

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
BETWEEN

2020
CLE/gen/No00705

WADE THOMPSON
AND
LORRAINE THOMPSON

Plaintiffs

AND

ELVIS COOPER
AND
FREDA COOPER

Defendants

Before: The Hon. Madam Justice G. Diane Stewart
Appearances: Alfred V. Gray for the Plaintiffs
LeShanda Brown for the Defendants

Judgment Date: February 20th, 2023

JUDGMENT

Background Facts

1. By Originating Summons filed 4th August 2020, the Plaintiffs Wade Thompson and Lorraine Thompson seek:-
 - i. An injunction to restrain the Defendants, Freda Cooper and Elvis Cooper, whether by themselves, their servants, agent or otherwise howsoever from entering, crossing over, encroaching upon or otherwise interfering in any manner with the Plaintiffs' enjoyment or easement over certain parcels of land being two lots adjacent land located at North Palmetto Point, Eleuthera;
 - ii. Damages for trespass; and
 - iii. Mesne profits

2. The Plaintiffs claim that they are the owners of a parcel of land measuring 154 x 80 feet which was purchased by them by conveyance dated 31st March 2005 from Ethelyn Thompson. Ethelyn Thompson had acquired the property from Mildred Thompson, 40 years ago, "**The Property**".
3. The property in dispute is a portion of the 154 x 80 ft. Property and delineated in a preliminary survey plan dated 7th August, 2020 prepared by Mr. Roderick Wood on behalf of the Plaintiffs, measuring 25 ft. along the public road and 80 ft. along the western boundary of the Plaintiffs property or approximately 2,000 sq. ft., "**The Disputed Portion**".
4. Although this plan states that the public road was Dry Hill Road, the court is satisfied that the road in question is actually Coopers Lane which runs east west.
5. The Property is currently mortgaged by the Plaintiffs to the Royal Bank of Canada.
6. After the Plaintiffs purchased the Property they claim that they allowed the Defendants to continue using the disputed portion as an access road. However, after some time the Defendants began depositing loads of quarry on the access road as an attempt to take possession of the property.
7. The Defendants have maintained that despite the Plaintiffs claim, they are not trespassers but are the legal and beneficial owners of the property. By virtue of both documentary and/possessory title derived from the late C. Vernon Cooper, the Defendants claim to be the owners of the property, having been in open and uninterrupted possession for over 30 years and have in fact allowed others in the community to use the same, therefore the Plaintiff's claim is without merit.
8. Mr. Elvis Cooper claims that he purchased his property in 1975 from his father Mr. C. Vernon Cooper which is adjacent to The Property and he has been in possession and occupation of The Disputed Portion first by virtue of his father and continuing thereafter his fathers' death. The Defendants maintained that they had been using the property as an access road under the permission of the now deceased Mr. Cooper, who owned this property.
9. They further assert that even if the Plaintiffs have a documentary title to The Property, they have been in actual continuous uninterrupted possession of the Disputed Portion which dispossesses the Plaintiffs' alleged title as they have occupied and possessed the Disputed Portion in excess of the twelve year limitation period.
10. The Plaintiffs' filed an Ex Parte Summons for an interim injunction on 4th August 2020, for an Order that the Defendants be restrained whether by themselves, their servants, agents or otherwise howsoever from entering upon, crossing over or otherwise entering upon the land belonging to the Plaintiffs being specifically all those pieces, parcels of lots of land situated at North Palmetto Point Eleuthera including The Disputed Portion.
11. The Plaintiffs' claim that as owners of the Property in Palmetto Point, the Defendants have wrongfully and willfully entered on The Disputed Portion as trespassers without their knowledge and permission. The Defendants' have had truckloads of quarry and debris deposited on the Disputed Portion as if they intended to build a structure. The Defendants' have also chased away the Plaintiffs' surveyor and gardener from The Disputed Portion.

