

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2013/CLE/qui/01041

IN THE MATTER of ALL THAT piece parcel or lot of land situate in the Western District of the Island of New Providence in the Commonwealth of The Bahamas and being portions of Allotments Numbers Four (4) and Six (6) of Gambier such portions respectively being 2.493 acres and 4.227 acres

AND

IN THE MATTER of the Quieting Titles Act, 1959

AND

IN THE MATTER of the Petition of Bahamas Trading Post Inc

Before Hon. Mr. Justice Ian R. Winder

Appearances: Carlton Martin with K. Melvin Munroe for the Petitioner
Travette Pyfrom for the Adverse Claimants

7 December 2021

DECISION

WINDER, J

On 7 December 2021 I dismissed the Plaintiff's application to strike out these proceedings and promised to put my reasons for so doing in writing. These are the promised reasons.

[1.] The Petition was filed on the 10 June 2013 seeking an investigation of the Petitioner's title under the provisions of the Quieting Titles Act (the QTA). The Petition was supported by an Affidavit filed by Robert Ian Mitchell and a plan (the Plan) of the property which was also filed on the 16 October 2013. Subsequently, additional affidavits in support of the Petition were filed by Theola Hepburn and Carletha Taylor.

[2.] In its Abstract of Title the Petitioner is said to derive its title from a conveyance of the interest of Henry Wright.

[3.] On the Plan the property is described (at the bottom right corner) as "*Portion of Allotment No. 4 and Allot No. 6 Gambier totaling 6.720 acres...surveyed at the instance of the Kenny Family....*". The Plan was prepared in August 2007 by Donald E Thompson. The Plan was amended on 15 October 2018.

[4.] Following the giving of the usual extensive directions the matter proceeded to hearing and evidence was taken on 1 August 2017 from Robert Ian Mitchell and Carletha Taylor. Harold Morris had entered an adverse claim to the action but did not attend at the trial. Morris subsequently sold the interest he claimed to the property to the Petitioner by a conveyance dated 17 March 2017.

[5.] Prior to any determination of the Claim, on 28 November 2017, Annette Kenny and Cheryl Kenny (purportedly on their own behalf and on behalf of their siblings) appeared before the Court claiming to have an interest in the property the subject of the Petition. They were then represented by Norwood Rolle. They claimed an undivided 1/3 interest in the property. With leave, pursuant to Section 7 of the QTA, their Adverse Claim was filed on 11 December 2017. The Adverse Claim is settled in the following terms:

WE, ANNETTE KENNY and CHERYL A. KENNY both of the Southern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas make oath and say as follows:

1. That we have filed on behalf of ourselves, and by way of Power of Attorney dated the 5th December 2017 on behalf of Coraline Newton AND the 5th December 2017 on behalf of Patricia Smith, Lorraine Arthur, Deyanne C. Duncombe, Hazel Pinder, Delores Edwards, Bunnicea Rolle and Glenard Holmes, an Adverse Claim herein.
2. That we verily believe that we are entitled to an undivided one-third (1/3) interest in the land the subject-matter of this action and described therein as:

"ALL THAT piece parcel or lot of land situate in the Western District of the Island of New Providence in the Commonwealth of The Bahamas and being portions of Allotments Numbers Four (4) and Six (6) [mislabelled Five (5) of Gambier such portions respectively being 2.493 acres and 4.227 acres."
3. That the statements contained herein are true and correct to the best of our knowledge, information and belief.

