

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY SIDE

Cle/gen/1911/2015

A. LOFTUS ROKER

Plaintiff

AND

KENNETH M. HIGGS

1ST Defendant

AND

DWIGHT HIGGS

2ND Defendant

AND

ALBERT HIGGS

3RD Defendant

AND

GREGORY HIGGS

4TH Defendant

Before: The Hon. Mr. Justice Gregory Hilton

Appearances: Sidney Campbell along with Cyril Ebong for Plaintiff

Bridgette Butler for 1st, 2nd and 3rd Defendants

Nadia Wright and Eugenie Butler for 4th Defendant

Hearing Dates: 16th May 2018 and 28th June 2018

**CIVIL – LAND – OWNER OF LAND – DOCUMENTARY TITLE-
POSSESSORY TITLE – WHETHER DEFENDANTS ARE TRESPASSERS
– WHETHER DEFENDANTS HAVE AN INTEREST IN THE LAND? –
WHETHER INJUNCTION SHOULD BE GRANTED?**

HELD: The Plaintiff is declared as the Lawful owner of the Land in dispute. The Defendants are declared as trespassers on the Land in dispute and are liable to the Plaintiff in damages.

1. On the balance of probabilities the plaintiff has proved that he was and is at all material times the owner of that Lot and parcel of Land containing two (2) acres being a portion of an original conveyance of three (3) acres situated on the southern side of Adderley Road in the Western District of New Providence made between Godfrey Christopher Scavella and the Plaintiff and dated 21st day of September A.D. 1953 and recorded in the Registry of Records in Book 0.20 at pages 62 to 65.
2. The Defendants have adduced insufficient evidence to demonstrate that their Late ancestor Clothilda Eugenia Higgs was the Legal and Beneficial Owner of the subject land (which they allege that they are the owners of as the beneficiaries of her Estate). Nor have the Defendants adduced sufficient evidence of physical possession of the subject land to oust the legal title of the Plaintiff to the property.
3. The Defendants are liable for damages as trespassers and a perpetual injunction is granted restraining the Defendants, their heirs or otherwise from trespassing and/or occupying the Plaintiff's property.

JUDGEMENT

HILTON,J,.

1. This action was commenced by the Plaintiff who filed a specially indorsed Writ of Summons on 1st December 2015. The Statement of claim was settled in the following terms:

STATEMENT OF CLAIM

1. The Plaintiff is the owner in fee simple of all that piece or parcel or lot of land containing two (2) acres being a portion of an original conveyance of the three (3) acres situate on the southern side of Adderley Road (in the Vicinity of Lake Cunningham) in the Western District of the Island of New Providence aforesaid and bounded on the North by the said Adderley Road and running thereon one hundred and eighty-five (185') feet on the East by land formerly and property of G.A. and S.G. Bosfield and running thereon Eleven hundred and twenty-three (1123') feet on the south by land formerly the property of H.S. Gladstone but now the property of the Caves Company Limited and running thereon one hundred and six and sixty – one hundredths (106.61') feet and on the West by land formerly the property of G.A. and S.G. Bosfield and running thereon ten hundred and eighty – one (1081') feet by reason of conveyance between Godfrey Christopher Scavella and the Plaintiff dated 21st day of September, A.D. 1953 and recorded in the Registry of Records in Book 0.20 at pages 62 to 65 (hereinafter called “the said land”).
2. The Defendants their servants or agents began trespassing on the land and wrongfully entered the land on or about November 1994 and has put a trailer on the land and other items which do not belong to the Plaintiff and removed soil from the land.
3. The Defendant their servants or agents trespassed again on the land and wrongfully entered the land on or around October 2015 and has erected fencing around the entire front of the land facing the road.
4. By the reasons of the matters aforesaid the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS

1. Scaring of the land.
 2. Value of the soil removed;
 3. Loss of economic Value
5. Notwithstanding a request from the Plaintiff to the Defendants to cease and desist, the Defendants their servants or agents continue to wrongfully enter the land.