12. By Interim Order dated 5th January 2021, it was ordered inter alia that:-

- i. Both the Plaintiffs and the Defendants be and are hereby restrained from any activities on the Disputed Portion, until the completion of hearing of the action;

Plaintiffs' Evidence

13. Both Plaintiffs gave oral evidence in addition to their affidavits. They averred that they purchased a parcel of land from Ethelyn Thompson which measured 154x80 ft., upon which is situate a grocery store owned and operated by them.
14. They maintained that Ms. Ethelyn Thompson inherited the property from her mother Ms. Mildred Thompson. They do not know where Ms. Mildred Thompson got the property from.
15. The Property was mortgaged to the bank and the deeds were provided to the bank without a survey or a plan attached to them. The conveyance was dated 5th March 2005.
16. The Plaintiffs do not accept that there was an error in the description of the property in the absence of a plan.
17. The 2nd named Plaintiff is unable to ascertain exactly how much of her property the Defendants were encroaching on.
18. She accepted that when she moved there, she met the Coopers living next door. She maintained that the Defendants used this Disputed Portion as a short cut to get to their house and that they had been using this Disputed Portion for one to two years.
19. She denied that the Defendants had been using The Property in excess of 30 years as she said she and her husband had not been there for 30 years.
20. She never gave them a letter to cease and desist using the disputed portion, nor did she erect any signs or put up any fences. She stated that they never asked her for permission to use the Property. She allowed them because they were neighbors.
21. The 1st Plaintiff confirmed that the Defendants dumped quarry on the property as if they wanted to construct a building, which he asked them to remove but they refused.
22. Mr. Rodrick Wood in his evidence stated that on the 6th August 2020, after completing his survey, he discovered that the Defendants had always known where the boundary line between their property and the parcel of land belonging to the Plaintiffs was and that the Defendants were knowingly using a portion of the Plaintiffs land as a driveway and parking for themselves and their guests, despite the objection of the Plaintiffs.
23. The portion of the Plaintiffs land being used by the Defendants measured 25ft along the public road called 'Dry Hill Road' and 80ft along the boundary between the Defendants land and the Plaintiffs land. He maintained that he does not know where Coopers Lane is. He could not say whether Dry Hill Road is the same as Coopers Lane.

24. In conducting his survey he spoke to the neighbors. At the time there were cars parked on the disputed portion.
25. Ms. Laura Culmer told him that she accessed her home by walking over the disputed portion.
26. He accepted that if there was an error in the conveyance they would conduct independent research but he did not focus on the root of title when preparing the survey. He is not an expert on the title requirements in land matters.
27. He also accepted that there was no fence or signs on the disputed portion.
28. The survey was prepared by referencing the 2005 conveyance. Upon his physical inspection of the property he found a boundary line which is delineated in black on his plan and had been there since the 1950s.
29. He placed two survey markers on the Disputed Portion and he also found historical evidence on the property.
30. His plan was not recorded even though it had been prepared over a year before the trial.

Defendants' Evidence

31. The Defendant, Elvis Cooper stated that he has lived on his property his entire life having been born on the property in 1951. The Plaintiffs built the building which comprises their store called Lakias on their property and had been there for several years.
32. The Plaintiffs trace their root of title to the Property to Thomas E. Culmer. Under the Will of Thomas E. Culmer only a piece of land measuring 50 x 100 was willed to his daughter Mildred Culmer Thompson on Cooper's Lane. Mr. Culmer also left his daughter 12 acres of property at Dry Hill Road which is a different property from Coopers Lane. This was the only property willed by Mr. Culmer through Coopers Lane.
33. The Property owned by the Plaintiff was originally owned by one Mr. Jerry Thompson who was the brother of Mildred Thompson.
34. He has papers for his property.
35. There is a vacant piece of land between the Jerry Thompson parcel and his property.
36. He maintained that the Disputed Portion is 8766 square ft.
37. He admitted to putting quarry on the Disputed Portion as he had been using it to access his home.
38. The quarry is still on the land.

