Fletcher on the property did not interrupt the possession by the Defendant; there was an adequate plea of proprietary estoppel at paragraph 51 of the Margaret Fletcher affidavit and that the substantive matter raised novel points of law with respect to the issue of adverse possession which are in the public’s interest.
20. In response, it was submitted on behalf of the Claimant that at the hearing of the substantive matter on the 11th October 2016 Counsel for the Defendant submitted that the Defence was one of adverse possession and that the Defendant ought not to be permitted to raise a new Defence of proprietary estoppel at this hearing. It was also argued that the Defendant has not demonstrated that the Court erred in its application of the law in making the order; there was no evidence to support the grounds (f) and (g) and that there was no evidence that the Court erred with its findings on the facts.
21. Having regard to my reasons for making the order, the grounds and evidence of the Defendant in support of the instant application I dismiss it for the following reasons.
22. Firstly, grounds (b), (c), (d), (e) and (j) are all mixed issues of law and fact. There was no challenge by the Defendant to the contemporaneous documents which the Court relied on in arriving at its finding that the Defendant was not in continuous undisturbed exclusive possession since 1997.

23. Secondly, the Defendant did not identify the issues of law where the Court erred in making the order. In the Defendant's submissions in support of the instant application the Attorney at law for the Defendant presented two authorities **Knowles v Knowles**⁸ and **E&L Berg Homes Ltd v Grey and another**⁹. She admitted that they both were on the law of proprietary estoppel. In my view the two authorities were not relevant since the Defendant did not set out a plea of proprietary estoppel in the Defence neither was it argued as a Defence at the hearing on the 11th October 2016. Further, Counsel for the Defendant did not present any authorities on the law of adverse possession. She also did not indicate to the Court how the Court erred with the law it applied in arriving at the decision on the 11th October 2016.
24. Thirdly, the grounds set out at (f), (g), (h) cannot in my view be substantiated by evidence from the Defendant since these grounds specifically refer to the views of, Ms Jacqueline Chang, the Attorney at law who appeared at the substantive hearing on the 10th October 2016 and there has been no reason presented to me to account for her failure to swear an affidavit in support of the instant application. In any event, at the hearing of the substantive Fixed Date Claim the onus was on the Defendant to present her best Defence and Counsel for the Defendant was only permitted to reply on new areas of law raised by Counsel for the Attorney at law for the Claimant. The Attorney at law for the Defendant was not permitted to reiterate or raise new matters of fact in response.
25. Fourthly, the law on adverse possession is settled and there was nothing in the facts which in my opinion view would further the public interest.
26. Lastly, at the hearing of the substantive matter, Counsel for the Defendant was clear that the Defendant's Defence was based on her claim of adverse possession. Therefore in considering whether the Defendant had a realistic prospect on appeal, the Defendant was not permitted to raise a new Defence which was not presented at the substantive hearing.

⁸ [2008] UKPC 30

⁹ [1980] 1 EGLR 103

27. The Defendant having failed to demonstrate that she has a realistic prospect of success on appeal, leave to appeal is refused and the issue of the stay of execution in the application no longer arises.

Order

28. The instant application is dismissed.

29. The Defendant to pay the Claimant costs of the instant application to be assessed in default of agreement.

**/S/ Margaret Y Mohammed
High Court Judge**