

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION  
2018/CLE/gen/00891**

**BETWEEN**

**IDA MELVERN THOMPSON ROSE**

**Plaintiff**

**AND**

**LIONEL WHYLLY aka LIONEL ROKER**

**1<sup>st</sup> Defendant**

**AND**

**ANTONIO ALLEN**

**2<sup>nd</sup> Defendant**

**Before: The Hon. Madam Justice G. Diane Stewart**

**Appearances: Mr. Norwood Rolle for the Plaintiff  
No appearance by the First Defendant  
No participation in proceedings by Second Defendant**

**Hearing Date: 26<sup>th</sup> February 2020**

**Judgment Date: 8<sup>th</sup> April, 2022**

**JUDGMENT**

1. By a Specially Endorsed Writ of Summons filed 1<sup>st</sup> August 2018, the Plaintiff commenced an action in trespass against the Defendants, as a result of their allegedly entering upon property situate Quakoo Street in the Southern District of the Island of New Providence by parking their vehicles thereon and preventing the Plaintiff access.
2. The property is described as : -

**“ALL THAT piece parcel or part of a lot being Lot No. 40 in Block 307 situate in Grants Town in the Southern District of the said Island of New Providence bounded on the South by a Public Road known as Quakoo Street and running thereon Fifty (50) feet on the EAST by Lot No. 39 said to be the property on the one Ms. Brown and running thereon One Hundred (100) feet on the NORTH by Lot No. 8 said to be the property of Fred McNeil and running thereon Fifty (50) feet and on the WEST by Lot No. 41 formerly the property of Thomas Higgs and now said to be the property of Sarah Hepburn and running thereon One Hundred (100) feet the said piece parcel or part of a lot of land is more particularly shown on Plan 3690 NP.” (“the Property”)**
3. The Second Defendant chose not to participate in the proceedings and did not enter an appearance or file a defence to the action. While the First Defendant filed a Defence on the 10<sup>th</sup> October, 2018 (the “Defence”), there was no evidence filed no submissions made on his behalf nor did he appear for trial despite being served with the Order for Case Management which scheduled the date of the trial as evidenced by an Affidavit of Service filed 21<sup>st</sup> February 2020.

4. By the Defence, the First Defendant claimed to be the owner in fee simple absolute possession of the Property by virtue of undisturbed open and exclusive possession for more than twelve years.
5. He claimed that in the year 1985, his adopted father, Brian Roker was contracted to erect a house on the Property and that he had become responsible for ensuring that a foundation was erected. Construction did not continue however, because the client, Mr. John Baker ("**Mr. Baker**") was unable to obtain clear title to the Property which prevented him from receiving approval for a bank loan.
6. Thereafter, the First Defendant claimed to enjoy undisturbed possession from about the year 2000 up to April 2018 when a fence was erected on the Property. The First Defendant also claimed that the action should be struck out as it was statute barred pursuant to section 16(3) of the Limitation Act which prevents a party from commencing an action for the recovery of land after the expiry of twelve years.

## EVIDENCE

7. The Plaintiff averred that her father, Mr. Ulysses Thompson, purchased the Property on or about the 1<sup>st</sup> July 1926 from one Marie Louis Mason. She, along with her father, mother and two brothers lived in a wooden house on the Property. On the 31<sup>st</sup> January 1962 she married, had seven children and continued to live in the wooden house on the Property until 1966 when she and her family moved into her own home.
8. By a conveyance dated 6<sup>th</sup> August 1963, her father conveyed the Property to her brother, Mr. Ulysses Thompson Jr., known as "Junior" (**hereinafter referred to as "Junior"**). Her father farmed the Property and had planted many fruit trees thereon. When she moved in 1966, Junior and her father moved with her and the Property became vacant but she along with other family members and a neighbor continued to look after it.
9. In either 1973 or 1974 Junior knocked the wooden house down and began building another home on the Property however, only the foundation was completed. He had hired a contractor by the name of Wesley Smith for the job. Junior died on the 29<sup>th</sup> June 2006 and had no children. A hurricane in 1979 had destroyed the fruit trees on the Property.
10. In 2004, the Ministry of Housing & National Insurance attempted to acquire the Property for its housing scheme. By a Power of Attorney granted to her dated 1<sup>st</sup> April 2004, she had authority to object to the intended acquisition and the Property was excluded from the housing scheme. In 2007 Mr. Jack Adderley started to farm the Property however, she slashed the trees which he had planted and although Mr. Adderley had threatened to bring the police, he never returned.
11. She never knew the First Defendant and she could not recall meeting him. In 2015, she noticed a red car parked on the Property. She would drive pass the Property to check on it. In or about 2016, she noticed cars and a trailer on the Property. After receiving legal advice, she and her daughter Ellen, erected a fence around the Property. The First Defendant then asked permission from her daughter's husband to keep the vehicles and trailer on the Property as he did not have anywhere else to store them.