AND THE PLAINTIFF CLAIMS:

1. A declaration that the Plaintiff is the rightful owner of the land.
 2. An Order for possession.
 3. An Order for the Defendants to remove the fencing unlawfully erected on the Plaintiff's property.
 4. An Order restraining the Defendants, their servants or agents from trespassing entering on, passing over the land, from placing anything or persons on the land or from removing any soil, subsoil or any other thing from the land.
 5. Costs.
2. The Defendants entered Appearances to the Writ and filed a Defence and Counter Claim (amended) on 6th April 2018 and settled in the following terms:

AMENDED DEFENCE AND COUNTER CLAIM

1. The first, second and third Defendants make no admission to paragraph 1 of the Statement of Claim.

2. The said Defendants deny paragraph 2 of the Statement of Claim and puts the Plaintiff to strict proof thereof.
3. The said Defendants make no admission to paragraph 3 of the Statement of Claim.
4. The said Defendants deny each and every allegation of the Statement of Claim save in so far as there are admissions as if specifically set out and *traversed seriatim*.

COUNTERCLAIM

5. The first Defendant is and was at all material times one of the Executors of the estate of the late Clothilda Eugenia Higgs, deceased.
6. That the said Estate is the legal and beneficial owner of **ALL THAT** piece parcel or tract of land forming a portion of the Sarah Poitier grant (grant A-340 and B3-262) containing 253.23 acres more or less situate to the southern Side of Lake Cunningham in the Western District of the Island of New Providence, Bahamas: and **ALL THAT** piece parcel or Lot of land being a portion of the tract of land originally granted to Williams Moss, and AND THAT piece parcel or Lot of land being a portion of the tract of land originally granted to Robert Hunt referred to as "Goodman" (Grant [A.102] A3-201); and ALL THAT piece parcel or Lot of land being a portion of the tract of land originally granted to Robert Johnston (A.27-153 acres) referred to as "Goodman".
7. That by an Order filed the 6th July, 1995 in Cle/gen/419 of 1995 the first and second Defendants were restrained by themselves, their servants or agents from entering upon or trespassing upon the land the subject of the

proceedings until the trial of the matter or until further order. The matter was thereafter adjourned sine die.

8. The Defendants were thereby restrained from the use and enjoyment of their land, the subject of the proceedings.
9. By reason of the aforesaid, the Defendants have suffered loss of the use of the disputed land and has thereby suffered damages.

PARTICULARS OF LOSS

- i) Undue loss of use and enjoyment
- ii) Reasonable costs for the use of the disputed land between 1995-2016.

AND THE DEFENDANTS CLAIM:-

- a) A Declaration that the Estate of the late Clothilda E. Higgs is the legal beneficial owner of the land the subject of these proceedings.
- b) A injunction restraining the Plaintiff, his servants and/or agents from entering upon or trespassing upon the land the subject of these proceedings.
- c) Exemplary Damages.
- d) Interests
- e) Costs
- f) Such further or other relief as the Court seems just

3. At the trial the Plaintiff (in addition to the documents filed in his bundle of documents) relied upon his Affidavit filed on 1st December 2015; his witness statement filed on 19th April 2017 and the witness statement of Clement R. Albury (a licenced Land Surveyor) filed on 14th May 2018. Both the Plaintiff and his witness were cross-examined on their respective witness statements.
4. At the trial the Defendants (in addition to the documents filed in their bundle of documents) relied upon the witness statements of the 3rd and 4th Defendants both filed on 6th April 2018 and the witness statement of Balder Campbell (a licenced Land Surveyor) filed on 15th May 2018. The 1st and 2nd Defendant and Mr. Campbell were all cross-examined on their respective witness statements.