39. The road was there for 50 years because it was it was how Mr. Johnny Culmer accessed his house. There was no other way.
40. He had placed quarry there previously even when the Plaintiff did not own the property after rain to protect the access.
41. He had been on this property longer than 1975.
42. Mrs. Freda Cooper stated that the Plaintiffs opened their store on Coopers Lane in or about 2005 whereas Mr. Elvis Cooper's family had resided on Coopers Lane for over 69 years. There are three Cooper families as well as the Thompsons whose properties border on Coopers Lane. The road also provides access to the Cooper Estate.
43. The surveyor, Mr. Woods admitted to her that he was related to Ms. Thompson, the Plaintiff.
44. She maintained that the Plaintiffs' neither purchased nor acquired the Disputed Portion and that the surveyor hired by the Plaintiff put down boundary stakes where they had never been before. She denied that the Plaintiffs' surveyor had met the Defendants' surveyor to discuss the property boundaries.
45. The Disputed Portion is also used by delivery and utility workers such as gas companies and water delivery to access the properties in the back.
46. Under the will of Thomas Culmer, Mildred Thompson only inherited a 50x100 piece of property from her father.
47. The Property is not on Dry Hill Road, as Dry Hill Road is not in the area, but off the Queens Highway and the exit to that road is at the back of a mechanic shop. You can only access Dry Hill Road from the highway and not Coopers Lane.
48. When she married Mr. Cooper, she met him with the disputed portion. They have been using the property as a driveway/access road to get to the back of their home.
49. Mr. Hank Johnson averred that he has lived in Palmetto Point all his life. He knew that the late Vernon Cooper, the father of the Plaintiff owned the area known as the Coopers Track. The portion of land that the Coopers now occupy was in the Cooper family. The southern boundary of this property is on Coopers Lane. The Cooper family have always been on the Disputed Portion for all of his life and he is 57 years old.
50. The southern boundary is not Dry Hill Road.
51. The land was conveyed from Vernon Cooper to his son.
52. Ms. Iva Cooper was unable to say how long the Thompsons had their property. She can only attest to seeing the Coopers in occupation of the disputed property and not the Thompsons.
53. Ms. Laura Culmer is the granddaughter of Thomas Culmer and the niece of Mildred Culmer Thompson. She believed Ms. Thompson died in 1987. She had two children,

Jeremiah and Ethelyn Thompson.

54. She has never seen the Thompsons documents for the land in issue nor has she spoken to the Thompsons about them.
55. She had been told by her father from a little child that the Disputed Portion in issue was Cooper property.
56. Her grandfather left a will and gave Mildred a piece of property 50x100 which was the only piece of property left to her on Coopers Lane in his will. She willed it to Jeremiah and after he died she passed it to Ethelyn, her daughter.
57. She never saw the Thompsons place anything on the disputed portion.
58. Mr. Rory Mitchell's property is at the back of the Thompsons store. Mrs. Thompson store is on Cooper Lane. He too had never seen the Thompsons documents but had seen the Coopers papers.
59. He has seen the Coopers utilizing the grass on the disputed property.
60. Mr. Ricardo Fernander is a land surveyor technician. He averred that the Disputed Portion does not belong to the Plaintiffs. It is also his observation that the Defendants and others use the Disputed Portion as an access roadway to their residence and for parking purposes.
61. He admits that he is not a licensed surveyor. He was not present when Mr. Wood conducted his survey and neither was Mr. Wood present when he carried out his work.
62. In carrying out his work which led to the preparation of a draft plan which was not completed, he obtained his information from the ground and from speaking to the Coopers and the adjacent land owners. He admitted to there being errors in the square footage on the draft plan but not the actual measurements.
63. Ms. Sharon Pinder is the niece of Mildred Thompson and the first cousin of Ethelyn Thompson who is now about 84 years old.
64. The road in question goes through the Coopers Property. Her father had always told her that the land was Vernon Coopers' land. The Coopers live to the side of the road. She has also used the disputed property to access her property.

Plaintiffs' Submissions

65. The Plaintiffs submit that they are owners of the Disputed Portion by virtue of their purchase of the Property by conveyance dated 31st March 2005 from Ethelyn Thompson.
66. Ethelyn Thompson purchased the land for Mildred Thompson in 1981. The land is presently mortgaged.

67. After purchasing the land, they allowed the Defendants to continue to use on the Disputed Portion as a shortcut to their property.
68. They rely on the survey conducted by Mr. Wood to support their claim and establish the measurements of the disputed portion.
69. The Defendants have provided no evidence to show that they are entitled to a right of way over the Disputed Portion or that they purchased it or hold any title of ownership over it.
70. They rely on **Joann Moss v Mitzi Jones and Edmund Jones SCCivApp & CAIS No. 225 of 2014**, where Allen P stated:-

“The learned judge’s finding that the respondents were in possession with approval of the owner of the property is totally inconsistent with her finding that the respondents had the requisite animus to possess the property adverse to the owner, and that they did in fact do so for upwards of 20 years. That finding cannot stand, in our view.