12. The First Defendant's request was denied and a letter from her attorney was sent to him, asking him to remove his possessions from the Property. He refused to remove them and claimed that only a court order could remove him from the Property. The Plaintiff denied that the First Defendant was on the Property from 2000.
13. The Plaintiff stated that Junior had died suddenly in 2006 and without a will. His estate was not administered and he resided with her at the time of his death.
14. Mr. Clint Williams, the Plaintiff's son-in-law, confirmed that on the 7<sup>th</sup> April 2018, he received a Whatsapp message from the First Defendant asking for permission to maintain his trailers on the Property. The conversation went as follows:

**"1:07 p.m. Good day bro Williams, This Lionel Roker here from Quakoo St. Could you let the person know who's putting down the fence that they went over almost 10' in the front eastern side of the property before they put their center poles down.**

**6:01 p.m. Williams could you ask your family if it's ok for my trailers to be there for the time been until they're ready please? Thanks"**

15. Mr. Williams stated that he met the First Defendant about twenty years ago and that two years ago he had exchanged numbers with him when he saw him at JBR. He later found out that the cars on the Property belonged to the First Defendant who lived across the street. He told the First Defendant that they had the deed to the Property and that he should consider moving the cars.
16. Mr. Henry Wesley Smith ("**Mr. Smith**"), averred that he was familiar with Junior and that they would also call him "Lil Ting". After Junior had spent some time in prison, they became friendly and Junior had told him that he wanted him to build a home. Junior brought him a plan of what he wanted and the foundation was constructed on the Property between 1973 and 1974. Junior liked to gamble however and had lost the property to Mr. John Baker ("**Mr. Baker**").
17. Junior had asked him to give Mr. Baker the plan if he ever asked for it. Mr. Baker came to him and got the plan and told him that when he was ready he would contact him to continue the building of the home using the same plan. Mr. Baker eventually died but prior to his death, he never mentioned anything else about continuing the construction of the home on the Property.
18. Ms. Ingrid Rose, the niece of Junior and the daughter of the Plaintiff, averred that she had been informed by her mother that she was born on the Property. She knew the Property well because she lived there from 1963 to 1966. Thereafter, she visited the Property frequently to collect the fruits from the fruit trees that remained after Junior had demolished the home.
19. For as long as she could remember, Junior dealt with the Property up until his death. She did not know about anyone interfering with his occupation of the Property or dealing with it. Junior gave her and her mother a Power of Attorney to deal with the Property when the Ministry of Housing & National Insurance attempted to acquire the Property. As a result, the Property was not acquired by the Government and the Property remained undisturbed until about 2009 when they observed cars being parked thereon.

20. She made enquiries of a neighbor as to who was parking on the Property and was informed that a gentleman in a yellow apartment was parking his vehicles thereon. Her sister had asked her about doing something with the Property for her niece and she did not object to her request.
21. Ms. Rose stated that she met Mr. Baker, who operated a club off of Andros Avenue, on two occasions. Her uncle had built a home in the back of the Plaintiff's yard but once he got sick, the Plaintiff provided him with a bedroom. Her uncle informed her that Mr. Baker was holding the documents for the Property.
22. She asked Junior to get the documents from Mr. Baker but her uncle stated that Mr. Baker would not have given them to him. Her sister ended up putting up a fence on the Property.

## **ISSUES**

23. There are two issues which must be determined. The first is whether the Plaintiff has locus standi to maintain the claim against the Defendants. If she succeeds on that issue then the Court must determine whether the Defendants were in fact trespassers on the Property.