BACKGROUND

5. The Plaintiff's title and claim to the property the subject of this dispute stems from an Indenture of Conveyance dated 21st September 1953 and made between Godfrey Christopher Scavella and the Plaintiff and recorded in Book 0.20 at pages 62 to 65; That Godfrey Christopher Scavella's root of title commences with a Crown Grant #A-115 to G.A. and S.J.Bosfield granted in 1889. The said conveyance contained a description of the Land conveyed and included a plan showing the location of the Land. And the Plaintiff contends that this property was not a part of Sarah Poitier Grant.
6. The Defendants' claim of ownership to the disputed property are as the beneficiaries to the Estate of the Late Clothilda Higgs (her estate being probated in 1974) and contended that the Schedule of property listed in the probate as owned by Clothilda Higgs encompassed the disputed property and was a portion of the Crown Grant to Sarah Poiter granted in 1829.

PLAINTIFF'S EVIDENCE

7. The salient facts as contained in the plaintiff's witness statement and under cross-examination are as follows:
 - a) The Plaintiff purchased the subject property in 1953. He built a home on the property in 1954 and resided there with his brother from 1954 to 1958 when he went to England for studies and left his brother on the property until 1962.
 - b) That when he purchased the property no other structures were there, only pine trees. That when he entered the property no one else was in occupation of it and that the first structure on the property was the wooden house which he built in 1954.
 - c) That he disputes that plans in support of his title forms a portion of the land comprising the Sarah Poitier Grant.
 - d) That he obtained an Interim Injunction against the 1st and 2nd Defendants in 1995 for trespass in Action No. 419 of 1995, but did not continue that Action because, the 1st Defendant moved off the property after claiming that he was not the person named in the injunction. This 1995 action was discontinued in 2015 when the Plaintiff commenced the present Action due to fresh acts of trespass by the present Defendants.

8. The salient facts as contained in the Plaintiff's witness Mr. Clement Albury's witness statement and under cross-examination are as follows:
 - a) That he examined the Will of the Late Clothilda Eugenie Higgs dated 18th December 1969 and recorded in volume 2222 at pages 524-526 in the Registry of records and the Schedule of Real

Property owned by the deceased annexed to the Affidavit of the Executors Kenneth Mckinney Higgs and Eric Alliday Higgs which makes reference to 730 Acres of occupied land. That the said schedule lists the properties as including "all that tract of Land situate at Goodmans and Sugar House including the Sarah Poitier, Peter Dean, Modie and a portion of the William Moss Grants."

- b) That he conducted a search and boundary survey of the plaintiff's property (as contained in the conveyance in 1953) and based upon his professional experience he was able to determine the location of the property which he concluded falls within the Bosfield Grant A-115 which is not a part of the Sarah Poitier Grant.
- c) That based upon his examination and survey the southern boundary of the Bosfield Grant is the Crown Grant to Sarah Poitier and the Northern boundary of the Bosfield Grant is the Crown Grant to Goodman as shown in the survey Plan exhibited to his witness statement as Exhibit "A"; and which shows the Plaintiff's property (disputed property) having its northern boundary as Adderley Road now Theodore Lane.

DEFENDANTS EVIDENCE

9. The evidence of the Defence comes from witness statements of the 3rd and 4th Defendants and Mr. Balder Campbell (a licenced surveyor) and for the purposes of this trial I have considered it necessary to set out their respective statements.

WITNESS STATEMENT OF ALBERT HIGGS

I, ALBERT HIGGS, of Theodore Lane in the Western District of the Island of the Commonwealth of the Bahamas make oath and say as follows:-