Moreover, the learned judge proceeded to extinguish the title of the appellant in circumstances in which there was a mortgage to a bank without directing that the bank be made a party to the proceedings and without hearing the bank on that issue. She extinguished both the title of the appellant and that of the bank without having heard all of the interested parties.

Defendants’ Submissions

71. The Defendants submit that they have openly maintained, used and cultivated the Disputed Portion for their personal use without charge interference or encumbrance from anyone or any person for over thirty years following the possession and ownership of C. Vernon Cooper.
72. The Plaintiffs claim to have purchased the Property in 2005 from Ethlyn Thompson who had acquired the property from Mildred Culmer. The Property according to the Plaintiffs measured 154 x 80 ft. However, the Defendants claim that the Plaintiffs measurements are incorrect as they claim that the root of title they rely on is from Mr. Thomas Culmer who willed only 50 x 100 ft to his daughter Mildred Culmer and as this was the only property willed to Mildred Culmer on Coopers Lane, the measurements could not be accurate or correct in the Conveyance. Ms. Ethelyn Thompson did not own 154 x 80 ft of land to sell to the Plaintiffs. She could only sell 50 x 100 feet.
73. The family of the late Vernon Cooper occupied the property for in excess of sixty years and he later conveyed property to the 1st named Defendant who continued the possession of the property previously occupied by his father.
74. There has been no possession of the Disputed Portion by the Plaintiffs for the past 30 years.
75. The Plaintiffs failed to call Ms. Ethelyn Thompson as a witness who was available to explain how the land conveyed by to her by her mother was larger than what was willed to her mother from her father.

76. Mrs. Thompson's evidence was full of inconsistencies including failing to acknowledge the existence of the home of Mr. Mitchell immediately behind her store, also describing that she had been on the Property forever when it was only for one to two years.
77. The Plaintiffs had paved the parking area of their store but had not made any attempt to pave the Disputed Portion.
78. The Plaintiffs acknowledged that neither of the Defendants or anyone else ever sought permission from them to use the Disputed Portion.
79. The Defendants by chasing persons from the Disputed Portion demonstrated their claim to the land but the Plaintiffs never chased anyone from the land.
80. Mr. Wood as a relative of Mrs. Thompson was biased and therefore his evidence was not objective and was largely self-serving.
81. Mr. Wood had conceded that the lack of a plan attached to the conveyance was significant and contributed to the error in the conveyance. His plan was never recorded, and he did not have any photographs of his findings and accordingly his plan was inaccurate.
82. The averment by Mr. Woods that there was an existing boundary line between the Plaintiffs and Defendants property was untrue. On a physical inspection the only evident path on the Disputed Property was made by usage over time by the Defendants' and their neighbors when using the land as an access way.
83. Section 16(3) of the Limitation Act provides:-
- “(3) No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person...”**
84. The Plaintiffs' originating summons filed on 4th August 2020 is statute barred as the requisite twelve year period dictated in the Limitation Act for bringing an action to recover land has passed. The limitation period would have expired in 2017 without the Plaintiffs asserting any claim to ownership over the Disputed Portion. The Plaintiffs further failed to interrupt the Defendants undisturbed use and actual physical possession of the property.

DECISION

85. In Perry v. Glissold [1907] 1 A.C. 73, Lord McNaughten stated:-
- “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 prescribed by the provisions of the Statue of Limitations applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title.”**
86. In Ocean Estates Ltd v. Pinder, [1969] 2 A.C. 19, p 25:-

“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 nor 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.”

87. The Plaintiffs claim that they are the legal and beneficial owners of the Disputed Portion which they claim is on Dry Hill Road in Palmetto Point Eleuthera. They claim this land measures 25 x 80 feet and is a part of the Property which measures 154 x 80 ft. in total and which was conveyed to them by Ethelyn Thompson in 2005.