### **ISSUE ONE – Whether the Plaintiff has locus standi to maintain the claim against the Defendants?**

24. The Plaintiff's request is for the Defendants to be restrained from trespassing on the Property and not for a finding of who is the documentary title owner of the Property.
25. She submits that the documentary title of Mr. Baker is not in issue, nor under attack and not before the Court to be adjudicated upon. It is not disputed that the documentary title to the Property resides in some other person not before the court. Neither of the parties are claiming through that individual.
26. In **Bannerman Town [2018] UKPC 27 at paras. 50**, the Privy Council addressed possession of land. Lord Briggs stated,

“50. While occupation or use of land is a familiar non-technical concept, possession of land is a legal term of art. Possession, for however short a time, may be sufficient to found a cause of action in trespass against someone thereafter coming upon the land. But possession sufficient to bar a prior title (whether itself documentary or possessory) must be proved for the whole of the time prescribed by the relevant Limitation Act: see *Perry v Clissold* [1907] AC 73, per Lord Macnaghten at p 79: “It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period Page 17 prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

27. In the text **Law of Real Property, Megarry and Wade, 3<sup>rd</sup> Edition at pg. 99**, the concept of relativity of title was illustrated,

“If last year S dispossessed O of land which has hitherto belonged to O, and O is taking no action, there are now two incompatible titles to the land; as between O and S, O is the

owner, for he can recover the land by bring an action; but as between S and the rest of the world (except O and persons claiming through him) S is the owner, for he is in possession and that is equivalent to ownership as against all persons who have no better title. Thus S can sue strangers for trespass or nuisance, just as O could before."

## DECISION

28. The Plaintiff is not the owner of the Property however, does this prevent her from having standing to commence this action in trespass against the Defendants?
29. The Plaintiff's evidence is that the Property, which was originally owned by her father, was conveyed to her brother. Thereafter, her brother, without any direct evidence including any physical documents, allegedly gave the property to a Mr. Baker which may or may not have been the result of a gambling loss.
30. Despite the First Defendant's lack of interest in defending his case, in the Defence, he claimed that his adopted father, based on instructions from Mr. Baker, erected a foundation on the Property but could not go any further due to lack of funds and a failure to obtain clear title in order to obtain a bank loan. This apparent ownership by Mr. Baker was confirmed by the Plaintiff's witnesses.
31. In **Orlean Clarke et al v Kathreen Barry (aka Kathleen Clarke) in her capacity as Administratrix of the Estate of Benjamin Lawrence Johnson, Deceased) SCCivApp No 99 of 2019**, Barnett P considered who could commence a claim in trespass over land.

**"16. A claim in trespass is based on an unjustifiable intrusion by one person upon land in the possession of another person. It can be brought at the suit of a person in possession of land. "Possession means generally the occupation or physical control of land". See Clerk & Lindsell On Torts 16th editions para 23-08. A person in possession of land can maintain a claim in trespass even in circumstances where he is not the owner of the land. On the face of the pleadings the plaintiffs are in occupation of the land and have been for a long period of time."**

32. There are two elements to possession. Firstly, there is physical possession and secondly the intention to possess land. The latter element will prevail even if the intention to possess is mistaken. In **Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd [2018] UKPC 27**, Lord Briggs stated,

**"51. Possession of land is generally described as having two elements, factual possession and the intention to possess: see JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419. In the present case there is no difficulty about a general intention to possess by the various Descendants who gave evidence, since they believed that they were co-owners of the land pursuant to Ann Millar's will. Such a belief, even if mistaken, is sufficient for the purposes of intention to possess: see Roberts v Swangrove Estates Ltd [2008] Ch 439. All that is common ground."**

33. By a Conveyance dated 6<sup>th</sup> August 1963, the Property was conveyed to Junior by the Plaintiff's father. The home that was on the Property and lived in by the Plaintiff, Junior and her family was demolished. Around 1973 or 1974 Junior erected a foundation on the Property. Some years later it seems that Junior gave the Property to Mr. Baker along with a plan to continue the construction of the home which had been started.