[6.] The relevant portion of the abstract filed by the Adverse Claimants were as follows:

<p>1936 6th December</p> <p style="text-align: right;">Note:</p>	<p>7.</p>	<p>On this date Maria Kenny married Cecil A. Kenny and they had nine (9) children; namely:</p> <ol style="list-style-type: none"> 1) Hazel Mae Kenny Pinder born 8th March 1937; 2) Coraline Kenny Newton born 23rd September 1941; 3) Patricia Kenny Smith born 27th March 1944; 4) Delores Kenny Edwards born 31st December 1946; 5) Loraine Kenny Arthur born 20th June 1950; 6) Annette Maria Kenny born 18th August 1953; 7) Julie Elaine Kenny born 30th March 1955; 8) Cheryl Ann Kenny born 15th October 1956; and 9) Diane C. Kenny born 13th August 1959. <p>A certified copy of the marriage certificate is produced.</p>
<p>1949 5th December</p>	<p>8.</p>	<p>On this date Florence Mitchell made her Last Will and Testament wherein after appointing Henry Alexander Wright her Executor, she made the following bequest:</p> <p><i>"I devise and bequeath all Real and Personal Estate possessed by me or to which I may be entitled to at my death to the said Henry Alexander Wright, my son Leon Theophilus Wright and my daughter Marie</i></p>

		<i>Kenny in equal shares as tenants in common absolutely and in fee simple."</i>
1982 30 th November	9.	On this date Florence Mitchell died without revoking her Last Will abstracted at 8 herein.
1992 18 th October	10.	On this date Probate of the Will of Florence Mitchell was granted to the Executor therein named by the Supreme Court of the Commonwealth of The Bahamas in Probate Action No. 443 of 1991. Note: A certified copy of this Grant is produced.
1992 18 th March	11.	On this date the Executor Assented to the devise abstracted at 8 herein. Note: This document is recorded in the Registry of Records in Vol 5788 at pages 39 to 41.
1995 30 th March	12.	On this day Maria Kenny died intestate survived by her husband, her personal representative, and their nine (9) children abstracted at para 7 herein. (i) A certified copy of the death certificate is produced. (ii) Following the death of Maria Kenny, Cecil Kenny and his children, abstracted at para 7 herein, continued in possession of the properties the subject of this action.
2002 July	13.	On this date Cecil Alfred Kenny made his Last Will and Testament wherein after appointing Pastor V.G. Clarke and Ross Davis his Executors and Trustees, he made the following bequests: <i>"I hereby give devise and bequeath all of my real estate and personal property wherever situated and any and or all interest which I may have thereon (a description of which is contained in the schedule below) to my children namely: The persons abstracted at 7 above</i> <i>The properties include; inter alia,</i> <i>All Those pieces parcels or lots of land situate in,</i> (i) Centerville; (ii) Market Street; (iii) Adelaide Road; (iv) Lily of the Valley Corner; and (v) Gambier

2004 3 rd December	14.	On this date application was made to the Supreme Court of the Commonwealth of The Bahamas by the husband of Maria Kenny, Cecil A. Kenny for the administration of the Estate of Maria Kenny, deceased.
Note:	15.	On this date Letters of Administration of the Estate of Maria Kenny was granted to her husband Cecil Kenny by the Supreme Court of The Bahamas on its Probate Side in Action No. 131 of 2005. A certified copy of this Grant is produced.

[7.] The Adverse Claimants, and the others for whom they claim, are the children of Maria Kenney. Maria Kenney is said to have been the sister of Henry Wright and was seized of the identical interest which was left to Wright by their mother Florence Mitchell.

[8.] There was no objections to the terms of the Adverse Claim until the Petitioner's Summons dated 10 August 2021, some 3½ years after the entry of the Adverse Claim.