88. In that conveyance which did not have a plan attached Ms. Thompson conveyed to them a parcel of land described as:

**“ALL THAT piece parcel or lot of land situate in the Township of North Palmetto Point in the island of Eleuthera one of the Islands of the Commonwealth of The Bahamas having the following boundaries:-
ON THE NORTH by and now or formerly the property of Thomas W. Culmer and running thereon for a distance of One hundred and Fifty four (154) feet
ON THE EAST by land now or formerly the property of Elvis Cooper and running thereon for a distance of Eighty (80') feet.
ON THE SOUTH by a public Road and running thereon for a diatance of One Hundred Fifty four (154') feet
AND ON THE WEST by land now or formerly the property of the Estate of Sybil Carey and running thereon for a distance of Eighty (80') feet**

”

89. In that conveyance Recital A states:

“By virtue of an Indenture of Conveyance dated 11th day of February AD, 1981 made between Mildred Thompson of the one part and Ethelyn Thompson of the other part which Conveyance is lodged for record in the Registry of Records in the city of Nassau in the island of New Providence one of the Islands of the Commonwealth of The Bahamas aforesaid in Volume 3442 at pages 136 to 138, the Vendor herein is seised in fee simple in possession of the hereditaments hereinafter described in the Schedule hereto (hereinafter referred to as “the said hereditaments”) free from encumbrances.”

The Plaintiffs therefore by this conveyance rely on the 1981 conveyance to support their title to the Property.

90. The conveyance from Mildred Thompson to Ethelyn Thompson dated 11th February, 1981 described the property as:-

**“On the north by land the property of Thomas W. Culmer and measuring thereon One hundred and Fifty four (154) feet
ON THE EAST by land the properties of Elvis Cooper and measuring thereon Eighty (80') feet, on the south by a public Road and measuring thereon One Hundred Fifty four (154') feet and on the West by land the property of the late Sybil Carey and measuring thereon Eighty (80) feet.**

The description in this conveyance is the same as the 2005 Conveyance.

91. In support of their claim they also rely on an unrecorded survey plan prepared by Mr. Rodrick Wood to determine the location and the size of the Disputed Portion. They allege that the Defendants are trespassing on the Disputed Portion of the Property that they own and right fully possess.

92. Trespass is the unjustifiable intrusion by one person upon land possessed by another.

93. The tort of trespass was considered in Fairness Limited v. Steven Bain et al SCCivApp No. 30 of 2015 by Allen P:-

“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.”

94. 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.”

95. Possession is comprised of two elements. The first is physical possession and the second is the intention to possess the 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.”

96. The Defendants claim that the Plaintiffs do not have good title to the Disputed Portion because of a serious defect in their title deed and also because they own the same. In light of this allegation the Plaintiffs documentary title must be examined to determine if their title to the property in dispute is good.

97. By **Section 3(4) of the Conveyancing and Law of Property Act (“CLPA”)** the owner of land is only required to prove a title of thirty years and if a Crown grant is involved then it is extended to the year of the Crown Grant:-

“A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter.”

98. The Plaintiffs rely on the conveyance to them from Ethelyn Thompson, which in turn refers to a conveyance to Ethelyn Thompson from Mildred Thompson. There is no Crown Grant referenced in the title or in evidence.

99. In both the 2005 and 1981 conveyances, the property conveyed is 154ft x 80 ft. In the attesting affidavit of in the 2005 Conveyance, the vendor, Ms. Ethelyn Thompson averred that she purchased a parcel of land 60x80 –ft. from Mildred Thompson by conveyance dated 21st September 1967. That conveyance was not produced in evidence, however, the Court obtained a copy and the land conveyed was described as:-

“All that piece parcel of lot of land situated in the said settlement of Palmetto Point North and bounded on the North by land owned by Sybil Carey and running thereon sixty (60) feet, on the South by land owned by Sybil Carey and running thereon sixty (60) feet, on the East by land owned by Thomas E. Culmer and running thereon eighty (80) feet, on the West by a Public Road and running thereon eighty (80) feet. “

This conveyance was two years after the death of Mildred Thompson’s father and after she had inherited a 50 x 100 feet parcel of land on Coopers Lane.