34. While Mr. Baker collected the plan, he never completed the home. Some thirty one years later in 2004, despite the plan and the supposed agreement between Mr. Baker and Junior, the Plaintiff was authorized by Junior to communicate with the Ministry of Housing and National Security on his behalf, to deny their request to include the Property in a housing scheme which was in fact acceded to. Although the Defendant did not live on the property, she had undisturbed access to the property except for the one issue in 2007.
35. The Plaintiff's daughter Ellen erected a fence on the Property around 2016. The Plaintiff's evidence however, was that she would frequently drive past the Property as it was on her route home from work and her daughter, who dealt with her uncle Junior's financial affairs wished to retrieve the Property papers from Mr. Baker prior to his death.
36. It is clear based on the evidence that, while the Plaintiff did not have physical possession over the Property, she had an intention to possess the Property and had control over the property. She believed that by virtue of the Power of Attorney given to her by her brother along with the fact that he was her brother and had no heirs, that she had possession of the Property.
37. I find that the Plaintiff has a sufficient interest in the Property, specifically an intention to possess the Property which gives her the locus standi to maintain this action.

**ISSUE TWO – Whether the Defendants trespassed on the Property?**

38. The Plaintiff submits that trespass is any unjustifiable intrusion by one person upon land in the possession of another. She relies on **Clerk and Lindsell on Torts, 14<sup>th</sup> Edition** which states at para. 1311,

**“the slightest crossing of the boundary is sufficient. If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.”**

39. She requests that the Defendants be restrained from parking their vehicles and having any access to the Property.

**DECISION**

40. A claim in trespass is based on an unjustifiable intrusion by one person upon land possessed by another.
41. In **Fairness Limited v. Steven Bain et al SCCivApp No. 30 of 2015**, Allen P considered the tort of trespass.

**“28. Trespass is defined in Volume 97 (Tort) of the Fifth Edition of Halsbury's Laws of England (2015) as the unlawful presence on land in the possession of another. Indeed, according to that text, a person trespasses on land “if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession...”**

.....

30. Moreover, so far as they are relevant to this case, the defences available against a claim for trespass are as set out at paragraphs 581, 583, 584, and 587 of the same volume and edition of Halsbury's:

"581 A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right; but he may not set up the title of a third person unless he claims under or by authority of such a person.....

587. A claim of trespass to land is barred by lapse of the statutory period of limitation, which, except in certain specified cases, is six years from the cause of action arose."

.....  
41. In my view, the learned Chief Justice had no choice but to find that the respondents were trespassers, for once the respondents' documentary title fell away, they were without any title to the land. Indeed, adverse possession gives no interest or title unless or until it is declared by the Supreme Court on the conclusion of an investigation under the Quieting Titles Act. Before such title is declared, possession of the land remains just that; and the person, as Lyons J. said in *Arawak Homes Ltd. v John Sands and Smith, Smith & Co.(Sued as a Firm)* who enters and remains on land knowing someone else is the owner of the land as the respondents appear to admit, remains a trespasser until the land is so quieted."

42. No evidence was led by the Defendants as to their right, title or interest to the Property. The pleading is not evidence. Therefore, there is nothing before the Court to support their claim.
43. By the Plaintiff's intention to possess the Property they denied the Ministry of Housing's request to acquire the Property in 2004. They also erected a fence around the Property in 2018. More importantly, I accept the Plaintiff's evidence that it was her brother Junior who erected the foundation on the Property and not the First Defendant's adopted father.
44. There is no evidence that the First Defendant earned a possessory title by way of undisturbed open and exclusive possession as there is no evidence of a declaration from the Supreme Court after the conclusion of an investigation under the Quieting Titles Act or any other direct evidence that the court can take notice of. I therefore do not accept that the First Defendant earned a right to enter upon the Property based on any allegation or any evidence before me.
45. Accordingly, after considering all of the evidence and submissions, I find that the Defendants were in fact trespassers on the Property.

## **CONCLUSION**

46. The Plaintiff has a sufficient interest in and possession of the Property.
47. The Defendants do not have a sufficient interest in and for possession of the Property.
48. The Defendants, whether by their agents, servants or otherwise are restrained from any further trespass on the Property and shall remove any of their personal belongings therefrom forthwith.

49. The Defendants shall pay to the Plaintiff the costs of the action to be taxed if not agreed.

Dated this 8<sup>th</sup> day of April 2022



**Hon. Justice G. Diane Stewart**