The Petitioner's Re-Amended Summons seeks the following:

1. Striking out the Adverse Claim or purported Adverse Claim of the Adverse Claimants or purported Adverse Claimants herein, namely Annette Kenny and Cheryl A. Kenny and the other persons listed in or under sub-paragraph (ii) below and in the Adverse Claim filed herein on the 11th day of December, 2017, and declaring that any claim of such Claimants or purported Claimants are barred, for the following reason/s:

i) There has been no adverse claim filed, by or on behalf of the persons mentioned in the Adverse Claim as acting by Power of attorney (sic) as the power of attorney was of no effect, pursuant to or consistent with the mandatory provisions of Section 7(2) of the Quieting Titles Act, 1959, and in particular prior to time limited for filing the same as is required under such provisions and as was allowed by the Court when application was made for the persons named in the said Adverse Claim or purported Adverse Claim to be allowed to file adverse claim/s on their behalf or no adverse claim was filed by them at all.

ii) There is no basis and or none has been filed in these proceedings in support of the claim to be the agent/s or attorney/s of or for the following persons in respect of any adverse claim in these proceedings and the Adverse Claim or purported Adverse Claim does not claim any interest on behalf of such following persons; and they have not filed any claim or claims pursuant to the Court's said order:

- a) Coraline Newton,
- b) Patricia Smith,
-
- d) Lorraine Arthur,
- e) Diane C. Duncombe,
- f) Hazel Pinder,
- g) Delores Edwards,
- h) Bunnicea Rolle, and
- i) Glenard Holmes

2. Also striking out the said Adverse Claimants or purported Adverse Claimants and or any representative they may have in these proceedings on the ground they:

i) have no interest in or title to or have failed to show that they have interest in or title to the land the subject-matter of this action or any part of such land; and

ii) are not vested of any interest in the land the subject-matter of this action or any part of it.

3. Striking out the present attorney or attorneys or purported attorney or attorneys on the ground that the powers of attorney they rely on for her or their appointment/s as such are and have always been of no effect and null and void.

4. That the costs of this application be the costs of the Petitioner to be taxed and paid if not agreed.

[9.] The Petitioner's application is supported by the affidavits of Robert Ian Mitchell and Floyd Ambrister. Learned Counsel Carlton Martin, for the Petitioner, crafts the issue as follows:

"the principal issue in this case is whether the Adverse Claimants have any claim at all in these proceedings; a claim or a right with respect to property is based on firstly possessory title and/or secondly documentary title."

[10.] The Petitioner objects to the Adverse Claim on the ground, it says, that the Adverse Claims were not filed within the time prescribed. The essence of the complaint is an objection to the description of the parties as set out in the Adverse Claim. At paragraph 11 of the submissions the Petitioner says:

11. The Petitioner relies on the principles set out in the Bahamas Court of Appeal case of **True Blue Co. Ltd. v. Moss and others** (No. 3/1968). It was held in this case as follows:

"..... The language of Section 7 of the Quieting Titles Act 1959 is plain and is intended to be mandatory so that if an adverse claim is not filed within the time fixed by the notice, there was an absolute bar to the claim in proceedings under the Quieting Titles Act 1959. No rule, or even the

inherent jurisdiction of the Court, can be prayed in aid to extend the time fixed by the notice to enable the claim to be revived.”

[11.] I accept the Adverse Claimants’ submissions that the case of **True Blue** is clearly distinguishable as:

- (1) The Court granted leave to the Adverse Claimants to file their Adverse Claim. The leave was granted on an application pursuant to section 7 of the QTA. Any objection to the filing of a claim on behalf of the Adverse Claimant ought to have been made at the time of the application.
- (2) The court granted leave to the Adverse Claimants. Having granted leave the Petitioner ought to have challenged the decision but failed to do so until some 3 ½ years later.
- (3) **True Blue** is not an authority for the proposition that Adverse Claims filed out of time are barred in every circumstance. Rather, the effect of **True Blue** is that where an Adverse Claimant fails to comply with the directions of the Court in a Section 7 Notice, as to the filing and service of its adverse claim, the adverse claim is barred.
- (4) The Adverse Claimants applied on 28 November 2017 for leave to file an Adverse Claim. The court heard the application and ordered (under its powers set out in section 7) that notice to be served on the proposed Adverse Claimants. A date was fixed for the filing of the Adverse Claim. The time fixed in the Notice was strictly complied with. The Adverse Claim and the Affidavit in Support and Abstract of Title were filed on 11 December 2017. The Petitioner’s argument that the Adverse Claim was filed out of time is erroneous.