1. That I am the Third Defendant herein and make this statement on behalf of the Defendants herein in Defence to the claim by the Plaintiff herein to be the legal and beneficial owner of two (2) acres of land the subject of dispute herein.
2. That by a grant of Probate dated the 20th day of March, 1974 the Supreme Court of the Commonwealth of the Bahamas, on its Probate Side in Action No. 54 of 1974 issued to Kenneth Mckinney Higgs, and Eric Alliday Higgs as Executors of the Estate of the late Clothilda Eugenia Higgs the legal and beneficial owner in possession of the land the subject of dispute herein.
3. By an Indenture dated 21st day of March, 1872 made between Abraham Patten of the one part and Alliday Adderley of the other part; Recorded in book C-8 pages 565 to 566 the said Alliday Adderley became seised of various parcels of land referred to as the Goodman Grant including the Crown grants originally granted to the late William Moss, the late Robert Johnston and the late Robert Hunt.
4. Further by an Indenture sated 8th November, 1873 made between Thomas William, Henry Dillet, Charlotte Augustus Dillet, Stephen Dillet and Thomas Martin Mathews of the one part and Alliday Adderley, now Recorded in G-8 at pages 516 to 519 [312 acres + 150 acres + 120 acres + 160 aces] the said Alliday Adderley also became seised of various other portions of land surrounding the said Goodmans Grant.

5. By an Indenture dated 15th April 1878 the said Alliday Adderley conveyed unto his children Joseph Richmond Adderley, William Campbell Adderley, Daniel Dewellmar Adderley and Sarah Ann Bain in equal shares the said various tracts of land subject only to the mortgage to Augustus Adderley dated the 20th March, 1877. The said Indenture is recorded in Book N-9 at pages 338 to 345.
6. The said DanielDellewar Adderley died testate on the 28th day of March, 1934 having by the Last Will and testament dated 8th day of April, 1930 devised ALL of his right title and interest in the subject properties unto his five (5) children including the late Clothilda Higgs, deceased. There being no residuary clause under the will the subject land devolved under the law of intestacy, leaving Clothilda the only lawful child residing within Commonwealth of the Bahamas, who took possession of the subject land.
7. The said Clothilda Higgs, deceased by her last Will and testament devised all of her right tile and interest in the said properties unto her seven children, namely Monica Delores Knowles, Avis Mae Higgs, Oliver Wheelock Higgs, Kenneth Mckinney Higgs, Eric Higgs, Osbourne Bernard Higgs and Levington Devonshire Higgs (Sam) in equal shares as tenants in common. Probate was issued 20th March, 1974 in No. 54 of 1974.
8. The said Kenneth Higgs, whether by his servants and or agents have remained in exclusive possession of the subject properties for the use and benefit of the said Estate.
9. That at no time was any scarring conducted on any property owned or claimed to be owned by the plaintiff, nor have any soil been removed from the subject property by the Defendants herein, their servants and or agents.

10. That I am aware that the Plaintiff had in CLE/gen/No.419 of 1995 obtained an injunctive order filed 6th July, 1995 against the first and second Defendants herein, claiming that the Defendants therein had without consent parked trailers and or heavy equipment vehicles on the subject property; however the Plaintiff failed to make any further pursuit of the matter until the filing of the present action. The Plaintiff subsequently discontinued the said existing action. To best of my knowledge the existing matter is still pending with a cross claim on behalf of the first and second Defendants herein.
11. That none of the Executors of the Estate of the late Clothilda Higgs, deceased, their servants and or agents have ever parked any trailers or heavy equipment vehicles on the subject property or authorized anyone to so park any vehicles on the said property.
12. That I know that Osbourne Higgs, one of the sons of the late Clothilda Higgs occupied the adjoining property and had operated a rock crushing business on the adjoining property for in excess of forty (40) years until his death sometime in 2014.
13. There are various persons who claim to be the legal and/or beneficial owners of various tracts of land in the vicinity of the Goodman tract.
14. That I have walked the subject property from a child and I am familiar with the boundaries of the subject property. I know that the properties occupied by Kenneth Higgs under the Estate of the late Clothilda Eugenia Higgs form a portion of the Goodman Tract and or the Sarah Poitier Tract.
15. That the content of this Statement is true and correct to the best of my knowledge information and belief.