100. In 1967 Ms. Ethelyn Ferguson acquired 60x80 ft. in N. Palmetto Point from her mother. There is no plan attached to this conveyance either so it cannot be confirmed by documentary evidence whether this is the same piece of land that is the subject of this

action although it is referred to in the affidavit attached to the 2005 Conveyance.

101. In Recital A of the 2005 Conveyance, Ms. Ethelyn Thompson refers to an 11th February A.D., 1981 conveyance as the source of her title and not the 1967 conveyance, but in her affidavit she refers to the 1967 conveyance.

102. None of the aforementioned conveyances have plans attached. The very source of the Plaintiffs title refer to two different documents with different land descriptions as forming their root of title. One refers to a 60 x 80 feet conveyance and the other a 154 x 80 feet conveyance.

103. In trial, the Plaintiffs relied on the will of Mr. Thomas Culmer who devised a 50 x 100 ft land to his daughter Mildred. By a Grant of Letters of Administration issued in April of 1967 this 50 x 100 is given to Ms. Mildred Thompson. I am satisfied that there is no evidence that Ms. Mildred Thompson owned any other Property on Coopers Lane other than the 50 x 100 feet willed to her. The 1967 Conveyance based on its description relates to a different piece of property bordering Coopers Drive and not Coopers Lane. There is only one road in the 1967 description and it is on the west of the property. It could not therefore be the Property.

104. The court conducted a physical inspection of the Property and I am satisfied that the Property inclusive of the Disputed Portion is on Coopers Lane and that Dry Hill Road was in another area. The police officers who attended my inspection confirmed that the street where the Property abutted was Coopers Lane and I accept it as so.

105. There are discrepancies in the title deed relied on by the Plaintiffs and the lack of a plan is significant as it would have assisted in providing an exact description and location.

106. I must also determine whether there is a good root of title as required by Section 3(4) of the CLPA. The only documents referred to are the 1981 conveyance which is not a good root and the 1967 conveyance which refers to another piece of land.

107. **In the matter of the Quieting Titles Act, 1959; And In the matter of the Petition of Eleuthera Land Company Limited, a company incorporated and existing under the laws of the Commonwealth of The Bahamas; And In the matter of a tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera [2019] 1 BHS J. No. 36, Charles J considered what was a good root of title:-**

"85 In addition, to establish a good root of title, a document must contain a recognisable description of the property to which it relates. In *Bannerman Town, Millars and John Millars Eleuthera Association and others v Eleuthera Properties Limited* SCCivApp Nos. 175, 164 and 151 of 2014, Allen P. explained the requirements of a good root of title as follows:

"Root of title is not defined by statute. However In *Collie v. The Prime Minister* [2012] 1 BHS J. No. 18, the court accepted the definition from *Williams on Vendor and Purchaser* at paragraph 23:

***"Williams on Vendor and Purchaser 4th Edition provides a good definition of what constitutes a good root of title. The authors state at page 24: "must be an instrument of disposition dealing with or proving on the face of it without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title."*[Emphasis added]**

86 Fundamentally, this is the same definition accepted by the parties in this action taken from Megarry and Wade: The Law of Real Property 4th Ed. at page 580 which describes a good root of title as:

"...a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title."

87 In order to establish a good root of title a document must contain a recognisable description of the property to which it relates."

108. The 2005 Conveyance does not specify exactly where the property is located. The survey which the Plaintiffs relied on to ascertain the location refers to the property as being on Dry Hill Road is not proof. The 1981 Conveyance does not meet the 30 year requirement as set out in the CLPA. The 1967 Conveyance relates to a different property.

109. The Latin phrase "Nemo dat quod non habet" which means "no one gives what they do not have." is significant and applicable here. I must determine whether Ethelyn Thompson owned all of the property which she conveyed to the Coopers.

110. If Ms. Thompson only inherited 50x100 from her father of the land belonging to him in the area in question and in the absence of a conveyance which satisfies the requirements of a good root of title for more land in excess of the 50 x 100, she cannot convey more than 50x100 of the land to the Plaintiffs. The 1967 conveyance cannot assist her. When the title is disputed the person relying on the deed must establish a good root of title.

111. I am cognisant of that fact and found it strange that Ms. Ethelyn Thompson was not called to explain the discrepancies in the title deeds and I must deduce that there had to be a reason why she was not called. Her explanation would have clarified the inconsistencies but they chose not to do this.