[12.] The second complaint of the Petitioner challenges the efficacy or validity of the powers of attorneys given to pursue the Adverse Claim on behalf of the several donor siblings. I did not find favor in this technical complaint. I remind myself that these proceedings are investigatory in nature. Section 26 of the QTA provides:

26. No petition, order, affidavit, certificate, recording or other proceedings under this Act shall be invalid by reason of any informality or technical irregularity therein, or of any mistake not affecting the substantial justice of the proceedings.

These matters can be raised and considered at trial and if meritorious, will be borne out when the evidence is being led. The Petitioner is not saying that there is no potential claim by the persons said to be the donors of the power but that there is a defect in the powers of attorney or that the relevant powers of attorneys have not been produced. In fact, that the Kenny family is interested or may have an interest in the property is reflected in the Petitioner's original version of the Plan which described the property as "*Portions of the Kenny Property*".

[13.] The Petitioner also complains that there is an issue with misidentifying the property as Allotments 4 and 5 of Gambier, in the Schedule to the Powers of Attorneys. This is clearly a typographical error, as accepted by the Adverse Claimants. The affidavit filed in support of the Adverse Claim on 11 December 2017 speaks to the "mislabeling" of the property. The Petitioner argues that the Schedule to the Power gave no authority to defend Lot #6 as Lot #5 is mentioned in the Schedule. I accept the Adverse Claimants submission that the Petitioner is not blameless in the reference to Lot #5. The Petitioner itself has likely caused by the mis-description in the heading of the Petition which it describes as "...being portions of Allotments Numbers Four (4) and Five (5) of Gambier" and also in the heading of the action in the Plan filed on the 16 October 2013 (which repeats the mis-description).

[14.] The third argument raised by the Petitioner challenges the validity of the Letters of Administration granted to Cecil Kenny. The Petitioner argues that the estate of Maria Kenny was not administered as Cecil Kenny died on 17 April 2005 prior to the issuance of the administration (in the estate of Marie Kenny) on the 29 June 2005. This argument, another arid technical point, if proven, merely challenges the formal legal interest.

[15.] On the face of the Grant of the Letters of Administration, a Grant was made out to Cecil Kenny. The Adverse Claimants rely on the presumption of regularity. In any event, the Adverse Claimants, who are essentially the children of Maria Kenny, assert a beneficial interest in the property through her estate.

[16.] I am not satisfied that the Adverse Claim could be described as an abuse of the process of the Court, having regard to the principles outlined in the Court of Appeal decision in ***West Island Properties v. Sabre Investment Limited and others - [2012] 3 BHS J. No. 57***. Allen P., writing for the Court in ***West Island Properties***, stated at paragraph 30 as follows:

[30] Concerning Order 18; rule 19(1)(d) R.S.C., both Bramwell B. and Blackburn J. in the cases of *Castro v. Murray* Law Rep. 10 Ex. 213;218 and *Dawkins v. Prince Edward of Saxe-Weimar* 1Q. B.D. 499;502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in *Dawkins v. Prince Edward of Saxe-Weimar* indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.

The category of cases, which may be described as an abuse of process, is reserved for cases which are groundless and an abuse of the process of the Court. It must also be a plain and obvious case. It is my considered view that as these are investigatory proceedings, the complaints raised by the Petitioner, if accurate, are either technical in nature or not such as to exclude the Adverse Claimants from making their claim, which still has to be proven at trial. There will be no saving of judicial time by striking them out. I accept the submissions of the Adverse Claimants that Section 8 of the QTA is wide enough to permit any evidence to be admitted even if the evidence fall short of what is admissible in other civil proceedings.

[17.] In all the circumstances I dismissed the Petitioner's Summons.

Dated this 4th day of March 2022



Ian R. Winder

Justice