WITNESS STATEMENT OF GREGORY HIGGS

I, **GREGORY HIGGS**, contractor, of the City of Nassau, of the Island of New Providence, one of the Islands of the Commonwealth of the Bahamas, make oath and say as follows:

1. That I am the Fourth Defendant herein.
2. That the First Defendant is my father and the Second and Third Defendants are respectively my brothers.
3. That by Conveyance dated 21st September, A.D. 1953, the Plaintiff purports to be the owner of a parcel of land containing three (3) acres situated on the Southern side of Adderley Road in the vicinity of Lake Cunningham in the Western District of the Island of New Providence (hereinafter called "the said property"), the subject of these proceedings.
4. That the said Estate of the late Clothilda Eugenia Higgs is the rightful legal and beneficial owner of the said property being claimed by the Plaintiff herein.
5. That I, along with the First through Third Defendants, am a beneficiary under the Estate of the late Clothilda Eugenia Higgs.
6. That the Plaintiff claims that the Defendants in this action are guilty of trespassing on the said property by entering the property and erecting a fence sometime in October of 2015.
7. That the Plaintiff herein is not the rightful owner of the property and his claim is fatally flawed. Therefore, the Conveyance on which the Plaintiff claims title rests should be set aside.

8. That the contents of this statement are correct and true to the best of my knowledge information and belief.

WITNESS STATEMENT OF BALDER CAMPBELL

I, **BALDER CAMPBELL**, licensed Surveyor, of the City of Nassau, of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. That I have been licensed as a Land Surveyor, registration number 019, for the past fifty three (53) years.
2. That the first part of my tenure I worked at the Ministry of Works and the latter part of my tenure I worked at the Department of Lands and Surveys having retired in 2004; therefore, I am very experienced in the field of surveying and I am familiar with most of the recorded land in the Bahamas. Particularly, I am very familiar with the area of Theodora lane formerly known as Adderley Road.
3. The Plaintiff claims to be legal owner of a parcel of land containing three (3) acres, situate on the Southern side of Adderley Road in the Western District of the Island of New Providence, but this cannot be unequivocally substantiated based on the plan produced by the plaintiff that I have examined.
4. My investigations have revealed that The Department of Lands and Surveys currently does not have the original plot plan for the area; therefore, the plan produced on behalf of the Plaintiff is unreliable as it only reflects a portion of the entire area.
5. That I have not had the opportunity to examine the statement of Clement Albury, the surveyor being relied on behalf of the Plaintiff, to confirm whether he would have examined the original plot plan for the entire area in order

to substantiate the accuracy of the Plaintiff's plan.

6. That based on my observation the plaintiff's root of title is purportedly from a Crown grant granted to S.A. and G.A. Bostfield a copy of which the Plaintiff has not produced. Logically based on the facts that emanate from the original Sarah Poitier Grant that I have examined the boundaries purported to be the Bostfield Grant is not reflected on the original plot plan of the 15th day of April A.D., 1829. During this date, the only existing grants were that of Sarah A. Poitier, William Moss and Robert Johnstone. The said plot plan is exhibited hereto and marked "B.C.1."
7. That having regard to my findings it is difficult to place the Bostfield Grant in the scope of the original plan.
8. Based on my findings, my determination is that the portion of the land that the Plaintiff is claiming cannot be logically placed.
9. That the contents of this statement are correct and true to the best of my knowledge information and belief.

ISSUES

10. The essential issue in this case is whether the Defendants, as beneficiaries of the Estate of Clothilda Higgs, can successfully challenge the Plaintiff's title to the disputed property under the Plaintiff conveyance of 21st September 1953 and recorded in Book 0.20 at pages 62 to 65.

FACTUAL FINDINGS

11. It is a fact that the Will of the Late Clothilda Higgs was probated in 1974 some 20 years after the conveyance to the Plaintiff of the disputed property in 1953.