112. The Defendants claim that they own the disputed land by virtue of a documentary title and also a possessory one.

113. The Conveyance dated 8th May, 1973 between C. Vernon Cooper and his son Elvis Cooper describes the property acquired by him from his father:-

"NORTH by land the properties of John Culmer and Eva Culmer and running thereon Sixty-four (64) feet on the EAST by land the property of C. Vernon Cooper and running thereon One Hundred and twenty-two (122) Feet on the SOUTH by a

Public Road and running thereon Ninety (90) Feet and on the WEST by land the property of Jerry Thompson and running thereon One Hundred and thirteen (113) feet.”

Based on this description the Disputed Portion is included in Mr. Coopers Conveyance. Further it refers to property bounded in the west by property of Jerry Thompson. Ms. Laura Culmer referred to Jeremiah Thompson being willed the 50 x 100 by his mother Mildred and upon his death it was given to Ethelyn. Again this only refers to the 50 x 100 ft. parcel and if Mr. Cooper's property is bounded on the West by Mr. Jerry Thompson's property it must include the Disputed Portion.

114. When referring to the draft plan of Ricardo Fernander, which the Defendants rely on, the Disputed Portion belonged to Elvis Cooper, as included in the description in the 1973 Conveyance.
115. Based on the 1973 Conveyance, which is more than 30 years old, the Defendants do have documentary title to the Disputed Portion which I accept. They however also claim a possessory title to the same.
116. The Plaintiffs came into legal possession in 2005, they would have had until 2017 to make a possessory claim to the Disputed Portion of the Property. They acknowledged in evidence that they knew the Defendants were using the property and that the Defendants never sought their permission to use it.
117. Mr. Elvis Cooper maintained that he along with other family members utilized the Disputed Portion all of his life. As the son of Vernon Cooper, the Disputed Portion was always used as an access road to reach the back of the homes situated to the north of Coopers Tract.
118. In the **Petition of Eleuthera Land Company Limited (supra)**, Charles J considered the intention to possess:-

“Intention to possess

125 Slade J. in Powell defines the “*animus possidendi*” in this way:

“(4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as “the intention of excluding the owner as well as other people.” This concept is to some extent an artificial one, because in the ordinary case, the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.” [Emphasis added]”

119. I also addressed this in the Petition of Wilfred Butler Jr. et al in which I referred to its Privy Council. Decision of **Bannerman Town, Millars and John Millars Eleuthera Association (Appellant) v Eleuthera Properties Ltd. (Respondent) (Bahamas) [2018] UKPC 27** where the Board 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.”

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 coowners 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.

52. Possession of land may be exercised jointly, and vicariously. Where a number of persons are proved to have occupation and use of land together, and the question arises whether they had joint possession of the whole of the land, this will usually turn upon the agreement, arrangement or shared common intention (if any) between them: see eg *Bigden v London Borough of Lambeth* (2001) 33 HLR 43; *Brown v Faulkner* [2003] NICA 5(2); *Churcher v Martin* (1889) 42 ChD 312 and (in Canada) *Afton Band of Indians v Attorney General of Nova Scotia* (1978) 85 DLR (3d) 454.

54. Possession may be vicarious in the sense that A may occupy land on behalf of B, such that B rather than A is in possession of it: see eg *Bligh v Martin* [1968] 1 WLR 804. Vicarious possession may arise where, for example, A is the licensee, agent or agricultural contractor of B. Again, this will depend upon the existence of some agreement or arrangement between them.

The Plaintiffs did not have the intention to possess the land in dispute until shortly before the commencement of this action. There is no evidence of any shared common intention with the Defendants to possess the land together. The Plaintiffs willingly accepted that the property was being used by others and only when the Defendants deposited quarry on the land did they object. This depositing of the quarry by the Defendants reflected an intention to possess the land by them. They claimed that they had done this on previous occasions after rainy periods to prevent the path being muddy and difficult to access. It also reflected that they considered the Disputed Portion as theirs to protect and also maintain. They did not seek permission to place the quarry there.

120. The evidence of the other Defendant witnesses supported the possessory claim of the Defendants. Under cross –examination, they were only challenged on the documentary title of the Plaintiffs and not to the fact of the possession by the Defendants. This possession of the Disputed Portion of the Property by the Defendants was accepted by all.

121. It is a common concept within this jurisdiction, that a person's documentary title is not absolute. Accordingly, if another person can prove a better title whether documentary or possessory, the Court will make a finding in favor of the better title. Barnett CJ (as he then was) also came to this conclusion in **In the Matter of the Quieting Titles Act, 1959; In the Matter of the Petition of Shameka L. Morley** [2010] 3 BHS J No. 82 where he stated:

“23 It is common ground that the documentary title to the Lot was vested in Budget Properties Limited. The Petitioner's own Abstract of Title confirms this fact. Budget Properties held its interest in the Lot on trust for Mrs. Spriggs, she having paid for the Lot. As owner of the documentary title, Mrs. Spriggs is deemed to be in possession of the Lot #7.

24 In Powell v McFarlane [1977] 38 P&CR 452 Slade J said:

In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

This decision was expressly approved by the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419.

25 Mrs. Spriggs can only be disentitled by someone who had been in adverse possession for 12 or more years. Such possession must be exclusive and continuous. Prior to the presentation of this Petition, neither the Petitioner nor Mr. Franklyn Farrington had been in such adverse possession.”

122. The Plaintiffs, if they had by their evidence shown an intention to possess the land which they say that they had purchased, there would and should have been acts of possession prior to 2020 when they sought an injunction to prevent the Defendants from depositing quarry on the land. Both parties claim to be the owner based on

conveyances. The court must however determine who has a better title by examining the possession of the Disputed Property.

123. The Defendants never acknowledged the Plaintiffs title, never sought permission because they claimed they possessed the land and did not need permission. The failure by the Plaintiffs to prevent the use of the land by the Defendants severely hurt their claim to possession of the land arising from either a documentary or possessory title.
124. Applying for an injunction in 2020 is outside of the 12 year limitation period and therefore any claim to possession of the Disputed Portion of the property land after 2017 would be barred by the Limitation Act.
125. After considering all of the evidence and the submission of the parties, and after a physical inspection of the property in dispute; I find that the Plaintiffs do not have factual or physical possession of the Disputed Portion of the Property, nor did they prove an intention to exclusively possess the same in order to oust the actual possession by the Defendants.
126. I also find that the Defendants had factual and physical possession of the Disputed Portion as well as clearly evidencing an intention to possess the same for more than the requisite period as set out in the Limitation Act.
125. In reaching my conclusion I have taken into account the evidence of Laura Culmer which showed that the Defendants and their predecessors have been utilizing the Disputed Portion of the Property prior to the Plaintiffs even acquiring the property.
126. As I see it, the Plaintiffs' trespass case against the Defendants cannot possibly succeed, because the evidence led confirmed the use of the Disputed Portion as an access road long before the Plaintiffs even acquired the property. Also, the Conveyance of the Plaintiffs clearly reflects an additional piece of property in excess of the 50 x 100 inherited and for which there is no root of title. The Plaintiffs cannot claim ownership or possession of the Property outside of the 50 x 100 ft. which was previously owned by Mildred Culmer. *Nemo dat quod non habet*.
127. I readily accept the title of the Defendants. I am satisfied that the Defendants' documentary and possessory title to the property in dispute ousts any claim of the Plaintiffs. The documentary title of the Plaintiffs is defective. I accept the evidence of the Defendants that the Disputed Portion of land, which is visible and accessible has always been used by the Defendants and their predecessors as *inter alia* an access roadway.

CONCLUSION

128. The Plaintiffs Originating Summons is dismissed.
129. The injunction against the Defendants is discharged. The Plaintiffs, their servants and or agents are hereby enjoined from interfering with and or obstructing access by the Defendants or their guests to the use of the Disputed Portion.

130. The Defendants are entitled to their costs to be paid by the Plaintiffs and to be taxed if not agreed.

Dated this 20th day of February, 2023

A handwritten signature in blue ink, appearing to read "G. Diane Stewart". The signature is stylized with a long horizontal stroke at the top and a loop at the bottom.

Hon. Madam Justice G. Diane Stewart