12. It is also a fact that one of Clothilda Higgs' predecessors conveyed property in the vicinity of the disputed property by an Indenture in 1890 and acknowledged the existence of the Bosfield Grant as one of the Boundaries to the property being conveyed.
13. The Plaintiff through his witness Clement Albury has produced a survey plan depicting the various boundaries of the Sarah Poitier Grant; the Goodman grant and the Bosfield grant which in the court's view has not been successfully challenged as inaccurate by the surveyor Mr. Balder Campbell who gave evidence on behalf of the Defendants. Mr. Campbells statements that the Bosfield Grant is mis-located and cannot be logically placed is not substantial by any maps he has produced. His testimony was uncertain and ambiguous.
14. The Plaintiff, subsequent to purchasing the disputed property in 1953, has exercised acts of ownership over the property from then to now in the following way: VIZ:
 - a) Recording the conveyance in 1953
 - b) Building a house on the property in 1954
 - c) Obtaining an Injunction against the 1st and 2nd Defendant in 1995 (which remained in existence until 2015).
 - d) Obtaining an injunction in 2015 against the 4 Defendants which remains in place pending the outcome of this decision.
15. Neither the Defendant nor any of their predecessors have sought or taken any action against the Plaintiff to seek to claim ownership of the disputed property save for the counter claim in this present action filed in 2018.
16. The 1/16 interests of Clothilda Higgs in the property listed as Tract "A" (in the Privy council decision of Higgs v. Nassauvian Ltd. P.C. 1975 page 467 at para: F.) has not been identified by

boundaries or description so as to determine in what part of the Sarah Poitier Grant, or Goodman Grant it falls and certainly cannot be evidence that it contained the Bosfield Grant and/or the parcel of Three Acres that was conveyed to the Plaintiff in 1953.

THE LAW

17. The Privy Council in the noted case of Ocean Estates Limited v. Pinder [1969] 2 A.C. 19 at page 24 and 25 gave its views regarding disputed title to land as follows:

“Where questions of title to land arise in litigation the Court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action or a person by whose authority B is in possession or occupation of the Land. It follows that as against a defendant whose entry upon the Land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20 year period of continuous and exclusive possession by the trespasser.....where a person has dealt in Land by conveying an interest in it to another person there is a presumption until the contrary is proved, that he is entitled to the estate in the land which he purports to convey.....It

is clear law that the slightest act by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title.....”(emphasis added)

18. Section 3 (3) of the Conveyancing and Law of Property Act 1909 Chapter 138 of the Statute laws of the Bahamas states:

“Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate be taken to be sufficient evidence of the truth of such facts, matters and descriptions.”

19. It is not in dispute that the plaintiff purchased the disputed property in 1953 and had his conveyance recorded in 1954. The presumption that the vendor, who conveyed the property to the Plaintiff, was entitled to the property has not been disproven.
20. Additionally the recitals including description of the land in the 1953 conveyance of the property to the plaintiff have not been proven to be inaccurate and must be taken to be sufficient evidence of the truth and accuracy of the description of the land.

DISPOSITION

21. In the Court’s view the plaintiff has demonstrated a better legal title to the property (by the conveyance in 1953) than the Defendants.
22. The description of the property as contained in the said 1953 conveyance and confirmed by the survey map produced by Clement Albury has not been proven to be inaccurate.
23. The Defendants have not proven any or any sufficient documentary title to the subject property nor have they proven any or any sufficient occupation or possessory title to the subject property so as to oust the plaintiff’s legal title.

24. The Court finds that the Plaintiff's claim is substantiated and that the Defendant's defence and counter claim is not established.

CONCLUSION

25. The court grants the declaration that the Plaintiff is the legal and beneficial owner of the property.
26. The Court orders that the Defendants remove the fencing erected on the Plaintiff's property.
27. The Court grants the order of possession of the property as claimed in the statement of claim and also grants a perpetual injunction against the Defendants restraining each of them their heirs, servants, agents or otherwise from trespassing and/or occupying the Plaintiff's property.
28. The Defendant's counter-claim is dismissed.
29. The Defendants are liable in damages as trespassers. As far as damages are concerned (as much as can be established by the plaintiff) they are to be assessed by the Registrar.
30. Costs to the Plaintiff to be taxed if not agreed.

Dated this 26th day of July 2019

The Hon. Mr. Justice Gregory Hilton